PENNSYLVANIA
Air Quality Fee Schedules
25 Pa. Code Chapters 121, 127 and 139
39 Pa.B. 6049 (October 17, 2009)
Environmental Quality Board Regulation # 7-441
(Independent Regulatory Review Commission # 2800)

Comment and Response Document

Air Quality Fee Schedules Proposed Rulemaking

On October 17, 2009, the Environmental Quality Board (Board, EQB) published a notice of public hearings and comment period for a proposed rulemaking concerning revisions to 25 *Pa. Code* Chapters 121, 127 and 139 (relating to general provisions; construction, modification, reactivation and operation of sources; and sampling and testing) to amend existing requirements and fees codified in Chapter 127, Subchapter I (relating to plan approval and operating permit fees) and add new categories of fees to that subchapter to address modifications of existing plan approvals and requests for determination of whether a plan approval is required. The proposed rulemaking would amend the existing annual emission fee paid by the owner or operator of a Title V facility and add a new section to address fees for risk assessment applications. The proposed rulemaking would also add Subchapter D (relating to testing, auditing, and monitoring fees) to Chapter 139, to add new categories of fees to address Department-performed source testing, test report reviews, and auditing and monitoring activities related to continuous emissions monitoring systems (CEMS). If the revised fee schedule for the Air Program is adopted, the final-form regulation will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP). The public comment period closed on December 21, 2009.

Three public hearings were held on the proposed rulemaking as follows:

November 17, 2009 10:00 AM	Department of Environmental Protection Southcentral Regional Office Susquehanna Room A 909 Elmerton Avenue Harrisburg, PA 17110
November 19, 2009 10:00 AM	Department of Environmental Protection Southeast Regional Office Delaware River Conference Room 2 East Main Street Norristown, PA 19401
November 20, 2009 10:00 AM	Department of Environmental Protection Southwest Regional Office Waterfront A Conference Room 400 Waterfront Drive Pittsburgh, PA 15222

This document summarizes the comments received during the public comment period. Each public comment is listed with the identifying commentator number for each commentator that made the comment. A list of the commentators, including name and affiliation (if any) can be found at the beginning of this document. The Board invited each commentator to prepare a one-page summary of the commentator's comments. Three one-page summaries were submitted to the Board for this rulemaking. No testimony was presented at the hearings. The Senate and House Committees did not submit comments.

Table of Commentators for the Environmental Quality Board
Air Quality Fee Schedules Rulemaking # 7-441
(IRRC # 2800)

ID	Name/Address	One Page Summary Submitted for Distribution to EQB	Provided Testimony	Requested Copy of Final Rulemaking after EQB Action
1.	Tony Fago Mill Manager Appleton Papers, Inc. Roaring Spring Mill			X
2.	Vincent J. Brisini Manager, Air Resources RRI Energy	X		
3.	Douglas L. Biden President Electric Power Generation Association	X		
4.	Matthew H. Gontarz Plant Manager Osram Sylvania Products, Inc.			
5.	Gene Barr Vice President Government and Public Affairs Pennsylvania Chamber of Business and Industry			
6.	Peter T. Kimmel V.P. of Operations Armstrong Cement & Supply			
7.	Luis A. Comas Environmental Managing Consultant Sunoco, Inc.			
8.	Jeff A. McNelly Executive Director ARIPPA	X		
9.	Robert R. Perry Advanced Scientist FirstEnergy Corp.			
10.	Peter E. Rigney General Manager Scrubgrass Generating Plant Cogentrix Energy			

11.	Mary Helen Marsh Director of Environmental Programs Exelon Power			
12.	Arthur E. Hall, P.E. Director, Environmental Affairs Wheatland Tube Co.			
13.	Allen Kramer Manager Environmentt, Health and Safety The Boeing Company			
14.	Jesse Hackenberg Engineer, Environmental Compliance JW Aluminum Company			
15.	David C. Cannon Jr. Vice President Environment, Health & Safety Allegheny Energy			
16.	Basil G. Constantelos Managing Director Environmental Services Midwest Generation EME, LLC			
17.	Kim Kaufman Executive Director Independent Regulatory Review Commission			

General Comments

1. Comment: The commentator understands the necessity of increasing the annual Title V emission fees over the next several years. The commentator states that the fees are intended to cover most, if not all of the activities related to the air program. (4)

Response: The Board appreciates the comment and agrees that the fees are intended to support the air program as required by Section 6.3 of the Air Pollution Control Act (APCA) (35 P.S. § 4006.3). Section 6.3 authorizes the Environmental Quality Board to establish fees sufficient to cover "the indirect and direct costs" of administering the Department's air pollution control program

2. Comment: A commentator supports the proposed periodic evaluation of the sufficiency of the fee program. The commentator requests that any recent evaluations be made available to the public for review. (6)

Response: The Board acknowledges the support for the periodic evaluation specified in proposed § 127.701(d) (relating to general provisions). The most recent evaluation of the program funding was conducted and published in the Department's report entitled "Evaluation of the Pennsylvania Air Quality Program 2002 – 2007." The report is available on the Department's Internet site at http://www.dep.state.pa.us/dep/deputate/airwaste/aq/default.htm.

3. Comment: The commentator is supportive of a reasonable and appropriate fee schedule so that any necessary reviews and approvals are implemented in a timely manner. (6)

Response: The Board appreciates the commentator's support for the revised fee schedule. The fee schedule amendments are necessary for the collection of fees sufficient to cover the costs of administering the air program, including the plan approval and operating permit programs, so that reviews and approvals are conducted in a timely manner.

4. Comment: A commentator states that the proposed fee schedules are extreme considering that there is no justification in terms of man-hour requirements associated with the fees. (12)

Response: The Department recommended the fee schedule proposed by the Board by analyzing the current and projected income and expenditures for the Clean Air Fund. The Department considered actual Clean Air Fund expenditures during the past 16 years. A review of the current and expected workload was completed to assess the need for increased fees and additional fees. As a result, the proposed fee schedules were developed to ensure that fees are sufficient to administer program costs.

5. Comment: A commentator understands the budgetary pressures being felt by State agencies and recognizes the need for the Department to increase fees which were previously established and have not been increased for almost 15 years. However, the proposed rule puts an onerous financial burden on industry, including manufacturing facilities. (5)

Response: The Board appreciates the commentator's recognition of the need for fee increases and concerns raised regarding a potential financial burden placed on all facility owners and operators that are impacted by the fee schedule changes. However, fees collected are no longer sufficient to cover program costs. Under the existing regulatory framework, plan approval and operating permit fees have not increased since January 2005, as promulgated in the final-form rulemaking published November 26, 1994 (24 Pa.B. 5899, p. 5937-5938). In regards to the Title V emission fee, the Department has relied on consumer price index (CPI) adjustments to the base fee, which was established November 26, 1994 (24 Pa.B. 5899, p. 5939). The fee schedule in the final-form rulemaking would apply prospectively to applications submitted to the Department on or after the date of publication of the final-form rulemaking in the *Pennsylvania Bulletin*— therefore the new fees should not take effect prior to the spring of 2011. The final-form rulemaking retains the phased-in approach for periodic increases in plan approval and operating permit fees.

6. Comment: Three commentators recognize the need for the Department to increase the fees which were previously established and have not been increased for almost 15 years. If this provides the resources to conduct and finalize necessary activities it will be money well spent. (2, 3, 11)

Response: The Board thanks the commentators for their support of the fee schedule amendments. If the revised fee schedule is approved as final-form rulemaking, the Department anticipates the ability to retain current staffing levels of "Clean Air Fund" positions to provide the services necessary for administering the Commonwealth's air pollution control program.

7. Comment: The proposed rule significantly increases the annual emission fee and adds a significant amount of new annual air permit-related activity fees. The proposed rule puts an onerous financial burden on manufacturing facilities. (1, 5)

Response: While the Board understands the concerns of the commentators, the Department is obligated under section 6.3 of the APCA (35 P.S. § 4006.3) to establish fees sufficient to cover indirect and direct costs of administering the air quality program. Because air program expenditures continue to exceed revenue, the existing fee schedule must be amended to ensure that fees collected are sufficient to cover program costs.

