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Re: Environmental Quality Board Proposed Regulation Water Quality Management (WQM) and National Pollution Discharge Elimination System (NPDES) Permit Application Fees and Annual Fees

Environmental Quality Board
c/o Pennsylvania Department of Environmental Protection
Rachel Carson Building
400 Market Street
Harrisburg, PA 17101

To whom it may concern:

On behalf of the 12,500 Pennsylvania small-business members of the National Federation of Independent Business (NFIB), I am writing to comment on the above-referenced proposed rulemaking, which amends Chapter 25 Pa. Code Chapters 91 and 92a to provide for fees for water quality permits in Pennsylvania.

NFIB understands that the rulemaking, which increases permit fees substantially in the regulated community, is intended to address the Department of Environmental Protection's (DEP's) "funding gap" so that the agency has sufficient staffing and other resources in the Clean Water Program. These funds support the administration of the Clean Streams Law and permit the Department to serve as the enforcement agency for the administration of the National Pollution Discharge Elimination System (NPDES) program in Pennsylvania.

While we appreciate the need for appropriate resources to provide a robust program, there are several concerns we have about the proposed fees.

First, the proposed fee increases are substantial and will have detrimental impact on many small businesses and farms. Question 24 of the Regulatory Analysis Form (RAF) indicates that "[i]t is not anticipated that this rulemaking would adversely affect small business. The fee increases are not considered significant when compared to normal operating expenses…" As a representative of small businesses in the Commonwealth, we would like to challenge this assumption.

As an example, one small business in south-central Pennsylvania requires a "Minor Industrial Waste Facility without ELG" permit to operate its business. This family-owned business, which has been in operation in the community for more than 100 years, processes and ships the fruit of over 40 local farms, thereby supporting the local economy and many local farm families.

Under the proposed rule, this small business's annual fee for their NPDES-required permit will increase by five times, from $500 to $2,500. Most small businesses have small profit margins and would have trouble absorbing such a drastic increase in annual operating expenses. They will be required to cut costs or employee hours or increase their prices to mitigate the impact, thereby increasing costs for the 40+ farms that depend on their services to get their Pennsylvania products to market.

Another small business, which provides protective coating services for industrial materials, has an industrial stormwater permit, the annual fee for which is proposed to double from $1000 to $2000. This increase will likely raise prices for the other businesses purchasing their services and, as a result, make the company less competitive in the national marketplace.

Most farms in Pennsylvania are also small businesses. For example, one local family-owned dairy farm is integrally involved in its local community, regularly engaging in outreach and education about farming and giving school tours of its operation. This farm, with about 950 milk cows, is permitted as a Concentrated Animal Feeding Operation (CAFO) under section 91.22. This category of permittee currently does not have an annual fee. Under the proposed rulemaking, this farm would need to pay $1,500 every year just to maintain its permit. New CAFO permit applications would double from $1,500 to $3,000. Given the dire circumstances of many farmers, and in particular dairy farmers, pinched between rising costs and declining milk prices, $1,500 in additional unplanned expenses every year is not insignificant. It is, in fact, around the cost of purchasing one additional milking system for use on the farm.

There are many such examples across the state. Indeed, question 15 of the RAF notes that there are approximately 2,500 small businesses with NPDES permits affected by the rulemaking, along with many small farms with water quality management (WQM) permits for manure storage facilities. It is likely that the vast majority of these small businesses would consider these increases "significant" when compared to their normal operating expenses.

Second, NFIB questions the statutory authority of the Department to establish by rulemaking an automatic escalator provision for NPDES and WQM annual permit fees every two years as proposed in sections 91.22(c) and 92a.62(c). This proposed automatic escalator circumvents public notice and comment on future fee increases, which are critical to weighing the costs and benefits of any proposed administrative action, as set forth in the Commonwealth Documents Law.

In addition, we appreciate the Department's statement in RAF question 16 that "[t]he Department is aware of areas of the program that could be improved or enhanced, in order to, for example, make the permit process less onerous and save applicants money." However, if fee increases are provided every other year without having to justify them to the regulated community, there is little incentive for the Department to engage in cost-saving measures such as this over the long term. Ensuring that those impacted by the fees have a chance to review and comment on the Department's proposed increases is an essential transparency and stop-gap measure to ensure that administrative agencies are responsive to the concerns of the regulated community.

Further, we note that where an escalator is provided to the Pennsylvania Fish and Boat Commission for boat and marine forfeiture, it is established in statute at 30 Pa.C.S. section 5331(c). If such a provision was intended for the Department's Clean Water programs, it would be provided by the General Assembly.

Third, the Department provides justification for the fee increases by explaining the public health and economic benefits of the rulemaking in question 10 of the RAF. We believe that it is also necessary to consider the economic harm of the proposed regulation in order to fairly assess costs and benefits of the rulemaking and achieve an appropriate balance. For example, having established that many farms are impacted by the proposed fee increases, we note that a recent study found that agriculture supports 280,500 direct jobs and 579,000 indirect jobs in the Commonwealth, accounting for approximately $83.8 billion in direct economic impact. Agriculture supports one out of every ten jobs in Pennsylvania. This same study found that the regulatory and business environment "limits investments in production, processing, and manufacturing in the state." The report recommends that the state "reconsider policies that deter agricultural investments."[1] The drastic fee increases proposed certainly reduce the resources farmers and other agricultural businesses have to invest in their operations, improve their production, and compete effectively, and therefore deserve to be examined in this light.

