

**NOTICE OF FINAL RULEMAKING
TITLE 25—ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CH. 78A]**

Unconventional Well Permit Application Fee Amendments

The Environmental Quality Board (Board) amends §§ 78a.1 and 78a.19 (relating to definitions; and permit application fee schedule) to read as set forth in Annex A. This final-form rulemaking satisfies the obligation of the Department of Environmental Protection (Department), as specified in § 78.19(e) (relating to permit application fee schedule) and § 78a.19(b), to provide the Board with an evaluation of the well permit application fees in Chapters 78 and 78a (relating to oil and gas wells; and unconventional wells) and recommend regulatory amendments to address any disparity between the income generated by well permit application fees and the cost of administering 58 Pa.C.S. Chapter 32 (relating to development) (2012 Oil and Gas Act) by the Department's Office of Oil and Gas Management (Oil and Gas Program or Program). This final-form rulemaking increases the well permit application fees from \$5,000 for nonvertical unconventional wells and \$4,200 for vertical unconventional wells to \$12,500 for all unconventional well permit applications to sustain the Program at current staff levels and operating costs. This final-form rulemaking does not amend the current fees for conventional well permit applications. This final-form rulemaking also removes definitions for “nonvertical unconventional well” and “vertical unconventional well” related to well permit applications as well permit application fees will now be the same for all unconventional well permit applications.

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

A. Effective Date

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

B. Contact Persons

For further information, contact Kurt Klapkowski, Director, Bureau of Oil and Gas Planning and Program Management, Rachel Carson State Office Building, 15th Floor, 400 Market Street, P.O. Box 8765, Harrisburg, PA 17105-8765, (717) 772-2199; or Elizabeth Davis, 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 Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department's web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board (EQB)").

C. Statutory Authority

This final-form rulemaking is being made under the authority of 58 Pa.C.S. § 3274, which directs the Board to adopt regulations necessary to implement the 58 Pa.C.S. Chapter 32 (relating to development), 58 Pa.C.S. §§ 3201–3274 (2012 Oil and Gas Act); 58 Pa.C.S. § 3211(d), which authorizes the Board to establish well permit application fees that bear a reasonable relationship to the cost of administering the 2012 Oil and Gas Act; and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to promulgate regulations of the Department.

D. Background and Summary

The purpose of this final-form rulemaking is to increase unconventional well permit application fees to sustain the Program at current staff levels and operating costs. This fee increase is needed because the current revenue generated by the well permit application fees are not adequate to cover the Program’s current costs despite recent staff reductions and the implementation of several cost-saving measures.

The fee increase in this final-form rulemaking is intended to cover the costs to sustain the existing Program. The other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 (relating to Unconventional Gas Well Fee) currently allocated to the Program, are needed to provide a funding buffer. This buffer is necessary in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections that form the basis of this final-form rulemaking, as well as restore the Program to a full staff complement of 226 people, hire necessary additional staff and fund program enhancements.

Statutory Framework for Well Permit Application Fees

The Department is tasked with implementing the 2012 Oil and Gas Act. Under Section 3202 of the 2012 Oil and Gas Act (relating to declaration of purpose of chapter), the purposes of the 2012 Oil and Gas Act are to:

- (1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.
- (2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.
- (3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. (58 Pa.C.S. § 3202).

The 2012 Oil and Gas Act contains requirements regarding the exploration, development and recovery of oil and gas resources in this Commonwealth, including permitting, bonding, well location restrictions, protecting water supplies, containment, well control emergencies, restoration, plugging, reporting and enforcement. See 58 Pa.C.S. §§ 3201–3274. Regulations found at 25 Pa. Code Chapter 78 (relating to Oil and Gas Wells) and Chapter 78a (relating to Unconventional Wells) implement the 2012 Oil and Gas Act. The Department administers the 2012 Oil and Gas Act and its implementing regulations through the functions of the Program, including data management, staffing, well permitting, surface activity permitting, inspections, compliance, and policy and program development.

Section 3211(d) of the 2012 Oil and Gas Act provides: “Each application for a well permit shall be accompanied by a permit fee, established by the Environmental Quality Board, which bears a reasonable relationship to the cost of administering [the 2012 Oil and Gas Act].” 58 Pa.C.S. § 3211(d). A well permit application fee is a one-time payment submitted with each well permit application that is deposited into the Well Plugging Fund as a dedicated revenue source for the Program. This fee is set by the Board in regulation and must be reasonably related to the cost of the Program to administer the 2012 Oil and Gas Act. The fees do not provide ongoing revenue to the Program. For that reason, the fees received in a given year must fund all of the Program’s functions beyond permitting.

Based on this funding mechanism, the Board has established reasonable fees to fund Program costs. Prior fee increases have established a fee structure based on several factors, including annual well permit applications projections, the different types of wells, total well bore length, the costs to develop the different well types and ability to pay.

In accordance with 25 Pa. Code §§ 78.19(e) and 78a.19(b), the Department evaluates these fees and recommends regulatory amendments to the Board every three years to address any disparity between the Program income generated by the fees and the Department’s cost of administering the Program with the objective of ensuring fees meet all Program costs and the Program is self-sustaining.

