
**Bureau of Mining Programs**

# COMMENT AND RESPONSE DOCUMENT

## Noncoal Mining Clarifications and Corrections

25 Pa. Code Chapter 77
51 Pa.B. 1519 (March 20, 2021)
Environmental Quality Board Regulation # 7-554
(Independent Regulatory Review Commission #3291)

## INTRODUCTION

On November 17, 2020, the Environmental Quality Board (Board) adopted a proposed rulemaking concerning revisions to 25. Pa. Code Chapter 77 (relating to noncoal mining). The amendments provide updates and clarifications to the requirements for mining noncoal minerals in Pennsylvania. Chapter 77 was finalized in 1990 to implement the Commonwealth's Noncoal Surface Mining Conservation and Reclamation Act. Since 1990, the Department of Environmental Protection's (Department) experience in implementing the noncoal mining regulatory program has uncovered several issues that require clarification of the Chapter 77 regulations. Many of the revisions in this rulemaking are administrative in nature. However, there are several technical revisions, including a change allowing an increase in air blast level for blasting, extending the time to activate a permit from three years to five years, setting a threshold for the amount of material that may be extracted during exploration, and identifying the circumstances when a permit revision is needed.

## PUBLIC COMMENT PERIOD

On March 20, 2021, the proposed rulemaking was published in the *Pennsylvania Bulletin* at 51 Pa.B. 1519, opening a 45-day public comment period that closed on May 4, 2021.

During the public comment period, the Board received comments from four organizations. The Independent Regulatory Review Commission (IRRC) submitted comments on June 3, 2021. The complete list of commentators is provided below.

In assembling this document, the Board has addressed all pertinent and relevant comments associated with this rulemaking. For the purposes of this document, comments of similar subject material have been grouped together and responded to accordingly.

All comments received by the Board during the public comment period are posted on the Department's eComment website at https://www.ahs.dep.pa.gov/eComment/. Additionally, copies of all comments are available on IRRC's website at http://www.irrc.state.pa.us by searching for Regulation # 7-554 or IRRC # 3291.

**Comment & Response Document**
**Noncoal Mining Clarifications and Corrections Proposed Rulemaking**
**Chapter 77**

## Commentators

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4. Maya K. van Rossum, the Delaware Riverkeeper
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## Comments and Responses

***Exploration***

**1. Comment**: A commentator states that for exploration by excavation, the proposed language [in § 77.109(d)] will require a permit or permit waiver. If less than 20 tons are excavated, no detailed information needs to be submitted to the Pennsylvania Department of Environmental Protection (Department). And if greater than 20 tons is proposed to be excavated, detailed information must be submitted to the Department, along with justification for why more than 20 tons must be excavated. With justification and approval, up to 1,000 tons can be removed. The Commentator asserts that "this means that 20-1000 tons can be excavated without a mining permit and its related regulatory and compliance controls". Any amount of excavation and removal should be covered by the same regulation and compliance controls as all other noncoal mining activity. **(2)**

**Response:** Exploration by excavation may be authorized by a permit or through acknowledgment by the Department of a permit waiver. Previously, regulations did not provide a clear volume that could be removed under a permit waiver for testing and analysis of noncoal properties. The revised language allows a small amount (20 tons is about one truckload) to be removed under a permit waiver. Additional details are not required due to the minimal impact of that scope of earth disturbance. Larger amounts, up to the 1,000-ton threshold, must include a justification for the estimated volumes needed for testing and analysis. Exploration activity is included in the definition of "noncoal surface mining activities" in § 77.1; therefore, exploration activity is still subject to the environmental protection performance standards established in the regulations. The performance standards include the requirements to maintain the distance limitations, to protect streams and wetlands under § 77.109(f), and to conduct reclamation through grading to approximate original contour and revegetation under § 77.109(h), which are the same reclamation standards as those activities conducted under a permit.

Please refer to the response to Comment 3 below for further discussion of the thresholds.

**2. Comment:** IRRC and a commentator express concern that the new rule change proposes to allow excavation cuts and pits, including those resulting from exploration blasting, to remain unreclaimed. Previously, all excavation cuts and exploration high walls had to be reclaimed to less than a 35-degree slope. The Commentators contend that this will result in dangerous environmental situations. The reason stated for the change is that now only 1,000 tons will be excavated. The Commentator states that this is an unacceptable justification for creating such a dangerous risk to communities surrounding the project sites.

IRRC also asks that the Board explain how removing this provision is consistent with the purpose of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act) and protects the public health, safety and welfare. **(2, 5)**

**Response:** Section 77.109(h) requires reclamation through grading to approximate original contour and revegetation. Excavation from exploration activities is subject to the same standard as excavation via a full permit. The operator cannot leave an open pit or highwall but must

regrade and replant the area disturbed. The revised language removes the reference to the 35-degree slope, which was an alternative reclamation requirement. The 35-degree slope requirement is typically impractical considering the small scale of the excavation for exploration. The revised requirement to regrade to meet the approximate original contour creates a higher standard of reclamation that is more protective of public health, safety and welfare than the relatively steep 35-degree slope requirement.

**3. Comment:** IRRC and a commentator are concerned that 20-1,000 tons can be excavated without regulatory oversight and compliance monitoring. The Commentators assert that excavation and removal of only a few pounds of materials can cause irreparable impacts to streams, wetlands and ecosystems. It is the Commentator's belief that any amount of excavation and removal should be covered by the same regulation and compliance controls as all other noncoal mining activity.

Further, IRRC points out that the Board explains in the Preamble and RAF that "20 tons is a relatively small amount, representing one truckload of material." It further states that the 1,000-ton threshold was based on the "the 200-ton minimum requirement of the Department of Transportation (DOT) specifications for certification in Bulletin 14 with the recognition that more than one size of material may need to be produced from a particular mine." It is unclear how the Pennsylvania DOT's Bulletin 14 was used to determine the appropriateness of the upper threshold.

The Board should explain how the 200-ton minimum requirement as specified in the DOT Bulletin 14 relates to the 1,000-ton upper threshold. **(2, 5)**

**Response:** Exploration activities are still subject to regulatory oversight and compliance monitoring. This rulemaking does not change these requirements. Environmental and safety considerations are not waived even if the requirements for a full permit are waived for exploration. Exploration is a small operation; however, if an operator seeks to remove material from an exploration area, the operator must first obtain a permit waiver from the Department, which the Department grants after considering the operator's justification for the amount of material to be removed and the environmental impacts of the exploration method. At every point in the exploratory process, the Department maintains oversight over the exploratory actions and is capable of monitoring compliance with the exploratory practices it has approved after a determination has been made that the approved activities are protective of the environment.

As noted in existing § 77.109, and left unchanged by this final-form rulemaking, a person conducting exploration activities must observe the same distance limitations as for any other noncoal surface mining activity, must minimize environmental impacts on roadways and vegetation, must provide erosion controls for excavated areas, and must avoid disturbance of wetland areas.

