

**Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 PA CODE CHAPTER 77
Noncoal Program Fees**

Order

The Environmental Quality Board (Board) by this order amends Chapter 77 (relating to noncoal mining). The final-form rulemaking incorporates amendments necessary to provide funding for the implementation of the Noncoal Surface Mining Conservation and Reclamation Act.

This order was adopted by the Board at its meeting of _____ (blank)_____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking, except that the annual administration fee established under § 77.106(b) will become effective on January 1, 2013 and will be applied to all mining licenses being renewed which have an expiration date occurring on or after January 1, 2013.

B. Contact Persons

For further information contact Thomas Callaghan, Director, Bureau of Mining Programs, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, Assistant Director, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection (DEP) website (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The amendments are proposed under sections 7(a) and 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (Act) (52 P. S. §§ 3307(a) and 3311(a)) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

D. Background and Purpose

The purpose of this final-form rulemaking is to establish fees as authorized by the Act. Section 7 of the Act states: “The department is authorized to charge and collect from persons a reasonable filing fee, which shall not exceed the cost of reviewing,

administering and enforcing the permit.” 52 P.S. § 3307(a). The Act thus authorizes the DEP to collect fees from noncoal mining permit applicants and permittees in an amount sufficient to cover DEP’s costs of administering the noncoal mining regulatory program, so long as the amount of fees collected does not exceed those costs. DEP has calculated its costs of administering the noncoal mining program and will establish fees through this regulation which are sufficient to cover most of its costs.

The final-form regulations implement the statutory authorization of the Act to collect a reasonable filing fee through two kinds of fees, the permit application fee and the administration fee. The permit application fee is intended to cover DEP’s cost to review noncoal mining permit applications. The permit fees have been set according to the type of permit application submitted; the amounts of these fees are based on the number of hours typically required to review a specific type of permit application. A large noncoal surface mining permit where the pumping of groundwater will take place is substantially more complex, and requires significantly more review time, than a small noncoal surface mining permit. Consequently, the amount of the respective permit fees reflects the average review time for each type of permitting action.

The annual administration fee is intended to cover DEP’s costs to administer the permit. These include, among other things, the cost of performing inspections of noncoal mining operations, compliance assistance, and other compliance related activities, as well as tracking of required reporting and monitoring by permittees. As with the permit fees, the annual administration fees have been set based on workload analyses. A large surface mining permit with blasting activity necessitates substantially more administrative activity by DEP; the annual administration fee reflects the differences between types of operations based on DEP’s respective administrative workload.

The assessment of the two kinds of fees is necessary to fairly represent the cost to the Commonwealth for reviewing, and administering, a noncoal mining permit. This final-form rulemaking is necessary in large part due to recent funding cuts. General appropriation funding to support DEP’s regulatory/permitting programs was significantly reduced in fiscal year 2009-10, so it has become necessary to pay for all of the noncoal mining program staff costs through collection of fees paid by the regulated industry. These staff costs total approximately \$2.5 million per year.

Permit Application Fee

The permit application fee amounts were calculated based on a workload analysis that DEP uses to manage the work force. The workload analysis assigns a certain number of hours for the review time for each type of application.

Permit applications vary in their complexity based on a number of factors. The primary factor relates to hydrologic impacts. Applications that propose to pump groundwater take significantly more time to review. Therefore, the application fee for these permits is higher. Similarly, if blasting is proposed, then the blasting inspector is involved in the

review of the blast plan for the application. Therefore, a fee is being proposed for blast plans.

The permit application fees will be applicable to any applications submitted after the date of publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Annual Administration Fee

The annual administration of a noncoal mining permit is accomplished through routine inspections to assure that the mining activities are being conducted in compliance with the permit requirements. DEP has established inspection frequencies based upon the type of permit and the status of the activity.

There are two types of permits, small and large. Small permits authorize up to 10,000 tons per year in production. Large permits are needed for production that exceeds 10,000 tons per year. The inspection frequency for large permits is four per year. For small permits, the frequency is two per year.

For large permits that authorize blasting, one inspection per year by a DEP Blasting Inspector is needed. This results in a higher annual administration fee amount for the large noncoal permits where blasting is authorized.

The annual administration fee will become effective on January 1, 2013, and will be applied to all mining licenses being renewed which have an expiration date occurring on or after January 1, 2013.

There is no advisory board for the noncoal mining program. DEP conducted outreach with the regulated community through meetings with trade groups (PA Aggregate and Concrete Association, the PA Bluestone Association, and the Society of Mining Engineers). Also, DEP held four outreach meetings throughout the state. All licensed noncoal mine operators were invited to attend these meetings through a mass mailing that included information about the proposed fees. DEP also used an email distribution list to keep interested parties informed through the process.