Prior Well Permit Applications Fee Increases

The Oil and Gas Act, originally enacted in 1984, established a \$100 well permit application fee. See 58 P.S. §§ 691.201(d), repealed by the act of February 14, 2012, P.L. 87, No. 13, § 3(2). This fee remained in place for 25 years. In 2009 and 2014, the Board increased well permit application fees to fund the Program’s increasing expenses and to establish a fee structure that sets different amounts for the different types of wells, including unconventional, conventional and home use wells. As stated above, the Board has established reasonable fees to fund Program costs for these different types of wells based on several factors, including annual well permit application projections, total well bore length, the costs to develop the different well types and ability to pay.

Declining Well Permit Revenues

When the Board last amended the unconventional well permit fees in 2014, it eliminated a sliding scale and established a flat fee of \$5,000 for nonvertical unconventional wells and \$4,200 for vertical unconventional wells. The Board projected that those increased fees would be adequate to support the Program with a full complement of 226 staff provided the Program receives 2,600 unconventional well permits annually.

However, while that projection was accurate during the pendency of that rulemaking, the number of unconventional well permit applications received since that time has been lower than anticipated. In Fiscal Year (FY) 2014-2015, the Program received 2,533 unconventional well permit applications. In FY 2015-2016, the Program received 1,646 unconventional well permit applications. And in, FY 2016-2017, the Program received 1,993 unconventional well permit applications. As a result, the well permit application fees have not generated the revenue needed to fund Program costs.

Cost-Saving Measures

Because of declining unconventional well permit application fee revenues, the Program reduced staff over time from 226 employees to 190 employees today. The Program also reduced operating costs, including the purchase of fixed assets and supplies. Over three years, the Program reduced operating and fixed asset costs by 38%.

Increasing Workload

Despite declining well permit application revenues, the Program's workload has increased. Each year more wells are drilled than plugged resulting in a growing inventory of wells to be inspected to ensure compliance with the 2012 Oil and Gas Act and its implementing regulations. There is also a growing number of support facilities, including gathering pipelines, well development impoundments, water withdrawals and other support facilities, with separate authorizations and inspection obligations. As the result of a continually growing oil and gas industry, the Program has increasing responsibilities to develop guidance, update forms, provide training, improve data management, and to study and evaluate new and evolving issues all to ensure that the Program operates effectively and efficiently while providing clarity to the regulated community. Equally important are the Program's responsibilities related to gas storage as well as orphaned and abandoned wells. Finally, the Program must ensure that it responds to complaints, emergencies and requests for public records related to the implementation of the 2012 Oil and Gas Act. All of these activities are essential program functions beyond well permit application reviews that are necessary to administer the 2012 Oil and Gas Act and are paid for by the one-time well permit application fees.

As a result, the Program now struggles to meet its gas storage field inspection goals, consistently achieve appropriate permit review time frames, adequately fund training opportunities for staff and provide trainings for the industry. Important Program development initiatives, such as policies, best practices and technical guidance documents, have been put on hold indefinitely due to the lack of sufficient staff to develop and update these important pieces of the Program

necessary to administer the 2012 Oil and Gas Act. In short, the Program is challenged to provide an adequate level of high-quality service to the public and to the industry.

Fee Report

To thoroughly address prior inaccurate well permit application projections and to comply with 25 Pa. Code §§ 78.19(e) and 78a.19(b), which requires the Department to provide an evaluation of well permit applications fees and recommend regulatory changes every three years, the Department prepared and presented to the Board a 3-Year Regulatory Fee and Program Cost Analysis Report (Fee Report) at the Board’s April 17, 2018, meeting. A copy of the Report is available from the persons listed in Section B.

The Fee Report provided that the Program’s projected budget to sustain the Program with 190 staff and operating costs in FY 2018-2019 would be approximately \$25 million. Given this projected budget and the current well permit application fees, the Program would need to receive 5,000 nonvertical unconventional well permit applications per year to sustain the Program. However, based on the average of annual well permit applications the Department received in FYs 2015-2016, 2016-2017 and 2017-2018 discussed above, the Department anticipated receiving 2,000 unconventional well permit applications per year. For that reason, the Department recommended that the Board revise the unconventional well permit application fee to \$12,500. This analysis provided the basis for the proposed rulemaking.

Current Projections

Based on the Fee Report’s analysis of unconventional well permit application trends for FYs 2014-2015, 2015-2016, and 2016-2017, the Program continues to anticipate that it will receive approximately 2,000 unconventional well permit applications per year. Additionally, the Program continues to project the costs to fund the Program at its reduced complement of 190 employees and operating costs at approximately \$25 million as explained in the table below. For this reason, as recommended in the Fee Report and in the proposed rulemaking, this final-form rulemaking establishes an increased unconventional well permit application fee of \$12,500.

