

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-522 (IRRC #3138)

Handling and Use of Explosives

April 27, 2016

We submit for your consideration the following comments on the proposed rulemaking published in the February 27, 2016 *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 RRA (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. Determining whether the regulation is in the public interest.

Commentators state that several of the proposed requirements conflict with, duplicate or are more stringent than federal requirements. We ask EQB to ensure that the final-form regulation does not conflict with or duplicate other state or federal requirements. If the final-form regulation is more stringent than federal requirements in any areas, EQB should explain in the Preamble and final-form Regulatory Analysis Form (RAF) the compelling Pennsylvania interest that demands stronger regulations.

2. Economic or fiscal impacts; Reasonableness of requirements, implementation procedures and timetables for compliance; Compliance with the RRA.

We have concerns related to several aspects of the proposed regulation addressing fees.

EQB proposes several new or increased fees related to blaster's licenses, blasting activities and explosive storage magazines. Commentators state that the increases, some of which are between 300 and 500 percent, seem excessive and would be a hardship for the regulated community. RAF #18 asks EQB to explain how the benefits of the regulation outweigh any costs or adverse effects. Related to new or increased permit fees, EQB states that "the increased costs to the regulated community reflected by the proposed fee schedule are necessary to support the explosives program without reliance on general fund monies." We ask EQB to explain in the final-form Preamble and RAF the reasonableness of imposing significant fee increases on the regulated community, and how any adverse effects of the fee increases are outweighed by the benefits of the regulation.

RAF #19 requires a specific estimate of the costs and/or savings to the regulated community associated with compliance, and an explanation of how the dollar estimates were derived. EQB responds that:

- The new blasting activity permit fees are expected to cost the permittees, collectively, about \$65,000 per year. This is based on about 500 applications per year at a cost of \$130 per application.
- Increased magazine licensing fees are expected to cost the regulated community about \$175,000 per year.
- Increased blaster license fees will cost each individual blaster an additional \$50 per year.

How did EQB derive the \$175,000 in revenue generated by magazine licensing fees?

The Fee Report Form attached to the RAF shows a proposed fee schedule which includes the three fees mentioned above. However, there are seven additional fees on the schedule which are not mentioned in response to RAF #19. In the final-form Preamble and RAF, we ask EQB to provide specific estimates of all of the costs associated with compliance and an explanation of how the dollar estimates were derived.

Additionally, the Fee Report Form states the recommended fees are estimated to generate about \$300,000 annually, which will support the program. EQB should ensure that final-form RAF #19 shows the fees totaling the revenue necessary to support the program.

3. Section 210.13. General. – Economic or fiscal impacts; Reasonableness of requirements, implementation procedures and timetables for compliance.

Subsection (b) states that a blaster's license will only be issued or renewed after it is verified that the applicant has undergone a background check by the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as either a responsible person or an employee possessor. A commentator notes that this requirement is a hardship, if not an improbable step, for certain individuals who want to maintain their licenses but are not directly involved with handling or distributing explosives. The commentator suggests an exemption for individuals such as retired, unemployed or laid off blasters, as well as consultants and engineers where a license is critical to offer services such as independent blast design evaluations and expert witness testimony. Regarding this segment of the regulated community, how will EQB implement this requirement? Are there alternative methods for obtaining an ATF background check for those who are not employed by a company with an explosives permit? We ask EQB to address the reasonableness of this requirement, including its economic impact on this segment of the regulated community.

4. Section 211.101. Definitions. – Economic or fiscal impacts; Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements, implementation procedures and timetables for compliance.

Commentators request that EQB consider using ATF definitions because many companies have multi-state operations and deal with multiple government agencies. Commentators believe that standardizing definitions as much as possible would eliminate some confusion and improve safety. We ask EQB to explain the need for and reasonableness of defining terms that are already defined at the federal level. Additionally, EQB should ensure that final-form definitions do not conflict with federal definitions and are clear for the regulated community to implement.

Blast area

EQB proposes to revise the definition of *blast area* to include prevention of “the potential for” injury to persons and damage to property. Commentators are concerned that “potential” is vague and ambiguous, and they assert that requiring the area around the blast site “to be cleared and secured” sets a clear standard. One commentator asserts that the addition of “the potential for” makes the proposed definition more stringent than federal regulations. We ask EQB to delete the phrase “the potential for” from the final-form definition, or to explain why the proposed definition is reasonable and how it sets clear standards for compliance.

Nuisance

According to the Preamble, EQB is adding a definition for *nuisance* for use regarding enforcement actions by DEP. Commentators strongly object to the new term which they argue is ambiguous, highly subjective in nature, and likely to lead to inconsistent application in the field.

A nuisance is something that is annoying or inconvenient, but EQB defines it as a hazard, which is generally understood as an unavoidable danger. We have concerns that taking a commonly understood term and defining it in an unexpected way creates ambiguity.

