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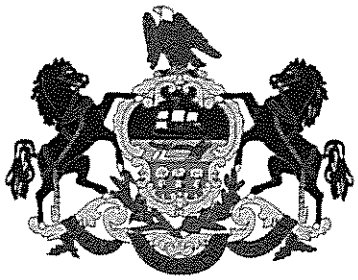

June 17, 2019

Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Re: Regulation #7-536: Air Quality Fee Schedule Amendments

Dear Commissioners,

We are writing in regard to the Department of Environmental Protection's (Department) proposal through the Environmental Quality Board (EQB) to amend the air quality fee schedules. We have several significant concerns that we would like to raise, namely that the proposed fees exceed their statutory authority, violate legislative intent, and will have a deleterious economic and fiscal impact on businesses, local governments and the overall economy. Our concerns, which we will expound upon below, lead us to request that the Department withdraw its proposal, and if they do not, that the IRRC not approve the proposed air quality fee schedule amendments.

It is our view that the Department erred in its conclusions regarding its expansive fee increase proposals because it did not take into account all the applicable statutory language. The Department points to section 6.3 of the Air Pollution Control Act (APCA) in box 8 of the Regulatory Analysis Form (RAF) as the authority to amend the fee schedules. The Department points specifically at subsection (a) which, in reference to the whole section, grants the authority for certain fees:

> "*to cover the indirect and direct costs of administering the air pollution control plan approval process, operating permit program required by Title V of the Clean Air Act, other requirements of the Clean Air Act .... to establish fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act.*"

While the above statutory language does authorize certain kinds of fees, it does not, however, authorize any kind of fees.

Note that subsection (a) specifically refers to the whole "*section*" in its grant of authority but does not grant any particular fees in this subsection. Only later in section 6.3 does the statute delineate the particular fees that it authorizes. Had the Legislature stopped at subsection (a) then, theoretically, a broad swath of fees would be authorized. However, the statute does not stop with subsection (a). The Legislature went on to explicitly set specific parameters on the fees it was authorizing in subsequent subsections. Those specific fees that are authorized are listed in subsections (c), and (j). Subsection (c) authorizes the emission fee for Title V sources, and subsection (j) authorizes "*the following categories of fees not related to Title V of the Clean Air Act.*" These Non-Title V fees are for:

1. The processing of any application for plan approval.
2. The processing of any application for an operating permit.
3. Annual operating permit administration.

Subsection (j) also states: "*In regard to fees established under this subsection, individual sources required to be regulated by Title V of the Clean Air Act shall* ***only*** *be subject to plan approval fees authorized in this subsection.*" 35 P.S. § 4006.3 (j). In other words, Title V sources can only be assessed an emission fee and plan approval fees. Non-Title V sources can only be assessed fees for: plan approvals, operating permits, and annual operating permit administration. Any other fees that go beyond the explicit authorization in these subsections goes beyond statutory authority.

It is clear that a plain reading of the statute prohibits most of the Department's fee proposals. In its proposal, the Department seems to concentrate only on the authority granted to cover the costs of the program and thereby ignores the fact that the Legislature only authorized specific fees. The fees that are outside specific legislative authorization are as follow; first, the statute does not allow the Department to increase the operating permit fee for Title V sources. In fact, this fee is only allowed for Non-Title V sources in subsection (j), which raises questions about the legality of the Department's current annual operating permit administration fee for Title V fees in 25 Pa Code § 127.704. Second, the statute only authorizes an annual operating permit "*administration*" fee, therefore it cannot be replaced with an annual operating permit "*maintenance*" fee. When asked if the Department had the statutory authority to charge a maintenance fee, as noted in the EQB Meeting Minutes for December 18, 2018, deputy Hartenstein responded affirmatively, but with no justification, citation, or explanation. He then said the maintenance fee was the same, conceptually, as the operating administrative fee and that the names are adjusted as they apply to different facilities to avoid confusion.[1] While we applaud any effort to avoid confusion, it does not change the fact that the statute is void of any such authorization for a "maintenance" fee and any confusion over wording can just as successfully be avoided by merely referring to it simply as it is in the statute: an administration fee. Third, the APCA does not authorize the Department to split apart the plan approval application into disparate parts only to then add them together for a higher cumulative fee. Plantwide applicability limits, ambient air impact modeling of certain plan approval applications, and risk assessments are not plan approval fees, they are newly invented fees. Furthermore,

although the Department claims the risk assessment fee is a plan approval fee, it does not even include it in the plan approval fee subsection (25 Pa Code § 127.702) but instead gives risk assessments its own section (proposed §127.708). This is not a new plan approval fee; this is simply an altogether new fee. The Department cannot invent new fees and call them plan approval fees and claim they are authorized by the statute. Fourth, the Department adds other proposed brand new fees, namely: asbestos abatement or demolition