8. Comment: A commentator supports the proposed periodic evaluation of the sufficiency of the fee program. (6)

Response: The Department appreciates the support and will conduct periodic fee schedule evaluations at least every 5 years and will make recommendations to the Board for fee adjustments, as appropriate. When feasible, this evaluation will coincide with the periodic program evaluation mandated under Section 4.3 (relating to evaluation) of the APCA.

9. Comment: The preamble indicates that the Commonwealth would benefit from the amendments because the Department would be able to maintain needed staffing levels. However, many agencies are implementing cost cutting measures including eliminating,

reducing or reevaluating the services they provide in order to be more competitive and effective. (5, 7)

Response: As a result of the unprecedented budget shortfalls in the General Fund in recent years, the Department has implemented numerous cost reduction and streamlining measures and has reevaluated services and eliminated some activities. However, the remaining programs implemented and administered by the Department are mandated by the Federal Clean Air Act (CAA) (42 U.S.C.A. § 7661-7661f), the APCA and the implementing regulations. The Department must also demonstrate to the EPA that it has sufficient funds and staff to implement, administer and enforce CAA requirements including delegated programs for new source performance standards and national emission standards for hazardous air pollutants, and the Title V Permits Program and new source permitting programs—these programmatic activities cannot be eliminated. Nonetheless, approximately 24 full-time-equivalent (FTE) positions have been eliminated since 2007. Certain innovative program development projects including the development of an electronic permitting system for general plan approvals and general operating permits have been put on hold.

10. Comment: The Department should consider whether the emissions fee cap of 4,000 tons per regulated pollutant, presently specified in the APCA, should be modified to adjust for disproportionate emission fee impacts on industry. (5)

Response: The Department agrees that the restriction on the payment of emission fees, which is currently limited to 4,000 tons per "regulated pollutant" as mandated under Section 6.3 of the APCA and its implementing regulations, should be repealed. However, a legislative amendment to the APCA would be necessary. Certain states including the State of New Jersey require the payment of fees for all regulated pollutant emissions. New York now requires the payment of emission fees for up to 7,000 tons per regulated pollutant, rather than 4,000 tons. Maryland has eliminated its cap beginning with fees due in 2011. During the ongoing evaluation of the adequacy of the Pennsylvania fee schedule for the air program, the Department will consider the commentator's recommendation.

11. Comment: The review of the program every 5 years will allow DEP to revise the fees. Such frequent revisions of a regulatory fee program are not an appropriate method to address Commonwealth budget shortfalls. Clean guidelines defining when and how the fees may be increased are necessary. (5, 7)

Response: As proposed, § 127.702(d) does not require the Board or Department to revise the fee schedule every 5 years. The provision, if adopted, would require the Department to conduct periodic evaluations of the fee schedule at least every 5 years and make recommendations to the Board for fee adjustments, as appropriate. When feasible, this evaluation will coincide with the periodic program evaluation mandated under Section 4.3 of the APCA. The fee structure in the final-form rulemaking is consistent with the existing framework which provides for periodic fee increases. However, if the Department determines during the periodic evaluation that a revision of the fee structure is warranted and makes a recommendation to the Board for a revision, a proposed rulemaking with public hearings and public comment period would be required by law before a revision to the fee schedule could be implemented.

12. Comment: A commentator supports reasonable increases in the fees that provide the necessary income for DEP, its Bureau of Air Quality, and the Department's air quality program, especially if the increases allow the Department to provide services in a timely and efficient manner. (4)

Response: The Board thanks the commentator for the support of the Department's Air Program and proposed fee schedule revisions.

13. Comment: Three commentators note that the permit fee increases are fixed through 2020. The commentators recommend an alternative fee increase scheme, as occurs under the emission fees, rather than the proposed fixed increase. (2, 3, 11)

Response: The regulatory framework for periodic fee increases from 2011-2020 is consistent with the framework adopted in November 1994 for the air quality fee schedule (24 Pa.B. 5899). The alternative fee increase scheme recommended by the commentators would adjust fees by using the CPI. While the Department considered this approach for non-Title V fees, the CAA and APCA limit the use of CPI adjustments to Title V emission fees only. Therefore, non-Title V fees for the air program cannot be adjusted in this manner

14. Comment: A commentator recognizes that the Title V fee is mandated by the CAA, however, the Commonwealth budget and correlating taxes should properly pay for basic PADEP overhead and services. (8)

Response: Section 6.3 of the APCA expressly requires the Board to establish fees sufficient to cover the indirect and direct costs of administering Pennsylvania's air program. The Department agrees that the Commonwealth budget should appropriate funds for basic program overhead and services. However, due to a decline in appropriations under the General Fund for environmental protection programs, the Department has relied on special funds to cover those costs in order to maintain a continuity of services and to adequately protect public health and the environment.

15. Comment: Fees charged citizens or industry without publishing supporting rationale or basis potentially usurps the duties and responsibilities given to the Legislature. The Department should update the Apogee Research report to support the fee increase. (8)

Response: The Board disagrees that the proposed fee schedule revision usurps the responsibilities given to the Legislature. The information to support the proposed fee rulemaking was discussed with the Air Quality Technical Advisory Committee. The Department hired Apogee Research in 1993/1994 to conduct a review and recommend a fee structure because of the 1990 Amendments to the CAA, including the Title V Permits Program. The Department has now gained approximately 16 years of experience and records of actual expenditures since the adoption and implementation of regulations to implement CAA requirements including the Title V program. In light of the extensive record of actual expenses, the Department did not think it necessary to incur additional costs for a contractor to develop the proposed changes to the existing fee schedule; expenditures including salaries, operational, and fixed asset costs are known and can be forecasted to the future. Therefore, the Department did not incur additional

expenses to update the Apogee Research Report, which was developed prior to the implementation of CAA and APCA requirements.

16. Comment: The commentator states that the Department should be required to submit any fees or increases to fees to an independent time/labor review body that would equitably and openly determine the fairness of such charges. (8)

Response: The Board disagrees that the proposed fee schedule should be forwarded to an independent time/labor review body. The Department's Bureau of Fiscal Management provides assistance and supporting documentation, including financial statements, which show actual and budgeted funds and expenditures. The Board reviewed the proposed rulemaking and under section 6.3 of the APCA is responsible for establishing fees sufficient to cover program costs.

17. Comment: The commentator states that fees should be based on transparent, published independent CPI or COLA indexes rather than the step increases proposed. (8)

Response: As discussed in the response to comment 13, the APCA does not authorize the Department to adjust fees, except the Title V emission fee, in the manner recommended by the commentator.

18. Comment: The commentator opposes the inclusion of charges for General Permits. The purpose of a general permit is to minimize PADEP-required review and action for standard practices, not be an income vehicle. (8)

Response: The Board has not proposed to change any fee associated with General Permits. The fees for each general permit are proposed in the general permit for public review and comment for 45 days prior to establishing or modifying the general permit and its fees.

19. Comment: The commentator states that the EQB should be cognizant that certain environmental issue associations have voiced openly their perceptions that DEP is unduly influenced by industry. The commentator disagrees with this perception. (8)

Response: The Board thanks the commentator for recognizing that the Department "is not unduly influenced by industry." The Department is responsible for protecting the air resources of this Commonwealth and implementing the requirements of the CAA and will continue to collaborate with stakeholders, including citizens, groups and associations and the regulated industry, as appropriate.

20. Comment: The DEP and its employees should serve as separate independent judges of filings/permits and not be unduly influenced by the need to make budget. (8)

Response: The Department does not make decisions on permits or applications based on the need to raise revenue or make budget. Permitting decisions are based on the content of an application and the technical information provided to demonstrate compliance with applicable laws and regulations.

General Comments on the Impact of the Regulation

21. Comment: A commentator understands the need for the Department to increase permit fees and testing fees, but the proposed increase in emission fees is exorbitant. A 30% increase in 1 year is unjustified. The fee increase will have a significant negative consequence to the regulated communities' budgets. (15)

Response: Section 6.3 of the APCA (35 P.S. § 4006.3) authorizes the Board to establish fees sufficient to cover the indirect and direct costs of administering the air pollution control plan approval process, operating permit program required by Title V of the CAA (42 U.S.C.A. § 7661-7661f), other requirements of the CAA and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Compliance Advisory Committee and Office of Small Business Ombudsman. This section also authorizes the Board by regulation to establish fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the CAA (42 U.S.C.A. § 7661a(b)). For the proposed fee schedule amendments, the Department evaluated the cost of the air program and proposed fees sufficient to maintain the program and demonstrate to the EPA that the Department has adequate resources to administer and enforce the Commonwealth's Air Program.

