

#2741



Senate Environmental Resources and Energy Committee

Senator Mary Jo White
Chairman

Patrick Henderson, Executive Director

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March 3, 2009

The Honorable Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: EQB Final-Omitted Rulemaking: Marcellus Shale
Well Permit Fees (#7-430)

Dear Chairman Coccodrilli:

I am writing to share with you my concerns regarding the process utilized by the Department of Environmental Protection (DEP) to increase the application fee for a Marcellus Shale natural gas permit. While this regulation was formally adopted by the Environmental Quality Board, it should be acknowledged that the decision to utilize the final-omitted rulemaking process was made by DEP.

As the Commission knows, utilization of a final (proposed-omitted) rulemaking process precludes a formal comment period by the regulated industry, general public, legislative committees and IRRC. Moreover, the lack of a formal comment period negates the requirement for DEP to provide a comment/response document to respond to questions or concerns relative to the underlying merits of the higher fee structure.

Historically, the final-omitted rulemaking process has been utilized to address legitimate emergency situations where the public's interest to expedite the rule overcame the requirement for comment and revisions. To my knowledge, this process has never been utilized before to raise fees to support a DEP program. While I acknowledge the Department's need to raise fees to reflect the true costs of reviewing and processing a Marcellus Shale natural gas permit application (and have introduced legislation to appropriate money for this purpose), I do not believe this rises to the level of urgency envisioned by the General Assembly when it authorized this process. This action sets a bad precedent for DEP to raise fees in the future for various programs it administers without enabling the regulated industry, general public, legislative committees or IRRC to review and comment on the changes. While DEP has stated that it will gather the benefit of comments through a parallel, proposed rulemaking process on oil and gas permit fee increases, I still do not believe this explanation justifies the use of a final-omitted rulemaking process.

In addition to the process used by DEP, there are legitimate underlying concerns regarding the new fee structure. It is my understanding that under this rule, an average Marcellus Shale permit fee will increase from \$100 to approximately \$2,600. The actual cost of each permit will, in large part, be tied to the total wellbore length of the well. In summary, the farther or deeper a well is drilled, the higher the permit fee will be – increasing about \$100 per 500 feet drilled. I question what the relationship is between the length of a proposed well and the administrative costs incurred by DEP in reviewing and processing the application.

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Additionally, I question the methodology utilized by DEP to arrive at a figure representative of what it costs to review and process an "average" permit application (again, using DEP's "average fee" figure of \$2,600). To this end, it is worth noting that as part of his 2007-2008 FY budget, Governor Rendell proposed raising the oil and gas permit fee from \$100 to \$1,475. The Governor's proposal – which was never enacted – is included in HB 1206 of the 2007-2008 legislative session. At this time – despite rising interest in the Marcellus Shale natural gas play, as well as an increase in well applications within the Marcellus Shale region – neither DEP nor the Governor made any distinction between application fees for Marcellus or non-Marcellus well permits. Further, the discrepancies between fee proposals put forth by the Administration (\$1,475 in 2007; \$2,600 in 2008) raise legitimate concerns whether DEP has properly identified the amount of revenue necessary to administer the program. Such questions would have benefitted from a formal comment period.

DEP appears to levy a 10% fee penalty if the final wellbore length of a Marcellus shale well exceeds the length specified in the permit application. It is ironic and inconsistent that DEP will not refund any portion of a fee if the final wellbore length is *less than* the length specified in the permit application, but instead intends to assess and collect what is essentially a penalty or fine if an operator *exceeds* the authorized length. Fees are intended to offset administrative review costs; this provision appears to be punitive and does not appear to be an appropriate use of the fee-setting structure.

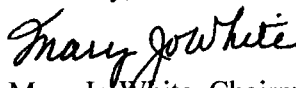
I also note that the final-omitted regulation states "Fees are non-refundable" (§78.19(e)). This provision makes no exceptions, including for DEP's money-back guarantee program whereby an applicant is to be refunded their fee if DEP fails to act on the application in a timely manner. I do not know if that was the intent of DEP, but believe a comment/response period again would have enabled DEP to clarify and revise this provision.

DEP has stated that the regulated industry has generally not opposed this fee increase. It should be noted that the industry originally did have significant concerns; however, DEP promised to make unrelated permitting modifications in exchange for industry representatives removing their opposition to higher fees. This smacks of impropriety on behalf of the Administration, as the industry is hardly in a position of equal bargaining power.

As you know, the Senate Environmental Resources and Energy Committee has already met and voted to extend its review of this regulation by an additional 14 days, commencing after IRRC's order on this regulation is issued. I would encourage the Commission to seek answers to the questions posed here, as well as other questions you may have on this rule.

Thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions or require additional clarification.

Sincerely,



Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee

cc: John Hanger, EQB Acting Chairman
Senate Environmental Resources & Energy Committee Members