In response to the portion of the comment regarding thresholds, the Department has included additional explanation in the Preamble to this final-form rulemaking to explain how the 20 ton and 1,000 ton thresholds were derived through discussions with the Aggregate Advisory Board (AggAB) Regulatory, Legislative and Technical Committee. A permit waiver may be granted for

noncoal exploration activities where less than 20 tons of material (approximately one truckload) will be removed. This minimum amount of material is used to determine commercial viability of the mineral resource in several cases. No additional justification is needed for removal of this minimum amount. Subsection 77.109(d)(2) requires justification by the applicant for any amount above the 20-ton threshold. The maximum amount will not exceed 1,000 tons, and this upper limit is not intended to be the "default" amount that can be removed under the exploration waiver. The justification must be related to the amount of material needed to provide valid test results for commercial use of the aggregate materials. A primary commercial use for aggregate materials mined in Pennsylvania is for construction of roadways. Aggregate specifications are set in this Commonwealth by the Pennsylvania Department of Transportation (PennDOT). The 1,000-ton maximum was identified by industry stakeholders in accordance with PennDOT specifications for aggregate producer certification (Bulletin 14), which is a publication by PennDOT for aggregate producers that establishes Pennsylvania's framework for testing and classifying aggregate type (for example, fine vs. coarse) and quality. Bulletin 14 states that a 200-ton minimum of processed and stockpiled material is the source for qualification samples for each aggregate size. Since mining operations often produce multiple sizes of aggregate, more than one test is typically needed during exploration. Consequently, multiple stockpiles of 200-tons may be produced during exploration activities. The threshold of 1,000 tons will allow operators to conduct up to five tests on different 200-ton piles. Therefore, the Department has tied the operator's scope for exploration to the anticipated use of the material. By using the two stated thresholds of 20 – 1,000 tons, the Department creates a structure for sufficient extraction of material while minimizing both the extent of earth disturbance and the burden on the operator.

This size threshold provides a discrete upper limit to the amount of mined aggregate that may be extracted without a permit for testing purposes and is rationally related to the bare minimum tonnage needed to adequately test the mined aggregate.

***Permit Activation Period***

**4. Comment:** A commentator asserts that the activation time should remain what it is, three years. Currently, if an operator cannot, or will not, start mining by five years, they can request an extension or reapply for a permit renewal for the same operation. The reason stated for this change is that five years better coincides with the five-year limit of a NPDES permit. However, surface coal mining permits also have five-year NPDES permits and must activate mining within three years of the permit being issued or the permit is revoked.

Extending the period for beginning operations creates the dangerous scenario in which changes to local environmental or hydrological conditions have occurred since the permit was issued. Any of those new, and potentially very significant, changes would not be covered or enforced by the issued permit. The practice of obtaining permits and then waiting several years to start mining is so that the operator can wait for the market price of the mined material to increase. Companies will often get several permits and then not act on them. This is known as permit hoarding. The limit of a three-year start time was introduced years ago, for coal and noncoal, in order to try and stop this. Expanding this limit would walk back those protections and negate the regulations' earlier intent.

IRRC reiterates this comment questioning the Board's rationale for this proposed change from a three-year activation date to a five-year date. In addition to addressing the commentator's concerns, IRRC asked the Board to explain how the proposed change protects the public health, safety and welfare and is in the public interest. **(2, 5)**

**Response:** The Department believes there is a misunderstanding of the permit activation requirements. In the non-typical situation where a permit is not activated shortly after issuance, the area typically sits idle or only preparatory earth disturbance activities occur, such as clearing and road building. That preparatory activity presents minimal risk to public safety and the environment and can be properly controlled using the basic erosion and sediment practices presented in the permit application. Under the existing process, if a permittee has not initiated mining activities in three years, they submit a request to maintain their permits and justify that with legitimate business reasons, such as responding to unexpected market demands. The decision to grant or deny an extension is based on a review of the operator's justification, not a review of changes in local environmental or hydrologic conditions. The mine operator is required to provide notice to the Department within 90 days (§ 77.131) of when the site will be activated, which means when mineral extraction will occur. This facilitates the tracking of the status of the site and provides the opportunity for the Department to conduct an inspection as the operation begins. The revisions that extend the activation period to five years ensure that application materials, including environmental or hydrologic changes, will be updated with the five-year renewal. This process includes a review of potential impacts of the mining based on contemporaneous conditions in the vicinity of the mine site.

***Permit Revisions***

**5. Comment:** A commentator suggests that changes to the major revisions will allow operators to add additional support acreage to an existing permit as a major revision. Currently, this is done by an additional permit. However, this new revision means the Department's standard for review of additional support acreage will now be for a revision, not a new permit. This is a potential problem because revisions and permit modifications are reviewed using less stringent standards and issued more frequently than an original permit application. This change is likely to lead to increased amounts of support acreage that have less stringent requirements for management than is currently the case. This more intensive safeguard is necessary because support acreage that holds rock, debris, waste, and other minerals, often creates sediment pollution in local waterways. This potential hazard could be catastrophic and should be regulated with the most stringent standards in order to prevent increased pollution and loss of aquatic habitat.

IRRC notes that under subsection 77.141(e), additional considerations are identified for the review of revisions to add acreage for mineral extraction, including the effect on hydrologic balance, the relation to the existing operation and reclamation plan, and feasibility of approving a new permit for the additional area. IRRC also notes that a commentator suggests that other environmental features such as streams and wetlands should be included in this provision. **(2, 5)**

**Response:** The final-form rulemaking adds the definition of "Insignificant boundary correction," which includes the requirement that there be no significant difference in environmental impact. The policy of allowing insignificant boundary corrections exists as a

technical guidance document dated 2009 titled *Boundary Changes to Mining Permits* (563-2112-203), available on the Department's eLibrary website http://www.depgreenport.state.pa.us/elibrary/. Revisions to add additional mining or support acres would be reviewed as a major permit revision, as a new permit encompassing existing and new area, or as a separate stand-alone permit, as applicable, with all updated information as with a new permit application so that environmental protective standards are considered. The review of the effect on the hydrologic balance necessarily includes the evaluation of potential impacts to streams and wetlands because these are hydrologic resources. Review of the approved reclamation plan is also conducted.

The intent of this revision is to provide clarity and consistency for the process and standards for these types of permit revisions.

