

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-536 (IRRC #3231)

Air Quality Fee Schedule Amendments

July 17, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the April 13, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (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. Comments, objections or recommendations of a committee.

The Department of Environmental Protection (Department) is proposing increases for plan approval applications for both Title V and Non-Title V operating permits, as well as for the annual operating permit administration fee for both Title V and Non-Title V sources. The annual operating permit administration fee is proposed to be replaced with an annual operating permit maintenance fee that would be due on or before December 31 of each year.

The proposed regulation includes new fees for applications for plantwide applicability limits (PALS); ambient air impact modeling of certain plan approval applications, risk assessments; asbestos abatement or demolition or renovation project notifications (asbestos notifications); requests for determination (RFDs) and for claims of confidential information. In addition, the proposal authorizes the Department to establish fees for the use of general plan approvals (GPAs) and general operating permits (GPs) for stationary or portable sources under Chapter 127, Subchapter H (relating to general plan approvals and operating permits).

On June 17, 2019, the House Environmental Resources and Energy Committee (Committee) voted to send a letter asking this Commission to disapprove the rulemaking in its proposed form and to urge the EQB and Department to withdraw it. The Committee is concerned with the financial and economic impact of the proposed fee increases on the Commonwealth's residents and businesses.

Forty-seven Republican members of the Pennsylvania House of Representatives submitted a joint letter expressing concerns with the proposed rulemaking. Legislators oppose the rulemaking because they believe the proposed fees exceed their statutory authority, violate legislative intent and will have a negative economic and fiscal impact on businesses, local governments and the overall economy. They request that the Department withdraw the regulation and also ask this Commission to not approve the proposed air quality fee schedule amendments.

As noted above, the Committee has issued comments and expressed their opposition to the regulation. If the EQB proceeds with this rulemaking, the objections of the Committee could be the basis for a disapproval by this Commission. However, a stated goal of the RRA is to encourage, to the greatest extent possible, the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.

To that end, we ask the EQB to work with all interested parties, particularly the Committee and members of the Legislature to address the issues raised. It should be the goal of the dialogue between the EQB and those with an interest in this rulemaking to devise a funding structure that is authorized by statute, meets the intent of the General Assembly and ensures adequate revenue is available to fund the Title V program.

2. Whether the regulation is in the public interest; Economic and fiscal impact; Protection of the public health, safety and welfare.

We have received over 1,300 comments from individuals expressing their support for the proposal's fee increases. They believe the fees are necessary to ensure that the Air Quality Program has the ability to effectively conduct inspections, respond to complaints, and pursue enforcement actions, when necessary. A joint letter from four nonprofit environmental and health organizations state they support the spirit of the proposal but feel that the amendments do not go far enough to ensure the solvency of the air quality program. They assert that the amendments only maintain the existing level of funding which is inadequate to protect air quality in Pennsylvania.

Comments from statewide organizations representing parties subject to the fees are varied in their opinion of the rulemaking. Some commentators oppose the proposed fee increases because they view them as excessive. Others state that the fee increases are likely justified but seek assurances from the Department that the revenue from the increased fees will improve the functionality of the permitting process. Others remark that it is the responsibility of the General Assembly to increase the state allocation for the air quality program rather than tapping the regulated community for more funds.

The criteria in the RRA require consideration of the economic impact of the regulation and protection of the public health, safety and welfare. 71 P.S. 745.5 b(1) and (2). The public comments submitted on the proposed regulation raise valid concerns related to both criteria. We will review the EQB's response to the issues raised by commentators as part of this Commission's determination of whether the regulation is in the public interest.

3. New Fees. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly.

The Department identifies section 6.3 (a) of the Air Pollution Control Act (APCA) as the authorizing statute to amend the air quality fee schedule. Section 6.3(a) reads:

“This section authorizes the establishment of fees sufficient 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 and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, the Small Business Compliance Advisory Committee, and the Office of Small Business

Ombudsman. This section also authorizes the board by regulation 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.” [35 P.S. § 4006.3.]

Legislators state that there are two other subsections in Section 6.3 of the APCA that must be considered in the construct of any fee schedule revisions. They point to subsection (c) which establishes the emission fee for Title V sources and subsection (j) that authorizes certain categories of fees not related to Title V of the Clean Air Act. It is their belief, based upon their review of these subsections, that the General Assembly clearly intended to prescribe specific and limited categories of fees for Title V and Non-Title V sources and that “any other fees that go beyond the explicit authorization in these subsections goes beyond statutory authority.”

The EQB should ask the Legislature to amend the statute to authorize other types of fees, or explain why it believes that the proposed fees for PAL, ambient air impact modeling of certain plan approval applications, risk assessments, asbestos project notifications, RFDs and for claims of confidential information are authorized by statute and consistent with the intent of the General Assembly. Additionally, the EQB should explain why it believes it has the statutory authority to require these new fees to be assessed cumulatively (Section 127.702 (a)).

4. Annual operating permit maintenance fees. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; Possible conflict with or duplication of statutes or existing regulations.