[1] EQB Meeting Minutes – December 18, 2018 (page 4).
http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2019/December%2018,%202018%20EQB%20Minutes.pdf

or renovation project notifications (asbestos notifications); and requests for determination or for claims of confidential information which are, likewise, statutorily unauthorized. Fifth and finally, there is no authorization to establish Title V general operating permit fees (which are unspecified) for stationary or portable sources under Chapter 127, Subchapter H (relating to general plan approvals and operating permits). In summary, the plain reading of the APCA does not authorize most of the Department's proposed new fees and/or fee increases.

We also wanted to focus special attention on one fee proposal that we find particularly troubling as it appears to border on extortion. The APCA requires the submission of some information that, if made publicly accessible, could "*tend to affect adversely the competitive position of such person by revealing trade secrets, including intellectual property rights.*" 35 P.S. § 4013.2. This section protects these entities by requiring the Department to keep this information (except for emission data) confidential. This is a statutory mandate and there is no mention of any authorization to charge a fee for this important protection. Firms are required to divulge sensitive information to the state, and the state must not exploit their vulnerability and turn it into an opportunity to seek a ransom just to keep outside competitors from gaining an unfair advantage by accessing this information. Therefore, we find the proposed Claims of Confidential Information fee not only statutorily unauthorized, but also abusive in the exercise of state authority.

To summarize this section, when the Legislature intends to delegate expansive authority for funding means to an agency, it expressly does so. And when the Legislature intends to delegate a narrow authority for funding means to an agency, it expresses the specific and limited categories of its authorization. The latter scenario is precisely the case with the fee authorization section of the APCA. Because the statute provides authorization only for a specific Title V fee, and limited categories of Non-Title V fees, we must therefore conclude that the Legislature only intended to delegate a narrow authority for funding means to the Department. The fees proposed by the Department are vastly expansive in kind and ought not to be approved on the grounds of exceeding legislative intent.

Having shown that the Department's fee proposals are statutorily unauthorized, it is clear, as will be shown, that the Department's attempt to raise revenue for the Air Quality program must be done through changing the statute, not through regulations. If, for the sake of argument, we stipulate that additional revenue is needed, then the fact that the funds are necessary by no means gives the Department permission to go beyond the fee structure authorized by statute in obtaining the funding. If they perceive an inadequacy in the statutorily designed fee structure, then the Department ought to discuss their desired changes to the statutory fee structure with the Legislature. The Department is familiar with statutory restrictions as evidenced by the fact that the Department states in RAF box 26 that they could not consider increasing the cap of 4,000 tons of regulated pollutants as a way to increase emission fee revenue because it is a statutory

cap. However, the Department could simply ask the Legislature to amend this cap. We understand that the APCA requires the Department to cover the indirect and direct costs of administering the program by fees, but if the Department believes that the current fees, as well as the current fee structure, are inadequate, then the legitimate venue for remedy is through legislation, not regulation. In other words, if the Department would like to shift away from reliance on the current fee structure to the various fees they are requesting, then they must ask the Legislature to consider amending the statute to authorize other types of fees. Until then the Department must abide by the current statutory fee structure in effect.

The current fee structure for the Department as authorized by the APCA for the Title V program is based on an emission fee model. The Legislature through the APCA, and Congress through the Clean Air Act, clearly intended for the emission fee to be the main source of revenue for the Title V program. Previously, when the Department needed more revenue for this program, they would amend this fee, such as they did in 2013 by increasing it 48% (in addition to also receiving additional revenue through automatic increases tied to the Consumer Price Index). However, the Department, in its current proposal, has chosen not to follow their former practice, which comported with the law. Instead, in box 26 of the RAF the Department discusses the three options that it considered but then rejected the two options that increased this emission fee. This is interesting in light of the fact that the current fee structure provides for 97% of the program's revenue, but under the proposed new fee structure it would drop down to just 70% (according to Table 7 in RAF Box 26). Thus, the Department's proposal shifts away from the Legislature's intention that the emission fee be the main revenue source for the Title V program. Since the Regulatory Review Act requires that the commission "*determine ... whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.*" (71 P.S. § 745.5b), it is our contention that a clear review of these facts in light of section 6.3 (c) of the APCA shows that the Departments proposal exceeds the intent of the Legislature, and thus, the commission must disapprove the proposal.