Expense	Cost (in dollars)
Staff (190 positions at \$106,000 per staff person)	20,140,000
Operating Expenses (FY2018-19)	4,519,000
TOTAL Cost	24,659,000

The Department’s well permit application projections are reasonable given the challenges in predicting the number of well permit applications. It is significant that in FY 2017-2018, the Department received 1,674 unconventional well permit applications. And in FY 2018-2019, the Department received 1,684 unconventional well permit applications. For the first half of FY 2019-2020, the Department is on track to receive fewer than 1,600 unconventional well permit applications. The variability of unconventional well permit applications can be attributed to

various market and industry changes. The price of natural gas has remained low, which industry analysts suggest is the result of supply-demand imbalances between the Appalachian region and the rest of the United States market. It might also be because the first few years of Marcellus Shale gas development constituted an initial boom and was not representative of drilling patterns in a more mature shale production market. Also, improvements in technology are allowing operators to extract more gas from each well, thus requiring fewer wells to satisfy the same demand. All of these trends are outside of the Department's control, may be subject to a vacillating commodity markets, and not readily predictable.

Because of this reasonable uncertainty, it is critical that the other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 (relating to Unconventional Gas Well Fee) currently allocated to the Program, provide a funding buffer in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections. If that happens, the Program will need these other revenue sources to sustain the Program. If not, these funds will be allocated for the additional Program needs described below.

Other Revenue Sources

Once received, unconventional and conventional well permit application fees are placed in the Well Plugging Fund as a dedicated revenue source for the Program. In addition to the one-time fee that the Department receives with each well permit application, the Program has the following other sources of revenue: (1) conventional well permit application fees; (2) an appropriation from the Act 13 Impact Fees; and (3) incidental civil penalties collected for violations of the 2012 Oil and Gas Act (section 3271(a) of the 2012 Oil and Gas Act (relating to well plugging funds)). No General Fund revenue is used to support the Program.

Conventional Well Permit Application Fees

Section 78.19(a) provides a sliding scale for conventional well permit applications based on total well bore length from \$250 for a well bore up to 2,000 feet to \$1,950 for a well bore between 11,501 feet to 12,000 feet. See 25 Pa. Code § 78.19(a). Conventional wells exceeding 12,000 feet pay \$1,950 plus \$100 for every 500 feet the well bore extends over 12,000 feet. See 25 Pa. Code § 78.19(b). Home use wells with a well bore length of 1,500 feet or less pay a \$200 well permit application fee. See 25 Pa. Code § 78.19(e).

The Department receives approximately 240 conventional well permits per year. The average conventional well permit application fee is approximately \$365.

Similar to unconventional wells, the number of conventional well permit applications has declined in recent years. This decrease in applications has resulted in less revenue from conventional well permit application fees. In FY 2015-2016, the conventional well permit application fee revenue was \$97,750. In FY 2016-2017, the conventional well permit application fee revenue was \$84,300. And in FY 2017-2018, the conventional well permit application fee revenue was \$76,973. In the proposed rulemaking, the Board stated the conventional well permit

application fees were not included in the fee analysis for this rulemaking. To clarify, these fees are included in the Program's overall budget, and the revenue collected from the fees represents less than 0.5% of the Program's annual operating costs.

Act 13 Impact Fee

Act 13 of 2012, 58 Pa.C.S. §§ 2301–3504 (Act 13), established an annual impact fee for the unconventional well industry and provided for the collection and distribution of these fees (Act 13 Impact Fees). Under Section 2314 of the Act 13, all Act 13 Impact Fees are collected and deposited in the Unconventional Gas Well Fund administered by the Pennsylvania Public Utility Commission. In accordance with Section 2314(c.1)(3), \$6 million of the annual fees collected are distributed to the Department “for the administration of [Act 13] and the enforcement of acts relating to clean air and clean water.” See 58 Pa.C.S. § 2314(c.1)(3).

During the proposed rulemaking process, the Board stated that the \$6 million distributed to the Department from the Act 13 Impact Fee were not included in the fee analysis. To clarify, these fees are included in the Program's overall budget. Currently, the \$6 million appropriated to the Department from the Act 13 Impact Fees is allocated to the Program. Significantly, these fees are not dedicated solely to the Program and may be used to support the Department's air and water programs. Allocation of these funds ultimately depends on the Department's immediate needs. The Department has determined that it is currently appropriate for the Program to receive all \$6 million dollars from the Department's Act 13 Impact Fee appropriation due to declining well permit application revenue.

Civil Penalties

The Program also receives revenue from fines and civil penalties assessed for violations of the 2012 Oil and Gas Act. The Department has not included fines and civil penalties in its well permit application fee analysis, because relying on penalties to fund fundamental elements of a regulatory program is not appropriate and is contrary to sound public policy.

Chapter 102 and Chapter 105 Fees

The Department receives fees from permit applications under 25 Pa. Code Chapters 102 and 105, including the Erosion and Sediment Control General Permit. These fees are not currently distributed to the Program. Instead, they are deposited into the Clean Water Fund. These fees are committed to funding critical operations that support County Conservation Districts as well as Department staff who, among other responsibilities, provide support and training to staff within the Program that review Chapter 102 and 105 permit applications and inspect permitted projects. In the Department's analysis of these fees, it was determined that if the Chapter 102 and Chapter 105 permit application fees were re-allocated to the Program, the Program would receive less of the \$6 million from the Act 13 Impact Fees because the Chapter 102 and Chapter 105 programs would then need a portion of those funds to make up for this reallocation.

