

Notice of Proposed Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code, Chapters 218 and 240)
(Radiological Health and Radon Certification Fees)

Preamble

The Environmental Quality Board (Board) proposes to amend 25 *Pa. Code*, Chapter 218 (relating to fees) and Chapter 240 (relating to radon certification.) The amendments in Chapter 218 will increase the annual fees for registration of radiation-producing machines, radiation-producing machine service providers, accelerator licenses and radioactive material licenses as well as the hourly rate professional fee associated with certain full cost recovery licenses. The amendments in Chapter 240 will increase the application fees for certification of radon services.

This proposal was adopted by the Board at its meeting of _____ (date)_____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Louis Ray Urciuolo, Chief, Division of Radiation Control, P.O. Box 8469, Rachel Carson State Office Building, Harrisburg, PA 17105- 8469, (717) 787-3720, or Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This proposal is available electronically through the DEP Web site (<http://www.depweb.state.pa.us>).

C. Statutory Authority

These amendments are proposed under the authority of the following statutes:

Sections 301, 302 and 401 of the Radiation Protection Act (35 P.S. §§ 7110.301, 7110.302, 7110.401) direct the Department to develop and conduct comprehensive programs for the registration, licensing, control, management, regulation and inspection of radiation sources and radiation source users, collect fees adequate to recover program costs and delegate to the Environmental Quality Board the power to adopt the regulations of the Department to implement the Act.

Sections 4, 5 and 8 of the Radon Certification Act, (63 P.S. §§ 2004, 2005, 2008), which direct the Department to establish radon certification programs and to establish a fee schedule to cover the costs of the certification programs.

Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20), which authorizes and directs the Environmental Quality Board to adopt regulations necessary for the proper performance of the work of the Department.

D. Background and Purpose

The Radiation Protection Act (Act 147-1984) requires that the fees be reviewed for adequacy every three years. The current fees in Chapter 218 were last revised in 2001 and the fees in Chapter 240 have not been revised since their inception in 1991, both despite a significant increase in personnel costs and the need to make a substantial investment in upgrading specialized technical equipment and program infrastructure. Programs can no longer be sustained at current levels as required. In addition, major program expansion is planned for April 1, 2008. At that time due to an upcoming agreement with the U.S. Nuclear Regulatory Commission, the radioactive material licensing and inspection program will expand by up to 25 people resulting in up to a tenfold increase in that component of the Radiation Protection Program's budget. The Agreement is necessary as a result of the Energy Policy Act of 2005 and is mandated by Act 147-1984. Otherwise, around August 2009 the Department would forfeit its regulatory authority to the NRC and lose its current program for licensing and inspecting the use of radioactive material.

Chapter 218 – Radiological Health Fees

The programs funded through Chapter 218 permit fees include registration and inspection of x-ray facilities, licensing and inspection of accelerators, registration of radiation-producing machine service providers and licensing and inspection of radioactive material users. An important component to the fees in Chapter 218 is the professional hourly rate fee that supports required full cost recovery for unique services that cannot be standardized. Examples include the evaluation, inspection and licensing of very high-energy accelerators and decommissioning activities at contaminated sites.

There are approximately 11,000 permits issued for x-ray facilities, accelerators, radioactive material users and radiation-producing machine service providers, each with associated annual fees.

Chapter 240 – Radon Certification Fees

Chapter 240 contains biennial application fees for the certification of radon services such as radon testing and mitigation. There are about 750 certified radon services that are subject to the certification fees and late penalties. The proposed permit fee increases are to ensure that the cost of permitting is borne by user fees rather than general fund monies as much as possible without damaging the viability of this marginal industry. New penalties have also been proposed in Chapter 240 in the form of a "late fee" for anyone failing to submit a renewal application for

certification of radon testing services at least 30 days prior to the expiration date or failing to provide the Department with a report of radon services or absence of activity within 90 days of the completion of the activity. If a firm wishes to have more than one certified radon tester, there is a new fee for certification of each additional employee. In addition, there is a new fee for each type of primary testing device the tester is certified to use. There is also a new fee for certification of radon courses used to satisfy educational requirements.