This leads us to express our concerns regarding the disincentive the proposed fee structure will have on Title V facilities. When the fees are correlated with emission volumes it encourages facilities to make voluntary technological and operational improvements to reduce its emissions because the less the sources pollute, the less they pay. The Department's newly proposed fee structure will reduce the proportionality of a reduced fee based on achieving reduced emission volumes and will slow down the progress of voluntary pollution reduction. Furthermore, the Department's new fee structure is going in the exact opposite direction of the recent EPA policy changes which incentivize voluntary pollution reduction. In 2018 the EPA withdrew the "once in always in" policy for the classification of major sources of hazardous air pollutants.[2] In 1995 the EPA implemented a policy that determined that any facility that emitted enough pollution to be considered a "major source" could not be unclassified as such, no matter how much it reduced the amount it polluted. The EPA understood that the 1995 policy removed a major incentive to voluntarily reduce the amount of pollution the facility emitted. Now that the EPA has withdrawn this policy, facilities will again have an incentive to make upgrades and run cleaner to get below the "major source" designation. Just as federal policy is changing its direction towards financially incentivizing Title V facilities in their voluntary reduction in pollution, so also should state policy, which heretofore, having proven to be highly effective, continue to incentivize voluntary pollution reduction via its primary reliance on the emission fee per ton structure.

The reason the Department offers for the need to increase fees, as stated in the Bulletin Notice, is because "*the Department, like many state and local agencies, has experienced shortfalls in fee revenue due to emissions reductions at major facilities.*" The Title V account, as outlined in box 10 of the RAF, does portray a positive ending balance through the end of the Department's projections in 2023, but admittedly, does show a decline in revenue and an increase in expenditures. This same section of the RAF also further details the cause of the decline in revenue which is because "*emissions subject to the Title V emission fee have decreased by 41% since 2000 and continue to decrease as more emissions reductions are required to attain and maintain the revised applicable NAAQS established by the EPA.*" This reflects the national trend that has seen the aggregate

[2] https://www.epa.gov/newsreleases/reducing-regulatory-burdens-epa-withdraws-once-always-policy-major-sources-under-clean

emissions of the six criteria pollutants identified in the Clean Air Act decline by 73% from 1970 to 2017.[3] Not only is the amount of pollution declining but the number of sources also appears to be declining. When the Department raised the emission fee 48% in 2013, it noted that there were approximately 560 Title V facilities in this Commonwealth. In the current proposal the Department notes that there are only 500, a decrease of 60 facilities to regulate. In the 2013 submission to the IRRC the Department noted a reduction in coal-fired power plants because of the low price of natural gas and included a list of facility shutdowns. Yet, despite a reduction in pollution and despite a reduction in pollution sources to regulate, the Department stated that it would not reduce the Department's workload. It is difficult to understand how the Department acknowledges an 11% reduction in the amount of Title V facilities to regulate, and yet is asking for a $15.5 million dollar increase in expenditures. A detailed analysis from the Department on how advancements in technology in reducing emissions combined with a reduction in the number of regulated facilities has not correspondingly reduced costs must be provided.

It is entirely reasonable that a decline in revenue for the air quality program would coincide with the significant decline in pollution and polluting facilities to be regulated. That is, in fact, the goal. As this goal is increasingly realized, Title V facilities which are regulated under this program should not have to subsidize efforts to reduce air pollution from other sources not under this program. Also consider that Pennsylvania was recently allocated over $118.5 million in the State Trust Agreement as a result of the Volkswagen Diesel cheating settlement. While this is a separate program focused more on vehicle sourced air pollution, it underscores the multi-pronged approach to reduce air pollution, and though the air quality program's revenue may be declining (because of better technology and a reduction in polluting facilities), total overall financial resources to combat air pollution have not.

Next, we would like to address a concern about the amount of revenue the Department intends to raise off Title V sources. In table 3 of RAF box 10 the Department estimates the 2020-2021 Title V fee revenue for the proposed new fees to be $21,601,800, which is $5,936,675 more than what the current fee structure would raise. Looking back to Table 1, we see that the Department estimates the total 2020-21 expenditures of $18,601,000. This means the Department's proposed fees would raise $2,534,675 over total expenditures which violates 35 P.S. § 4006.3(c) that states that "*in no case shall the amount of the permanent fee be more than that which is necessary to comply with section 502(b) of the Clean Air Act.*" The statute clearly states that the fee must not be more than it costs to administer the Title V program, yet the Department is proposing fees that would be $2.5 million more than costs (not even accounting for expected cost savings due to less pollution and less facilities to regulate).