**6. Comment:** A commentator asks the Department to clarify why "insignificant boundary correction" is being allowed and how the Department defines "insignificant". Is it based on acreages of expansion of a quarry? Is it based on changes in mining depth? Is a boundary change insignificant if it is not an expansion into a stream or wetland or riparian buffer? Since this term is being used to determine if there is a requirement for a "major permit revision", this term on its face is concerning. Is this possibly just a paperwork change versus a change on the ground with the actual mine? Please clarify and define parameters for a revision being deemed "insignificant." **(4)**

**Response:** The final-form rulemaking adds the definition of "Insignificant boundary correction," which includes the requirement that in order to be "insignificant," there is no significant difference in environmental impact. This issue was also raised during the interaction with the AggAB. It is common for minor boundary changes to be requested by operators due to the long-term nature of these operations and the various factors that arise such as property issues, geological conditions, and operational necessities. For example, a small change to the acreage may be needed to correct a surveying error, to provide a proper barrier area, or other change that would be a benefit but would not be expected to create any environmental impact. It would not be in the public or the Department's interest to allow a major revision to be categorized as "insignificant" without basis. Large acreage additions or additional depth requests would not be considered "insignificant" because the environmental resources information, as well as the operations and reclamation plans, would need to be updated. See Technical Guidance Document *Boundary Changes to Mining Permits* (563-2112-203) for an elaboration on this topic.

***Civil Penalties***

**7. Comment:** A commentator states that they oppose the proposed rule change [in § 77.301(a)] that will expand the time period before a Civil Penalty is assessed from 30 days to 45 days. They also oppose the proposal to change the trigger date for a penalty being assessed from the date of the Department's knowledge of the violation to when the Notice of Violation was served on the operator.

The change from 30 to 45 days–and the change of the start date for when a Civil Penalty will be issued–will ultimately make it much easier for an operator to have committed a serious violation

without any consequences. This is because it extends the time period for an operator to commit a violation and attempt to remedy it before an NOV or Civil Penalty would attach to the operator's record. This creates additional repercussions because when an operator has outstanding violations, they would normally experience a block for issuing future permits. However, with this proposed change, an operator could have outstanding violations and could continue to receive new permits.

Changing the trigger date from 30 to 45 days to after a Notice of Violation was *issued*, and to when the violation was first *noticed* by the inspector (and included in the inspection report as required by the Department) is too lenient and will allow the operator extra weeks or more to keep his compliance record clean, when it is not. **(2)**

**Response:** The Department acknowledges the comment but corrects a misunderstanding expressed in this comment relative to the change to timelines for the assessment of civil penalties in § 77.301(a). The 15 days of additional time for the civil penalty process to be initiated will not have any effect on the operator's compliance record. The additional time allows for the Department to better manage the workflow and establish effective penalty amounts. The civil penalty process begins with an enforcement action that notes a violation. Then a proposed penalty amount is calculated. This is the time frame reflected in the proposed revision. After the proposed penalty is provided to the violator, they have an opportunity to request a conference. After this process runs its course, the final penalty is established. The existing 30-day time frame is particularly limiting in cases where a violation is the subject of escalating enforcement actions.

In the case of notices of violation (NOV), which generally address less serious violations, a civil penalty is typically not assessed. However, if the violator fails to comply with requirements of an NOV, then another enforcement action (an order) will be issued. A civil penalty will be associated with this order. Under the current rule, the proposed assessment would need to be sent within 30 days of the identification of the violation noted in the original NOV. The 30-day time would likely have passed by the time the follow up order is issued. The proposed revisions provide the Department time to determine the most appropriate civil penalty. While the civil penalty process is triggered by an enforcement action, the civil penalty and enforcement action are managed on separate tracks. The civil penalty process has no impact on the resolution of the enforcement action. Moreover, resolving the violation before the civil penalty is assessed does not stop the civil penalty process.

**8. Comment:** IRRC notes that in subsections 77.293(a) and (b), the Board proposes to add clarifying language that refers to each violation "of the act or any rule, regulation, order of the Department or condition of any permit issued under the Act" which leads to a cessation order. Under existing § 77.1 (relating to Definitions), "*Act*" is defined as the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 3301—3326). The Board proposes to amend § 77.291 (relating to Applicability) to specify the statutes for which violations of the subchapter are applicable to assessments of civil penalties. It includes Section 21 of the Act (52 P.S. § 3321) and Section 605(b) of The Clean Streams Law (35 P.S. § 691.605(b)). For consistency, should §§ 77.293(a) and (b)(1) be amended to include both of the statutes contained in § 77.291? **(5)**

**Response:** The reference to the Clean Streams Law was included in § 77.291 to clarify for the regulated community that noncoal mining permits are issued under both the Noncoal Act and The Clean Streams Law. See 35 P.S. § 691.315 (prohibiting operation of a mine or allowing discharge from a mine without a permit); 52 P.S. § 3307 (prohibiting operation of a noncoal surface mine or allowing discharge from a noncoal surface mine without a permit). As a result, violation of a noncoal mining permit can be a violation of both The Clean Streams Law and the Noncoal Act. Subsections 77.293(a) and (b) are written to match the current statutory maximum civil penalties for noncoal violations allowed under the Noncoal Act. See 52 P.S. § 3321. This topic was the subject of discussion with the AggAB which suggested an amendment to emphasize the requirements under the Noncoal Act.

In response to this comment, the language in subsection 77.293(a) has been revised to reference The Clean Streams Law as suggested. For completeness and clarity, the maximum penalties listed under The Clean Streams Law were also added to each subsection dependent on whether the violations resulted in a cessation order (§ 77.293(a)) or only a civil penalty (§ 77.293(b)). This additional language does not change the current practices for assessing penalties. Also, the citation in § 77.291(b) has been revised from Section 605(b) of The Clean Streams Law (35 P.S. § 691.605(b)) to Section 605 of The Clean Streams Law (35 P.S. § 691.605) because the entire section, including subsection (a), is applicable.

***Blasting***

**9. Comment:** IRRC asks that under circumstances where the Department has determined that a higher air blast level may be appropriate, if the Board considered amending § 77.563 (relating to Public notice of blasting schedule) to require the person conducting the mining activities to inform residents, local governments and public utilities within close proximity of the blasting operation about the exception to the maximum decibel level. The Board should submit a revised Preamble and RAF, in particular block #18, that discusses the impact of allowing a higher threshold on the regulated community, but also on residents, local governments and public utilities surrounding the blasting operation. **(5)**

**Response:** The current public notice of blasting schedule does not include reference to decibel levels and the Department does not believe altering the current public notice requirements in § 77.563 are needed to protect the public. The Department must decide on a case-by-case basis, and in consideration of the nearest homes, buildings, or other structures, if alternative decibel levels will be allowed. A higher threshold will only be approved when evaluation by the Department demonstrates that doing so does not permit a public nuisance, and the RAF has been amended as requested by IRRC to clarify this.

