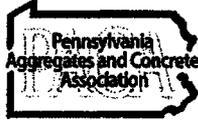


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February 21, 2012

The Honorable Michael Krancer
Chairman
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

SECRETARY'S OFFICE

FEB 27 2012

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Re: Proposed Amendments To 25 Pa. Code Chapter 105
Dam Safety & Waterway Management Fees
42 Pa.B. 553 (January 28, 2012)

Dear Secretary Krancer:

On behalf of Hanson Aggregates BMC, Inc. and Tri-State River Products (collectively "Dredgers," individually "a Dredger") the Pennsylvania Aggregates and Concrete Association, submits the following comments on the above proposed rulemaking ("Proposed Rulemaking") relating to permit fees for permits issued pursuant to 25 Pa.Code, Chapter 105 ("105 Permits").

Interest of the Dredgers In The Proposed Rulemaking

The Dredgers are the only companies authorized to conducting river dredging in western Pennsylvania. They do so pursuant to a 105 Permit issued by the Department of Environmental Protection, a sand and gravel lease between each company and the Commonwealth, and a permit issued by the Army Corps of Engineers.

As discussed below, unless the Proposed Rulemaking for calculating "permit fees" is modified to recognize the unique status of the Dredgers they will be unable to continue their current operations. As a result, collectively, over 65 employees and their families will be without a job, the Commonwealth and local municipalities will be deprived of the primary source of aggregate materials used in the construction of roads and road maintenance projects and the Commonwealth will be deprived of the revenue it currently receives from the sand and gravel leases it has negotiated with each Dredger.

Impact of the Proposed Rulemaking on The Dredgers

The Dredgers current 105 permits, which were recently reissued, contain specific authorizations to continue dredging in areas which have been previously approved for dredging by the Department, and a "general" authorization to dredge in other locations within both the Allegheny and Ohio Rivers, which can subsequently, over the life of the permit, be activated once a site-specific authorization (e.g., River Miles 22.5 – 24.0) is sought and approved. To obtain a "new" site specific authorization the Dredgers must submit to the Department for its review and approval a mussel survey and a fish survey of the proposed area. Until these studies are approved by the Department no dredging can occur in a new area otherwise encompassed within the "generally" approved permit area.

The Department currently treats each request for a "new" area as an "amendment" to the 105 Permit, which under the Proposed Rulemaking would require them to submit a base fee with their application of either \$500 or \$250, depending upon whether the Department views the request for a "new" area as a "major" or "minor" amendment to the 105 Permit. See 42 Pa.B. 562. This fee, of course, is not unreasonable.¹

However, the Proposed Rulemaking also indicates that in addition to this fee a minimum "disturbance fee" of \$800 for every 0.10 acre of waterway that is proposed to be permanently disturbed, or \$400 for every 0.10 acre of waterway that may be temporarily disturbed, must be paid. Ibid. When this "fee" is added on to the permit fee for any application to dredge a "new" area, the fees becomes astronomical and, if imposed, will make all future river dredging in western Pennsylvania uneconomical.

To understand the impact of the "disturbance fee" on the Dredgers, an understanding of how "new" areas are permitted by the Dredgers and the Department is needed.

Typically, a Dredger will seek to add 1.0 - 2.0 miles of "new" area to its active permit before it exhausts the reserves being dredged in currently authorized areas. "New" areas are only sought when needed. Only relatively small areas are actually dredged each year. As noted above, a mussel survey and a fish survey must be done to obtain approval for any "new" area. Because the cost of conducting such surveys generally exceeds \$100,000 it is not economical to permit smaller segments. This is the case because the cost of surveying .5 miles of river is about the same as the cost of surveying 1.0 - 2.0 miles of river since only one "mobilization" and one set of "reports" is needed, rather than multiple mobilizations and reports which would be needed if smaller segments were proposed for dredging. More importantly, as discussed below, areas of this size are about the smallest which can be effectively surveyed during the limited time frame available each year for surveying.