Legacy Wells

Significantly, the well permit application fee does not include the Program's costs to plug orphaned and abandoned wells. Section 3271(b) of the 2012 Oil and Gas Act requires a \$50 surcharge paid in addition to the well permit application fee. This surcharge is deposited into a restricted revenue account known as the Abandoned Well Plugging Fund to indemnify the Commonwealth for the cost of plugging abandoned wells. Section 3271(c) of the 2012 Oil and Gas Act requires a \$100 surcharge for oil wells and a \$200 surcharge for gas wells paid in addition to the well permit application fee. These surcharges are deposited into a restricted revenue account known as the Orphan Well Plugging Fund for the Department to plug orphan wells. These surcharges have not changed since the act of December 19, 1984 (P.L. 1140, No. 223) (58 P.S. §§ 601.101—601.605) (repealed by the act of February 14, 2012 (P.L. 87, No. 13)). Significantly, these permit surcharges are insufficient to cover the cost of properly plugging all legacy wells in Pennsylvania.

Program Enhancements and Restoring Program Staff Complement

In the event that the actual number of permit applications that the Program receives meet the permit application projections in this final-form rulemaking, the \$6 million Act 13 Impact Fee revenue and conventional well permit application fees are available for needed program enhancements, restoring staff complement and adding necessary staff to administer the 2012 Oil and Gas Act and its implementing regulations.

The Program estimates that approximately \$6.5 million is needed for the following program enhancements and staffing needs. The Department developed these estimates for this final-form rulemaking. These estimates clarify and update prior estimates in the Fee Report and proposed rulemaking. Notably, the staffing numbers have been updated to reflect that the Program recently reorganized the Office of Oil and Gas Management to create three new management positions to oversee statewide subsurface and surface permitting. Additionally, the current estimated cost of an employee based on standard benefits and average salary is \$106,000 and prior estimates were based on a prior estimated cost of \$100,000 per employee.

Enhanced electronic data management

The Program will allocate a portion of any available revenue to information technology projects for the Program. These include enhancing the current mobile digital inspections tools, digitizing forms and developing new databases that will better enable analysis of the effectiveness of the regulatory programs. This investment in technology will yield efficiencies for the Program and the regulated community in terms of more predictable and timely permit issuance, more effective site inspections, increased availability of staff for compliance assistance, and more streamlined reporting to and communication with the Department. It will also make the Program's work more transparent to the public as electronic documents can be easily made available online.

Enhancements to the mobile digital inspection platform and mobile devices will create additional improvements and efficiencies through the establishment of a risk-based inspection protocol. Through the protocol, wells will be ranked and color coded based on a hierarchy of need for an

inspection. This will give inspectors and supervisors a simple way of prioritizing their work and ensuring that all wells are inspected an appropriate number of times during all phases of a well's life.

The Program also intends to digitize all other oil and gas related forms. These include the well record and completion report, alternative waste management authorization request, well plugging forms and others. Electronic receipt and storage of the permitting documents and forms will also result in significant savings in terms of records storage and of staff time and costs associated with requests from the public to access records. The public will enjoy greater access to timely data and information as the Department receives it.

Finally, the Department intends to develop additional databases to house information it collects to enable better analysis of Program effectiveness. Two of these databases include water sample results and spills. The Program receives thousands of ground and surface water sample results; these records are not managed in a manner that allows analysis over time and location. A properly designed data management system would give the Department the ability to analyze trends in water quality across this Commonwealth. Similarly, the spills database could produce reports on spill volumes, types, locations and causes, which could provide the basis of Program enhancements and industry improvements.

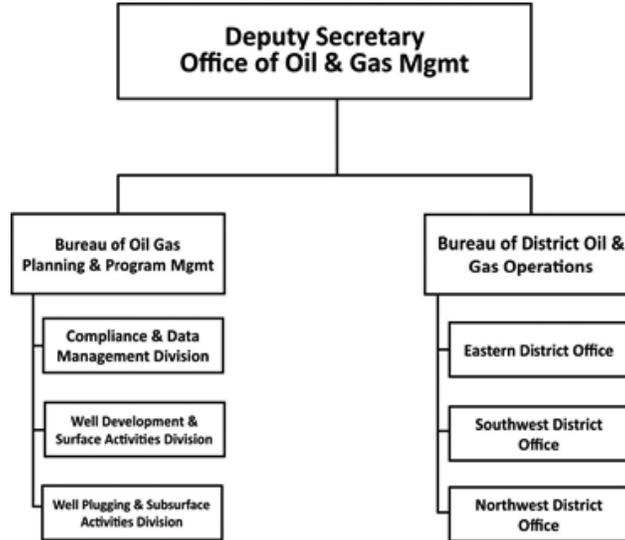
The enhanced electronic data management needs previously described are not new concepts. They are simply needs that are not yet met because the Department lacks the resources to pay for the information technology services required to meet these needs and create these tools. The Program currently pays the Bureau of Information Technology (BIT) \$700,000 each year. However, BIT services to the Program actually cost \$2 million annually. Allocating an additional \$1.3 million to fully fund these program enhancements will enable the Program to support the Program's information technology needs.

