Pennsylvania Aggregates and Concrete Association

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August 8, 2012

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

Re: Regulation #7-460 (IRRC # 2864)
Environmental Quality Board
Noncoal Mining Fees

Dear Commissioners:

The Pennsylvania Aggregates and Concrete Association ("PACA") represents the interests of the aggregates industry (stone, sand and gravel) in the Commonwealth of Pennsylvania. There are 1,500 noncoal mining operators in the Commonwealth. PACA submits this letter in opposition to the Environmental Quality Board's (the "EQB's") proposed noncoal mining fees regulation, which would increase industry-wide fees to $2,500,000 a year.

Background

On May 21, 2012, the EQB submitted to the Independent Regulatory Review Commission (the "Commission") a final-form regulation which would increase noncoal mining permit fees and add an annual administration fee for noncoal mining operations. On June 21, 2012, the Commission disapproved the final-form regulation. The Commission determined that the proposed regulation was not in the public interest because it would have an adverse economic impact on the regulated community, and it did not constitute the least burdensome alternative to the industry.

On July 26, 2012, the EQB re-submitted the final-form regulation to the Commission. Despite the Commission's disapproval order, the EQB made no changes to the regulation.

PACA submits the following comments in opposition to the EQB's proposed regulation. These comments are in addition to those we submitted by letters dated September 27, 2010, February 27, 2012, June 18, 2012, and July 13, 2012.

Comment No. 1. The Proposed Regulation is Not Authorized by the Noncoal Act

The Department of Environmental Protection and the EQB are attempting to do by regulation what they have not been authorized to do by the Noncoal Surface Mining Conservation and Reclamation Act (the "Noncoal Act"). This is improper for a variety of reasons and should not be permitted by the Commission. The Noncoal Act has two particularly relevant provisions.

First, The Noncoal Act allows DEP to charge and collect "a reasonable filing fee." 52 P.S. § 3307. The fee cannot exceed the cost of reviewing, administering and enforcing the permit. *Id.*

Second, The Noncoal Act establishes how funds (including permit fees) are appropriated to DEP and may be used.[1] Use of the funds is limited to:

- Revegetation or reclaiming of land affected by surface mining;
- Restoration or replacement of water supplies affected by surface mining operations; or
- Other conservation purposes provided by the act.

52 P.S. § 3317(a).

DEP and the EQB may only exercise those powers vested in them by the General Assembly. *Foundation Coal Res. Corp. v. DEP*, 993 A.2d 1277, 1289 (Pa. Cmwlth. 2010). This means that where the General Assembly has clearly addressed an issue, DEP and the EQB cannot expand the meaning of a statute in the promulgation of permit conditions or regulations. *See Id.* At 1290. By attempting to expand the authority vested in DEP via the proposed regulations, DEP and the EQB violate these important principles.

Put together, the language of the Noncoal Act reveals the following basic principles.

Comment No. 2. The Noncoal Act Authorizes a Reasonable, One-Time Filing Fee.

DEP is permitted to "charge and collect" a "reasonable filing fee." Nothing in the Noncoal Act implies that the fee is a recurring fee, an annual fee or an administrative fee. The language states it is a "filing" fee. The General Assembly intended this fee to be a one-time fee that relates to the filing of an application and is charged at the time a permit application is filed.

Comment No. 3. EQB Conflates the Term "Filing Fee" into an Annual Fee.

The EQB's proposed regulations improperly conflate the term "filing fee" into an annual fee:

> *Annual administration fee*—a non-refundable filing fee assessed on an annual basis for the cost to the department of inspecting a permitted activity or facility in order to administer the permit. *Proposed addition to* 25 Pa. Code § 77.1 (Definitions).

There is no basis in the Noncoal Act to support EQB's expansion of the term "filing fee" into an annual fee. The fee authorized by the Noncoal Act is not intended as an ongoing fee that could be charged on an annual (or other) basis. If the General Assembly had wanted to allow for additional fees, it would have authorized "filing and annual fees." It did not do so.

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[1] "***All funds received by the secretary under this act from...permit fees***...shall be held by the State Treasurer in a special fund, separate and apart from all other moneys in the State Treasury, to be known as the Noncoal Surface Mining Conservation and Reclamation Fund; ***shall be used*** by the secretary ***for the purposes of the revegetation or reclaiming of land affected by surface mining of any minerals, for restoration or replacement of water supplies affected by surface mining operations or for any other conservation purposes provided by this act; and, for such purposes, are specifically appropriated to the department by this act.***" 52 P.S. § 3317(a) (emphasis added).