**10. Comment:** A commentator noted that the proposed rule change in § 77.564(f)(2) will allow higher decibel blasts as an alternative. The current rule allows for an alternative of a lower decibel blast. The commentator asserts that higher decibel blasts increase the chances of property damage due to blasting that could create more of a disruption and more unsafe scenarios in our communities. The lower blasting limits must remain unchanged in order to prevent potential bodily injury and property damage. **(2)**

**Response:** This section on alternative air blast was revised to clarify the maximum air blast limit of 133 dBL and to allow exceptions to that maximum value under certain conditions. The change of "lower" to "alternative" was made to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allow for an exception for a higher air blast level to be approved for noncoal permits. See § 211.151(d) and (e). In some limited instances, a higher air blast level may be appropriate where it is clear that the structures will not be subject to damage with the higher threshold. Examples of this situation in practice include utility towers or buildings without windows that will not be affected by the higher air blast level. The alternative language allows for either a decrease or an increase in the air blast level that may be warranted based on site-specific circumstances including geographical considerations which may enhance air blast effects. The factors that the Department must consider in evaluating alternatives include potential damage and whether the alternative will create a public nuisance.

Specifically, if a limit higher than the existing 133 dBL air blast limit (based on the recommended safe limit established by U.S. Bureau of Mines RI 8485) is granted, an evaluation of the attenuation of the air blast is conducted and, where necessary based on distances of structures, additional seismograph monitoring would be required to ensure that the 133 dBL regulatory limit is not exceeded at other buildings or structures. For example, the operator can design for a higher limit because no vulnerable structures would be affected if the closest structure is a utility tower, which is not affected by a higher airblast limit.

**11. Comment:** Regarding proposed amendments to § 77.564, a commentator states that permitting any upward departure from the current 133 dBL maximum air blast sound-level to an unknown maximum neither meets Constitutional requirements or as a matter of law can constitute a "minimal impact," adequate "sound reduction," or adequate pollution prevention as an unknown. The Commentator objects to the Department's conclusion that the proposed rulemaking "has minimal impact on pollution prevention" and believes that allowing a lessor-owner to request a lessee waiver without notifying the lessee of numerous health impacts related to noise, does not protect public health, mitigate pollution, or meet Constitutional requirements.

The commentator provided several examples of Federal and State statutes, including the Federal Clean Air Act and the Federal Pollution Prevention Act, that require the abatement of noise pollution and ensure the appropriate use and enjoyment of private property by the landowner, and suggested that the change in this final-form rulemaking to allow for higher blasting levels in limited circumstances may be in violation of such statutes. The commentator further went on to provide examples of adverse health effects as a result of exposure to noise pollution and asserted that even small increases in sound emissions represent significant differences in perceived sound-level. **(3)**

**Response**: The Department considers noise as part of the air pollution control plan submitted by the operator. Air blast, however, is not considered "sound." Air blast is a measure of air pressure waves, not a measure of sound, loudness of sound, or sound intensity. The air blast level has no bearing on the perception of loudness. A blast may "sound" loud and yet produce low levels of air overpressure, or alternatively, a blast might have little or no perceptible sound and yet produce an air pressure wave that is over the regulatory limits. The concept behind air blast

regulation is not to reduce the sounds people hear, but to limit structural response (shaking) to passing air pressure waves, which, if too high, could damage a structure.

Moreover, the alternative limit provision in this rulemaking does not alter the Department's obligation to consider noise from a proposed mining operation and determine if operational mining noise will constitute a public nuisance under § 1917-A of the Administrative Code of 1929. See *Plumstead Twp. v. DER*, 1995 EHB 741, 789-90; *see also Chimel v. DEP*, 2014 EHB 957, 1000. The Department will continue to consider noise in a new application for a mining operation, in a proposed revision or expansion of mining for an existing operation.

The Department disagrees with commentator's assertion that the Department would violate Federal or State constitutional law, the Federal Clean Air Act, the Federal Pollution Prevention Act, or allow a regulatory or physical taking, when it permits air blast above 133 dBL under its current regulatory structure or the modifications in this rulemaking. Pennsylvania's regulatory limit (133 dBL) for air blast comes from the recommended safe limit established by U.S. Bureau of Mines RI 8485. The limit was scientifically established to prevent air blast overpressure from damaging the most vulnerable structures—wood framed dwellings. Other buildings are more resistant to damage from air overpressure. The 133 dBL limit was also set in consideration of annoyance. Most air blasts from quarry blasting have peak levels of less than 120 dBL. Although levels up to 125 dBL are not uncommon, levels approaching the regulatory limit of 133 dBL are rare but when they occur, Department Blasting and Explosives Inspectors typically investigate. Most blasts are barely audible, of very short duration, occur during daylight, and only occur a few times a week. Therefore, quarry blasting does not constitute noise pollution.

These comments regarding the alternative air blast limits do not consider the design and review of blast plans specific to the mining situation. The "unknown maximum" described suggests that the Department would have no upper limit and would be inconsiderate of the health of persons nearby. This is an incorrect characterization of both existing and proposed regulation and procedures. The blast plans are individually reviewed by specialized blasting inspectors who confirm the distances and calculations related to the amount and type of explosives to be used, the process of detonating the blast (including warning signals and public notice), the monitoring for ground vibration and air blast, and the data submitted after the blast to assess compliance. The blast plans are designed to not cause damage or a nuisance specific to the area that may be affected, and to ensure that the 133 dBL regulatory limit is not exceeded at nearby buildings or structures.

**12. Comment:** A commentator objects that allowing a lessor-owner to merely request of a lessee a signed waiver to the air blast requirements, without the lessor-owner first notifying the lessee of the numerous adverse health effects linked to noise, and claims that such an allowance does not protect public health, mitigate pollution, or meet Constitutional requirements. **(3)**

**Response:** The rulemaking does not change the allowance in § 77.564(f) for a lessee to execute a waiver from meeting the air blast limitations. The Department disagrees that occasional and controlled noise and air blast from regulated blasting operations constitutes a risk to public health in the manner asserted by the commentator and believes the current waiver requirement in

§ 77.564(f) is adequate to protect public health. See also the responses to Comment 11 and Comment 14.

**13. Comment:** A commentator suggests revising § 77.564(f)(2) to read: "The Department may specify lower maximum allowable air blast levels than those in this subsection for use in the vicinity of a specific blasting operation." **(3)**

**Response:** The comment suggests a reversion to the existing language. As explained in the response to Comments 10 and 11, the proposal to change "lower" to "alternative" is consistent with existing requirements in § 211.151(d) and (e), and allows for higher levels under limited, justified circumstances. The proposed change also continues to allow for the reduction of the air blast limit where needed and appropriate. The change proposed by this final-form rulemaking is a starting point from which to begin regulating activity under typical circumstances. Other conditions may warrant alternative levels that may be higher or lower than the base standard given in the regulations.

**14. Comment:** A commentator suggests adding § 77.564(f)(4) to read: "Notwithstanding the air blast level specified in this section, the person who conducts the surface mining activities shall actively minimize and abate noise from air blasts to minimize noise pollution on properties not owned by the person who conducts the surface mining activities." **(3)**

**Response:** The Department believes that this change is not warranted. The Department includes the following information to address the misperception inherent in the assertions that blasting noise is a health hazard to people outside the blast area or in nearby structures.