Permitting larger areas is also not feasible due to a variety of factors, unrelated to economics. The required surveys must be done during the period from May 1 through October 15 of each year and even during this period only during appropriate "river conditions." Therefore, the time available to do surveys of long segments of river is simply not available. In addition, there are currently only a handful of individuals who are deemed "qualified" to conduct the required surveys and it is extremely difficult to coordinate their schedules so that they can all be on-site at one time, during the limited time frame when the surveys can be done. Finally, when it is considered that it takes up to six or more weeks to properly survey only 2.0 miles of river bottom, it becomes obvious that attempting to survey larger segments is simply logistically impossible. In addition, the fact that the required surveys are only "valid" for a limited number of years effectively limits the area surveyed to that which can be dredged within the "life" of a survey.

Assuming that a 1.5 mile "new" segment of the Ohio is proposed for dredging, and the river is 1,300 wide along this segment, the total square footage of the area that might be "disturbed" can be calculated using the following formula: 1.5 (the number of miles in terms of length of river to be permitted) x 5,280 (the number of feet in a mile, and which defines the length of the area to be permitted) x 1,000 (the width in feet of the area to be permitted, less shoreline buffers) = 7,920,000 square feet.

¹ The Proposed Rulemaking would also impose a \$1,750 fee for a "new" 105 Permit. This fee is also not unreasonable. The Dredgers note, however, that the Proposed Rulemaking does not discuss the fees to be paid when a "renewal" application is filed. The failure to recognize that the Dredgers 105 Permits, unlike virtually all other 105 Permits, must be renewed and are valid for only 5 years further suggests that the drafters of the Proposed Rule simply did not focus on the unique nature of the Dredgers 105 Permit when developing the proposal.

This area can then be converted to square acres by dividing 7,920,000 by 43,560 feet (the number of square feet in 1 acre) to determine the total number of square acres of potentially disturbed area in this example, which are 181.

A request to add 1.5 miles of "new" area to an existing 105 Permit, at the rate of \$800 per 0.10 acres disturbed will result in a Dredger being required to pay a "permit fee" of at least \$1,448,000 (if the disturbance is deemed permanent), each time it seeks to add "new" dredging areas to its current 105 Permit.²

Clearly, no company can afford to pay such an exorbitant "permit fee" and hope to remain viable.

Given the outrageous size of the potential "permit fee," the Dredgers have assumed that their unique situation was not factored into the thinking of the individuals who drafted the proposal. However, to the extent the Proposed Rule is intended to apply to the Dredgers in the manner discussed above, as discussed below, it is completely unjustified and is also contrary to recognized principles of state law.

The Permit Fee In The Case Of The Dredgers Bears No Reasonable Relationship To The Department's "Cost" Of Reviewing An Application To Add "New" Areas For Dredging

The Proposed Rulemaking indicates that one of the underlying rationale behind its development was the need to have permit fees more accurately reflect the Department's costs in reviewing applications for 105 Permits and to recover a more "reasonable" portion of these costs.

In the case of an application to obtain approval to add "new" areas to an existing Dredger's 105 Permit, Department personnel will have to engage in the following tasks: (1) one person, likely a relatively lower paid individual, will have to review the paperwork submitted with the application to assure that all the "boxes" have been properly checked, the necessary notices sent, and the required materials (e.g., a mussel survey and a fish survey) provided; (2) a second, likely more experienced individual will have to review the mussel survey and the fish survey to assure that each was properly done and the results are consistent with the protection of any "protected" species; (3) a third, supervisory, personal will have to "sign" off on any approval which results from the first two reviews; and (4) a fourth person, a clerk typist, will have to prepare the final permit and letter for issuance. This is important and valuable work, and it has been the Dredgers experience that it is done professionally and efficiently by the Department's Southwest Regional Office staff.

However, under no circumstances, could the "cost" of such work (i.e., the number of hours spend times the "pay rate" of the persons involved, which rate would include not only their salary but an appropriate figure for "overhead" or "indirect" costs associated with any employee) equal \$1,500,000.

