

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-466 (IRRC #2927)

Dam Safety and Waterway Management Fees

March 28, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the January 28, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (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. General. – Consistency with statute; Economic impact; Reasonableness; Clarity.

Reasonable fees

The Dam Safety and Encroachments Act (Act) charges the EQB, in part, with protecting the public safety through the regulation of dams, reservoirs, water obstructions and water encroachments. 32 P.S. § 693.2. Relating to fees, the EQB has the power to adopt regulations establishing “reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act.” 32 P.S. § 693.5(a)(5).

In Regulatory Analysis Form (RAF) Questions 12, 13 and 14, the EQB provides a breakdown of the fee impact by program, which we summarize as follows:

- **Dam Safety Program:** The proposed regulation would increase the annual revenue from \$28,000 in existing fees to \$1,139,850 in new fees, an increase of \$1,111,850.
- **Water Obstruction and Encroachment Program:** The proposed regulation would increase the annual revenue from \$47,850 in existing fees to \$2,952,612 in new fees, an increase of \$2,904,762.
- **Submerged Lands License Agreement Program:** The proposed regulation would increase the annual revenue from \$391,000 in existing fees to \$1,564,000 in new fees, an increase of \$1,173,000.

Overall, existing fees generate about \$467,000 and the new fees would generate about \$5.6 million. The EQB would receive an increase of \$5 million to cover the costs to administer the

Act, and the regulated community would incur increased costs of the same amount. In comparison, the response to RAF Question 17a shows that expenditures for programs affected by the regulation are expected to total about \$106 million for fiscal year 2011-2012.

Under existing regulation, Subsection 105.13(b) specifies a fee exemption for “applications submitted by Federal, State, county or municipal agencies or a municipal authority for a dam, water obstruction or encroachment.” The proposed regulation amends this exemption. It exempts fees for Federal and State agencies for dams and Federal, State, county and municipal agencies and authorities related to water obstruction and encroachment. We note that the proposed regulation does not exempt county and municipal agencies and authorities related to dams. However, in the Preamble, the EQB states it will add them to the exemption in the final-form regulation.

Commentators believe the distribution of fees is not equitable. They note that dam safety work is not optional and the Dam Safety Program oversees the regulation and safety of approximately 3,300 dams throughout Pennsylvania. The commentators state that there are 930 dams owned by state, county or municipal entities and 1,749 category C-4 dams (Category C dams have impoundment storage of equal to or less than 100 acre feet, and a height of equal to or less than 40 feet; Category 4 dams have no expected population at risk, and economic loss is expected to be minimal to private or public property and cause no significant public inconvenience). However, virtually all of the fees are assessed on only the 645 privately-owned dams. Consequently, a disproportionate share of the program costs is paid by private dam owners. They ask that fees be applied to all categories of dam owners equally, including fees for review of dam permit applications.

We believe these commentators make a valid point relating to the Act. The Act states that the EQB has the power to adopt regulations establishing “reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act.” 32 P.S. § 693.5(a)(5).

We emphasize three points relating to the proposed regulation. First, the regulation imposes significant fee increases of more than \$5 million which, overall, amounts to a 12-fold increase over existing fees and revenues. Some fee categories are being increased by more than 12-fold. Second, RAF Question 20 asks what regulatory alternatives have been considered and rejected and requests a statement that the least burdensome alternative has been selected. The EQB responds, in part, that “no alternatives have been considered and/or rejected.” Finally, as one example, the fees specified in the regulation are applied to only about 20% of dam owners. Given that the programs cover all dams, it is not clear how the exemptions and application of fees meet the Act’s provision for “reasonable fees.”

While we recognize that fees have not been increased since 1991, given the magnitude of the fee increases and the limitations on what portions of the regulated community pay the fees, we believe that exploration of alternatives is warranted, particularly in regard to the entities that pay the fees. The EQB should explain how all of the fees in the final regulation meet the statutory provision for “reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act.”