Air blast is an impulsive wave generated by an explosive blast resulting from the rock breakage and mass movement. Air blast from confined, surface-mine blasts consists mostly of acoustic energy below 20Hz (concussion), where human hearing becomes less acute. (Humans can detect sound in the frequency range of about 20 to 20,000 Hz.) Air blast (air overpressure) from mine blasting is measured with microphones that respond at frequencies between 4 and 125 Hz. This is the range important for preventing structure damage. Noise is measured using microphones which are "A-weighted" which are designed to capture the frequencies of human hearing (predominately between 1,000 to 5,000 Hz).When observed outside, a blast routinely sounds like a low rumble resulting from the low frequency components of the event. Inside a structure, the ground vibrations and air blast cause the structure to vibrate that then causes the structure to produce noise and objects on walls to rattle. These sounds are generated from the structure-response rather than blast-induced noise.

Blasting events typically have a duration of one second or less. Quarries may blast two to three times a week, during daylight hours. Most quarries blast about once a week. This results in up to 3 events a week of less the one second. At greater distances or behind the rock face, dispersion and refraction of the waves mask the individual pulses from each blasting hole and the blast timing becomes less evident.

For further information about blasting regulations and design, the Department recommends the publication "Citizen's Guide to Explosives Regulations in Pennsylvania" (5600-FS-DEP3144)

and the "Pennsylvania Blaster's License Training Manual" (5600-MN-DEP4778) which are available on the Department's eLibrary at http://www.depgreenport.state.pa.us/elibrary/ under Publications > Mining Programs.

**15. Comment:** A commentator requests that § 77.564(f) be revised to read "Air blasts shall be controlled so that they do not exceed the air blast level specified in this subsection at a dwelling, public building, school, church or commercial or institutional structure, unless the structure is owned by the person who conducts the surface mining activities and is not leased to another person. After providing written notice to the lessee of the adverse health effects linked to noise and allowing the lessee to revoke informed consent at any time, and providing proof of such written notice to the Department upon request, the lessor may obtain written, informed consent and waiver from lessee relieving the operator from meeting the air blast limitations of this subsection." **(3)**

**Response:** This comment assumes that all structures have the same response to an air blast, which is not the case. For example, an older wood framed building with large glass windows is not the same as a modern school or office building made of brick and steel with reinforced windows. Where alternative limits are necessary, the Department will establish limits suitable to the structure based on site-specific circumstances.

As discussed in responses to Comments 10, 11, 12, 13, and 14, the air blast levels already consider the potential for damage, nuisance or other adverse effects to structures and persons.

**16. Comment:** A commentator requests that the Board add § 77.564(f)(5) to read: "Affected owners or lessees of properties not owned by the person who conducts the surface mining activities, including government entities, may directly petition [the] Department to specify lower maximum allowable air blast levels than those in this subsection for use in the vicinity of a specific blasting operation." **(3)**

**Response:** The Department already considers the existence of historic or sensitive structures when evaluating and approving mining permits and blasting plans. The Department currently responds to citizen concerns regarding the effects of air blast on their property or property where they may reside. Therefore, the suggestion for petitioning is an unnecessary addition.

***Public Participation***

**17. Comment:** IRRC and a commentator observe that the *Pennsylvania Bulletin* notice publish date will be changed from after the date of receipt of the permit application to the date after the permit is accepted by the Department. This will effectively shorten the time period that the public has to prepare and submit questions and comments to the Department about the permit application. The time period for public involvement and the public's opportunity to inquire about the application will be shortened, possibly by months. This is an unacceptable limitation to the public's right to notice and comment of these permits.

The proposed rule will mean that a public hearing or informal conference must be held within 60 days after the close of the public comment period. No longer will a public hearing or informal

conference be held based upon the date of the public request for a hearing or conference. In addition, only one hearing or informal conference meeting will be held by DEP, no matter if different groups or organizations request a hearing or conference based on totally different issues with the permit. This, too, is an unacceptable limitation to the public's right to participate in the regulatory process. **(2, 5)**

**Response:** Public notice for applications is accomplished in two ways - the applicant must publish a newspaper public notice (once a week for four weeks) and the Department must publish notice in the *Pennsylvania Bulletin*. The proposed change only relates to the notice in the *Pennsylvania Bulletin*. The length of the public comment period is not being shortened because the newspaper public notice requirement is being maintained, and the requirement in § 77.123 that a request be filed 30 days from final newspaper notice has been left unchanged, The proposed change is intended to avoid providing notice in the *Pennsylvania Bulletin* for applications which are not ultimately accepted for review.

The Department also notes that, under this proposed regulation, local government entities and agencies potentially affected by a proposed activity would have 30 days from publication in the *Pennsylvania Bulletin* to file a request for an informal conference. To the extent the new *Pennsylvania Bulletin* requirement staggers notice to the public from the initial newspaper publication noting the application to the later *Bulletin* notice indicating Department has accepted the application, this, in fact, creates a longer window for interested parties to request an informal conference, not a shorter one, because these request deadlines will no longer run concurrently. Moreover, effective public participation can be achieved through a single public meeting for each application. This has been amply demonstrated in past practice. Outside of the public meeting process, there are opportunities for the public to provide written comments during the span of permit review.

**18. Comment:** IRRC poses the following questions:

> (1) Section 77.123(a)(2) provides that a person having an interest that is, or may be, adversely affected may request in writing that the Department hold a public hearing or informal conference on an application for a permit. The request must be filed with the Department within 30 days after the publication of the newspaper advertisement placed by the applicant or within 30 days of **receipt of notice** by the public entities to whom notification is provided under § 77.121(e). Emphasis added. Since the Board is proposing to eliminate the existing requirement for these notices to be delivered by registered mail and is not updating the requirement for the notice to be delivered by certified mail, how will the Department verify receipt of written or electronic notice to each local government in which activities are located, as well as Federal, State and local government agencies with jurisdiction over or an interest in the area of the proposed activities? §§ 77.121(e)(1) and (2).
>
> (2) Are requests for a public hearing or informal conference on an application for permit by persons having an interest accepted electronically?
>
> (3) What are the instances where electronic notices are not appropriate?

(4) In situations where electronic notices are not appropriate, will notifications be sent via first class mail? **(5)**

**Response:** The Department recognizes that it has the responsibility to provide adequate notice and to provide documentation that the notice was provided. Under the Environmental Hearing Board's rules, the Department must demonstrate that a party received actual notice for all Department actions not published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52. No other Department bureau requires use of Registered mail, which is designed for mailing valuables and secure documents. As part of everyday business, each permitting office maintains physical and email address (where available) for the local municipalities and Federal, State, and local agencies that are notified of permit actions. This rulemaking change does not change a situation where the entities are not responsive to incoming correspondence. The Department processes continue to move to all-digital communication. As permitting moves towards an e-permitting platform, these notifications will be automated. If an email communication fails, the Department is notified and immediately attempts to correct the failure and route the communication. While every effort is made to accommodate the capabilities of the municipality, some prefer email notices and others do not. Where electronic notice is not preferred, the mail will be used. Certified Mail will continue to be used when it is necessary to demonstrate delivery. Additionally, all applications received and acted upon are published in the *Pennsylvania Bulletin* and the requirement for public newspaper notices is still continued under § 77.121(a), providing a non-electronic means for the public to be informed of the application.

