Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY REVIEW COMMISSION

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APR 13 2023

Independent Regulatory Review Commission

IRRC Number: **3291**

(1) Agency: Department of Environmental Protection

(2) Agency Number: 7

Identification Number: 554

(3) PA Code Cite: 25 Pa Code Chapter 77

(4) Short Title: Noncoal Program Corrections and Clarifications

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Laura Griffin, 717-772-3277, laurgriffi@pa.gov
Secondary Contact: Ezra Thrush, 717-783-8727, ezthrush@pa.gov

(6) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation
  - ☐ Certification by the Governor
  - ☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The amendments provide updates and clarifications to the requirements for mining noncoal minerals in Pennsylvania. Chapter 77 was finalized in 1990 to implement the Noncoal Surface Mining Conservation and Reclamation Act. Since 1990, the Department of Environmental Protection's (Department) experience in implementing the noncoal mining regulatory program has uncovered several issues that require clarification of the Chapter 77 regulations.

Many of the revisions in this final-form rulemaking are administrative in nature. Among the technical revisions in this final-form rulemaking are: allowing an increase in air blast level, extending the time to activate a permit from three years to five years, setting a threshold for the amount of material that may be extracted during exploration, and identifying the circumstances when a permit revision is needed.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This final-form rulemaking is authorized under section 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (act) (52 P.S. § 3311(a)), which authorizes the Environmental Quality Board (Board) to promulgate regulations as it deems necessary to carry out the provisions and purposes of the act; section 5 of The Clean Streams Law (35 P.S. § 691.5); 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.

(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.

The regulation is not mandated by any federal or state law or court order or federal regulation.

There are two Environmental Hearing Board (EHB) decisions that are pertinent to parts of this final-form rulemaking. The exploration requirements in the existing regulations have caused confusion due to the conflation of requirements for exploration by drilling and a permit waiver. This was pointed out in *Lower Milford Twp. v. DEP (Geryville Materials, Inc., permittee)*, EHB Docket No. 2006-109-L (June 26, 2009). To dispel this confusion, the final-form rulemaking creates a new section for exploration by drilling (§ 77.113).

In *Karnick v. DEP (Wayco Sand and Gravel, permittee)*, EHB Docket No. 2016-135-M (April 24, 2018), the EHB pointed out the error in § 77.593(2), which makes reference to "subsection (a)" when there is no subsection (a), but rather there is paragraph (1). This error is corrected in this final-form rulemaking.

(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.

The final-form regulation is needed to update the requirements for mining noncoal minerals in Pennsylvania and provide additional clarity to the regulated community, the Department, and the public regarding compliance standards.

There are about 1,200 licensed noncoal mine operators who will benefit from the clarification and corrections in the final-form rulemaking. Commonwealth residents who reside in the vicinity of noncoal mine sites will also benefit from the minimum insurance protection coverage increase, which provides adequate compensation for bodily harm or property damage caused by noncoal operations. This improved clarity provides certainty as to the requirements and protections provided in the regulated environment. It is not possible to quantify the benefits because of the nature of the revisions.

(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.

Noncoal mining is not subject to federal standards. The noncoal regulatory program is implemented under the act and The Clean Streams Law.

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

While other states regulate noncoal mining, there are fundamental differences based on geology, geography and population. The geology controls the minerals that are available to be mined. Conceptually, regulatory approaches are similar from state-to-state taking into account these differences.

This final-form rulemaking will not put the Commonwealth at any competitive disadvantage with other states.

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

No, the final-form regulation will not affect 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 worked with the Aggregate Advisory Board to develop these regulations. The Aggregate Advisory Board is comprised of the Secretary of the Department of Environmental Protection, three aggregate surface mining operators, four members of the public from the Citizens Advisory Council, one member from county conservation districts, one Senate member from the majority party, one Senate member from the minority party, one House member from the majority party, and one House member from the minority party.

Interaction with the Aggregate Advisory Board on this rulemaking began in October 2018 with a discussion of concepts at a meeting of the Aggregate Advisory Board's Regulatory, Legislative and Technical (RLT) Committee meeting. The Department continued interaction with the Aggregate Advisory Board at several meetings of the RLT Committee throughout 2019. On May 6, 2020, the Aggregate Advisory Board voted to concur with the Department's recommendation that the proposed rulemaking proceed with the regulatory process.

The draft final-form regulation was presented to the Aggregate Advisory Board on November 3, 2021 and February 1, 2023. The Aggregate Advisory Board voted unanimously to recommend that the revised final-form rulemaking proceed after suggesting the Department add language to clarify the applicability of civil penalties in the cessation order subsection of § 77.293 (relating to penalties). The Board has incorporated this language as suggested by the Aggregate Advisory Board.

(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?

There are about 1,200 licensed noncoal mine operators in Pennsylvania. While there are several multinational corporations who mine noncoal minerals in Pennsylvania, a majority of the regulated community meet the definition of small businesses.

The main impact of the final-form rulemaking on the regulated community should be improved clarity of the requirements for mining noncoal minerals in Pennsylvania. Outside of the improved clarity expected from this regulation, one change related to insurance requirements may have an additional impact on noncoal operators who extract more than 2,000 tons of marketable minerals in a year. The final-form rulemaking increases the minimum insurance coverage amounts required for these operators. The Department estimates there are around 200 operators that will need to increase their insurance coverage, and many of these operators are small businesses. Operators who produce less than 2,000 tons of marketable minerals in a year are not subject to the insurance requirement, and all of these operators would be considered 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.

There are about 1,200 licensed noncoal mine operators in Pennsylvania that will be required to comply with the regulations. However, as noted in the response to Question 15, the increase in insurance coverage amounts will only apply to a subset of the mine operators (about 200) who extract more than 2,000 tons of marketable minerals in a year.

(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.

There will be some moderate increased costs for approximately 200 operators, who produce more than 2,000 tons of marketable minerals per year, that would be required to increase their insurance coverage. Insurance costs vary depending on specific circumstances, so it is not possible to quantify the precise impact. Another factor to be considered is that many current licensed operators maintain more than the required minimum coverage, so they will not incur any additional cost as a result of the increase in the minimum coverage limits. However, for those operators who choose to maintain the minimum coverage limits, the rulemaking increases the overall limits from $500,000 to $1 million. Assuming that $1 million in liability coverage will cost about $1,000 per year, the increase in costs will be approximately $500 per year. Since it is anticipated that about 200 operators will have to increase their insurance coverage amounts, the final-form regulation would result in a collective additional cost to the regulated community of $100,000 per year.

However, increasing the insurance coverage requirements is important as the last time the minimum insurance requirement amounts were modified was 1990. A minimum insurance coverage amount of $1 million reflects the amount of insurance needed by today's standards to adequately provide for bodily injury or property damage caused by noncoal operations. This increase will help to ensure that a noncoal operator has enough insurance coverage to adequately compensate persons injured or property damaged as a result of noncoal operations. An additional benefit is that the increased insurance coverage would reduce the financial risk of a catastrophic event for noncoal operators by ensuring they have adequate coverage to handle the costs associated with these events should they occur.

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

The overall benefit of the final-form rulemaking is improved clarity of the requirements for mining noncoal minerals in Pennsylvania for the regulated community, making business planning decisions easier.

The primary area where there is an anticipated increased cost associated with this final-form rulemaking is related to the minimum insurance coverage amounts increase. While there will be an increased cost to operators who produce more than 2,000 tons of marketable minerals per year, this may also benefit the operator by reducing the likelihood of a catastrophic loss. The public will also benefit, because there will be a reduced risk that any damage caused by mining will not be fully mitigated either by the operator or through a claim filed against the insurance.

While adverse effects are not anticipated, the Department acknowledges a concern raised during the public comment period related to a revision to add § 77.564(f)(1.2) to allow for increases in air blast levels to be approved by the Department based on site-specific circumstances. This new subsection

(f)(1.2) includes a revision that changes "lower" to "alternative" regarding maximum allowable airblast levels in order to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allows for an exception for a higher air blast level to be approved for noncoal permits. See § 211.151(d) and (e). In some limited instances, a higher air blast level may be appropriate where it is clear that the controlling structure will not be subject to damage with the higher threshold. This revision allows for either a decrease or an increase in the air blast level based on site-specific circumstances. The factors that the Department must consider in evaluating alternatives include potential damage and whether the alternative will create or mitigate a public nuisance. Specifically, if a level higher than the existing 133 dBL air blast limit (based on the recommended safe limit established by U.S. Bureau of Mines RI 8485) is granted, an evaluation of the attenuation of the air blast is conducted and, where necessary based on distances of structures, additional seismograph monitoring would be required to ensure that the 133 dBL regulatory limit is not exceeded at other buildings or structures. One example of this situation in practice is where the closest structure is a utility tower, which is not affected by a higher airblast limit. The operator can design for a higher limit because no vulnerable structures would be affected. This revision will be implemented in a manner to avoid any adverse effect because the Department has a duty to do so under other statutory (see, for example, the conditions that are identified as nuisances under section 11(b) of the act), regulatory (see, for example, 25 Pa. Code § 77.564(h)) and constitutional (Article 1, § 27) requirements. Because the potential adverse effects are mitigated by other requirements, the benefits of clarity and avoidance of unnecessary limitations outweigh the cost.

The public comments suggested that there are potential adverse effects resulting from the changes relating to permit terms, permit revisions, public notices of filing of permit applications and noncoal mining permit waivers. Relating to permit terms, the change in the termination time frame from three to five years results in a more efficient process since extensions to the existing three-year lapse period are frequently granted. The changes relating to the public notices of filing of application are intended to clarify when these notices are required for revisions and will not reduce public participation.

Noncoal permit waivers for exploration are granted under the current regulatory scheme. Previously, noncoal exploration activities have caused confusion for operators, because they may be authorized in different ways depending on the circumstances of the exploration. Exploration is included in the definition of "noncoal surface mining activities" in § 77.1, which suggests that it must be authorized under a permit. However, exploration may be conducted by either drilling or by excavation. Exploration may be allowed by drilling upon notice to the Department because it has minimal ground disturbance and environmental impacts. Exploration by excavation may be authorized by a permit or through acknowledgment by the Department of a permit waiver. All forms of exploration are still subject to requirements to protect environmental resources and public health and safety and the land restored to contour and revegetated.

In these final-form regulations, § 77.113 (relating to permit waiver—noncoal exploration drilling) is added to establish the requirements for exploration by drilling while § 77.109 (relating to noncoal exploration activities) has been updated to establish requirements for exploration activities using a combination of drilling and excavation. These updates will distinguish the two forms of exploration activity from one another and provide clarity to the regulated community.

These revisions provide clear benefits without incurring adverse effects.

(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.

There will be some moderate increased costs for approximately 200 operators, who produce more than 2,000 tons of marketable mineral per year, that would be required to increase their insurance coverage.

Insurance costs vary depending on specific circumstances, so it is not possible to quantify the precise impact. Another factor to be considered is that many current licensed operators maintain more than the required minimum coverage, so they will not incur any additional cost as a result of the increase in the minimum coverage limits. However, for those operators who choose to maintain the minimum coverage limits, the final-form rulemaking increases the overall limits from $500,000 to $1 million. Assuming that $1 million in liability coverage will cost about $1,000 per year, the increase in costs will be approximately $500 per year. Since it is anticipated that about 200 operators will have to increase their insurance coverage amounts, the final-form regulation would result in a collective additional estimated cost to the regulated community of $100,000 per year.

(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.

There are no costs or savings for local governments anticipated as a result of this final-form rulemaking, as local governments typically do not operate noncoal mines in Pennsylvania.

(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.

There are no identifiable costs or savings for state government anticipated as a result of this final-form rulemaking, as the Commonwealth does not operate noncoal mines, and will benefit administratively from the added clarity provided in this final-form rulemaking.

(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.

There are no additional reporting, recordkeeping or other paperwork requirements established in the final-form rulemaking. Some existing forms may need to be revised as described in more detail in response to parts (a) and (b) of this question.

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

The final-form rulemaking does not require any new forms. However, some existing forms are used for implementing the current program and will continue to be used upon finalization of the rulemaking package. For example, there are two forms related to noncoal exploration. The forms were revised in the aftermath of the Geryville Materials case referred to in the answer to Question 9. The final-form regulations reflect the approach taken in the forms, so it is unnecessary to substantially revise the forms

in response to the final-form rulemaking. Please note that an effort is underway to implement ePermitting, which will ultimately replace these forms with online web forms.

The revision that establishes thresholds for the permit waiver will need to be reflected on the permit waiver form (and instructions) when it is promulgated as a final-form regulation. This will entail the inclusion of more detail on the form justifying the amount of material needed for the exploration.

(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 form for exploration by drilling can be found at this link:
http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3032
Similarly, there is a form for the permit waiver, which can be found at the following link:
http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3033

The regulations also reference "modules" in § 77.141(b)(2). These modules are related to the application for a large noncoal permit and are available here:
http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3818

(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 2022-23	FY +1 2023-24	FY +2 2024-25	FY +3 2025-26	FY +4 2026-27	FY +5 2027-28
SAVINGS:	$	$	$	$	$	$
Regulated Community	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Local Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
State Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total Savings	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
COSTS:						
Regulated Community	$0.00	$0.00	$100,000	$100,000	$100,000	$100,000
Local Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
State Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total Costs			$100,000	$100,000	$100,000	$100,000
REVENUE LOSSES:						
Regulated Community	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Local Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
State Government	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total Revenue Losses	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00

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

Program	FY -3 2019-20	FY -2 2020-21	FY -1 2021-22	Current FY 2022-23
Noncoal Regulatory Program	$3,809,152	$2,982,555	$3,115,973	$3,978,000

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

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

There are about 1,200 licensed noncoal mine operators in Pennsylvania, a majority of which meet the definition of small businesses.

(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 total increased costs is estimated to be about $100,000, shared among about 200 operators who may have to increase their minimum insurance coverage as a result of the final-form regulation.

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

The probable effects of the final-form regulation on Pennsylvania's 1,200 licensed noncoal mine operators, a majority of which are small businesses, are that they will benefit from the improved clarity of the requirements for mining noncoal minerals in Pennsylvania, making business planning decisions easier. Approximately 200 of these operators, who produce more than 2,000 tons of marketable minerals per year, may have an increase in their costs due to the increase in minimum insurance coverage requirements.

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

There are no apparent less costly alternative methods that would achieve the purpose of the final-form regulation.

(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.

There are no special provisions related to minorities, the elderly, small businesses, and farmers.

(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.

During interaction regarding the proposed rulemaking with the Aggregate Advisory Board, several versions of preliminary drafts were discussed. Several items from earlier drafts were rejected because the discussions suggested that the changes were not necessary or might decrease clarity rather than improve it. The final-form rulemaking as provided was determined to be the least burdensome, most acceptable alternative.

(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;

The existing regulatory scheme establishes simpler standards for operators who produce less than 2,000 tons of marketable minerals in a year. The final-form rulemaking maintains this scheme. There are no revisions that will impose adverse impacts on small businesses.

b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

There are no new reporting requirements in the final-form rulemaking.

c) The consolidation or simplification of compliance or reporting requirements for small businesses;

There are no new reporting requirements in the final-form rulemaking. Moreover, this final-form rulemaking will provide additional clarity to all affected operators regarding statutory requirements, including small businesses.

d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and

The existing regulations use this approach and it is maintained in the revisions.

e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The existing regulations already account for some exemptions for small mines, for example those mines producing less than 2,000 tons of marketable materials per year, the majority of which are small businesses, will not need to comply with increased insurance requirements. However, the emphasis on environmental protection is maintained.

(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 Pennsylvania Department of Transportation's Bulletin 14 was used to establish the upper threshold for justification for a permit waiver to conduct exploration. Exploration is necessary to identify new aggregate sources that may be developed into full-scale operations.

The 1,000-ton upper threshold for the waiver was identified based on the 200-ton minimum requirement of the Pennsylvania Department of Transportation's specifications for certification in Bulletin 14 with the recognition that more than one size of material may need to be produced from a particular potential mine. Page F-6 of Bulletin 14 includes the following statement:

> (2) Qualification Samples (Sample Class: QS) are obtained from new aggregate sources where a crushing and screening plant is in operation and sufficient material (minimum 200 tons of each aggregate size intended to be produced) has been processed and stockpiled.

Bulletin 14 is available at this link:
http://www.dot.state.pa.us/public/pdf/construction/bulletins_supporting_docs/Bulletin%2014%20-%20Supporting%20Information.pdf

Because it may be necessary to qualify more than one size of aggregate, the 1,000-ton threshold was established. If the minimum requirement for qualification is met for each size of aggregate, then four to five sizes may be evaluated at the same time through the exploration activity. Additionally, to produce 200 tons of a particular size material, more than that is needed because the crushing process produces various sizes of material and some off-specification or wasted material. In other words, to produce 200 tons of a particular size material, substantially more than 200 tons must be extracted.

Assuming a density of 150 lbs/cu ft, the extraction of 1000 tons would require an excavation about 37 feet long on each side (about 0.03 acre) at a depth of ten feet.

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

A. The length of the public comment period:	45 Days
B. The date or dates on which any public meetings or hearings will be held:	None held
C. The expected date of delivery of the final-form regulation:	Quarter 2, 2023
D. The expected effective date of the final-form regulation:	Upon publication in the *Pennsylvania Bulletin*

E. The expected date by which compliance with the final-form regulation will be required:	Upon publication in the *Pennsylvania Bulletin*
F. The expected date by which required permits, licenses or other approvals must be obtained:	Upon publication in the *Pennsylvania Bulletin*

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

Effectiveness will be gauged through ongoing interaction with the industry, advisory boards, and the public.

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FOR FILING DOCUMENTS
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Independent Regulatory Review Commission

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

By: (Deputy Attorney General)

DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-554

DATE OF ADOPTION April 11, 2023

BY Richard Negrin

TITLE RICHARD NEGRIN
ACTING CHAIRPERSON

EXECUTIVE OFFICER CHAIRPERSON OR SECRETARY

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

BY

DATE OF APPROVAL
April 13, 2023
(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 Clarifications and Corrections

25 Pa. Code Chapter 77

FINAL-FORM RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CH. 77]

Noncoal Mining Clarifications and Corrections

The Environmental Quality Board (Board) amends Chapter 77 (relating to noncoal mining). This final-form rulemaking provides updates and clarifications for the requirements for mining noncoal minerals in this Commonwealth.

This final-form rulemaking was adopted by the Board at its meeting of April 11, 2023.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Sharon Hill, Environmental Program Manager, Bureau of Mining Programs, P.O. Box 8461, Rachel Carson State Office Building, 5th Floor, 400 Market Street, Harrisburg, PA 17105-8461, (717) 787-5015, or Richard Marcil, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 783-8504. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board" and then navigate to the Board meeting of April 11, 2023).

C. *Statutory Authority*

This final-form rulemaking is authorized under section 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (act) (52 P.S. § 3311(a)), which authorizes the Board to promulgate regulations as it deems necessary to carry out the provisions and purposes of the act; section 5 of The Clean Streams Law (35 P.S. § 691.5); 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*

Chapter 77 was finalized in 1990 to implement the act. Since 1990, the Department's experience implementing the noncoal mining regulatory program has uncovered several issues that require clarification of the regulations in Chapter 77. Many of these revisions are administrative in nature.

The Department worked with the Aggregate Advisory Board to develop these regulations. The Aggregate Advisory Board is comprised of the Secretary of the Department of Environmental Protection, three aggregate surface mining operators, four members of the public from the Citizens Advisory Council, one member from county conservation districts, one Senate member

from the majority party, one Senate member from the minority party, one House member from the majority party and one House member from the minority party. The Department's interaction with the Aggregate Advisory Board on this rulemaking began in October 2018 with a discussion of concepts at a Regulatory, Legislative and Technical (RLT) committee meeting. After several RLT committee meetings throughout 2019 and 2020, on May 6, 2020, the Aggregate Advisory Board voted to concur with the Department's recommendation that the proposed rulemaking proceed in the regulatory process. The Department presented the draft final-form regulation to the Aggregate Advisory Board on November 3, 2021, and February 1, 2023. The Aggregate Advisory Board voted unanimously to recommend that this final-form rulemaking proceed after suggesting the Department add language to clarify the applicability of civil penalties in the cessation order subsection of § 77.293 (relating to penalties). The Board has incorporated this language as suggested by the Aggregate Advisory Board.

E. *Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking*

§ 77.1. Definitions

Several definitions are amended and two new terms are defined. "Insignificant boundary correction" is added to identify the changes to permit boundaries that may require a major permit revision as described in § 77.141 (relating to permit revisions). "Local government" is defined to be used in several sections to describe the entities that must be notified of applications or actions. Clarifications are included for the definitions of "Noncoal minerals" and "Noncoal surface mining activities." In particular, the phrase "ancillary and customary" was added to the latter definition to encompass non-extractive activities that normally occur within the mining permit boundaries in support of the mining activity, such as crushing, bagging or equipment storage. The definition of "Noxious plants" is revised to update the citation of the law relating to noxious plants. The definition of "Related party" is amended to include a director of a corporation and members and managers of Limited Liability Companies. A correction is made in the definition of "Sedimentation pond."