Calculation of fees

The EQB provided a “FEE REPORT FORM” dated October 2010 with the proposed regulation. The form includes a “Proposed Revised Dam Safety Fee Schedule” showing, for example, that the fee for “Permit Application – New Dam – Class A, Hazard 1” should be increased from \$3,000 to \$26,500. While the form establishes that current fees do not cover costs and provides a narrative describing examples of reviews, it does not provide clear support or a direct correlation of the specific hours and costs of these activities to administer the Act and the basis for the actual fee increases that are being implemented. Using the above example, what is the basis for the calculation of the fee of \$26,500? Without providing the basis for the calculation of all proposed fees, it is not clear how the EQB determined that it is reasonable for fees to offset approximately 35% of the costs of the Dam Safety Program and 31% of the costs of the Water Obstruction and Encroachment Program, as well as 53% of the cost of conducting permit reviews for the Water Obstruction and Encroachment Program. For the final-form regulation, the EQB should provide calculations showing how the specific fee increases it proposes correlate to the costs and activities required to administer the Act.

Exemptions

In the Preamble to the proposed regulation, the EQB states that the final-form rulemaking will include counties and municipalities within the Dam Safety Program’s fee exemption in Paragraph 105.13(a)(1). We are concerned that the public, legislature and this commission were not given an opportunity to comment on the proposed language. In addition, the EQB should clarify whether the data provided as the basis for the proposed fees included counties and municipalities in the calculation of the fees and what impact that would have on the proposed fees.

Cost reductions

Commentators noted three things that may reduce costs that we ask the EQB to address. First, commentators state there is a duplication of inspection efforts by licensed professionals and Dam Safety Program personnel. They state that eliminating this duplication could result in lower fees. We recommend that where it is consistent with the Act and feasible to do so, the regulation should allow the acceptance of valid inspections performed by private licensed professionals if the goals of the inspections are consistent.

Second, a commentator believes that updating and developing new general permits would improve efficiency without compromising public safety. Has the EQB done a review of the program to improve efficiency before imposing additional fees?

Finally, a commentator recommended using additional fee revenue to expedite the development of an electronic permitting process. Has the EQB considered using technology such as an electronic permitting process to reduce program costs?

The EQB should consider these suggestions and explain why they were or were not adopted before imposing fee increases.

State Conservation Commission and its county conservation districts

The State Conservation Commission (SCC) submitted comments reflecting comments it received from 25 county conservation districts. The SCC comments raise concerns with what it describes as excessive fees, issues related to implementation of the fees, services provided by county conservation districts, whether county conservation districts will receive part of the fees and delegation agreements. We will review the EQB's responses to all of the SCC comments as part of our review of the final-form regulation. We also ask the EQB to explain how the regulation will impact county conservation districts, what services they provide related to the programs the fees will support and whether the revenues received as a result of this regulation will be shared with the county conservation districts.

Advanced Notice of Final-Form Rulemaking

In the Preamble, the EQB expressly seeks input regarding modifying the proposed rule to incorporate flexibility in the water obstructions and encroachments fee proposal to accommodate multiple structures in one project. We recognize this phrasing is used in existing Subsection 105.13(c); however, it is not clear what modifications the EQB contemplates.

Additionally, as noted previously, the EQB states in the Preamble that the final-form rulemaking will include counties and municipalities within the Dam Safety Program's fee exemption in Paragraph 105.13(a)(1). We question why the EQB chose to state this information in the Preamble rather than include it in the body of the proposed rulemaking.

In order to give the regulated community and other interested parties an opportunity to provide input on any revisions made by the EQB related to these two issues, we recommend that the EQB publish an Advanced Notice of Final Rulemaking (ANFR). An ANFR would provide the opportunity to review and resolve remaining issues before submittal of a final-form regulation.