Another area of concern arises from the statement in Box 10 of the RAF: "*The Department acknowledges that the Non-Title V Account is projected to be in deficit by the end of FY 2020-2021 even with the fee revision. The Department will continue to review its expenditure priorities and may re-allocate expenses between the two Clean Air Fund special fund accounts.*" It is questionable whether reallocating expenses between the two accounts is permitted under 40 CFR § 70.9 (a) and (b). Section (a) declares that "*the state program... shall ensure that any fee required by this section will be used solely for permit program costs.*" Secondly, according to the EPA's 1993 Operating Permits Program fee schedule guidance "*only funds collected from Part 70 sources may be used to fund a state's Title V permits program.*"[4]

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[3] White, Kathleen and Brent Bennett, Ph.D. The U.S. Leads the World in Clean Air: The Case for Environmental Optimism. Texas Public Policy Foundation, files.texaspolicy.com/uploads/2018/11/27165514/2018-11-RR-US-Leads-the-World-in-Clean-Air-ACEE-White.pdf.

[4] https://www.epa.gov/sites/production/files/2015-08/documents/fees.pdf (see second bullet on pg. 4 of file).

The Department's proposal to potentially re-allocate expenses between these accounts is without legislative authority. While we truly appreciate the achievements in pollution reduction and the efforts made to provide for cleaner air, we believe that we can achieve this goal while not harming our economy. As you know, the Regulatory Review Act requires the commission to consider the economic or fiscal impacts of a regulation, specifically the adverse effects on prices of goods and services, productivity or competition. 71 P.S. § 745.5b. Certainly, the $15.5 million increased annual cost will have a significant adverse effect, not just on the regulated community and their competitiveness, but also on Pennsylvania citizens who will have to bear these costs.

Because of the ripple effect these fee increases will have throughout the economy it is imperative that this particular proposal be viewed in the broader context of the Department's other recently approved and currently proposed fee increases. For perspective, consider that since 2017 the Department has increased, or proposed to increase, various fees that would, when approved and implemented, increase costs by a combined amount of $50 million annually – coming from new increased fees from Radiological Health fees and Radon Certification fees and Safe Drinking Water fees and Noncoal Mining and Unconventional Well fees and National Pollutant and Discharge Elimination System fees and Water Quality Management fees and Air Quality fees. Potentially to be added to these amounts, though not submitted to the regulatory review process yet, is the proposed cap and trade petition that the EQB voted to accept on April 16, 2019. The petitioners estimate this proposal alone will cost the Commonwealth $1.563 billion to $1.978 billion! A comprehensive look at the impact of the air quality fee increases must be considered in the context of all the fee increases in the aggregate. In reality, the consequences and ramifications of these fees ripple out across many dimensions of the Commonwealth and are presented here as evidence of a pattern of Departmental growth that the Legislature meant to limit when it passed the Regulatory Review Act to "*curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania.*" 71 P.S. § 745.2. We contend that the Department has been, and is, by the instant submission, imposing hidden and burdensome costs on the Pennsylvania economy without authority and without adequate justification.

Box 12 of the RAF asks "*[h]ow does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?*" Pennsylvania faces many challenges in its ability to stay competitive with other states. Evidence of this is shown in our population statistics. According to the Independent Fiscal Office, Pennsylvania has been losing, and will continue to lose, the economically crucial 18-34 demographic. Between 2012 and 2017 the net out-migration for this age group category was nearly 32,000.[5] An earlier IFO report indicated that nearly 13,000 college graduates left Pennsylvania in just one year.[6] The Senate Majority Policy Committee recently held a hearing expressing concerns about the problem of student flight (aka, "Brain Drain") from Pennsylvania and the challenges this trend will have on our economic competitiveness.[7] Also consider that, unfortunately, Pennsylvania consistently ranks in the bottom third of various state comparisons for economic and business climate attractiveness:

- ALEC-Laffer State Economic Outlook Rankings, 2018: 38th[8]
- U.S. News and World Report Best States: 38th[9]
- U.S. News and World Report State Economy Rankings: 44th[10]

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[5] http://www.ifo.state.pa.us/releases.cfm?id=265

[6] In year 2015 http://www.ifo.state.pa.us/download.cfm?file=/Resources/Documents/MTR-2017-04.pdf