§ 77.51. License requirement

Subsections (c)(1) and (e) are revised to include a director of a corporation and members and managers of Limited Liability Companies as parties that need to be identified in an application for a mining license and as parties who will be considered in evaluating the eligibility for holding a mining license. The revisions are included since Limited Liability Companies have become more common in the years since 1990. These changes are also consistent with the change to the definition of "Related party" in § 77.1 (relating to definitions).

Subsection (f)(2)(i) is revised to remove the statement about the Department notification 60 days prior to expiration and to require the submission of a mining license renewal application at least 60 days before the current license expires to be consistent with section 5(a) of the act (52 P.S. § 3305(a)).

§ 77.107. Verification of application

This section is revised to eliminate the requirement for an application to be attested by a notary or district justice. Most notably, this update will facilitate the transition to electronic submission of applications.

§ 77.108. Permit for small noncoal operations

Subsection (f) is amended to add transfers to the list of applications that are exempt from the requirement for public notification in a newspaper. This will make it clear that permits for small operations may be transferred. Because transfers were previously omitted from the list, it has been unclear whether these permits are transferable as § 77.144 (relating to transfer of permit) requires newspaper public notice. This created confusion because it is inconsistent that a new permit for a small operation would be exempt from the newspaper public notice, but the transfer of the same permit would be subject to the newspaper public notice requirement.

Subsection (m) is revised to add reference to the regulatory requirement that an applicant must hold a mining license in order for the permit to be issued.

§ 77.109. Noncoal exploration activities

Noncoal exploration activities have caused confusion for operators because they may be authorized in various ways depending on the circumstances of the exploration. Exploration is included in the definition of "noncoal surface mining activities" in § 77.1, which suggests that it must be authorized under a permit. However, exploration may be conducted by drilling or by excavation. Exploration may be allowed by drilling upon notice to the Department. Exploration by excavation may be authorized by a permit or through acknowledgment by the Department of a permit waiver.

In this final-form rulemaking, § 77.113 (relating to permit waiver—noncoal exploration drilling) is added to establish the requirements for exploration by drilling while § 77.109 (relating to noncoal exploration activities) has been updated to establish requirements for exploration activities using means that include excavation. These updates will distinguish the two forms of exploration activity from one another and provide clarity to the regulated community.

Subsection (a) is revised to clarify that a written notice must be provided to the Department for anyone who intends to conduct noncoal exploration in an area outside of an existing noncoal surface mining permit and to make reference to the proposed § 77.113. This section also lists the permit or waiver authorization options for exploration by excavation.

Subsection (b) is revised to modify what information must be included in the noncoal exploration notice to the Department. Specifically, the revisions add a requirement for contact information for a representative from the entity preparing to explore and clarify that it is the amount to be removed for testing that is to be reported in the notice. Also, requirements are added to the notice relating to what environmental protection measures are proposed to be implemented to prevent any adverse impacts to the environment from exploration activities and relating to a blast plan if explosives are needed to conduct the exploration.

The regulatory provisions in subsection (c) are moved to § 77.113 since that section relates to exploration by drilling. Subsection (c) is reserved.

Subsection (e) is amended with new language that sets threshold amounts for a permit waiver related to exploration activities. A permit can be waived when minerals will be removed to determine if the material is suitable for some commercial purpose. If found to be suitable, the operator would then pursue a mining permit. Two threshold amounts have been established with this final-form rulemaking – 20 tons and 1,000 tons. These thresholds were identified through discussions with the Aggregate Advisory Board RLT committee. A permit waiver may be granted for noncoal exploration activities where less than 20 tons of material (approximately one truckload) will be removed. This minimum amount of material is used to determine commercial viability of the mineral resource in several cases. No additional justification is needed. If the applicant proposes to extract more than 20 tons, then a justification for the estimated amount must be provided. The maximum amount will not exceed 1,000 tons, and this upper limit is not intended to be the "default" amount that can be removed under the exploration waiver. The justification must be related to the amount of material needed to provide valid test results for commercial use of the aggregate materials. The 1,000-ton maximum was identified by industry stakeholders in accordance with the Department of Transportation specifications for aggregate producer certification (Bulletin 14). Bulletin 14 states that a 200-ton minimum of processed and stockpiled material is the source for qualification samples for each aggregate size. Large quarry operations can produce multiple sizes and, consequently, multiple stockpiles of 200-tons each. From the proposed rulemaking to this final-form rulemaking, a comma was added after "prior to beginning exploration" for clarity.

New subsection (e.1) describes the factors considered by the Department in evaluating a waiver request. In subsection (e.1)(2), language was revised from the proposed rulemaking to this final-form rulemaking to clarify that existing or designated uses of the receiving streams are evaluated for adverse effects resulting from exploration activities.

Subsection (h) deletes the reference to the restoration to a slope not exceeding 35 degrees. This slope requirement is no longer necessary due to the limited amount of material that may be removed without a permit. This results in a reclamation standard of approximate original contour.

Subsection (k) is added to require compliance with Chapters 210 and 211 (relating to blaster's license; and storage, handling and use of explosives) for those exploration projects that require the use of explosives.

Designators for subsections and paragraphs throughout this section are changed from the proposed rulemaking to this final-form rulemaking to conform with the Legislative Reference Bureau's rule prohibiting reuse of designators.

§ 77.113. Permit waiver—noncoal exploration drilling

Section 77.113 is added to provide separate requirements for exploration conducted through drilling. This section includes the concepts currently in § 77.109(c). Subsection (a) allows for exploration to be conducted 10 days after notice to the Department unless the Department

requests more information to assure compliance or if the exploration is planned for areas within the distance limitations established in § 77.504 (relating to distance limitations and areas designated as unsuitable for mining). Subsection (b) establishes a performance standard for sealing the drill holes and allows for drill holes to remain open to serve a purpose, such as to be used as a monitoring well or water well.

Subsection (b) is revised from the proposed rulemaking to this final-form rulemaking to replace the words "provided that" with "if" in conformance with the *Pennsylvania Code and Bulletin Style Manual* rules.

§ 77.121. Public notices of filing of permit applications

Subsection (a) is amended to require each local government (that is, the city, borough, incorporated town or township) where the operation is located be included in the local newspaper public notice required at the time of filing an application.

Subsection (c) is amended to require use of certified mail rather than registered mail for notice of a proposed permit to the property owners within the proposed permit area. Registered mail is not necessary because it is not essential to track the progress of the mailing, whereas certified mail provides the benefit of documenting receipt of the notice.

Subsection (d) is amended to modify when the Department will publish notice in the *Pennsylvania Bulletin* of the proposed activities based on the Department's acceptance of the application rather than upon receipt. This eliminates unnecessary notices for applications that are returned and not accepted for review by the Department. The change in reference to the permit is also clarified by eliminating the modifier "complete" which is no longer needed because an application must be complete in order to be accepted.

Subsection (e) is amended in a similar fashion to subsection (d) relating to the acceptance of the permit application and also to specify that the notice required under this subsection must be in writing. Also, the newly defined term "local government" replaces "city, borough, incorporated town or township," and the requirement for the notice to be sent by registered mail is eliminated. Registered mail is not necessary because it is not essential to track the progress of the mailing, whereas certified mail provides the benefit of documenting receipt of the notice. This will also facilitate the use of electronic notices, where appropriate. The contents of the notice are also updated to reflect the new term "local government" in subsections (e) and (f).

§ 77.123. Public hearings—informal conferences

Subsection (a)(2) is amended to change the reference from § 77.121(d) (relating to public notices of filing of permit applications) to § 77.121(e). This is a correction of an error. The reference is for identifying those parties who should be notified when an application is submitted. Section 77.121(e) lists these parties.

Subsection (b) is amended to set the public hearing or informal conference due date based on the close of the comment period rather than on when the request was received. This eliminates the need to have multiple hearings if more than one request is received at different times during the public comment period.

Subsection (e) is deleted and reserved from the proposed rulemaking to this final-form rulemaking. The language is moved to new subsection (g). This subsection is revised to describe the report that summarizes comments received during a public hearing or informal conference. This report, which will include Department "findings," will be publicly available on the Department's website instead of distributed only to those persons who attended. The deadline for providing the report is contemporaneous with the permit decision for ease of public distribution, although it may be available prior to a final permit action being taken.

§ 77.128. Permit terms

Subsection (b) is amended to change the time frame for when a permit terminates from 3 years to 5 years. The 5-year term is included so the term of the mining permit will be synchronized with the National Pollutant Discharge Elimination System (NPDES) permit, where applicable. NPDES permits have a term of 5 years. This subsection is also revised to allow extensions through the permit renewal process. This ensures that updated information is provided before extending the permit beyond the 5-year period.

§ 77.141. Permit revisions

Subsection (b) is deleted and reserved to eliminate the requirement for submission of a major permit revision at least 180 days before undertaking the change. This time frame is unnecessary, because the Department has found that often these revisions can be acted upon more quickly than 180 days. With this change, the applicant must plan the timing of their application based on the complexity of the application rather than on a flat time frame.

Subsection (c) is amended to add a reference to § 77.105 (relating to application contents) to describe what constitutes a complete application for revision and to add "modules" to paragraph (2) to make it clear that only the portions of the application relating to the revision must be included. Paragraph (2) is also revised to correct the typographical error where "the acts" should be "the act."

Subsection (d) is amended to delete "complete" from the description of the application since this is redundant with the previous subsection.

Subsection (e) is amended to clarify how an application for a revision that is adding acreage for support activities will be reviewed and adds an exception from this review for insignificant boundary corrections. Specifically, the reference to "the same procedures as an application for a new permit but will be processed a revision to the existing permit" is intended to allow for a permit to be revised when additional acreage for support activities is needed and to avoid the need for a smaller adjacent permit where plans have changed. The procedures relating to a new permit assure that the environmental impacts are fully vetted prior to approval of the revision. For example, the original application would have been evaluated for the potential impacts to nearby properties. Since the added area would not have been reviewed from this perspective, the additional area must be evaluated to determine if there could be any additional potential impacts for the proposed revision.

Subsection (f) is revised similarly as the previous subsection, but specific additional considerations are identified for the review of revisions to add acreage for mineral extraction,

including the effect on hydrologic balance, the relation to the existing operation and reclamation plan, and the practicality of approving a new permit for the additional area. For example, the application for the addition would have been evaluated for the potential impacts to water supplies. Since the added area would not have been reviewed from this perspective, the additional area must be evaluated to determine if there could be any additional potential water supply impacts for the proposed revision.

Subsection (g) is added to provide cross references to the requirements for public notice and compliance with the existing permit. This subsection also adds the requirement that each major revision may be subject to providing current environmental resources information and a review of the bond liability.

Subsection (h) is added to identify the circumstances where the Department may require a major permit revision. These include unanticipated substantial impacts to public health, safety or environment. The impacts included are described as unanticipated and substantial. The intent is to make it clear that a permit revision is not required for impacts that were planned for in the original permit and that the impact must rise to the level of being substantial as opposed to an incidental impact. For example, a highwall failure resulting in encroachment upon areas where mining is prohibited or limited would meet the criteria of being unanticipated and substantial, requiring a major permit revision, while a highwall failure that can be easily remediated within the existing permit area is unanticipated, but it is not substantial and therefore would not require a major permit revision. Another example that illustrates the intent of this requirement is where mining is being conducted in an area prone to the development of karst features. Many of the potential impacts can be predicted based on modeling as part of an application-these impacts would not be unanticipated. However, if sinkhole development as a result of the mining occurs beyond the predicted area of influence, then this would likely require a major permit revision. Another category that may trigger the requirement for a major permit revision is when the permittee must change their plans from what was presented in the application and approved by the Department. This is intended to capture major operational changes or alterations of the post-mining configuration of the reclamation as compared with the approved plans.

Designators for subsections throughout this section are changed from the proposed rulemaking to this final-form rulemaking to conform with the Legislative Reference Bureau's rule prohibiting reuse of designators.

§ 77.142. Public notice of permit revision

Section 77.142 (relating to public notice of permit revision) is amended to add subsections (b) and (c). This necessitates the lettering of the existing single section as subsection (a). Subsection (a) includes three revisions. First, in paragraph (1)(iii), "the addition of reclamation fill" for surface mining activities has been added as an example of the change in type of reclamation that would be subject to the notice requirements of § 77.121. Second, the phrase "but are not limited to," is inserted and permit area additions are added to the examples of a physical change to the mine configuration in paragraph (1)(iv). Third, the phrase "but are not limited to" is also inserted and permit area additions are again added to the examples of a physical change to the mine configuration in paragraph (2)(ii).

Subsection (b) is added to include new mining or support as subject to public notice if the revision includes a lateral or vertical change in the plans. Some large quarries that pump groundwater are limited with respect to the depth to which they are authorized to mine (and pump). For example, where mining is planned for decades, it is not possible to predict the potential hydrologic impacts as the quarry goes deeper with the initial application. The operation may be approved to mine in vertical increments to allow for the reassessment of the hydrologic conditions systematically after a particular depth has been reached. More robust predictions can be made based on the updated hydrologic data available after the initial mining has been conducted as to the potential effects of deepening the operation. This vertical incremental approval necessarily includes further public participation because of the potential off-site impacts of pumping large amounts of groundwater. The reference to lateral changes is intended to include areas added to the footprint of the permit area only. This subsection also excludes incremental approvals within the previously approved permit area from the notice requirement. This is due to the fact that the environmental impacts of these areas have already been evaluated as part of the initial application review.

Subsection (c) is added to clarify that unaffected areas to be deleted from the footprint of the permit may be approved without public notice. This also includes areas that have been disturbed only by exploration by drilling.

Subsection (c) is revised from the proposed rulemaking to this final-form rulemaking to replace the words "provided that" with "if" in conformance with the *Pennsylvania Code and Bulletin Style Manual* rules.

§ 77.143. Permit renewals

Subsection (b)(2) is amended to delete the reference to "a new application" and to cross reference § 77.141, which relates to permit revisions. This is intended to clarify that the addition of area to a permit is not integral to a renewal, but constitutes a permit revision.

Subsection (b)(2) is revised from the proposed rulemaking to this final-form rulemaking to correct the cross-references to § 77.141(e) and (f).

Subsection (b)(8) is amended to change "send copies of its decision to" to "notify" and append "of the Department's decision" to clarify the requirement.

§ 77.144. Transfer of permit

In the proposed rulemaking, subsection (a) was revised to rephrase the statement of the purpose of this section. In this final-form rulemaking, the language is not being amended and will remain as written to align with the *Pennsylvania Code and Bulletin Style Manual* rules.

Subsection (b) is amended to clarify that name changes, including those changes which result from a conversion in corporate entity, do not subject a permit to the transfer requirements. In the case of a name change, it is still the same entity holding the permit. Conversions of corporate entity provide the resulting entity with the same permit rights that the previous form of entity had.

Subsection (c) is amended to clarify that Department approval is required for a transfer to be effective. Paragraph (4) is revised to include the exception of small noncoal permits, which are not subject to newspaper public notice, from the public notice requirement to transfer a small noncoal permit. The inclusion of this exception clarifies that a small noncoal permit may be transferred.

§ 77.224. Special terms and conditions for collateral bonds

Subsection (c)(2) is amended to delete the $100,000 maximum amount for certificates of deposit. This insurable amount has been revised by the agencies responsible for this and could be subject to further revision. Therefore, is it not appropriate to retain the amount in the regulations. Also, the applicable agency names are spelled out rather than using the acronyms.

§ 77.231. Terms and conditions for liability insurance

Subsection (b) is amended to add that the insurance is written on an occurrence basis. Generally, insurance can be written on either a claims-made or occurrence basis. With claims-made insurance, the claim must be filed during the term of the insurance coverage. With occurrence coverage, claims may be filed as long as the damage occurred during the course of the insurance coverage. This is particularly important for the kinds of impacts associated with mining, because the impacts are not instantaneous and may take some time to manifest themselves.

Subsection (d) is amended to clarify that notification by the insurer to the Department be made whenever changes occur affecting the adequacy of the policy, including cancellation.

Subsection (e) is amended to increase the coverage limits for insurance. Section 5(c) of the act specifies that the amount of insurance be prescribed by regulation. The current limits have been in place since the regulations were finalized in 1990. The increase in limits is intended to reflect the increase in costs over time. The numbers are consistent with the requirements that are in place for coal mining.

Subsection (h) is amended to delete "solely" in describing the certificate holder. There are circumstances where other parties may also be a certificate holder.

§ 77.242. Procedures for seeking release of bond

Subsection (g)(2) is amended to correct the erroneous reference to subsection (e), which relates to the inspection of the reclamation work. The correct reference is subsection (f), which relates to the subject of the subsection, public hearings and informal conferences.

§ 77.291. Applicability

This section is amended to refer to the act and The Clean Streams Law (35 P.S. §§ 691.1—691.1001). This revision is included because there are many types of violations which violate both the act and The Clean Streams Law. This revision makes it clear that penalties for these violations will be assessed using the same procedures. The terms "the environmental acts and the act" were removed because this subchapter is specific to civil penalty procedures only under the

act and The Clean Streams Law. The procedures would not apply to other environmental acts that may be cited; in such cases, the regulations implementing those other statutes would describe the respective procedures.

Subsection (b) is revised from the proposed rulemaking to this final-form rulemaking to remove the reference to subsection (b) of section 605 the The Clean Streams Law (35 P.S. § 691.605) because both subsections apply to civil penalties.

§ 77.293. Penalties

Subsections (a) and (b) are amended to add the language "of the act or any rule, regulation, order of the Department or a condition of permit issued under the act" because these requirements are explicitly stated in the act and to clearly state what violations are covered.

Subsections (a) and (b) are revised from the proposed rulemaking to this final-form rulemaking to to add that up to $10,000 per day for each violation of The Clean Streams Law will be applied for cessation orders under subsection (a)(2) and may be applied for civil penalties under subsection (b)(3). This clarifies the penalties that could be applied if those civil penalties are assessed under both statutes listed in § 77.291 (relating to applicability). For clarity, subsection (a)(3) is added to list the existing substantive provision regarding the $750 daily civil penalty involving a failure to correction a violation separately.

§ 77.301. Procedures for assessment of civil penalties

Subsection (a), which relates to the notice of a proposed assessment, is amended to change three things: the notice method from registered mail to certified mail, the deadline for service from 30 to 45 days, and the trigger to be the issuance of the enforcement action. Registered mail is not necessary because it is not essential to track the progress of the mailing, whereas certified mail provides the benefit of documenting receipt of the notice. The deadline for the proposed assessment is extended to allow for more time to establish an appropriate initial penalty amount. This will also assist in managing the Department's workload while maintaining timeliness to assure due process. The existing regulation has the time trigger as the Department's knowledge of the violation. This is revised because it is not always possible to document the first knowledge of a violation. It is more appropriate to use the date of the enforcement action as this is a date that will always be easily identified.

Subsection (d)(2) is amended to eliminate the registered mail alternative and to correct the typographical error of "in" instead of "on" in the description relating to the site identification sign, which is required to have the permittee's address on it.

§ 77.410. Maps, cross section and related information

Subsection (a)(11) is amended to use the newly defined term "local government" instead of municipality or township. The revision for subsection (a)(13) corrects a typographical error.

§ 77.531. Dams, ponds, embankments and impoundments—design, construction and maintenance

Subsection (a) is amended to update the name of the Natural Resources Conservation Service, which was formerly known as the Soil Conservation Service.

§ 77.532. Surface water and groundwater monitoring

Subsection (c) is amended to change Chapter 92 to Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) because Chapter 92 was reserved and replaced with Chapter 92a several years ago.

§ 77.562. Preblasting surveys

Several references to "preblast surveys" are amended to "preblasting surveys" to be consistent with other references in this subchapter.

§ 77.563. Public notice of blasting schedule

The reference to "preblast survey" is amended to "preblasting survey" to be consistent with other references in this subchapter.

§ 77.564. Surface blasting requirements

Subsection (f) is amended to clarify the maximum airblast limit of 133 dBL and to allow exceptions to that maximum value under certain conditions. This clarification resulted in the removal of the specific limit from the main paragraph and the creation of the new subsection (f)(1.1). Existing subsection (f)(1) is renumbered as (f)(1.2). Subsection (f)(1.2) is amended to change "lower" to "alternative" to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allow for an exception for a higher air blast level to be approved for noncoal permits. See § 211.151(d) and (e) (relating to prevention of damage or injury). In some limited instances, a higher air blast level may be appropriate where it is clear that the controlling structure will not be subject to damage with the higher threshold. This revision allows for either an decrease or increase in the air blast level based on site-specific circumstances. The factors that the Department must consider in evaluating alternatives include potential damage and whether the alternative will create or mitigate a public nuisance.

Although it does not occur very often, occasionally there are buildings located close to mining operations that are engineered structures (which are more robust and would not be subject to damage from vibrations) but are not owned by the mining permittee. In those cases, a higher air blast level may be allowed if it is determined that the higher air blast level will not damage the building and not cause annoyance to the building's occupants. Air blast attenuates over distance. If a higher than 133 dBL air blast level is granted, an evaluation of the attenuation of the air blast is conducted and, if necessary, based on distances from blasting, additional seismograph monitoring is required to ensure that the 133 dBL regulatory limit is not exceeded at other buildings or structures.

