Title 25-ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 121, 127 and 139]

The Environmental Quality Board (Board) amends Chapters 121, 127 and 139 (relating to general provisions; construction, modification, reactivation and operation of sources; and sampling and testing) to read as set forth in Annex A. This final-form rulemaking will address any disparity between the program income generated by fees and the cost of administering the program.

These amendments were adopted by order of the Board at its meeting of _____, 2010.

A. Effective Date

This final-form rulemaking is effective upon final-form publication in the *Pennsylvania Bulletin*.

This final-form rulemaking will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the Pennsylvania State Implementation Plan upon final-form publication.

B. Contact Persons

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C. Statutory Authority

This final-form rulemaking is adopted under the authority of section 6.3 of the Air Pollution Control Act (APCA) (35 P.S. § 4006.3), which grants the Board the authority to adopt regulations to establish fees to cover the indirect and direct costs of administering the air pollution control program.

D. Background and Summary

The main purpose of this final-form rulemaking is 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 final-form regulation adds a new section to address fees for risk assessment applications. The final-form regulation amends the existing emission fee paid by the owner or operator of a Title V facility.

The final-form regulation also adds 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 reviews and auditing, and activities related to continuous emissions monitoring systems (CEMS).

The final rulemaking ensures that any difference between the existing and new fees that generate revenue for the air quality program is comparable with the costs of administering that program. This will ensure that the program is self-sustaining. The fee revisions allow the Department to maintain staffing levels in the air quality program. This provides a sound basis for continued air quality assessments and planning that are fundamental to protecting public health and welfare and the environment.

Increased funding for the plan approval and operating permit program continues to allow for timely and complete review of plan approval and operating permit applications. Implementation of new fees for risk assessment applications allows for resources to address this important area of public health and social well-being by evaluating the risks associated with observed levels of contaminants.

Implementation of the new schedule of fees proposed in Chapter 139, Subchapter D, for the source testing and monitoring program funds observations of stack emissions source testing and audits of CEMS by Department staff. Observations and audits conducted by Department staff with expertise in source testing and monitoring ensure that high quality test and monitoring data are collected and submitted to the Department. High quality data are critical to determining compliance with permitted air pollutant emission limits and establishing emission inventories used by the Department in developing programs to protect public health and social well-being.

The Department worked with the Air Quality Technical Advisory Committee (AQTAC) in the development of this final-form regulation. At its October 21, 2010, meeting, the AQTAC concurred with the Department's recommendation to advance the amendments to the Board for consideration as final-form rulemaking.

The Department also conferred with the Citizens Advisory Council (CAC) Air Committee concerning the final-form regulation on October 18, 2010. The CAC concurred with the Department's recommendation to advance the amendments to the Board for consideration as final-form rulemaking.

The Small Business Compliance Advisory Committee (SBCAC) discussed the rulemaking at its July 28, 2010, meeting. On October 29, 2010, the SBCAC sent a letter to the Department recommending that the fee for Requests for Determination submitted by the owners or operators of small businesses be reduced or waived.

E. Summary of Comments and Responses

A 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. The Board appreciates the 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. The Board acknowledges the support for the periodic evaluation specific 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."

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. The Board disagrees that the proposed fee schedules are extreme. The fee schedules were developed based on an analysis of the overall current and projected incomes and expenditures for the Clean Air Fund. A review of the current and expected workload was completed assessing the need for increased fees and additional fees. As a result, the fee schedules were developed to meet those needs.

A commentator understands the budgetary pressures being felt by State agencies and recognizes the need for the Board 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. The Board recognizes the potential burden placed on all facility owners and operators that are impacted by the fee schedule changes. The Board has not proposed a fee increase for many years. In addition, the fees are gradually increased over a number of years, rather than in a single year.

Two commentators state that the proposed rule significantly increases the annual emission fees and adds a significant amount of new annual air permit-related activity fees. The proposed rule puts an onerous financial burden on manufacturing facilities. The Board appreciates the impact that increased fees may have on a facility. However, the Board is obligated under the APCA to impose fees to recoup the cost of the air quality program.

Two commentators state that 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, eliminating, reducing or reevaluating the services they provide in order to be more competitive and effective. The Board agrees. The Department has made significant cost reductions and eliminated some activities. However, the remaining programs operated by the Department are mandated by the Clean Air Act (CAA), the APCA, or the implementing regulations. As such, the Department cannot eliminate those activities.

