

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

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

This final-form rulemaking was adopted by the Board at its meeting on \_\_\_\_\_.

*A. Effective Date*

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

*B. Contact Persons*

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

*C. Statutory Authority*

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

*D. Background and Purpose*

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

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

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

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

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

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

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

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

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

Table 1B: Revenues and Costs (current)

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

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

<sup>2</sup> Updated figures are from current spend plans and projections.

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

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

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

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

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

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

*Permit application fee - § 77.106(e)*

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

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

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

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

#### *Annual administration fee - § 77.106(f)*

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

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

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

[http://files.dep.state.pa.us/Mining/BureauOfMining/Programs/BMPPortalFiles/AAB/Agendas\\_and\\_Handouts/2016/January%202016%20Noncoal%20Admin%20Fee%20Phases.pdf](http://files.dep.state.pa.us/Mining/BureauOfMining/Programs/BMPPortalFiles/AAB/Agendas_and_Handouts/2016/January%202016%20Noncoal%20Admin%20Fee%20Phases.pdf).

### *Advisory board collaboration and outreach*

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

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

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

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

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

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

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

#### *E. Summary of Changes to the Proposed Rulemaking*

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

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

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

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

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

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

The Department designed the noncoal permit application fees and annual administration fees to correlate to the workload of the noncoal program to which the permit application fees and annual administration fees relate – reviewing, administering, and enforcing permits. For example, permit application fees accompany permit applications that the Department reviews, and so the number of permit applications and associated amount of work (*i.e.*, Department costs) are reflected in the fees charged. Similarly, the annual administration fees correlate to the workload associated with the inspection and compliance activities. However, the workload analysis that the Department used to calculate these fees includes work related to these functions for which the Department cannot impose fees because the work is too variable among permits to accurately capture in an up-front fee. For example, it is not possible to impose fees for complaint investigations because there is no reliable correlation between the number or type of complaints a particular operation might generate. The fact that the Department cannot account for these costs in the annual administration fee eliminates the likelihood that the Department will collect more money in permit application fees and annual administration fees than it costs to review, administer, and enforce permits. Further, due to the fees being established through the rulemaking process, which takes substantial time, this also makes it unlikely that revenue will exceed costs. 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 fee report presented to the Board in May 2015 was the basis for the initial discussion of this fee increase with the Aggregate Advisory Board in 2015. That report included an analysis that the costs were increasing each year at a rate of about 3.3%.

Recent fiscal year expenses are as follows:

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

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

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



2023-24	\$4,372,602	\$3,700,000
2024-25	\$4,503,780	\$3,885,000

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

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

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

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

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

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

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

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

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

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

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

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

The requirements in §§ 77.106(d) and 77.106(g) are intended to work in concert with one another. The use of the word "will" in § 77.106(g) is intentional to require that the changes be made rather than provide discretion to the Department, in order to ensure fee revenue keeps pace with costs so as alleviate future fee increases. The Board is satisfied that the adjustment will unlikely exceed the costs of reviewing, administering, and enforcing the permit due to the following factors: the long historical trend in the noncoal program of costs greatly outpacing fee

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

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

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

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

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

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

Nothing in either of these provisions limits the type of fee schedule that can be established by regulation. In fact, from 1990 to 2012, the Board used its general statutory authority under the Noncoal Act to promulgate § 77.106, which at that time provided that “... a permit application for noncoal mining activities shall be accompanied by a check. . . in the amount set forth by the Department. The Department may require other fees set by the act, the environmental acts, this title or the Secretary.” 20 Pa.B. 1653 (March 17, 1990). This discretionary approach was modified in 2012, and § 77.106 established sum-certain fees that must be collected. 42 Pa.B. 6536 (October 13, 2012). These various regulatory designs are similar to regulations deemed valid and binding by the Commonwealth Court in *Naylor v. Dep’t of Public Welfare*, 54 A.3d 429 (Pa. Cmwlth. 2012), *aff’d*, 76 A.3d 563 (Pa. 2013), which allowed an agency to adjust the amounts of certain payments through publication in the *Pennsylvania Bulletin* absent statutory language that would limit that practice. In *Naylor*, the Commonwealth Court found, among other things, that regulations allowing the Department of Public Welfare to reduce State Supplementary Payments (SSP) through notice in the

Pennsylvania Bulletin were authorized by the Public Welfare Code and reasonable because no provision of the Code “restricts or directs the manner by which the Department must establish SSP payment amounts.” 54 A.3d at 435. Accordingly, the general statutory authority here under the Noncoal Act is sufficient authority to establish the fee adjustment provision in this final-form rulemaking.

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

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

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

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

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

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

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

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

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

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

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

#### *G. Benefits, Costs and Compliance*

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

#### *Benefits*

As described in the purpose of the Noncoal Act discussed in Section D of this Notice of Final Rulemaking, the final-form rulemaking will ensure that the benefits of the Noncoal Act

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

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

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

#### *Compliance costs*

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

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

For large noncoal surface mining operations, as well as underground noncoal mining operations, the permit application fees will also increase. For example, the permit application

fee for large noncoal surface mining operations that require groundwater pumping will increase from \$20,225 to \$29,500, with a \$2,225 increase in the first phase, a \$3,075 increase in the second phase and a \$3,975 increase in the third phase. The annual administration fee for active large surface mining operations with blasting will increase from \$1,850 to \$2,250, with an actual decrease of \$175 in the first phase, an increase of \$75 above the current fee in the second phase, and a further increase of \$325 in the third phase.

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

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

#### *Compliance assistance plan*

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

#### *Paperwork requirements*

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

#### *H. Pollution Prevention*

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

### *I. Sunset Review*

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

### *J. Regulatory Review*

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

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

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

### *K. Findings of the Board*

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 48 Pa.B. 733 (February 3, 2018).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.



*L. Order of the Board*

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

(1) The regulations of the Department, 25 Pa. Code Chapter 77, are amended by amending §§ 77.1, and 77.106 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(2) The Chairman of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(3) The Chairman shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act (71 P.S. §§ 745.1—745.14).

(4) The Chairman of the Board shall certify this order and Annex A, as approved for legality and form, and deposit them with the Legislative Reference Bureau, as required by law.

(5) This order shall take effect on January 1, 2020.

PATRICK McDONNELL,  
Chairperson