22. **Comment:** The regulated community has established budgets for 2010. The increase in fees has not been included in these budgets. (9, 15)

Response: The final-form rulemaking will require compliance with the revised fee schedule in 2011; this revised fee structure would apply to any applicant who submits an application to the Department on or after the effective date of the final-form rulemaking. In September 2011, the owners and operators of Title V facilities will pay emission fees for 2010 emissions up to 4,000 tons per regulated pollutant. Since the rulemaking was proposed October 17, 2009 (39 Pa.B. 6049), with calendar year 2010 fee implementation dates and a January 1, 2010, implementation date for the revised Title V emission fee, the proposed rulemaking provided sufficient notice for the regulated community to budget for air program fee increases beginning with calendar year 2010. The Department has revised the date for the increased plan approval and operating permit fees to be calendar year 2011 in the final-form rulemaking; the increased Title V emission fee for emissions released in 2010 is retained in the final-form rulemaking.

23. Comment: The commentator is concerned about the size of the fee increase during a 1-year period. The commentator states that it would be more equitable to propose a phase-in approach over the next 3 to 5 years, identifying permit and testing fee increases for each year. Emission fees should continue to be based on the Consumer Price Index. (15)

Response: While the Department understands that the initial fee increases will have an impact on the regulated community, fees must be sufficient to cover program costs. The final-form rulemaking retains the existing regulatory framework for subsequent increases, which are phased in over 10 years. The existing fee structure, which was adopted in November 1994, has been implemented flawlessly—however, expenditures for Title V and non-Title V programs continue to exceed the amount of revenue generated each year. If the final-form rulemaking is adopted,

subsequent increases in the new Title V emission fee would be established based on the CPI adjustments. However, the periodic fee schedule evaluation, discussed in the response to Comment 11, could show that additional adjustments are necessary in order for the fund to remain solvent.

24. Comment: The Department is encouraged to not impose an increase in the Title V fee and restrict the increase to the Consumer Price Index as authorized by the CAA. If an increase is needed, it should be delayed until 2011 so that the regulated community can budget for the increase. (9)

Response: The proposed Title V fee increase is needed to support the Title V program, as required by the CAA and APCA. Due to the delay in finalizing the rulemaking, the increase in the fee will take effect in 2011, for emissions released in calendar year 2010, as the commentator recommends.

25. Comment: The proposed Title V fee increase will exacerbate the cost differences, with plants in other states, associated with environmental compliance. The proposed Title V fee increase will result in a fee higher than other states. (14)

Response: The APCA and the CAA require that the Department establish fees sufficient to support the air program. The proposed fee schedule is designed to impose fees sufficient to recover the cost of administering the program. While there are differences in fee schedules between states, the proposed fees are similar to other states with air programs the same size as Pennsylvania. For example, Title V emission fees in New Jersey are $103.93 per ton with no cap on emissions; New York's 2010 emission fee ranges from $45 (for facilities with emissions of less than 1,000 tons per year) to $65 per ton for facilities having total annual emissions of 5,000 tons or more with a 7,000 ton cap; Maryland has a $53 per ton emission fee with no cap on emissions; and Connecticut imposes a $224.60 per ton emission fee based on an "Inventory Stabilization Factor," which is adjusted periodically to ensure that Title V fees are adequate for at least two years to support its air program.

26. Comment: The proposed increase to the air emission program fees sends the message that Pennsylvania is not interested in maintaining a manufacturing base. (14)

Response: The Board disagrees—fees must be sufficient to cover the indirect and direct costs of protecting the air resources of this Commonwealth. The fee schedule amendments will allow the Department to maintain staffing levels to support permitting for industrial and other facilities and other critical program functions including planning, monitoring source testing, and compliance and enforcement activities.

27. Comment: The proposed Title V fee increase is a near doubling of the emission fees under 25 Pa. Code § 127.705. (13)

Response: The current Title V emission fee is $54 per ton of emissions up to 4,000 tons per regulated pollutant. The proposed fee would increase to $70 per ton, which is an increase of 30%. The Department is not proposing to revise the original fee established in 1994 but rather is

setting a new base fee that will be effective beginning in 2011 for emissions released in calendar year 2010 and sufficient to cover program costs including salaries, operational expenses, and fixed assets.

28. Comment: The Title V program was to be funded through an established base fee per ton of pollutant needed to develop and administer the program. The expectation was that costs to sources would be relatively modest. In reality, the Title V program costs far exceed original estimates and provide no tangible environmental benefit. (10)

Response: The Title V program is a federally mandated operating permit program which streamlines the way Federal, state, tribal, and local authorities regulate air pollution by consolidating all air pollution control requirements into a single, comprehensive operating permit that covers all aspects of a source's year-to-year air pollution activities. The program is designed to make it easier for sources to understand and comply with control requirements, and results in improved air quality. EPA guidance dated August 4, 1993, does not restrict states to a base fee per ton of pollutant. A State may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all reasonable direct and indirect permits program costs. The Board established the original fee structure in 1994 based on the analysis of the potential program costs that were anticipated at that time. Not anticipated were the significant costs associated with electronic systems and the expansion of certain activities such as air monitoring. The EPA guidance anticipated that adjustments to the Title V funding would be needed, stating: "Changes in fee structure over time are inevitable and may be required by the following events:

- Results of periodic audits/accountings.
- Revised number of part 70 sources (discovery of new sources, new EPA standards, expiration of the deferral of nonmajor sources).
- Changes in the number of permit revisions.
- Changes in the number of affected units under section 404 (e.g., substitution units).
- CPI-type adjustments.
- Different activities during post-transition period."

The initial program costs did not anticipate the investments made in electronic reporting systems and new applications systems. For example, the cost to develop the electronic Continuous Emission Monitoring Data Processing System is approximately $1.2 million, which was not anticipated in the original fee structure. Further, the original fee structure did not anticipate the impact of implementation of EPA ambient air monitoring requirements and other activities.

29. Comment: The increasing cost of the Title V fee presents economic impacts to facilities under long-term power purchase agreements which do not allow the facilities to recover cost increases. Because we are unable to recover costs, a more equitable fee structure should be considered. (10)

Response: The CAA requires that states impose a Title V fee irrespective of contracts that affected facilities may have with other entities. The Board has established the Title V emission fee consistent with EPA guidance and with public review and comment. The fees are assessed

on the emissions from each affected facility, up to 4,000 per regulated pollutant. The owners and operators of the affected facilities are encouraged to reduce emissions to lessen the impact of the emission fee increases.

30. Comment: The increase in the Title V emission fee from $56 to $70 as proposed under § 127.705 is excessive. (9)

Response: The Board proposed the revised fee schedule for emission fees to cover reasonable program costs, which have increased substantially. The Title V emission fee for 2009 and 2010, with the CPI adjustments, is $54 per ton of pollutant with a 4,000-ton cap. The proposed fee of $70 was established to reflect the actual costs of administering the program, as required by the CAA and APCA.

31. Comment: The CAA requires the state to establish a Title V fee sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program. The CAA provides for the annual application of the Consumer Price Index to the base fee. Presumably, the DEP is already collecting sufficient fees to cover the reasonable cost of the Title V program. (9)

Response: The Board proposed the increase in the Title V emission fee to cover the actual costs of administering the program. The Department's Title V expenditures have exceeded income for many years. Income from Title V emission fees has ranged from $17.8 million to $18.4 million over the past 4 fiscal years. Actual Title V expenditures have ranged from $ 22.7 million to $26.2 million over the same time period.

32. Comment: Title V is a mature program and there are no anticipated changes to the existing Title V program that would warrant such a large increase as proposed. (9)

Response: The Board agrees that the Title V program, established in November 1994 (24 Pa.B. 5899), is a mature program that requires permit renewals and modifications to incorporate new applicable requirements. In addition to the salary, operations and fixed asset costs, there are several new activities that impact the Title V program. For example, the Department has invested approximately $1,200,000 to develop and implement a new computer system for the continuous emissions monitoring system to replace an antiquated system that could no longer be supported. Additional resources will be needed for maintenance of the new system and to modify the system if necessary. Such investments were not anticipated when the Title V program was established. The EPA recognized that there could be a need to adjust the Title V fees. In a memo issued on August 4, 1993, the EPA addressed the need for future adjustments to the fee schedule, stating that there is a continuing requirement to demonstrate the adequacy of the fees. The EPA stated that the states were obligated to update and adjust their fee schedules periodically if the fees are not sufficient to fund the direct and indirect costs of the permit program.

