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# S.8308/A.8808, Part T (Budget)

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<b>BILL</b> S.8308/A.8808, Part T (Budget)
<b>SUBJECT</b> Air Permit Fees
<b>DATE</b> March 28, 2024
<b>OPPOSE</b>

While we recognize that the federal Clean Air Act imposes fee mandates on the states, we find that two of the air permit fee proposals in the FY 2025 Executive Budget are overly broad and should be amended before being approved by the legislature.

Of particular concern are the proposals to:

- Allow Title V permit fees to go as high as \$245 per ton, (current fees range from \$60 to \$90 per ton), eliminate the 7,000 ton per facility cap, and provide that these fees shall increase annually based on the CPI (with the changes effective 1/1/27); and
- Authorize DEC to “implement new or revise existing” permit fees for VOCs, NOx and other regulated air contaminants necessary to comply with federal ambient air quality standards or the Title V permit program.

Our concerns and recommendations regarding both proposals are provided below.

### Title V Fees

Title V of the federal Clean Air Act requires states with delegated permitting programs for major sources to impose permit fees that are sufficient to fund all reasonable permit program costs, and the EPA establishes an annual inflation adjusted “presumptive” minimum fee, which is \$61.73 for the period September 2023 to August 2024. Under current New York law, Title V fees are set in statute, ranging from \$60 to \$90 per ton, based on a facility’s total emissions of “regulated air pollutants” (Under the Act, these fees apply to emissions of NOx, VOCs, SO<sub>2</sub>, particulates, CO and hazardous air pollutants.)

The Department of Environmental Conservation argues that the current fee structure is inadequate and has been cited as such by the US EPA. If fee increases are mandated by the EPA, we recommend a more measured approach.

Based on Title V emissions inventory data available on data.ny.gov, total emission of “regulated air contaminants” in 2022 were 77,820 tons. Based on the DEC’s projected 2027 Title V program budget of \$13.8 million, this would result in a per ton fee of \$177, an increase ranging from 97% to 197% from current fee levels. Moreover, assuming a 3% inflation rate, it would be more than a decade before fees would hit the \$245 cap proposed in the Executive Budget.

Moreover, the Executive Budget proposal would allow the state to raise \$5.3 million above and beyond the projected Title V program costs for 2027. Since there is inadequate public disclosure in the Executive Budget as to what functions are paid for through this fee mechanism, this presents a significant opportunity for cost-shifting.

If Title V fees need to be increased to remain in compliance with CAA mandates, the final budget should include a more limited increase in the cap, e.g., sufficient to meet projected program funding needs for the next several budget cycles. In addition, as part of the annual budget process, the state should provide a publicly accessible description of program components and costs that are to be funded through Title V fees. Also, since this fee structure allows annual fees to be based on actual appropriations, there is no need to impose an automatic CPI inflator, as proposed in the Executive Budget. Likewise, since no Title V source in New York even approaches the current 7,000 ton fee limit, we see no practical need for its repeal.

We note that in its budget resolution, the Senate accepted the Administration’s Title V fee proposal, while the Assembly proposes a four-tier per ton fee structure, ranging from \$80 to \$120 based on a facility’s emissions, with a 10,000 ton cap. While we are not opposed to a multi-level fee structure, we have not analyzed the Assembly’s proposal’s impact on total fee revenues.

#### CAA Section 7511-d Fees

Of greater concern is the Executive Budget proposal for new fees “to comply with the statutory mandates of the Act.” Our understanding is that this proposal is intended to allow the state to meet the requirements of Clean Air Act section 7511-d, which mandates that fees be imposed on major stationary sources of VOCs and NO<sub>x</sub> in severe and extreme ozone non-attainment areas, with the fee for calendar 2023 set at \$11,922.

However, contrary to the federal mandate in CAA §7511-d (i.e., a fee on VOC and NO<sub>x</sub> emissions from major sources within a severe or extreme non-attainment area) the Executive Budget proposal is very broad and open ended. As shown below, the Executive Budget language would allow the DEC to create new fee

programs by rule “to comply with the statutory mandates of the Act,” including mandates other than those specifically related to fee programs (e.g., any expense mandated by the act might be financed through this fee mechanism.)

Executive Budget Proposal

**§ 19-0328. Fee programs.**

**1. In order to comply with the statutory mandates of the Act, the department may implement new or revise existing regulatory or permitting fee programs, including but not limited to the programs established by title V and section 7511d of the Act.**

**2. Such fee shall be calculated based upon ton of volatile organic compound, oxides of nitrogen, or other regulated air contaminant emitted as set forth in the Act, this article or otherwise pursuant to regulation established by the department.**

**3. The department may further establish by rule or rules additional procedures for assessment of and collection of such fees.**

It is our understanding that the attainment date for the 2008 ozone standard (severe classification) is July 20, 2027, based upon actual monitoring data from 2024, 2025, and 2026. The fee would be assessed against each Title V facility's emissions of regulated air contaminants above 80 percent of its baseline emissions in 2027, with the initial assessment in 2029, but only if the downstate area does not attain the standard by July 20, 2027.

At this point, it is uncertain whether the New York metropolitan area (NYC, Long Island and Westchester and Rockland counties) will remain as a severe non-attainment area, but this fee mechanism is being proposed for this eventuality.

If the legislature agrees that a new fee mechanism is necessary under CAA §7511-d , we recommend this section be rewritten as shown below, to limit this new fee-setting authority to the specific mandates of §7511-d.

**§ 19-0328. Fee programs.**

**1. The department is authorized to adopt regulations imposing fees on major stationary sources of volatile organic compounds and oxides of nitrogen located in an area designated as a severe or extreme non-attainment area pursuant to section 7511 of the Act, to the extent and duration and in the amount that such fees are mandated by section 7511-d of the Act.**

**2. The computation of such fees shall be consistent with the requirements of section 7511-d(b) of the Act.**

**3. The department may further establish by rule any required additional procedures for the assessment of and collection of such fees.**

The Executive Budget does not specify where these fees would be deposited, so it appears that they would go to the General Fund. The DEC estimates that the revenues from this fee proposal (applied to major sources in the severe non-attainment area) would be up to \$33 million per year.

Any final budget language should also specify how the revenues from these fees could be used. EPA guidance says, "The CAA does not specify how states may spend or allocate the fees collected under a section 185 fee program," however states are not allowed to use these revenues to offset Title V fees, or otherwise provide a benefit to the entities subject to the fee. Therefore, states have discretion on how to use the fees. We believe the state should channel the fees into innovative programs to provide incentives for additional ozone precursor emissions reductions from stationary or mobile sources, or for other purposes aimed at reducing ozone levels in the severe non-attainment area.

We note that the Senate budget resolution authorizes the state to adopt new permit fees by rule as necessary to comply with Clean Air Act section 7511-d. As discussed above, we agree that any new fee-setting authority should be clearly linked to specific Clean Air Act mandates. The Assembly's budget resolution omits the Administration's language.

We appreciate your review of our concerns and recommendations and welcome the opportunity to discuss them as the Administration, Senate and Assembly work toward agreement on a final budget for SFY 20215.