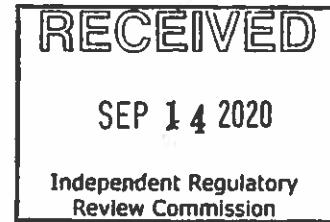




House of Representatives  
Commonwealth of Pennsylvania  
Harrisburg

September 14, 2020

Independent Regulatory Review Commission  
333 Market Street  
14<sup>th</sup> Floor  
Harrisburg, PA 17101



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

Dear Commissioners,

We are submitting these comments in response to the Department of Environmental Protection's (Department) submission of the Final-Form Regulation to amend existing schedules and add new fees relating to plan approval and operating permit fees for the Air Quality Program. Our purpose is to, first, raise our objections to the Department's responses to the concerns raised in our letter regarding their Proposed Regulation and, second, reiterate our request that the IRRC vote to disapprove this regulation.

First and foremost, we do not believe the Department adequately explained how they have the statutory authority to implement new fees beyond what is explicitly authorized in statute. In multiple places in the Department's comment and response document the Department points to subsection 6.3 (a) of the APCA as providing "the Board with broad authority to establish fees sufficient to cover the indirect and direct costs of administering the Air Quality Program." However, as we pointed out in the letter to the Proposed Regulation, this subsection does not grant broad open-ended authority to establish whatever fees the Board can imagine. This subsection merely states that this *section*, that is *section 6.3* as a whole, grants the Board the authority to implement fees. These fees are specified by the statute in the following subsections. The Board confuses purpose with means. The purpose of subsection (a) is to provide general fee authorization, whereas subsections (c) and (j) provide the specific means of funding the Air Quality Program.

Secondly, the Department points to 40 CFR 70.9 as another support for their statutory authority to implement whatever fee structure they can imagine. We strongly disagree that this federal regulation permits the Department to ignore the Legislature's fee structure enacted in the APCA. To help us understand the proper construction of state statutes and federal interests we turn to the Legislative Reference Bureau's Statutory Construction Digest which states that: "even where a State statute has been enacted to advance a Federal interest, it is improper to utilize the Federal statutory scheme to interpret the language of the State statute if that language is clear and unambiguous. *Penn Advertising,*

*Inc. v. Department of Transportation*, 147 Pa. Commonwealth Ct. 624, 628-30, 608 A.2d 1115, 1117-18 (1992)<sup>1</sup>.” We maintain that the APCA statute is clear and unambiguous in explicitly laying out the fee structures and that the Department improperly utilizes this federal regulation to skew the interpretation of the state statute otherwise.

Third, the Department points to the House and Senate Journals of the Session of 1992 to show that there were “no comments limiting the structure of the fees schedule to specific fees.” However, instead of supporting the Department’s claim that they have broad authority to implement whatever fee structure they want, we believe the lack of comments to that effect actually supports the case that the legislators intention was to set the actual structure of the fees in statute. In fact, the lack of comments is precisely what we would expect to see if they were under the impression that the subsections that explicitly limits the fee structure were, indeed, meant to limit the fee structure. When a piece of legislation does X, Y, and Z, the Members feel no need to debate whether or not the legislation does X, Y, and Z. They instead focus their debate on the pros and cons of passing X, Y, and Z.

In summary, we do not believe the Department has offered adequate explanations to satisfy our objections that they lack the statutory authority to impose new fees beyond what is explicitly authorized in the statute.

Addressing our second objection, we assert the Department’s changes represent a policy decision of such a substantial nature that it requires legislative review. 71 P.S. §745.5b (b) (4).

To clarify, we are not objecting to the Department’s claims *per se* that they need additional revenue to continue administering the Air Quality Program. Our objection, specifically, is with the unauthorized means by which the Department is proposing to raise this revenue. As stated in our previous letter, if the Department feels the current statutorily authorized fee structure is inadequate then we, again, invite the Department to work with us on proposals to make constructive changes to the statute or to increase the General Fund appropriations. Again, these are policy issues and policy issues must be reviewed by the people’s elected representatives in the Legislature. This is especially true when it comes to policies that raise revenue. Pa. Const. art. III, § 10.

To highlight what was spelled out in more detail in our previous letter, the current fee structure intentionally implements the policy of incentivizing the voluntary reduction of emissions by linking the fee amount to the amount of pollutants that an entity emits. A regulatory change in this design is a regulatory change in legislative policy and changing a legislative policy is a prerogative of the Legislature only. It may be the case that the Legislature’s policy was so successful in reducing emissions that it now warrants revision because without enough emissions the program’s funding is no longer sustainable, but, again, this is a matter we invite the Department to work with us on to propose legislative remedies to the APCA.