A commentator recommends that the Board 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. The Board thanks the commentator for the suggestion, but legislative revisions to the APCA are beyond the scope of this rulemaking.

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. The Board cannot raise fees, except for the Title V

emission fee in § 127.705 (relating to emission fees), based on the Consumer Price Index (CPI). The APCA only authorizes the Title V emission fee to be increased based on the CPI.

A commentator states that fees charged to citizens or industry without publishing a supporting rationale or basis potentially usurps the duties and responsibilities given to the Legislature. The Board should update the Apogee Research Report to support the fee increase. 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 AQTAC. The Board disagrees that the Apogee Research Report should be updated. The Department hired Apogee Research to help develop the first Title V fee schedule when the Title V program was being established. The Department now has 16 years of experience with the Title V program and is able to forecast the need for a revision to the fee schedule.

The commentator states that the Board 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. The Board disagrees that the fee schedule should be forwarded to an independent time/labor review body. The Board considered the proposed rulemaking and is responsible for assessing the need for the rulemaking.

The commentator opposes the inclusion of charges for General Permits. The purpose of a general permit is to minimize Department-required review and action for standard practices, not an income vehicle. The Board has not proposed to change any fee associated with General Permits.

A commentator understands the need for the Department to increase permit fees and testing fees, but the proposed increase in the emission fee is exorbitant. A 30% increase in 1 year is unjustified. The fee increase will have a significant negative consequence to the regulated communities' budgets. The Board understands that any fee increase may have consequences to the budgets of the regulated community. 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, Small Business 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 the APCA and not covered by fees required by section 502(b) of the CAA (42 U.S.C.A. § 7661a(b)). In this rulemaking, the Board has considered the cost of the air program and proposed fees sufficient to maintain the program.

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. The Board understands that the fee increase will have an impact on the regulated community. However, delaying the full implementation of the fee increase over a 3- to 5-year period will delay the full benefit of the increase available to support the air program.

A commentator encourages the Board 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. The Board disagrees. The proposed 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 fees will not go into effect until 2011.

A commentator expresses concern that 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. The Board agrees that while there are differences in fee schedules between states, the proposed fees are similar to other states with air programs the same size as in this Commonwealth. For example, Title V fees in New Jersey are $103.93 per ton with no cap on emissions; New York imposes Title V fees ranging from $45-$65 per ton with a 7,000-ton cap; and Maryland recently established a fee of $53 per ton with no cap on regulated pollutants plus a base fee of $200.

A commentator states that the proposed Title V fee increase is a near doubling of the emission fees under § 127.705. The Board disagrees that the Title V fee is doubling. The current Title V fee is $54 per ton of emissions of each regulated pollutant. The proposed fee will increase to $70 per ton, which is an increase of 30%. The Board is not proposing to revise the original fee established in 1994 but is setting a new base fee that will apply to emissions released during calendar year 2010; CPI adjustments would be calculated for the 2012 and succeeding calendar years.

A commentator states that the increase in emission fees from $56 to $70 as proposed under § 127.705 is excessive. The Board disagrees. The established Title V fee for 2009 and 2010 is $54 per ton of pollutant. A $56 dollar fee has not been calculated. The proposed fee was established to reflect the cost of administering the program as required by the CAA. It is a reasonable fee reflective of the program's needs.

The commentator states that 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. The Board agrees that the Title V program is a mature program. However, there are several new activities that impact the Title V program. For example, the Department has invested approximately $1.2 million to develop and implement a new computer system for the continuous emission monitoring system to replace an antiquated system that could no longer be supported. Additional resources will be needed for maintenance of the 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 collected are not sufficient to fund the direct and indirect costs of the permit program.

Three commentators state that 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.

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 fees 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 approximately $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 approved local air pollution control programs 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).