EQB uses the term *nuisance* only once in the regulation in Section 211.151 (relating to prevention of damage or injury). Subsections 211.151(a) and (b) both are new proposed language.

Subsection (a) states, “Blasting shall be conducted to **prevent injury to persons** or damage to private or public property” [Emphasis added.]

Subsection (b) states, “Blasting shall be conducted in a manner that does not cause a **nuisance.**” [Emphasis added.]

If blasting is conducted to prevent injury to persons as required in Subsection (a), then by default the blasting would not cause a nuisance (an unavoidable danger) as defined by EQB. We ask EQB to delete the term *nuisance* and Subsection 211.151(b), or to explain why the final-form definition is necessary and how it sets clear standards for the regulated community.

Person

EQB is adding municipalities to be included under the definition of *person*. A commentator expresses concern that municipal bomb squads, who detonate explosives to ensure public safety, should not be regulated in the same manner as construction and mining operations. We ask EQB to explain in the RAF and Preamble of the final-form regulation the reasonableness of regulating public safety entities in the same category as industry.

Unauthorized handling and use of explosives

A commentator expresses concern that EQB's definition eliminates the 30-day grace period for vetting and obtaining clearances for new workers. If the definition used in the final-form regulation continues to eliminate the grace period, we ask EQB to address the reasonableness of the definition, as well as any economic impact it would have on the regulated community.

5. Section 211.103. Enforcement. – Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance.

Subsection (d) states that the Department “will not” issue a permit or license to any person who has done any of the items listed in Paragraphs (1) through (4). Is it EQB's intention to **never** issue a permit or license to any person under these circumstances? Can a person correct a non-compliance requirement and at some point be issued a permit or license? We ask EQB to ensure that the final-form regulation makes clear how the regulation will be implemented.

6. Section 211.124. Blasting activity permits. – Economic or fiscal impacts; Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance.

Paragraph (a)(2)

Elsewhere in the regulation, a printed signature is required. Will EQB accept an electronic signature under Paragraph (a)(2), or should this be clarified to require a printed signature?

Paragraphs (a)(10) and (17)

Commentators ask for additional clarity in Paragraphs (a)(10) and (17) if there is more than one blast.

Paragraph (a)(20)

What is the need for extending the distance in Paragraph (a)(20)? Commentators state that this change will cause unnecessary or excessive burden and costs. We ask EQB to explain the reasonableness of the change in distance and how the benefits outweigh the cost to industry.

Paragraph (e)

If an electronic version of the permit is acceptable in Paragraph (e), we ask EQB to clarify the language in the final-form regulation.

7. Section 211.151. Prevention of damage or injury. – Clarity and lack of ambiguity.

Subsection (d) addresses how blasts shall be designed and conducted. EQB proposes to modify the phrase “maximum allowable peak particle velocity” to “allowable particle velocity,” but then uses the phrase “maximum allowable peak particle velocity” in the last sentence. EQB uses this same phrase in Subsection (g). EQB should review this section to ensure the language is consistent and clear for the regulated community to comply.

8. Section 211.152. Control of noxious gases, including carbon monoxide and oxides of nitrogen. – Clarity and lack of ambiguity; Need for the regulation.

The title of this section addresses control of noxious gases, but EQB is inserting the term “toxic” in Subsections (a) and (b) to describe the gases. We ask EQB either to use one of these terms in the final-form regulation, or to explain the need for using both terms.

9. Section 211.155. Preblast measures. – Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance.

Item (7) addresses circumstances where there are no specific access points. In these cases, “a minimum of four signs shall be posted on all sides of the blast site” It is unclear how EQB intends for this provision to be implemented. For example, does EQB require one sign or four signs on each side? What is considered a “side”? We ask EQB to clarify this provision. Additionally, we ask EQB to explain in the Preamble of the final-form regulation how it determined that 100 feet from the blast site is the appropriate placement of warning signs.

10. Subchapter J. Civil penalties. – Statutory authority; Conforms to the intention of the General Assembly; Determining whether the regulation is in the public interest; Economic or fiscal impacts; Need for the regulation; Reasonableness of requirements, implementation procedures and timetables for compliance.

What is EQB’s specific statutory authority for this new subchapter imposing civil penalties? Based on the response provided by EQB in RAF #8, it is not evident that the legislature intended for EQB to have the authority to impose civil penalties under Chapter 211 (related to the storage, handling and use of explosives).

Under *Subchapter J. Civil penalties* in the Preamble, EQB states that this subchapter provides an alternative to filing summary citations with local magistrates. Provided EQB demonstrates its statutory authority, EQB should explain the need for establishing civil penalties, including why the current system of enforcement is insufficient. Further, EQB should explain the basis for the amount of each penalty established within the subchapter, including setting \$10,000 as the

maximum penalty per day for each violation. EQB should address the economic impact and reasonableness of each penalty.