pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY

RECEIVED
IRRC
2012 AUG 14 PM 3:03

August 14, 2012 2864

Silvan B. Lutkewitte, III, Chairman
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 Chairman Lutkewitte:

On June 21, 2012, the Independent Regulatory Review Commission (Commission) issued a Disapproval Order for the Noncoal Mining Fees final rulemaking. In response to the disapproval of the rulemaking, the Environmental Quality Board (EQB) met on July 17, 2012, and approved the resubmission of the final rulemaking to the Commission without revisions or further modifications pursuant to the provisions of Section 7(b) of the Regulatory Review Act. In anticipation of the Commission's reconsideration of the Noncoal Mining Fees rulemaking on August 16, 2012, the Commission received an August 8, 2012 letter from Peter T. Vlahos, President, Pennsylvania Aggregates and Concrete Association (PACA) regarding the final rulemaking. The letter from PACA raises several assertions that I would like to address.

**The Final-Form Rulemaking is Authorized by the Noncoal Surface Mining Conservation and Reclamation Act:** PACA asserts in its letter to the Commission that the final-form regulation runs counter to the provisions of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act). This is clearly not the case and is contradictory to the Commission's assessment in the Disapproval Order of the rulemaking, where the Commission confirmed that the regulation is consistent with the statutory authority of the EQB and the intention of the General Assembly. The Noncoal Act explicitly provides the authority to the Department of Environmental Protection (Department) to impose fees as they are included in the final-form Noncoal Mining Fees rulemaking. Section 7(a) of the Noncoal Act provides " ... *The department is authorized to charge and collect from persons a reasonable filing fee, which shall not exceed the cost of reviewing, administering and enforcing the permit.*" 52 P.S. § 3307(a). The Department has clearly followed the statutory intent of the General Assembly by proposing permitting and administrative fees in the rulemaking that capture the real costs to the Department for reviewing, administering and enforcing a noncoal mining permit. Those costs are substantiated by a detailed work load analysis for the specific operations being permitted and inspected. It should be noted that the General Assembly did not limit the fee prescribed at 52 P.S. § 3307(a) to a *specific amount*, as it did at 52 P.S. § 3305(b) concerning the establishment of a license fee; nor did the General Assembly limit the fee to covering only the costs of "reviewing" a permit application. Rather, the Noncoal Act expressly provides, in the broadest possible terms, that fees may be collected from the regulated industry to cover the costs of the Department to review, administer, and enforce the permitted activity. The only limitation on this

statutory provision is that the revenue from the fees may not exceed the costs of reviewing, enforcing, and administering the mining permits.

**The Noncoal Act Supports Provisions for a Noncoal Mining Permit Fee and an Administrative Fee:** PACA also claims in its August 8, 2012 correspondence that the Noncoal Mining Fees regulation "conflates" the reasonable filing fee provision of the Noncoal Act into an annual reoccurring fee. In its contention, PACA appears to be arguing that the EQB cannot split the "filing fee" into two parts (i.e. permit and administrative fees) despite the statutory authority provided to the Department in the Noncoal Act to collect a fee that covers the costs to review, administer and enforce the permitted activity. This contention is not logical because it contradicts the statutory text and is inconsistent with practical considerations of administration and equitable concerns. Notably, the General Assembly did not specify a precise fee amount which must accompany an application as it did with the noncoal operator's license fee. See 52 P.S. § 3305(b) (*the "application for a license shall be accompanied by a fee of. . . $500 in the case of persons mining more than 2,000 tons" per year*). If the General Assembly intended to limit the fees provided for in 52 P.S. § 3307(a) to a one-time application fee, it would have employed a structure analogous to the license fee provisions in the statute. Instead, the statute gives the EQB discretion on how to structure fees sufficient to cover the costs of administering the Department's noncoal mining program.

