

**NOTICE OF FINAL RULEMAKING**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**ENVIRONMENTAL QUALITY BOARD**  
**[25 Pa. Code Chs. 218 AND 240]**  
**Radiological Health and Radon Certification Fees**

**ORDER**

The Environmental Quality Board (Board) by this order amends 25 Pa. Code, Chapters 218 and 240. These amendments revise the fees associated with Article V, Radiological Health programs including permits for radiation-producing machines, radioactive materials and radon certification. Appendix A of Chapter 218, dealing with radioactive material license fee categories, has been revised to better reflect the license categories covered under Pennsylvania's Agreement State status with the U.S. Nuclear Regulatory Commission. The radon certification fees in Chapter 240 have been organized into a new table designated as Appendix A and named the Radon Certification Fee Schedule. The Radon Certification Fee Schedule also includes new fees for certification of course providers, primary testing devices and additional testing employees within a firm as well as new fees for late submission of applications and late submission of required reports.

This order was adopted by the Board at its meeting of \_\_\_\_\_.

*A. Effective Date*

These amendments are effective upon publication in the *Pennsylvania Bulletin* as final-form 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. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available electronically through the Department's web site at [www.depweb.state.pa.us](http://www.depweb.state.pa.us).

*C. Statutory Authority*

This final-form rulemaking is being made under the authority of Sections 301, 302 and 401 of the Radiation Protection Act (act) (35 P. S. §§ 7110.301, 7110.302 and 7110.401), which, respectively, 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 reasonable annual fees in an amount at least sufficient to cover the

Department's costs in administering programs; and delegates to the Board the power to adopt the regulations of the Department to implement the act.

These amendments are also made under Section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes and directs the Board to adopt regulations necessary for the proper performance of the work of the Department, and pursuant to the Radon Certification Act, which directs the Department to establish, by regulation, a fee schedule to cover the costs of radon certification programs (63 P.S. §2008).

#### *D. Background of the Amendments*

The Radiation Control Act requires the Department to establish fees in amounts at least sufficient to cover the costs of the radiation protection program mandated by that act. Similarly, the Radon Certification Act requires the Department establish fees for its certification activities. In 1991 the Board created fees in Chapter 240 (relating to radon certification). These fees were published at 21 Pa.B. 317 and have not been adjusted since then. In 2001 the Board last updated Chapter 218 (relating to fees) of the radiological health regulations to revise fees associated with programs for radiation-producing machines and radioactive materials. This update was published at 31 Pa.B. 6280 (November 17, 2001). In recent years, receipts from registrations, licenses and certifications have fallen short of the costs to operate those programs primarily due to contract labor increases for personnel and the cumulative effect of inflation.

The Department presented its Radiation Protection Advisory Committee (RPAC) with proposed amendments for fees in Chapters 218 and 240 at its meeting on August 21, 2007. The committee recommended by letter of the chairman dated September 12, 2007, that the proposed rule be forwarded, unchanged, to the Board for approval and publication as proposed rulemaking. The committee also recommended that due to the small and fragile nature of the radon industry, the Department evaluate the possibility of phasing in radon fees and/or scale fees to business size. The committee also asked the Department to consider indexing fees to inflation to help avoid significant future fee increases. The Board reviewed the proposed amendments at its meeting on December 18, 2007. The proposed amendments were published in the *Pennsylvania Bulletin* at 38 Pa.B. 1246 (March 15, 2008) with a 30-day comment period. No public meetings were held. Two commentators filed responses to the proposed rule, both of which were from the regulated community regarding radon fees. The Board received no comments from the Independent Regulatory Review Commission (IRRC) or the legislative oversight Committees concerning the proposed rulemaking.

As requested by the RPAC, the Department considered indexing fees to inflation. However, at this time it is the Department's policy not to introduce the administrative complexity of indexing fees. The regulated community should find fiscal planning easier knowing that fees will be fixed for the next four years or so. The Department also considered phasing in the change in radon fees, but could not further delay increasing revenues since the certification process is already spread over a two-year period. In response to the RPAC's request to evaluate scaling radon fees to business size, the Department determined that the regulation already effectively did that. The Department therefore returned to the RPAC on May 29, 2008 with a draft of the final-form rule that was unchanged from proposed and discussed the Department's intended response to the

commentators. By letter from the RPAC chairman dated May 30, 2008, the RPAC recommended the draft final-form rule be forwarded unchanged to the Board for approval as final-form rulemaking.

