

MID-ATLANTIC CHAPTER - ISEE

March 24, 2016

Environmental Quality Board
Rachel Carson State Office Building
16th Floor, 400 Market Street
Harrisburg, PA 17101-2301

RE: Comments: Proposed PA DEP Chapter 210 and 211 Revisions

Dear Sir or Madam:

These comments are being submitted by the Mid-Atlantic Chapter of the International Society of Explosive Engineers ("MACISEE"), regarding the Environmental Quality Board's ("Board") proposed rulemaking relating to the handling and use of explosives for blasting purposes within the Commonwealth of Pennsylvania, published in the Pennsylvania Bulletin on February 27, 2016, 46 Pa.B. 996 (the "Proposed Rule").

Founded in 1974, the International Society of Explosive Engineers is a society of professionals promoting the safety, security, and the controlled use of explosives. The Mid-Atlantic Chapter of the ISEE is based in Indiana, Pennsylvania, and many of its members operate within the Commonwealth. We appreciate the opportunity to provide these comments.

In brief, if the Board's Proposed Rule revisions are made final as they now appear, it will negatively impact the business operations of many of MACISEE's members. Our comments and suggested changes follow:

I. Regarding Chapter 210 Proposed Revisions:

210.13 General

Item #1: Page 2: (b) For specific individuals and professional groups, the requirement for a blaster license renewal which requires a background check as a responsible person or employee possessor is a hardship, if not an improbable step. This includes individuals who want to maintain their license but are not directly involved with handling or distributing explosives. Examples include retired, laid off, or unemployed blasters, as well as consultants or engineers where a license is critical to offer services such as independent blast design evaluations and expert witness testimony. We suggest an exemption in these instances.

210.15 License Application Fee

Item #2: Page 2: (a) The increase fee to \$150 is considered excessive and again a hardship to unemployed blasters attempting to maintain their license for future employment opportunities, as well as employed blasters required to pay for and maintain their license as a condition of employment. We suggest a \$75 fee as more appropriate.

210.17 Issuance & Renewal of Licenses

Item #3: Page 3: (e) Same comment as Item 3 above

II. Comments Regarding Chapter 211 Proposed Revisions

211.101 Definitions

Item #4: Page 4: Blast Area and Blast Site: We express the concern that definitions vary and encourage a more standardized definition throughout the various regulatory agencies. At this time, we don't see the need for DEP to create another definition when the Federal agency (MSHA) has already defined these terms (MSHA 56.2).

Item #5: Page 4: Cube root scaled distance: Clarify in definition that this is to be applied to demolition activity only.

Item #6: Page 5: Employee possessor: Already defined – use ATF's definition in ATF Chapter 27.

Item #7: Page 6: Nuisance: We protest, and strongly advise against the use of, or any reference to the term "nuisance". We request the term be stricken from inclusion anywhere throughout either Chapter 210 or 211. This word will lead to highly subjective conclusions with prejudicial connotations. We believe there would exist a high probability for misinterpretations and misapplications on behalf of the public, industry, and regulatory agencies.

Item #8: Page 6: Responsible Person: Remove – already included and defined by ATF's Chapter 27.

Item #9: Page 7: Remove "Unauthorized detonation of explosives", "unauthorized handling and use of explosives", and "Unauthorized storage of explosives". We suggest accepting ATF's Chapter 27 definitions.

Furthermore, as written, the "Unauthorized handling and use of explosives" removes the 30 day "grace" period for vetting and obtaining clearance for new workers (laborers), which poses a hardship to industry.

211.115

Item #10: Delete this section. Previous requirements set forth by ATF, DOT, OSHA, MSHA, and Homeland Security are in place and proven to be adequate. The four hour access requirement in (j) is just not always feasible.

211.122

Item #11: Delete section – redundant; ATF is already more stringent.

211.123

Item #12: Delete section – redundant; ATF is already more stringent.

211.116

Item #13: Page 10: Eliminate this entire section, with justification that this is redundant and will create a burden to comply. This is a duplication of effort from existing State and Federal regulations.

211.124

Item #14: Page 12: (a)(2) Must make clear that electronic signature is accepted.

Item #15: Page 12: [(4)](6) Why must the specific type of explosives be listed? Please define “specific”.