A transition to electronic permitting in the future will likely result in a more direct communication with interested parties. The Department will also consider any future improvements in this direct notification process but notes that there are multiple other indirect ways that these parties can gain notice of the action, such as through alerts from the Department's web-based eNotice system at https://www.ahs.dep.pa.gov/eNOTICEWeb/.

The Department honors requests for public hearings or informal conferences for mining permits submitted via email.

**19. Comment:** A commentator points out that with the proposed changes, the name of the local government now will be required in public notice in newspaper. This could make it easier for the general readership of the newspaper to know approximately where the permit will be located and would create more effective notice for the public and increases their ability to meaningfully engage in the permitting and regulatory processes. **(2)**

**Response:** The Department acknowledges this comment. The change implements the new definition of "local government" but does not change the requirements.

**20. Comment:** A commentator expresses approval that public notice will now be required for any lateral or vertical change in operational mining plans, as this will require a major revision to the permit. This would be if the quarry operator decides to mine deeper or to mine laterally into acres that were permitted as adjacent surface support areas. This also creates more effective

notice for the public and increases their ability to meaningfully engage in the permitting and regulatory processes. **(2)**

**Response:** The Department acknowledges this comment. The intent of the proposed revision to the public notice requirements is to make it clearer as to when a public notice is required for a permit revision.

**21. Comment:** A commentator suggests that to ensure public notice is adequate, transfers and small permits both not be exempt from public notice in a newspaper. The commentator believes more public notice both in newspapers and electronically are critical to providing adequate notice for the public to engage in the process especially in light of the impacts and long life and operation of these mines. **(4)**

**Response:** Small noncoal permit applications, which are for operations that have limited area and extent for mining and land disturbance and limited extraction volumes, are exempted in § 77.108(f) from the public notice requirements in the existing regulations because of their insignificant potential effect upon the safety and protection of the life, health, property and the environment. However, transfers of large noncoal permits are subject to the public notice requirements. All permit decisions by the Department, however, do appear in the *Pennsylvania Bulletin.* The Department suggests any interested parties consult the weekly *Pennsylvania Bulletin* search functions to monitor any activities proposed or issued for their municipalities and counties.

**22. Comment:** IRRC points out that the Preamble states that Subsection (c) of § 77.142 is being added to clarify that unaffected areas to be deleted from the footprint of the permit may be approved without public notice. The Board explains that this also includes restored areas that have been disturbed only by exploration drilling. A commentator contends that this new subsection "appears to invite abuse, inasmuch as grading typically is associated with exploration of mineral resources."

In order for IRRC to determine whether a regulation is in the public interest it must analyze the text of the Preamble and proposed regulation, as well as the reasons for the new or amended language. The explanation provided is not sufficient to allow IRRC to determine if the regulation is in the public interest. IRRC asks the Board to explain in greater detail in the Preamble to the final-form regulation how the applicant will demonstrate that the area has not been affected by surface mining.

The description in the Preamble refers to "restored" areas. However, the language in the Annex does not reflect the same. The Board should make certain that the description in the Preamble of this section, and all sections, is consistent with the regulatory language in the Annex. **(4, 5)**

**Response:** The deletion of unaffected area or areas that have been incidentally affected by exploration is exempt from public notice.

Exploration drilling creates minimal disturbance and may be conducted without a mining permit. The area is subsequently sealed, regraded and revegetated upon completion of drilling.

The applicant demonstrates that an area is unaffected by submitting new maps. These new maps are reviewed by a field inspector to confirm that the area is eligible prior to the approval of the deletion.

The reference to restored areas is limited to those minor disturbances that were the result of exploration activities. Subsection (c) of § 77.142 does not specifically reference a restoration requirement; however, sealing of drill holes is a requirement of the new § 77.113(b). The Preamble has been edited accordingly to correctly reflect the language in the Annex.

***Findings***

**23. Comment:** In relation to the requirements in § 77.123, IRRC and a commentator observe that deleted from the new rule is the requirement that a report on the findings of the public hearing is to be completed 60 days after the hearing date. If the proposed changes are adopted, there will be no deadline for the issuance of the Department's report on a public hearing—except that it will be issued before or on the same day of the Department's decision on the permit application. This could then lead to a situation in which the public has no time to read or respond to report because it is issued at the same time as the permit. This negates the purposes of such reports and eliminates the ability of the public to meaningfully engage with this regulatory process.

IRRC suggests that based on the stated intent in the Preamble, they agree with the concern expressed by this commentator that the proposed change could lead to a situation in which the public has no time to respond to the report.

The actual language as proposed in the Annex differs from the intent described in the Preamble. As drafted, it appears that the summary report could be made available *prior to the approval or denial of the application or upon approval or denial of the application*. 52 P.S. § 3310(c) requires the Department to notify, within 60 days of the hearing or conference, the applicant of its decision to approve or disapprove or of its intent to disapprove. Presumably, the report under the new language would be made available to the public within this same time period.

Proposed subsection (e) lacks the clarity needed to establish a binding norm. The elimination of the existing time period for the Department to give its findings to the applicant and to each person who is party to the public hearing or informal conference is replaced with vague language. The new provisions are not only less clear, but represent a significant departure from the existing report's purpose and intended audience with little to no explanation provided by the Board. IRRC asks the Board to explain in greater detail the need for and its rationale for the proposed changes.

IRRC also notes that the amendments to subsection (e) make it inconsistent with the notification requirements under § 77.143(b)(8) (relating to *Mine permit renewals—general requirements*). What is the need for and rationale for differing notification requirements among permit applications and permit renewals? **(2, 5)**

**Response:** The summary report (that contains "findings") serves three purposes. First, the report documents the public's concerns expressed during a public meeting (any public hearing or informal conference) as part of the public record to show that the Department recorded and considered the concerns voiced in the public event. Second, the report provides responses to these concerns in the context of permit application information. Third, the report explains the action taken by the Department to issue or deny the application in response to public comments and concerns.

After the public meeting takes place and the Department reviews all comments, the next action by the Department is stated in § 77.123(f), "the Department will notify the applicant of its decision to approve or disapprove or of its intent to disapprove *subject to the submission of additional information*." (emphasis added). In most cases, the Department will ask the applicant to supply additional information in response to the public meeting comments.