Designators for paragraphs in this subsection are changed from the proposed rulemaking to this final-form rulemaking to conform with the Legislative Reference Bureau's rule prohibiting reuse of designators.

Subsection (i) is amended to change the reference to a peak particle velocity of 2.0 inches per second to be to the z-curve, which is Figure 1 in § 77.562 (relating to preblasting surveys). This change makes the requirements more internally consistent.

Subsection (k) is amended to correct the description of the time interval to be used in determining the maximum weight of explosives that could be used. The reference in this subsection to "any 8 millisecond or greater period" is incorrect. The inclusion of "or greater" is incorrect and results in the weight of explosives used in the entire blast needing to be considered in the formula. In addition, the formula term "d" is currently omitted in the description of the formula, so the revision inserts "d" where it is needed. Also, in this subsection, the denominator in the formula is changed from 50 to 90. This is consistent with the requirements in Chapter 211.

§ 77.565. Records of blasting operations

Several amendments are included for the requirements for the blast records. This is primarily an effort to provide consistency with blast record requirements in § 211.133 (relating to blast reports). In paragraphs (10) and (11), "in pounds" is inserted for the weight of explosives, because the scaled distance formula requires the weight to be in pounds. These requirements are consistent with the requirements in § 211.133, subsections (a)(14) and (15), respectively. In paragraphs (11) and (12), "8 millisecond or less" is inserted, because the scaled distance formula is based on this time period. This is consistent with § 211.133(a)(15). Paragraph (16) is revised to insert "total quantity and" so that the number of detonators will be reported. This is consistent with § 211.133(a)(23). Paragraph (17) is revised to be more descriptive of what needs to be included in the sketch of the blast. This is consistent with § 211.133(a)(9). Paragraph (19) is revised to include three instances where "seismographic" is replaced with "seismograph." Paragraphs (22), (23) and (24) are added to include the scaled distance, the location of the seismographs and the type of circuit, respectively. These requirements are consistent with § 211.133, subsections (a)(19), (a)(2) and (a)(16), respectively.

§ 77.593. Alternatives to contouring

Paragraph (1)(i) is amended to change "is likely to" to "can." This is intended to clarify the justification needed for the alternative to contouring. The former phrase is somewhat speculative, where the latter is more concrete. Paragraph (1)(vi) is amended to clarify the requirement. Paragraph (2) is amended to correct the error in reference to "subsection (a)" since there is no subsection (a).

§ 77.618. Standards for successful revegetation

Subsection (a)(2) is amended to change the reference of "United States Department of Agriculture Soil Conservation Service" to "Natural Resources Conservation Service" because this agency changed its name several years ago.

§ 77.654. Cleanup

This section is amended to correct "cleanup" to be two words.

§ 77.655. Closing of underground mine openings

This section is amended to correct the error where two of the items were run together in subsection (a)(1)(iii). The item "to prevent access to underground workings" is deleted from this subsection and appended in this section as subsection (a)(1)(v).

§ 77.807. Change of ownership

The section is amended to correct the typographical error where "chance" should be "change."

F. *Summary of Comments and Responses on the Proposed Rulemaking*

Notice of the public comment period on the proposed rulemaking was published in the *Pennsylvania Bulletin* on March 20, 2021 (51 Pa.B. 1519). The 45-day public comment period opened on March 20, 2021 and closed on May 4, 2021. The Board received comments from four commentators during the public comment period, as well as the Independent Regulatory Review Commission (IRRC), which submitted comments on June 3, 2021. Comments and responses are separated by subject and summarized below. Detailed responses to all public comments are provided in the comment and response document that accompanies this final-form rulemaking.

Exploration

IRRC and a commentator suggested amendments to the rule will result in disparate regulation based on the weight of material excavated during exploration. There was also a request to explain how the 200-ton minimum requirement as specified in the Department of Transportation specifications for aggregate producer certification (Bulletin 14) relates to the 1,000-ton upper threshold.

In response, the Board acknowledges there are various permit authorizations for noncoal exploration depending on the exploration circumstances. Section 77.1 includes exploration in the definition of "noncoal surface mining activities," therefore, exploration activity is still subject to the environmental protection performance standards established in the regulations. Exploration can occur through several methods, including drilling. However, drilling does not generate substantial disturbances that necessitate reclamation. All exploration activities are required to maintain the distance limitations, protecting streams and wetlands as required by § 77.109(f). In addition, § 77.109(h) requires reclamation through grading to approximate original contour and revegetation. This is the same reclamation standard as those activities conducted under a permit.

Regarding thresholds, a permit waiver may be granted for noncoal exploration activities where less than 20 tons of material (approximately one truckload) will be removed. This minimum amount of material is used to determine commercial viability of the mineral resource in several cases. No additional justification is needed for removal of this minimum amount. Subsection 77.109(d)(2) requires justification by the applicant for any amount above the 20-ton threshold. The maximum amount will not exceed 1,000 tons, and this upper limit is not intended to be the

"default" amount that can be removed under the exploration waiver. The justification must be related to the amount of material needed to provide valid test results for commercial use of the aggregate materials. A primary commercial use for aggregate materials mined in this Commonwealth is for construction of roadways, and aggregate specifications are set by the Department of Transportation. The 1,000-ton maximum was identified by industry stakeholders in accordance with Bulletin 14, which is a publication for aggregate producers that establishes the Commonwealth's framework for testing and classifying aggregate type (for example, fine vs. coarse) and quality. Bulletin 14 states that a 200-ton minimum of processed and stockpiled material is the source for qualification samples for each aggregate size. Since mining operations often produce multiple sizes of aggregate, more than one test is typically needed during exploration. Consequently, multiple stockpiles of 200-tons may be produced during exploration activities. The threshold of 1,000 tons will allow operators to conduct up to five tests on different 200-ton piles. Therefore, the operator's scope for exploration is tied to the anticipated use of the material. By using the two stated thresholds of 20—1,000 tons, the Department creates a structure for sufficient extraction of material while minimizing both the extent of earth disturbance and the burden on the operator. This size threshold provides a discrete upper limit to the amount of mined aggregate that may be extracted without a permit for testing purposes and is rationally related to the bare minimum tonnage needed to adequately test the mined aggregate.

IRRC and a commentator expressed concern that the rule will generate unreclaimed excavation areas with steep slopes, posing a danger to the public. The Board notes that the regulations do not allow areas impacted by exploration to remain unreclaimed. Section 77.109(h) requires reclamation through grading to approximate original contour and revegetation, which is more protective because it creates a higher standard of reclamation to protect the public health, safety and welfare.

IRRC also asked why exploration avoids only wetlands, but not streams, ponds or springs per § 77.109(g)(3). In response, wetlands are singled out because they are not otherwise protected elsewhere in the exploration regulations. Streams are specified in the distance limitations referred to in § 77.109(f), so they must also be avoided. Ponds and springs are protected to the extent they are used as water supplies.

Permit Activation Period

IRRC and a commentator questioned why the Board proposed to change the permit activation period from three years to five years and requested an explanation for this change and how it protects the public health, safety and welfare and is in the public interest.

The Board believes there is a misunderstanding of the permit activation requirements. Currently, if a permittee does not initatiate mining activities within three years, the permittee must request an extension. This involves an administrative process where the permittee must justify the request to maintain their permits with legitimate business reasons, such as responding to unexpected market demands. The decision to grant or deny an extension is based on a review of the operator's justification. Under § 77.131 (relating to progress report), a mine operator is required to provide notice to the Department within 90 days of when the site is activated. This facilitates tracking of the site's status and provides the opportunity for the Department to conduct an inspection as the operation begins. Extending the activation period to five years ensures that

the application materials, including environmental or hydrologic changes, will be updated with the 5-year renewal. This process includes a review of the potential impacts of the mining based on contemporaneous conditions in the vicinity of the mine site.

Permit Revisions

IRRC and some commentators noted that the amendments allow operators to add support acreage to existing permits as a major revision, as opposed to the current practice that requires a new permit. The commentators expressed concerns that permit revisions and modifications are reviewed under less stringent standards and are issued more frequently than original permit applications, resulting in less intensive environmental safeguards. IRRC and some commentators also asked about the effects of permit revisions relating to other environmental features like streams and wetlands.

In response, in the rulemaking the Board adds the definition of "insignificant boundary correction," which includes the requirement that there be no significant difference in environmental impact. All other revisions are reviewed through the same procedures as an application for a new permit. Therefore, the environmental protective standards are maintained. The review of the effect on the hydrologic balance necessarily includes the evaluation of potential impacts to streams and wetlands because these are hydrologic resources.

Civil Penalties

Commentators opposed the proposed rule change in § 77.301(a) (relating to procedures for assessment of civil pentalies) that will expand the time period before a civil penalty is assessed from 30 days to 45 days out of a concern that violators will not be held accountable.

The Board notes that there is a misunderstanding expressed in this comment. The 15 days of additional time for the civil penalty process to be initiated will not have any effect on the accountability of a violator with respect to civil penalties. The additional time allows the Department to better manage the workflow and establish effective penalty amounts. The civil penalty process begins with an enforcement action that notes a violation. Then a proposed penalty amount is calculated. This is the time frame reflected in the revision. After the proposed penalty is provided to the violator, they have an opportunity to request a conference. After this process runs its course, the final penalty is established. The existing 30-day time frame is particularly limiting in cases where a violation is the subject of escalating enforcement actions. In the case of notices of violation (NOV), which generally address less serious violations, a civil penalty is not assessed. However, if the violator fails to comply with requirements of an NOV, then another enforcement action (an order) will be issued. A civil penalty will be associated with this order. Under the current rule, the proposed assessment would need to be sent within 30 days of the identification of the violation noted in the original NOV. The 30-day time would likely be passed by the time the follow up order is issued. The proposed revisions provide the Department time to determine the most appropriate civil penalty. While the civil penalty process is triggered by an enforcement action, the civil penalty and enforcement action are managed on separate tracks. The civil penalty process has no impact on the resolution of the enforcement action. Also, resolving the violation before the civil penalty is assessed does not stop the civil penalty process.

IRRC noted that the Board proposed to amend § 77.291 (relating to applicability) to specify the statutes for which violations of the subchapter are applicable to assessments of civil penalties. For consistency, IRRC asked if § 77.293(a) and (b)(1) should be amended to include both of the statutes contained in § 77.291.

The Board responds that the reference to The Clean Streams Law was included in § 77.291 to clarify for the regulated community that noncoal mining permits are issued under both the act and The Clean Streams Law. As a result, violation of a noncoal mining permit can be a violation of both The Clean Streams Law and the act. Subsections 77.293(a) and (b) are written to match the current statutory maximum civil penalties for noncoal violations allowed under the act. These requirements are not based on The Clean Streams Law. This topic was discussed with the Aggregate Advisory Board with the intent that the proposed amendments specify the requirements under the act. However, in response to IRRC's comments, the Board has added language to include information on civil penalty assessments related to The Clean Streams Law to subsection (a) on cessation orders and to subsection (b) on civil penalties. These revisions include clarifying language suggested by the Aggregate Advisory Board to specify that the penalties of subsection (a)(2) only apply when a cessation order is issued.

Blasting

IRRC asked if, under circumstances where the Department has determined that a higher air blast level may be appropriate, the Board considered amending § 77.563 to require the person conducting the mining activities to inform other interested parties within close proximity of the blasting operation about the exception to the maximum decibel level. IRRC also asked the Board to discuss the impact of allowing a higher threshold on the regulated community, and on residents, local governments and public utilities surrounding the blasting operation.

Two commentators also objected to allowing any upward departure from the current 133 dBL maximum air blast level to an unknown maximum because the limit prevents bodily harm and property damage and removing the limit does not meet Constitutional and other Federal and State statutory requirements. The commentators also requested that the Department revert to the existing language in § 77.564(f)(2) to allow for lower alternative blasting levels, but prohibit higher alternative blasting levels.

The Board provides the following response. This section on alternative air blast was revised to clarify the maximum air blast limit of 133 dBL and to allow exceptions to that maximum value under certain conditions. The change of "lower" to "alternative" was made to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allow for an exception for a higher air blast level to be approved for noncoal permits. See § 211.151(d) and (e). In some limited instances, a higher air blast level may be appropriate where it is clear that the structures will not be subject to damage with the higher threshold. If a limit higher than the existing 133 dBL air blast limit is granted, an evaluation of the attenuation of the air blast is conducted and, where necessary based on distances of structures, additional seismograph monitoring would be required to ensure that the 133 dBL regulatory limit is not exceeded at other buildings or structures. The alternative language allows for either a decrease or an increase in the air blast level that may be warranted based on site-specific circumstances including geographical considerations which may enhance air blast effects. The factors that the Department

must consider in evaluating alternatives include potential damage and whether the alternative will create a public nuisance.

In response to the comments on Constitutional, Federal and State statutory requirements, the Department disagrees with commentator's assertion that the Department would violate Federal or State constitutional law, the Federal Clean Air Act, the Federal Pollution Prevention Act, or allow a regulatory or physical taking, when it permits air blast above 133 dBL under its current regulatory structure or the modifications in this rulemaking. The Commonwealth's regulatory limit (133 dBL) for air blast comes from the recommended safe limit established by the United States Bureau of Mines Report of Investigation (RI) 8485, *Structure Response and Damage Produced by Airblast from Surface Mining*. Moreover, the alternative limit provision in this final-form rulemaking does not alter the Department's obligation to consider noise from a proposed mining operation and determine if operational mining noise will constitute a public nuisance under § 1917-A of the Administrative Code of 1929. See *Plumstead Twp. v. DER*, 1995 EHB 741, 789-90; *see also Chimel v. DEP*, 2014 EHB 957, 1000.

A commentator also requested that the Board revise § 77.564(f) to require an owner to provide written notice to the lessee of the adverse health effects linked to noise, to allow interested parties to petition the Department to specify lower maximum allowable air blast levels, and to add language requiring mining operations to minimize and abate noise. For the reasons discussed previously and in more detail in the comment and response document, the Board has not adopted the suggested language because the Commonwealth's regulatory limit (133 dBL) for air blast comes from the recommended safe limit established by the Federal government and the Department is required to protect public health and safety, as well as neighboring properties, in its implementation of the air blast regulations.

Public Participation

A commentator and IRRC asserted that changing the *Pennsylvania Bulletin* notice publication date from after the date of receipt of the permit application to the date after the permit is accepted by the Department effectively shortens the time period that the public has to prepare and submit questions and comments to the Department regarding the permit application. The commentator also objected to only one hearing or informal conference being held by the Department, irrespective of the number of groups requesting a meeting based on different concerns.

In response, the Board notes that the public notice for applications is accomplished in two ways—the applicant must publish a newspaper public notice (once a week for four weeks, beginning at the time that the application is filed) and the Department publishes notice in the *Pennsylvania Bulletin*. The proposed change only relates to the notice in the *Pennsylvania Bulletin*. Since the newspaper public notice requirement is being maintained, the length of the public comment period is not being shortened. The proposed change is intended to avoid publishing notice in the *Pennsylvania Bulletin* for applications which are not ultimately accepted for review. Effective public participation can be achieved through one public meeting for each application. In addition to public meetings, there are opportunities for written comments to be provided.

IRRC posed several questions relating to the notice to the public entities provided pursuant to § 77.121(e) including how the Department will confirm receipt with electronically filed applications, whether requests for public meetings will be accepted electronically, when electronic notices are not appropriate, and if the mail will continue to be used for notices. In response, the Board notes that the Department is in the process of transitioning to electronic permit applications. The Department recognizes its responsibility to provide the notice and to provide documentation that the notice was provided. Certified mail will continue to be used when it is necessary to demonstrate delivery.

A commentator requested that transfers and small permits not be exempt from public notice in a newspaper and that electronic notice be used. In response, the Board notes that small noncoal permits are exempt from the public notice requirements in the existing regulations because of their insignificant potential effect upon the safety and protection of the life, health, property and the environment. However, transfer of large noncoal permits are subject to the public notice requirements and all permit decisions by the Department are published in the *Pennsylvania Bulletin*.

IRRC and a commentator note that § 77.142(c) is being added to clarify that unaffected areas to be deleted from the footprint of the permit may be approved without public notice and that the Board explains that this also includes restored areas that have been disturbed only by exploration drilling. They ask how the applicant will demonstrate that the area has not been affected by surface mining and note that the language in the annex does not mention restoration. In response, the deletion of unaffected areas that have been incidentally affected by exploration is exempt from public notice because exploration drilling creates minimal disturbance and may be conducted without a mining permit. The area is subsequently sealed, regraded and revegetated upon completion of drilling. The applicant must demonstrate that an area is unaffected by submitting new maps. These new maps are reviewed by a field inspector to confirm that the area is truly eligible prior to the approval of the request to delete an area from the footprint of the permitted area. Restoration that may be needed as a result of drilling activities is addressed under § 77.113(b).

Findings

IRRC and a commentator noted that the proposed rulemaking deleted the requirement in § 77.123 (relating to public hearings—informal conferences) for the Department to issue a report on the findings of the public hearing within 60 days after the hearing date. The concern was that the removal of the deadline could leave the public with no time to read or respond to the Department's report because it is issued at the same time as the permit.

IRRC also noted that the proposed language in the annex differs from the intent described in the preamble and referenced 52 P.S. § 3310(c) as requiring the Department to notify, within 60 days of the hearing or conference, the applicant of its decision to approve or disapprove or of its intent to disapprove. Presumably, the report under the new language would be made available to the public within this same time period. IRRC asked the Board to explain in greater detail the need for and its rationale for the proposed changes.

IRRC also noted that the amendments to § 77.123(e) appear to be inconsistent with the notification requirements under § 77.143(b)(8) (relating to permit renewals) and asked the rationale for differing notification requirements among permit applications and permit renewals.

In response, the summary report (that contains "findings") serves three purposes. First, the report documents the public's concerns expressed during a public meeting (any public hearing or informal conference) as part of the public record to show that the Department recorded and considered the concerns voiced in the public event. Second, the report provides responses to these concerns in the context of permit application information. Third, the report explains the action taken by the Department to issue or deny the application in response to public comments and concerns.

After the public meeting takes place and the Department reviews all comments, the next action by the Department is stated in § 77.123(f), "the Department will notify the applicant of its decision to approve or disapprove or of its intent to disapprove *subject to the submission of additional information*." (emphasis added). In most cases, the Department will ask the applicant to supply additional information in response to the public meeting comments.

Instead of issuing a report within a set timeframe that will contain incomplete information, the Department waits until the applicant provides additionally requested information and then crafts the findings (as part of the "summary report" document) based on the final version of the application that is acted upon by the Department. Therefore, the summary report resulting from a public meeting is completed and provided to interested parties in conjunction with the permitting action.

In response to this comment, the revised subsection § 77.123(e) was changed to "Reserved" and the revisions added instead as a new subsection (g) at the end of the section to better reflect the typical chronological order of steps.

A permit issuance or denial is not a "regulatory process" as stated by the commentator. The summary report is not subject to further commentary by the public. It documents previous public comments and represents a closure of the review process. The next step for engagement by any party in the permitting process would be the consideration of appeal of the permit action for which directions are provided in the decision notice issued with the permit action.

In response to the comment about the language in 52 P.S. § 3310(c), that section applies specifically to hearings or conferences on final bond release action only. Therefore, this time limit of 60 days would not apply to issuance of new or revised permits. The statute is silent regarding timelines for providing the findings or for taking a permit action in those situations even though the regulations reflect the 60-day post-public meeting for other permit actions. Section 77.242 (relating to procedures for seeking release of bond) does not refer to § 77.123 regarding public hearings. Instead, § 77.242(f) explains the public hearing procedures for bond release. In that situation, the time limitations in 52 P.S. § 3310(c) would be applicable.

The Department further notes that these notification requirements are not inconsistent with the notification requirements under § 77.143(b)(8) regarding mine permit renewals. Proposed § 77.143(b)(8) states that the Department will "notify the applicant, persons who filed objections

or comments to the renewal and persons who were parties to an informal conference held on the permit renewal of the Department's decision" to renew a mining permit. Both the current and proposed revisions to § 77.143 are silent as to any temporal requirements regarding renewals. So, to be consistent, the notification to commenters on renewals will occur in conjunction with the Department's decision.

Bonding

A commentator expressed support for the amendment to remove the maximum limit of $100,000 for Certificates of Deposit for collateral bonds, which creates the possibility of increasing the collateral bonds to amounts that more accurately reflect appropriate bond amounts. In response, the Board notes that under the rule there will be a limit on the amount of an individual Certificate of Deposit. This limit will be the maximum insurable amount by Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance Corporation, which is currently $250,000. This limit has no effect on the amount of bonds required as multiple certificates can be accepted.

Miscellaneous

A commentator objects to the characterization that the proposed rulemaking "has minimal impact on pollution prevention." The Board notes that revisions are primarily administrative. This is the reason the preamble describes the pollution prevention impact as minimal. For example, relating to exploration, the addition of § 77.113 implements the current requirements. The creation of the new section is intended to clarify the distinction between the requirements for when exploration involves extraction and when it is conducted strictly by drilling. Other changes made may seem to be more substantial, but are not expected to have any pollution impact. For example, the revision to allow increased air blast limits is mitigated by the requirement that any increase must not create a nuisance.