Item #16: Page 12: [(7)](10) We provide a map now. Is it necessary or required to add arrows and footage distances to each item listed?

Item #17: Page 13: (17)(20) 200 feet has worked fine. Increasing the distance can cause unnecessary or excessive burden and cost to contractors. What is the justification to increase to 300 feet?

Item #18: Page 13: (22)(e) Will a digital/electronic version such as EX smart phone, I Pad, laptop etc. be accepted?

Chapter 211.126 Fees

Item #19: Page 14: (1) At times, DEP specifically requests the permit application be submitted on paper. In those instances, will the applicant be eligible for the reduced “online” cost?

Item #20: Page 14: (2) How do we pay this fee in a timely manner? Will DEP accept credit cards? If industry is forced to mail a check, this will extend the time to turn the permit around.

211.133. Blast Reports

Item #21: Page 15-17: (3) The latitude and longitude and a brief description of the monitoring locations. If monitoring is conducted at a home or other building with a 911 address, the address of the structure must be provided.

Change to read:

(3) The latitude and longitude, and where available, the 911 address should be included.

Reason: The house may have an address but not everyone posts those addresses in a readily visible or accessible manner.

Item #22: [(7)] (9) A sketch showing the number of blast holes, burden, spacing, pattern dimensions, delay timing sequence, description of the ground surrounding the blast site, and point of initiation.

Change to read:

[(7)] (9) A sketch showing the number of blast holes, burden, spacing, pattern dimensions, delay timing sequence, and point of initiation.

Reason: There is no standard for describing the ground surrounding the blast site. The benefit, purpose, or any guide for providing such a description is not apparent to us.

Item #23: [(15)] (18) A general description, including the street address and latitude and longitude of the nearest building [location] not owned or leased by the blasting activity permittee or its customer [based upon local landmarks].

Change to read:

[(15)] (18) A general description and latitude and longitude of the nearest building [location] not owned or leased by the blasting activity permittee or its customer [based upon local landmarks].

Reason: The house may have an address but not everyone posts those addresses.

Item #24: (26) A drill log showing the condition of all of the blast holes prior to loading and any other bore holes in the blast site related to the blasting activity.

Change to read:

(26) The blaster-in-charge shall [make every reasonable effort to] determine the condition of the material to be blasted by consulting with the driller, [or] information from the drill log, or “at-the-hole” communication with others familiar with the specific drilling process prior to loading the holes. The permittee must ensure that a written drill log or “at-the-hole” communication is available to the blaster-in-charge.

Reason: Without training and licensing drillers and providing a standardized drill log this rule will be meaningless and ineffective for use by blasters. The only viable, best option is “at hole” communication.

211.141. General Requirements

Item #25: (13) Only load explosives into “on-road” vehicles that have passed the State safety inspection or certification.

Change to read: (13) Only load explosives into “on-road” vehicles that have passed FMCSA/DOT safety inspection or certification.

Reason: Trucks are licensed in several states and not all states have a “state” inspection.

211.151

Item #26: (b) Eliminate entire sentence, and especially the term “nuisance”. (See previous objection; Definitions Item #9). Furthermore, MACISEE believes that this terminology has the potential to expose both practicing contractors and blasters to be exposed to overly subjective framed civil suits or actions. By very definition, the word can mean annoyance or inconvenience. To the general public, consideration of the very concept of blowing something up anywhere near their backyard is threatening and inconvenient to weigh. It is possible that the notion itself is a nuisance. In the legal arena, the concept of nuisance can be civilly and/or criminally punished. Again, we are against the notion of double jeopardy where existing legal remedies are available and the notion of significant penalties from the Department have the potential to be overly onerous.

Item #27: [(d)](e) Should read: ...designated by the Department unless the building is owned or leased by the permittee or customer, or granted via DEP approved variance.

211.155 Preparing the Blast

Item #28: (Page 22)(7). With regard to posting signage. The proposed 100-foot distance in all directions may not always be safe to install. We suggest wording to say “adequate signage” at the safest, most logical, and most convenient location.

SUBCHAPTER G – Requirements for Monitoring

Item #29: (Page 23)(E) Sentence should read, “ ...established by the International Society of Explosives Engineers Standards Committee [and/or manufacturer’s recommendations].