Additional Program Staffing

As discussed above, as a result of declining unconventional well permit application fee revenue following the 2014 fee rulemaking, the Program reduced staff from 226 employees to 190 employees. Allocating the other revenue sources to additional program staffing will enable the Program to restore previously reduced staff positions and add staff needed to administer the 2012 Oil and Gas Act and its implementing regulations.

In 2016, the Program conducted an analysis of permitting, inspections and compliance processes and developed a tool to aid in Program planning. To develop the current workload analysis, annual permitting, inspection and compliance-related data from 2017 was entered into the workload tool. This workload tool provides a high-level assessment of current staffing needs within the Program based on current data. However, the workload tool is limited and does not capture all of the various job duties performed by the Program. For example, it does not analyze staffing levels within the Bureau of Oil and Gas Planning and Program Management (BPPM) because of the significant variability of the work performed by those staff. The output of the model is confined to the Bureau of District Oil and Gas Operations (DOGO) staff only.

The Program consists of two Bureaus:



The Bureau of District Oil and Gas Operations

DOGO consists of three district offices primarily headquartered in three regional office locations (Pittsburgh, Meadville and Williamsport) in the oil and gas producing regions of this Commonwealth. DOGO staff are responsible for permitting, inspection, compliance and enforcement functions.

DOGO includes the following:

Permitting

When the above-referenced staff reductions and cost-saving measures occurred, it included nine permitting positions. As a result, the Program faced challenges related to meeting permit review timeframes. To address this shortcoming, the Program reorganized the Office of Oil and Gas Management to create three new management positions to oversee statewide subsurface and surface permitting. The Program also reclassified certain vacant positions to well permit geologist positions. The well permit review timeframes then improved. For example, in the Southwestern District Office, the well permit review timeframes decreased from over 100 days to an average of approximately 35 days. For Erosion and Sediment Control General Permits, the review times decreased from more than 230 to approximately 125 days.

To further improve review timeframes, the Program needs to restore the nine previously eliminated permitting positions and fund the three new management positions resulting from the reorganization. These 12 positions would cost approximately \$1.27 million.

Inspections

Inspections staff perform the majority of the Program's field inspection and investigatory work. Inspector positions include water quality specialists, oil and gas inspectors, environmental protection specialist and field geologists. These inspectors are also responsible for responding to citizen complaints regarding oil and gas activities throughout the Commonwealth. More inspectors of all types are needed across this Commonwealth. Two areas of critical need involve the inspection of gas storage wells and oil and gas inspectors focused drilling and construction of new wells and plugging legacy wells.

The workload tool estimates 16 additional inspectors are needed including three just for gas storage wells inspections at a cost of \$1.7 million to fund these positions.

Compliance

Compliance specialists perform a variety of important job duties, including handling and management of enforcement and compliance cases, development and execution of compliance documents, and document gathering of responsive information for the many requests from the public for records. Compliance specialists perform the majority of the duties responding the requests for records as many of the requests are for records regarding the Program's enforcement efforts to ensure compliance with the 2012 Oil and Gas Act. Compliance specialists are vital to the Program's administration of the 2012 Oil and Gas Act as they directly interface with the citizens of this Commonwealth residing in areas of active oil and gas development.

The workload tool estimates that 11 additional compliance positions are needed to perform these various duties at a cost of \$1.17 million annually to fund these positions.

The Bureau of Oil and Gas Planning and Program Management

BPPM is in the Department's Central Office (Harrisburg) and is responsible for administrative, policy and regulatory development functions.

BPPM includes the following:

Division of Well Development and Surface Activities

The Division of Well Development and Surface Activities is responsible for developing policies and guidance regarding surface activities associated with well site and gathering line design, construction and operation. This includes waste management and engineered components, such as erosion and sediment control structures, postconstruction stormwater management features, spill and release reporting and remediation, and stream and wetland crossings and encroachments.

Division of Well Plugging and Subsurface Activities

The Division of Well Plugging and Subsurface Activities includes the Subsurface Activities Section and the Well Plugging Section. The Subsurface Activities Section is responsible for the management of subsurface oil and gas activities and offers expertise in drilling, casing, cementing, completion, workover, and production activities and operations. The Well Plugging Section maintains and implements the Department's Orphaned and Abandoned Well Plugging Program.

The Division of Compliance and Data Management

The Division of Compliance and Data Management works closely with BIT to oversee the development, operation and maintenance of data management systems that track reports, notifications, records, applications and other information or documents that are submitted to the Department by the regulated community. This division is also responsible for assisting in the development of Statewide data management tools, such as electronic well permitting and mobile site inspection, as well as Statewide enforcement efforts related to electronic data submissions.

As a result of staff reductions, BPPM has postponed several policy development projects including updated guidance documents, public information, internal training, external training, modernized well plugging regulations, standards for storing mine influenced water in well development impoundments and an established area of alternative methods for hydraulically fracturing Utica wells in western Pennsylvania. The Program estimates that 11 BPPM positions at a cost of \$1.17 million would enable the Program to begin work on these and other important projects.