*E. Summary of Changes to the Proposed Rulemaking*

The final-form rulemaking presented is unchanged from proposed except for a housekeeping change to correct an omission in § 240.123. When the fees in the individual sections of Chapter 240 were moved, updated and consolidated into Appendix A (radon certification fee schedule), the preamble to the proposed rule failed to show the deletion of the fee in § 240.123 (relating to radon laboratory application contents) that was moved to Appendix A. This was corrected in the final-form rule using the same formatting as applied to the fees in other sections that were moved to Appendix A.

*F. Summary of Comments and Responses on the Proposed Rulemaking*

All comments were concerned with the impact of fees on the radon service industry, which is comprised of small businesses of varying size. From the start, the Department has tried to minimize that impact and still meet its statutory obligations. IRRC reviewed the proposed regulation and all comments received on it. IRRC did not comment, other than to say the final-form rule would be deemed approved if presented unchanged from proposed.

A general comment was made that the radon industry derives no real benefit from the fees. The Department emphasizes that the fees are primarily used to protect the general public from potential harm from poor radon services. This is accomplished through the certification process for which costs must be recovered through the fees. The Department must review application materials, maintain databases on those certifications, answer questions from the public regarding radon service providers, etc. Through this, the radon service industry does benefit indirectly. The Department engages in outreach to the general public on the dangers of Radon and the need to test and mitigate with certified testers and mitigators, respectively. Certification revenues are not used for public outreach; however, the Department's efforts to promote public awareness of potential radon problems in homes, coupled with the maintenance of lists of certified service providers and a toll free radon hot line, promotes business for the radon service industry. It reduces advertising costs and helps to minimize competitive pressure by excluding uncertified individuals.

Another general comment was received that the radon fee increases are exorbitant. The Department has not increased radon certification fees for over 16 years. One reason costs have been contained is that the Department's radon certification program maintains a minimum number of staff. The Department looked at the fee increase for an average Radon laboratory, testing and mitigation firm and determined that the fee increase was no more than inflation, even though the Department's costs have risen from inflation and contracted labor costs for personnel. The current labor union contract will result in an additional 20% increase in salary, benefits and operational costs over the next 4 years.

Another commentator felt the regulated community had no control over the imposition of radon fees or their amount. The Department is reminded of the statutory requirement that certification fees be set at a level sufficient to recover the cost of the certification program. While the regulated community may not have a part in determining the overall cost of the program, it does have input in the way the costs are proportioned among the regulated community, because fees must be promulgated through this rulemaking process. This rulemaking process includes input from the RPAC and opportunities for public input through the formal public comment periods associated with regulation development.

The RPAC and the regulated community both expressed a desire to have radon fees scaled to business size. Apparently, it was not recognized that the radon fees are essentially scaled. The Department had considered three ways to scale radon certification fees to business size. One was to establish a small business fee based on gross receipts, similar to the method used with radioactive material license fees. This was not appropriate since using that standard would result in all radon service providers being categorized as small businesses. The second approach involved scaling fees according to the volume of radon services provided. This was not practical based on experience from other states that employ this approach. Volume-based scaling would significantly increase administrative overhead necessary to track and verify the volume of services provided. The Department instead chose the fairest alternative, which is to scale fees based on the number of certifications that a firm requires. This led to the creation of new fees for certification of primary testing devices, additional testing firm employees, certification of course providers, etc. In effect, the more services a firm requests to have certified, the greater the cost because the Department would have to expend more effort. However, to balance that, it is expected the firm would be able to provide more services, do more business and be better able to afford the extra fees.

Comments were received questioning why there are fees for certification of additional testing employees and not mitigation employees. The Department noted that there are fewer individuals engaged in mitigation, less time is needed to review applications for mitigation, and certification is not as crucial in ensuring proper delivery of mitigation services because warranty and liability factors also help ensure that services are done correctly.

