DAN A. SURRA, MEMBER
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TOLL-FREE: 1 (800) 348-9126

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320 W. LONG AVENUE
DUBOIS, PENNSYLVANIA 15801
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HARRISBURG OFFICE:
ROOM 300 SOUTH OFFICE BUILDING
HOUSE BOX 202020
HARRISBURG, PENNSYLVANIA 17120-2020
PHONE: (717) 787-7226

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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GAME AND FISHERIES
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NORTHWEST CAUCUS, DEMOCRATIC VICE-PRESIDENT
LEGISLATIVE SPORTSMEN CAUCUS, TREASURER

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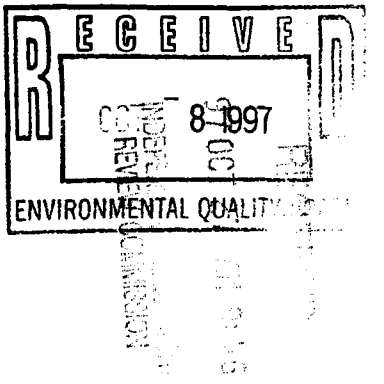


September 25, 1997

James M. Seif, Secretary
Department of Environmental Protection
16th Floor, Rachel Carson State Office Building
Harrisburg, PA 17105-2063

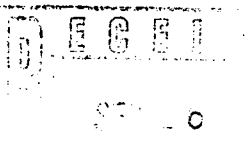
Dear Secretary Seif,

I pen this letter to voice my concern over the Department's proposed changes to the Malodor Regulations. By the Department's own admission, a full 30% of citizen complaints to your agency deal with malodors. I t would seem by implementation of the proposed changes, the Department would be turning their backs on one of the most common problems experienced by the citizens of this Commonwealth.

What will be the determining factor of what is the best available technology? Who will make that decision? I am seriously concerned that the cost will be the overriding factor in these decisions and the citizens of this State will be forced to live with the problem for at least five years under this proposal.

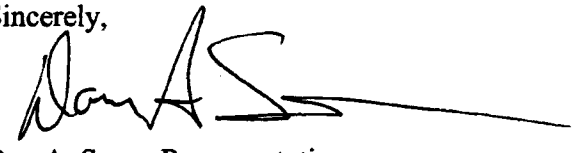
Also, the proposal would allow the Department the latitude to add to the list of instances that are totally exempted from the malodor regulations with NO legislative oversight. I understand you desire to be able to expand that list should the need arise. However, I feel it is important that there must be some checks and balances to this process.

In my legislative district, I am dealing with a serious malodor problem from hydrogen sulfide and sulphur dioxide from a papermill. Residents of the community of Johnsonburg have been subjected to these gasses at levels that cause children and elderly people to gasp for breath, become watery eyed, and irritation to the respiratory systems. How will these changes help them?



Mr. Secretary, the people of Pennsylvania are entitled to clean air by our constitution. This proposal does nothing to enhance that noble idea. I respectfully request that we go back to the drawing board in an effort that will protect both our businesses and citizens.

Sincerely,



Dan A. Surra, Representative
75th Legislative District

DAS/rls

cc: Environmental Quality Board
All House Members
Carol Browner, Director, EPA

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11TH DISTRICT
MICHAEL A. O'PAKE, Esq.
SENATE BOX 203011
HARRISBURG, PA 17120-3011
TELEPHONE: (717) 787-8925

ROCKLAND PROFESSIONAL CENTER
1940 NORTH 13TH STREET, STE. 232
READING, PA 19604
TELEPHONE: (610) 929-2151

REPLY TO: Reading Office

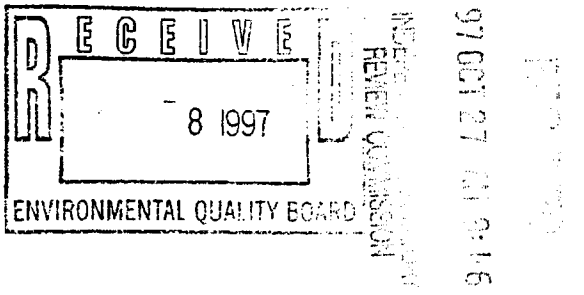
Democratic Caucus Chairman

Senate of Pennsylvania

COMMITTEES
JUDICIARY, MINORITY CHAIRMAN
AGRICULTURE AND RURAL AFFAIRS
APPROPRIATIONS
BANKING AND INSURANCE
EDUCATION
RULES AND EXECUTIVE NOMINATIONS

PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY
JOINT STATE GOVERNMENT COMMISSION
EDUCATION COMMISSION OF THE STATES

October 2, 1997



The Honorable James Seif, Chairman,
Pennsylvania Environmental Quality Board
P. O. Box 2063
Harrisburg, PA 17105-2063

Dear Chairman Seif:

It has come to my attention that the Department has proposed a rulemaking which would modify the Department's existing program for investigating and addressing malodor complaints. Specifically, as I understand it, this rulemaking proposes that a facility which controls malodorous air contaminants through the use of best available technology would not be required to further reduce residual odors for a five-year period. Further, the rulemaking would require the Department to work with facility owners to eliminate objectionable odors

While I recognize the practical benefits of the Department working with an emitting facility to alleviate malodors, I am concerned that the five year limitation on responsibility established by this rulemaking would subject the general public to objectionable odors, whether "residual" or not, for extended periods of time with little opportunity to seek relief through the Department. In those instances where a facility is using a new process, there indeed may be no "best available technology" to control odors. Hence, it appears under this proposed rulemaking the Department would work with the facility operator, through trial and error, to develop the "best available technology," forcing citizens to endure malodors and act as environmental guinea pigs. As you will recall, this is precisely the situation we experienced in Berks County with the operation of the Western Berks Compost Facility. Residents of Exeter Township endured pungent odors for an extended period while the facility operator tried a series of failed odor control measures.

I have also been contacted by local municipal officials who are concerned that this proposed rulemaking will eliminate their ability to enforce local ordinances which regulate malodors.

I therefore respectfully urge the Department to reevaluate this proposed rulemaking to protect the heath and safety and quality of life of our citizens. Thank you for your thoughtful attention to this matter.

Sincerely,

Michael A. O'Pake
Senator--11th District

MAO'P:T

STEVEN R. NICKOL, MEMBER
ROOM 150-B EAST WING
HOUSE POST OFFICE BOX 202020
MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120-2020
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HANOVER DISTRICT OFFICE:
141 BROADWAY, SUITE 130
HANOVER, PENNSYLVANIA 17331
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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

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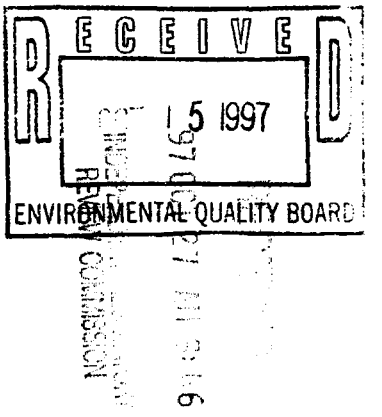

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October 14, 1997

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Dear Board Members:

I have learned through several newspaper articles that the Department of Environmental Protection is considering changes to the state's odor regulations. Please allow me to comment on the proposal.

The proposed changes would exempt industries that install so-called "Best Available Technology" to control odors from making further improvements for five years, even if odor complaints continue. This greatly concerns me based on my familiarity with odor problems from two local industrial plants.

Both of these plants emit chemicals with low odor thresholds that can be smelled by residents in the surrounding area even though there is only a minute quantity of the chemical in the air. It has never been proven that the chemicals emitted by either of these plants are injurious to the health of area residents. However, the odors are quite unpleasant and the source of numerous complaints.

One of these plants is a foundry located near my office. Scores of citizens have complained to my office about the odors, and the Department has been active in trying to resolve the problem. The foundry has fully cooperated with the Department and has spent a good bit of time, effort and money to find solutions. Years of effort have limited severe odor problems to several days each month.

Many of the earlier suggestions by the Department to resolve the odor complaints accomplished little, and some were even counterproductive. For example, the company tried using a new binder for their molds because it would produce "a less objectionable odor". The new odor actually proved even more sickening than the previous one. If it were not for trial and error, the severe odor problem would still occur daily.

I would hate to think if this new Department proposal had been in effect several years ago when the odor problem at this foundry was most severe. Would one attempt have been made at seeking its resolution, and then the Department allowed to back off for five years? Had this been the case, the foundry would still be my number one source of constituent complaints.