A commentator suggested that § 77.51 (relating to license requirement) provide for a longer reporting period than 5 years preceding the data of application to have a broader view of the applicant's history with mines especially considering the long life of a mine. The Board notes that the 5-year look-back period has been effective at identifying the history of applicants and related parties. In addition to the self-reporting on an application, the Department maintains a database of mine operators and related parties that provides supplementary information considered by the Department in evaluating applications.

IRRC and a commentator asked if attained use should be added to designated use and water quality provision in § 77.109(e)(2) and the commentator questioned if the Department considers attained use in making a determination. In response, this section has been revised from the proposed rulemaking to include reference to the existing (attained) and designated uses of the stream, which may be affected by exploration. This is consistent with water quality standards in 25 Pa. Code Chapter 93. Contrary to the commentator's assertion, the Department applies these requirements by evaluating the more stringent of the existing or designated use. Permit applications and exploration requests include the review of measure to be taken to protect the hydrologic balance of potentially affected waters.

IRRC suggested that the Board provide more detailed explanations for the revisions in the proposed rulemaking as many appear to be substantive and not simply administrative in nature. In response, the Board has supplemented explanations the Regulatory Analysis Form (RAF) and the preamble to allow IRRC to determine if the regulation is in the public interest. Additionally, the commentators' concerns on substantive regulatory amendments are addressed directly in the comment and response document for this final-form rulemaking.

IRRC requested clarification on what ancillary and customary activities are in the context of adding the phrase to the definition of "noncoal surface mining activities" in § 77.1. The Board included the phrase "ancillary and customary" as a result of the interaction with the Aggregate Advisory Board. The phrase is intended to clarify that only activities normally conducted to support the mining activity would be included in the definition. "Ancillary" is intended to connote activities that support mining. "Customary" is intended to connote the usual or normal suite of activities. Examples of these activities include, but are not limited to, bagging, crushing, sales and storage facilities. Inclusion of these activities on the mining permit area allows the Department to better regulate potential pollution from such facilities and ensure complete reclamation upon completion of mineral extraction.

IRRC asked if the Board considered making the information in § 77.109(c) and (j)(1) available, upon request, to the public in an electronic format. The Board did consider the ability to supply this information digitally to the public. Generally, the Department makes the information requested for any permit application available in the most efficient form, and in electronic format whenever possible. Most application documentation can be submitted in or converted to digital storage formats. However, digital submittal is not mandated and not all paper applications are easily converted. The Department currently accepts some applications through the ePermitting online application and continues to expand these offerings. The transition to managing all documents in electronic form will be accomplished incrementally as the program is expanded and permits are updated.

The Board also received several comments and questions on subjects outside the scope of the proposed rulemaking. Responses are provided in the comment and response document prepared for this final-form rulemaking.

G. *Benefits, Costs and Compliance*

Benefits

The revisions in this final-form rulemaking will provide clarity to mine operators regarding compliance standards. In some cases, this will result in reduced costs. Clarity in the requirements can prevent errors in applications and improve efficiency, saving time for both operators and the Department.

Compliance costs

Very few of the new or revised requirements are likely to increase costs. One example that will increase costs is the updated insurance requirements. The increased coverage limits will increase the cost of insurance for those operators who maintain the minimum coverage amounts. However, many operators already have insurance that meets the increased coverage limits.

Compliance assistance plan

Compliance assistance for this final-form rulemaking will be provided through the Department's routine interaction with trade groups and individual applicants. There are about 1,200 licensed noncoal surface mining operators in this Commonwealth, most of which are small businesses that will be subject to this final-form rulemaking.

Paperwork requirements

This final-form rulemaking does not require additional paperwork.

H. *Pollution Prevention*

The Federal 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 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 since it is predominantly administrative, focused on updating regulations to reflect current requirements, amendments to Commonwealth statutes and references to citations, names and data sources.

I. *Sunset Review*

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

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 25, 2021, the Department submitted a copy of the notice of proposed rulemaking, published at 51 Pa.B. 1519 (March 20, 2021), and a copy of a Regulatory Analysis Form to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees.

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

Under section 5.1(j.2) of the Regulatory Review Act, on ___(DATE)___, this 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 ___(DATE)___ and approved this 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), referred to as the Commonwealth Documents Law, and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

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

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 51 Pa.B. 1519.

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

L. *Order of the Board*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 77, are amended by amending §§ 77.1, 77.51, 77.107, 77.108, 77.109, 77.121, 77.123, 77.128, 77.141, 77.142, 77.143, 77.144, 77.224, 77.231, 77.242, 77.291, 77.293, 77.301, 77.410, 77.531, 77.532, 77.562, 77.563, 77.564, 77.565, 77.593, 77.618, 77.654, 77.655 and 77.807 and adding 77.113 to read as set forth in Annex A.

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

(c) The Chairperson of the Board shall submit this final-form rulemaking 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).

(d) The Chairperson of the Board shall certify this final-form rulemaking and deposit it with the Legislative Reference Bureau, as required by law.

(e) This final-form rulemaking shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

RICHARD NEGRIN,
Acting Chairperson

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Bureau of Mining Programs

COMMENT AND RESPONSE DOCUMENT

Noncoal Mining Clarifications and Corrections

25 Pa. Code Chapter 77
51 Pa.B. 1519 (March 20, 2021)
Environmental Quality Board Regulation # 7-554
(Independent Regulatory Review Commission #3291)

INTRODUCTION

On November 17, 2020, the Environmental Quality Board (Board) adopted a proposed rulemaking concerning revisions to 25. Pa. Code Chapter 77 (relating to noncoal mining). The amendments provide updates and clarifications to the requirements for mining noncoal minerals in Pennsylvania. Chapter 77 was finalized in 1990 to implement the Commonwealth's Noncoal Surface Mining Conservation and Reclamation Act. Since 1990, the Department of Environmental Protection's (Department) experience in implementing the noncoal mining regulatory program has uncovered several issues that require clarification of the Chapter 77 regulations. Many of the revisions in this rulemaking are administrative in nature. However, there are several technical revisions, including a change allowing an increase in air blast level for blasting, extending the time to activate a permit from three years to five years, setting a threshold for the amount of material that may be extracted during exploration, and identifying the circumstances when a permit revision is needed.

PUBLIC COMMENT PERIOD

On March 20, 2021, the proposed rulemaking was published in the *Pennsylvania Bulletin* at 51 Pa.B. 1519, opening a 45-day public comment period that closed on May 4, 2021.

During the public comment period, the Board received comments from four organizations. The Independent Regulatory Review Commission (IRRC) submitted comments on June 3, 2021. The complete list of commentators is provided below.

In assembling this document, the Board has addressed all pertinent and relevant comments associated with this rulemaking. For the purposes of this document, comments of similar subject material have been grouped together and responded to accordingly.

All comments received by the Board during the public comment period are posted on the Department's eComment website at https://www.ahs.dep.pa.gov/eComment/. Additionally, copies of all comments are available on IRRC's website at http://www.irrc.state.pa.us by searching for Regulation # 7-554 or IRRC # 3291.

Comment & Response Document
Noncoal Mining Clarifications and Corrections Proposed Rulemaking
Chapter 77

Commentators

1. Peter Vlahos, President and CEO
   PA Aggregate and Concrete Association
   2040 Linglestown Rd, Suite 204
   Harrisburg, PA 17110

2. Melissa W. Marshall, Esq., Community Advocate
   Mountain Watershed Association
   PO Box 408/1414-B ICV Road
   Melcroft, PA 15462

3. Shannon Brown
   Pennsylvania Association for Noise Pollution Abatement
   406 Highland Avenue
   Clarks Summit, PA 18411

4. Maya K. van Rossum, the Delaware Riverkeeper
   Delaware Riverkeeper Network
   925 Canal St, Ste 3701
   Bristol, PA 19007

5. David Sumner, Executive Director
   Independent Regulatory Review Commission
   333 Market Street, 14th Floor
   Harrisburg, PA 17101

Comments and Responses

Exploration

1. Comment: A commentator states that for exploration by excavation, the proposed language [in § 77.109(d)] will require a permit or permit waiver. If less than 20 tons are excavated, no detailed information needs to be submitted to the Pennsylvania Department of Environmental Protection (Department). And if greater than 20 tons is proposed to be excavated, detailed information must be submitted to the Department, along with justification for why more than 20 tons must be excavated. With justification and approval, up to 1,000 tons can be removed. The Commentator asserts that "this means that 20-1000 tons can be excavated without a mining permit and its related regulatory and compliance controls". Any amount of excavation and removal should be covered by the same regulation and compliance controls as all other noncoal mining activity. **(2)**

Response: Exploration by excavation may be authorized by a permit or through acknowledgment by the Department of a permit waiver. Previously, regulations did not provide a clear volume that could be removed under a permit waiver for testing and analysis of noncoal properties. The revised language allows a small amount (20 tons is about one truckload) to be removed under a permit waiver. Additional details are not required due to the minimal impact of that scope of earth disturbance. Larger amounts, up to the 1,000-ton threshold, must include a justification for the estimated volumes needed for testing and analysis. Exploration activity is included in the definition of "noncoal surface mining activities" in § 77.1; therefore, exploration activity is still subject to the environmental protection performance standards established in the regulations. The performance standards include the requirements to maintain the distance limitations, to protect streams and wetlands under § 77.109(f), and to conduct reclamation through grading to approximate original contour and revegetation under § 77.109(h), which are the same reclamation standards as those activities conducted under a permit.

Please refer to the response to Comment 3 below for further discussion of the thresholds.

2. Comment: IRRC and a commentator express concern that the new rule change proposes to allow excavation cuts and pits, including those resulting from exploration blasting, to remain unreclaimed. Previously, all excavation cuts and exploration high walls had to be reclaimed to less than a 35-degree slope. The Commentators contend that this will result in dangerous environmental situations. The reason stated for the change is that now only 1,000 tons will be excavated. The Commentator states that this is an unacceptable justification for creating such a dangerous risk to communities surrounding the project sites.

IRRC also asks that the Board explain how removing this provision is consistent with the purpose of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act) and protects the public health, safety and welfare. **(2, 5)**

Response: Section 77.109(h) requires reclamation through grading to approximate original contour and revegetation. Excavation from exploration activities is subject to the same standard as excavation via a full permit. The operator cannot leave an open pit or highwall but must

regrade and replant the area disturbed. The revised language removes the reference to the 35-degree slope, which was an alternative reclamation requirement. The 35-degree slope requirement is typically impractical considering the small scale of the excavation for exploration. The revised requirement to regrade to meet the approximate original contour creates a higher standard of reclamation that is more protective of public health, safety and welfare than the relatively steep 35-degree slope requirement.

3. Comment: IRRC and a commentator are concerned that 20-1,000 tons can be excavated without regulatory oversight and compliance monitoring. The Commentators assert that excavation and removal of only a few pounds of materials can cause irreparable impacts to streams, wetlands and ecosystems. It is the Commentator's belief that any amount of excavation and removal should be covered by the same regulation and compliance controls as all other noncoal mining activity.

Further, IRRC points out that the Board explains in the Preamble and RAF that "20 tons is a relatively small amount, representing one truckload of material." It further states that the 1,000-ton threshold was based on the "the 200-ton minimum requirement of the Department of Transportation (DOT) specifications for certification in Bulletin 14 with the recognition that more than one size of material may need to be produced from a particular mine." It is unclear how the Pennsylvania DOT's Bulletin 14 was used to determine the appropriateness of the upper threshold.

The Board should explain how the 200-ton minimum requirement as specified in the DOT Bulletin 14 relates to the 1,000-ton upper threshold. **(2, 5)**

Response: Exploration activities are still subject to regulatory oversight and compliance monitoring. This rulemaking does not change these requirements. Environmental and safety considerations are not waived even if the requirements for a full permit are waived for exploration. Exploration is a small operation; however, if an operator seeks to remove material from an exploration area, the operator must first obtain a permit waiver from the Department, which the Department grants after considering the operator's justification for the amount of material to be removed and the environmental impacts of the exploration method. At every point in the exploratory process, the Department maintains oversight over the exploratory actions and is capable of monitoring compliance with the exploratory practices it has approved after a determination has been made that the approved activities are protective of the environment.

As noted in existing § 77.109, and left unchanged by this final-form rulemaking, a person conducting exploration activities must observe the same distance limitations as for any other noncoal surface mining activity, must minimize environmental impacts on roadways and vegetation, must provide erosion controls for excavated areas, and must avoid disturbance of wetland areas.

In response to the portion of the comment regarding thresholds, the Department has included additional explanation in the Preamble to this final-form rulemaking to explain how the 20 ton and 1,000 ton thresholds were derived through discussions with the Aggregate Advisory Board (AggAB) Regulatory, Legislative and Technical Committee. A permit waiver may be granted for

noncoal exploration activities where less than 20 tons of material (approximately one truckload) will be removed. This minimum amount of material is used to determine commercial viability of the mineral resource in several cases. No additional justification is needed for removal of this minimum amount. Subsection 77.109(d)(2) requires justification by the applicant for any amount above the 20-ton threshold. The maximum amount will not exceed 1,000 tons, and this upper limit is not intended to be the "default" amount that can be removed under the exploration waiver. The justification must be related to the amount of material needed to provide valid test results for commercial use of the aggregate materials. A primary commercial use for aggregate materials mined in Pennsylvania is for construction of roadways. Aggregate specifications are set in this Commonwealth by the Pennsylvania Department of Transportation (PennDOT). The 1,000-ton maximum was identified by industry stakeholders in accordance with PennDOT specifications for aggregate producer certification (Bulletin 14), which is a publication by PennDOT for aggregate producers that establishes Pennsylvania's framework for testing and classifying aggregate type (for example, fine vs. coarse) and quality. Bulletin 14 states that a 200-ton minimum of processed and stockpiled material is the source for qualification samples for each aggregate size. Since mining operations often produce multiple sizes of aggregate, more than one test is typically needed during exploration. Consequently, multiple stockpiles of 200-tons may be produced during exploration activities. The threshold of 1,000 tons will allow operators to conduct up to five tests on different 200-ton piles. Therefore, the Department has tied the operator's scope for exploration to the anticipated use of the material. By using the two stated thresholds of 20 – 1,000 tons, the Department creates a structure for sufficient extraction of material while minimizing both the extent of earth disturbance and the burden on the operator.

This size threshold provides a discrete upper limit to the amount of mined aggregate that may be extracted without a permit for testing purposes and is rationally related to the bare minimum tonnage needed to adequately test the mined aggregate.

Permit Activation Period

4. Comment: A commentator asserts that the activation time should remain what it is, three years. Currently, if an operator cannot, or will not, start mining by five years, they can request an extension or reapply for a permit renewal for the same operation. The reason stated for this change is that five years better coincides with the five-year limit of a NPDES permit. However, surface coal mining permits also have five-year NPDES permits and must activate mining within three years of the permit being issued or the permit is revoked.

Extending the period for beginning operations creates the dangerous scenario in which changes to local environmental or hydrological conditions have occurred since the permit was issued. Any of those new, and potentially very significant, changes would not be covered or enforced by the issued permit. The practice of obtaining permits and then waiting several years to start mining is so that the operator can wait for the market price of the mined material to increase. Companies will often get several permits and then not act on them. This is known as permit hoarding. The limit of a three-year start time was introduced years ago, for coal and noncoal, in order to try and stop this. Expanding this limit would walk back those protections and negate the regulations' earlier intent.

IRRC reiterates this comment questioning the Board's rationale for this proposed change from a three-year activation date to a five-year date. In addition to addressing the commentator's concerns, IRRC asked the Board to explain how the proposed change protects the public health, safety and welfare and is in the public interest. **(2, 5)**

Response: The Department believes there is a misunderstanding of the permit activation requirements. In the non-typical situation where a permit is not activated shortly after issuance, the area typically sits idle or only preparatory earth disturbance activities occur, such as clearing and road building. That preparatory activity presents minimal risk to public safety and the environment and can be properly controlled using the basic erosion and sediment practices presented in the permit application. Under the existing process, if a permittee has not initiated mining activities in three years, they submit a request to maintain their permits and justify that with legitimate business reasons, such as responding to unexpected market demands. The decision to grant or deny an extension is based on a review of the operator's justification, not a review of changes in local environmental or hydrologic conditions. The mine operator is required to provide notice to the Department within 90 days (§ 77.131) of when the site will be activated, which means when mineral extraction will occur. This facilitates the tracking of the status of the site and provides the opportunity for the Department to conduct an inspection as the operation begins. The revisions that extend the activation period to five years ensure that application materials, including environmental or hydrologic changes, will be updated with the five-year renewal. This process includes a review of potential impacts of the mining based on contemporaneous conditions in the vicinity of the mine site.

Permit Revisions

5. Comment: A commentator suggests that changes to the major revisions will allow operators to add additional support acreage to an existing permit as a major revision. Currently, this is done by an additional permit. However, this new revision means the Department's standard for review of additional support acreage will now be for a revision, not a new permit. This is a potential problem because revisions and permit modifications are reviewed using less stringent standards and issued more frequently than an original permit application. This change is likely to lead to increased amounts of support acreage that have less stringent requirements for management than is currently the case. This more intensive safeguard is necessary because support acreage that holds rock, debris, waste, and other minerals, often creates sediment pollution in local waterways. This potential hazard could be catastrophic and should be regulated with the most stringent standards in order to prevent increased pollution and loss of aquatic habitat.

IRRC notes that under subsection 77.141(e), additional considerations are identified for the review of revisions to add acreage for mineral extraction, including the effect on hydrologic balance, the relation to the existing operation and reclamation plan, and feasibility of approving a new permit for the additional area. IRRC also notes that a commentator suggests that other environmental features such as streams and wetlands should be included in this provision. **(2, 5)**

Response: The final-form rulemaking adds the definition of "Insignificant boundary correction," which includes the requirement that there be no significant difference in environmental impact. The policy of allowing insignificant boundary corrections exists as a

technical guidance document dated 2009 titled *Boundary Changes to Mining Permits* (563-2112-203), available on the Department's eLibrary website http://www.depgreenport.state.pa.us/elibrary/. Revisions to add additional mining or support acres would be reviewed as a major permit revision, as a new permit encompassing existing and new area, or as a separate stand-alone permit, as applicable, with all updated information as with a new permit application so that environmental protective standards are considered. The review of the effect on the hydrologic balance necessarily includes the evaluation of potential impacts to streams and wetlands because these are hydrologic resources. Review of the approved reclamation plan is also conducted.

The intent of this revision is to provide clarity and consistency for the process and standards for these types of permit revisions.

6. Comment: A commentator asks the Department to clarify why "insignificant boundary correction" is being allowed and how the Department defines "insignificant". Is it based on acreages of expansion of a quarry? Is it based on changes in mining depth? Is a boundary change insignificant if it is not an expansion into a stream or wetland or riparian buffer? Since this term is being used to determine if there is a requirement for a "major permit revision", this term on its face is concerning. Is this possibly just a paperwork change versus a change on the ground with the actual mine? Please clarify and define parameters for a revision being deemed "insignificant." **(4)**

Response: The final-form rulemaking adds the definition of "Insignificant boundary correction," which includes the requirement that in order to be "insignificant," there is no significant difference in environmental impact. This issue was also raised during the interaction with the AggAB. It is common for minor boundary changes to be requested by operators due to the long-term nature of these operations and the various factors that arise such as property issues, geological conditions, and operational necessities. For example, a small change to the acreage may be needed to correct a surveying error, to provide a proper barrier area, or other change that would be a benefit but would not be expected to create any environmental impact. It would not be in the public or the Department's interest to allow a major revision to be categorized as "insignificant" without basis. Large acreage additions or additional depth requests would not be considered "insignificant" because the environmental resources information, as well as the operations and reclamation plans, would need to be updated. See Technical Guidance Document *Boundary Changes to Mining Permits* (563-2112-203) for an elaboration on this topic.

Civil Penalties

7. Comment: A commentator states that they oppose the proposed rule change [in § 77.301(a)] that will expand the time period before a Civil Penalty is assessed from 30 days to 45 days. They also oppose the proposal to change the trigger date for a penalty being assessed from the date of the Department's knowledge of the violation to when the Notice of Violation was served on the operator.

The change from 30 to 45 days–and the change of the start date for when a Civil Penalty will be issued–will ultimately make it much easier for an operator to have committed a serious violation

without any consequences. This is because it extends the time period for an operator to commit a violation and attempt to remedy it before an NOV or Civil Penalty would attach to the operator's record. This creates additional repercussions because when an operator has outstanding violations, they would normally experience a block for issuing future permits. However, with this proposed change, an operator could have outstanding violations and could continue to receive new permits.