A commentator asserted that DEP should allow approved annual conferences to meet the full 16 hours of continuing education requirements. DEP currently allows for 2 hours of conference attendance to qualify for 1 credit hour of continuing education, with no limitations. However, DEP approved courses allow for improved quality control and oversight, thus ensuring that credible information is presented and retained through the administration of pre-approved course materials, tests and quizzes.

A commentator suggested that the work of the Radon Section could be done by the Regions, thus removing central office positions from the payroll. DEP's regional radon staff primarily carries out inspections, while the central office staff deals with registrations, certifications, fee collection, licensing, database management, outreach activities, the Radon Hotline and various other duties. These duties are most appropriately maintained in a centralized location. Inspection duties are better suited for dispersed, regionally-located staff.

## *G. Benefits, Costs and Compliance*

### *Benefits*

The Department is the main state agency charged with protecting the public and environment from radiation sources. The general public benefits in that user fees will continue to support the radiation protection program at a level adequate to accomplish its mission. The community of radioactive material users benefits by the Commonwealth being able to maintain a program that helps ensure that Pennsylvania's status as an NRC Agreement State is maintained. Under Agreement State, radioactive material license fees are generally lower than comparable federal fees and the Department endeavors to be more responsive to its licensees than the NRC. Fees for the radon service industry will be apportioned more fairly. Instead of flat fees, the total cost of certification fees will be scaled based on the number of services and individuals requiring certification.

### *Compliance Costs*

All compliance costs are directly related to either an increase in existing fees or imposition of new fees. In the case of radon certification fees, new fees were introduced to reduce the magnitude of the increase needed in the existing base fees. By diversifying the fee categories DEP is minimizing the cost increase of each individual fee category. Fees in Chapter 218 for radiation-producing machines were increased across the board an average of about 40 percent and rounded off. This is expected to generate an increase in annual revenue of about \$1.2 million dollars from approximately 11,000 registrants and licensees. Chapter 218 fees for radioactive material licenses were increased an average of 30 percent. In addition, no individual radioactive material license category is more than the NRC fee category Pennsylvania licenses would have been under had Pennsylvania not become an NRC Agreement State. The increase in radioactive material license fees is expected to generate approximately an additional \$950,000 per year from about 927 licenses. The radon fee amendments are expected to generate an additional \$82,000 per year from about 750 certificate holders. The increase in all program fees is equivalent to an annual increase in fees of less than 3.7 percent per year, which is comparable to inflation.

### *Compliance Assistance Plan*

The radioactive material license fee categories include reduced fees for small businesses. The radon certification table was derived assuming all categories were small business. No additional assistance is planned in helping the regulated community pay the required fees.

### *Paperwork Requirements*

No additional paperwork is involved in paying the amended fees. The reporting requirement contained in § 240.303 has been extended to include reporting periods of null activity. Since a

report of no activity involves only a transmittal letter, the requirement will be of negligible impact unless noncompliance triggers the new \$100 late report fee in Chapter 240 Appendix A.

#### H. *Sunset Review*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

#### I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 14, 2008, the Department submitted a copy of the proposed rulemaking, published at 38 Pa.B. 1246 (March 15, 2008) to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

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(c) of the Regulatory Review Act, IRRC and the Committees are to be provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on     (blank)    , these final-form regulations were deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, IRRC met on     (blank)     and approved the final-form regulations.

#### J. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 38 Pa. B. 1246 (March 15, 2008).

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

*K. Order of the Board*

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 Pa. Code Chapters 218 and 240, are amended by amending § 218.11, Chapter 218 Appendix A (relating to fees for radioactive material licenses), §§ 240.3, 240.102, 240.103, 240.104, 240.113, 240.123, 240.124, 240.303 and 240.306; and by adding new Chapter 240 Appendix A (relating to radon certification fee schedule) to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resource and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately upon publication.

BY:

JOSEPH R. POWERS  
Acting Chairman  
Environmental Quality Board