Comments of the Independent Regulatory Review Commission

Environmental Quality Board Regulation #7-533 (IRRC #3227)

Water Quality Management and National Pollution Discharge Elimination System Permit Application and Annual Fees

June 13, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the March 30, 2019 *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 (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. Comments, objections or recommendations of a committee.

This proposed rulemaking would increase fees for Water Quality Management (WQM) permit applications and National Pollutant Discharge Elimination System (NPDES) permit applications and annual fees. Provisions have been added that require the Department of Environmental Protection (DEP) to adjust fees according to the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation every two years. EQB states that the purpose of the rulemaking is to raise approximately $8 million to increase program resources for the Bureau of Clean Water and the Clean Water Program (Program). The additional funding is needed so that DEP can accomplish its mission and meet its legal obligations to the public, regulated community, and federal authorities.

The proposed rulemaking has generated opposition from the General Assembly and the regulated community. On May 14, 2019, the House Environmental Resources and Energy Committee (Committee) voted to send a letter asking this Commission to disapprove the rulemaking in its proposed form and urging EQB to withdraw it. Concerns raised by the Committee relate to a lack of statutory authority and consistency with the intent of the General Assembly, reasonableness, and the fiscal impact on small businesses and farmers. The Committee is particularly concerned with the automatic adjustment of fees provision of the proposal.

Forty-three Republican members of the Pennsylvania House of Representatives submitted a joint letter expressing numerous concerns with the proposed rulemaking. These members believe the proposal is deviating from the legislative intent of the Clean Streams Law (CSL) (35 P.S. §§ 691.1 – 391.1001) and the regulatory authority granted to EQB to allow for reasonable fees for applications filed and permits issued. The members state it was never the intent of the legislature to fund a sizeable portion of the Program from these fees. Also, if the Legislature

wanted to allow fees to be set based on an index, they would have stated that in statute. They also state the amount of the fee increases are not reasonable and would have an adverse effect on prices of goods services, productivity or competition. The fiscal impact of the rulemaking on local governments and the regulated community is another concern raised by the members.

Fifteen Republican members of Pennsylvania's Senate, including all majority members of the Senate Environmental Resources and Energy Committee, also submitted a letter opposing the proposed rulemaking. The letter emphasizes the negative fiscal impact the proposal will have on the agriculture industry. It concludes by stating that further discussion and a public hearing are needed to examine economic impact of the rulemaking.

In addition to the opposition expressed by the Legislature, various segments of the regulated community have expressed concerns with the proposed rulemaking, that are to a large degree, similar to those noted above. Segments of the regulated community that have submitted letters in opposition to the rulemaking include: business; water companies; local government; agriculture; and the automotive recycling/salvage industry.

One criterion of the RRA that this Commission must consider when determining if a regulation is in the public interest is the comments, objections or recommendations of a committee. As noted above, the Committee has issued comments and expressed objections to the regulation. If EQB proceeds with this rulemaking, we note that the objections raised by the Committee could be the basis for a disapproval by this Commission. However, a goal of the RRA and the regulatory review process is the resolution of objections to a regulation and reaching of consensus among this Commission, the designated standing committees, interested parties and the promulgating agency. We ask EQB to work with all parties with an interest in this rulemaking, particularly the Committee and members of the Legislature, to create a regulatory environment that is consistent with the intent of the General Assembly, fair to the regulated community and protective of the Commonwealth's natural resources.

2. Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

A goal of this rulemaking is to increase funding for the Program. In the Preamble to the rulemaking, EQB states the following:

> The administration of the Clean Water Program involves many activities including permit application reviews, inspections, enforcement, surface water assessments and related activities such as development and implementation of Federally required Total Maximum Daily Loads.

Comments from the House Committee and the 43 Republican members indicate that it was not the intention of the General Assembly to fund the Program through application fees authorized by the Clean Streams Law. In light of these comments, we believe funding the Program, beyond what is required to review permit applications, may be a policy decision that should be made by

the General Assembly. As suggested in the letter from the 43 Republican members, EQB should present any funding changes for the Program to the General Assembly for consideration.