Instead of issuing a report within a set timeframe that will contain incomplete information, the Department waits until the applicant provides additionally requested information and then crafts the findings (as part of the "summary report" document) based on the final version of the application that is acted upon by the Department. Therefore, the summary report resulting from a public meeting is completed and provided to interested parties in conjunction with the permitting action.

In response to this comment, the revised subsection § 77.123(e) was changed to "Reserved" and the revisions added instead as a new subsection (g) at the end of the section to better reflect the typical chronological order of steps.

A permit issuance or denial is not a "regulatory process" as stated by the commentator. The summary report is not subject to further commentary by the public. It documents previous public comments and represents a closure of the review process. The next step for engagement by any party in the permitting process would be the consideration of appeal of the permit action for which directions are provided in the decision notice issued with the permit action.

In response to the comment about the language in 52 P.S. § 3310(c), that section applies specifically to hearings or conferences on final bond release action only. Therefore, this time limit of 60 days would not apply to issuance of new or revised permits. The statute is silent regarding timelines for providing the findings or for taking a permit action in those situations even though the regulations reflect the 60-day post-public meeting for other permit actions. Section 77.242, regarding procedures for seeking release of bond, does not refer to § 77.123 regarding public hearings. Instead, § 77.242(f) explains the public hearing procedures for bond release. In that situation, the time limitations in 52 P.S. § 3310(c) would be applicable.

The Department further notes that these notification requirements are not inconsistent with the notification requirements under § 77.143(b)(8) regarding mine permit renewals. Proposed § 77.143(b)(8) states that the Department will "notify the applicant, persons who filed objections or comments to the renewal and persons who were parties to an informal conference held on the permit renewal of the Department's decision" to renew a mining permit. Both the current and proposed revisions to § 77.143 are silent as to any temporal requirements regarding renewals. So,

to be consistent, the notification to commenters on renewals will occur in conjunction with the Department's decision.

***Bonding***

**24. Comment:** A commentator points out that the Certificate of Deposit for collateral bonds will no longer have a maximum limit of $100,000. There will be no limit to the dollar amount required. This creates the possibility of increasing the collateral bonds to amounts that more accurately reflect the millions of dollars in potential damage that might occur from these operations, instead of simply deflecting the private operators damages on to the taxpayers. **(2)**

**Response:** Under the revision to § 77.224(c)(2) in the final-form regulation, there will be a limit on the amount of an individual Certificate of Deposit. This limit will be the maximum insurable amount by Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance Corporation, which is currently $250,000. This limit has no effect on the amount of bonds required as multiple certificates can be accepted.

***Miscellaneous***

**25. Comment:** A commentator objects to the conclusion that the Proposed Rulemaking "has minimal impact on pollution prevention." IRRC reiterated this concern. **(3, 5)**

**Response:** The preamble describes the pollution prevention impact as minimal because the proposed revisions of this rulemaking are primarily administrative and do not revise the existing and substantive requirements for obtaining and operating a noncoal permit or the associated environmental standards. In some instances, clarification was necessary, but the current requirements were not changed, and the level of protection achieved by these requirements will not be altered. For example, relating to exploration, the addition of § 77.113 implements the current requirements. The creation of the new section is intended to clarify the distinction between the requirements for when exploration involves extraction and when it is conducted strictly by drilling.

**26. Comment:** A commentator asks the Department to clarify from the Aggregate Advisory Board member list which member serving on the Board is from the county conservation district. **(4)**

**Response:** This comment is outside the scope of the proposed rulemaking; however, the Conservation District member of the AggAB is the representative of the Eastern Pennsylvania Coalition of Abandoned Mine Reclamation. The public is welcome to correspond directly with the AggAB with any further questions and/or attend the meetings of the Board.

**27. Comment:** A commentator observes that data was shared relating to EPA's review of Draft NPDES permits at an Aggregate Advisory Board Meeting. The commentator asked where the summary data for these EPA rejections is housed for review by the public to better understand the extent of concerns with these NPDES permits. **(4)**

**Response:** This level of detail regarding EPA review is outside the scope of the rulemaking. By way of clarification, EPA does not "reject" permits. EPA provides comment, objects, makes recommendations, or takes no action during their NPDES review period. The information about the EPA review of specific NPDES permits is in the permit files at the respective District Mining Office.

**28. Comment:** A commentator asks if the map of noncoal sites is available electronically for public review or posted on a website. If not, the commentator asks that the Board consider adding it so that the public has more readily available data and maps to help better understand the extent of impacts and engage in the permitting and public review process. The Department has developed helpful monitoring maps and online tools to assist in other programs. Providing this summary information and maps for mining in the state using story maps and other interactive mapping would be helpful to the public. **(4)**

**Response:** This comment is outside the scope of the proposed rulemaking. The location of industrial mineral facilities are available via eMapPA (https://gis.dep.pa.gov/emappa/)

**29. Comment:** A commentator points out that noxious and invasive plants continue to plague our natural resources and impacts from mines with disruption of soils certainly can lead to colonization of these invasive plants both during the life of the mine and after reclamation. An update to ensure all plants are included would benefit the Commonwealth's natural resources. **(4)**

**Response:** The final-form regulation includes the most recent definition of noxious plants in order to ensure compliance with the requirements of 3 Pa.C.S. Chapter 15 (relating to controlled plants and noxious weeds).

**30. Comment:** A commentator noted changes to § 77.51(c) (License requirement), measures to ensure complete details pertaining to company ownerships and regarding LLCs is an important change. The Commentator suggests that the Department change § 77.51(c)(2) to require a longer reporting period than 5 years preceding the data of application to have a broader view of the applicant's history with mines especially considering the long life of a mine. **(4)**

**Response:** The Department does not think it is necessary to make this change. The five-year look-back period has been effective at identifying the history of applicants and related parties. In addition to the self-reporting on an application, the Department maintains a database of mine operators and related parties that provides supplementary information considered by the Department in evaluating applications.

**31. Comment:** A commentator asks, since noncoal surface mining excludes mining via subsurface shafts and tunnels, why there is a reference to underground mining activities at p. 12 [§ 77.142(a)(2)]. **(4)**

**Response:** The reference to underground mining activities is included because surface activity associated with underground mining is part of the statutory definition of "surface mining." The proposed revision to the definition of "Noncoal surface mining activities" is limited to the addition of the phrase "ancillary and customary."

**32. Comment:** A commentator asks why the definition of "Noncoal surface mining activities" excludes dredging in streams, rivers, and Lake Erie, and if it would include Manor and Van Sciver Lakes. **(4)**

**Response:** The exclusion of dredging from the definition is based upon the statutory language found in the Noncoal Surface Mining Conservation and Reclamation Act. Dredging operations in Manor and Van Sciver Lakes would not be exempt from the definition of noncoal surface mining activities, unless one of the other exemptions would apply. The exclusions of rivers, streams and Lake Erie is presumed to be related to the need to maintain those waterways for navigation or related purposes where the primary purpose of dredging would not be commercial mineral extraction.