Changing the trigger date from 30 to 45 days to after a Notice of Violation was *issued*, and to when the violation was first *noticed* by the inspector (and included in the inspection report as required by the Department) is too lenient and will allow the operator extra weeks or more to keep his compliance record clean, when it is not. **(2)**

Response: The Department acknowledges the comment but corrects a misunderstanding expressed in this comment relative to the change to timelines for the assessment of civil penalties in § 77.301(a). The 15 days of additional time for the civil penalty process to be initiated will not have any effect on the operator's compliance record. The additional time allows for the Department to better manage the workflow and establish effective penalty amounts. The civil penalty process begins with an enforcement action that notes a violation. Then a proposed penalty amount is calculated. This is the time frame reflected in the proposed revision. After the proposed penalty is provided to the violator, they have an opportunity to request a conference. After this process runs its course, the final penalty is established. The existing 30-day time frame is particularly limiting in cases where a violation is the subject of escalating enforcement actions.

In the case of notices of violation (NOV), which generally address less serious violations, a civil penalty is typically not assessed. However, if the violator fails to comply with requirements of an NOV, then another enforcement action (an order) will be issued. A civil penalty will be associated with this order. Under the current rule, the proposed assessment would need to be sent within 30 days of the identification of the violation noted in the original NOV. The 30-day time would likely have passed by the time the follow up order is issued. The proposed revisions provide the Department time to determine the most appropriate civil penalty. While the civil penalty process is triggered by an enforcement action, the civil penalty and enforcement action are managed on separate tracks. The civil penalty process has no impact on the resolution of the enforcement action. Moreover, resolving the violation before the civil penalty is assessed does not stop the civil penalty process.

8. Comment: IRRC notes that in subsections 77.293(a) and (b), the Board proposes to add clarifying language that refers to each violation "of the act or any rule, regulation, order of the Department or condition of any permit issued under the Act" which leads to a cessation order. Under existing § 77.1 (relating to Definitions), "*Act*" is defined as the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 3301—3326). The Board proposes to amend § 77.291 (relating to Applicability) to specify the statutes for which violations of the subchapter are applicable to assessments of civil penalties. It includes Section 21 of the Act (52 P.S. § 3321) and Section 605(b) of The Clean Streams Law (35 P.S. § 691.605(b)). For consistency, should §§ 77.293(a) and (b)(1) be amended to include both of the statutes contained in § 77.291? **(5)**

Response: The reference to the Clean Streams Law was included in § 77.291 to clarify for the regulated community that noncoal mining permits are issued under both the Noncoal Act and The Clean Streams Law. See 35 P.S. § 691.315 (prohibiting operation of a mine or allowing discharge from a mine without a permit); 52 P.S. § 3307 (prohibiting operation of a noncoal surface mine or allowing discharge from a noncoal surface mine without a permit). As a result, violation of a noncoal mining permit can be a violation of both The Clean Streams Law and the Noncoal Act. Subsections 77.293(a) and (b) are written to match the current statutory maximum civil penalties for noncoal violations allowed under the Noncoal Act. See 52 P.S. § 3321. This topic was the subject of discussion with the AggAB which suggested an amendment to emphasize the requirements under the Noncoal Act.

In response to this comment, the language in subsection 77.293(a) has been revised to reference The Clean Streams Law as suggested. For completeness and clarity, the maximum penalties listed under The Clean Streams Law were also added to each subsection dependent on whether the violations resulted in a cessation order (§ 77.293(a)) or only a civil penalty (§ 77.293(b)). This additional language does not change the current practices for assessing penalties. Also, the citation in § 77.291(b) has been revised from Section 605(b) of The Clean Streams Law (35 P.S. § 691.605(b)) to Section 605 of The Clean Streams Law (35 P.S. § 691.605) because the entire section, including subsection (a), is applicable.

Blasting

9. Comment: IRRC asks that under circumstances where the Department has determined that a higher air blast level may be appropriate, if the Board considered amending § 77.563 (relating to Public notice of blasting schedule) to require the person conducting the mining activities to inform residents, local governments and public utilities within close proximity of the blasting operation about the exception to the maximum decibel level. The Board should submit a revised Preamble and RAF, in particular block #18, that discusses the impact of allowing a higher threshold on the regulated community, but also on residents, local governments and public utilities surrounding the blasting operation. **(5)**

Response: The current public notice of blasting schedule does not include reference to decibel levels and the Department does not believe altering the current public notice requirements in § 77.563 are needed to protect the public. The Department must decide on a case-by-case basis, and in consideration of the nearest homes, buildings, or other structures, if alternative decibel levels will be allowed. A higher threshold will only be approved when evaluation by the Department demonstrates that doing so does not permit a public nuisance, and the RAF has been amended as requested by IRRC to clarify this.

10. Comment: A commentator noted that the proposed rule change in § 77.564(f)(2) will allow higher decibel blasts as an alternative. The current rule allows for an alternative of a lower decibel blast. The commentator asserts that higher decibel blasts increase the chances of property damage due to blasting that could create more of a disruption and more unsafe scenarios in our communities. The lower blasting limits must remain unchanged in order to prevent potential bodily injury and property damage. **(2)**

Response: This section on alternative air blast was revised to clarify the maximum air blast limit of 133 dBL and to allow exceptions to that maximum value under certain conditions. The change of "lower" to "alternative" was made to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allow for an exception for a higher air blast level to be approved for noncoal permits. See § 211.151(d) and (e). In some limited instances, a higher air blast level may be appropriate where it is clear that the structures will not be subject to damage with the higher threshold. Examples of this situation in practice include utility towers or buildings without windows that will not be affected by the higher air blast level. The alternative language allows for either a decrease or an increase in the air blast level that may be warranted based on site-specific circumstances including geographical considerations which may enhance air blast effects. The factors that the Department must consider in evaluating alternatives include potential damage and whether the alternative will create a public nuisance.

Specifically, if a limit higher than the existing 133 dBL air blast limit (based on the recommended safe limit established by U.S. Bureau of Mines RI 8485) is granted, an evaluation of the attenuation of the air blast is conducted and, where necessary based on distances of structures, additional seismograph monitoring would be required to ensure that the 133 dBL regulatory limit is not exceeded at other buildings or structures. For example, the operator can design for a higher limit because no vulnerable structures would be affected if the closest structure is a utility tower, which is not affected by a higher airblast limit.

11. Comment: Regarding proposed amendments to § 77.564, a commentator states that permitting any upward departure from the current 133 dBL maximum air blast sound-level to an unknown maximum neither meets Constitutional requirements or as a matter of law can constitute a "minimal impact," adequate "sound reduction," or adequate pollution prevention as an unknown. The Commentator objects to the Department's conclusion that the proposed rulemaking "has minimal impact on pollution prevention" and believes that allowing a lessor-owner to request a lessee waiver without notifying the lessee of numerous health impacts related to noise, does not protect public health, mitigate pollution, or meet Constitutional requirements.

The commentator provided several examples of Federal and State statutes, including the Federal Clean Air Act and the Federal Pollution Prevention Act, that require the abatement of noise pollution and ensure the appropriate use and enjoyment of private property by the landowner, and suggested that the change in this final-form rulemaking to allow for higher blasting levels in limited circumstances may be in violation of such statutes. The commentator further went on to provide examples of adverse health effects as a result of exposure to noise pollution and asserted that even small increases in sound emissions represent significant differences in perceived sound-level. **(3)**

Response: The Department considers noise as part of the air pollution control plan submitted by the operator. Air blast, however, is not considered "sound." Air blast is a measure of air pressure waves, not a measure of sound, loudness of sound, or sound intensity. The air blast level has no bearing on the perception of loudness. A blast may "sound" loud and yet produce low levels of air overpressure, or alternatively, a blast might have little or no perceptible sound and yet produce an air pressure wave that is over the regulatory limits. The concept behind air blast

regulation is not to reduce the sounds people hear, but to limit structural response (shaking) to passing air pressure waves, which, if too high, could damage a structure.

Moreover, the alternative limit provision in this rulemaking does not alter the Department's obligation to consider noise from a proposed mining operation and determine if operational mining noise will constitute a public nuisance under § 1917-A of the Administrative Code of 1929. See *Plumstead Twp. v. DER*, 1995 EHB 741, 789-90; *see also Chimel v. DEP*, 2014 EHB 957, 1000. The Department will continue to consider noise in a new application for a mining operation, in a proposed revision or expansion of mining for an existing operation.

The Department disagrees with commentator's assertion that the Department would violate Federal or State constitutional law, the Federal Clean Air Act, the Federal Pollution Prevention Act, or allow a regulatory or physical taking, when it permits air blast above 133 dBL under its current regulatory structure or the modifications in this rulemaking. Pennsylvania's regulatory limit (133 dBL) for air blast comes from the recommended safe limit established by U.S. Bureau of Mines RI 8485. The limit was scientifically established to prevent air blast overpressure from damaging the most vulnerable structures—wood framed dwellings. Other buildings are more resistant to damage from air overpressure. The 133 dBL limit was also set in consideration of annoyance. Most air blasts from quarry blasting have peak levels of less than 120 dBL. Although levels up to 125 dBL are not uncommon, levels approaching the regulatory limit of 133 dBL are rare but when they occur, Department Blasting and Explosives Inspectors typically investigate. Most blasts are barely audible, of very short duration, occur during daylight, and only occur a few times a week. Therefore, quarry blasting does not constitute noise pollution.

These comments regarding the alternative air blast limits do not consider the design and review of blast plans specific to the mining situation. The "unknown maximum" described suggests that the Department would have no upper limit and would be inconsiderate of the health of persons nearby. This is an incorrect characterization of both existing and proposed regulation and procedures. The blast plans are individually reviewed by specialized blasting inspectors who confirm the distances and calculations related to the amount and type of explosives to be used, the process of detonating the blast (including warning signals and public notice), the monitoring for ground vibration and air blast, and the data submitted after the blast to assess compliance. The blast plans are designed to not cause damage or a nuisance specific to the area that may be affected, and to ensure that the 133 dBL regulatory limit is not exceeded at nearby buildings or structures.

12. Comment: A commentator objects that allowing a lessor-owner to merely request of a lessee a signed waiver to the air blast requirements, without the lessor-owner first notifying the lessee of the numerous adverse health effects linked to noise, and claims that such an allowance does not protect public health, mitigate pollution, or meet Constitutional requirements. **(3)**

Response: The rulemaking does not change the allowance in § 77.564(f) for a lessee to execute a waiver from meeting the air blast limitations. The Department disagrees that occasional and controlled noise and air blast from regulated blasting operations constitutes a risk to public health in the manner asserted by the commentator and believes the current waiver requirement in

§ 77.564(f) is adequate to protect public health. See also the responses to Comment 11 and Comment 14.

13. Comment: A commentator suggests revising § 77.564(f)(2) to read: "The Department may specify lower maximum allowable air blast levels than those in this subsection for use in the vicinity of a specific blasting operation." **(3)**

Response: The comment suggests a reversion to the existing language. As explained in the response to Comments 10 and 11, the proposal to change "lower" to "alternative" is consistent with existing requirements in § 211.151(d) and (e), and allows for higher levels under limited, justified circumstances. The proposed change also continues to allow for the reduction of the air blast limit where needed and appropriate. The change proposed by this final-form rulemaking is a starting point from which to begin regulating activity under typical circumstances. Other conditions may warrant alternative levels that may be higher or lower than the base standard given in the regulations.

14. Comment: A commentator suggests adding § 77.564(f)(4) to read: "Notwithstanding the air blast level specified in this section, the person who conducts the surface mining activities shall actively minimize and abate noise from air blasts to minimize noise pollution on properties not owned by the person who conducts the surface mining activities." **(3)**

Response: The Department believes that this change is not warranted. The Department includes the following information to address the misperception inherent in the assertions that blasting noise is a health hazard to people outside the blast area or in nearby structures.

Air blast is an impulsive wave generated by an explosive blast resulting from the rock breakage and mass movement. Air blast from confined, surface-mine blasts consists mostly of acoustic energy below 20Hz (concussion), where human hearing becomes less acute. (Humans can detect sound in the frequency range of about 20 to 20,000 Hz.) Air blast (air overpressure) from mine blasting is measured with microphones that respond at frequencies between 4 and 125 Hz. This is the range important for preventing structure damage. Noise is measured using microphones which are "A-weighted" which are designed to capture the frequencies of human hearing (predominately between 1,000 to 5,000 Hz).When observed outside, a blast routinely sounds like a low rumble resulting from the low frequency components of the event. Inside a structure, the ground vibrations and air blast cause the structure to vibrate that then causes the structure to produce noise and objects on walls to rattle. These sounds are generated from the structure-response rather than blast-induced noise.

Blasting events typically have a duration of one second or less. Quarries may blast two to three times a week, during daylight hours. Most quarries blast about once a week. This results in up to 3 events a week of less the one second. At greater distances or behind the rock face, dispersion and refraction of the waves mask the individual pulses from each blasting hole and the blast timing becomes less evident.

For further information about blasting regulations and design, the Department recommends the publication "Citizen's Guide to Explosives Regulations in Pennsylvania" (5600-FS-DEP3144)

and the "Pennsylvania Blaster's License Training Manual" (5600-MN-DEP4778) which are available on the Department's eLibrary at http://www.depgreenport.state.pa.us/elibrary/ under Publications > Mining Programs.

15. Comment: A commentator requests that § 77.564(f) be revised to read "Air blasts shall be controlled so that they do not exceed the air blast level specified in this subsection at a dwelling, public building, school, church or commercial or institutional structure, unless the structure is owned by the person who conducts the surface mining activities and is not leased to another person. After providing written notice to the lessee of the adverse health effects linked to noise and allowing the lessee to revoke informed consent at any time, and providing proof of such written notice to the Department upon request, the lessor may obtain written, informed consent and waiver from lessee relieving the operator from meeting the air blast limitations of this subsection." **(3)**

Response: This comment assumes that all structures have the same response to an air blast, which is not the case. For example, an older wood framed building with large glass windows is not the same as a modern school or office building made of brick and steel with reinforced windows. Where alternative limits are necessary, the Department will establish limits suitable to the structure based on site-specific circumstances.

As discussed in responses to Comments 10, 11, 12, 13, and 14, the air blast levels already consider the potential for damage, nuisance or other adverse effects to structures and persons.

16. Comment: A commentator requests that the Board add § 77.564(f)(5) to read: "Affected owners or lessees of properties not owned by the person who conducts the surface mining activities, including government entities, may directly petition [the] Department to specify lower maximum allowable air blast levels than those in this subsection for use in the vicinity of a specific blasting operation." **(3)**

Response: The Department already considers the existence of historic or sensitive structures when evaluating and approving mining permits and blasting plans. The Department currently responds to citizen concerns regarding the effects of air blast on their property or property where they may reside. Therefore, the suggestion for petitioning is an unnecessary addition.

Public Participation

17. Comment: IRRC and a commentator observe that the *Pennsylvania Bulletin* notice publish date will be changed from after the date of receipt of the permit application to the date after the permit is accepted by the Department. This will effectively shorten the time period that the public has to prepare and submit questions and comments to the Department about the permit application. The time period for public involvement and the public's opportunity to inquire about the application will be shortened, possibly by months. This is an unacceptable limitation to the public's right to notice and comment of these permits.

The proposed rule will mean that a public hearing or informal conference must be held within 60 days after the close of the public comment period. No longer will a public hearing or informal

conference be held based upon the date of the public request for a hearing or conference. In addition, only one hearing or informal conference meeting will be held by DEP, no matter if different groups or organizations request a hearing or conference based on totally different issues with the permit. This, too, is an unacceptable limitation to the public's right to participate in the regulatory process. **(2, 5)**

Response: Public notice for applications is accomplished in two ways - the applicant must publish a newspaper public notice (once a week for four weeks) and the Department must publish notice in the *Pennsylvania Bulletin*. The proposed change only relates to the notice in the *Pennsylvania Bulletin*. The length of the public comment period is not being shortened because the newspaper public notice requirement is being maintained, and the requirement in § 77.123 that a request be filed 30 days from final newspaper notice has been left unchanged, The proposed change is intended to avoid providing notice in the *Pennsylvania Bulletin* for applications which are not ultimately accepted for review.

The Department also notes that, under this proposed regulation, local government entities and agencies potentially affected by a proposed activity would have 30 days from publication in the *Pennsylvania Bulletin* to file a request for an informal conference. To the extent the new *Pennsylvania Bulletin* requirement staggers notice to the public from the initial newspaper publication noting the application to the later *Bulletin* notice indicating Department has accepted the application, this, in fact, creates a longer window for interested parties to request an informal conference, not a shorter one, because these request deadlines will no longer run concurrently. Moreover, effective public participation can be achieved through a single public meeting for each application. This has been amply demonstrated in past practice. Outside of the public meeting process, there are opportunities for the public to provide written comments during the span of permit review.

18. Comment: IRRC poses the following questions:

> (1) Section 77.123(a)(2) provides that a person having an interest that is, or may be, adversely affected may request in writing that the Department hold a public hearing or informal conference on an application for a permit. The request must be filed with the Department within 30 days after the publication of the newspaper advertisement placed by the applicant or within 30 days of **receipt of notice** by the public entities to whom notification is provided under § 77.121(e). Emphasis added. Since the Board is proposing to eliminate the existing requirement for these notices to be delivered by registered mail and is not updating the requirement for the notice to be delivered by certified mail, how will the Department verify receipt of written or electronic notice to each local government in which activities are located, as well as Federal, State and local government agencies with jurisdiction over or an interest in the area of the proposed activities? §§ 77.121(e)(1) and (2).
>
> (2) Are requests for a public hearing or informal conference on an application for permit by persons having an interest accepted electronically?
>
> (3) What are the instances where electronic notices are not appropriate?

(4) In situations where electronic notices are not appropriate, will notifications be sent via first class mail? **(5)**

Response: The Department recognizes that it has the responsibility to provide adequate notice and to provide documentation that the notice was provided. Under the Environmental Hearing Board's rules, the Department must demonstrate that a party received actual notice for all Department actions not published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52. No other Department bureau requires use of Registered mail, which is designed for mailing valuables and secure documents. As part of everyday business, each permitting office maintains physical and email address (where available) for the local municipalities and Federal, State, and local agencies that are notified of permit actions. This rulemaking change does not change a situation where the entities are not responsive to incoming correspondence. The Department processes continue to move to all-digital communication. As permitting moves towards an e-permitting platform, these notifications will be automated. If an email communication fails, the Department is notified and immediately attempts to correct the failure and route the communication. While every effort is made to accommodate the capabilities of the municipality, some prefer email notices and others do not. Where electronic notice is not preferred, the mail will be used. Certified Mail will continue to be used when it is necessary to demonstrate delivery. Additionally, all applications received and acted upon are published in the *Pennsylvania Bulletin* and the requirement for public newspaper notices is still continued under § 77.121(a), providing a non-electronic means for the public to be informed of the application.

A transition to electronic permitting in the future will likely result in a more direct communication with interested parties. The Department will also consider any future improvements in this direct notification process but notes that there are multiple other indirect ways that these parties can gain notice of the action, such as through alerts from the Department's web-based eNotice system at https://www.ahs.dep.pa.gov/eNOTICEWeb/.

The Department honors requests for public hearings or informal conferences for mining permits submitted via email.

19. Comment: A commentator points out that with the proposed changes, the name of the local government now will be required in public notice in newspaper. This could make it easier for the general readership of the newspaper to know approximately where the permit will be located and would create more effective notice for the public and increases their ability to meaningfully engage in the permitting and regulatory processes. **(2)**

Response: The Department acknowledges this comment. The change implements the new definition of "local government" but does not change the requirements.

20. Comment: A commentator expresses approval that public notice will now be required for any lateral or vertical change in operational mining plans, as this will require a major revision to the permit. This would be if the quarry operator decides to mine deeper or to mine laterally into acres that were permitted as adjacent surface support areas. This also creates more effective

notice for the public and increases their ability to meaningfully engage in the permitting and regulatory processes. **(2)**

Response: The Department acknowledges this comment. The intent of the proposed revision to the public notice requirements is to make it clearer as to when a public notice is required for a permit revision.

21. Comment: A commentator suggests that to ensure public notice is adequate, transfers and small permits both not be exempt from public notice in a newspaper. The commentator believes more public notice both in newspapers and electronically are critical to providing adequate notice for the public to engage in the process especially in light of the impacts and long life and operation of these mines. **(4)**

Response: Small noncoal permit applications, which are for operations that have limited area and extent for mining and land disturbance and limited extraction volumes, are exempted in § 77.108(f) from the public notice requirements in the existing regulations because of their insignificant potential effect upon the safety and protection of the life, health, property and the environment. However, transfers of large noncoal permits are subject to the public notice requirements. All permit decisions by the Department, however, do appear in the *Pennsylvania Bulletin*. The Department suggests any interested parties consult the weekly *Pennsylvania Bulletin* search functions to monitor any activities proposed or issued for their municipalities and counties.

22. Comment: IRRC points out that the Preamble states that Subsection (c) of § 77.142 is being added to clarify that unaffected areas to be deleted from the footprint of the permit may be approved without public notice. The Board explains that this also includes restored areas that have been disturbed only by exploration drilling. A commentator contends that this new subsection "appears to invite abuse, inasmuch as grading typically is associated with exploration of mineral resources."

