



417 Walnut Street
Harrisburg, PA 17101
717 255-3252 / 800 225-7224
FAX 717 255-3298
www.pachamber.org

Jessica Shirley, Director
Policy Office
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063

May 14, 2019

RE: Proposed Rulemaking: Water Quality Management (WQM) and National Pollutant Discharge Elimination System (NPDES) Permit Application Fees and Annual Fees (25 Pa. Code Chapters 91 and 92a)

I am writing on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber), the largest, broad-based business advocacy organization in the Commonwealth. Our nearly 10,000 member companies are involved in all industrial categories and are of all sizes. On behalf of these businesses, we welcome the opportunity to respond to the Department's invitation for public comments concerning the proposed rulemaking to increase fees for WQM and NPDES permits.

As the Department and its staff are aware, the PA Chamber has been actively and positively involved throughout the past 15 years or more in working with other stakeholders in helping to frame workable approaches to addressing the water quality challenges of the state. As the PA Chamber has expressed in our previous comments on various legislation regarding water policy, DEP and EPA proposed rulemakings, and proposals from interstate water basin commissions for the Delaware and Susquehanna rivers, the PA Chamber and its members recognize that development, use and stewardship of the state's water resources is vital to the health and success of the communities, industries and enterprises throughout the state. That stewardship of our water resources requires a thoughtful balancing of environmental and economic considerations. It is with this perspective that we offer the following comments.

Broadly, the PA Chamber supports a well-functioning Department that is appropriately resourced with revenues and staff to effectuate its statutory and regulatory obligations in a consistent, timely, predictable manner. However, the membership of the PA Chamber is not persuaded by the documents supporting the proposal, which do not appear to include a substantial analysis and examination of the costs to administer the actual workload of reviewing and issuing permits and conducting inspections. We are concerned that the Department has positioned this proposal as an "either/or": either fees increase, or General Fund appropriations must. This is not the case.

The Department notes in its Regulatory Annex Form that the proposed fee increases will "allow the Department to properly administer the Clean Water Program to protect the quality of water resources in the Commonwealth without any increases in the appropriation of general tax revenue to the Department." While as a general principle we agree that the regulated community should bear a reasonable burden for the costs of administering relevant regulatory programs, clean water is, as we are often reminded, a matter of state constitutional right; therefore it is also reasonable that this administration would seek to support the Clean Water Program in part through the General Fund. It must also be noted that while we are aware of the reductions in General Fund appropriations that have occurred over the past decade, the General Fund is not the only source of revenue the administration may look to. A significant portion of the

Department's revenues come from the federal government, and the Department can, should and ought to advocate for increased federal funding given the substantial amount of federal law that is delegated to the state. The General Assembly, the Department and the administration are also not precluded from supporting environmental programs through revenues collected from the sale or lease of publicly held natural resources.

As it relates to the sufficiency of existing resources and staff, it is not clear how the Department arrived at its desired increase of staff complement that would be hired with the finalization of this proposal. Prior to finalizing the fee package, the Department should make public a report that includes an analysis of the staff and resource burden is borne by the agency for each of the Chapter 91 and 92a categories. The Department should also continue to focus efforts on streamlining review to avoid unnecessary steps and to give increased attention from executive management to the fact that there continue to be significant variations in regional workflow practices.

Notably, the proposed rulemaking and the accompanying documents in support of the permit fee increases are silent with respect to one very notable issue: the awarding of attorneys' fees in Clean Streams Law litigation. While we recognize there is currently on-going litigation regarding the awarding of attorneys' fees in one particular case and that a fee package regulation is not the appropriate vehicle to resolve this issue, nonetheless the Department is well aware of the direct and indirect costs of this provision of the Clean Stream Law: directly, to the tens or hundreds of thousands of dollars annually the Department may have to transfer to third parties, and indirectly to the inordinate amount of staff time the Department commits to ensuring each permit will withstand litigation from such groups. To be clear: we recognize the Department has done an excellent job in defending its permitting decisions and are not asking for a change in work practice in this respect. We do, however, encourage the Department to support efforts to limit the awarding of fees to opposing counsel except in instances where a party has acted in bad faith in either a application or permit information submission or in challenging a permit. We also encourage the Department to support efforts to authorize contracting with licensed professionals to assist in the technical review of permits, in order to ease the administrative burden on the agency.

The PA Chamber also encourages DEP to provide for reduced application fees for permit renewals in circumstances in which site design and operations have not significantly changed. While it is possible that relevant regulatory criteria (such as in-stream water quality standards under Chapter 93) may have changed in the period of time between the issuance of a permit and its expiration, if the bulk of the permit conditions in the previously issued permit are substantially similar to the renewal, the Department will not be expending the same amount of resources in reviewing the permit for renewal. The proposed fee schedule for most permit categories does not distinguish between new applications and renewals. Unless modified, this will result in existing facilities seeing an order of magnitude higher in permit fees for renewals. While all facilities' budgets are highly scrutinized by management, these increases will affect small and medium-sized businesses the hardest who may be limited in their ability to shift the cost for the higher fees from other operating functions.

Finally, the PA Chamber does not support the portion of the proposal that seeks to authorize an automatic increase in permit fees commensurate with inflation. The Clean Streams Law is clear that the Department must every three years review the adequacy of its fees and present a recommendation to the EQB should the Department believe a change in the fee schedule is warranted. The Clean Streams Law and the Regulatory Review Act do not authorize the Department to increase fees without going through the regulatory development process.

Jessica Shirley
PA DEP Office of Policy
May 14, 2019
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In closing, the PA Chamber supports the Department having adequate revenues to effectuate the timely issuance of permits and the protection of the waters of the Commonwealth. Other sources of revenue are available for the administration to look to beyond solely placing the burden of implementation of the Clean Water Program on industry. There also remains significant work to be done with respect to improving processes and performance of the Department, as well as shoring up the loss of revenue through the awarding of attorneys' fees to third parties, before we can endorse this proposal.

Thank you for your consideration of our comments on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Sunday". The signature is written in a cursive style with a large, stylized initial "K".

Kevin Sunday
Director, Government Affairs