33. Comment: The CAA and the operating permit rule (40 CFR Part 70) require that the Title V operating permit fees recover 100% of the costs of certain program activities. This category

includes all permit issuance, source testing, compliance monitoring, inspections, enforcement and program development activities associated with Title V sources. (2, 3, 11)

Response: The Board agrees that section 502(b)(3) of the CAA requires that Title V permit holders pay an annual fee, or equivalent fee over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements. The Department has established in the final-form regulation a revised annual Title V emission fee and revised Title V permit fee schedule sufficient to support the costs of the Title V program. The Department's Title V fee income with the revised fee structure is estimated to be $23.5 million in September 2011. However, expenditures are estimated to be $ 24.7 million. The difference will be taken from the Clean Air Fund Major Source Facilities (Title V) account. Consequently, the Department will collect sufficient fees to support the activities required under Title V of the CAA. Allegheny County and Philadelphia County have local air pollution control programs approved by the Department as authorized under Section 12 of the APCA (35 P.S. § 4012). Both counties are authorized to collect Title V emissions fees to support the Title V permitting program in those counties. In 2009, Allegheny County collected $1.3 million in Title V emission fees; expenditures in 2009 were $1.4 million. In 2009, Philadelphia County collected $410,000, with expenditures of $1.75 million. The increase in the base Title V emissions fee in the final-form regulation will increase the local program emissions fee income by $397,000 (Allegheny County) and $121,000 (Philadelphia County).

Section 6.3 of the APCA authorizes the Board to establish fees to support the air pollution control program. The Department established source testing fees in the proposed rulemaking to support the air program, as authorized by the APCA. These fees will support activities not covered by the Title V emission fee program. The Department does not believe that this is double charging under Title V. Rather, separate fees are established to address the increased costs associated with source testing and monitoring activities. Several states now collect fees for source testing or monitoring. New Jersey collects fees to evaluate source testing ($450 to $500 per test protocol), test observation ($200 to $500), and to review the test report. Idaho charges a fee for services not to exceed $7,500 per facility per year. Wisconsin collects a fee for emission testing and environmental assessment. Delaware collects a user fee that ranges from $3,000 to $200,000 per year based on the hours expended at the facility. The Department's final-form regulation fees are within these ranges.

34. Comment: A commentator states that the appearance of any type of "plan change" will remove it from a 'minor' event by current rules to a 'significant' event. (8)

Response: A minor operating permit modification is a defined term in § 121.1 (relating to definitions), which means a change to incorporate de minimis conditions and other insignificant physical changes to a source or applicable requirements into an existing permit or a change that does not require plan approval but which contravenes an express permit term. Therefore, minor permit changes must qualify as insignificant changes.

Comments on the Proposed Testing and Monitoring Fees

35. Comment: A commentator states that by imposing testing, monitoring, and auditing fees, the Title V facilities will be charged twice for the same services. (4)

Response: Section 502(b)(3) of the CAA and its implementing regulations require that Title V permit holders pay an annual fee, or equivalent fee over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements. Not all Title V sources are required to conduct significant source testing or operate continuous emission monitoring systems. It is not equitable to establish higher Title V fees to cover the costs of services used mainly by facilities equipped with continuous emission monitors and those sources which require source testing to demonstrate compliance—the proposed source testing fees would apply to both major and non-major sources for services provided by the Department. EPA guidance dated August 4, 1993, does not restrict states to a base fee per ton of pollutant. A State may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all reasonable direct and indirect permits program costs.

Section 6.3 of the APCA authorizes the Board to establish fees to support the air pollution control program. The Department has established source testing fees to support the air program, as authorized by the APCA. These fees will support activities not covered by the Title V emission fee program. The Department does not believe that this is double charging under Title V. Rather, separate fees are established to address the increased costs associated with source testing and monitoring activities. Several states now collect fees for source testing or monitoring. New Jersey collects fees to evaluate source testing ($450 to $500 per test protocol), test observation ($200 to $500), and to review the test report. Idaho charges a fee for services not to exceed $7,500 per facility per year. Wisconsin collects a fee for emission testing and environmental assessment. Delaware collects a user fee that ranges from $3,000 to $200,000 per year based on the hours expended at the facility. The Department's final-form rulemaking fees are within these ranges.

36. Comment: The Federal CAA, the Operating Permit Rule (40 CFR Part 70) and the APCA require that the Title V operating permit fees recover the costs of certain program activities. The proposed Chapter 139 fees duplicate fees that are already covered by the Title V fee. The proposed amendments to Chapter 139 should be revised to exclude program activities encompassed in the Title V fee and other operating permit administration fees. (16)

Response: The Board agrees that the CAA, the APCA, and implementing regulations require that the Title V operating permit fee recover certain direct and indirect costs of the Title V permitting program. The Department has modified the base Title V emission fee to meet this standard. However, there are certain services that are needed by a limited number of owners and operators. In these instances, the Department believes that the users of these services should pay for the activity and should not require all permittees to support the services. Such fees are authorized by section 6.3 of the APCA.

37. Comment: Two commentators request that the revised fee schedule not impose duplicative fees on Title V sources. The Title V fees are to be sufficient to cover all program costs. The

additional fees for testing are already included in the annual Title V emission fees that are being increased significantly. (2, 3)

Response: The Board has established the Title V annual emission fee sufficient to cover permits program costs. However, there are certain services that are needed by a limited number of owners and operators. For example, the costs to develop the electronic Continuous Emission Monitoring Data Processing System are approximately $1.2 million dollars. In this instance, the Department believes that the users of this service should pay, rather than require all permittees to support the service. Such fees are authorized by section 6.3 of the APCA and.

38. Comment: The proposal to establish source testing fees will unfairly tax smaller facilities because of the costs to cover the review of source testing activities. The commentator's facility has six narrow-width coating lines and four foil-rolling mills. Currently during stack tests, similar equipment is grouped together under a common protocol; the stack tests are performed in succession and reports are included in the same binder for DEP review. Under the proposed fee structure, there is no allowance for the grouping of similar sources in the protocol review, stack test review or source test observation fee. (14)

Response: The proposed fee schedule does not alter the current procedures for "grouping" sources. The same procedure will continue to be followed. If one protocol is submitted for several sources, then one fee is charged for protocol review.

39. Comment: Three commentators support the imposition of the testing, auditing, and monitoring fees in the case of plan approval applications, new permit applications, or non-Title V permitted facilities. (2, 3, 11)

Response: The Board thanks the commentators for the support but points out that the fees are for all users of the services.

40. Comment: These commentators state that, in the case of Title V facilities, the proposed increases to the existing operating permit fees, including the emission fee, should provide adequate funding. The commentators provide a quote that Title V operating permit fees recover 100% of certain program costs. The commentators point out that the proposed Chapter 139 fees are not permit fees and are not applicable to meet the Title V funding requirement. (2, 3, 11)

Response: The Board has proposed a revision of the permit fee schedule to reflect the costs of the permit program. The Title V emission fee in the final-form rulemaking is sufficient to cover the costs of the Title V permits program. The Department has proposed to establish separate source testing and monitoring fees as authorized under section 6.3 of the APCA.

41. Comment: For sources with annual testing requirements, the protocol review fee of $675 would be incurred each year, although the protocol is rarely revised from year to year. Similarly, the full test report review fee of $1,000 would be incurred even for a test conducted year to year. (13)

Response: The source testing fee allows the Department to recoup the costs of administering the air quality program source testing activities. While some tests are routine from year to year, there is no guarantee that the source testing firm or staff are the same and will conduct the tests appropriately. Consequently, it is important for Department staff to review each protocol and test report to verify the accuracy of the information.

42. Comment: In light of the repetitious nature of emission testing to comply with annual testing requirements, and that the fees are excessive, the testing fees should be deleted or reduced for annual emission testing. (13)

Response: The Board has not reduced or eliminated the fees for annual testing requirements. These annual tests require the same Department review and staff time each year as source testing done on an infrequent basis.