All proposed changes to the radiological fees regulations in Chapters 218 and 240 were reviewed by the Department's Radiation Protection Advisory Committee (RPAC). The Committee represents various stakeholder interests and the general public. The proposed rule was presented to the Committee and reviewed in detail at its meeting on August 21, 2007. The RPAC submitted a letter, dated September 12, 2007, recommending the draft proposed regulations be forwarded to the EQB.

The letter from the Committee also expressed two concerns. The Committee suggested that all fees be indexed to a measure of inflation, and that fees be phased in and/or scaled to the relative size of each radon business. The Bureau considered the concerns expressed by the RPAC, but maintains that it is DEP policy to adjust for inflation through a three-year regulatory review process. Regarding the second concern, the Bureau notes that although the percentage increase in radon-related fees is large, the actual dollar amount of the increase is nominal. Therefore, a phased-in or scaled approach has been deemed unnecessary.

E. Summary of Regulatory Requirements

§ 218.11. Registration, renewal of registration and license fees. The annual registration fees in subsection (a) for radiation-producing machines, other than accelerators, have been increased by approximately 40 percent across the board. The same applies to accelerator license fees in subsection (d) and radiation-producing machine service provider registrations in subsection (h). The only exception is the supplemental hourly rate professional fee in subsection (d)(iii) that increases from \$50 an hour to \$150 an hour. A major component of these increases are attributed to contractual obligations for salaries and benefits under collective bargaining since 2001 projected through 2010. Subsection (i) is a requirement levied on the Department to assist the Environmental Quality Board in the Board's obligation under the Act to review and set sufficient fees every three years.

§ 218.11a. Special provisions for calculating fees during Agreement State transition period. This new regulation is needed to adjust annual fees for radioactive material licenses transferred from the NRC under Agreement State during the first year to transition them from invoicing on the NRC's fiscal year schedule to a license anniversary schedule described in subsection (a). The Department will adjust the annual invoice to include the time from the effective date of the agreement to the anniversary month of the license issuance as indicated in subsection (b). Should the Agreement State program become effective before this regulation takes effect, the transition fee will be collected retroactively under subsection (c).

Appendix A Fees for Radioactive Material Licenses. As Agreement State will occur before or shortly after the final-form rule and Naturally Occurring and Accelerator-Produced

Radioactive Material (NARM) is now considered byproduct material under the jurisdiction of the NRC by the Energy Policy Act of 2005, the NARM fee categories have been deleted. The fee category designations of the NRC have been adopted. Some additional common fee categories from the NRC's fee tables in 10 CFR Parts 170 and 171 have been added. The fees have in general been set equal to the NRC's fee for FY2007. The formula in Footnote 3 for fee categories not listed has been changed to slightly more than 100 percent of the corresponding NRC fee because personnel will not be familiar with those categories and they will require extra effort in licensing and inspection. The professional fee component (Hourly Rate) identified by the asterisk is increased from \$50 per hour to \$150 per hour. This fee is substantially below the NRC's FY2007 Hourly Rate of \$265 per hour.

§ 240.3. Definitions. Definitions of "Primary Device" and "Primary Tester" have been added to support references in regulations such as the radon certification fee table.

§ 240.102. Prerequisites for radon testing certification. Subsection (a)(3) clarifies that the Department will accept equivalent testing experience in lieu of 1 year professional experience toward individual tester certification. Subsection (b) clarifies that if a testing firm wishes to have more than one certified person, there will be a separate fee for each additional employee of the testing firm who is certified.

§ 240.103. Radon testing application contents reflects that the application fee has been moved to a new consolidated fee table.

§ 240.104. Application filing deadline. This section imposes a new Late Application Fee for radon testers who fail to reapply for certification at least 30 days prior to either the expiration of their certificate or the anticipated starting date of performing radon testing.

§ 240.113. Radon mitigation application contents reflects that the application fee has been moved to a new consolidated fee table.

§ 240.124. Application filing deadline. This section imposes a new Late Application Fee for radon laboratories who fail to reapply for certification at least 30 days prior to either the expiration of their certificate or the anticipated starting date of performing laboratory analysis.

§ 240.303(a). Reporting of information. This subsection expands upon the existing requirement that radon-related service providers furnish a report of activities to the Department within 45 days to also submit a report even if there is no activity for the time period. A new Late Reporting Fee is also applied to any report subject to the 45-day reporting rule that is not submitted within 90 days of being due.