We maintain that the Department’s proposal does, indeed, represent a policy decision of such a substantial nature that it requires legislative review. We now turn to our last objection for which we believe the Department failed to adequately address, which is regarding the harmful economic impact of the fee increases.

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<sup>1</sup> Legislative Reference Bureau. (2019). *Statutory Construction Digest*, p. 19.

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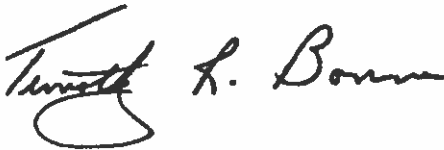
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As we pointed out in our previous letter, the Regulatory Review Act requires the Commission to consider the economic or fiscal impacts of a regulation, specifically the adverse effects on prices of goods and services, productivity or competition. 71 P.S. § 745.5b. Although we appreciate some of the Department's fee revisions to alleviate some of the harmful impacts, we note that most of the fees are still significantly higher than those of surrounding states. Furthermore, when these fee increases were proposed last year, we were experiencing a period of relative economic prosperity. Now, we are amid an economic catastrophe as a result of the COVID-19 pandemic, the full extent of which probably will not be known for years. The cost of these fee increases will be passed on to all Pennsylvanians, who are currently experiencing the highest unemployment rates on record. With so many individuals and businesses facing these extreme financial challenges, we maintain that these new fees will impose enormous costs on our economy that will significantly disadvantage the competitiveness of Pennsylvania's business community and will further exacerbate the financial hardship and economic struggles of millions of Pennsylvanians. Now, amid widespread economic devastation, is not the right time to add to the financial burden of Pennsylvanians.

In summary, the Department has failed to satisfactorily address the objections we raised to their proposed regulation in their final-form regulation submission currently before the Commission. We maintain that this proposal exceeds the statutory authority in scope and intent, and that it will have a deleterious economic impact that is not in the public's interest. For these reasons we, again, reiterate our request that the Commission vote to disapprove this proposed regulation.

Thank you for your time in taking these concerns under review.

Sincerely,



Representative Timothy Bonner  
8<sup>th</sup> Legislative District



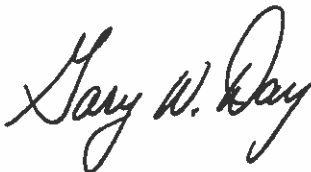
Representative Martin Causer  
67<sup>th</sup> Legislative District



Representative Bud Cook  
49<sup>th</sup> Legislative District



Representative Eric Davanzo  
58<sup>th</sup> Legislative District



Representative Gary Day  
187<sup>th</sup> Legislative District



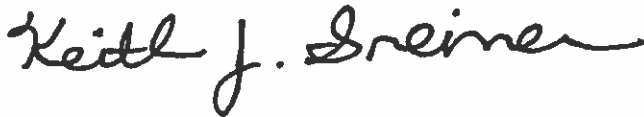
Representative George Dunbar  
56<sup>th</sup> Legislative District



Representative Mark Gillen  
128<sup>th</sup> Legislative District



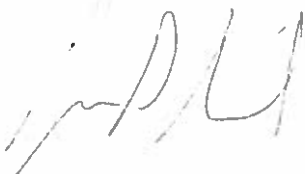
Representative Barbara Gleim  
199<sup>th</sup> Legislative District



Representative Keith Greiner  
43<sup>rd</sup> Legislative District



Representative Barry Jozwiak  
5<sup>th</sup> Legislative District



Representative Joshua Kail  
15<sup>th</sup> Legislative District



Representative David Millard  
109<sup>th</sup> Legislative District



Representative Brett Miller  
41<sup>st</sup> Legislative District



Representative Tina Pickett  
110<sup>th</sup> Legislative District



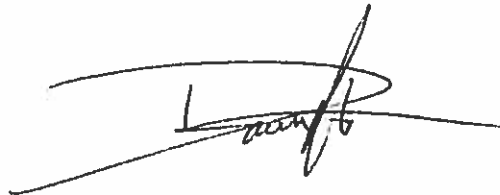
Jack Rader  
176<sup>th</sup> Legislative District



Representative Brad Roae  
6<sup>th</sup> Legislative District



Representative Greg Rothman  
87<sup>th</sup> Legislative District



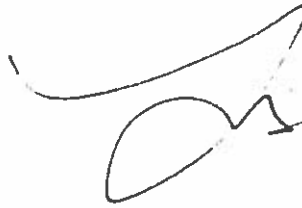
Representative David Rowe  
85<sup>th</sup> Legislative District

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Representative Francis Ryan  
101<sup>st</sup> Legislative District



Representative Louis Schmitt Jr.  
79<sup>th</sup> Legislative District



Representative Ryan Warner  
52<sup>nd</sup> Legislative District