The problem is that "Best Available Technology" is such a loose concept. It is not always obvious up front as to what technology might resolve a particular problem, and the Department can't always just write a prescription for some technology and then walk away from the situation for five years. We owe more than this to the people who have to live with the odors.

Your consideration of my comments would be greatly appreciated. I urge you to seek modifications in the proposal to prevent the Department from just walking away from serious odor complaints.

Sincerely,

Steven R. Nickol
Representative

SRN:dp

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EQB
Environmental Quality Board

p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

October 22, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Nancy Naragon, Leauge of Women Voters of Greater Pittsburgh
2. John J. and Cheryl Z. Rinck

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

Sharon K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

League of Women Voters of Greater Pittsburgh

•LWV Community Information Center • YWCA Room 207
•305 Wood Street • Pittsburgh, Pennsylvania 15222-1982
• 412-261-4284

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Copies: Tyrrell
Sandusky
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DEP Environmental Quality Board

Department of Environmental Protection
Southwest Regional Office
400 Waterfront Drive
Pittsburgh, PA 15222

October 13, 1997

Dear Mr. Duritsa:

The League of Women Voters would like to comment on the proposed rulemaking regarding malodors: the Regulatory Basics Initiative #3 (malodors); Title 25: Pennsylvania Code Chapters 121 and 123.

We believe that the public should be allowed to identify malodors and that a single person should be able to file a complaint. Subsection (c) of Chapter 123.31 should be deleted. The provision that a facility with the best available technology (BAT) will be exempt for five years is not acceptable. The public will have to wait five years for a review from DEP and during this time complaints will be ignored.

Exemptions from malodor regulations should not be at the discretion of DEP. This puts too much discretion in the hands of DEP. Also these exemptions should not only be published in the Pennsylvania Bulletin, which is not widely read nor easily available to the public. The exemptions should be announced in a widely read newspaper or other major publication.

For malodor complaints, we believe that the response and inspection by DEP should be immediate and unannounced and a variety of inspection techniques should be available to DEP.

In order to accomplish this task, we believe that the regional offices, particularly in Pittsburgh and Philadelphia areas, should have adequate staff to address the need to combat odor exposures to the public, depending on the needs of the regional offices.

In summary, we believe that the regulations need to be strengthened.

Sincerely,

Nancy Naragon

Nancy Naragon, President

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To: Environmental Quality Board
15th Floor
Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, Pennsylvania 17105-8477

From: John J. and Cheryl Z. Rinck
7 Meadow Woods Lane
West Grove, PA 19390
(610) 869-4221

October 16, 1997

To whom it may concern,

We are sending this letter to add our voice, along with our numerous concerns, relating to the malodorous conditions which exist in Southern Chester County. We have been notified by State Representative Arthur Hershey, that an amendment to Title 25 has been recommended. If the proposed amendment can streamline the complaint and investigation process, and establish more clear limits of responsibility on facility owners, we are in favor.

We have been residents of Southern Chester County for over 8 years, and have fallen victim to the ever increasing malodorous conditions emanating from our neighboring mushroom grower/spent composter. We understood when we bought our land in 1988, that there was a mushroom farm located adjacent to our property, and that there were certain odors normally associated with this farming activity. In 1988 these odors were tolerable and rarely if ever affected our lives. As I write this letter to you in 1997, the situation has drastically changed. The neighboring mushroom farmers have substantially increased their mushroom growing operation, and most importantly, developed a new process for the increased cultivation, drying, bagging, and shipping of **Spent Mushroom Compost**. This new process has affected our community, our local neighborhood, and most dramatically, our family. The odors that this new process put out are extremely offensive to all who encounter them. It is potent enough to drive residents from their homes, or force them to open all doors and windows in their homes to help elevate this detestable odor. This odor attacks our home at predictable time frames. It happens whenever the mushroom farmers, adjacent to our home, aerate their spent compost. The aeration process happens throughout the entire year, so dealing with this odor differs with the seasons. In the winter we must shut off our heating system and open all windows and doors to let the odor out, no matter how cold it is. In the spring, we try the same as winter, unless we are in the middle of rainy season, so our choices then become suffer through it or leave our home. In the summer we run our air-conditioners, but this does not stop the odor from entering, so we leave the house. And in fall, we try the same as spring. I ask you, is this any way to raise a family?

