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Independent Regulatory  
Review Commission

House of Representatives  
Commonwealth of Pennsylvania  
Harrisburg

May 14, 2019

George D. Bedwick, Chairman  
Independent Regulatory Review Commission  
333 Market Street  
14<sup>th</sup> Floor  
Harrisburg, PA 17101

Re: Proposed Rulemaking: Regulation #7-533: Water Quality Management and National Pollution Discharge Elimination System Permit Application and Annual Fees; IRRC reference number: 3227

Dear Chairman Bedwick,

We are writing in regard to the Department of Environmental Protection's (Department) proposal through the Environmental Quality Board (EQB) to amend the Water Quality Management (WQM) and National Pollution Discharge Elimination System (NPDES) fees. We have several significant concerns regarding the lack of statutory authority for the scope, structure, and magnitude of the proposed fees, as well as the fact that they are not reasonable when their full economic and fiscal impact are taken into consideration.

As the Department notes in box 9 of the RAF the "*charging fees for permits under Chapters 91 and 92a is not mandated by any federal or state law or court order or federal regulation.*" Nevertheless, the Clean Streams Law (CSL) does authorize the Department to "*charge and collect from persons and municipalities in accordance with its rules and regulations reasonable filing fees for applications filed and for permits issued.*" 35 P.S. § 691.6. We agree that this statute does grant the department authority to promulgate regulations for "reasonable" fees, however, we strongly disagree with the scope of fees that the Department appears to simply assume the statute authorizes. Rather, we contend that the clear language of the statute is precisely and purposefully limiting in its scope and breadth as to what fees the Department may impose.

The Department apparently believes the statute authorizes them to promulgate fees to cover a sizeable share of the state's costs to administer this program. It states in box 7 of the RAF that "*[t]hese fees support the whole range of activities involved with water quality protection by the Department.*" This is not, however, what the statute authorizes. A plain reading of the actual language of the statute (35 P.S. § 691.6) only, we repeat, *only* authorizes the Department to charge for "filing" fees. "Filing fees" are clearly not authorizing language for fees which are to fund "the whole range of activities..." of the Departments operations. Had the Legislature desired to delegate such expansive funding authority to the Department, it would have expressly done so. Rather, the Legislature's intent was clearly expressed when it authorized "*reasonable filing fees for applications filed and permits issued.*" Thus, the Department erred in asserting that these fees are meant to support the whole range of activities for this program. The statute must be construed to only allow for the charges it authorizes, that is, charging for the costs associated with the filing of applications and permits. In other words, the plain reading of the statute clearly conveys the intent of the Legislature that all other costs associated with ancillary and support activities are to be provided by federal funds and by general funds provided by the Legislature.

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Had the Legislature intended for the fees to cover the whole cost of the program it would have indicated so in the statute and would not have included the restricting word "filing." This is the case in other programs where the statute explicitly authorizes fees to cover additional costs of the program. For example, the Air Pollution Control Act authorizes "*fees sufficient to cover the indirect and direct costs.*" 35 P.S. § 4006.3 (a). The Board of Nursing is authorized by 63 P.S. § 221.2(a) to set fees by regulation to meet projected expenditures. Similarly, the Massage Therapy Law requires the Board to support its operations from the revenue it generates from fees, fines and civil penalties. 63 P.S. § 627.11(a). Finally, the Radiation Protection Act specifically authorizes the EQB to set reasonable annual fees "*in an amount at least sufficient to cover the department's costs of administering the programs.*" 35 P.S. § 7110.401. These examples illustrate that when the Legislature intends to authorize an agency to charge fees to cover all or a substantial portion of a program's costs, it does so explicitly. There is no explicit authorization in the CSL to charge fees to cover all the costs of the WQM and NPDES programs. To the contrary, the explicit authorization in the CSL is limited to charging "filing fees" only.

Again, no such statutory authorization is provided in the CSL to charge fees beyond the costs for the filing of applications and permits.

Next, we contend that the proposed fees go beyond the intent of the Legislature in magnitude. The Department notes in box 10 of the RAF that its "*costs to process and issue WQM permits and perform follow-up compliance activities far exceed the current amount of fees generated.*" This is how it should be if the Legislature only intended the fees to cover a fraction of the program. The Department continues later that "*the revenue generated by the current fees only pays for approximately 10% of the total program costs. The remainder of the costs are paid through the Department's annual appropriation from the General Fund.*" Similarly, "*fee revenue from the NPDES program only covers approximately \$3.7 million of program expenditures on average, or 18% of the cost to administer the NPDES Program.*" It is unclear what percentage of costs go to the filing of applications and permits, but 10% and 18% appear to be reasonable amounts because the legislature did, in fact, only intend the fees to cover a fraction of the program's costs.