[7] https://policy.pasenategop.com/043019-2/

[8] https://www.alec.org/app/uploads/2019/01/RSPS-11th-Edition-WEB-LOW-REZ.pdf

[9] https://www.usnews.com/news/best-states/rankings

[10] https://www.usnews.com/news/best-states/rankings/economy

- WalletHub's Best & Worst States to Start a Business: 46th[11]
- WalletHub's 2019 Tax Rates by State: 49th[12]
- Tax Foundation's 2019 State Business Tax Climate Index: 34th[13]

In addition to the above, factor that Pennsylvania has the second highest Corporate Net Income Tax rate in the nation and it becomes evident that there are enormous challenges to its ability to attract businesses. The Legislature was clearly concerned about limiting the deterring nature of over-regulation when it stated its intent for the Regulatory Review Act that "*[u]nnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes.*" 71 P.S. § 745.2. Furthermore, the APCA requires the consideration of "*the importance of not placing existing or prospective sources in this Commonwealth at a competitive disadvantage.*" 35 P.S. §4006.3(d). The proposal to increase costs by an additional $15.5 million will significantly disadvantage the competitiveness of Pennsylvania's business community.

In summary, the Constitution requires that all taxation originate in the General Assembly.[14] Fee increases are a form of taxation and, although the General Assembly may have outsourced some of its discretion on the setting of fee levels to the executive branch, it is important to remember that the source of this authority remains with the General Assembly. As you know, our nation was birthed over the issue of taxation without representation. Therefore, it is vitally important to carefully discern the will of the people, as expressed by their elected representatives in the General Assembly, for any proposal to raise taxes. The Department must not usurp this authority by expanding the fee setting discretion granted to them. In respect to the constitutional separation of powers, the Department must strictly adhere to Legislature's authorized criteria for raising taxes. For the reasons laid out above, we contend that this proposal clearly and expressly exceeds the statutory authority in scope and intent. Furthermore, the deleterious economic and fiscal impacts are not in the public's interest. For these reasons, we, as elected members of the House of Representatives, respectfully request that the IRRC deny this proposal.

Thank you for your taking these concerns under review.

Sincerely,

Representative Kerry Benninghoff
171st Legislative District

Representative Aaron Bernstine
10th Legislative District

Representative Stephanie Borowicz
76th Legislative District

Representative Jim Cox
129th Legislative District

Representative Bud Cook
49th Legislative District

Representative Bryan Cutler
100th Legislative District

[11] https://wallethub.com/edu/best-states-to-start-a-business/36934/#methodology
[12] https://wallethub.com/edu/t/best-worst-states-to-be-a-taxpayer/2416/
[13] https://taxfoundation.org/state-business-tax-climate-index-2019/
[14] Pa. Const. art. III, § 10

Representative Sheryl Delozier
88th Legislative District

Representative Russ Diamond
102nd Legislative District

Representative George Dunbar
56th Legislative District

Representative Chris Dush
66th Legislative District

Representative Torren Ecker
193rd Legislative District

Representative Garth Everett
84th Legislative District

Representative Mindy Fee
37th Legislative District

Representative Jonathan Fritz
111th Legislative District

Representative Valerie Gaydos
44the Legislative District

Representative Barbara Gleim
199th Legislative District

Representative Mark Gillen
128th Legislative District

Representative Keith J. Greiner
43rd Legislative District

Representative Seth Grove
196th Legislative District

Representative Jonathan Hershey
82nd Legislative District

Representative Rich Irvin
81st Legislative District

Representative R. Lee James
64th Legislative District

Representative Mike Jones
93rd Legislative District

Representative Dawn Keefer
92nd Legislative District

Representative Kate Klunk
169th Legislative District

Representative Andrew Lewis
105th Legislative District

Representative David Maloney
130th Legislative District

Representative Steven Mentzer
97th Legislative District

Representative Brett R. Miller
41st Legislative District

Representative Dan Moul
91st Legislative District

Representative Eric Nelson
57th Legislative District

Representative Donna Oberlander
63rd Legislative District

Representative Clint Owlett
68th Legislative District

Representative Tina Pickett
110th Legislative District

Representative Jeff Pyle
60th Legislative District

Representative Jack Rader
176th Legislative District

Representative Kathy Rapp
65th Legislative District

Representative Brad Roae
6th Legislative District

Representative Greg Rothman
87th Legislative District

Representative Frank Ryan
101th Legislative District

Representative Stan Saylor
94th Legislative District

Representative Paul Schemel
90th Legislative District

Representative Lynda Schlegel Culver
108th Legislative District

Representative Marcy Toepel
147th Legislative District

Representative Tarah Toohil
116th Legislative District

Representative Jeff Wheeland
83rd Legislative District

Representative Dave Zimmerman
99th Legislative District