A commentator states that by imposing testing, monitoring, and auditing fees, the Title V facilities will be charged twice for the same services. The Board disagrees that the proposed testing, monitoring, and auditing fees found in Chapter 139 are duplicative. Guidance provided by the EPA was reviewed concerning the establishment of Title V fees. Under the CAA, its implementing regulations, and the EPA guidance, Title V fees are to be sufficient to cover the direct and indirect costs of the permit program. In the August 4, 1993, memorandum from John Seitz, the EPA stated that a state may design the fee structure as it deems appropriate. The structure may include base fees on actual or allowable emissions, fees based on categories of sources, or annual fees or fees covering some period of time. The Department has proposed to assess fees for source testing and monitoring services. These fees, when assessed to Title V facilities, will be placed in the Title V fund to cover the permitting program as required by the CAA.

A commentator states that the Federal CAA, Operating Permit Rule (40 CFR Part 70) and 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. The Board agrees that the CAA, APCA, and implementing regulations require that the Title V operating permit fee recover certain costs. The Board has modified the base Title V emission fee to cover certain program costs. However, there are certain services that are needed by a limited number of owners and operators. In this instance, the Board believes that the users of these services should pay for the activity and should not require all permittees to support the service. As provided in the EPA August 4, 1993 memo, the state may adopt different fees to address the needs.

A commentator contends that 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 Department

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. The Board disagrees with the commentator. 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.

Three commentators state that, in the case of Title V facilities, the proposed increases to the existing operating permit fees, including 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. The Board has proposed a revision of the permit fee schedule to reflect the costs of the program. Under EPA guidance dated August 4, 1993, the Department has the flexibility to propose a range of fees so long as the total fees meet the direct and indirect costs of the program. The fees may include base fees on actual or allowable emissions, fees based on source categories or type of pollutants, fees based on some basis other than emissions, annual fees or fees covering other periods of time.

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. The Board disagrees. 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 Board believes that the users of these services should pay for such services, rather than establishing a higher 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 Board 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.

The proposed fee schedule results in significantly disproportionate impact on facilities that use CEMS and conduct frequent stack sampling regardless of the facilities' relative impact on the environment. 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. The Board agrees that facilities that do frequent sampling or use CEMS would be impacted by the proposed fees. 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.

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-form rulemaking. 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. The Board has proposed a fee schedule revision that reflects the direct and indirect costs of the permitting program as required by the CAA. Under EPA guidance dated August 4, 1993, the Department has the flexibility to propose a range of fees so long as the total fees meet the direct and indirect costs of the program. The fees may include base fees on actual or allowable emissions, fees based on source categories or type of pollutants, fees based on some basis other than emissions, annual fees or fees covering other periods of time, etc. The EPA guidance does not restrict the Title V fee to be solely an emission fee.

Three commentators state that 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. The Board agrees that the owners and operators of facilities should have the opportunity to contract with private firms to conduct testing costs. 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 a private testing company to conduct source testing instead of having these services performed by the Department.

A commentator states that the Board is proposing a fee of $400 for an RFD which is a simple and straightforward process. It is unreasonable to charge $400 for 1 or 2 hours of Department staff time. The Board disagrees. In establishing the proposed fee schedule, the Department reviewed the staff time associated with processing RFDs. On average, the Department spent 7.5 hours reviewing and responding to each RFD submitted using the paper form. This includes clerical, technical and supervisory time. The estimate also does not include the time for the computer system development, maintenance and oversight for the electronic system. The costs for the computer system development are over $800,000. Therefore, the Board believes that the proposed fee is justifiable.

A commentator recommends that 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 Department 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. However, 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).

Two commentators state that proposed § 127.702(h) (relating to plan approval fees) 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. The Board disagrees with the commentator. 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.

Two commentators state that 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 Department 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. The Board disagrees that these fees should not apply. The Department will expend staff time to process each request. The proposed fee will cover that cost.

A commentator indicates that for 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. 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 cost of the program. For the existing permit fees, the Board proposed a general increase of 20% to reflect the increased costs. 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 the activity. The fee was calculated based on the average staff costs and the time associated with the activity. The overall fee schedule proposal was based primarily on the Clean Air Fund history since the fee structure was established in November 1994. To this end, the Board considered the revenue, spending and budgeting history and determined that the annual expenses 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. Consequently, the Board proposed increases in the plan approval and permitting fees and new fees sufficient to meet the program costs as required by the APCA.

A commentator states that there should not be extra fees for Risk Assessments as these are included in the existing permit fees. The Board disagrees with the commentator. Risk assessments are staff 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 of the complex reviews and analyses.