Since the Legislature only intended the fees to cover a fraction of the program, the amount of staff costs that can be justified to be covered by the fees is also limited. In RAF box 10 the Department summarizes its workload analysis to evaluate its staffing needs for the Clean Water Program. They provide analysis for staffing the entire program and determined that an additional 63 positions are needed (38 in the regional offices and 25 in the Bureau of Clean Water). We are not disputing the Department's estimated number of needed staff. We are, however, disputing the number of staff whose cost can be presented as justification for increasing these fees. If the fees authorized by the CSL are only meant to cover applications and permits, then only the workload analysis for permit application review tasks found in Attachment B-1 and Attachment B-2 are relevant. The costs of the desired staffing increase for the other functions must be covered by other funding sources. Thus, the actual staffing increase that is statutorily authorized to be funded by fees is not 63, but rather, only 2, as per DEP's own statement in Attachment B-7: "*the Department currently has 47 engineer positions across Pennsylvania that focus on the review of NPDES and WQM permit applications, and the Department determined that it requires two additional positions to fulfill all of its permitting responsibilities in an effective manner.*" If the fee increases that the Department is requesting were commensurate with the costs of adding these 2 positions, then they would potentially be within the scope and magnitude of the Legislature's intent.

The Legislature intended to cover a significant portion of the program's costs from the General Fund, yet the Department in their Three-Year Regulatory Fee and Program Cost Analysis Reports to the EQB on August 21, 2018 stated, “[g]iven the potential fluctuations in appropriations by the legislature, a more stable and sustainable funding source is desired.”<sup>1</sup> The Department is certainly entitled to advocate for their preferred funding source, however, they are not authorized to request it be fulfilled outside of their statutory authority. The Legislature, recognizing the variability and fluctuations in economic conditions which directly impact the amounts that may be appropriated, chose not to delegate this authority to the Department. Instead, the Legislature maintained this authority because they were aware that the available resources of the regulated community also fluctuates. If the Department wants the source and method of their funding to be changed, they must present to the Legislature their proposal to change the statute. Until then, the program must abide by the current fee structure designed by the statute.

The Department states in RAF box 10 that the “*Department’s total appropriations from the General Fund have been decreasing in recent years.*” This statement by the Department does not tell the entire story. The Department’s total appropriations from the General Fund have both increased and decreased over the years. For fiscal year 2019-20, while the proposed total appropriation from the General Fund appears to be decreasing on paper, it is actually being offset by transfers that provide the Department with an overall increase of \$4.6 million or a 3% increase compared to FY 2018-19. This funding increase includes \$10 million from the Recycling Fund and \$15.480 million from the Environmental Stewardship Fund. Thus, there is no decrease for 2019-20. In fact, there is a proposed 3% increase. Note the following chart which shows the last eleven years of funding of the Department by the Legislature:

Year	Amount	Percent Increase/Decrease
FY 2009-10 Actual	\$ 154,259,000	
FY 2010-11 Actual	\$ 142,114,000	-8%
FY 2011-12 Actual	\$ 132,509,000	-7%
FY 2012-13 Actual	\$ 124,837,000	-6%
FY 2013-14 Actual	\$ 125,856,000	+1%
FY 2014-15 Actual	\$ 139,233,000	+11%
FY 2015-16 Actual	\$ 142,620,000	+2%
FY 2016-17 Actual	\$ 148,356,000	+4%
FY 2017-18 Actual	\$ 146,477,000	-1%
FY 2018-19 Available	\$ 156,049,000	+7%
*FY 2019-20 Proposed	*\$ 135,186,000 Total funding will be \$160,666,000 when transfers are included.	*-13% *+3%

\* Actual increase of 3% (See paragraph directly above.)

<sup>1</sup> WQM page 2:

<http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2018/August%202018/Fee%20Reports/Chapter%2091%20Fee%20Report.pdf>.

NPDES page 6:

<http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2018/August%202018/Fee%20Reports/Chapter%2092a%20Fee%20Report.pdf>.

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Another area of concern is the inadequacy of the fiscal note provided in the Bulletin notice. As you know, the Administrative Code directs the Office of the Budget to prepare a fiscal note for regulatory actions of administrative departments. Specifically, the "*fiscal note shall state whether the proposed action or procedure causes a loss of revenue or an increase in the cost of programs to the Commonwealth or its political subdivisions.*" 71 P.S. § 232. Incredibly, the fiscal note in the Bulletin merely states: "*No fiscal impact. The Historical and Museum Commission (HMC) and the Department of Corrections (DOC) will face nominal costs resulting from the adjustments in the fee schedules.*" Contrary to the assertion of "nominal costs" by the Office of the Budget, if these fee increases are approved there will be significant costs on political subdivisions throughout the Commonwealth. It is not known why the Office of the Budget only considered the costs to the HMC and the DOC and not the costs to political subdivisions which make up a substantial portion of all permittees. A more accurate measure of the full impact of these fees should be obtained from the Office of the Budget which should evaluate the eight enumerated points of consideration required by the Administrative Code and ultimately reissue a revised fiscal note.

