Comments of the Independent Regulatory Review Commission

Environmental Quality Board Regulation #7-554 (IRRC #3291)

Noncoal Mining Clarifications and Corrections

June 3, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the March 20, 2021 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA)(71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Compliance with the RRA.

Section 5.2 of the RRA directs the Independent Regulatory Review Commission (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 EQB 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 EQB 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, we ask the EQB to provide more detailed information, such as why the amendments are needed.

Finally, we would encourage the EQB to reach out to the commentators to seek their input and to build consensus as it develops the final version of the rulemaking.

Chapter 77. Noncoal Mining
Subchapter A. General Provisions

2. Section 77.1 Definitions. – Clarity.

"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?

Subchapter C. Permits and Permit Applications

3. Section 77.109. Noncoal exploration activities. – Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources; and Clarity, feasibility and reasonableness of the regulation.

Subsections (c) and (j)

EQB 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 EQB consider and reject making the information in §§ 77.109(c) and (j)(1) available, upon request, to the public in an electronic format?

Proposed Subsection (d)

This subsection sets threshold amounts for a permit waiver. There are two threshold amounts proposed for noncoal exploration activities. The first is if the material removed from the site will be less than 20 tons of material. The second is when the exploration is expected to need more than 20 tons, then a justification can be provided by the applicant. With justification, an upper limit of 1,000 tons is proposed for this permit waiver.

Commentators are concerned that 20-100 tons can be excavated without regulatory oversight and compliance monitoring. They assert that excavation and removal of even a few pounds of materials can cause irreparable impacts to streams, wetlands and ecosystems. It is their belief that any amount of excavation and removal should be covered by the same regulation and compliance controls as all other noncoal mining activity.

The EQB 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. EQB

should explain how the 200-ton minimum requirement as specified in the DOT Bulletin 14 relates to the 1,000 ton upper threshold.

Proposed Subsection (e)

Proposed subsection (e) describes the considerations to be made by the Department in evaluating a waiver request. Those considerations include the method of exploration proposed and the potential for adversely affecting wetlands, **streams or water supplies** and the designated uses and quality of the receiving stream. Emphasis added.

A commentator suggests that "attained use" should also be considered in the determination of a waiver request consistent with the requirements of 25 Pa Code Chapter 93 (relating to Water Quality Standards). We will review EQB's response to the commentator's concern in determining whether the regulation is in the public interest.

Existing Subsection (g)

For consistency, should existing subsection (g)(3) be amended to include "streams or water supplies?"

Subsection (h)

This subsection removes an existing requirement that areas affected by the noncoal exploration be restored to a slope not exceeding 35 degrees when grading to approximate original contour is not possible. The Preamble explains that the amendment removes the slope requirement because it is no longer necessary due to the limited amount of material that may be removed without a permit.

A commentator asserts that the proposed revisions to this subsection could create a danger risk to communities surrounding the project by allowing excavation cuts and pits, including those from exploration blasting, to remain unreclaimed. The EQB should explain how removing this provision is consistent with the purpose of the Noncoal Surface Mining Conservation and Reclamation Act (Act) and protects the public health, safety and welfare. 52 P.S. § 3302.

Review, Public Participation, Items and Conditions of Permit Applications

4. Section 77.121. Public notices of filing of permit applications. – Implementation procedures and timetables for compliance; and Clarity.

Subsection (d) and Subsection (e)

The amendments to Subsection (d) proposes to modify when the Department will publish notice in the *Pennsylvania Bulletin*. Publication will be based on the Department's acceptance of the application rather than upon receipt. Subsection (e) is proposed to require the Department, upon acceptance of the permit application, to notify in writing each local government in which the

activities are located. The EQB explains that these proposed changes will eliminate unnecessary notices for applications that are returned and not accepted for review by the Department and facilitate the use of electronic notices, where appropriate."

A commentator suggests that the proposed revisions to this section will have the effect of shortening the time period that the public has to prepare and submit questions and comments to the Department about the permit application. We will review the EQB's response to the concern raised in determining whether the regulation is the public interest.

