

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-523 (IRRC #3190)

Noncoal Mining Program Fees

April 4, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the February 3, 2018 *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. Statutory authority; Consistency with the intent of the General Assembly; Fiscal impact.

This proposed rulemaking increases permit application and administrative fees. EQB states the increases are needed to support the Noncoal Mining Program (Program) and the Department of Environmental Protection's (DEP) duty to implement the Noncoal Surface Mining Conservation and Reclamation Act (Act) and the Clean Streams Law. EQB has proposed an incremental approach to raising fees. Fees will be automatically increased three times after the rulemaking is adopted. The increases will occur one year, three years and five years after adoption of the rulemaking. Seven years after the adoption of the rulemaking, DEP will adjust the fees every two years. These adjustments will be based on the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation, or an equivalent index recognized by the United States Department of Labor. The fee schedule will be adjusted in increments of \$25 and the adjusted fee schedule will be published in the *Pennsylvania Bulletin*.

EQB has cited Section 7(a) of the Act (52 P.S. § 3307(a)) as part of its statutory authority for this rulemaking. That section of the Act states, in part, the following:

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.* (Emphasis added.)

In the material submitted in support of this proposal, EQB has not included a projection of expenses for the Program. Without a projection of expenses, how can EQB ensure that the revised fees will not exceed the cost of reviewing, administering and enforcing permits, as required by Section 7(a) of the Act? We ask EQB to provide a projection of expenses for the program and to compare those expenses to projected revenues. The projections should cover, at

a minimum, seven years. We will review those projections to determine if the proposed rulemaking is authorized by statute and consistent with the intent of the General Assembly.

2. Possible conflict with or duplication of statutes or existing regulations; Implementation procedures.

We are concerned that the proposed automatic, incremental fee increases could conflict with existing regulations found at § 25 Pa. Code § 77.106(d). This subsection requires DEP, at least every three years, to recommend regulatory changes to the fees to EQB to address disparities between Program income generated by fees and Program costs. Automatic fee increases would potentially make the language of Subsection (d) obsolete. How will EQB implement the new fee structure and the requirements of Subsection (d)? This should be explained in the Preamble to the final-form regulation.

3. Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small businesses; Fiscal impact.

Regulatory Analysis Form (RAF) Question #15 asks an agency to identify the types and number of persons, businesses and small businesses which will be affected by the regulation. EQB explains that there are approximately 1,200 licensed noncoal mine operators in Pennsylvania and most are considered small businesses. Question #10 of the RAF asks an agency to explain the need for the regulation. As part of the response, EQB states the following, “The proposed rulemaking will provide additional funding to sustain the program, which at the current rate of expenditures will exhaust the reserves in the Noncoal Surface Mining Fund, resulting in inadequate funding and curtailment of the program.” How much of a reserve is currently in the Noncoal Surface Mining Fund? Is there a statutory minimum that must be kept in reserve? In lieu of the proposed fee increases, has EQB considered spending down the reserve? We believe such an approach could lessen the financial burden of the small businesses affected by this regulation.

4. Section 77.106. Fees. – Statutory authority; Implementation procedures; Fiscal impact; Clarity.

Subsection (g) is a new subsection that provides for an ongoing fee adjustment factor. The adjustments will be based on the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation or an equivalent index recognized by the United States Department of Labor. We have five concerns with this subsection. First, the new language states that the permit application and administrative fees found under Subsections (e) and (f) *will* be adjusted by the DEP every two years. Use of the word “will” would require fees to be raised or lowered, regardless of the findings of DEP during its triennial review of the fees required by Subsection (d). To provide discretion, we suggest that “will” be changed to “may.”

Second, as written, DEP would be the agency amending the regulation by publishing a revised fee schedule in the *Pennsylvania Bulletin*. Prior to publication, DEP is to provide the proposed

fee schedule to the Aggregate Advisory Board. We recommend that the final-form regulation include a definition for this Board.

Third, this proposal is being promulgated by EQB. Does DEP have the statutory authority to make the adjustments contemplated by this Subsection? What specific statutory authority would allow DEP to amend a regulation by publishing a notice in the *Pennsylvania Bulletin*? Has EQB considered following the procedures set forth in Subsection (d)? Under that subsection, DEP recommends regulatory changes to EQB.

Fourth, adjustments to fees are to be based on the “United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation or an equivalent index recognized by the United States Department of Labor.” Why does EQB believe the first index cited is most appropriate for this type of adjustment? Under what circumstances would the second index be used? The description of this language in the Preamble indicates that the second index could be used if it is found to “be more appropriate.” The language in the rulemaking, coupled with the description in the Preamble, makes it unclear how this provision will be implemented. We ask EQB to clarify how it will implement the fee adjustments of this subsection.

Finally, in order for this Commission to gain an understanding of the potential fiscal impact the fee adjustments of this subsection will have, we ask EQB to provide a 10-year history of the percentage increase or decrease for the first index cited.