E. Summary of Changes to the Proposed Rulemaking

§ 77.106. Fees

The permit application fee schedule has been revised to clarify the description of the two categories of large noncoal sites. In the proposed regulation, these categories were described as “mining below the water table” and “not mining below the water table.” For clarity, the descriptions have been changed to “groundwater pumping authorized” and “no groundwater pumping.” This clarifies that it is the pumping of the groundwater, and assessing the impacts of that pumping, that makes a difference in the complexity of the review. Sites where mining is occurring below the water table, but where pumping is not being done (i.e. dredge operations) are in the less complex category.

In the fee schedule, the fee category and amount have been deleted for the small surface mining permit transfer, since these permits are not transferable. The fee category and amount have also been deleted for general permits (GP). This was done because application fee amounts vary with each GP and are published in the *Pennsylvania Bulletin* when a GP is proposed. Final application fee amounts for GPs are included with the final publication of each permit after the opportunity for comment. These GPs are alternatives to large or small noncoal permits where the applicant voluntarily chooses to apply for coverage under the GP rather than obtaining a small or large noncoal permit. Also, the annual administration fee description for GPs has been revised to delete the reference to the GP for short-term construction. At the time the regulation was proposed, this was the only GP available. This revision applies the same administration fee amount to all GPs.

F. Summary of Comments and Responses on the Proposed Rulemaking

Opposition to Imposition of Fees

Several commentators voiced general opposition to the imposition of permit fees on noncoal mining operators, stating that the fees would burden small businesses during a difficult economic time, and the noncoal mining program should be funded by the Commonwealth through general fund appropriations. Comments stated that DEP's administration of the mining permitting program is a fundamental function of state government and should be funded by taxpayers. Objections to the amount of the fees in the proposed fee schedule were also raised, as well as concerns that the substantial fee increases will decrease competition by reducing the number of noncoal operators in the Commonwealth.

The Noncoal Surface Mining and Conservation Act clearly authorizes the collection of reasonable fees from operators as the means of funding the DEP's implementation and administration of the statute's provisions. While the concern of the regulated community is understandable, these fees are required as part of a shift to a self-sustaining program. The fee amounts are reasonable, in part because they have been tailored to the scale of the mining operation, and the amounts compare favorably with fees assessed by neighboring and other states so they are not expected to have any anti-competitive impacts.

Support for Fees

Several commentators voiced general support for the proposed rulemaking to increase the permit application fees and to add an annual administration fee to be paid by noncoal mine operators. Support was also noted for assessing fees for the small operators differently, including increasing the proposed fee amounts for the smaller operations because they are not self-supporting.

The Board acknowledges and appreciates the support expressed for the rulemaking. While the individual fee amounts are lower for small noncoal operators, there are more of

these operators in Pennsylvania, therefore, they are self-supporting. The fee amounts are based on the workload analysis which accounts for the differences between small and large permits.

Fee Amounts

Comments were made that the proposed permit application fee schedule is unreasonable because DEP takes too much time to complete its permit review and administration work, excessive inspections are conducted, DEP's salaries are too high, or fees should not be based on salaries for DEP personnel in the noncoal mining program. Commentators also objected that DEP's operations are inefficient and therefore the overall cost of operating the program is too high.

The fee amounts are based upon a well-developed work load analysis. The fee calculations reflect the cost to DEP to review applications to assure that they comply with the regulations and to administer permits to assure compliance. Regulatory compliance prevents pollution, protects the environment and assures that resources are preserved. DEP is continuously looking to improve efficiency. For example, DEP has revised an existing general permit to expand its use. Unfortunately, many of the permit applications DEP receives are often not well prepared, and DEP has historically made extensive efforts to assist the permit applicant with correcting an application. Since the regulation requires that DEP review the fee amounts at least every three years, and report its analysis to the Board, program efficiencies will be evaluated as part of this effort.

Professional Seals

Comments were made that DEP's review time is too lengthy and cumbersome for work that is submitted under a professional seal and that DEP is unwilling to accept work performed by a licensed professional without further review. The commentator contends that DEP duplicates work by not accepting application materials that have been sealed by a professional.

The information submitted with any permit application requires review. The professional seal ensures that conclusions drawn by the consultant have been prepared in the best professional opinion of that particular consultant. DEP review of the work submitted with a permit application is necessary in order to assure that it meets the regulatory requirements. In DEP's experience, however, meeting generally accepted engineering or geology standards does not guarantee that the work meets the regulatory requirements. DEP does not duplicate work, it reviews the work of consultants. Revisions to the permit application may be required to meet regulatory requirements, correct an error or clarify a conclusion reached in an application.

Administration fee by site rather than Permit

Commentators suggested that the annual administration fee should be applied to a site and not to each individual permit; i.e. the annual administration fee should be tied to a location rather than a permit.