43. Comment: Fees should not be required for review and approval of stack test protocols that have been previously reviewed and approved. The commentator conducts annual NOx testing and the protocol is generally unchanged. A review and approval fee for the same review and approval should be avoided or at least discounted. (4)

Response: The Department must review each protocol and test report each time it is submitted to determine the acceptability and approvability of the information. While the commentator states that the protocol is generally unchanged, this does not mean that there are never any changes. As a result, Department staff must conduct a review of each protocol.

44. Comment: The commentator states that fees for test protocol reviews should not be imposed if a previously approved protocol is being submitted. (4)

Response: The Department must review each test protocol to determine the acceptability and approvability of the request. While the facility owner or operator may submit a previously approved protocol, Department staff must conduct a new review to determine if the protocol is still approvable or if changes are required to meet new testing standards.

45. Comment: Pennsylvania is seeking to increase non-fossil electric generation through the use of biomass. The increase in fees associated with test burn applications and oversight seem in direct contradiction with Pennsylvania's stated goals. These efforts should be exempt from further regulatory burdens. (10)

Response: The final-form rulemaking does not incorporate this recommendation because the source testing of biomass combustion must be conducted by the Department to determine the environmental impact of the emissions from biomass sources. Successful testing of biomass sources can lead to increased biomass usage. The testing fees will support the oversight needed for this program.

46. Comment: The proposed fees for continuous emission monitoring-related activities should not be imposed on Title V facilities as these costs are already reflected in the annual emission fees. Imposing these fees would be double charging. (9)

Response: The Board proposed a revision of the permit fee schedule to reflect the costs of the program. The Title V emission fee in the final-form rulemaking is sufficient to cover the costs of the Title V permits program. The Department has proposed to establish separate source testing and monitoring fees to be paid by all users of these services, as authorized under section 6.3 of the APCA.

47. Comment: Many facilities have implemented emission reduction measures which impact the fees paid by the owner or operator. Increasing the fees to make up for this reduction penalizes the facility for making the environmental improvements. (7)

Response: The Department has not proposed to increase the fees in response to the installation of control equipment. The Department has proposed to increase the fees to meet the costs of administering the air quality program. The Department supports the reduction in emissions which help attain and maintain the health-based National Ambient Air Quality Standards.

48. Comment: As an alternative to fee increases, the EQB should consider alternatives such as conducting a thorough evaluation of the program, increase the use of technology, consolidate offices, and adopt the EPA regulations rather than developing state versions. (7)

Response: The Department has considered alternatives to fee increases and implemented such measures, where practical. However, certain alternatives will also require the imposition of fee increases. For example, the increased use of technology requires significant investment in computer system development and maintenance, which were not costs projected when the fees were originally established in 1994. The Department has reduced costs substantially. There have been significant staff reductions over the past 3 years. System development costs have been reduced. The development of additional electronic systems including the e-General Permit system has been put on hold

49. Comment: The proposed fee schedule results in significantly disproportionate impact on owners and operators of facilities that use continuous emissions monitoring systems (CEMS) and conduct frequent stack sampling regardless of the facilities' relative impact on the environment. Owners and operators of facilities that rely on less onerous compliance tools such as parametric monitoring, work practices, and periodic sampling would be affected less even where those facilities have equal or greater environmental impact. (5, 7)

Response: The final-form regulation requires the owners and operators of facilities that do frequent sampling or use CEMS to cover the actual costs of those services and development and maintenance of electronic systems designed to streamline source testing operations.

50. Comment: The proposed sampling, testing, and CEM fees for submissions made by Title V facilities in support of demonstrating compliance with their Title V permit should not be included in the final rule. In accordance with the Federal requirements for establishing the Title V emission fees as specified under § 127.705, these air program costs are to be included in the determination of these fees. (5)

Response: The Board has proposed a fee schedule revision that reflects the direct and indirect costs of the permitting program as required by the CAA. EPA guidance dated August 4, 1993, does not restrict states to a base fee per ton of pollutant. A State may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all reasonable direct and indirect permits program costs. The EPA guidance anticipated that adjustments to the Title V funding would be needed, stating: "Changes in fee structure over time are inevitable and may be required by the following events:

- Results of periodic audits/accountings.
- Revised number of part 70 sources (discovery of new sources, new EPA standards, expiration of the deferral of nonmajor sources).
- Changes in the number of permit revisions.
- Changes in the number of affected units under section 404 (e.g., substitution units).
- CPI-type adjustments.
- Different activities during post-transition period."

The initial program costs did not anticipate the investments made in electronic reporting systems and new applications systems. For example, the cost to develop the electronic Continuous Emission Monitoring Data Processing System is approximately $1.2 million, which was not anticipated in the original fee structure.

Therefore, the Board has proposed a revision of the permit fee schedule to reflect the costs of the program. The Title V emission fee in the final-form regulation should be sufficient to cover the costs of the Title V permits program. The final-form regulation retains the separate source testing and monitoring fees, as authorized under section 6.3 of the APCA.

51. Comment: The proposed fees should not be included in the final-form rulemaking and instead the DEP should consider relying solely on reasonable fees under § 127.705. (7)

Response: The proposed testing and monitoring fees reflect actual costs of the program. The commentator's recommendation would require an emission fee greater than the $70 per ton proposed Title V emissions fee, which could unfairly impact those owners or operators of Title V facilities that do not conduct significant testing activities.

52. Comment: Should DEP opt not to eliminate the proposed testing fees, the fees should at a minimum be limited to one fee per activity. There should be no fees for subsequent submittals. (7)

Response: The final-form rulemaking has retained the proposed fee schedule. Subsequent submittals require the same Department staff review effort to verify that the information is correct and addresses the mistakes or omissions found in previous reports. Submitting supplemental information at the request of the Department is not charged a fee.

53. Comment: The fees associated with stack testing are far too complicated. We understand that the intent is to make the user of the services pay the cost; however, the question of when a permittee will be required to negotiate observer numbers and the number of testing days that will

be observed adds complexity and confusion. We recommend that the Department support incorporating these costs into the protocol or testing results review fee. (5)

Response: The final-form rulemaking does not incorporate the test observation fee into the test protocol review fee. However, the fee for additional observers was eliminated to simplify the fee schedule.

54. Comment: Three commentators state that Title V facilities should either pay the proposed increased emission fee and other proposed operating permit fee increases in Chapter 127 or the emission fee should remain unchanged with Title V facilities paying the testing fees. Requiring Title V facilities to pay both the increased operating permit fees and the testing fees is extracting payment twice from the Title V facilities. (2, 3, 11)

Response: According to guidance provided by the EPA on August 4, 1993, a state "may design its fee structure as it deems appropriate, provided the fee structure raises sufficient revenue to cover all reasonable direct and indirect permits program costs." The Board has established the Title V annual emission fee sufficient to cover Title V permits program costs. However, there are certain services that are needed by a limited number of owners and operators of both Title V and non-Title V facilities. The proposed source testing and monitoring fee schedule was designed to recover costs incurred by the Department for providing these services. Due to a decline in appropriations under the General Fund for environmental protection programs, the Department has relied on special funds to cover those costs in order to maintain a continuity of services and to adequately protect public health and the environment. In this instance, the Department believes that the users of these services should pay for such services, rather than establishing a higher emissions fee that would be imposed on all permittees to support the services. Such fees are authorized by section 6.3 of the APCA. The Department recommended the fee schedule proposed by the Board by analyzing the current and projected income and expenditures for the Clean Air Fund. The Department considered actual Clean Air Fund expenditures during the past 16 years. A review of the current and expected workload was completed to assess the need for additional fees. As a result, the proposed fee schedule was developed to ensure that fees are sufficient to administer program costs.

55. Comment: The proposed fee for a Department-conducted source test is quite expensive compared to private testing firms. Companies should have the opportunity to contract with a private firm to control the testing costs. (2, 3, 11)

Response: The Department's plan approvals and operating permits require the owner or operator to periodically test the emission sources with a Department-approved testing protocol. While the Department is authorized to conduct source testing, private testing companies perform the majority of source testing conducted in this Commonwealth for the regulated community. Therefore, an owner or operator may continue to choose any private testing company to conduct source testing instead of having these services performed by the Department.

