

# Regulatory Analysis Form

(Completed by Promulgating Agency)

## INDEPENDENT REGULATORY REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency: Department of Environmental Protection

(2) Agency Number: 7

Identification Number: 554

IRRC Number: **3291**

(3) PA Code Cite: 25 Pa Code Chapter 77

(4) Short Title: Noncoal Program Corrections and Clarifications

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Laura Griffin, 717-772-3277, laurgriffi@pa.gov

Secondary Contact: Brian Chalfant, 717-783-8727, bchalfant@pa.gov

(6) Type of Rulemaking (check applicable box):

- Proposed Regulation  
 Final Regulation  
 Final Omitted Regulation

- Emergency Certification Regulation  
 Certification by the Governor  
 Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The amendments provide updates and clarifications to the requirements for mining noncoal minerals in Pennsylvania. Chapter 77 was finalized in 1990 to implement the 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 final-form rulemaking are administrative in nature. Among the technical revisions in this final-form rulemaking are: allowing an increase in air blast level, 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.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This final-form rulemaking is authorized under section 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (act) (52 P.S. § 3311(a)), which authorizes the Environmental Quality Board (Board) to promulgate regulations as it deems necessary to carry out the provisions and purposes of the act; section 5 of The Clean Streams Law (35 P.S. § 691.5); and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to adopt rules and regulations necessary for the performance of the work of the Department.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The regulation is not mandated by any federal or state law or court order or federal regulation.

There are two Environmental Hearing Board (EHB) decisions that are pertinent to parts of this final-form rulemaking. The exploration requirements in the existing regulations have caused confusion due to the conflation of requirements for exploration by drilling and a permit waiver. This was pointed out in *Lower Milford Twp. v. DEP (Geryville Materials, Inc., permittee)*, EHB Docket No. 2006-109-L (June 26, 2009). To dispel this confusion, the final-form rulemaking creates a new section for exploration by drilling (§ 77.113).

In *Karnick v. DEP (Wayco Sand and Gravel, permittee)*, EHB Docket No. 2016-135-M (April 24, 2018), the EHB pointed out the error in § 77.593(2), which makes reference to “subsection (a)” when there is no subsection (a), but rather there is paragraph (1). This error is corrected in this final-form rulemaking.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The final-form regulation is needed to update the requirements for mining noncoal minerals in Pennsylvania and provide additional clarity to the regulated community, the Department, and the public regarding compliance standards.

There are about 1,200 licensed noncoal mine operators who will benefit from the clarification and corrections in the final-form rulemaking. Commonwealth residents who reside in the vicinity of noncoal mine sites will also benefit from the minimum insurance protection coverage increase, which provides adequate compensation for bodily harm or property damage caused by noncoal operations. This improved clarity provides certainty as to the requirements and protections provided in the regulated environment. It is not possible to quantify the benefits because of the nature of the revisions.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Noncoal mining is not subject to federal standards. The noncoal regulatory program is implemented under the act and The Clean Streams Law.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania’s ability to compete with other states?

While other states regulate noncoal mining, there are fundamental differences based on geology, geography and population. The geology controls the minerals that are available to be mined. Conceptually, regulatory approaches are similar from state-to-state taking into account these differences.

This final-form rulemaking will not put the Commonwealth at any competitive disadvantage with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No, the final-form regulation will not affect any other regulations.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. (“Small business” is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department worked with the Aggregate Advisory Board to develop these regulations. The Aggregate Advisory Board is comprised of the Secretary of the Department of Environmental Protection, three aggregate surface mining operators, four members of the public from the Citizens Advisory Council, one member from county conservation districts, one Senate member from the majority party, one Senate member from the minority party, one House member from the majority party, and one House member from the minority party.

Interaction with the Aggregate Advisory Board on this rulemaking began in October 2018 with a discussion of concepts at a meeting of the Aggregate Advisory Board’s Regulatory, Legislative and Technical (RLT) Committee meeting. The Department continued interaction with the Aggregate Advisory Board at several meetings of the RLT Committee throughout 2019. 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.

The draft final-form regulation was presented to the Aggregate Advisory Board on November 3, 2021 and February 1, 2023. The Aggregate Advisory Board 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 by the Aggregate Advisory Board.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

There are about 1,200 licensed noncoal mine operators in Pennsylvania. While there are several multinational corporations who mine noncoal minerals in Pennsylvania, a majority of the regulated community meet the definition of small businesses.