In sum, based on prior staff reductions and the workload tool, the Program estimates that it needs 49 additional positions at a cost of approximately \$5.2 million to administer the 2012 Oil and Gas Act and its implementing regulations. Because of new permit review tools and mobile inspection tools, the Program will continue to evaluate staffing and hire staff when necessary and when funds are available.

No Increase to Conventional Well Permit Application Fees

As stated in the Fee Report, the Department decided to not increase conventional well permit application fees for conventional wells as a solution to correcting this funding imbalance. Significantly, Section 3211(d) of the 2012 Oil and Gas Act requires that well permit application fees bear a “reasonable relationship” to the cost of administering the 2012 Oil and Gas Act. The determination to increase only unconventional well permit application fees and not conventional well permit applications is (1) within the Board’s granted authority under Section 3274 of the 2012 Oil and Gas Act to promulgate regulations to establish a permit application fee under Section 3211(d) of the 2012 Oil and Gas Act for each application for a well permit which bears a reasonable relationship to the cost of administering the 2012 Oil and Gas, (2) advances the purposes of the 2012 Oil and Gas Act in Section 3202 of the 2012 Oil and Gas Act, and (3) is not contrary to the express language in the 2012 Oil and Gas Act.

Conventional well drilling has declined significantly over the last few years. In FY 2015-2016, the Program received 287 conventional well permit applications generating \$97,750. In FY 2016-2017, the Program received 205 conventional well permit applications generating \$84,300. In FY 2017-2018, the Program received 225 conventional well permit applications generating \$76,973. If the Program projects that it will receive 240 conventional well permit applications annually at the average conventional well permit application fee of \$365, the Program can anticipate receiving \$87,600 per year from conventional well permit application fees under the existing fee structure. These fees are included in the Program's overall budget, and the revenue collected from the fees represents less than 0.5% of the Program's annual operating costs.

The cost to drill a conventional oil well is approximately \$115,000, and the cost to drill a conventional gas well is approximately \$250,000. The three-year average conventional well permit application fee paid was \$365. Thus, the average conventional well permit accounts for between .15% and .3% of the cost to drill a conventional well. The cost to drill an unconventional well is approximately \$8 million. The \$12,500 unconventional well permit application fee established by this rulemaking accounts for .16% of the cost to drill an unconventional well. Accordingly, the fees are comparable in terms of the percentage of the costs to drill wells.

In developing the analysis for this final-form rulemaking, the Department considered that the conventional industry may account for approximately 40% of the costs to administer the Program. In doing so, the Department considered proportional costs related to fee amounts. Based on the projected budget of \$25 million to sustain current staff and operating costs, the conventional industry's proportional costs would be \$10 million. If the Program projects that it will receive 240 conventional well permit applications annually, the conventional well permit application fee would need to be set at a flat rate of nearly \$42,000 per application to account for the conventional industry's proportional costs. Increasing the conventional well permit applications fees from the average of \$365 to \$42,000 per well permit application is not reasonable or appropriate given the costs to drill conventional wells and because most, if not all, conventional well operators are small businesses.

It is reasonable for the conventional industry to pay less for well permit applications than the unconventional industry and for the Board to maintain the conventional well permit application fee at its current sliding scale structure. For these reasons, conventional well permit application fees are part of the Program's budget allocated for restoring staff, funding program enhancements or, if necessary, providing a funding buffer.

Public Outreach

The Department consulted with the Oil and Gas Technical Advisory Board (TAB) in the development of the proposed rulemaking to raise the unconventional well permit application fee to \$12,500 and discussed the final rulemaking at the TAB meeting on September 19, 2019.

E. Summary of Regulatory Requirements

Current fee structure

The current well permit application fee structure in § 78a.19 assesses a flat well permit application fee of \$5,000 for every nonvertical unconventional well permit and \$4,200 for every vertical unconventional well permit.

Final-form fee structure

This final rulemaking amends §§ 78a.1 and 78a.19 to increase the well permit application fee on all unconventional wells to \$12,500. This final-form rulemaking also removes definitions for “nonvertical unconventional well” and “vertical unconventional well” related to well permit applications so that permit application fees will now be the same for all unconventional well permit applications. Assuming the Program will receive approximately 2,000 unconventional well permit applications annually following this final-form rulemaking, \$12,500 per unconventional well permit application is needed to sustain the Program at current staff levels and operating costs.

As discussed in Section D of this preamble, this final-form rulemaking does not amend the current conventional well permit application fees in 25 Pa. Code § 78.19.

F. Changes from Proposed to Final-Form Rulemaking;

This final rulemaking Annex A does not contain any changes from the proposed rulemaking Annex A.

G. Summary of Major Comments and Responses

The proposed rulemaking was adopted by the Board at its meeting on May 16, 2018, and published in the *Pennsylvania Bulletin* on July 14, 2018, with a 30-day comment period (48 Pa. B. 4100). No public hearings were held. The public comment period closed on August 13, 2018.

The Board received 51 comments from 14 commenters. One commenter was neutral on the rulemaking. Two commenters offered comments in support of the rulemaking while 10 commenters opposed the rulemaking. The Independent Regulatory Review Commission (IRRC) also submitted comments on September 12, 2018.