The commentator states that 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 a detailed MACT analysis and should not be subject to the large fees that may make sense for a large coal-fired boiler. The Board disagrees. The proposed fee schedule in § 127.702 for MACT review applies solely to sources that 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.

Three commentators believe that 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 and stated that 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. The Board disagrees. The commentators are referencing the report entitled "An Evaluation of the Pennsylvania Air Quality Program 2002-2007," which is mandated every 5 years under section 4.3 of the APCA. On pages 48-50 of that report, the Department showed the revenues and expenditures for the air program during 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 3 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.

One commentator indicated that 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. The Board 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 at 75 FR 31514 does not include a mechanism for assessing Title V emission fees. 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; the 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.

F. Summary of the Final-form Rulemaking and Changes from Proposed to Final-form Rulemaking

Summary of final-form rulemaking

The final-form rulemaking adds the following 21 new definitions and terms to § 121.1 (relating to definitions) to explain source testing, auditing and monitoring activities used in the substantive provisions under either Chapter 127, Subchapter I or Chapter 139, Subchapter D: "CEMS level 1 quarterly report," "CEMS level 1 quarterly report audit," "CEMS level 2 system inspection audit," "CEMS level 3 analyzer audit," "CEMS level 4 system audit," "CEMS level 4 system audit report," "CEMS level 4 test protocol," "CEMS level 4 test protocol review," "CEMS level 4 test report (RATA)," "CEMS level 4 test report (RATA) review," "CEMS levels," "CEMS periodic self-audit," "CEMS phase 1 monitoring plan," "CEMS phase 1 monitoring plan review," "CEMS phase 2 test protocol," "CEMS phase 3 certification test report," "CEMS phase 3 certification test report review," "CEMS phases," "RATA-relative accuracy test audit," "risk assessment" and "trial burn operating scenario." The final amendments revise the definition of one term to provide clarity: "CEMS – continuous emissions monitoring system." The proposed term "observer" and its definition have been deleted at final because the term and definition are no longer needed.

Final changes to § 127.701 ensure that fees are made payable to the Pennsylvania Clean Air Fund and that at least every 5 years, the Department will provide the Board with an evaluation of the fees in this subchapter and recommend regulatory changes to the Board to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.

Final changes to § 127.702 provide for, among other things, the following proposed fee provisions:

Under subsection (b), and except as otherwise provided, the owner or operator of a source requiring approval under Subchapter B (relating to plan approval requirements), including a proposed revision to an application that requires reassessment of a control technology determination, shall pay a fee equal to: one thousand three hundred dollars for applications filed during the 2011-2015 calendar years; one thousand six hundred dollars for applications filed during the 2016-2020 calendar years; and two thousand dollars for applications filed for the calendar years beginning in 2021.

Under subsection (c), the owner or operator of a source requiring approval under Subchapter E (relating to new source review), including a proposed revision to an application that requires reassessment of a control technology determination, shall pay a fee equal to: six thousand three hundred dollars for applications filed during the 2011-2015 calendar years; seven thousand three hundred dollars for applications filed during the 2016-2020 calendar years; and eight thousand dollars for applications filed for the calendar years beginning in 2021.

Under subsection (d), the owner or operator of a source requiring approval under Chapter 122 (relating to national standards of performance for new stationary sources), Chapter 124 (relating to national emission standards for hazardous air pollutants) or § 127.35(b) (relating to maximum achievable control technology standards for hazardous air pollutants), including a proposed revision to an application that requires reassessment of a control technology determination, shall pay a fee equal to: two thousand dollars for applications filed during the 2011-2015 calendar years; two thousand five hundred dollars for applications filed during the 2016-2020 calendar years; and three thousand dollars for applications filed during the calendar years beginning in 2021.

Under subsection (e), the owner or operator of a source requiring approval under § 127.35(c), (d) or (h), including a proposed revision to an application that requires reassessment of a control technology determination, shall pay a fee equal to: ten thousand dollars for applications filed during the 2011-2015 calendar years; twelve thousand dollars for applications filed during the 2016-2020 calendar years; and fourteen thousand dollars for applications filed during the calendar years beginning in 2021.