This new process has an enormous effect on all who come in contact with it, yet no one seems to be able to stop it. To understand it might be a place to start. Hearing about it from the money hungry mushroom grower can never give the proper prospective on this process, one must visit the neighborhoods, their residents, the schools, perform air quality tests, and much much more to ensure that this new process will be one that does not drive families from their homes and communities.

Thank you for any help that you or your amendment may provide.

Sincerely,

John J. Rinck

ARTHUR D. HERSHEY, MEMBER
HOUSE POST OFFICE BOX 202020
MAIN CAPITOL BUILDING
ROOM 405 SOUTH OFFICE
HARRISBURG, PA 17120-2020
PHONE: (717) 783-6435
FAX: (717) 783-3899

3157 LIMESTONE ROAD
P.O. BOX 69
COCHRANVILLE, PA 19330
PHONE: (610) 593-6565
FAX: (610) 593-7041

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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MAJORITY CHAIRMAN, VETERANS AFFAIRS & EMERGENCY PREPAREDNESS
AGRICULTURAL AND RURAL AFFAIRS,
CONSUMER AFFAIRS

TIMBER CAUCUS
FIREMEN'S CAUCUS

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CHESAPEAKE BAY COMMISSION

October 23, 1997

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Environmental Quality Board
15th Floor, Rachel Carson State Office Building
PO Box 8477
Harrisburg, PA 17105-8477

Re: Amendments to PA Code Chapters 121 and 123
(Regulatory Basics Initiative #3 – Malodors)

Dear Secretary Seif:

I was pleased to see that the proposed amendments referenced above retained in principle the agricultural exemption to malodor regulation. However, the specific use of the phrase "production of agricultural commodities *in their unmanufactured state*" reflects language in the Air Pollution Control Act (1959 P.L. 2119, No. 787) prior to being amended by House Bill 873 which became Act No. 174 of 1996.

This Act, among other provisions, deletes the term "*in their unmanufactured state*" from Section 4.1 of the Air Pollution Control Act and adds a definition of "production of agricultural commodities". Included in this definition is "the processing of agricultural commodities propagated, produced, harvested or dried..." when this occurs on the premises of the farm operation where the commodity is produced. This was a key element in discussions of House Bill 873 prior to its passage into law and a provision fully supported by the Department of Environmental Protection.

In that I feel it is of utmost importance that the regulations accurately reflect the statute, I recommend changing section 123.91 (d)(1) of the proposed rulemaking to include this reference to processing of agricultural commodities on the premises where they are produced.

I would be pleased to discuss this request further at your convenience and look forward to favorable action by the EQB.

Sincerely,

Art

Arthur D. Hershey
State Representative

EQB
Environmental Quality Board

p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

November 14, 1997

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Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Janet H. Friday, Merck and Co., Inc.

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

I N T E R O F F I C E M E M O R A N D U M

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Date: 07-Nov-1997 04:18pm EST
From: Keller, Heather J.
heather_j_keller@merck.com@PMD
Dept:
Tel No:

TO: 'Environmental Quality Board' (Regcomments@a1.dep.state.pa.us@PMDF@

Subject: FW: Comments on Regulatory Basics Initiative #3 (Malodors)

Attention: Sharon Freeman

As discussed during our phone conversation on November 7, 1997, I am resending these comments to the correct e-mail address ("Regcomments@a1.dep.state.pa.us"). I had previously mailed these comments to EQB on October 29, 1997 to the e-mail address listed in the Pennsylvania Bulletin on August 23, 1997 ("Regcomments@a1.dep.state.pa.us"). The address listed in the PA Bulletin contained a typographical error, and resulted in having my e-mail returned to me on November 3, 1997 by the "postmaster@PADER.GOV". You instructed me to resend the comments so that they may be included in the Department's comment/response document.

Thanks for your consideration,
Heather Keller

From: Keller, Heather J.
To: 'Environmental Quality Board'
Subject: Comments on Regulatory Basics Initiative #3 (Malodors)
Date: Wednesday, October 29, 1997 12:32PM

Janet H. Friday, P.E.
Environmental Manager
Merck and Co., Inc.
P.O. Box 600
Danville, PA 17821
717-271-2103

October 29, 1997

Environmental Quality Board
15th Floor
Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, PA 17105-8477

RE: Comments on Regulatory Basics Initiative #3 (Malodors)

Dear Board Members:

Merck & Co., Inc. appreciates the opportunity to provide comments on the Department's proposed modifications to the malodor definitions and regulations contained in 25 PA Code Chapter 121 and 123. Notice of these proposed changes was published in the Pennsylvania Bulletin on August 23, 1997.

