pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

COMMENT AND RESPONSE DOCUMENT

NONCOAL MINING PROGRAM FEES

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

LIST OF COMMENTATORS ON THE PROPOSED RULEMAKING

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INTRODUCTION

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

COMMENTS AND RESPONSES

1. Comment:

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

Response:

The Department acknowledges this comment.

2. Comment:

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

Response:

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

fees charged. Similarly, the annual administration fees correlate to the workload associated with the inspection and compliance activities the Department is required to perform. However, the workload analysis that the Department used to calculate permit application fees and annual administration fees includes additional work related to these functions for which the Department cannot impose fees because the work is too variable among permits to accurately capture in an up-front fee. For example, it is not possible to impose fees for complaint investigations because there is no reliable correlation between the number or type of complaints a particular operation might generate. The fact that the Department cannot account for these costs in the annual administration fee eliminates the likelihood that the Department will collect more money in permit application fees and annual administration fees than it costs to review, administer, and enforce permits. That these permit application fees and annual administration fees are established through the rulemaking process, which takes substantial time, also makes it unlikely that revenue will exceed costs. The last comprehensive cost and workload analysis was done in 2015, based on costs from fiscal year 2013-2014. The first phase of the incremental fee increases will be effective January 1, 2020. This time lag creates a situation where the revenue lags behind the costs. Finally, the Board has revised § 77.106(g) to ensure that the fee adjustment pursuant to the Employment Cost Index for State and Local Government Compensation is not applied if doing so would result in fees that exceed the Department's cost of reviewing, administering and enforcing the permit.

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

Recent fiscal year expenses are as follows:

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

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

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

Estimated expenses are based on special fund spend plan preliminary numbers through fiscal year 2021-2022. Projections of expenses for fiscal year 2022-2023 through fiscal 2024-2025 are estimated to increase at about 3% per year. The revenue estimate is based on the assumption that the fee-generating activity (*i.e.*, mining applications and current mining activities) will remain the same.

3. Comment:

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

Response:

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

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

4. Comment:

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

Response:

The Noncoal Surface Mining Fund (Fund) serves several purposes - holding cash deposited by permittees as bond; earmarking the proceeds of bond forfeitures; and for conservation purposes provided by the Noncoal Act. As a result, there are three accounts established in the Fund. The first account includes the Mining Permit Collateral Guarantee Restricted Receipt Account for collateral deposits made by permittees for their bonding obligations under the Noncoal Act. Money in this account is returned to the permittees when they complete the required reclamation of their permitted area. The second account includes the Forfeiture of Bonds Account, where bonds forfeited because of non-compliance with the Noncoal Act are deposited. Money in this account is

required to be used to reclaim abandoned mine sites for which the bond was posted. *See* 52 P.S. § 3317. The third account includes the Noncoal General Operations Account, which is used to manage the day-to-day operations of the Noncoal Program and support the Payment-in-Lieu-of-Bond program.

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

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

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

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

5. Comment:

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

Response:
The requirements in §§ 77.106(d) and 77.106(g) are intended to work in concert with one another. The use of the word "will" in § 77.106(g) is intentional to require that the changes be made rather than provide discretion to the Department, in order to ensure fee revenue keeps pace with costs so as alleviate future fee increases. The Board is satisfied that the adjustment will unlikely exceed the costs of reviewing, administering, and enforcing the permit due to the following factors: the long historical trend in the noncoal program of costs greatly outpacing fee revenue, the adjustment factor only accounts for employee-related costs, and not all costs associated with reviewing, administering, and enforcing permits are reflected in the permit application fees and annual administration fees. If during the three-year review a disparity is identified between the results of the index adjustment and the needs of the program, then the rulemaking process will be initiated to address the issue.

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

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

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

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

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

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

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

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

8. Comment:

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

Response:

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

9. Comment:

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

Response:

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

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

The index applies to this rulemaking as follows. The first fee adjustment will be done in 2025 to be effective January 1, 2026. This adjustment will use the end-of-year indices from 2023 and 2024, since these will represent the most recent two-year period in 2025. To clarify, the following examples are provided. The highest fee amount in the fee schedule to be in effect in 2025 is $29,500 for the Large Surface Mining Permit—Groundwater Pumping Authorized application. For the purpose of the example, using the two most recently available indices (2.4% for 2016 and 2.5% for 2017), results in a new fee amount of $30,975 ($29,500x1.024x1.025=$30,963.20) rounding to the nearest $25 increment. However, the calculations may result in no change to the fee amount or a decrease to the fee amount. For example, for the annual administration fee for permits in the Not Started status in 2025 will be $175. The fee amount will remain $175 ($175x1.024x1.025=$183.68) since this result rounds down.