Under subsection (f), the owner or operator of a source requiring approval under Subchapter D (relating to prevention of significant deterioration of air quality), including a proposed revision to an application that requires reassessment of a control technology determination, shall pay a fee equal to: twenty-seven thousand two hundred dollars for applications filed during the 2011-2015 calendar years; thirty thousand seven hundred dollars for applications filed during the 2016-2020 calendar years; and thirty-five thousand seven hundred dollars for applications filed during the calendar years beginning in 2021.

Under subsection (g), the owner or operator of a source proposing a modification of a plan approval, extension of a plan approval or transfer of a plan approval due to a change of ownership, except as provided in subsection (h), where an amendment of a plan approval or revision of an application by the applicant that requires the reassessment of a control technology determination or of the ambient impacts of the source is a significant modification of the plan approval or application, shall pay a fee equal to: four hundred dollars for applications filed during the 2011-2015 calendar years; five hundred dollars for applications filed during the 2016-2020 calendar years; and six hundred fifty dollars for applications filed during the calendar years beginning in 2021.

Under subsection (h), the amendment of a plan approval or revision of an application that requires the reassessment of a control technology determination or of the ambient impacts of the source is a significant modification of the plan approval or application.

Under subsection (h)(1), the owner or operator of a source requiring an amendment of the plan approval or revision to an application that requires reassessment of a control technology determination shall pay fees as established under subsections (b)-(f).

Under subsection (h)(2), the owner or operator of a source requiring an amendment of a plan approval or revision to an application that requires changes to the ambient impact analysis or Department reanalysis of the ambient impacts of the source to meet the requirements of 40 CFR 51, Appendix W (relating to guideline on air quality models) shall pay fees in accordance

with the following: for modeling using a screening technique as defined in 40 CFR 51, Appendix W - three thousand five hundred dollars for applications filed during the 2011-2015 calendar years; four thousand five hundred dollars for applications filed during the 2016-2020 calendar years; and six thousand dollars for applications filed for calendar years beginning in 2021; for all other modeling as defined in 40 CFR 51, Appendix W - seven thousand five hundred dollars for applications filed during the 2011-2015 calendar years; nine thousand dollars for applications filed during the 2016-2020 calendar years; and eleven thousand dollars for applications filed for the calendar years beginning in 2021.

Under subsection (j), the owner or operator of a source that submits a request for determination for a plan approval shall pay a fee equal to: four hundred dollars for requests for determination filed during the 2011-2015 calendar years; five hundred dollars for requests for determination filed during the 2016-2020 calendar years; and six hundred fifty dollars for requests for determination filed for the calendar years beginning in 2021.

Under subsection (k), the owner or operator of a source proposing to use a general plan approval under Subchapter H (relating to general plan approvals and operating permits) shall pay a fee which will not be greater than the fees established under § 127.702. The Department will establish these fees at the time the general plan approval is issued and will publish the fees in the *Pennsylvania Bulletin* as provided in §§ 127.612 and 127.632 (relating to public notice**;** and review period).

Final changes to § 127.703 (relating to operating permit fees under Subchapter F) provide for, among other things, the following final fee provisions:

Under subsection (a) each applicant for an operating permit, which is not a Title V facility, shall, as part of the operating permit application and as required on an annual basis, submit the fees required under this section to the Department. These fees apply to an administrative amendment, extension, minor modification, revision, renewal, reissuance or transfer due to a change of ownership of each operating permit or part thereof.

Under subsection (b), for processing an application for an operating permit: five hundred dollars for applications filed during the 2011-2015 calendar years; six hundred dollars for applications filed during the 2016-2020 calendar years; and eight hundred fifty dollars for applications filed for the calendar years beginning in 2021.

Under subsection (c), for the annual operating permit administration fee: five hundred dollars for the 2011-2015 calendar years; six hundred dollars for the 2016-2020 calendar years; and seven hundred fifty dollars for the calendar years beginning in 2021. The annual operating permit administration fee is due on or before March 1 of each year for the current calendar year.

Under subsection (e), the owner or operator of a source that submits a request for determination for an operating permit or for both a plan approval and an operating permit shall pay a single fee equal to: four hundred dollars for requests for determination filed during the 2011-2015 calendar years; five hundred dollars for requests for determination filed during the 2016-2020 calendar years; and six hundred fifty dollars for requests for determination filed for the calendar years beginning in 2021.