§ 240.306. Continuing education program. Training and continuing education for radon-related services must be approved by the Department. A new Course Provider Fee for persons providing these services is created within the Radon Certification Fee Schedule.

Radon Certification Fee Schedule. Fees have been consolidated into a single new table. Existing fees are increased by approximately 40-50%. The table also includes new penalty fees

for late reporting of radon services data as well as late submission of renewal applications, a charge for certification of additional employees as testers under a firm and an additional charge for each type of primary testing device a tester is certified to use. Footnote 4 sets forth a task which the Department will perform, to assist the Environmental Quality Board in the Board's obligation under the Act to review and set sufficient fees every three years.

F. Benefits, Costs and Compliance

Benefits

Periodic adjustment of program fees is necessary to maintain a viable radiation protection program. The programs covered by these fees include oversight of accelerators, which are some of the most dangerous but also beneficial radiation-producing machines that the general public encounters. There is an x-ray safety program that includes medical computed tomography which is the largest source of deliberate exposure to the general public. The radon program involves the largest controllable source of unnecessary exposure to the public. One of the benefits of supporting a radioactive material control program is to guard against the potential for wide spread contamination from the use of radioactive material. Without the program, local control would be ceded to federal authority at a higher cost to the regulated community. The benefit of radon's new late application and reporting penalty fees is to help ensure that anyone providing radon-related services is properly credentialed, and so the Department can maintain a comprehensive database of radon levels in the Commonwealth and follow up on the quality of the services and data. The new Radon Course Provider Fee, additional employee tester fee for firms and separate type primary testing device certification fees are to defray the additional effort the Department expends in certification.

Compliance Costs

The cost of compliance with the new fee regulation for radiation-producing machines has gone up about 40 percent in absolute dollars since the fees were last adjusted in 2001. The radon certification fees have increased by a similar amount for the same reasons. The extension of the requirement to report radon-related activities within 45 days, even during periods of no activity, is negligible since the reporting mechanism is already in place and no specific data needs to be assembled for periods of inactivity. The new late fees can be avoided simply by complying with the regulations for timely submittals. The new radon course certification fee could be recovered by the certificate holder through charges levied on individuals who use the course. In regards to the additional personnel certification fee for firms, it is not mandatory to have more than one certified tester in the firm or to utilize any primary testing devices. Radioactive material licensees will also pay more in absolute dollars. However, without this program, fees would be higher with the NRC as the licensing agency if the Commonwealth does not become an Agreement State.

Compliance Assistance Plan

The Department will put the regulated community on notice to expect higher fees so it will not come as a surprise, particularly the provision for the possible collection of retroactive

transition fees for NRC licenses. However, the lead time may be short since much of the invoicing is done 60 days in advance. The reporting of radon data to the Department will be facilitated in the future by the development of a web-based reporting system.

Paperwork Requirements

There are no additional reporting forms as a result of fee increases. The null reporting requirement in writing for periods of no radon-related service activity can be accomplished through a letter or the service provider's normal report form. The Department is working on expanding the range of acceptable media that can be used for communications with the regulated community. This is expected to include a web-based reporting option. In any case, the requirement of reporting periods of no service activity and the submittal of radon course material for certification is viewed as a negligible burden.

G. Pollution Prevention (if applicable)

Any increase in fees has an indirect effect on pollution prevention. Where potentially polluting activities have an associated user fee and are of marginal value, the impact of the fee may result in a decision to discontinue the activity if the benefit is not justified by the cost, thereby reducing the potential pollution. The proposed application of late fees to required radon data submittals helps to ensure that the Department is made aware of the activities and can perform any necessary quality assurance checks on the activities. The certification of radon educational courses helps ensure the quality of radon services, the primary aim of which is to reduce exposure to radon in contained building structures.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on (blank), the Department submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

J. Public Comments

Written Comments - Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by (blank) (within __ days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by (blank) (within __ days following publication in the *Pennsylvania Bulletin*). The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments - Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by __(date)__. A subject heading of the proposal and a return name and address must be included in each transmission.

BY:

KATHLEEN A. MCGINTY
Chairperson
Environmental Quality Board