Having a better grasp of the impact of these fee increases will show whether the proposal is in keeping with another criterion of the CSL that the fees be "reasonable." Admittedly, "reasonable" is a subjective standard, however, some of the proposed fee increases (up to 2,900%) would have a drastic, and therefore unreasonable, impact on some fee payers. As you know, the Regulatory Review Act requires the IRRC to consider the economic or fiscal impacts of a regulation, specifically the "*adverse effects of prices of goods and services, productivity or competition.*" 71 P.S. § 745.5b (b) (1) (ii).

Because of the ripple effect these fee increases will have throughout the economy it is imperative that this particular proposal be viewed in the broader context of the Department's other recently approved and currently proposed fee increases. For perspective, consider that since 2017 the Department has increased, or proposed to increase, various annual fees that will increase costs by nearly \$50 million (Radiological Health and Radon Certification, Safe Drinking Water, Noncoal Mining, Unconventional Well, NPDES, WQM, and Air Quality fees). Potentially to be added to these amounts, though not submitted to the regulatory review process yet, is the proposed cap and trade petition that the EQB voted to accept on April 16, 2019. The petitioners estimate this proposal will cost the Commonwealth \$1.563 billion to \$1.978 billion! In light of the actual and proposed substantially higher fee increases, a careful analysis of the impact on the individual or specific entity and the overall economy must be considered.

A comprehensive look at the impact of the NPDES and WQM fee increase must be considered in the context of all the fee increases in the aggregate. In reality, the consequences and ramifications of these fees ripple out across many dimensions of the Commonwealth and are presented here as evidence of a pattern of Departmental growth that the Legislature meant to limit when it passed the Regulatory Review Act to "*curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania.*" 71 P.S. § 745.2. We contend that the Department has been, and is, by the instant submission, imposing hidden costs on the Pennsylvania economy without authority and without adequate justification.

The final area of concern is the Department's proposal to automatically adjust the fees every two years based on the Employment Cost Index. This proposal clearly circumvents the intent of the law that fees must be set by regulation. Furthermore, this proposal violates the essential principle of government transparency. The statutory design purposely and explicitly keeps fee changes in view of the public to allow for scrutiny rather than notification *ex post facto*. As you know, the Regulatory Review Act requires that the commission shall "*determine ... whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon*

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*which the regulation is based.*" 71 P.S. § 745.5b.(a). Automatically setting fees based on an index was not the intent of the General Assembly. In fact, "*inflationary impact and conformity to legislative intent*" were two factors the General Assembly cited that were not being sufficiently reviewed when they passed the Regulatory Review Act. 71 P.S. § 745.2.(a). If the legislature had wanted to allow setting the fees based on an index, they would have allowed for it in the statute, but they did not. For example, the Legislature explicitly allowed for the air emission fee to be increased based on the Consumer Price Index in the Air Pollution Control Act. 35 P.S. § 4006.3 (i). Because they did not explicitly authorize it in the CSL, this proposal should be denied. The democratic principles of our form of government demand that the people have input into how much they are taxed (assessed fees).

In summary, the Constitution requires that all taxation originate in the General Assembly. Fee increases are a form of taxation and, although the General Assembly may have outsourced some of its discretion on the setting of fee levels to the executive branch, it is important to remember that the source of this authority remains with the General Assembly. As you know, our nation was birthed over the issue of taxation without representation. Therefore, it is vitally important to carefully discern the will of the people, as expressed by their elected representatives in the General Assembly, for any proposal to raise taxes. The Department must not usurp this authority by expanding the fee setting discretion granted to them. In respect to the constitutional separation of powers, the Department must strictly adhere to Legislature's authorized criteria for raising taxes. For the reasons laid out above, we contend that this proposal clearly and expressly exceeds the statutory authority in scope, in magnitude, and intent. Furthermore, the deleterious economic and fiscal impacts are not in the public's interest. For these reasons, we, as elected members of the House of Representatives, respectfully request that the IRRC deny this proposal.

Thank you for your taking these concerns under review.

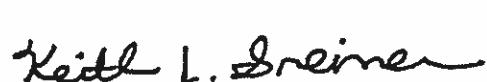
Sincerely,



Representative Brett R. Miller  
41<sup>st</sup> Legislative District



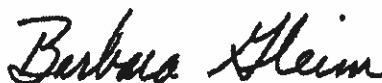
Representative Bryan Cutler  
100<sup>th</sup> Legislative District



Representative Keith J. Greiner  
43<sup>rd</sup> Legislative District



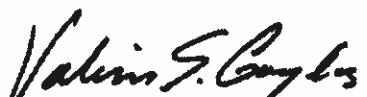
Representative Kate Klunk  
169<sup>th</sup> Legislative District



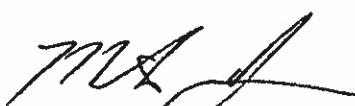
Representative Barbara Gleim  
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Representative Garth Everett  
84<sup>th</sup> Legislative District



Representative Valerie Gaydos  
44<sup>th</sup> Legislative District



Representative Mike Jones  
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Representative David Maloney  
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Representative Dave Zimmerman  
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