The proposed fee increases also affect many other small businesses, including the fruit packaging company and industrial coating firm mentioned above. Small businesses in Pennsylvania employ 2.5 million (or 46.6%) of its employees[2] and create two out of every three new jobs. But small businesses, many of which operate with razor-thin profit margins, already function under burdensome and expensive regulatory restrictions and simply cannot absorb increased costs, such as the rulemaking provides. In fact, in a study of small business regulation, Pennsylvania ranked 49th among states for regulation costs impacting business.[3]

These businesses will be forced to make difficult choices to manage the increased costs. They will likely raise the prices of their goods and services to cover it, but many will then be unable to compete with larger operations that benefit from better economies of scale. Others may choose not to invest in an expansion (and hire new employees) if the higher fees will make those investments less rewarding. The Department must consider the impact of drastically higher permit fees on the business environment, measured by lost investment and innovation, less productivity, and a higher regulatory cost burden as factors when weighing the impact of the rulemaking.

Lastly, we would like to encourage the Department to find other ways to fund the Clean Water Program in order to mitigate the burden the regulated community must bear through increased

[1] https://www.agriculture.pa.gov/Documents/PennsylvaniaAgriculture_EconomicImpactFutureTrends.pdf

[2] https://s3.amazonaws.com/advocacy-prod.sba.fun/wp-content/uploads/2019/04/23142656/2019-Small-Business-Profiles-PA.pdf

[3] https://www.pacificresearch.org/wp-content/uploads/2017/04/SmBusinessIndex_UpdatedVersion2_web.pdf.

fees. For example, question 12 of the RAF compares the proposed fees to states that are "comparable" to Pennsylvania and those with "workloads similar to the Department." Has the Department examined how other states (that are not necessarily "comparable") regulate and administer their Clean Water Programs to determine whether less costly and less burdensome regulatory schemes may be appropriate in Pennsylvania? The RAF specifically mentions New York, which does not issue CAFO permits and verify compliance like most other states. They instead rely on third parties to do so. Has the Department examined this option in Pennsylvania as a means of reducing the workload in the Clean Water Program? If a statutory change is required to responsibly reduce the burden of administering the program, it should propose such a change to the General Assembly.

We would also suggest that the Department return all revenue generated from fines and penalties in the Clean Water Program to the program to contribute toward its administration. The Department notes, in RAF question 10, that revenue for the WQM program comes from fees and the General Fund, and the NPDES program is funded by fees, federal funds, and the General Fund, with fees covering about 18% of the total cost of the program. We note that penalties are not included here in revenue sources and wonder why.

Last year, a $12.6 million penalty was assessed and was distributed as grants in 14 Pennsylvania counties.[4] Indeed, while we understand this to be unique revenue impact, this single penalty would have covered 60% of the Clean Water Program costs this year, with no increase in fees necessary. While the water quality, watershed restoration, and stormwater management goals of the grants are laudable, we believe that it is appropriate for penalties such as this to contribute to the administration of the Clean Water Program, especially in the areas of inspection and compliance monitoring, which constitute 36% of program costs, according to page 3 of the Preamble.

We appreciate that the Department is basing proposed fees on the proportionate amount of time and effort required for staff to assess and process each permit application. But NPDES permit application/NOI reviews account for only 29% of program costs. Asking the regulated community that is utilizing the permitting process to comply with regulatory requirements to bear a disproportionate share of program costs is unreasonable, especially considering the above-cited impact on the business community of the drastically increased costs of the proposed fees.

As recently as 2008, collected fines made up over 80% of revenue collected by the Clean Water Fund.[5] We would suggest that the Department provide the total revenue generated from fines and penalties in the program and incorporate it into funding sources for the Clean Water Fund in order to reduce the cost impact on businesses complying with the law through permitting.

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[4] https://stateimpact.npr.org/pennsylvania/2018/10/16/dep-awards-water-quality-related-grants-funded-by-12-6m-penalty-against-sunoco/

[5] http://files.dep.state.pa.us/Water/BWEW/Watershed%20Management/WatershedPortalFiles/fy_09_demystifying_the_clean_water_fund.ppt

Thank you for the opportunity to provide feedback on the rulemaking. Again, on behalf of the small business community, we ask that you consider the impact of the proposed increases on small businesses in Pennsylvania as well as the overall business climate. Also, please consider alternative regulatory schemes to reduce costs on the regulated community, along with additional funding sources for the Clean Water Program, such as penalty revenues.

Please do not hesitate to contact me if you have any questions on this or any other issue affecting the men and women who own or work for Pennsylvania small business.

Sincerely,

Gordon Denlinger

Gordon Denlinger
State Director