In addition to the commentator's concern, we have 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 EQB 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. Section 77.123. Public hearings--informal conferences. – Need for the regulation; Implementation procedures and timetables for compliance; and Clarity.

Subsection (e)

In the Preamble, the EQB states that "Subsection (e) is proposed to be revised to describe the results of the public hearing or informal conference in a report available to the public instead of only giving the findings of the public meeting or informal conference to each person who attended. The deadline for providing the report is proposed to be contemporaneous with the permit decision."

Based on the stated intent in the Preamble, we agree with the concern expressed by a commentator that the proposed change could lead to a situation in which the public has no time to read or respond to the Department's report because it is issued at the same time as the permit.

The commentator feels that the EQB's decision to make the report available to the public at the same time as the Department's decision to approve or disapprove an application "negates the purposes of such reports and eliminates the ability of the public to meaningfully engage with this regulatory process."

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 u*pon 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 EQB. We ask the EQB to explain in greater detail the need for and its rationale for the proposed changes.

We also note 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?

6. Section 77.128. Permit terms. – Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources.

Subsection (b)

The amendment to this subsection revises the time frame for when a permit terminates from 3 years to 5 years. The EQB explains that the proposed 5-year term synchronizes with the National Pollutant Discharge Elimination System (NPDES) permit, which also has a term of 5 years. Additionally, the EQB notes that extensions are allowed through the permit renewal process and must include updated permit information as described in § 77.161 (relating to responsibilities). This, according to the EQB's explanation in the Preamble, assures that updated information is provided before extending the permit beyond the 5-year period.

A commentator challenges the EQB's rationale for this proposed change. They contend that it is inconsistent with surface coal mining permits which also have 5 year NPDES permits and must activate mining within 3 years of the permit being issued or the permit is revoked. The commentator also asserts that the existing 3 year permit term was put in place (for coal and noncoal mining) to avoid dangerous situations where changes to local environmental or hydrological conditions may have occurred since the permit was issued and to thwart the practice of "permit hoarding." In addition to addressing the commentator's concerns, we ask the EQB to explain how the proposed change protects the public health, safety and welfare and is in the public interest.

Permit Reviews, Renewals, Revisions and Transfers

7. Section 77.141. Permit revisions. – Clarity.

Subsection (e)

Under this subsection, 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 feasibility of approving a new permit for the additional area. A commentator suggests that other environmental features such as streams and wetlands should be included in this provision.

8. Section 77.142. Public notice of permit revisions. – Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources.

The Preamble states that Subsection (c) is being added to clarify that unaffected areas to be deleted from the footprint of the permit may be approved without public notice. The EQB 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 this Commission 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 this Commission to determine if the regulation is in the public interest. We ask the EQB 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 EQB should make certain that the description in the Preamble of this section, and all sections, is consistent with the regulatory language contained in the Annex.

Subchapter E. Civil Penalties for Noncoal Mining Activities
General Provisions

9. Section 77.293. Penalties. – Clarity.

In §§ 77.293 (a) and (b), the EQB 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 EQB 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?

Subchapter I. Environmental Protection Performance Standards
Use of Explosives

10. Section 77.564. Surface blasting requirements. – Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources.

New subsection (f)(2) would allow for the possibility of a higher air blast level being approved. The EQB explains that 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.

Commentators are concerned with the potential effects on health and property that higher decibel blasts may have on the community surrounding a project and request that the lower blasting limits remain unchanged. The description in the Preamble and the RAF lacks discussion of the potential adverse effects of permitting alternative (i.e. higher) maximum allowable air blast levels on the communities surrounding the project.

Under circumstances where the Department has determined that a higher air blast level may be appropriate, did the EQB consider 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 EQB 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.

11. Miscellaneous clarity.

In RAF #14, the EQB reports that on May 6, 2020, the Aggregate Advisory Board (Board) voted to concur with the Department's recommendation that the proposed rulemaking proceed with the regulatory process. We ask the EQB to indicate the vote of the Board in the RAF of the final-form rulemaking.