Merck is a research-based pharmaceutical company that operates two major manufacturing facilities in Pennsylvania. Merck has more than 9500 current and retired employees throughout the Commonwealth. In addition, we employ more than 1700 contractor and temporary full-time employees at our facilities. Combined annual payrolls and benefits total almost $390 million, and we pay more than $160 million to 1500 Pennsylvania suppliers. Since 1988, Merck has invested more than $1.2 billion in research, manufacturing, and corporate office infrastructure enhancements at its two Pennsylvania sites.

With pharmaceutical, biotechnology, and chemical manufacturing operations, Merck has maintained a commitment in the state for more than 50 years. Merck also contributes over $1.5 million annually in social services and science education, and was the recipient of the Governor's Waste Minimization award in 1991, 1992, 1994, and 1996.

Merck is a member of the Pennsylvania Chemical Industry Council (PCIC), and as such has participated in discussions with other member firms and PCIC officials to prepare oral testimony and written comments on the proposed changes to Pennsylvania's malodor regulations. Merck is supportive of the oral testimony and written comments submitted by PCIC regarding this rule. In addition to expressing support for comments submitted by PCIC, Merck would like to provide independent comments on several issues.

Merck does not believe that the proposed changes to Pennsylvania's malodor regulations are consistent with the intent of DEP's Regulatory Basics initiative. The proposed changes are more significant than simple procedural or streamlining changes. For example, the proposed revisions eliminate the current requirements for more than one person to find an odor objectionable, and for the odor to create a public nuisance before action is required. This regulatory change would eliminate the historical legal need to prove that odors from a source are a public nuisance before initiating an odor investigation. The change would also result in increased paperwork for DEP and regulated sources because a complaint by a single individual would require documentation, investigation, and a Best Available Technology (BAT) determination (if deemed necessary) for the complaint. This revision to the definition of a malodor could also encourage an individual to register an odor complaint against a company for motives other than odors, as odors are very subjective.

The inclusion of malodor rules in Pennsylvania's State Implementation Plan (SIP) is also inconsistent with EPA's policy, which has been to leave enforcement of odor regulations up to the individual states. Including malodor regulations in the Pennsylvania SIP will result in a

source having increased paperwork once a Title V permit is issued. Sources could be forced to institute routine odor monitoring at their fence-lines, and develop odor logs to comply with the monitoring and compliance demonstration requirements of their Title V permit. This monitoring would by nature be extremely subjective. In order to alleviate these burdensome monitoring and recording-keeping requirements, and in order to be consistent with EPA's policy on odor regulation enforcement, Merck suggests that DEP remove odor regulations from the Pennsylvania SIP.

Merck agrees that malodors can be a nuisance, and has proactively taken measures to control odors from sources at our manufacturing sites. Our processes currently have a very high level of emissions control. In addition, Merck works actively to be a "good neighbor" in the communities where our facilities are located. Merck has used fence-line meetings, outreach programs, and other means to obtain feedback and input from the community regarding any concerns stemming from Merck's operations. Merck also has systems in place to promptly investigate the source of any odors and implement appropriate corrective actions whenever any malodor does arise.

Because of the effective odor control systems and equipment currently in place at its facilities, Merck disagrees with the presumptive requirement that incineration be specified as BAT for odor control. Incineration results in increased emissions of other regulated pollutants, and requires fuel to burn the compounds in odorous streams since many fumes do not have a high BTU content. Merck feels that sources should have the flexibility to use other appropriate means of controlling odors, especially odors arising from volatile organic compounds (VOC's), which may be well-controlled through other methods.

If DEP is going to impose BAT based upon a single odor complaint, the standard must be made less subjective. What one person finds objectionable may vary widely from what the remainder of the public regards as a nuisance. At a minimum, DEP should consider utilizing some type of quantitative, non-subjective odor standard to determine when an odor is objectionable.