In order for IRRC to determine whether a regulation is in the public interest it must analyze the text of the Preamble and proposed regulation, as well as the reasons for the new or amended language. The explanation provided is not sufficient to allow IRRC to determine if the regulation is in the public interest. IRRC asks the Board to explain in greater detail in the Preamble to the final-form regulation how the applicant will demonstrate that the area has not been affected by surface mining.

The description in the Preamble refers to "restored" areas. However, the language in the Annex does not reflect the same. The Board should make certain that the description in the Preamble of this section, and all sections, is consistent with the regulatory language in the Annex. **(4, 5)**

Response: The deletion of unaffected area or areas that have been incidentally affected by exploration is exempt from public notice.

Exploration drilling creates minimal disturbance and may be conducted without a mining permit. The area is subsequently sealed, regraded and revegetated upon completion of drilling.

The applicant demonstrates that an area is unaffected by submitting new maps. These new maps are reviewed by a field inspector to confirm that the area is eligible prior to the approval of the deletion.

The reference to restored areas is limited to those minor disturbances that were the result of exploration activities. Subsection (c) of § 77.142 does not specifically reference a restoration requirement; however, sealing of drill holes is a requirement of the new § 77.113(b). The Preamble has been edited accordingly to correctly reflect the language in the Annex.

Findings

23. Comment: In relation to the requirements in § 77.123, IRRC and a commentator observe that deleted from the new rule is the requirement that a report on the findings of the public hearing is to be completed 60 days after the hearing date. If the proposed changes are adopted, there will be no deadline for the issuance of the Department's report on a public hearing—except that it will be issued before or on the same day of the Department's decision on the permit application. This could then lead to a situation in which the public has no time to read or respond to report because it is issued at the same time as the permit. This negates the purposes of such reports and eliminates the ability of the public to meaningfully engage with this regulatory process.

IRRC suggests that based on the stated intent in the Preamble, they agree with the concern expressed by this commentator that the proposed change could lead to a situation in which the public has no time to respond to the report.

The actual language as proposed in the Annex differs from the intent described in the Preamble. As drafted, it appears that the summary report could be made available *prior to the approval or denial of the application or upon approval or denial of the application*. 52 P.S. § 3310(c) requires the Department to notify, within 60 days of the hearing or conference, the applicant of its decision to approve or disapprove or of its intent to disapprove. Presumably, the report under the new language would be made available to the public within this same time period.

Proposed subsection (e) lacks the clarity needed to establish a binding norm. The elimination of the existing time period for the Department to give its findings to the applicant and to each person who is party to the public hearing or informal conference is replaced with vague language. The new provisions are not only less clear, but represent a significant departure from the existing report's purpose and intended audience with little to no explanation provided by the Board. IRRC asks the Board to explain in greater detail the need for and its rationale for the proposed changes.

IRRC also notes that the amendments to subsection (e) make it inconsistent with the notification requirements under § 77.143(b)(8) (relating to *Mine permit renewals—general requirements*). What is the need for and rationale for differing notification requirements among permit applications and permit renewals? **(2, 5)**

Response: The summary report (that contains "findings") serves three purposes. First, the report documents the public's concerns expressed during a public meeting (any public hearing or informal conference) as part of the public record to show that the Department recorded and considered the concerns voiced in the public event. Second, the report provides responses to these concerns in the context of permit application information. Third, the report explains the action taken by the Department to issue or deny the application in response to public comments and concerns.

After the public meeting takes place and the Department reviews all comments, the next action by the Department is stated in § 77.123(f), "the Department will notify the applicant of its decision to approve or disapprove or of its intent to disapprove *subject to the submission of additional information*." (emphasis added). In most cases, the Department will ask the applicant to supply additional information in response to the public meeting comments.

Instead of issuing a report within a set timeframe that will contain incomplete information, the Department waits until the applicant provides additionally requested information and then crafts the findings (as part of the "summary report" document) based on the final version of the application that is acted upon by the Department. Therefore, the summary report resulting from a public meeting is completed and provided to interested parties in conjunction with the permitting action.

In response to this comment, the revised subsection § 77.123(e) was changed to "Reserved" and the revisions added instead as a new subsection (g) at the end of the section to better reflect the typical chronological order of steps.

A permit issuance or denial is not a "regulatory process" as stated by the commentator. The summary report is not subject to further commentary by the public. It documents previous public comments and represents a closure of the review process. The next step for engagement by any party in the permitting process would be the consideration of appeal of the permit action for which directions are provided in the decision notice issued with the permit action.

In response to the comment about the language in 52 P.S. § 3310(c), that section applies specifically to hearings or conferences on final bond release action only. Therefore, this time limit of 60 days would not apply to issuance of new or revised permits. The statute is silent regarding timelines for providing the findings or for taking a permit action in those situations even though the regulations reflect the 60-day post-public meeting for other permit actions. Section 77.242, regarding procedures for seeking release of bond, does not refer to § 77.123 regarding public hearings. Instead, § 77.242(f) explains the public hearing procedures for bond release. In that situation, the time limitations in 52 P.S. § 3310(c) would be applicable.

The Department further notes that these notification requirements are not inconsistent with the notification requirements under § 77.143(b)(8) regarding mine permit renewals. Proposed § 77.143(b)(8) states that the Department will "notify the applicant, persons who filed objections or comments to the renewal and persons who were parties to an informal conference held on the permit renewal of the Department's decision" to renew a mining permit. Both the current and proposed revisions to § 77.143 are silent as to any temporal requirements regarding renewals. So,

to be consistent, the notification to commenters on renewals will occur in conjunction with the Department's decision.

Bonding

24. Comment: A commentator points out that the Certificate of Deposit for collateral bonds will no longer have a maximum limit of $100,000. There will be no limit to the dollar amount required. This creates the possibility of increasing the collateral bonds to amounts that more accurately reflect the millions of dollars in potential damage that might occur from these operations, instead of simply deflecting the private operators damages on to the taxpayers. **(2)**

Response: Under the revision to § 77.224(c)(2) in the final-form regulation, there will be a limit on the amount of an individual Certificate of Deposit. This limit will be the maximum insurable amount by Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance Corporation, which is currently $250,000. This limit has no effect on the amount of bonds required as multiple certificates can be accepted.

Miscellaneous

25. Comment: A commentator objects to the conclusion that the Proposed Rulemaking "has minimal impact on pollution prevention." IRRC reiterated this concern. **(3, 5)**

Response: The preamble describes the pollution prevention impact as minimal because the proposed revisions of this rulemaking are primarily administrative and do not revise the existing and substantive requirements for obtaining and operating a noncoal permit or the associated environmental standards. In some instances, clarification was necessary, but the current requirements were not changed, and the level of protection achieved by these requirements will not be altered. For example, relating to exploration, the addition of § 77.113 implements the current requirements. The creation of the new section is intended to clarify the distinction between the requirements for when exploration involves extraction and when it is conducted strictly by drilling.

26. Comment: A commentator asks the Department to clarify from the Aggregate Advisory Board member list which member serving on the Board is from the county conservation district. **(4)**

Response: This comment is outside the scope of the proposed rulemaking; however, the Conservation District member of the AggAB is the representative of the Eastern Pennsylvania Coalition of Abandoned Mine Reclamation. The public is welcome to correspond directly with the AggAB with any further questions and/or attend the meetings of the Board.

27. Comment: A commentator observes that data was shared relating to EPA's review of Draft NPDES permits at an Aggregate Advisory Board Meeting. The commentator asked where the summary data for these EPA rejections is housed for review by the public to better understand the extent of concerns with these NPDES permits. **(4)**

Response: This level of detail regarding EPA review is outside the scope of the rulemaking. By way of clarification, EPA does not "reject" permits. EPA provides comment, objects, makes recommendations, or takes no action during their NPDES review period. The information about the EPA review of specific NPDES permits is in the permit files at the respective District Mining Office.

28. Comment: A commentator asks if the map of noncoal sites is available electronically for public review or posted on a website. If not, the commentator asks that the Board consider adding it so that the public has more readily available data and maps to help better understand the extent of impacts and engage in the permitting and public review process. The Department has developed helpful monitoring maps and online tools to assist in other programs. Providing this summary information and maps for mining in the state using story maps and other interactive mapping would be helpful to the public. **(4)**

Response: This comment is outside the scope of the proposed rulemaking. The location of industrial mineral facilities are available via eMapPA (https://gis.dep.pa.gov/emappa/)

29. Comment: A commentator points out that noxious and invasive plants continue to plague our natural resources and impacts from mines with disruption of soils certainly can lead to colonization of these invasive plants both during the life of the mine and after reclamation. An update to ensure all plants are included would benefit the Commonwealth's natural resources. **(4)**

Response: The final-form regulation includes the most recent definition of noxious plants in order to ensure compliance with the requirements of 3 Pa.C.S. Chapter 15 (relating to controlled plants and noxious weeds).

30. Comment: A commentator noted changes to § 77.51(c) (License requirement), measures to ensure complete details pertaining to company ownerships and regarding LLCs is an important change. The Commentator suggests that the Department change § 77.51(c)(2) to require a longer reporting period than 5 years preceding the data of application to have a broader view of the applicant's history with mines especially considering the long life of a mine. **(4)**

Response: The Department does not think it is necessary to make this change. The five-year look-back period has been effective at identifying the history of applicants and related parties. In addition to the self-reporting on an application, the Department maintains a database of mine operators and related parties that provides supplementary information considered by the Department in evaluating applications.

31. Comment: A commentator asks, since noncoal surface mining excludes mining via subsurface shafts and tunnels, why there is a reference to underground mining activities at p. 12 [§ 77.142(a)(2)]. **(4)**

Response: The reference to underground mining activities is included because surface activity associated with underground mining is part of the statutory definition of "surface mining." The proposed revision to the definition of "Noncoal surface mining activities" is limited to the addition of the phrase "ancillary and customary."

32. Comment: A commentator asks why the definition of "Noncoal surface mining activities" excludes dredging in streams, rivers, and Lake Erie, and if it would include Manor and Van Sciver Lakes. **(4)**

Response: The exclusion of dredging from the definition is based upon the statutory language found in the Noncoal Surface Mining Conservation and Reclamation Act. Dredging operations in Manor and Van Sciver Lakes would not be exempt from the definition of noncoal surface mining activities, unless one of the other exemptions would apply. The exclusions of rivers, streams and Lake Erie is presumed to be related to the need to maintain those waterways for navigation or related purposes where the primary purpose of dredging would not be commercial mineral extraction.

33. Comment: A commentator suggests that the words "and attained use, if higher than designated use" should be added to designated use and water quality in § 77.109(e)(2). The commentator states that the Department routinely ignores attained use in making determinations, despite the requirements of 25 Pa. Code Chapter 93. Thorough monitoring should be required to ensure the proper uses are reflected before any permit is issued.

IRRC comments that it will review the Board's response to the commentator's concern in determining whether the regulation is in the public interest. **(4, 5)**

Response: Section 77.109(e.1)(2) references noncoal exploration activities outside of obtaining a noncoal surface mining permit. It allows for a waiver of a full permit to conduct this limited activity. However, in response to this comment, this section has been revised from the proposed rulemaking to include reference to the existing and designated uses of the stream, which may be affected by exploration. This is consistent with water quality standards in 25 Pa. Code Chapter 93. Contrary to the commentator's assertion, the Department applies these requirements by evaluating the more stringent of the existing or designated use. Permit applications and exploration requests include the review of measure to be taken to protect the hydrologic balance of potentially affected waters.

34. Comment: IRRC and a commentator ask why exploration must avoid only wetlands, but not streams, ponds, springs, water supplies, per § 77.109(g)(3). **(4, 5)**

Response: The reference solely to wetlands in § 77.109(g)(3) was not a change made in this rulemaking. Wetlands are singled out because they are not otherwise protected elsewhere in the regulations. Streams are specified in the distance limitations referred to in § 77.109(f), so they must also be avoided. Ponds and springs are protected to the extent they are used as water supplies.

35. Comment: A commentator points out with respect to public information that it is available only at District Mining Offices. [§77.109(j)(1)]. All permit application information upon request should be available to the public electronically once permitting is done online. Previous discussion anticipates electronic permitting, but availability to public is not noticed. In the

electronic age it is critical these documents are readily available online to the public for better public engagement and review. **(4)**

Response: While this comment is outside the scope of the proposed revision, the Department notes that it is engaged in an effort to improve online access to documents and data as technology allows but currently not all permit information is available electronically.

36. Comment: A commentator asks about effects on other environmental features than hydrologic balance, such as streams and wetlands at § 77.141(e)(1). **(4)**

Response: The hydrologic balance includes all surface and subsurface water including streams and wetlands. See the definition in § 77.1. Therefore, information on all hydrologic resources are provided in the permit application and potential effects are evaluated.

37. Comment: A Commentator points out that water quality monitoring may be required over and above any NPDES requirements per § 77.532(c). **(4)**

Response: The proposed revision to § 77.532 is limited to updating the reference to Chapter 92a. Therefore, the comment is outside the scope of the proposed rulemaking. The Department requires additional monitoring as needed to demonstrate the protection of the hydrologic balance.

38. Comment: An industry trade group acknowledges the collaborative effort of the Department when clarifying and correcting these rules, and the scientific thinking and approach—while staying within the confines of the noncoal mining statute. **(1)**

Response: The Department acknowledges the comment.

39. Comment: IRRC points out that Section 5.2 of the RRA directs IRRC to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. When making this determination, IRRC considers criteria such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 5 of the RRA in the Regulatory Analysis Form (RAF). See 71 P.S. § 745.5 (a).

The Board indicates in its response to RAF #7 that many of the revisions in the proposed rulemaking are administrative in nature. However, the comments received in opposition to certain provisions, such as those affecting surface blasting requirements, permit terms, permit revisions, public notices of filing of permit applications and noncoal mining permit waivers contradict that characterization. The Board should revise its response to RAF #7 and the Preamble to include the significant changes in its explanation of the regulation. It should also include those significant amendments in its discussion of how the benefits of the regulation outweigh any costs and adverse effects (RAF #18).

The explanation of the regulation in the Preamble to the proposed rulemaking is not sufficient to allow IRRC to determine if the regulation is in the public interest. In most of the comments that

follow this section, IRRC asks the Board to provide more detailed information, such as why the amendments are needed. **(5)**

Response: The Regulatory Analysis Form and preamble have been revised to address these concerns. Many of the comments that are critical of the proposed rulemaking are based on misunderstanding of the current regulatory approach to noncoal mining. More detailed explanations are provided in the RAF to clear up these misunderstandings.

40. Comment: IRRC points out that relating to § 77.1 Definitions, *"Noncoal surface mining activities"* the Preamble states that clarifications are being made to this definition. However, it does not explain the purpose or need for adding "ancillary and customary." What are ancillary and customary activities? **(5)**

Response: The phrase "ancillary and customary" was inserted as a result of discussion with the AggAB and their Regulatory, Legislative and Technical committee where this phrasing was derived. The AggAB expressed concerns regarding common non-extractive activities that occur on the permitted areas that are closely associated with the extraction and processing of minerals, such as bagging, crushing, equipment storage, etc. The phrase was intended to clarify that these activities normally conducted to support the mining activity would be included in the definition and understood to be appropriately covered as activities on a mining permit. It is not possible to list all these potentially included activities, so this phrasing was derived. "Ancillary" is intended to connote activities that support the mining. "Customary" is intended to connote the usual or normal suite of mining-related activities. This addition provides a benefit to both the permittee and to the Department in that there is no dispute that non-extractive activities are appropriate to be covered on the areas of the mining permit and, as regulated under the permit, are then subject to pollution controls and bond release criteria under this Chapter. Additional clarification has been provided in the preamble.

41. Comment: IRRC comments that the Board is amending §§ 77.107 (relating to verification of application) and 77.121(e) (relating to public notices of filing of permit applications) to facilitate the submission of applications and electronic notices, where appropriate. Did the Board consider and reject making the information in §§ 77.109(c) and (j)(1) available, upon request, to the public in an electronic format? **(5)**

Response: Generally, the Department makes the information requested available in the most efficient form, and in electronic format whenever possible. While most application documentation can be submitted in or converted to digital storage formats, at this time, it is premature to require the documents to be exclusively available electronically. The Department currently accepts some coal mining activity applications through the ePermitting online application and continues to expand these offerings. The transition to managing all documents in electronic form will be accomplished incrementally as the program is expanded and permits are updated.

42. Comment: IRRC notes that in RAF #14, the Board reports that on May 6, 2020, the Aggregate Advisory Board voted to concur with the Department's recommendation that the

proposed rulemaking proceed with the regulatory process. IRRC asks the Board to indicate the vote of the Board in the RAF of the final-form rulemaking. **(5)**

Response: The final RAF includes the requested information that the AggAB voted unanimously to recommend that the revised final-form rulemaking proceed after suggesting the Department add language to clarify the applicability of civil penalties in the cessation order subsection of § 77.293 (relating to penalties). The Board has incorporated this language as suggested.

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 A. GENERAL PROVISIONS

§ 77.1. Definitions.

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

* * * * *

Impoundment—A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment or waste.

***Insignificant boundary correction*—A small or inconsequential change to the permit boundary to correct an error in mapping, surveying or other minor adjustment that results in no significant difference in environmental impact.**

Intermittent stream—A body of water flowing in a channel or bed composed primarily of substrates associated with flowing water which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges.

* * * * *

Large noncoal permit—A mining permit that authorizes the extraction of greater than 10,000 tons per year of noncoal materials.

***Local government*—A city, borough, incorporated town or township.**

Major permit revision—A revision to a permit that requires public notice.

* * * * *

Noncoal minerals—An aggregate or mass of mineral matter, whether or not coherent, that is extracted by surface mining. The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite, and clay. The term does not include peat**[**,**]**. **The term does not include** anthracite or bituminous coal or coal refuse, except as provided in section 4 of the act (52 P.S. § 3304).

Noncoal surface mining activities—The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above

or between them or otherwise exposing and retrieving them from the surface. The term includes strip mining, auger mining, dredging, quarrying and leaching and the surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and **ancillary and customary** activities related thereto. The term does not include mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings. The term does not include the following:

(i) The extraction of minerals by a landowner for the landowner's noncommercial use from land owned or leased by the landowner.

(ii) The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes of the Department of Transportation or the extraction of minerals under construction contracts with the Department if the work is performed under a bond, contract and specifications that substantially provide for and require reclamation of the area affected in the manner provided by the act.

(iii) The handling, processing, or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(iv) Dredging operations that are carried out in the rivers and streams of this Commonwealth and in Lake Erie.

(v) The extraction, handling, processing, or storing of minerals from a building construction excavation on the site of the construction if the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals. For purposes of this section, the minerals removed are incidental if the excavator demonstrates that:

(A) Extraction, handling, processing or storing are conducted concurrently with construction.

(B) The area mined is limited to the area necessary to construction.

(C) The construction is reasonably related to the use proposed for the site.

(vi) The removal and sale of noncoal materials from retail outlets.

Noxious plants—Species that have been included on the official State list of noxious plants for the Commonwealth under **[the Noxious Weed Control Law (3 P.S. §§ 255.1—255.11)]** **3 Pa.C.S. Chapter 15 (relating to controlled plants and noxious weeds)**.

* * * * *

Recurrence interval—The interval of time in which a precipitation event is expected, on the average, to occur once. For example, the 10-year, 24-hour precipitation event expected to occur on the average once in 10 years.

Related party—A partner, associate, officer, **director, Limited Liability Company member, Limited Liability Company manager,** parent corporation, subsidiary corporation, affiliate, or person by or under common control with the applicant, contractor, or subcontractor.

Sedimentation pond—A primary sediment control structure, including, but not limited to, a barrier, dam, or excavated depression which **[details]** **detains** water runoff to allow sediment to settle out. The term does not include secondary sedimentation control structures, such as straw dikes, riprap check dams, mulches, dugouts and other measures that reduce overland flow velocity, reduce runoff volume or trap sediment, to the extent that secondary sedimentation structures drain to a sedimentation pond.

* * * * *

Subchapter B. SURFACE MINING OPERATOR'S LICENSE

§ 77.51. License requirement.

* * * * *

(c) *Identification of ownership.* The application shall indicate whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity. For business entities other than single proprietorships, the application shall contain the following information if applicable:

(1) The name and address of the applicant, including partners, associates, officers, **directors, Limited Liability Company members, Limited Liability Company managers,** parent, or subsidiary corporations.

* * * * *

(e) *Refusal to issue or renew license.* The Department will not issue a noncoal surface mining operator's license or renew or amend a license if it finds, after investigation and an opportunity for informal hearing, that a person, partner, associate, officer, **director, Limited Liability Company member, Limited Liability Company manager,** parent corporation or subsidiary corporation has been subject to a bond forfeiture under the act and environmental acts or has failed to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree under the act and environmental acts. The Department will not renew a license for an operator who uses the provisions for payment in lieu of bond unless the operator submits his annual payment with the license renewal application. A person who opposes the Department's decision on issuance or renewal of a license has the burden of proof.

(f) *License renewal requirements.*

(1) A person licensed as a noncoal surface mining operator shall renew the license annually according to the schedule established by the Department.