211.182

Item #30: (c) Eliminate the requirement to use 3” diameter holes. The blaster is required under [d](1) to use safe, accepted techniques and [e] to gain a waiver from DEP and the utility owner for deviations from other controls in place.

Subchapter J. Civic Penalties – (pages 27-32).

Item #31: Comments Regarding Proposed Rulemaking for the Handling and Use of Explosives (46 Pa.B. 996, February 27, 2016)

Subchapter J

MACISEE recognizes the effort expended by the Board and its legal counsel to draft the Proposed Rule, and MACISEE understands that the impulse behind the Rule is to protect the safety of Pennsylvania citizens and their property. MACISEE shares those priorities and has worked throughout its approximately 40 years of existence to ensure the same. MACISEE also acknowledges the concern expressed by Board representatives about its ability to levy fines under current Pennsylvania law.

Respectfully, however, MACISEE submits that the Proposed Rule, as drafted, goes too far in establishing new civil penalties by failing to fully take into account the negative impact that the Rule will have on Pennsylvania’s contractors, including many of MACISEE’s members. In particular, Subchapter J (“Subchapter J”) proposes an entirely new civil penalty structure that has significant ramifications for blasting contractors. In the view of MACISEE and its legal counsel, Subchapter J represents a potential overreach of the regulatory powers of the Board granted by the applicable Enabling Statutes. Further, while MACISEE appreciates that the Proposed Rule may have some positive effects, the Rule does not articulate why the current civil and regulatory framework is inadequate, nor does it establish that the benefits of the new regulations outweigh the burdens on contractors. Finally, the administration of Subchapter J, including the amount of potential civil penalties, the applicable burden of proof, and the discretionary powers of the Department, is unclear and affords too much discretion in assessing penalties that, in many cases, will be very significant. MACISEE, therefore, opposes the Proposed Rule in its current form, and encourages the Board to defer passage of the regulations until additional fact finding takes place and revisions are made.

A. The Imposition Of An Entirely New Civil Penalty Structure Exceeds The Reasonable Powers Of The Board.

It is fundamental law that a regulatory board only has powers that have been explicitly delegated to it by the legislature. The Proposed Rule refers to ten statutory sections as providing the authority for the Board's actions. (See Section C, Statutory Authority.) MACISEE does not dispute that the cited statutory sections give the Board the ability to publish regulations that apply to blasting, generally. In MACISEE's view, however, none of the statutory sections provide the Board with authority to establish Subchapter J, an entirely novel civil scheme that imposes drastic new penalties on blasting contractors. To the extent that the statutory sections give authority to impose fines or fees, it is within the context of the fees that are necessary to support DEP activities. For example, 71 P.S. § 510-20(f) permits the Board to establish fees and charges relating to State parks, which shall be used "solely for the acquisitions, maintenance, operation or administration of the State parks systems." Within the context of the Proposed Rule, MACISEE notes that, *inter alia*, there are increased fees related to obtaining blasting licenses. These are the type of fees and charges that appear to be contemplated by applicable statutes.

Subchapter J, however, is not addressed to fees that are necessary for the administration of the Board's activities in monitoring the work of blasting contractors. Instead, Subchapter J establishes sanctions which have as their principal purpose the punishment of blasting contractors. These civil penalties have the potential to drastically impact existing businesses, even causing them to close, depriving these companies of economic benefits and years of goodwill.

As discussed below, there is an existing legal framework in place to deter and punish contractors that improperly use explosives, and this framework is adequate to address the safety of Commonwealth citizens. To the extent that the existing framework is inadequate, however, MACISEE submits that it is the function of the legislature, as elected officials who represent the interests of their constituents, to weigh the costs and benefits of modifying that framework, to hear from all interested parties who may be affected, and, if appropriate, pass legislation to address any issues.

B. The Existing Legal Framework Applicable To Blasting Contractors Is Adequate To Protect Pennsylvania Citizens. The Proposed Regulations Do Not Establish Why Subchapter J Is Necessary, Nor Do They Accurately Weigh The Costs and Benefits Of Subchapter J.

Assuming that it is within the Board's authority to establish Subchapter J, the Proposed Rule does not offer sufficient evidence for why Subchapter J is necessary. As noted within the Proposed Rule, criminal penalties are already in existence for blasting-related violations, which may be imposed by means of summary citations and possible misdemeanor charges. (See Section D, Background and Purpose.) Moreover, for decades, the Board has had, and exercised, its ability to suspend and rescind licenses given to blasters that fail to comply with applicable law.