Finally, Merck objects to the imposition of a 5-year time frame on the BAT determination for odors proposed by DEP. This would be a precedent setting rule if adopted. No other regulations currently allow for additional later BAT determinations after control technology has been installed for a source. It could become very costly for companies to install new emissions controls based on a new BAT determination every 5 years. DEP's preamble to the revised rule states that the intent of this requirement was to create certainty concerning the extent of responsibility a facility has for control of odors. Merck feels this rule will actually accomplish the opposite, in that a facility would be uncertain as to whether installed control equipment is sufficient, as a new BAT determination could be made for that source at 5 year intervals.

Thank you for the opportunity to provide comments on these proposed changes to Pennsylvania's malodor regulations.

Sincerely,

Janet Friday, P.E.

cc: Mr. David Aldenderfer, DEP, Northcentral Regional Office

Original: 1877
Copies: McGinley (Itkin & George only)
Nyce (Itkin & George only)
Tyrrell
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Wyatte Bereschak

EQB
Environmental Quality Board
p.o. box 8477 · harrisburg, pa. 17105-8477 (717) 787-4526

September 30, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

RE: Proposed Rulemakings - Malodors (RBI #3) (#7-325) and Equivalency Determinations and Aerospace Manufacturing (#7-326)

Dear Mr. Nyce:

The Environmental Quality Board (EQB) held three public hearings concerning the subject rulemakings on September 23 in Harrisburg, September 25 in Pittsburgh and September 29 in King of Prussia. Testimony and/or written statements regarding these proposals were presented to the Board at the hearings by the following individuals:

Equivalency Determinations and Aerospace Manufacturing

None

Malodors (RBI #3)

1. Michael Fiorentino, Clean Air Council
2. David W. Patti, Pa. Chemical Industry Council
3. Nancy Parks, Sierra Club
4. Karl J. Novak
5. Rich Thomas, Representative George's office
6. Marie Kocoshis, Group Against Smog and Pollution
7. Myron Arnowitt, Clean Water Action (no written statement)
8. Tom Buell (no written statement)
9. Alex Griffith (no written statement)
10. Hon. Ivan Itkin
11. Jerome Balter, Public Interest Law Center (no written statement)
12. Tina Daly, Pa. Environmental Network
13. Zulene Mayfield, Chester Residents Concerned for Quality Living (no written statement)
14. Jane Garbacz
15. Donna Madaras Cuthbert, Alliance for a Clean Environment

Copies of these written statements are enclosed for your review. Please contact me if you have any questions.

Sincerely,

Sharon K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

Original: 1877
Cc: Tyrrell
Sandusky
Wyatte
Bereschak

(1)

Clean Air Council

135 South 19th Street
Suite 300
Philadelphia, PA 19103
215-567-4004
Fax 215-567-5791
E-Mail office@cleanair.org

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
REGULATORY BASICS INITIATIVE - MALODOR REGULATION
SEPTEMBER 23, 1997

Good afternoon. My name is Michael Fiorentino. I am a staff attorney with the Clean Air Council, a statewide membership-based nonprofit environmental advocacy and education organization. The Council uses public education, citizen-based advocacy, and government oversight to protect the rights of Pennsylvania residents to breathe clean air.

Odor regulations provide neighborhood residents with one of the few mechanisms that enables them to effectively battle polluters in order to safeguard their environment and their health. This is because malodors, often signaling the presence of some of the more dangerous environmental hazards to which people are exposed, are also more easily detected than most other types of pollution. The Council is extremely concerned with the Department's desire to weaken the current malodor regulations.

Malodors are often a serious environmental and public health threat throughout Pennsylvania. DEP claims that nearly a third of all complaints that its regional air program offices receive relate to malodors. This being the case, the Council finds the Department's attempts to streamline the complaint and investigation process to be inappropriate and confusing. The Council believes that each and every odor complaint deserves serious attention from the Department. Limiting the issuance of notices of violation for malodor to only those that have been reported a certain number of times or to those that elicit the most public objection, severely jeopardizes the public health and will discourage residents from reporting problems in their neighborhoods. All malodors, whether they are being reported for the first time or the fiftieth time and whether one person has complained or fifty, deserve serious attention from Department investigators. There is probably no other kind of enforcement action taken by the Department that better reflects its

Clean Air Council 30 YEARS OF SWEET SUCCESS

respect for the members of the community than how it handles odor complaints.