(2) Notice of license renewal and filing of an application for license renewal shall conform to the following:

(i) **[The Department will notify the licensee in writing at least 60 days prior to the expiration of the current license to renew the license. The applicant shall be responsible for filing a license renewal application prior to the expiration of the current license]** **The application for renewal shall be made at least 60 days before the current license expires**.

(ii) If the Department does not intend to renew a license, the Department will notify the licensee, a minimum of 60 days prior to expiration of the license. This section does not prevent the Department from not renewing the license for violations occurring or continuing within this 60-day period if the Department provides an opportunity for an informal hearing.

Subchapter C. PERMITS AND PERMIT APPLICATIONS

GENERAL

§ 77.107. Verification of application.

Applications for permits shall be verified by a responsible official of the applicant with a statement that the information contained in the application is true to the best of the official's information and belief**[, and attested by a notary public or district justice]**.

§ 77.108. Permit for small noncoal operations.

* * * * *

(f) The Department will publish its decision on a small noncoal permit application and a final bond release in the *Pennsylvania Bulletin*. Permit applications**, transfers** and bond releases under this section are exempt from the newspaper public notice requirements of section 10(a) of the act (52 P.S. § 3310(a)).

* * * * *

(m) An application for a small noncoal permit shall be reviewed, approved, or denied in accordance with § 77.126(a)(1)—(8) **[and]**, (10) **and (11)** (relating to criteria for permit approval or denial).

§ 77.109. Noncoal exploration activities.

(a) A person who intends to conduct noncoal exploration outside an existing **noncoal surface mining** permit shall file with the Department a written notice of intention to explore for each exploration area at least 10 days prior to the start of exploration activities on forms provided by the Department. **Except for drilling operations as provided for in § 77.113 (relating to permit waiver—noncoal exploration drilling), no noncoal exploration activity shall occur except as authorized by either of the following:**

(1) A letter from the Department waiving the requirement for a permit.

(2) A permit issued in accordance with the act and this chapter.

(b) The notice shall include:

(1) The name, address and telephone number of the person seeking to explore.

~~(2)~~ **(1.1) The name, address and telephone number of the representative who will be present at and responsible for conducting the exploration activities.**

~~[(2)]~~ ~~(3)~~ A map, at a scale of 1:24,000, of the exploration area showing the extent of the exploration area and approximate locations of drill holes, exploratory pits, trenches, and excavations.

~~[(3)]~~ ~~(4)~~ A statement of the period of intended exploration.

~~[(4)]~~ ~~(5)~~ The method of exploration and types of equipment to be used.

~~[(5)]~~ ~~(6)~~ The purpose of testing.

~~[(6)]~~ ~~(7)~~ The amount of mineral needed for testing **[(if exploration is by test pit, trench, or excavation)]** **that is to be removed**.

~~(8)~~ **(7) A description of the practices proposed to be followed to prevent adverse impacts to the environment as a result of the exploration activities.**

~~(9)~~ **(8) A blast plan if explosives are to be used.**

(c) **[Exploration by drilling methods may proceed 10 days after the notice of intent to explore form is submitted to the Department unless notified otherwise by the Department to provide other information to assure compliance with the environmental acts (for example—the location of access roads) or if the area is located within the distance limitations of § 77.504 (relating to distance limitations and areas designated unsuitable for mining).] (RESERVED.)**

(d)] The Department will, except as otherwise provided in § 77.124 (relating to public availability of information in permit applications), place the notices on public file and make them available for public inspection and copying during regular office hours at the established fee.

[(e) [A person who intends to conduct noncoal exploration operations in which noncoal minerals will be removed shall, prior to conducting the exploration, obtain a permit under this chapter. Prior to removal of minerals, the Department may waive the requirement for the permit to enable the testing and analysis of noncoal properties.]

~~(d)~~ **To remove material from an exploration area, a person conducting noncoal exploration shall, prior to beginning exploration, obtain a noncoal mining permit under this chapter or receive a waiver from the Department. A person who receives a waiver from the Department shall still comply with the performance requirements in subsections (f)—(k). The Department may waive the requirement for a noncoal mining permit if one of the following apply:**

(1) The material removed from the site will be less than 20 tons.

(2) The person conducting noncoal exploration can, to the satisfaction of the Department, justify an amount greater than 20 tons, but which may not exceed 1,000 tons.

~~(e)~~ (e.1) **In granting a waiver under subsection ~~(d)~~(e), the Department will consider:**

(1) The method of exploration proposed.

(2) The potential for adversely affecting ~~wetlands, streams or water supplies and the designated uses and quality of the receiving stream~~ WATER SUPPLIES, WETLANDS, OR THE EXISTING USES OR DESIGNATED USES OF STREAMS.

(f) A person who conducts noncoal exploration activities will observe the distance limitations under § 77.504 (relating to distance limitations and areas designated unsuitable for mining).

(g) Exploration activities shall be conducted to accomplish the following:

(1) To minimize environmental impacts on roadways and vegetation.

(2) To provide erosion controls for excavated areas, including access roads, in accordance with Chapter 102 (relating to erosion and sediment control).

(3) To avoid disturbance of wetland areas.

(h) The areas affected by the noncoal exploration shall be graded to approximate original contour **[when possible or restored to a slope not to exceed 35° unless approved by the Department § 77.594(2)(v) (relating to final slopes)]** within 30 days after completion of exploration, and will contain no depressions which will impound water. Drill holes shall be sealed under § 77.503 (relating to casing and sealing of drilled holes). The affected areas shall be revegetated within the first planting season after completion of exploration.

(i) Noncoal exploration activities shall be subject to the applicable inspection and enforcement provisions of the Department, and Subchapters E and F (relating to civil penalties for noncoal mining activities; and enforcement and inspection).

(j) Information will be made available to the public as follows.

(1) Except as provided in paragraph (2), information submitted to the Department under this section will be made available for public inspection and copying at the appropriate district mining office.

(2) Information which pertains only to the analysis of the chemical and physical properties of the mineral (except information regarding the mineral or elemental content that is potentially toxic to the environment) will be kept confidential and will not be made a matter of public record.

(k) Blasting in connection with noncoal exploration activity must comply with the requirements of Chapters 210 and 211 (relating to blaster's license; and storage, handling and use of explosives).

(*Editor's Note*: The following text is proposed to be added and printed in regular type to enhance readability.)

§ 77.113. Permit waiver—noncoal exploration drilling.

(a) Drilling that is done solely for the purpose of exploration where only the drilled material is removed from the site does not require a permit. Exploration by drilling methods may proceed 10 days after the notice of intent to explore is received by the Department except if the following applies:

(1) The applicant is notified by the Department to provide additional information to assure compliance with the environmental acts.

(2) The area is located within the distance limitations of § 77.504 (relating to distance limitations and areas designated unsuitable for mining).

(b) All drill holes must be sealed upon completion or finished as specified in the exploration plan. Drill holes may be used as monitoring wells or water wells ~~**provided that**~~ **IF** the wells are properly constructed and developed for their intended purposes.

REVIEW, PUBLIC PARTICIPATION, ITEMS AND CONDITIONS OF PERMIT APPLICATIONS

§ 77.121. Public notices of filing of permit applications.

(a) At the time of filing an application with the Department, an applicant for a permit, transfer, renewal or revision under § 77.142 (relating to public notice of permit revision) shall place an advertisement in a local newspaper of general circulation in the locality of the proposed noncoal mining activities once a week for 4 consecutive weeks. The advertisement shall contain the following information:

(1) The name and business address of the applicant.

(2) The **[township and county]** **local government** and county in which the operation is located. **If the operation spans multiple jurisdictions, then each local government and county shall be listed.**

* * * * *

(c) During the public notification period, the applicant shall notify each property owner within the proposed permit area, by **[registered]** **certified** mail, of the proposed permit except for surface landowners who have a completed Consent of Landowner form submitted with the application.

(d) **[Upon receipt of a complete application]** **Upon acceptance of an application for review**, the Department will publish notice of the proposed activities in the *Pennsylvania Bulletin*.

(e) **[Upon receipt of a complete application]** **Upon acceptance of an application for review**, the Department will notify**, in writing**:

(1) **[By registered mail, the city, borough, incorporated town or township]** **Each local government** in which the activities are located.

(2) Federal, State and local government agencies with jurisdiction over or an interest in the area of the proposed activities.

(f) The content of the notice shall include:

(1) The application numbers.

(2) The name and business address of the applicant.

(3) **[The township]** **Each local government** and county in which the operation is located.

(4) The receiving streams.

(5) A brief description of the operation and the location.

(6) The location where a copy of the application may be inspected.

(7) Where comments on the application may be submitted.

§ 77.123. Public hearings—informal conferences.

(a) A person having an interest that is, or may be, adversely affected may request in writing that the Department hold a public hearing or an informal conference on an application for a permit. The request shall:

(1) Briefly summarize the issues to be raised by the requestor at the public hearing or informal conference.

(2) Be filed with the Department within 30 days after the last publication of the newspaper advertisement placed by the applicant under § 77.121(a) (relating to public notices of filing of permit applications) or within 30 days of receipt of notice by the public entities to whom notification is provided under § **[77.121(d)]** **77.121(e)**.

(b) Except as provided in subsection (c), if a public hearing or an informal conference is requested under subsection (a), the Department will hold a public hearing or an informal conference within 60 days following **[the receipt of the request]** **the close of the public comment period provided under § 77.122(a) (relating to opportunity for submission of written comments or objections on the permit application)**. The public hearing or informal conference will be conducted as follows:

(1) The public hearing or informal conference shall be held in the locality of the proposed mining operation.

(2) The date, time and location of the public hearing or informal conference shall be advertised by the Department in a newspaper of general circulation in the locality of the proposed mine at least 2 weeks prior to the scheduled public hearing or informal conference.

(3) The public hearing or informal conference shall be conducted by a representative of the Department who may accept oral or written statements and other relevant information from a party to the public hearing or informal conference.

(c) If the parties requesting the public hearing or informal conference agree to withdraw their request, the public hearing or informal conference need not be held.

(d) Informal conferences held under § 77.504 (relating to distance limitations and areas designated as unsuitable for mining) may be used by the Department as the public hearing or informal conference required under proposed uses or relocation of public highways.

(e) **[The Department will give its findings of the public hearing or informal conference to the permit applicant and to each person who is a party to the public hearing or informal conference within 60 days of the public hearings or informal conference]** ~~**After the public hearing or informal conference, the Department will prepare a summary report regarding the comments submitted. This document will be made available to the public prior to, or upon approval or denial of, the application**~~. **(RESERVED.)**

(f) Within 60 days of the public hearing or informal conference, the Department will notify the applicant of its decision to approve or disapprove or of its intent to disapprove subject to the submission of additional information.

(g) AFTER THE PUBLIC HEARING OR INFORMAL CONFERENCE, THE DEPARTMENT WILL PREPARE A SUMMARY REPORT REGARDING THE

COMMENTS SUBMITTED IN ASSOCIATION WITH THE PUBLIC HEARING OR INFORMAL CONFERENCE. THIS DOCUMENT WILL BE MADE PUBLICLY AVAILABLE PRIOR TO OR UPON APPROVAL OR DENIAL OF THE APPLICATION.

§ 77.128. Permit terms.

(a) A permit will be issued for the duration of the mining and reclamation operation except for the NPDES permit, which shall be renewed every 5 years.

(b) A permit will terminate if the permittee has not begun the noncoal mining activities covered by the permit within **[3]** **5** years of the issuance of the permit**, unless extended in accordance with this section**. The Department may grant reasonable extensions of time for commencement of these activities upon receipt of a written statement showing that the extensions of time are necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee or if there are conditions beyond the control and without the fault or negligence of the permittee. Requests for extensions shall be submitted to the Department prior to expiration of the permit. If a permit has not been activated within **[3]** **5** years, **[or the permittee has not been granted an extension,]** the permittee may apply for a permit renewal **that includes updated permit information as described in § 77.161 (relating to responsibilities)**.

(c) A permit renewal application shall be filed under § 77.143 (relating to permit renewals).

PERMIT REVIEWS, RENEWALS, REVISIONS AND TRANSFERS

§ 77.141. Permit revisions.

(a) A revision to a permit shall be obtained for a change to the noncoal mining activities, as defined by the Department, set forth in the application.

[(b) [The permittee shall submit the application for permit revisions which require public notification to the Department at least 180 days before undertaking the change. In emergency situations, the Department may waive the 180-day requirement.] (RESERVED.)

(c)[~~(b)~~ An application for revision shall be complete **as described in § 77.105 (relating to application contents)** and contain the following information:

(1) The permittee's name and address and permit number.

(2) A description of the proposed revisions, including appropriate maps, plans and application **modules** to demonstrate that the proposed revision complies with the **[acts]** **act**, the environmental acts, and this chapter.

[(d)[~~(c)~~ The Department will approve or disapprove the **[complete]** application for revision under § 77.127 (relating to final permit action).

~~(~~e) [Revisions to change permit boundaries for needed support facilities may be considered by the Department.] EXCEPT FOR AN INSIGNIFICANT BOUNDARY CORRECTION, THE ADDITION OF ACREAGE FOR SUPPORT ACTIVITIES IS SUBJECT TO REVIEW THROUGH THE SAME PROCEDURES AS AN APPLICATION FOR A NEW PERMIT BUT WILL BE A REVISION TO THE EXISTING PERMIT.

(f) [The addition of acreage for mineral extraction shall be considered as an application for a new permit, except if the Department deems the area to be an insignificant boundary correction.]

~~(d) Except for an insignificant boundary correction, the addition of acreage for support activities is subject to review through the same procedures as an application for a new permit but will be a revision to the existing permit.~~

~~(e)~~ Except for an insignificant boundary correction, the addition of acreage for mineral extraction is subject to review through the same procedure as an application for a new permit but will be a revision to an existing permit, with consideration to the following:

(1) Effect on the hydrologic balance.

(2) Improvement to or logical extension of the existing overall operations and reclamation plan.

(3) Feasibility of issuing a new individual permit for the additional area.

~~(f)~~ (g) Any permit revision for circumstances described under § 77.142 (relating to public notice of permit revision) is a major revision and is subject to the provisions of § 77.121 (relating to public notices of filing of permit applications). The Department may require that any major revision include an update of related permit information to reflect current conditions or requirements including bond liability.

~~(g)~~ (h) The Department may require a permit revision in response to the following:

(1) Unanticipated substantial impacts that affect public health, safety or the environment have occurred or are expected to occur as a result of the mining activity.

(2) The permittee has deviated or must deviate from the approved operational information or reclamation plan.

§ 77.142. Public notice of permit revision.

(a) A permit revision request is subject to the notice requirements of § 77.121 (relating to public notices of filing of permit applications) under the following circumstances:

(1) For surface mining activities:

(i) Discharging to a different watershed or a change in water treatment facility design which would result in a change in effluent limits or additional discharge points.

(ii) The change of postmining land use.

(iii) A change in the type of reclamation (for example—approximate original contour, terrace, water impoundment, **the addition of reclamation fill** or other alternative reclamation).

(iv) A physical change in the mine configuration. Physical changes include, **but are not limited to,** stream diversion structures, new or expanded haul road connections to a public highway, **permit area additions,** elimination of public highways and increases in approved pit depth.

(v) The addition of blasting to the operation.

(vi) The addition of mineral processing to the mining activity.

(2) For underground mining activities:

(i) Discharging to a different watershed or a change in water treatment facility design which would result in a change in effluent limits or additional discharge points.

(ii) A physical change in the mine configuration. Physical changes include, **but are not limited to,** stream diversion structures, new or expanded haul road connections to a public highway, **permit area additions,** elimination of public highways and new openings.

(iii) A change to the postmining land use.

(iv) The addition of mineral processing to the mining activity.

(b) Initiation of new mining or support area is subject to public notice if the plan includes a lateral or vertical change to the previously authorized permit area. Incremental mining within the permit area, as described in the permit application, is not subject to public notice.

(c) Deletion of area from within the permit boundary, with the exception of final bond release area, does not require public notice ~~provided that~~ IF the applicant can demonstrate that the area has not been affected by surface mining. Areas affected only by exploration by drilling may be deleted without public notice.

§ 77.143. Permit renewals.

(a) *NPDES permit renewals.* An application for renewal of an NPDES permit shall be filed with the Department at least 180 days before the expiration date of the NPDES permit in question. A renewal application shall be filed in the format required by the Department.

(b) *Mine permit renewals—general requirements.*

(1) A valid, existing permit issued by the Department will carry with it the presumption of successive renewals upon expiration of the term of the permit. Successive renewals will be available only for areas which were specifically approved by the Department on the application for the existing permit.

(2) A permit renewal will not be available for extending the acreage of the operation beyond the boundaries of the permit area approved under the existing permit. Addition of acreage to the operation will be considered **[a new application]** **under ~~§ 77.141(d) and (e)~~ § 77.141(e) AND (f) (relating to permit revisions)**. A request for permit revision may accompany a request for renewal and shall be supported with the information required for application as described in this chapter.

* * * * *

(8) The Department will **[send copies of its decision to]** **notify** the applicant, persons who filed objections or comments to the renewal and **[to]** persons who were parties to an informal conference held on the permit renewal **of the Department's decision**.

§ 77.144. Transfer of permit.

(a) **[A]** transfer, assignment or sale of the rights granted under a permit may **[not]** be made, except as provided in this section.

(b) Permits may be reissued in a new name**, without transfer,** if there is no change in legal entity, **including name changes that result from conversions of a corporate entity**.

(c) The Department may **[allow a permittee to transfer]** **approve the transfer of** a permit to another operator if the successor operator:

(1) Meets the requirements of § 77.126(a)(6)—(9) (relating to criteria for permit approval or denial).

(2) Assumes liability for reclamation, water pollution, planting and other responsibilities under the law, rules and regulations and the terms and conditions of the permit from the date of original issuance of the permit.

(3) Furnishes the Department with an appropriate bond in the amount specified by the Department under Subchapter D (relating to bonding and insurance requirements).

(4) Submits proof of publication as required by § 77.121 (relating to public notices of filing of permit applications) **with the exception of permits issued under § 77.108 (relating to permits for small noncoal operations)**.

(5) Submits additional information to enable the Department to determine that the applicant is able to operate the mine in a manner complying with the environmental acts.

Subchapter D. BONDING AND INSURANCE REQUIREMENTS

FORMS, TERMS AND CONDITIONS OF BONDS AND INSURANCE

§ 77.224. Special terms and conditions for collateral bonds.

* * * * *

(c) A collateral bond pledging certificates of deposit is subject to the following conditions:

(1) The Department will require that certificates of deposit be assigned to the Department, in writing, and that the assignment be recorded upon the books of the bank issuing the certificates.

(2) The Department will not accept an individual certificate of deposit for a denomination in excess of **[$100,000, or]** the maximum insurable amount as determined by the **[FDIC and FSLIC]** **Federal Deposit Insurance Corporation (FDIC) and Federal Savings and Loan Insurance Corporation (FSLIC)**.

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§ 77.231. Terms and conditions for liability insurance.

* * * * *

(b) The insurance shall **be written on an occurrence basis and** provide for personal injury and property damage protection in a total amount determined by the Department on a case by case basis, and adequate to compensate persons injured or property damaged as a result of the permittee's mining and reclamation operations and entitled to compensation under Pennsylvania law.

(c) If explosives are to be used by the permittee and loss, diminution in quantity or quality, contamination or interruption of public or private sources of water is possible as determined by the Department, the liability insurance shall include and the certificate shall provide a rider covering personal injury and property damage from these occurrences. The applicant may provide bond under subsection (i) in lieu of insurance to cover water supply loss, diminution, contamination or interruption.

(d) The insurance shall include a rider requiring that the insurer notify the Department whenever substantive changes are made **[in the policy, including termination]** **affecting the adequacy of the policy, including cancellation** or failure to renew.

(e) Minimum insurance coverage for bodily injury shall be **[$300,000 per person and $500,000 aggregate; and minimum insurance coverage for property damage shall be**

$300,000 for each occurrence and $500,000 aggregate] $500,000 per person and $1 million aggregate. Minimum insurance coverage for property damage shall be $500,000 for each occurrence and $1 million aggregate.

* * * * *

(h) The certificate holder shall be **[solely]** the Department.

* * * * *

RELEASE OF BONDS

§ 77.242. Procedures for seeking release of bond.

* * * * *

(g) *Review by Department.* Department review and decision will be as follows:

(1) The Department will consider, during inspection, evaluation and public hearing or informal conference decisions:

(i) Whether the permittee has met the criteria for release of the bond under § 77.243.

(ii) Whether the permittee has satisfactorily completed the requirements of the reclamation plan, or relevant portions thereof, and complied with the requirements of the act, this chapter, and the conditions of the permit.

(iii) Whether pollution of surface and subsurface water is occurring or the continuance of present pollution, and the estimated cost of abating pollution.

(2) If a public hearing or informal conference has not been held under subsection **[(e)]** **(f)**, the Department will notify the permittee in writing of its decision to release or not to release all or part of the bond.

(3) If there has been a public hearing or informal conference held, the notification of the decision shall be made to the permittee, and other interested parties, within 30 days after conclusion of the public hearing or informal conference.