Consider Alternate Sources of Funding

The Board received comments from commenters that did not believe that well permit fees should be such a disproportionate source of program funding and that the Board should work with stakeholders to find an alternative, more stable source of funding. These commenters recommended forming a workgroup to identify cost saving measures, using General Fund money, re-allocating Chapter 102 and 105 permit fees that are paid by the oil and gas industry

from the Clean Water and Dam Safety Programs to the Oil and Gas Program, and use of the \$6 million Impact Fee.

The Board will work with stakeholders to identify more stable sources of funding. Re-allocating general funds or permit fees received by other programs to the Program is not an option, as those programs are also underfunded. The Department noted that the Program currently receives the entire \$6 million Impact Fee even though that fee could be allocated to the Clean Air and Clean Water Programs in addition to or instead of the Oil and Gas Program.

Clarify Benefits of Well Permit Fee Increase

Commenters requested that the Board identify cost saving measures that could be undertaken through an audit or workload analysis.

The Department implemented cost saving measures by reducing 36 positions and reducing operational costs by 38%. However, these cost savings have resulted in operational shortcomings which this rulemaking, along with the conventional well permit fees and the \$6 million Impact Fee, is intended to address. The Program also developed a sophisticated workload analysis tool and used that tool to provide a detailed explanation for why additional staffing and financial resources are needed.

Justify that the Fee is Reasonably Related to the Cost of Administering the Program

The Board received comments that a 150% increase in the cost of an unconventional well permit fee is disproportional to the Program's costs to administer a program that oversees both the conventional and unconventional industry.

In response, the Board relies on Section 3211(d) of the 2012 Oil and Gas Act. As prescribed by Section 3211(d), a well permit application fee is a one-time payment submitted with each well permit application that is deposited into the Well Plugging Fund as a dedicated revenue source for the Program. This fee is set by the Board in regulation and must be reasonably related to the cost of the Program to administer the 2012 Oil and Gas Act. The fees do not provide ongoing revenue to the Program. For that reason, the fees received in a given year must fund all of the Program's functions beyond permitting.

Since 1984, the Board has increased the well permit application fees, in 2009 and 2014, to fund the Program's increasing expenses and established different amounts for the different classes of wells, including unconventional, conventional and home use wells. The Board established different amounts for these different classes of wells based on the cost of the Program related to well permit application projections, total well bore length for conventional wells, the costs to develop each class of well and the ability of the applicant to pay. The Board ensures that the well permit application fees bear a reasonable relationship to Program costs by using these factors to establish the different fee amounts.

The Board disagrees that fees must be based on proportional costs by industry sector. Section 3211(d) does not require that the fees be determined by the proportional costs of the Department

based on the different segments of the industry. Section 3211(d) only requires that these fees bear a “reasonable relationship” to costs. Nonetheless, in developing this final-form rulemaking, the Board considered proportional costs related to fee amounts. The Board also considered that conventional well drilling has declined over recent years with only 225 conventional well permit applications submitted in FY 2017-18. In contrast, the Department received 1,706 unconventional well permit applications in 2018. This demonstrates that the unconventional industry is applying for the vast majority of the permits issued by the Department. The Board also considered the revenue generated by conventional well permit application fees. In FY 2017-18, the conventional well permit application fee revenue was \$76,973. The revenue collected from the fees represents less than 0.5% of the Program’s annual operating costs. Further, the average conventional well permit fee accounts for between .14% and .3% of the cost to drill a conventional well. With the fee increase included in this rulemaking, the unconventional well permit application fee would cost .16% of the cost to drill an unconventional well.

Based on the information above, the one-time nature of the well permit and Program costs, the Board decided not to increase the conventional well permit application fees. The determination to increase only unconventional well permit application fees and not conventional well permit applications is (1) within the Board’s granted authority under Section 3274 of the 2012 Oil and Gas Act to promulgate regulations to establish a permit application fee under Section 3211(d) of the 2012 Oil and Gas Act for each application for a well permit which bears a reasonable relationship to the cost of administering the 2012 Oil and Gas Act, (2) advances the purposes of the 2012 Oil and Gas Act in Section 3202 of the 2012 Oil and Gas Act, and (3) is not contrary to the express language in the 2012 Oil and Gas Act.

As such, the Board asserts that the existing conventional well permit application fees and the increase fee for unconventional well permit established in the final-form rulemaking bear a reasonable relationship to the cost of administering the Oil and Gas Program for both industries.

New Fee Will Negatively Impact Small Businesses & Pennsylvania’s Competitiveness

Some commenters expressed concern that the increased unconventional well permit application fee would negatively impact Pennsylvania small businesses and the Commonwealth’s ability to compete for business compared to other gas producing states.

In developing the rulemaking, the Board thoroughly considered the impact of raising fees on companies engaged in unconventional natural gas extraction that qualify as small businesses and what impact that could have on Pennsylvania’s competitiveness for future business. While a majority of the 80 unconventional natural gas extraction operators that will be impacted by this rulemaking qualify as small businesses, the increased unconventional well permit application fee will now account for .16% of the cost to drill an unconventional well that costs approximately \$8 million to drill. Furthermore, the Marcellus and Utica Shales are the premier shale gas plays in the United States with Pennsylvania being the premier state in which to drill these wells. While the well permit fee in Pennsylvania will be higher than in other states, other state regulatory agencies receive significant funding from a severance tax to fund their oil and gas program operations and charge fees for a variety of activities other than well permit applications.