In addition, as the Board is likely aware, the storage, handling and use of explosives are, in and of themselves, considered ultra-hazardous activities which carry a strict liability burden under applicable civil law. In the event a party undertakes improper blasting activities that cause harm to others, that party is exposed to civil action liability through the Court of Common Pleas. If a blaster is found to cause significant damages, wronged parties may recover those damages through an appropriate civil suit. Notably, accused contractors are afforded the protections of the system of courts, including burdens of proof established by law, the right to present witness testimony and documentary evidence, and the ability to join other

parties that may be at fault, in whole or in part, or that may have been involved in the relevant project, as blasting activities are often part and parcel to a larger construction project.

The new civil penalty system also implies a type of “double jeopardy” in which a contractor might be subject both to civil penalties from the Board and individual causes of action. For example, proposed Section 211.151(b) indicates that “blasting shall be conducted in a manner that does not cause a nuisance.” In the event of an alleged nuisance activity, therefore, a contractor might be subjected to a civil suit and civil penalties, yet the Rule does not discuss why a lawsuit on its own would be insufficient protection against nuisance.

Aside from acknowledging the criminal penalties, however, the Board’s Proposed Rule does not provide evidence as to why this existing system, in place for decades, is inadequate to ensure the safety of citizens of Pennsylvania and to punish offending blasting contractors. The Proposed Rule does not offer any examples of individuals who have been damaged or contractors who would not have been punished absent the Proposed Rule. It does not compare Pennsylvania’s current system to those found in other states, nor does it articulate clear safety improvements that would be brought about by the new system.

Additionally, the Proposed Rule does not provide a meaningful analysis of the costs associated with Subchapter J. Although the Rule does acknowledge that costs will increase for those who do not comply with the requirements (See Section F, Compliance Costs), it glosses over the fact that there will be increased costs for all blasting contractors, even those who do comply with the Proposed Rule. For example, all contractors are likely to incur increased insurance and bonding costs, as the risk of large civil penalties must be factored by any third party providing insurance to contractors.

Further, blasting is not an activity that is performed solely by the blasting contractor, but, instead, is performed with reliance on other parties, such as geotechnical engineers, who may provide an analysis of subsurface conditions, or security personnel, who may have an obligation to keep the project site safe. A blasting accident may not be the fault of the blasting professional, but it is that party that will bear the brunt of the new regulations. The Proposed Rule, therefore, is not simply an issue for contractors who fail to operate in accordance with the law. It is a burden on all contractors, even those that have complied and will continue to comply with the law.

The Proposed Rule does not analyze how increased costs will affect businesses and, in particular, does not assess whether the costs will cause businesses operating in Pennsylvania to close. Many of MACISEE members are small businesses with a handful of employees, often serving as project subcontractors, not large general contractors. For some of these businesses, a single fine of \$10,000 (or more) may seriously jeopardize the ability of the company to continue operations. The increased costs associated with Subchapter J are significant, and MACISEE submits that the Board has not fully appreciated these costs and compared to any benefits of the Proposed Rule.

C. As Drafted, The Proposed Rule Imposes Penalties That Are Too Burdensome, Gives Undue Discretion To Investigators, And Creates A Standard Of Proof That Is Contrary To Established Jurisprudence.

Finally, assuming that a cost-benefit analysis would support the establishment of a civil penalty system, it is manifest that the system actually created by Subchapter J is improper. In brief, the Proposed Rule allows for the assessment of a penalty of up to \$10,000 per day for each “violation” of any provision of Section 211. (See Section 211.203.) This penalty will be assessed by the Department on the basis of the

“seriousness” of each violation, based on 8 non-exclusive factors. (See Section 211.204(b)(1).) The penalty will only be reduced if a contractor proves to the Department that it is “demonstrably unjust.” (See Section 211.205(a).) In order to appeal a Department decision, a contractor must pre-pay or provide an appeal bond for the full amount of any penalty. (See Section 211.206.)