The main impact of the final-form rulemaking on the regulated community should be improved clarity of the requirements for mining noncoal minerals in Pennsylvania. Outside of the improved clarity expected from this regulation, one change related to insurance requirements may have an additional impact on noncoal operators who extract more than 2,000 tons of marketable minerals in a year. The final-form rulemaking increases the minimum insurance coverage amounts required for these operators. The Department estimates there are around 200 operators that will need to increase their insurance coverage, and many of these operators are small businesses. Operators who produce less than 2,000 tons of marketable minerals in a year are not subject to the insurance requirement, and all of these operators would be considered small businesses.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

There are about 1,200 licensed noncoal mine operators in Pennsylvania that will be required to comply with the regulations. However, as noted in the response to Question 15, the increase in insurance coverage amounts will only apply to a subset of the mine operators (about 200) who extract more than 2,000 tons of marketable minerals in a year.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

There will be some moderate increased costs for approximately 200 operators, who produce more than 2,000 tons of marketable minerals per year, that would be required to increase their insurance coverage. Insurance costs vary depending on specific circumstances, so it is not possible to quantify the precise impact. Another factor to be considered is that many current licensed operators maintain more than the required minimum coverage, so they will not incur any additional cost as a result of the increase in the minimum coverage limits. However, for those operators who choose to maintain the minimum coverage limits, the rulemaking increases the overall limits from \$500,000 to \$1 million. Assuming that \$1 million in liability coverage will cost about \$1,000 per year, the increase in costs will be approximately \$500 per year. Since it is anticipated that about 200 operators will have to increase their insurance coverage amounts, the final-form regulation would result in a collective additional cost to the regulated community of \$100,000 per year.

However, increasing the insurance coverage requirements is important as the last time the minimum insurance requirement amounts were modified was 1990. A minimum insurance coverage amount of \$1 million reflects the amount of insurance needed by today's standards to adequately provide for bodily injury or property damage caused by noncoal operations. This increase will help to ensure that a noncoal operator has enough insurance coverage to adequately compensate persons injured or property damaged as a result of noncoal operations. An additional benefit is that the increased insurance coverage would reduce the financial risk of a catastrophic event for noncoal operators by ensuring they have adequate coverage to handle the costs associated with these events should they occur.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The overall benefit of the final-form rulemaking is improved clarity of the requirements for mining noncoal minerals in Pennsylvania for the regulated community, making business planning decisions easier.

The primary area where there is an anticipated increased cost associated with this final-form rulemaking is related to the minimum insurance coverage amounts increase. While there will be an increased cost to operators who produce more than 2,000 tons of marketable minerals per year, this may also benefit the operator by reducing the likelihood of a catastrophic loss. The public will also benefit, because there will be a reduced risk that any damage caused by mining will not be fully mitigated either by the operator or through a claim filed against the insurance.

While adverse effects are not anticipated, the Department acknowledges a concern raised during the public comment period related to a revision to add § 77.564(f)(1.2) to allow for increases in air blast levels to be approved by the Department based on site-specific circumstances. This new subsection

(f)(1.2) includes a revision that changes “lower” to “alternative” regarding maximum allowable airblast levels in order to be consistent with requirements in Chapter 211 (relating to storage, handling and use of explosives) that allows 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 controlling structure will not be subject to damage with the higher threshold. This revision allows for either a decrease or an increase in the air blast level based on site-specific circumstances. The factors that the Department must consider in evaluating alternatives include potential damage and whether the alternative will create or mitigate a public nuisance. Specifically, if a level 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. One example of this situation in practice is where the closest structure is a utility tower, which is not affected by a higher airblast limit. The operator can design for a higher limit because no vulnerable structures would be affected. This revision will be implemented in a manner to avoid any adverse effect because the Department has a duty to do so under other statutory (see, for example, the conditions that are identified as nuisances under section 11(b) of the act), regulatory (see, for example, 25 Pa. Code § 77.564(h)) and constitutional (Article 1, § 27) requirements. Because the potential adverse effects are mitigated by other requirements, the benefits of clarity and avoidance of unnecessary limitations outweigh the cost.

The public comments suggested that there are potential adverse effects resulting from the changes relating to permit terms, permit revisions, public notices of filing of permit applications and noncoal mining permit waivers. Relating to permit terms, the change in the termination time frame from three to five years results in a more efficient process since extensions to the existing three-year lapse period are frequently granted. The changes relating to the public notices of filing of application are intended to clarify when these notices are required for revisions and will not reduce public participation.

