

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-542 (IRRC #3206)

Unconventional Well Permit Application Fee Amendments

September 12, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the July 14, 2018 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Section 78a.1. Definitions. – Need.

EQB proposes to delete “Nonvertical unconventional well” and “Vertical unconventional well” from the Definitions section of the regulation. EQB does not explain this deletion in the Preamble except to state that the definitions are unnecessary. We ask the EQB to explain the need for the deletion of these two terms from the regulation in the final rulemaking.

2. Section 78a.19. Permit application fee schedule. – Economic or fiscal impacts; Reasonableness; Need.

The Department of Environmental Protection (Department) has an obligation under 25 Pa. Code §§ 78.19 (e) and 78a.19(b) to evaluate the oil and gas well permit fee every three years and recommend any changes to the fee necessary “to address any disparity between program income generated by the fees and the Department’s cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.” However, the 2012 Oil and Gas Act (Act) requires the permit fee to bear a “reasonable relationship” to the cost of administering the Act. 58 P.S. § 601.201(d).

In response to Regulatory Analysis Form (RAF) question #10, EQB explains that the rulemaking is needed because the current revenue generated by the well permit application fees is not sufficient to cover the cost of the Program’s efforts to administer the Act. Its response also details why certain factors, such as the Impact fee, fines, and General Fund dollars, were not considered as part of the well permit fee analysis. It also notes that an increase to the fee for conventional well permits was not included in the analysis because it “currently submits approximately 200 permit applications per year and is unable to materially support Program costs through applicable fees.”

EQB further states that the revenue generated from the proposed fee increase will enable the Department to continue funding the direct and indirect costs of administering the Act. These costs include personnel costs for carrying out Program activities such as processing of permits, compliance inspections, operating expenses and the purchase of fixed assets associated with ensuring compliance of the Act. (RAF #18)

The Department's 3-Year Regulatory Fee and Program Cost Analysis Report (Report) submitted to the EQB states the total number of compliance inspections at conventional and unconventional well sites has increased from 14,651 to 36,268 between calendar year 2009 and 2017. In 2017, there were a total of 36,268 inspections. Approximately 60 percent of those compliance and site inspections were conducted on unconventional wells. The remaining 40 percent were conducted on conventional wells.

As mentioned previously, the Department explains that the conventional well industry accounts for a lesser number of permit applications being filed with the Program and therefore it has been excluded from the fee analysis. Several commentators including 46 state lawmakers have pointed out that while the conventional well industry has less volume of permit applications, it nonetheless contributes significantly to the workload of the Program through compliance inspections. State lawmakers believe this proposed fee increase places a disproportionate share of the funding responsibility upon one segment of the industry and ignores the mandate that it bear a reasonable relationship to the cost to administer the Program. They ask the Department to examine not only the total costs of the Program, but also the proportional costs borne by the program for oversight of the unconventional, conventional and legacy industry costs.

Given the proposal's significant fee increase (150%) for unconventional well permits that will support the majority of the Program's permitting and compliance activities for both sectors of the industry, we ask EQB to address the following:

- How the fee proposal bears a "reasonable relationship" to the cost of the program specifically in terms of its compliance monitoring activities;
- The Department's rationale for not utilizing/requesting General Fund dollars to support the Program;
- The Department's decision to exclude the \$6 million Impact Fee statutorily allocated for "the **administration of this act** and the enforcement of acts relating to clean air and clean water" from the fee analysis. 58 Pa. C.S. § 2314 (c.1)(3) [Emphasis added]; and
- Several commentators, including members of the legislature, have asked EQB to explain how the increase in permit fees will translate into a shorter time period for permit reviews.

We will review EQB's response to these concerns and others as part of our consideration of the final-form regulation.

Permit fees

EQB explains that permit application fees are a one-time source of revenue that is paid at the beginning of a well's operating life. These fees fund ongoing obligations. A well will typically remain active for decades before being plugged. During that time, the cost for the Department to conduct inspections of the well site is supported by new drilling permit application fees. (Report, pg.1) As noted in the Report, while the number of permits has decreased dramatically in recent years, the volume of natural gas produced by unconventional operators has continued to rise. In fact, Pennsylvania is ranked as the second largest producer of natural gas in the nation, just behind Texas. (Report, pg. 8)

We recognize the unique circumstances the Department faces in funding the Program. In addition to its reliance on permit fee revenues, the Department is tasked with accurately forecasting the number of permit applications that it expects to receive annually. These projections then become the basis upon which the Department makes a regulatory recommendation and fee adjustment to fund the Program until the next review period.

One commentator illustrates the challenge of relying predominantly on permit fees to fund the Program. They remark that the Program's budgetary shortfall is partially attributed to a downturn in commodity prices internationally and a pricing discount that has been difficult for producers. The commentator goes on to say that "These factors have resulted in a decline in rig activity and correspondingly, a decline in permit fees received by the Office."

Several commentators have recommended that the Department reach out to stakeholders and the legislature to seek more stable sources of funding. One commentator describes the reliance on permit fees as an "inelastic source of funding" that should be changed. We agree with the suggestion to seek additional input from the regulated community, stakeholders, and the Legislature to explore alternative sources and methods of funding and encourage the Department to pursue this option as it develops the final-form regulations to be approved by the EQB.

3. Compliance with the RRA or the regulations of this Commission and whether the regulation is in the Public Interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. The Commission also considers the information a promulgating agency is required to provide in the Regulatory Analysis Form (RAF). Question #12 of the RAF asks how a regulation compares with those of other states and how this will affect Pennsylvania's ability to compete with other states.

Several commentators, including 32 lawmakers, have observed that EQB's response to RAF #12 does not include a comprehensive list of other shale-gas producing states with which the Commonwealth competes. Specifically, they mention the following states as being excluded from EQB's analysis: Arkansas, Colorado, New Mexico, Texas and Oklahoma. Commentators contend that the proposed permit application fee of \$12,500 will be the highest in the nation.

They are concerned that it sends a “chilling message” about the business climate and will discourage potential investment in Pennsylvania.

Governor’s Executive Order 1996-1 requires that “Regulations shall not hamper Pennsylvania’s ability to compete effectively with other states.” In order for this Commission to determine whether this rulemaking is in the public interest, the Department should revise its response to RAF#12 to include permit fee information for the above-mentioned states as part of the final-form regulation submittal or explain why the information is unnecessary.

4. Miscellaneous.

In RAF questions #12, #24 and #26, EQB calculates that an increase of \$7,500 to a flat fee of \$12,500 for an unconventional well represents .001% of the overall cost (\$8 million) to drill a well. Commentators suggest that EQB’s calculation is incorrect. EQB should revise its calculation accordingly.