2. Section 105.13. Regulated activities—information and fees. – Economic impact; Reasonableness; Clarity.

Impact on dredgers

Commentators who represent dredging operations provided calculations demonstrating that application of the fees to their operations could result in permit fees of \$1.4 million for a single permit and the disturbance fee could cost over \$48 million for their operations. Fees of this magnitude would be unaffordable to them. We agree with the commentators that it does not appear this was the EQB's intent within the context of an overall estimated fee increase of \$5 million. Did the EQB intend for the proposed rulemaking to apply to dredgers? If so, the EQB should explain in the Preamble of the final-form regulation how it considered the economic impact on this industry, and how it found that impact to be reasonable. If not, the regulation should specifically provide a clarification that the fees do not apply to dredging operations.

Inconsistent language

The regulated activities listed under Subsection (a) do not appear to be consistent with the language in the fee descriptors listed under Subsection (c). For example, Subsection (a) includes a “registration for a general permit” but we do not see any reference to a “registration for a general permit” under Subsection (c). These subsections should be consistent in describing the regulated activities in the final-form regulation.

Clean Water Fund

The EQB states in Subsection (b) that fees collected by the Dam Safety Program and Water Obstruction and Encroachment Program will be deposited into the Clean Water Fund and utilized to offset the operating costs to implement respective programs. A commentator suggests that any fees and penalties associated with Chapter 105 be accounted for separately from other monies that go into the Clean Water Fund. The EQB should explain how it can ensure that the funds collected through Chapter 105 will be used only for the benefit of the Water Obstruction and Encroachment Program, Submerged Lands License Agreement Program and the Dam Safety Program to offset the costs of these respective programs.

Application of fees

Commentators have indicated the proposed rulemaking lacks clarity in regard to the application of fees as stated in Paragraph (c)(2). For example:

- Did the EQB intend for a general permit applicant to pay the Administrative Filing Fee, the Disturbance Fee and appropriate General Permits Fee?
- When would the proposed \$500 fee for Environmental Assessment for Waived Activities apply?
- To which permits would the \$1,750 Administrative Filing fee apply?
- Does the Disturbance Review Fee only apply to GP 11 and GP 15? Is it only for full Water Obstruction and Encroachment permits?
- Will applicants be required to obtain an approved Erosion and Sediment Control Plan and pay the associated fees in addition to the proposed permit fees?
- Dam rehabilitations may involve the need to provide additional hydraulic spillway capacity. With large dam rehabilitation designs, a hydrologic and hydraulic review by the Department of Environmental Protection is usually required very early in the design process. How will this staged review approach be handled in accordance with the new fees?

- By referencing fees established under Section 105.13, is Paragraph 105.444(5) limiting fees for new general permits because those new permits are not specifically listed in Paragraph 105.13(c)(2)?

We recommend that the EQB clearly establish the applicability of fees in the final-form regulation in response to all public comments.

“Waived activities,” “major amendment” and “minor amendment”

Under Paragraph (c)(2), the EQB should define the “waived activities” which are subject to the Environmental Assessment for Waived Activities. The EQB should also define what qualifies as a major or minor amendment as it did under Clauses (c)(1)(iv)(B) and (C) in defining major and minor projects. A commentator states that the implication that major amendments include temporary and/or permanent impacts, while minor amendments do not, should be explicit in this section.

Evaluation of fees

Subsection (l) states that the Department’s report regarding the adequacy of fees “will contain recommendations to **increase** fees to eliminate the disparity...” (Emphasis added.) As written, the regulation precludes the possibility of a finding that fees could be more than adequate and should be reduced. We recommend amending this provision to also accommodate the possibility of a fee decrease.

3. Section 105.448. Determination of applicability of a general permit. – Clarity.

Nonregulatory language

Subsection (c) states that a project requiring registration under Section 105.447 “may” be charged an application fee. This is nonregulatory language. The final-form regulation should specify when an application fee will be charged.

4. Miscellaneous clarity.

- Clause 105.13(c)(1)(iv)(C) addresses circumstances when costs are less than \$250,000 and when costs exceed \$250,000. This should be amended to include the possibility that the amount of the total construction costs equals \$250,000.
- In Section 105.131a, the reference to Subparagraph 105.13(c)(viii) should be amended to 105.13(c)(**1**)(viii).