The EQB proposes to implement an annual maintenance fee. This \$10,000 annual maintenance fee would be applicable to the owners and operators of affected Non-Title V and Title V facilities. It replaces the annual operating permit administration fee currently set at \$750.

Both lawmakers and commentators perceive the proposed annual maintenance fee as the Department’s attempt to shift away from the current fee structure. For some in the regulated community that are subject to the fee, they view it as a means of making the program more sustainable long-term, provided the emissions continue to decrease.

Legislators, on the other hand, object to the annual maintenance fee because it is not explicitly authorized by statute. It is their belief that the legislature clearly intended for the emission fee to be the main source of revenue to support the Title V program. They state that if the Department wants to shift away from a reliance on the current fee structure to the various fees they are requesting, then it must ask the Legislature to consider amending the statute to authorize other categories of fees.

Both commentators and legislators question whether this new fee will be as effective as the emission fee in reducing air pollutants. Some commentators and the 47 Republican lawmakers state that this new fee seems “counterintuitive” to the 1990 Clean Air Act Amendments goal of providing an incentive to facilities to voluntarily reduce emissions by charging the per ton fee.

In light of the comments received from lawmakers and the regulated community, we believe the proposal being offered by the EQB maybe a policy decision of such a substantial nature that it requires legislative review.

We ask the EQB to explain why it believes that replacing the annual permit operating administrative fee with an annual operating permit maintenance fee is authorized by the APCA. How is this fee different from the administration fee and what types of activities does it cover? It should also explain how the fee is consistent with the intent of the General Assembly, the Clean Air Act and APCA.

5. Amount of Fee increases. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector; Economic and fiscal impact.

The Department estimates that the fee schedule established in this regulation is expected to produce an additional \$12.7 million (\$5.9 million for Title V facilities; \$6.8 million for non-Title V) which will increase the total fees collected per year to \$29.6 million. The potential impact on the owners and operators of small business is estimated to be approximately \$4.8 million in increased plan approval applications, operating permit and asbestos notification costs.

In some instances, the EQB is proposing to increase existing fees by over 500 percent while also instituting a number of new fees. The Preamble states that the increased fees and new fees will allow the Department to maintain staffing levels as well as cover operating expenses.

The Committee, 47 Republican lawmakers and certain sectors of the regulated community are concerned about the economic and fiscal impact of this rulemaking on small businesses and ultimately the Commonwealth's taxpayers. They strongly object to the "exponential" fee increases being put forth by the EQB and remark that the decline in revenues due to a decrease in emissions is to be expected because, it is, in fact the goal of the Clean Air Act.

They question the need for the program to have the same amount of funding if there are significantly less pollutants being released into the air. In addition, the 47 legislators assert the Department's proposed fees, which are expected to generate revenue in excess of its expenditures, violates the APCA which 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." 35 P.S. § 4006.3(c).

Based on the concerns of the Committee and lawmakers, the EQB should address the issues relating to statutory authority and intent of the General Assembly. It should also explain its rationale for the timeline for implementation of the proposed air quality fee schedule amendments. How did the EQB determine that the incremental approach for fee increases until 2031 is appropriate? How will the EQB assess whether fees moving forward will be commensurate with the activities being performed, fair to the regulated community, and competitive with other states?

6. Compliance with the RRA.

Section 5.2 of the RRA directs this Commission to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. The explanation of the regulation in the Preamble is not sufficient to allow the Commission to determine if the regulation is in the public interest.

The Summary of Regulatory Requirements provided in the Preamble to the proposed regulation lacks an explanation for the new fees in Sections 127.708, 127.709, 127.711 and 127.712. In the Preamble to the final-form rulemaking, the EQB should provide a detailed description of the amendments proposed for each section and why the amendments are required.

**CHAPTER 127. CONSTRUCTION, MODIFICATION, REACTIVATION AND
OPERATION OF SOURCES**

**Subchapter F. OPERATING PERMIT REQUIREMENTS
OPERATING PERMIT MODIFICATIONS**

**7. Section 127.465. Significant operating permit modification procedures. –
Implementation.**

New subsection (e)

Subsection (e) provides for the Department's role once it has taken final action on the proposed change for the significant modification of an operating permit. It reads:

The Department will take final action on the proposed change for the significant modification of the applicable operating permit and, after taking final action, will publish notice of the action in the *Pennsylvania Bulletin*.

What is meant by final action? Does final action by the Department result in an approval or disapproval of the modification request? Subsection (e) should be revised to define final action. Also, the Department should specify a time period from final action within which it will publish notice in the *Pennsylvania Bulletin*.

Subchapter I. PLAN APPROVAL AND OPERATING PERMIT FEES

8. Section 127.709. Asbestos abatement or regulated demolition or renovation project notification. – Clarity; Implementation.

This new section establishes an asbestos abatement project fee for owners and operators of a project not located in Philadelphia or Allegheny counties.

One commentator states that this new section does not differentiate between an initial notification and subsequent revised notifications. The EQB should clarify the applicability of this new fee.