**33. Comment:** A commentator suggests that the words "and attained use, if higher than designated use" should be added to designated use and water quality in § 77.109(e)(2). The commentator states that the Department routinely ignores attained use in making determinations, despite the requirements of 25 Pa. Code Chapter 93. Thorough monitoring should be required to ensure the proper uses are reflected before any permit is issued.

IRRC comments that it will review the Board's response to the commentator's concern in determining whether the regulation is in the public interest. **(4, 5)**

**Response:** Section 77.109(e.1)(2) references noncoal exploration activities outside of obtaining a noncoal surface mining permit. It allows for a waiver of a full permit to conduct this limited activity. However, in response to this comment, this section has been revised from the proposed rulemaking to include reference to the existing and designated uses of the stream, which may be affected by exploration. This is consistent with water quality standards in 25 Pa. Code Chapter 93. Contrary to the commentator's assertion, the Department applies these requirements by evaluating the more stringent of the existing or designated use. Permit applications and exploration requests include the review of measure to be taken to protect the hydrologic balance of potentially affected waters.

**34. Comment:** IRRC and a commentator ask why exploration must avoid only wetlands, but not streams, ponds, springs, water supplies, per § 77.109(g)(3). **(4, 5)**

**Response:** The reference solely to wetlands in § 77.109(g)(3) was not a change made in this rulemaking. Wetlands are singled out because they are not otherwise protected elsewhere in the regulations. Streams are specified in the distance limitations referred to in § 77.109(f), so they must also be avoided. Ponds and springs are protected to the extent they are used as water supplies.

**35. Comment:** A commentator points out with respect to public information that it is available only at District Mining Offices. [§77.109(j)(1)]. All permit application information upon request should be available to the public electronically once permitting is done online. Previous discussion anticipates electronic permitting, but availability to public is not noticed. In the

electronic age it is critical these documents are readily available online to the public for better public engagement and review. **(4)**

**Response:** While this comment is outside the scope of the proposed revision, the Department notes that it is engaged in an effort to improve online access to documents and data as technology allows but currently not all permit information is available electronically.

**36. Comment:** A commentator asks about effects on other environmental features than hydrologic balance, such as streams and wetlands at § 77.141(e)(1). **(4)**

**Response:** The hydrologic balance includes all surface and subsurface water including streams and wetlands. See the definition in § 77.1. Therefore, information on all hydrologic resources are provided in the permit application and potential effects are evaluated.

**37. Comment:** A Commentator points out that water quality monitoring may be required over and above any NPDES requirements per § 77.532(c). **(4)**

**Response:** The proposed revision to § 77.532 is limited to updating the reference to Chapter 92a. Therefore, the comment is outside the scope of the proposed rulemaking. The Department requires additional monitoring as needed to demonstrate the protection of the hydrologic balance.

**38. Comment:** An industry trade group acknowledges the collaborative effort of the Department when clarifying and correcting these rules, and the scientific thinking and approach—while staying within the confines of the noncoal mining statute. **(1)**

**Response:** The Department acknowledges the comment.

**39. Comment:** IRRC points out that Section 5.2 of the RRA directs IRRC to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. When making this determination, IRRC considers criteria such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 5 of the RRA in the Regulatory Analysis Form (RAF). See 71 P.S. § 745.5 (a).

The Board indicates in its response to RAF #7 that many of the revisions in the proposed rulemaking are administrative in nature. However, the comments received in opposition to certain provisions, such as those affecting surface blasting requirements, permit terms, permit revisions, public notices of filing of permit applications and noncoal mining permit waivers contradict that characterization. The Board should revise its response to RAF #7 and the Preamble to include the significant changes in its explanation of the regulation. It should also include those significant amendments in its discussion of how the benefits of the regulation outweigh any costs and adverse effects (RAF #18).

The explanation of the regulation in the Preamble to the proposed rulemaking is not sufficient to allow IRRC to determine if the regulation is in the public interest. In most of the comments that

follow this section, IRRC asks the Board to provide more detailed information, such as why the amendments are needed. **(5)**

**Response:** The Regulatory Analysis Form and preamble have been revised to address these concerns. Many of the comments that are critical of the proposed rulemaking are based on misunderstanding of the current regulatory approach to noncoal mining. More detailed explanations are provided in the RAF to clear up these misunderstandings.

**40. Comment:** IRRC points out that relating to § 77.1 Definitions, *"Noncoal surface mining activities"* the Preamble states that clarifications are being made to this definition. However, it does not explain the purpose or need for adding "ancillary and customary." What are ancillary and customary activities? **(5)**

**Response:** The phrase "ancillary and customary" was inserted as a result of discussion with the AggAB and their Regulatory, Legislative and Technical committee where this phrasing was derived. The AggAB expressed concerns regarding common non-extractive activities that occur on the permitted areas that are closely associated with the extraction and processing of minerals, such as bagging, crushing, equipment storage, etc. The phrase was intended to clarify that these activities normally conducted to support the mining activity would be included in the definition and understood to be appropriately covered as activities on a mining permit. It is not possible to list all these potentially included activities, so this phrasing was derived. "Ancillary" is intended to connote activities that support the mining. "Customary" is intended to connote the usual or normal suite of mining-related activities. This addition provides a benefit to both the permittee and to the Department in that there is no dispute that non-extractive activities are appropriate to be covered on the areas of the mining permit and, as regulated under the permit, are then subject to pollution controls and bond release criteria under this Chapter. Additional clarification has been provided in the preamble.

**41. Comment:** IRRC comments that the Board is amending §§ 77.107 (relating to verification of application) and 77.121(e) (relating to public notices of filing of permit applications) to facilitate the submission of applications and electronic notices, where appropriate. Did the Board consider and reject making the information in §§ 77.109(c) and (j)(1) available, upon request, to the public in an electronic format? **(5)**

**Response:** Generally, the Department makes the information requested available in the most efficient form, and in electronic format whenever possible. While most application documentation can be submitted in or converted to digital storage formats, at this time, it is premature to require the documents to be exclusively available electronically. The Department currently accepts some coal mining activity applications through the ePermitting online application and continues to expand these offerings. The transition to managing all documents in electronic form will be accomplished incrementally as the program is expanded and permits are updated.

**42. Comment:** IRRC notes that in RAF #14, the Board reports that on May 6, 2020, the Aggregate Advisory Board voted to concur with the Department's recommendation that the

proposed rulemaking proceed with the regulatory process. IRRC asks the Board to indicate the vote of the Board in the RAF of the final-form rulemaking. **(5)**

**Response:** The final RAF includes the requested information that the AggAB voted unanimously to recommend that the revised final-form rulemaking proceed after suggesting the Department add language to clarify the applicability of civil penalties in the cessation order subsection of § 77.293 (relating to penalties). The Board has incorporated this language as suggested.