Due to the relatively small percentage that the well permit application fee will cost unconventional operators in the scheme of developing a well and the fee structure that Pennsylvania has compared to other states, the new unconventional well permit application fee will not negatively impact unconventional operators that qualify as small businesses or harm Pennsylvania's ability to be competitive with other gas producing states.

New Fees will not Assure Faster Permit Review Times

Commenters contended that the new fee will not result in faster permit reviews, which are the greatest challenge faced by the Department, and that additional permit reviewers should be prioritized over other staffing needs.

The Board acknowledged that the Oil and Gas Program was struggling to meet permit review timeframes in 2017. This was a direct result of the reduction in staff by 36 positions in response to a lack of revenue from well permit fees. To address this shortcoming, the Program reorganized the Office of Oil and Gas Management to create three new management positions to oversee statewide subsurface and surface permitting. The Program also reclassified certain vacant positions to well permit geologist positions. The well permit review timeframes then improved. For example, in the Southwestern District Office, the well permit review timeframes decreased from over 100 days to an average of approximately 35 days. For Erosion and Sediment Control General Permits, the review times decreased from more than 230 to approximately 125 days.

As discussed above, the Program estimates that additional 12 permitting staff is needed to further improve review timeframes. The fee increase in this final-form rulemaking is to sustain the Program at current staff levels and operating costs. The other sources of revenue, including conventional well permit application fees and the \$6 million distributed to the Department from the Act 13 Impact Fees, provide a funding buffer in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections. If that happens, the Program will need these other revenue sources to sustain the Program. If not, these funds will be allocated for needed program enhancements, restoring staff complement and adding necessary staff to administer the 2012 Oil and Gas Act and its implementing regulations. Because of new permit review tools and mobile inspection tools, the Program will continue to evaluate staffing and hire staff when necessary and when funds are available.

H. Benefits, Costs and Compliance

Benefits

The increased unconventional well permit application fee revenue will be used to sustain the Program at current staff levels and operating costs in order to administer the 2012 Oil and Gas Act and ensure the responsible development of oil and natural gas in this Commonwealth.

As long as the Department receives the projected number of unconventional well permit applications that form the basis of this final-form rulemaking in order to sustain the Program at

its current staffing and operating costs, the other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 (relating to Unconventional Gas Well Fee) currently allocated to the Program, can be used to restore the Program to a full staff complement of 226 people, hire necessary additional staff and fund program enhancements.

Compliance costs

The fee paid for unconventional well permit applications is currently a \$5,000 fee for each nonvertical unconventional well and \$4,200 for each vertical unconventional well permit. The proposed fee increase is \$12,500 for all unconventional well permit applications. This is an increase of \$7,500 for each nonvertical unconventional well application and \$8,300 for each vertical unconventional well application. The Department assumes that if approximately 2,000 well permit applications are received annually the final-form rulemaking would result in an additional annual incremental permit application cost of \$15 million to the regulated community.

This final-form rulemaking does not require new legal, accounting or consulting procedures.

Compliance assistance plan

The Department plans to educate and assist the public and regulated community in understanding the proposed requirements and how to comply with them. This outreach initiative will be accomplished through the Department's ongoing compliance assistance program. Permit application forms and instructions would be amended to reflect the new fee structure.

Paperwork requirements

This final-form rulemaking does not create any additional paperwork requirements. Minor changes to the unconventional well permit application form, Permit Application to Drill and Operate an Unconventional Well (Document # 8000-PM-OOGM0001BU), will be necessary to implement this final-form rulemaking and a draft version of that form was submitted to IRRC.

I. 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 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. The anticipated increased revenues would allow the Department to continue providing adequate oversight of the oil and gas industry in this Commonwealth, ensuring continued protection of the environment and the public health and welfare of the citizens of this Commonwealth.

J. Sunset Review

The Board is not establishing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary. In addition, in accordance with §§ 78.19(e) and 78a.19(b), the Department will evaluate these fees and recommend regulatory amendments to the Board to address any disparity between the Program income generated by the fees and the Department's cost of administering the Program with the objective of ensuring fees meet all Program costs and the Program is self-sustaining. This report and any proposed regulatory amendments will be presented to the Board no later than three years after the promulgation of the final-form rulemaking.

K. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on July 2, 2018, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to IRRC and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

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 this final-form 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 _____, 20__, 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 _____, 20__ and approved the final-form rulemaking.

L. Findings

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, 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) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 48 Pa.B. 4100.
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

M. Order

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

- (a) The regulations of the Department, 25 Pa. Code Chapter 78a, is amended to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this regulation 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 regulation to IRRC and the Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this regulation and deposit them with the Legislative Reference Bureau as required by law.
- (e) This regulation shall take effect immediately upon publication in the Pennsylvania Bulletin.

PATRICK McDONNELL, Chairperson
Environmental Quality Board