Comment No. 4. The Amount of the Fee Cannot Exceed the Cost of Reviewing, Administering and Enforcing a Permit.

A "reasonable" fee cannot "exceed the cost of reviewing, administering and enforcing the permit." If the fee exceeds the costs of reviewing, administering and enforcing the permit, it is not "reasonable" and may not be charged. Although there may be other costs to DEP which, in a vacuum, might be considered "reasonable" (such as public outreach programs, educational programs, purchasing Jeeps for inspectors, contracting for a variety of computer services for the Noncoal program, paying DEP's costs of overhead for the Noncoal program, etc.), the Noncoal Act limits a "reasonable fee" to the "cost of reviewing, administering and enforcing the permit."

Comment No. 5. The Amount of the Fee Must Relate to the Activities Proposed in a Permit, Not DEP's Cost for Administering the Entire Noncoal Program.

The EQB loses sight of the requirement that the fee be linked to a particular permit. For example, the proposed regulation establishes a $13,500 permit fee for all large surface mining permits. The fee is the same regardless of whether a proposed mining operation would impact twenty acres or 200 acres. Such non-fact-based fees are not authorized by the Noncoal Act. The Noncoal Act does not allow for fees that "exceed the cost of reviewing, administering and enforcing ***the*** permit." The EQB suggests that the Commission should approve the noncoal mining fees because the Commission has recently approved fee increases for other DEP programs. However, the EQB fails to mention that many of the fees previously approved by the Commission were based on the size of the proposed activity. *See* 25 Pa. Code Chapter 78 (Amount of Marcellus shale permit fee based on depth and length of well); 25 Pa. Code Chapter 102 (Amount of NPDES permit fee based on acreage of disturbance). Here, the proposed regulation is not the least burdensome alternative because the proposed fees have no correlation to the size of the permitted activity.

Comment No. 6. Funds Received by DEP May Only be Used for Certain Conservation Purposes.

The Noncoal Act imposes limitations on how DEP may use permit fee funds it has received. Use of the funds is limited to:

1. Revegetation or reclaiming of land affected by surface mining;
2. Restoration or replacement of water supplies affected by surface mining operations; or
3. Other conservation purposes provided by the act.

52 P.S. § 3317(a).

While DEP may ***charge and collect*** a "reasonable filing fee," 52 P.S. § 3307(a), unless that fee is for conservation purposes (or revegetation/reclamation of land or restoration/replacement of water supplies, neither category of which is at issue here), it is not ***appropriated*** to DEP. 52 P.S. § 3317(a). Section 3317(a) is clear that it is only for the three enumerated purposes that the funds are appropriated to DEP. This means that any such money, if it were correctly charged and collected by DEP, would not be appropriated to DEP.

Only the General Assembly may appropriate funds to an administrative agency like DEP. *Jubelirer v. Rendell,* 953 A.2d 514, 529-30 (Pa. 2008) ("In administering the programs funded by the General Assembly, the executive branch must abide by all requirements and restrictions of the relevant legislation and may not spend more than the amount appropriated by the General Assembly. Moreover, the executive branch may not of its own initiative use funds appropriated for one program in carrying out another and may not spend on a program more than its designated amount. It is in this way that the doctrine of separation of powers functions.") (citations omitted, internal quotation marks omitted); *Progress Gas Consumers Group v. PUC*, 511 A.2d 1315, 1321 (Pa. 1986) ("Though the PUC proposals are laudatory in showing concern for the earth's resources, their execution requires the legislative powers of taxation and appropriation. These powers are not within the PUC's delegated authority."). Here, the EQB is attempting to appropriate fees to cover DEP's general administrative costs. This is a function expressly reserved to the Legislature.

Clearly the proposed annual administration fee (and other charges) is not for reclamation of land or restoration of water supplies. Thus, while DEP may *charge and collect* a "reasonable filing fee," unless that fee is to be used for conservation purposes, it is not *appropriated* to DEP.

Conclusion

The Department and the EQB have overstepped their boundaries in attempting to promulgate regulations that establish permit fees that are not authorized by the Noncoal Act. PACA opposes the proposed noncoal mining fees regulation, and respectfully requests that the Commission disapprove the regulation.

Respectfully submitted,

Peter T. Vlahos
President