This system is contrary to basic considerations of fairness. First, the “baseline” penalty is \$10,000, which may be multiplied per day and per violation. Although the regulations do allow for certain reductions, such as in the case of rapid remediation, the fact that \$10,000 is the default penalty suggests that the typical burden on a contractor will be significant. Some blasting conduct is not subject to remediation, such as exceeding air blast decibel limits. Does this mean if a single shot exceeds the legal decibel level by 0.2 dBL the penalty starts at \$10,000? By contrast, a similar event in Kentucky would result in a fine of \$1500 or less. Additionally, there is no discussion in the Proposed Rule as to whether this figure is keeping with the practices of other states, and it is the experience of MACISEE that this Proposed Rule would impose fines in Pennsylvania that are much higher than comparable Mid-Atlantic states.

Second, the penalty is based on a “violation,” but there is no definition of a violation in the regulations. To note just one ambiguity, a blasting contractor might rig a system of explosions at multiple sites on a Project, but which are all detonated simultaneously. If it is the regulatory agency’s decision that each of the sites violates applicable regulations, is this one “violation” or multiple “violations”? The lack of a definition suggests that this would be entirely within the discretion of the inspector investigating any incident.

Relatedly, as noted above, new Section 211.151(b) implies that a “nuisance” activity may be considered a violation. Nuisance is not defined, however, and a member of the general public might classify any explosive activity in his or her vicinity as the type of annoyance or inconvenience that constitutes a “nuisance.” The upshot is that a blaster may be found guilty of a violation not for injuring a person or damaging property, but simply for undertaking its normal business activities.

Third, any penalty is based on the alleged “seriousness” of the violation, and the regulations note certain non-exclusive factors that may be taken into account. However, the regulations do not establish what evidence is necessary to demonstrate the existence of the factors, how the factors are to be weighted, or how the factors relate to the amount of the assessed penalty. Although the regulations allow the Department to take into account prior violations, the regulations do not appear to give any preferences to contractors that have a long history of safe practices. At bottom, the “seriousness” of the violation is based entirely on the discretion of the Department and whatever evidence it believes is sufficient.

Further, the assessment of “seriousness” is based principally on the report of a Department Inspector. The contractor is permitted, within fifteen days of service of a notice of violation, to submit written information in its defense. (Section 211.205.) The contractor may also request an “informal assessment conference,” but the Board’s decision may occur prior to any such assessment and such a conference does not stay the time for any appeal. (Section 211.205(d).)

Fourth, in order to challenge the penalty, the burden is on the contractor to establish that it is “demonstrably unjust.” This flips the typical burden of proof – that a defendant is innocent until proven guilty – on its head, instead requiring the contractor to bear the burden of reducing any penalty. The standard – that the penalty is “demonstrably unjust” – does not appear to conform to typical burdens of proof (*i.e.*, “preponderance of the evidence,” “clear and convincing evidence,” etc.) but by its plain language suggests a high burden for any contractor.

Finally, after assuming the propriety of any penalty assessed, the system requires the contractor to pre-pay or bond off any penalty assessed in order to appeal. This will undoubtedly create a burden on small contractors, who may not be able to simultaneously afford the costs of prosecuting an appeal and the costs of pre-payment.

The system as proposed, therefore, runs contrary to basic considerations of justice and fairness. In a typical civil suit, a contractor that is accused of causing damage through blasting activities is given an opportunity for a full and fair hearing, and only after a jury hears all of the evidence is civil liability assessed. With these regulations, a contractor is subject entirely to the discretion of the Board, which may issue a decision only on the basis of written evidence, and it is the contractor's burden to overcome the Board's discretionary assessment.

As noted above, MACISEE members share in the Board's goals to encourage best practices in blasting and to ensure the safety of Pennsylvania citizens. MACISEE desires to work with the Board to jointly formulate legal guidelines that further these shared goals, and would like to have further discussions with the Board to define both the scope, structure, and administration of Subchapter J. Both the Board and MACISEE are entrusted to maximize the positive impacts of blasting activities in Pennsylvania, and a jointly formulated civil penalty structure can help to ensure those impacts for years to come, long after the current members of the Board and MACISEE have moved on. MACISEE respectfully submits, however, that the Proposed Rule as currently drafted misses the mark, by placing undue burdens on contractors. MACISEE, therefore, requests that the Board reject the Proposed Rule as drafted or, at the very least, decline to enact Subchapter J.

Sincerely yours,

Mid-Atlantic Chapter of the International Society of Explosive Engineers