56. Comment: The commentators state that if a fee is to be charged for Department staff to observe testing, the staff should be qualified under the current specification of ASTM D7036

"Standard Practice for Competence of Air Emission Testing Bodies." The commentators recommend a change to the definition of Observer to meet this requirement. (2, 3, 11)

Response: The ASTM D7036 standard applies to testing bodies, not individuals. The specific provisions of ASTM D7036 are referenced in the EPA Part 75 acid rain monitoring requirements. The EPA incorporated the ASTM standard into its Part 75 regulations to require Air Emission Testing Bodies to conduct relative accuracy test audits (RATA) for SO2 and NOx only. The Department does not conduct RATAs for Part 75. Therefore, no changes are needed.

57. Comment: If the Department decides to conduct a test as part of enforcement action, that testing effort should be included in the Title V operating permit fees as specified by the CAA Amendments of 1990 and 40 CFR Part 70. (2, 3, 11)

Response: Any Department-conducted source test initiated after enforcement action has begun is not to be part of the Title V fee program, as provided by EPA guidance. Such costs will be covered under the new source testing fee structure. In order to avoid an increase greater than the proposed $70 per ton Title V emission fee, Department-conducted source tests conducted to determine if there is a compliance problem or to prepare for enforcement action against a Title V facility owner or operator will be imposed solely for source-specific compliance and enforcement activities.

Comments on the Request for Determination Fee

58. Comment: The Department is proposing a fee of $400 for a request for determination (RFD), which is a simple and straightforward process. It is unreasonable to charge $400 for 1 or 2 hours of Department staff time. (12)

Response: In establishing the proposed fee schedule, the Department reviewed the staff time associated with processing RFDs. On average, Department staff spent 7.5 hours reviewing and responding to each RFD submitted using the paper form. This includes clerical, technical and supervisory time. It should be noted that the estimate does not include the time for the computer system development and maintenance, and oversight for the electronic system. The costs for the computer system development for the electronic RFD system are over $800,000. Therefore, the proposed fee is reasonable.

59. Comment: If the Department insists on charging a fee for an RFD, then it should impose a deadline for its response. (12)

Response: The fee is intended to cover the cost of processing and reviewing each RFD, which must be considered on its own merit. Many RFDs require the Department to contact the applicant for additional information before a response can be made. Imposing a response deadline may require the Department to deny many approvable RFDs that only need additional information. Such denials would cause hardship to the applicant and burden the Department with appealable actions.

60. Comment: The commentator requests that the EQB clarify what is covered by the new fee for submitting an RFD. The RFD form is also used to provide a 7-day written notice of a de minimis emissions increase under 25 Pa. Code § 127.449 (relating to de minimis emission increases) or provide notice of certain physical changes of minor significance under § 127.14(c) (relating to exemptions). (6)

Response: The proposed fee is for all RFDs submitted for review. The source owner or operator should not be using the RFD process to notify the Department of de minimis emission increases or to notify the Department of minor physical changes. Each RFD submitted requires the Department to expend staff time to review the RFD and make a determination. The proposed fee schedule reflects that effort.

61. Comment: The Department has a list of permit exemptions. Many owners submit RFDs for sources on the exemption list so that DEP will concur with the determination that a source is exempt from plan approval, operating permit or both. The Department should clarify what is covered by the RFD fee. (4, 6)

Response: The Board is establishing the RFD fee for all RFDs submitted to the Department for consideration. Sources and activities identified on the Air Quality Exemption List do not require RFD review and approval by the Department. Submitting a RFD to verify this determination requires the Department to expend staff resources to review and analyze the information. The proposed fee would recover the costs associated with the review.

62. Comment: The Department should coordinate the changes being made to the plan approval exemption list with the new fee schedule. The exemption list is being revised to require previously exempted sources to submit an RFD so that the DEP has an inventory and notice of these sources. The commentator states that a notice for inventory purposes should not require a detailed evaluation and should not be subject to a fee. (6)

Response: The Department has not finalized the proposed Air Quality Exemption List. The comment period closed on July 18, 2010. Proposed revisions to the exemption for the oil and gas industry will include an option to allow facility owners and operators to submit a RFD prior to the submission of a plan approval or operating permit application. This flexibility will allow both the owners and operators of affected facilities and the Department to determine if a plan approval or permit is needed. A fee for this technical review is appropriate. The RFD process is used to determine sources of minor significance. Emission inventories for this sector will be established in accordance with the source reporting and emission statement requirements in Chapter 135 (relating to reporting of sources).

63. Comment: A commentator opposes the assessment of fees for RFDs at the time of submission. The added time to process the check request for this new fee will remove all benefit from the recently rolled out web-based RFD system. The state is working on an electronic payment method for RFDs, but if this system is not successful, then fees should be payable within 30 days of submission of an RFD. (5)

Response: The final-form rulemaking will assess fees for RFDs, which will only be processed by the Department if a complete application and fee for the service has been submitted to the appropriate regional office. Consequently, an applicant must submit the appropriate fee at the time of the application. The Department has developed electronic payment systems for other programs and is committed to developing and implementing an electronic payment system for the electronic RFD system.

64. Comment: Three commentators support the proposed RFD fee. However, it appears that the proposed § 127.702(j)(2) (relating to plan approval fees) may require payment of an RFD fee with the submission of a plan approval application or under § 127.703(e)(2) (relating to operating permit fees under Subchapter F). If this is the intent of the language, the commentators do not support the fee. The commentators recommend the language be clarified. (2, 3, 11)

Response: Proposed § 127.702(j) does not require the submission of an RFD with the submission of a plan approval application. Similarly, § 127.703(e) does not require the submission of an RFD with the submission of an operating permit application. The two sections require the payment of an RFD fee if an RFD is submitted to determine if a plan approval or operating permit is needed. The Department has revised the sections for clarity.

65. Comment: A commentator states that the RFD is an administrative function that is a check to make sure that the facility and bureau read current regulations in the same way, not an intensive review of any proposed change. The commentator opposes the proposed fee. (8)

Response: The submission of an RFD requires the Department to expend staff resources to review the submission. The facility owner or operator has other means to verify regulation interpretation than use RFDs.

Plan Approval and Operating Permit Fees

66. Comment: Proposed § 127.702(h) should be revised to indicate that the additional fees are payable only when the affected modifications to the plan approval application are initiated by the owner or operator. (5, 7)

Response: The proposed section has been revised to clarify that the fees are due and payable by the owner or operator of a source when an amendment of a plan approval or revision of an application that requires reassessment of a control technology determination or of the ambient impacts of the source is submitted, whether the amendment or revision is initiated by the owner or operator of the source or by the Department. In the case of the owner or operator of the source initiating the amendment or revision that requires reassessment of the control technology determination or of the ambient impacts of the source, the owner or operator has initiated the action and is required to pay the fee. If the Department has found that the plan approval or application is not approvable in its current form, the Department initiates the action that requires the owner or operator of the source to submit additional information. To be approvable, the owner or operator must submit an amendment or revision on which the Department can take final action. In both cases, the appropriate fee would be due and payable by the owner or operator of the source.

67. Comment: The proposed fees in § 127.704 (relating to Title V operating permit fees under Subchapter G) should not apply to activities that do not require significant DEP action or intervention, such as administrative amendments, minor modifications and transfer of ownership. Such changes occur frequently during the term of the permit but have no environmental impact. (5, 7)

Response: As previously stated, fees must be sufficient to cover the indirect and direct costs of administering the Commonwealth's air pollution control program. The Department will expend staff time to process each request. The proposed fee will cover that cost.

68. Comment: For the plan approval fees, the notice should provide the rationale behind how the Department determined the magnitude of the fee increases. The permit fees should be based upon the legitimate effort associated with administering the permit program. (5)

Response: The Board's proposed rulemaking considered actual expenditures and the overall direct and indirect cost of administering and implementing the air program to determine the magnitude of the fee increases. The Board proposed a revision to the fee schedule to reflect the costs of the program. For the existing permit fees, the Department recommended to the Board an average increase of 20% to reflect the increased costs of administering the air program based on the review of a16-year history of expenditures. The proposed new fees for RFDs, ambient air quality analysis, risk assessments, and source testing and monitoring were developed by reviewing the staff time associated with each activity. The fee for each service was calculated based on the average staff costs and the time associated with the activity.