In point of fact, the administrative fee is tied directly to permit-related inspection and enforcement costs of the Department. The proposed fees were calculated based on a comprehensive work load analysis and were deliberately and carefully designed to meet the statutory requirement not to exceed the cost of implementing the elements of the noncoal regulatory program enumerated in the Noncoal Act. The annual administrative fee equitably shares the cost of administering and enforcing permits across all noncoal operators and is implemented over the life of the permit based on a permittee's mine license renewal date. An important aspect to understand when evaluating fees for noncoal operations is that noncoal mining permits do not expire. Therefore, the permit fee constitutes a one-time cost over the entire life of the operation, which is often measured in decades for large noncoal mines, unless a subsequent permit action is requested by the mine operator. Existing fees have been in place for decades, have never been updated, and therefore have no relation to the amount of work required by the Department to review noncoal permit applications or the costs for inspecting noncoal operations. The proposed higher permitting and administrative fees capture the real costs of the Department in its review and inspection of operation processes being permitted and inspected and thus reflect the statutory intent of having fees that relate to the costs of reviewing, administering and enforcing the permit.

**The Noncoal Act Provides Discretion to the EQB on the Structure of the Fees:** PACA also asserts that the fees must be based on permit-specific calculations and not on categories of permits in order to comply with the Noncoal Act. PACA suggests that the size of the mining operation must be considered in the fee assessment. The Noncoal Act does not specify a calculation method for fees. The statute gives discretion to the EQB on how to best structure the fees when establishing implementing regulations. PACA had an opportunity to comment on the proposed structure of the fees during the regulatory process and the EQB took PACA's comments into consideration when preparing the final-form regulations. As explained in the

Order for the final-form regulations, the proposed fee schedule assesses fees based on the size and complexity of noncoal mining permits and includes fees to cover the Department's costs for enforcing and administering the permits as provided for in the Noncoal Act. The fee schedule accounts for practical administrative-efficiency concerns, and the structure is more equitable to the industry as a whole. The fee schedule is a reasonable means—within the EQB's discretion—of implementing the statutory authority to collect fees to cover the Department's costs to administer the noncoal mining program.

**The Noncoal Act Supports the Department's Use of the Permit Fees:** Lastly, PACA asserts an opinion regarding the use of funds in the Noncoal Surface Mining Conservation and Reclamation Fund, as articulated by the General Assembly in the Noncoal Act. PACA asserts that DEP may not use the fees to cover "administrative costs." First, 52 P.S. § 3307(a) of the Noncoal Act expressly authorizes a fee to cover the costs to "administer" the permitted activity. Moreover, the statute expressly provides in 52 P.S. § 3317(a) that funds received under the Noncoal Act may be used "for any other conservation purposes provided by this act." The statutory text is written in very broad terms, and must be read consistently with the remainder of the statute. See 52 P.S. § 3302 (purposes of Noncoal Act). The conservation purposes provided by the statute surely include the Department's administration of the noncoal mining permit program since that program is the means by which the police power of the Commonwealth is implemented to protect the general welfare and the environment from the effects of noncoal mining activities. See also 52 P.S. §1396.18(a)(3) (Surface Mining Conservation and Reclamation Act, which similarly provides that funds may be used for "conservation purposes" of the Act). The fees that will be assessed and collected under the final-form rulemaking will be used by the Department to assure that noncoal mining activities are conducted in a manner that protects the health and safety of the public and the environment and thus are certainly for the conservation purposes provided by the Noncoal Act.

In summary, the final-form Noncoal Mining Fees regulations clearly implement the intent of the General Assembly and are consistent with the statutory authority of the Environmental Quality Board. Good governance requires funding options that are stable, targeted and sustainable. The Noncoal Mining Fees rulemaking is necessary because it will establish a reliable funding source for the noncoal mining program to support ongoing permitting and related environmental and safety inspections of noncoal mining operations and will provide a level of service delivery to the noncoal industry that is predictable and sustainable.

Sincerely,

Michael Krancer
Secretary

cc: The Honorable Mary Jo White
The Honorable Scott Hutchinson
The Honorable Camille George
The Honorable John Yudichak