Indeed, in circumstances where the "fee" being charged for a "state service" bears no relationship at all to the actual cost of providing the "service," the law of Pennsylvania clearly provides that such fees are illegal "tax." This principle was recognized by the Pennsylvania Supreme Court in *Flynn v. Horst*, 51 A.2d 54, 59 (Pa. 1947), a case involving a state imposed license fee on oleomargarine wholesalers and retailers, where the Court stated:

No principle is more firmly established in the law of Pennsylvania than the principle that a revenue tax cannot be constitutionally imposed upon a business under the guise

² Even assuming smaller areas could be permitted, which as noted above is not feasible for a variety of economic and operational reasons, the "permit fee" would only be reduced proportionately. For example, if 1.0 mile of "new" river was to be permitted the fee would be \$968,000; and if only 0.5 mile of "new" river was proposed for dredging the permit fee would still be an incredibly high \$480,000.

of a police regulation, and that if the amount of the "license fee" is grossly disproportionate to the sum required to pay the cost of the due regulation of business, the "license fee" will be struck down.

See also, *American Baseball Club v. Philadelphia*, 167 A. 891 (Pa. 1933), ("license fees" must be reasonably commensurate with the actual cost to the regulator of administering the program for which the fee is sought).

The Permit Fee In The Case of The Dredgers Also Does Not Reasonably Further The Goal Of Encouraging An Applicant To Avoid and Minimize Impacts To The Maximum Extent In Their Initial Applications to Add "New" Areas For Dredging.

A second stated purpose behind the Proposed Rulemaking was, in the case of certain types of permits, to "encourage applicants to avoid and minimize impacts to the maximum extent possible on their initial application." 42 Pa.B. 554.

This goal is also not furthered by imposing on a Dredger a permit fee of up to \$800 for each 0.10. acre of area it disturbs.

First, unlike virtually any other 105 Permit applicant, before the Dredgers 105 Permits were issued they were required to conduct an Environmental Impact Statement pursuant to the National Environmental Policy Act which took years to complete and which resulted in numerous conditions being placed into each Dredger's 105 Permit that were designed to minimize adverse impacts.

Second, the Dredgers' existing 105 Permits contain numerous provisions which serve to assure that before any application to add "new" areas for dredging is made the applicant will have already sought to minimize the environmental impact of the proposed activity. For example, the Dredgers' existing 105 Permits effectively preclude the Dredgers from dredging in any area where a mussel survey would disclose "protected" mussel species. Because of this condition, the Dredgers make a conscious effort to only select potential "new" areas which either has been previously affected, or which are otherwise likely to have marginal habitat suitable for mussel development. It makes no sense for a Dredger to spend thousands of dollars on a mussel survey only to find that protected species are present in the area. Of necessity, the Dredgers are already fully "encouraged" to minimize the impacts of their activities before applying for "new" areas to dredge. The limitations imposed by the mussel and fish surveys, coupled with various other special conditions which limit where dredging can occur (e.g., shore line buffers, set backs from water intakes) more than adequately "encourage" the Dredgers to only propose for "new" dredging areas which are the least likely to be affected (either temporarily or permanently) by their activities.

Third, unlike other activities which require 105 Permits, which can be modified or reduced in size or scope to minimize their impact, dredging is what it is and that is the removal of material from areas where it is located. It cannot be successfully pursued by reducing the size of the area dredged to just a few 0.10 of an acre. The Dredgers already are fully incentivized to reduce in size the areas they seek to dredge simply because of the costs and logistics associated with "surveying." As noted above, it is because of these facts (and the length of time they remain valid) that the Dredgers already only seek to add relatively small increments to the areas where they can actually dredge. Imposing an additional fee will not further incentivize them to do anything – it will simply put them out of business.

Finally, the Proposed Rule overlooks the fact that the Dredgers are already also required to not only minimize the impacts of their activities both in terms of where they propose to do them and in terms of the size of the area they will affect, but to also engage in active (and costly) mitigation activities. For example, the Dredgers are currently required, under their most recently renewed 105 Permit, to "reclaim" each year previously affected segments of the Ohio or Allegheny Rivers by placing back into the river at locations approved by the Department appropriate substrate materials which will "fill in" deep holes caused by prior activities on the Rivers, thus improving conditions within these areas.