3. **Amount of the fee increases. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector; Adverse effects on prices of goods and services, productivity or competition; Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small businesses.**

When this regulation is fully implemented in fiscal year 2022-2023, EQB estimates it will cost the regulated community approximately $8 million per year. In some instances, existing fees will increase by 500 percent. Commentators have raised two main concerns about the size and scope of the fee increases being proposed in §§ 91.22(a), 92a.26(b) and 92a.62(b). First, the commentators question if the proposed increases are consistent with the statutory directive that fees be reasonable. We note that Sections 5(b)(1) and 6 of the CSL (35 P.S. §§ 691.5(b)(1) and 691.6) have been cited by EQB as part of its statutory authority for this rulemaking. Section 5(b)(1) provides EQB with general rulemaking authority necessary to implement the CSL. Section 6 pertains to application and permit fees. It states the following:

> The [EQB] is hereby authorized 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.

Given the dollar amount and percentage increase of the fee increases, we ask EQB to explain why it believes the proposed fee structure is consistent with the legislative directive that fees be reasonable.

Second, the adverse effects the proposed increases would have on the price of goods and services, productivity or competition has been raised as an issue. For example, the National Federation of Independent Business states that EQB, "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." East Petersburg Borough submitted comments explaining how Safe Drinking Water fee increases by EQB in 2018 have impacted community water systems across the Commonwealth. They stress the importance of considering the fiscal impact of this rulemaking. Finally, representatives of the agriculture industry and individual farmers submitted comments highlighting the many challenges the industry is currently facing and how the proposed increases will negatively affect them.

We understand that DEP has an obligation to protect the Commonwealth's natural resources and an obligation to meet federal mandates related to the Program. We appreciate the effort put forth by EQB to demonstrate and document the need and rationale for the proposed fee increases. If EQB moves forward with this proposal, we ask that DEP continue its efforts to reduce costs and find efficiencies that could possibly reduce the size and scope of the proposed increases. In

addition, we ask EQB to work with small businesses and farmers to possibly find a less costly or less intrusive method of achieving the goal of the regulation.

4. Automatic adjustment of fees. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Implementation procedures; Reasonableness.

EQB is adding new provisions that provide for an ongoing adjustment to its fees schedules. The new provisions are §§ 91.22(c), 92a.26(f) and 92a.62(c). The adjustments will be made every two years and 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 and Industry. DEP will publish the final adjusted fee schedules and effective dates in the *Pennsylvania Bulletin.* The fees will not be adjusted if the application of the index would result in fees exceeding DEP's costs to administer the Program. We have three concerns. First, commentators, including members of the General Assembly, do not believe Section 6 of the CSL provides EQB with the statutory authority to change fees via this method. Why does EQB believe that Section 6 of the CSL provides for this type of automatic fee adjustment? Can EQB cite to any other statute that would allow for these specific fees to be increased in this manner? Second, we question the reasonableness of increasing fees without public or legislative scrutiny. In the Preamble to the final rulemaking, we ask EQB to explain why this method of increasing fees is in the public interest. Finally, if EQB can justify the legality and reasonableness of the automatic adjustment provisions, we are concerned with the implementation of them. As written, DEP would not be able to adjust the index if the amount of the increase would exceed the increased costs of administering the Program. We suggest that the language be amended to allow DEP to increase the fees to the lesser of the index or the actual costs to administer the Program.

5. Miscellaneous clarity.

Subsection 91.22 (b) includes new language that states fees for a general permit "shall" be established in the general permit itself. Section 6.7 (c) of the *Pennsylvania Code & Bulletin Style Manual* indicates that the word "will" should be used when the Commonwealth pledges to act. Since DEP will be determining the amount of the fee, we suggest that the word "shall" be changed to "will." Similar language is found in §§ 91.22 (c), 92a.26 (f) and 92a.62 (c).