Noncoal permit waivers for exploration are granted under the current regulatory scheme. Previously, noncoal exploration activities have caused confusion for operators, because they may be authorized in different ways depending on the circumstances of the exploration. Exploration is included in the definition of “noncoal surface mining activities” in § 77.1, which suggests that it must be authorized under a permit. However, exploration may be conducted by either drilling or by excavation. Exploration may be allowed by drilling upon notice to the Department because it has minimal ground disturbance and environmental impacts. Exploration by excavation may be authorized by a permit or through acknowledgment by the Department of a permit waiver. All forms of exploration are still subject to requirements to protect environmental resources and public health and safety and the land restored to contour and revegetated.

In these final-form regulations, § 77.113 (relating to permit waiver—noncoal exploration drilling) is added to establish the requirements for exploration by drilling while § 77.109 (relating to noncoal exploration activities) has been updated to establish requirements for exploration activities using a combination of drilling and excavation. These updates will distinguish the two forms of exploration activity from one another and provide clarity to the regulated community.

These revisions provide clear benefits without incurring adverse effects.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There will be some moderate increased costs for approximately 200 operators, who produce more than 2,000 tons of marketable mineral per year, that would be required to increase their insurance coverage.

Insurance costs vary depending on specific circumstances, so it is not possible to quantify the precise impact. Another factor to be considered is that many current licensed operators maintain more than the required minimum coverage, so they will not incur any additional cost as a result of the increase in the minimum coverage limits. However, for those operators who choose to maintain the minimum coverage limits, the final-form rulemaking increases the overall limits from \$500,000 to \$1 million. Assuming that \$1 million in liability coverage will cost about \$1,000 per year, the increase in costs will be approximately \$500 per year. Since it is anticipated that about 200 operators will have to increase their insurance coverage amounts, the final-form regulation would result in a collective additional estimated cost to the regulated community of \$100,000 per year.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs or savings for local governments anticipated as a result of this final-form rulemaking, as local governments typically do not operate noncoal mines in Pennsylvania.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no identifiable costs or savings for state government anticipated as a result of this final-form rulemaking, as the Commonwealth does not operate noncoal mines, and will benefit administratively from the added clarity provided in this final-form rulemaking.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

There are no additional reporting, recordkeeping or other paperwork requirements established in the final-form rulemaking. Some existing forms may need to be revised as described in more detail in response to parts (a) and (b) of this question.

(22a) Are forms required for implementation of the regulation?

The final-form rulemaking does not require any new forms. However, some existing forms are used for implementing the current program and will continue to be used upon finalization of the rulemaking package. For example, there are two forms related to noncoal exploration. The forms were revised in the aftermath of the Geryville Materials case referred to in the answer to Question 9. The final-form regulations reflect the approach taken in the forms, so it is unnecessary to substantially revise the forms

in response to the final-form rulemaking. Please note that an effort is underway to implement ePermitting, which will ultimately replace these forms with online web forms.

The revision that establishes thresholds for the permit waiver will need to be reflected on the permit waiver form (and instructions) when it is promulgated as a final-form regulation. This will entail the inclusion of more detail on the form justifying the amount of material needed for the exploration.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The form for exploration by drilling can be found at this link:

<http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3032>

Similarly, there is a form for the permit waiver, which can be found at the following link:

<http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3033>

The regulations also reference “modules” in § 77.141(b)(2). These modules are related to the application for a large noncoal permit and are available here:

<http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3818>

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	<b>Current FY 2022-23</b>	<b>FY +1 2023-24</b>	<b>FY +2 2024-25</b>	<b>FY +3 2025-26</b>	<b>FY +4 2026-27</b>	<b>FY +5 2027-28</b>
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
<b>Regulated Community</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Local Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>State Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Total Savings</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>COSTS:</b>						
<b>Regulated Community</b>	\$0.00	\$0.00	\$100,000	\$100,000	\$100,000	\$100,000
<b>Local Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>State Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Total Costs</b>			\$100,000	\$100,000	\$100,000	\$100,000
<b>REVENUE LOSSES:</b>						
<b>Regulated Community</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Local Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>State Government</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Total Revenue Losses</b>	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

<b>Program</b>	<b>FY -3 2019-20</b>	<b>FY -2 2020-21</b>	<b>FY -1 2021-22</b>	<b>Current FY 2022-23</b>
Noncoal Regulatory Program	\$3,809,152	\$2,982,555	\$3,115,973	\$3,978,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.

There are about 1,200 licensed noncoal mine operators in Pennsylvania, a majority of which meet the definition of small businesses.

- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.

The total increased costs is estimated to be about \$100,000, shared among about 200 operators who may have to increase their minimum insurance coverage as a result of the final-form regulation.

- (c) A statement of probable effect on impacted small businesses.

The probable effects of the final-form regulation on Pennsylvania's 1,200 licensed noncoal mine operators, a majority of which are small businesses, are that they will benefit from the improved clarity of the requirements for mining noncoal minerals in Pennsylvania, making business planning decisions easier. Approximately 200 of these operators, who produce more than 2,000 tons of marketable minerals per year, may have an increase in their costs due to the increase in minimum insurance coverage requirements.

- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

There are no apparent less costly alternative methods that would achieve the purpose of the final-form regulation.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

There are no special provisions related to minorities, the elderly, small businesses, and farmers.



(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

During interaction regarding the proposed rulemaking with the Aggregate Advisory Board, several versions of preliminary drafts were discussed. Several items from earlier drafts were rejected because the discussions suggested that the changes were not necessary or might decrease clarity rather than improve it. The final-form rulemaking as provided was determined to be the least burdensome, most acceptable alternative.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;

The existing regulatory scheme establishes simpler standards for operators who produce less than 2,000 tons of marketable minerals in a year. The final-form rulemaking maintains this scheme. There are no revisions that will impose adverse impacts on small businesses.

- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

There are no new reporting requirements in the final-form rulemaking.

- c) The consolidation or simplification of compliance or reporting requirements for small businesses;

There are no new reporting requirements in the final-form rulemaking. Moreover, this final-form rulemaking will provide additional clarity to all affected operators regarding statutory requirements, including small businesses.

- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and

The existing regulations use this approach and it is maintained in the revisions.

- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The existing regulations already account for some exemptions for small mines, for example those mines producing less than 2,000 tons of marketable materials per year, the majority of which are small businesses, will not need to comply with increased insurance requirements. However, the emphasis on environmental protection is maintained.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The Pennsylvania Department of Transportation’s Bulletin 14 was used to establish the upper threshold for justification for a permit waiver to conduct exploration. Exploration is necessary to identify new aggregate sources that may be developed into full-scale operations.

The 1,000-ton upper threshold for the waiver was identified based on the 200-ton minimum requirement of the Pennsylvania Department of Transportation’s specifications for certification in Bulletin 14 with the recognition that more than one size of material may need to be produced from a particular potential mine. Page F-6 of Bulletin 14 includes the following statement:

(2) Qualification Samples (Sample Class: QS) are obtained from new aggregate sources where a crushing and screening plant is in operation and sufficient material (minimum 200 tons of each aggregate size intended to be produced) has been processed and stockpiled.

Bulletin 14 is available at this link:

[http://www.dot.state.pa.us/public/pdf/construction/bulletins\\_supporting\\_docs/Bulletin%2014%20-%20Supporting%20Information.pdf](http://www.dot.state.pa.us/public/pdf/construction/bulletins_supporting_docs/Bulletin%2014%20-%20Supporting%20Information.pdf)

Because it may be necessary to qualify more than one size of aggregate, the 1,000-ton threshold was established. If the minimum requirement for qualification is met for each size of aggregate, then four to five sizes may be evaluated at the same time through the exploration activity. Additionally, to produce 200 tons of a particular size material, more than that is needed because the crushing process produces various sizes of material and some off-specification or wasted material. In other words, to produce 200 tons of a particular size material, substantially more than 200 tons must be extracted.

Assuming a density of 150 lbs/cu ft, the extraction of 1000 tons would require an excavation about 37 feet long on each side (about 0.03 acre) at a depth of ten feet.

(29) Include a schedule for review of the regulation including:

- |   |  |
|---|--|
| A. The length of the public comment period:                                 | <u>45 Days</u>                                       |
| B. The date or dates on which any public meetings or hearings will be held: | <u>None held</u>                                     |
| C. The expected date of delivery of the final-form regulation:              | <u>Quarter 2, 2023</u>                               |
| D. The expected effective date of the final-form regulation:                | <u>Upon publication in the Pennsylvania Bulletin</u> |

E. The expected date by which compliance with the final-form regulation will be required:

Upon publication in the  
*Pennsylvania Bulletin*

F. The expected date by which required permits, licenses or other approvals must be obtained:

Upon publication in the  
*Pennsylvania Bulletin*

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

Effectiveness will be gauged through ongoing interaction with the industry, advisory boards, and the public.