Summary

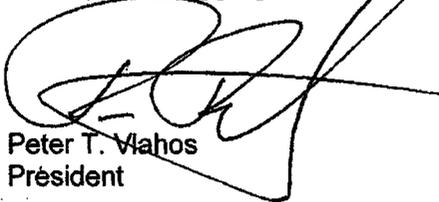
Although the Proposed Rulemaking, as proposed, can be interpreted to apply to applications submitted by the Dredgers to add "new" areas to their existing 105 Permit, and presumably to applications to renew each Dredger's existing 105 Permit, which would next be due in 2016, the Dredgers believe the drafters of this proposal simply failed to take into consideration the unique nature of river dredging and how it is currently regulated by the Department when developing the current proposed rule.

Therefore, they request that the Environmental Quality Board promptly: (1) clarify that the current Proposed Rulemaking was not intended to apply to river dredging 105 Permit applications; (2) develop a separate permit fee proposal that would be applicable to applications for river dredging 105 Permits that take into account the realities of such permitting; and (3) submit that proposal for public comment.

Pursuant to the Notice of Rulemaking attached is a one page summary of the foregoing for distribution to the members of the Environmental Quality Board.

Respectfully submitted on behalf of Hanson Aggregates BMC and Tri-State River Products,

Pennsylvania Aggregates and Concrete Association



Peter T. Wlahos
President

Attachment

Dear Member of the Environmental Quality Board:

Re: Proposed Amendments To 25 Pa. Code Chapter 105; Dam Safety & Waterway Management Fees; 42 Pa.B. 553 (January 28, 2012) ("Proposed Rulemaking").

The following is a summary of the Comments submitted by the Pennsylvania Aggregates and Concrete Association on behalf of Hanson Aggregates BMC, Inc. and Tri-State River Products (collectively "Dredgers," individually "a Dredger") to the EQB.

The Proposed Rulemaking was drafted without factoring in the unique nature of the Chapter 105 Permits under which the Dredgers operate and will, unless revised to reflect the nature of how dredging is permitted, force the Dredgers out of business, cost 65 families a good paying job, deprive the Commonwealth of revenue it would otherwise receive from sand and gravel leases it has entered into with the Dredgers, and remove the main source aggregates used by PennDOT and local municipalities in road construction and maintenance projects.

First, it overlooks the fact that for a variety of operational reasons (discussed in PACA's Full Comments), the Dredgers must seek to amend their 105 Permits in 1.0 – 2.0 mile segments of the Ohio or Allegheny River. They only do so as needed to remain in operation over the 5 year life of their 105 Permit. As result, a typical permit amendment has the potential to affect 181 square acres of river bottom. If the \$800 per 0.10 acre of affected waterway component of the Proposed Rulemaking is applied to the typical Dredger's amendment application the fee will equal **\$1,448,000**. Such an outrageous fee bears absolutely no relationship to the costs associated with reviewing the application. License fees, like this, which are "grossly disproportionate" to the sum required to pay the cost of regulating a business are invalid in Pennsylvania. *Flynn v. Horst*, 51 A.2d 54, 59 (Pa. 1947). This outcome could not have been intended by the drafters of the Proposed Rulemaking.

Second, unlike other 105 Permittees, the Dredgers need no further "incentive" to minimize the environmental impacts of their proposed activities because, *inter alia*: (a) they had to develop a full Environmental Impact Statement, pursuant the National Environmental Policy Act, before each received its current 105 Permit, a study which resulted in lessening the impact of the proposed activity by causing restrictive permit conditions to be imposed on where and how dredging can occur; (b) to actually obtain approval to operate in a specific segment of either River a Dredger must first submit to DEP (and the Army Corps of Engineers and the U.S. Fish and Wildlife Service) a mussel survey and a fish survey which documents that the proposed activity will not, among other things, adversely impact threatened and endangered ("T&E") mussel or fish species – if either survey indicates a T&E mussel or fish is present then approval to actually dredge can be denied or seriously restricted or delayed, until further protective conditions are attached, therefore only areas believed to be already affected are surveyed for dredging. Dredging is what it is – it is an activity that must occur where sand and gravel is present, and imposing a permit fee of at least \$1,448,000 will not further incentivize the Dredgers to do anything at all – it will simply put them out of business.

The Dredgers request the EQB to: promptly: (1) clarify that the Proposed Rule was not intended to apply to river dredging 105 Permits; (2) develop a separate proposal relating to permit fees for river dredging 105 Permits; and (3) resubmit that proposal for public comment. Thank you for your consideration.