Under subsection (f), the owner or operator of a source proposing to use a general plan approval under Subchapter H (relating to general plan approvals and operating permits) shall pay a fee that will not be greater than the fees established under this section. The Department will establish these fees at the time the general plan approval is issued and will publish the fees in the *Pennsylvania Bulletin* as provided in §§ 127.612 and 127.632.

Final changes to § 127.704 provide for, among other things, the following proposed fee provisions:

Under subsection (a), each applicant for an operating permit, which is a Title V facility, shall, as part of the operating permit application and as required on an annual basis, submit the fees required under this section to the Department. These fees apply to an administrative amendment, extension, minor modification, revision, renewal, reissuance or transfer due to a change of ownership of each operating permit or part thereof.

Under subsection (b), for processing an application for an operating permit: nine hundred dollars for applications filed during the 2011-2015 calendar years; one thousand one hundred dollars for applications filed during the 2016-2020 calendar years; and one thousand five hundred dollars for applications filed for the calendar years beginning in 2021.

Under subsection (c), the annual operating permit administrative fee: nine hundred dollars for applications filed during the 2011-2015 calendar years; one thousand one hundred dollars for applications filed during the 2016-2020 calendar years; and one thousand three hundred dollars for applications filed for the calendar years beginning in 2021.

Under subsection (e), the owner or operator of a source proposing to use a general plan approval under Subchapter H (relating to general plan approvals and operating permits) shall pay a fee which will not be greater than the fees established under § 127.704. The Department will establish these fees at the time the general plan approval is issued and will publish the fees in the *Pennsylvania Bulletin* as provided in §§ 127.612 and 127.632.

Final changes to § 127.705 provide for, among other things, under subsection (a) that the Title V emission fee is $70 per ton for each ton of regulated pollutant actually emitted from the facility. The owner or operator of a Title V facility located in Philadelphia County or Allegheny County shall pay the emission fee to the county Title V program approved by the Department under Section 12 of the act (35 P.S. § 4012) and § 127.706 (relating to Philadelphia County and Allegheny County financial assistance).

Under subsection (b), the emission fees required by this section shall be due on or before September 1 of each year for emissions from the previous calendar year. The fees required by this section shall be paid for emissions occurring in calendar year 2010 and for each calendar year thereafter.

Under subsection (d), the emission fee imposed under subsection (a) shall be increased in each calendar year after _____(*Editor's note*: The blank refers to the effective date of adoption of this final rulemaking.), by the percentage, if any, by which the Consumer Price Index

for the most recent calendar year exceeds the Consumer Price Index for the previous calendar year.

Final amendments to § 127.708 (relating to risk assessment) provide that each applicant for a risk assessment shall, as part of the plan approval application, submit the application fee as follows:

Under subsection (b), for a risk assessment that is inhalation only with a screening model: five thousand dollars for applications filed during the 2011-2015 calendar years; six thousand dollars for applications filed during the 2016–2020 calendar years; and seven thousand two hundred dollars for applications filed for the calendar years beginning in 2021.

Under subsection (c), for a risk assessment that is inhalation only for all other modeling: nine thousand dollars for applications filed during the 2011-2015 calendar years; eleven thousand dollars for applications filed during the 2016–2020 calendar years; and thirteen thousand dollars for applications filed for the calendar years beginning in 2021.

Under subsection (d), for a risk assessment that is multi-pathway: ten thousand dollars for applications filed during the 2011-2015 calendar years; twelve thousand dollars for applications filed during the 2016–2020 calendar years; and fourteen thousand five hundred dollars for applications filed for the calendar years beginning in 2021.

Chapter 139 is amended to add Subchapter D. This subchapter establishes fees for testing, auditing and monitoring activities that the Department undertakes to administer the requirements of the APCA or the CAA. The fees collected under this subchapter shall be made payable to the Pennsylvania Clean Air Fund and deposited into the Clean Air Fund established under section 9.2 of the APCA (35 P.S. § 4009.2). The Department will bill the applicant, owner or operator of an air contamination source for the applicable testing, auditing or monitoring fees after the completion of the required testing, auditing or monitoring activity. The applicant, owner or operator shall submit payment for the testing, auditing or monitoring fee to the Department of Environmental Protection, Bureau of Air Quality, Division of Source Testing and Monitoring, PO Box 8468, Harrisburg, PA 17105-8468 within 60 days of the billing date.