The overall fee schedule proposal was based primarily on consideration of the Clean Air Fund history since establishment of the fee structure in November 1994. To this end, the Department reviewed the revenue, spending, and budgeting history and determined that the annual expenses consistently exceeded revenue. For example, in Fiscal Year (FY) 2008-2009, actual revenue from Title V Emission Fees was approximately $18,476,000; expenditures totaled $22,660,000. For the non-Title V appropriation, revenue generated from application fees and civil penalties was $5,720,000; expenditures were approximately $7,949,000. At the time the rulemaking was proposed, a Clean Air Fund deficit was projected by FY 2013. As a result, the Department recommended to the Board proposed increases in the plan approval and permitting fees and new fees sufficient to cover the indirect and direct program costs, as required by the APCA.

69. Comment: The commentator states that the regional offices need to be staffed with sufficient permit engineers to meet the demands for their services. The new permit fees should be based on an ideal design staffing level in the regional offices and not on the current understaffed State. (5)

Response: The proposed fee schedule amendments are reflective of the current complement and obligations to implement the requirements of the CAA and APCA. While additional staff would be needed to meet the ideal design staffing levels, fees would need to be increased again prior to 2015 to cover additional indirect and direct costs.

70. Comment: A reasonable permit review timetable is an even higher priority for regulated entities than reasonable permit fees and the Department should calibrate its fees and use the funds so generated for that purpose as called for by authorizing legislation. (5)

Response: The Department has developed a permit review schedule which is published on the Department's web site. The money-back guarantee will remain in effect and is applicable to the revised fee schedule. Information on the money-back guarantee can be found at: http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/plan.htm.

71. Comment: A commentator states that there should not be extra fees for Risk Assessments as these are included in the existing permit fees. (4)

Response: Risk assessments are complex and resource intensive. Only a few are conducted each year depending on the applications received for certain sources including cement kilns, incinerators, and landfills. Because these assessments are not required for all plan approval applications, the fee is justified to cover program costs for the complex reviews and analyses.

72. Comment: Three commentators support the imposition of the risk assessment fee for plan approval applications. However, if the risk assessment is linked to an existing Title V permit absent a plan approval application, the fee is not supported. (2, 3, 11)

Response: Proposed § 127.708 (relating to risk assessment) states, "[e]ach applicant for a risk assessment shall, as part of the plan approval application, submit the application fee required by this section to the Department." The fee would be due even if there is an existing Title V Permit if the applicant has requested that a risk assessment be conducted.

73. Comment: Fees for sources subject to case-by-case maximum achievable control technology (MACT) should recognize that small sources will not require any controls. Small gas-fired industrial boilers will not require any detailed MACT analysis and should not be subject to the large fees that may make sense for a large coal-fired boiler. (4)

Response: The proposed fee schedule in § 127.702 for MACT review applies solely to sources, which emit at least 10 tons per year of a single hazardous air pollutant (HAP) or 25 tons or more of a combination of HAPs. Each MACT application must be reviewed in accordance with applicable Federal and state law and regulations. Small gas-fired industrial boilers would be subject to a MACT analysis if the HAP thresholds are exceeded.

74. Comment: Three commentators support the proposed changes to §§ 127.702(h)(1) and (2) so long as the fee is triggered by an amendment proposed by the applicant. (2, 3, 11)

Response: The proposed section has been revised to clarify that the fees are due and payable by the owner or operator of a source when an amendment of a plan approval or revision of an application that requires reassessment of a control technology determination or of the ambient impacts of the source is submitted, whether the amendment or revision is initiated by the owner or operator of the source or by the Department. In the case of the owner or operator of the source initiating the amendment or revision that requires reassessment of the control technology

determination or of the ambient impacts of the source, the owner or operator has initiated the action and is required to pay the fee. If the Department has found that the plan approval or application is not approvable in its current form, the Department initiates the action that requires the owner or operator of the source to submit additional information. To be approvable, the owner or operator must submit an amendment or revision on which the Department can take final action. In both cases, the appropriate fee would be due and payable by the owner or operator of the source.

75. Comment: The increase in the Title V fee represents a 25% increase over the likely Consumer Price Index adjusted fee, a substantial increase in the fee. Based on the draft report "Adequacy of Funding for the Air Quality Program 2002-2007, Table 3. Revenue History," the emission fees provided $18,335,445 in revenue. The proposed fee increase will bring in an additional $4.5 million. This is a substantial increase when the fund had a $2 million surplus in 2006-2007. (2, 3, 11)

Response: The commentators are referencing the report entitled "An Evaluation of the Pennsylvania Air Quality Program 2002-2007," which is mandated every five years under Section 4.3 of the APCA. On pages 48-50 of that report, the Department showed the revenue and expenditures for the air program during the FY2001/2002 –FY 2006/2007, which were sufficient for the time period evaluated. However, revenue has decreased and expenditures have increased substantially since that report was prepared. Over the next three years, the Department estimates Title V and non-Title V revenue of approximately $27.4 million with projected expenditures of approximately $32 million. With the draw-down on the balance of the Clean Air Fund and projected increase in revenue of approximately $7.5 Million, fees should adequately cover program costs based on current cost assumptions including personnel, operating expense, program services and fixed assets. The Department will continue to examine and implement cost reduction measures, as appropriate.

76. Comment: The commentators are concerned that the new proposed fees in § 127.708 and Chapter 139 are in addition to the proposed amended operating permit fees and may be duplicative for Title V facilities. (2, 3, 11)

Response: See the response to Comment 35.

Greenhouse Gases

77. Comment: It is unclear whether greenhouse gases (GHG) will be charged a fee even though the EPA has proposed that GHGs would not be subject to emission fees. The Department should exclude GHGs from the fee structure or establish a different fee structure taking into account considerations pertinent to GHG regulation. (13)

Response: The Department agrees that this fee schedule revision should not cover GHG emissions and, therefore will not impose the Title V emission fee on GHGs. The EPA's Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule published on June 3, 2010, does not include a mechanism for assessing Title V emission fees (75 FR 31514). In this final action, the EPA indicates that GHGs are not pollutants subject to the Title V

emission fee and that states cannot collect the Title V emission fee on GHGs. The EPA indicated that states could establish other fees, including permit fees sufficient to cover the costs of the GHG program; EPA will consider fees for GHG permitting during subsequent rulemaking addressing the GHG permitting process. Therefore, the Department has not conducted a detailed analysis of the potential costs of a GHG program and has not proposed to revise the fee schedule to include GHG costs at this time. Such a review may occur in the future.

Independent Regulatory Review Commission Comments

The Independent Regulatory Review Commission (IRRC) submitted comments on January 20, 2010. The IRRC comments are summarized and responses provided as follows:

1. Comment: The IRRC stated that commentators questioned the dollar amount of the fees in the proposed regulation and how the fee increases were developed.

Response: The Department reviewed the overall indirect and direct costs of the air program to determine the need for a fee increase. The Board proposed a revision to the fee schedule to reflect the costs of the program. For the existing permit fees, the Board proposed an average increase of 20% to reflect the increased costs for processing permits. The proposed new fees for RFDs, ambient air quality analysis, risk assessments, and source testing and monitoring were developed by reviewing the staff time associated with each activity and the average staff time for the activity. The fee was calculated based on the average staff costs and the time associated with the activity.

The fee schedule proposal was based primarily on consideration of the Clean Air Fund history since the fee structure was established in November 1994. To this end, the Department reviewed the revenue, spending, and budgeting history and determined that the annual expenses consistently exceeded revenue. For example, in FY 2008-2009, actual revenue from Title V Emission Fees was approximately $18,476,000; expenditures totaled $22,660,000. For the non-Title V appropriation, revenue generated from application fees and civil penalties was $5,720,000; expenditures were approximately $7,949,000. At the time the rulemaking was proposed, the Clean Air Fund was projected to be exhausted by FY 2013. As a result, the Department recommended to the Board proposed increases in the plan approval and permitting fees and the new fees sufficient to meet the indirect and direct program costs, as required by the APCA.

