

Dear Member of the Environmental Quality Board:

Re: Proposed Amendments To 25 Pa. Code Chapter 105; Dam Safety & Waterway Management Fees; 42 Pa.B. 553 (January 28, 2012) ("Proposed Rulemaking").

The following is a summary of the Comments submitted by the Pennsylvania Aggregates and Concrete Association on behalf of Hanson Aggregates BMC, Inc. and Tri-State River Products (collectively "Dredgers," individually "a Dredger") to the EQB.

The Proposed Rulemaking was drafted without factoring in the unique nature of the Chapter 105 Permits under which the Dredgers operate and will, unless revised to reflect the nature of how dredging is permitted, force the Dredgers out of business, cost 65 families a good paying job, deprive the Commonwealth of revenue it would otherwise receive from sand and gravel leases it has entered into with the Dredgers, and remove the main source aggregates used by PennDOT and local municipalities in road construction and maintenance projects.

First, it overlooks the fact that for a variety of operational reasons (discussed in PACA's Full Comments), the Dredgers must seek to amend their 105 Permits in 1.0 – 2.0 mile segments of the Ohio or Allegheny River. They only do so as needed to remain in operation over the 5 year life of their 105 Permit. As result, a typical permit amendment has the potential to affect 181 square acres of river bottom. If the \$800 per 0.10 acre of affected waterway component of the Proposed Rulemaking is applied to the typical Dredger's amendment application the fee will equal **\$1,448,000**. Such an outrageous fee bears absolutely no relationship to the costs associated with reviewing the application. License fees, like this, which are "grossly disproportionate" to the sum required to pay the cost of regulating a business are invalid in Pennsylvania. *Flynn v. Horst*, 51 A.2d 54, 59 (Pa. 1947). This outcome could not have been intended by the drafters of the Proposed Rulemaking.

Second, unlike other 105 Permittees, the Dredgers need no further "incentive" to minimize the environmental impacts of their proposed activities because, *inter alia*: (a) they had to develop a full Environmental Impact Statement, pursuant the National Environmental Policy Act, before each received its current 105 Permit, a study which resulted in lessening the impact of the proposed activity by causing restrictive permit conditions to be imposed on where and how dredging can occur; (b) to actually obtain approval to operate in a specific segment of either River a Dredger must first submit to DEP (and the Army Corps of Engineers and the U.S. Fish and Wildlife Service) a mussel survey and a fish survey which documents that the proposed activity will not, among other things, adversely impact threatened and endangered ("T&E") mussel or fish species – if either survey indicates a T&E mussel or fish is present then approval to actually dredge can be denied or seriously restricted or delayed, until further protective conditions are attached, therefore only areas believed to be already affected are surveyed for dredging. Dredging is what it is – it is an activity that must occur where sand and gravel is present, and imposing a permit fee of at least \$1,448,000 will not further incentivize the Dredgers to do anything at all – it will simply put them out of business.

The Dredgers request the EQB to: promptly: (1) clarify that the Proposed Rule was not intended to apply to river dredging 105 Permits; (2) develop a separate proposal relating to permit fees for river dredging 105 Permits; and (3) resubmit that proposal for public comment. Thank you for your consideration.