At least every 5 years, the Department will provide the Board with an evaluation of the fees in this subchapter and recommend regulatory changes to the Board to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.

Under final § 139.202 (relating to schedule of testing, auditing and monitoring fees) for testing, auditing and monitoring activities performed by Department personnel for calendar years 2011-2015, 2016-2020, and calendar years beginning with 2021, the Department will assess a testing, auditing or monitoring fee on the applicant or permittee in accordance with the Schedule of Testing, Auditing and Monitoring Fees listed in Table I of Annex A.

Summary of changes from proposed to final-form rulemaking

Under § 121.1, the proposed term and definition “observer” was deleted.

Under § 127.702, the effective calendar years were changed to 2011-2015, 2016-2020, and 2021. These changes were made to be in agreement with the effective date of the final-form rulemaking.

Under § 127.703, the effective calendar years were changed to 2011-2015, 2016-2020, and 2021. These changes were made to be in agreement with the effective date of the final-form rulemaking.

Under § 127.704, the effective calendar years were changed to 2011-2015, 2016-2020, and 2021. These changes were made to be in agreement with the effective date of the final-form rulemaking.

Under § 127.705, the original Title V emission fee of $37 per ton for each ton of a regulated pollutant actually emitted from a facility is revised to $70 per ton. Under subsection (b) the fees required by this section shall be paid for emissions occurring in calendar year 2010 and each calendar year thereafter, revised from calendar year 1994. Under subsection (d), the fee imposed under subsection (a) shall be increased in each calendar year after the effective date of this rulemaking by the percentage, if any, that the Consumer Price Index for the most recent calendar year exceeds the Consumer Price Index for the previous calendar year.

Under § 127.708, the effective calendar years were changed to 2011-2015, 2016-2020, and 2021. These changes were made to be in agreement with the effective date of the final-form rulemaking.

Under § 139.202, the effective calendar years were changed to 2011-2015, 2016-2020, and 2021. These changes were made to be in agreement with the effective date of the final-form rulemaking.

G. Benefits, Costs and Compliance

Benefits

Overall, the citizens of this Commonwealth will benefit from this final-form rulemaking because the fee revisions will allow the Department to maintain staffing levels in the air quality program. This will provide a sound basis for continued air quality assessments and planning that is fundamental to protecting public health and welfare and the environment.

Compliance Costs

The final-form regulation revises the fees to be paid by the owners or operators of affected facilities. The Department estimates that the increase in emission fees will result in additional costs of $5.3 million per year to the owners or operators of affected facilities. The adjusted plan approval and permit fees are estimated to result in an increase in costs of $760,000 per year. The source testing fees will increase costs to affected owners or operators by $1.4 million per year. No new legal accounting or consulting procedures would be required.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding the newly revised requirements and how to comply with them. This will be accomplished through the Department's ongoing compliance assistance program.

Paperwork Requirements

There are no additional paperwork requirements associated with this final-form rulemaking that industry would need to comply with.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking allows the Department to maintain staffing levels in the air quality program, which will provide a sound basis for continued air quality assessments and planning that is fundamental to protecting public health and welfare and the environment.

I. Sunset Review

This final-form rulemaking 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.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 6, 2009, the Department submitted a copy of the notice of proposed rulemaking published at 39 *Pa.B.* 6049, to IRRC and the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, 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 xxxx, xx, 2010, the final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on xxxx, xx, 2010, and approved the final-form rulemaking.

K. 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 at *1 Pennsylvania Code* §§ 7.1 and 7.2.

(2) At least a 60-day public comment period was provided as required by law, and all comments were considered.

(3) These final-form regulations do not enlarge the purpose of the proposed rulemaking published at 39 Pa.B. 6049.

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

(5) These regulations are reasonably necessary to attain and maintain the ozone and PM2.5 National Ambient Air Quality Standards.

L. 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 121, 127 and 139 are amended by amending §§ 121.1 and 127.701-127.705 and adding §§ 127.708, 139.201 and 139.202 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 Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the 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 final-form rulemaking will be submitted to the EPA as an amendment to the Pennsylvania SIP.

(f) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

JOHN HANGER
Chairperson