DEP's workload analysis is based on the average amount of time for each category of permits.

The annual administration fee is defined in § 77.1 as: "A nonrefundable filing fee assessed on an annual basis for the cost to the Department of inspecting a permitted activity or facility in order to administer the permit." Subsection § 77.106(f) lists eight different types of permits that would be subject to the annual administration fee. A commentator stated that each mining facility could have several permits, and asked whether a mining facility could be subject to more than one annual administration fee, or is the fee only applicable to the facility.

The permit fees are set on a per-permit basis. Administratively, inspections are conducted on a permit-specific basis, not on a facility basis. Each permit file must be reviewed for the permit requirements. A separate inspection report is needed for each permit. An alternative for a permittee with multiple permits, subject to multiple fees, would be to consolidate its facility under one permit.

Industry Advisory Board

According to a commentator, the industry needs to be heard in a formal setting, and it is not reasonable for the industry to be 100% responsible for the management costs of the program given that there is no advisory board for the noncoal mining program.

In order to comply with the Noncoal Surface Mining Conservation and Reclamation Act, a sustainable funding source is required. Since there are no other funds available, the proposal is based on 100% program funding from these fees. DEP is committed to providing the highest level of interaction possible with the regulated industry. DEP meets on a quarterly basis with PACA and regularly with the PA Bluestone Association as issues arise. These meetings will continue in order to identify and understand industry concerns and to work to improve program efficiency.

Miscellaneous

A commentator questioned what the large permit fee covers and if the fee covers all processing fees associated in the correction of an application, if such an application is returned by DEP.

The large noncoal permit fee (new) includes all of the processing time in the review of an application. This may include multiple correction letters to resolve application deficiencies. Typically, DEP provides assistance to applicants and their consultants throughout the course of the application review (including before the application is

submitted). DEP strives to review all applications as promptly as possible. For permits that are rejected, the fees remain applicable because the review is still needed to determine that the permit can not be issued. DEP strives to accommodate permit applicants.

The PA Bluestone Association commented that it did not have sufficient interaction with DEP concerning this fee rulemaking proposal.

DEP conducted outreach with the regulated community on the proposed rule. The outreach included a series of meetings with industry groups (Pennsylvania Aggregate and Concrete Association and the PA Bluestone Association) and roundtable meetings with industry representatives. DEP meets regularly with the PA Bluestone Association as issues arise. These meetings will continue in order to identify and understand industry concerns and to work to improve program efficiency.

A commenter suggested that there has been no clear evidence given of the budget for the Industrial Minerals administration and permit reviews other than what DEP has generated, and that an external independent audit should be conducted to verify DEP's need for this fee increase, and any future fee increases.

DEP's costs are based on actual expenditures. The workload analysis used is continually evolving in order to keep up with changing circumstances. During the outreach to industry, data was shared. The detailed data is available and was provided to individuals who requested it during the outreach process.

G. Summary of Comments and Responses Solicited by the DEP

On January 28, 2012, the DEP published notice in the PA Bulletin, at 42 Pa.B. 553, announcing it was accepting comments for thirty days relating to the Noncoal Fee Regulations.

Comments were received from 20 commentators during this comment period. These comments were mostly (13 of 20) related to sand and gravel operations in northwest Pennsylvania. The comments primarily focused on the adverse impact the increased fees will have on small businesses that operate sand and gravel pits. Four comments of support for the fees were received.

DEP appreciates that the fees impose a burden on noncoal mine operators, including small businesses that operate sand and gravel pits. The fees are necessary to provide funding to enforce the Noncoal Surface Mining and Conservation Act.

Other comments related to general noncoal program implementation through permitting and compliance activity. DEP continues to endeavor to improve efficiency and reduce costs.

H. Benefits, Costs and Compliance

The amendments will enable the Commonwealth to fulfill its obligations to enforce the Act.

Compliance Costs

It is estimated that these regulations will impose total additional compliance costs of about \$2,500,000 on the regulated community.

Compliance Assistance Plan

DEP will provide written notification to all noncoal mine operators to inform them of the final promulgation of these regulatory changes. DEP may also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

Paperwork Requirements

The amendments will require DEP to update its application forms.

I. Pollution Prevention

The rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multi-media pollution prevention approach of existing requirements in 25 Pa. Code.

J. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by DEP to determine whether the regulations effectively fulfill the goals for which they were intended.

K. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 18, 2010, DEP submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 4963, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act, on ___ (blank) ___, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on (blank) ___ and approved the final-form regulations.

L. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at *1 Pennsylvania Code* §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 40 *Pennsylvania Bulletin* 4963 (Saturday, August 28, 2010).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

M. Order of the Board

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

- (a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapter 77, are amended to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

Michael Krancer
Chairman
Environmental Quality Board