(4) The notice of the decision will state the reasons for the decision, recommend corrective actions necessary to secure the release and notify the permittee and interested parties of the right to file an appeal to the decision with the EHB. An appeal shall be filed with the EHB under section 4 of the Environmental Hearing Board Act (35 P.S. § 7514) and Chapter 1021 (relating to practice and procedures).

Subchapter E. CIVIL PENALTIES FOR NONCOAL MINING ACTIVITIES

GENERAL PROVISIONS

§ 77.291. Applicability.

This subchapter is applicable to assessments of civil penalties under **[the environmental acts and the act.]**:

(a) Section 21 of the act (52 P.S. § 3321).

(b) Section ~~605(b)~~ 605 of The Clean Streams Law ~~(35 P.S. § 691.605(b))~~ (35 P.S. § 691.605).

§ 77.293. Penalties.

(a) *Cessation order.*

(1) The Department will assess a civil penalty of up to $5,000 per day for each violation **of the act or any rule, regulation, order of the Department or a condition of any permit issued under the act** which leads to a cessation order. ~~**If a violation involves a failure to correct within the period prescribed for its correction, a violation for which a cessation order or other abatement order has been issued, a civil penalty of at least $750 will be assessed for each day the violation continues beyond the period prescribed for its correction.**~~

(2) THE DEPARTMENT WILL ASSESS A CIVIL PENALTY UP TO $10,000 PER DAY FOR EACH VIOLATION OF THE CLEAN STREAMS LAW WHICH LEADS TO A CESSATION ORDER.

(3) IF A VIOLATION INVOLVES A FAILURE TO CORRECT WITHIN THE PERIOD PRESCRIBED FOR ITS CORRECTION, A VIOLATION FOR WHICH A CESSATION ORDER OR OTHER ABATEMENT ORDER HAS BEEN ISSUED, A CIVIL PENALTY OF AT LEAST $750 WILL BE ASSESSED FOR EACH DAY THE VIOLATION CONTINUES BEYOND THE PERIOD PRESCRIBED FOR ITS CORRECTION.

(b) *Civil penalty.*

(1) The Department may assess a civil penalty of up to $1000 per day for each violation **of the act or any rule, regulation, order of the Department or a condition of any permit issued under the act**, unless the operator demonstrates with clear and convincing evidence that the violations:

(i) Result in no environmental damage.

(ii) Result in no injury to persons or property.

(iii) Are corrected within the required time prescribed for its abatement.

(2) If the violation involves a failure to correct within the period prescribed for its correction, a violation for which a cessation order or other abatement order was not issued, a civil penalty of at least $250 will be assessed for each day the violation continues beyond the period prescribed for its correction.

(3) THE DEPARTMENT MAY ASSESS A CIVIL PENALTY OF UP TO $10,000 PER DAY FOR EACH VIOLATION OF THE CLEAN STREAMS LAW.

PROCEDURES

§ 77.301. Procedures for assessment of civil penalties.

(a) *Initial review.* When the Department determines that a civil penalty will be assessed, it will make an initial review of the violation and will serve a copy of the results of the initial review, including the civil penalty computations, on the party responsible for the violation. The service will be by **[registered]** **certified** mail within **[30]** **45** days of the Department's **[knowledge of the violation]** **issuance of the notice of violation or order**.

* * * * *

(d) *Service.* The Department will serve a copy of the civil penalty assessment on the person responsible for a violation as follows:

(1) Upon the failure of the assessed party to timely request an assessment conference on the results of the initial review.

(2) Upon the completion of an assessment conference, or upon review of timely submitted information for review by the Department, if the Department does not decide to vacate the penalty. The service will be **[registered or]** by certified mail, or by personal service. If the mail is tendered at the address of the assessed person set forth **[in]** **on** the sign required under § 77.502 (relating to signs and markers), or at an address at which that person is in fact located, and the person refuses to accept delivery of or to collect the mail, the requirements of this paragraph will be deemed to have been complied with upon that tender.

Subchapter G. INFORMATION ON ENVIRONMENTAL RESOURCES

§ 77.410. Maps, cross sections and related information.

(a) An application shall contain maps and plans of the proposed permit area and within 1,000 feet of the permit area, except as otherwise designated by the Department, showing the following:

* * * * *

(11) The **[municipality or township]** **local government** and county.

(12) The elevation and location of test borings and core samplings.

(13) The location and extent of existing or previously deep or **[surfaced]** **surface** mined areas.

* * * * *

Subchapter I. ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

HYDROLOGIC BALANCE

§ 77.531. Dams, ponds, embankments and impoundments—design, construction and maintenance.

(a) Dams, ponds, embankments and impoundments shall be designed, constructed and maintained in accordance with the **[Soil]** **Natural Resources** Conservation Service Engineering Standard # 350 "Pond" and if applicable, Chapter 105 (relating to dam safety and waterway management).

(b) A facility under subsection (a) shall be designed and certified to the Department by a qualified registered professional engineer, if required by Chapter 105, or qualified registered land surveyor.

§ 77.532. Surface water and groundwater monitoring.

* * * * *

(c) In addition to the monitoring and reporting requirements established by the Department under Chapter **[92]** **92a** (relating to National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance), surface water shall be monitored to accurately measure and record the water quantity and quality of the discharges from the permit area and the effect of the discharge on the receiving waters when requested by the Department. The Department will approve the nature of data, frequency of collection, reporting requirements and the duration of the monitoring programs.

USE OF EXPLOSIVES

§ 77.562. Preblasting surveys.

(a) Preblasting surveys will not be required if blasting is designed and conducted below the levels of blasting vibration shown on Figure #1 at the nearest dwelling, school, church, commercial or institutional building neither owned nor leased by the operator. If **[preblast]** **preblasting** surveys are not conducted, the operator shall provide a seismograph record including both the particle velocity time-history (wave form) and the particle velocity and vibration frequency levels for each blast.

* * * * *

(b) If the operator intends to conduct blasting at vibration levels exceeding the levels of vibration in figure #1 at the nearest dwelling, school, church, commercial or institutional building neither owned nor leased by the operator, the operator shall offer **[preblast]** **preblasting** surveys. At least 30 days before commencement of blasting or resumption of blasting in accordance with § 77.562(a)(3)(i) the operator shall notify, in writing, the residents or owners of dwellings or other structures located within 1,000 feet (304.8 meters) of the area where blasting will occur of their right to request a preblasting survey and how to request a preblasting survey. On the request to the Department or operator by a resident or owner of a dwelling or structure that is located within 1,000 feet (304.8 meters) of the area where blasting will occur, the operator shall promptly conduct a preblasting survey of the dwelling or structure. If a dwelling or structure is renovated or added to subsequent to a **[preblast]** **preblasting** survey, then, upon request by the resident or owner to the Department or operator, a survey of the additions and renovations shall be performed by the operator in accordance with this section. The operator shall provide the Department with a copy of the request.

* * * * *

§ 77.563. Public notice of blasting schedule.

(a) *Blasting schedule publication.*

(1) Copies of the schedule shall be distributed by mail to local governments and to public utilities within 1000 feet of the blasting area.

(2) The blasting schedule shall be revised, published, and distributed in accordance with this section. Advice on requesting a **[preblast]** **preblasting** survey need not be provided to parties advised in the original distribution under subsection (a)(1).

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§ 77.564. Surface blasting requirements.

* * * * *

(f) Airblasts shall be controlled so that they do not exceed **[133 dBL]** **the airblast level specified in this subsection** at a dwelling, public building, school, church or commercial or institutional structure, unless the structure is owned by the person who conducts the surface mining activities and is not leased to another person. The lessee may sign a waiver relieving the operator from meeting the airblast limitations of this subsection.

~~(1)~~ **(1.1)** ***Maximum decibel level.*** **The maximum allowable airblast level is 133 dBL.**

~~[(1)]~~ ~~(2)~~ **(1.2)** *Exceptions.* The Department may specify **[lower]** **alternative** maximum allowable airblast levels than those in this subsection for use in the vicinity of a specific blasting operation, if necessary.

~~[(2)]~~ ~~(3)~~ *Monitoring.* The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Department may require an airblast measurement of a blast and may specify the location of the requirements.

* * * * *

(i) In blasting operations, except as otherwise authorized in this section, the maximum peak particle velocity may not exceed **[2.0 inches per second]** **the levels of blasting vibration shown in Figure 1 in § 77.562** at the location of a dwelling, public building, school, church or commercial or institutional building or other structure designated by the Department. The maximum peak particle velocity shall be the largest of three measurements. The Department may reduce the maximum peak particle velocity allowed, if it determines that a lower standard is required because of density of population or land use, age or type of structure, geology or hydrology of the area, frequency of blasts or other factors.

(j) The maximum peak particle velocity limitation of subsection (i) does not apply at a structure owned by the permittee.

(k) When seismographs are not used to monitor peak particle velocity, the maximum weight of explosives to be detonated within any 8 millisecond **[or greater]** period may be determined by the formula **[W = (d/50)2]** **$W=(d/90)^2$** where W equals the maximum weight of explosives, in pounds, that can be detonated in any 8 millisecond period **[or greater]**, and **d** equals the distance, in feet, from the blast to the nearest dwelling, school, church, commercial or institutional building. The development of a modified scale-distance factor may be authorized by the Department on receipt of a written request by the operator, supported by seismographic records of blasting at the mine site. If the peak particle velocity will exceed .5 inch per second with the adjusted scale-distance, § 77.562(d) shall be complied with prior to blasting at the adjusted levels.

* * * * *

§ 77.565. Records of blasting operations.

A record of each blast shall be retained for at least 3 years and shall be available for inspection by the Department. Seismographic reports, if applicable, shall be made a part of that record. The record shall include the following data:

* * * * *

(10) The total weight**, in pounds,** of explosives used.

(11) The maximum weight, **in pounds,** of explosives detonated per **8 millisecond or less** delay intervals.

(12) The maximum number of holes detonated per **8 millisecond or less** delay intervals.

* * * * *

(16) The **total quantity and** type of delay detonator and delay periods used.

(17) The sketch **[of the delay pattern] showing the number of holes, burden, spacing, and pattern dimensions of the delay pattern and point of initiation**.

(18) The number of persons in the blasting crew.

(19) The **[seismographic] seismograph** and airblast records, when required, including the type of instrument, sensitivity and calibration signal of the gain setting and certification of annual calibration and the following:

(i) The **[seismographic] seismograph** or airblast level reading, or both, including exact location of the seismograph, its distance from the blast and the name of the property.

(ii) The name of the person taking the seismograph reading.

(iii) The name of person and firm analyzing the **[seismographic] seismograph** record.

(20) The reasons and conditions for an unscheduled blast.

(21) The total number of blasting caps used.

(22) The scaled distance.

(23) The location(s) of the seismograph(s), when required.

(24) The type of circuit, if electric detonation is used.

BACKFILLING AND GRADING

§ 77.593. Alternatives to contouring.

Alternative reclamation to approximate original contour may be authorized as follows:

(1) The applicant shall demonstrate that the proposed operation will be carried out over a substantial period of time and that the volume of mineral to be removed is large compared to the overburden to restore the area to approximate original contour. The applicant shall provide a description of the alternative and demonstrate that:

(i) The alternative to contouring **[is likely to]** **can** be achieved.

(ii) The alternative poses no actual or potential threat to public health or safety.

(iii) The alternative poses no actual or potential threat to water diminution, contamination, interruption or pollution.

(iv) The alternative is consistent with applicable land use policies, plans and programs.

(v) The alternative is consistent with Federal, State or local law.

(vi) The alternative is **[capable of supporting]** the highest or best use **[it can reasonably support]** **that can reasonably be supported** after mining and reclamation is completed.

(2) If the applicant does not meet the requirements of **[subsection (a)]** **paragraph (1)**, an alternative to contouring may be authorized if the applicant demonstrates that the operation will either restore the land affected to a condition capable of supporting the uses it was capable of supporting prior to mining or to a higher or better use. The applicant shall demonstrate that:

* * * * *

REVEGETATION

§ 77.618. Standards for successful revegetation.

(a) When the approved postmining land use is cropland:

(1) The standards for successful revegetation shall be based upon crop productivity or yield.

(2) The approved standard shall be the average yields per acre for the crop and soil type as specified in the Soil Surveys of the United States Department of Agriculture **[Soil]** **Natural Resources** Conservation Service.

(3) The productivity or yield of the mined area shall be equal to or greater than the approved standard for the last two consecutive growing seasons of the 5-year responsibility period established in § 77.615 (relating to species). Productivity or yield shall be considered equal if production or yield is at least 90% of the approved standard.

(b) When the approved postmining land use is other than cropland:

(1) The standards for successful revegetation shall be determined by ground cover.

(2) The approved standard shall be the percent ground cover of the vegetation which exists on the proposed area to be affected by surface mining activities. The Department will not approve less than a minimum of 70% ground cover of permanent plant species with not more than 1% of the area having less than 30% ground cover with no single or contiguous area having less than

30% ground cover exceeding 3000 square feet. When woody species are planted in mixture with herbaceous species, these standards shall be met and a minimum of 400 woody plants per acre shall be established unless alternate plans are approved or required by the Department. On slopes greater than 20 degrees, the minimum number of woody plants shall be 600 per acre.

(3) The percent of ground cover of the mined area shall meet the standards of paragraph (2) to qualify for Reclamation Stage I and Reclamation Stage II approval.

(4) For purposes of this subsection, the term "herbaceous species" means grasses, legumes and nonleguminous forbs. The term "woody plants" means woody shrubs, trees and vines.

CESSATION AND COMPLETION OF MINING

§ 77.654. [Cleanup] Clean up.

Upon completion of mining, the operator shall remove and **[cleanup] clean up** temporary unused structures, facilities, equipment, machines, tools, parts or other materials, property, debris or junk that were used in or resulted from the surface mining activity.

§ 77.655. Closing of underground mine openings.

(a) *Mine openings.*

(1) Upon completion of mining, a mine opening, except those approved for water monitoring or otherwise managed in a manner approved by the Department, shall be closed:

(i) To prevent degradation of surface waters and groundwaters.

(ii) To assist in returning the groundwater as near to its premining level as possible.

(iii) To assist in returning the hydrologic balance as near to its premining condition as possible **[to prevent access to underground workings]**.

(iv) To ensure the safety of people.

(v) To prevent access to underground workings.

(2) Prior to closing a mine opening, the plan for the closing shall be approved by the Department.

* * * * *

Subchapter J. GENERAL PERMITS

§ 77.807. Change of ownership.

For an activity requiring registration under this section, an amended registration shall be filed if there is a **[chance]** **change** of ownership of the entity conducting the surface mining activities.

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

April 13, 2023

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

Re: Final Rulemaking: Noncoal Mining Clarifications and Corrections (#7-554 / IRRC # 3291)

Dear Mr. Sumner:

Pursuant to Section 5.1(a) of the Regulatory Review Act (RRA), please find enclosed the Noncoal Mining Clarifications and Corrections final-form rulemaking for review by the Independent Regulatory Review Commission (IRRC). The Environmental Quality Board (EQB or Board) adopted this rulemaking on April 11, 2023.

The Board adopted the proposed rulemaking on November 17, 2020. On March 20, 2021, the proposed rulemaking was published in the *Pennsylvania Bulletin* at 51 Pa.B. 1519 for a 45-day public comment period that closed on May 4, 2021. The Department received four public comments. The Board provided the Environmental Resources and Energy Committees and IRRC with copies of all comments received in compliance with Section 5(c) of the RRA.

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

Please contact me by e-mail at laurgriffi@pa.gov or by telephone at 717.772.3277 if you have any questions or need additional information.

Sincerely,

Laura Griffin
Regulatory Coordinator

Enclosures

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 7-554

SUBJECT: Noncoal Mining Clarifications and Corrections

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

TYPE OF REGULATION

RECEIVED
APR 13 2023
Independent Regulatory Review Commission

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
		HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
4/13/23	electronic submittal	MAJORITY CHAIR Representative Greg Vitali
4/13/23	electronic submittal	MINORITY CHAIR Representative Martin Causer
		SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
4/13/23	electronic submittal	MAJORITY CHAIR Senator Gene Yaw
4/13/23	electronic submittal	MINORITY CHAIR Senator Carolyn Comitta
_____	_____	*INDEPENDENT REGULATORY REVIEW COMMISSION*
_____	_____	*ATTORNEY GENERAL* (for Final Omitted only)
_____	_____	*LEGISLATIVE REFERENCE BUREAU* (for Proposed only)

Madison Brame

From: Franzese, Evan B.
Sent: Thursday, April 13, 2023 10:04 AM
To: Griffin, Laura; Michele Musgrave
Cc: Shupe, Hayley; Thrush, Ezra; Reiley, Robert A.; Nezat, Taylor
Subject: RE: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)

Receipt confirmed. Thank you!

Evan Franzese-Peterson
Executive Director | House Environmental Resources & Energy Committee (D)
Representative Greg Vitali
Pennsylvania House of Representatives
P: 717-787-7647
F: 717-780-4780

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Thursday, April 13, 2023 9:58 AM
To: Franzese, Evan B. <EFranzese@pahouse.net>; Michele Musgrave <Mmusgrav@pahousegop.com>
Cc: Shupe, Hayley <HShupe@pahouse.net>; Thrush, Ezra <ezthrush@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Nezat, Taylor <tnezat@pa.gov>
Subject: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)
Importance: High

Good morning,

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find attached the Noncoal Mining Clarifications and Corrections final rulemaking (#7-554) for review by the House Environmental Resources and Energy (ERE) Committee. The rulemaking documents are attached as one document and the cover letters for Representatives Vitali and Causer are attached separately.

A copy of the transmittal sheet is attached for your records – all ERE Committee chairs are receiving the rulemaking electronically.

Please confirm receipt of this rulemaking by replying to all recipients.

Thank you,
Laura

Laura Griffin | Regulatory Coordinator
she/her/hers
Department of Environmental Protection | Policy Office
Rachel Carson State Office Building
400 Market Street | Harrisburg, PA 17101
Phone: 717.772.3277| Fax: 717.783.8926
Email: laurgriffi@pa.gov
www.dep.pa.gov

Madison Brame

From: Michele Musgrave
Sent: Thursday, April 13, 2023 10:05 AM
To: Griffin, Laura; Franzese, Evan B.
Cc: Shupe, Hayley; Thrush, Ezra; Reiley, Robert A.; Nezat, Taylor
Subject: RE: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)

Receipt confirmed, thanks!

Michele Musgrave
Administrative Assistant II
Representative Martin Causer
67th Legislative District
Room 47 East Wing
PO Box 202067
Harrisburg, PA 17120-2067
717-787-5075

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Thursday, April 13, 2023 9:58 AM
To: Franzese, Evan B. <EFranzese@pahouse.net>; Michele Musgrave <Mmusgrav@pahousegop.com>
Cc: Shupe, Hayley <HShupe@pahouse.net>; Thrush, Ezra <ezthrush@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Nezat, Taylor <tnezat@pa.gov>
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Thank you,
Laura

Laura Griffin | Regulatory Coordinator
she/her/hers
Department of Environmental Protection | Policy Office

Madison Brame

From: Osenbach, Matt
Sent: Thursday, April 13, 2023 10:02 AM
To: Griffin, Laura; Eyster, Emily
Cc: Thrush, Ezra; Reiley, Robert A.; Nezat, Taylor; Troutman, Nick
Subject: RE: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)

Message received. Thanks Laura!

Matt Osenbach
Director, Environmental Resources & Energy Committee
Office of State Senator Gene Yaw (R-23)
362 Main Capitol Building, Senate Box 203023
Harrisburg, PA 17120
T: (717) 787-3280
F: (717) 772-0575
www.SenatorGeneYaw.com

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Thursday, April 13, 2023 9:59 AM
To: Osenbach, Matt <mosenbach@pasen.gov>; emily.eyster@pasenate.com
Cc: Thrush, Ezra <ezthrush@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Nezat, Taylor <tnezat@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>
Subject: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)
Importance: High

Good morning,

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find attached the Noncoal Mining Clarifications and Corrections final rulemaking (#7-554) for review by the Senate Environmental Resources and Energy (ERE) Committee. The rulemaking documents are attached as one document and the cover letters for Senators Yaw and Comitta are attached separately.

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Thank you,
Laura

Madison Brame

From: Eyster, Emily
Sent: Thursday, April 13, 2023 10:26 AM
To: Griffin, Laura; Osenbach, Matt
Cc: Thrush, Ezra; Reiley, Robert A.; Nezat, Taylor; Troutman, Nick
Subject: Re: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)

Received. Thanks Laura!

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

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Thursday, April 13, 2023 9:58 AM
To: Osenbach, Matt <mosenbach@pasen.gov>; Eyster, Emily <emily.eyster@pasenate.com>
Cc: Thrush, Ezra <ezthrush@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Nezat, Taylor <tnezat@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>
Subject: Delivery of Final Rulemaking - Noncoal Mining Clarifications and Corrections (7-554)

■ EXTERNAL EMAIL ■

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Thank you,
Laura

Laura Griffin | Regulatory Coordinator
she/her/hers
Department of Environmental Protection | Policy Office
Rachel Carson State Office Building
400 Market Street | Harrisburg, PA 17101