2. Comment: The IRRC stated that commentators noted that the emission fee increase exceeds the Consumer Price Index.

Response: The CAA and APCA require that the Title V emission fee be adjusted annually based on the CPI. However, Title V permit program costs have exceeded projections and a fee adjustment is needed. The EPA anticipated such a need when it issued the August 4, 1993, implementation guidance on Title V fees. The EPA recognized that “changes in fee structure over time are inevitable…” The increase in the base Title V Emission Fee reflects increased staff costs, significant costs associated with computer program development, and other costs.

3. Comment: The EQB has not provided enough detail regarding the calculation of the dollar amount of the fees. We recommend that the EQB provide with the final-form rulemaking the fully detailed calculation of each fee to establish that the fees are reasonable.

Response: The general fee revision process is explained in response to IRRC comment 1. In addition, the new fees for risk assessments, requests for determination, and source testing and monitoring are based on average time expended on these activities. In addition to the staff time, the costs of electronic data processing systems and other costs must be included in the fee consideration.

4. Comment: We recommend that the EQB consider the effect of the fee increases on small businesses and industries, and the feasibility of setting lower fees for them.

Response: The proposed fee amendments consider the impact of the revised fee schedule on small businesses and industries. A plan approval received from the owner or operator of a small source requires similar review and staff resources as a non-major plan approval received from an owner or operator of a large source. The Department does recognize that review of major sources can be complex and time consuming and has proposed a separate fee schedule for this category of sources.

5. Comment: Title V facilities already pay annual fees and some of the new fees duplicate activities that are already covered by the existing fees. The IRRC stated that commentators believe they should either pay fees under Chapter 127 or 139, not both.

Response: The owners and operators of Title V facilities will not be charged twice for the same services. Section 502(b)(3) of the CAA requires that the Title V permit holders pay an annual fee, or equivalent fee over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements. The Department has established in the final-form regulation a fee schedule sufficient to cover the costs of the Title V permits program. The annual Title V income with the revised fee is estimated to be $ 23.5 million in September 2011. Annual expenditures are estimated to be $ 24.7 million. The difference will be taken from the Clean Air Fund Major Source Facilities (Title V) account. Consequently, the Department will collect sufficient fees to support the activities required under Title V of the CAA.

Section 6.3 of the APCA authorizes the Board to establish fees to support the air pollution control program. The Department recommended that the Board establish source testing fees to support the air program, as authorized by the APCA. These fees will support activities not covered by the Title V program. The Department does not believe that this is double charging under Title V. Rather, a separate fee is established to address the increased costs associated with source testing and monitoring activities. Several states now collect fees for source testing or monitoring. New Jersey collects fees to evaluate source testing ($450 to $500 per test protocol), test observation ($200 to $500), and to review the test report. Idaho charges a fee for services not to exceed $7,500 per facility per year. Wisconsin collects a fee for emission testing and environmental assessment. Delaware collects a user fee that ranges from $3,000 to $200,000 per

year based on the hours expended at the facility. The Department's final-form rulemaking fees are within these ranges.

6. Comment: The emission fee increase is excessive. Emission fees should continue to be calculated using the Consumer Price Index.

Response: As discussed in the response to IRRC comment 1, annual Title V income has not kept pace with the expenses incurred. Therefore, an increase in the annual Title V emissions fee is needed. It should be noted that the Title V emissions fee is adjusted annually for the CPI as required by the CAA and APCA. The proposed base Title V emissions fee increase was established to cover reasonable costs incurred by the Department. Section 6.3(d) of the APCA requires that the fee be set considering, among others, the amount of fees charged in neighboring states. Other states have raised the annual Title V emissions fee in recent years to reflect the increasing costs of administering the Title V permits program. For example, Title V emission fees in New Jersey are $103.93 per ton with no cap on emissions; New York's 2010 emission fee ranges from $45 (for facilities with emissions of less than 1,000 tons per year) to $65 per ton for facilities having total annual emissions of 5,000 tons or more, with a 7,000 ton cap; Maryland has a $53 per ton emission fee with no cap on emissions (for 2011); and Connecticut imposes a $224.60 per ton emission fee based on an "Inventory Stabilization Factor," which is adjusted periodically to ensure that Title V fees are adequate for at least two years.

7. Comment: Subsection 127.702(h) should require payment of a fee only if the modifications are initiated by the applicant, not when DEP requires modifications.

Response: Certain modifications or amendments may be necessary in order to determine that the application is true, accurate and complete or to issue a plan approval. The proposed section has been revised to clarify that the fees are due and payable by the owner or operator of a source when an amendment of a plan approval or revision of an application that requires reassessment of a control technology determination or of the ambient impacts of the source is submitted, whether the amendment or revision is initiated by the owner or operator of the source or by the Department. In the case of the owner or operator of the source initiating the amendment or revision that requires reassessment of the control technology determination or of the ambient impacts of the source, the owner or operator has initiated the action and is required to pay the fee. If the Department has found that the plan approval or application is not approvable in its current form, the Department initiates the action that requires the owner or operator of the source to submit additional information. To be approvable, the owner or operator must submit an amendment or revision on which the Department can take final action. In both cases, the appropriate fee would be due and payable by the owner or operator of the source.

8. Comment: Payment of fees should not be required when the action has no adverse environmental impact such as administrative amendments, minor modifications and transfer of ownership.

Response: The Board has proposed to revise the fee schedule for minor modifications. Each change requires Department staff resources even when there are no obvious environmental impacts.

9. Comment: The fees have a disproportionate impact on facilities that have numerous continuous emission monitoring systems.

Response: The Board has proposed a fee schedule for CEMS that reflects the time and staff resources directed to the CEMS. The owners and operators of the facilities using CEMS should pay for the services rendered. Small businesses that do not use CEMS should not subsidize the larger facilities. The proposed fees address the Department's time and resource demands for certifying CEMS and processing CEMS reports.

10. Comment: How will the fees be implemented under §§ 127.703(j)(2), 127.703(e)(2), 127.704, 127.708, 139.201 and 139.202?

Response: The fees for RFDs will be due upon submission of the RFD. Fees due under the Title V operating permit program will be collected as currently collected. Fees for the risk determination will be due upon submission of the risk determination. Fees for source testing and monitoring will be due upon submission of the application. Certain of the source testing and monitoring fees will not be known until the Department conducts the observation or test. These fees will be invoiced to the applicant.

11. Comment: Source test fees exceed the cost for a private testing firm to perform the same analysis. Therefore those who pay the fees should have the opportunity to contract with a private firm.

Response: The Department's plan approval and operating permits require the owner or operator to periodically test the emission sources with a Department-approved testing protocol. The owner or operator may choose a private testing company to conduct the source testing.

While the Department is authorized to conduct source testing, private testing companies perform the majority of source testing conducted in this Commonwealth for the regulated community. Therefore, an owner or operator may continue to choose any private testing company to conduct source testing instead of having these services performed by the Department.

12. Comment: The fiscal impact of the fee increases is affecting already-completed budgets.

Response: The final-form rulemaking for the revised fee schedule will become effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*, anticipated to be in Spring 2011. The owners or operators of affected facilities have had notice since the proposed rulemaking was published October 17, 2009, of the proposed fee revisions, providing sufficient time for owners and operators to adjust budgets accordingly for anticipated projects.

13. Comment: Long-term contract holders are affected because the contracts cannot be adjusted to accommodate the fee increases.

Response: The CAA requires the states to impose a Title V emission fee irrespective of contracts that affected facilities may have with other facilities. The Title V emission fee is

consistent with EPA guidance. The fees are based on the emissions from each affected facility up to 4,000 tons per regulated pollutant. The owners and operators of the facilities are encouraged to reduce emissions to lessen the impact of the fees.

14. Comment: The fees associated with stack testing are too complicated.

Response: The Board has developed a fee schedule that reflects the different aspects of source testing and review. In the final-form rulemaking, the fee for additional observers was eliminated to simplify the fee schedule.

15. Comment: The definition of "observer" is vague. The phrase "staff qualified to observe testing" is not clear regarding what qualifications a person must have to be an observer. We recommend adding specific qualifications to this definition.

Response: The Board has deleted this definition as it is no longer needed for the final-form rulemaking.

16. Comment: For clarity, the EQB should delete the obsolete fees for the years 2005 to 2009.

Response: The fee schedule for the years 2005 to 2009 has been deleted in the final-form rulemaking.