Even a single documented complaint should be sufficient grounds for the issuance of a notice of violation. Polluting entities are responsible for knowing that the law prohibits malodor migration.

Furthermore, requiring an inspector to undertake a complex investigation of the frequency of odors from a source and acquiring affidavits and odor logs has the potential to further burden the entire process, thereby defeating the Department's objectives. An investigator needs to be able to issue a notice of violation to a facility when he or she detects a malodor while conducting an inspection in response to a complaint. If the Department is suggesting, however, that the investigator must first undertake the complex investigation process before being able to document an official malodor, then the process will become mired down in bureaucracy and will fail to serve the needs of community residents. Prolonging the entire process will also subject the affected community to further harm as the facility continues to emit the malodor. At a time when the DEP's ability to enforce the full range of air quality laws and regulations is stretched thin, it is highly unlikely the resources will be available to make these proposals work with the efficacy of its regulatory predecessor.

Regarding malodors that result from the emissions of volatile organic compounds, the Council encourages the Department to retain the current minimum requirements that facilities must meet. VOCs are some of the most pervasive and dangerous air pollutants in Pennsylvania. Maintaining a strict limit on malodors from the incineration of materials which result in the emission of VOCs is essential to protect the public health.

Finally, the Council would like to address the Department's proposal to exempt facilities from having to reduce residual odors for a five year period for those that control malodorous air contaminants through the use of best available control technology (BACT). Pollution control technology evolves at such a rapid rate that what is considered BACT will change from year to year. Exempting a facility from having to reduce residual odors for five years despite the fact that the control technology it uses will most likely become outdated is an endorsement by the Department for facilities to emit malodors that threaten the public health. The Council believes that a more

stringent and periodic review of all facilities that emit malodorous air contaminants is more environmentally friendly and is a more effective means of protecting the public health.

Thank you for the opportunity to speak before you today. The Council reserves its right to submit further comments in writing.

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Testimony of
David W. Patti, President
Pennsylvania Chemical Industry Council
proposed Amendments to the Malodor Regulation
25 Pa Code Chapter 121 and 123
before the
Environmental Quality Board
September 23, 1997

Good afternoon. Thank you holding these important public hearings and for providing the Pennsylvania Chemical Industry Council an opportunity to comment on the proposed amendments to the Commonwealth's malodor regulation. My name is David Patti. I am the President of PCIC.

There are over 560 chemical-related facilities in Pennsylvania. Industries in the state that rely on the chemical industry for a significant portion of their inputs employ about 1.3 million workers. Pennsylvania's chemical industry itself, employs about 65,000 people, or more than 6 percent of the state's manufacturing workers. The chemical industry's total wage and salary payments in Pennsylvania amount to more than $3 billion annually, or more than 10 percent of the total for manufacturing in the state. The state's chemical workers earn average annual wages and salaries of about $48,000 – nearly 50 percent higher than the state's overall average.

Pennsylvania ranks 7th among the states in chemical production. The value of the state's chemical shipments total more than $14 billion annually. Each year, over $1 billion worth of chemical products are shipped abroad from Pennsylvania. Overall, the total US chemical industry exports more than $24 billion annually, and maintains a trade surplus with every nation including Japan.

We make, in this state, the basic chemicals for products critical to our daily lives: pharmaceuticals, plastics, fertilizers, pesticides, paints and coatings, food additives and preservatives, synthetic fibers, cosmetics, and building materials.

BACKGROUND

The proposed amendments to the malodor regulation is a major departure from historical approaches to "public nuisances." In fact, we were somewhat surprised to find this proposal in the Regulatory Basics Initiative since it is more far reaching than a procedural or streamlining issue.

PCIC and its 100 member firms share the concern of our Commonwealth's citizens that bad odors originating in manufacturing operations can be unpleasant, distasteful, irritating, disruptive, and even threatening to property values. Through voluntary efforts such as Responsible Care®, the chemical industry has worked hard to be good neighbors within the communities in which we are located.

Historically, Pennsylvania has recognized the spirit of the social contract between neighbors and industry only implemented public policy provisions when that contract was broken through behavior or actions that created a continuing public nuisance. The definition of "air pollution" in the state Air Pollution Control Act requires proof of a noxious or obnoxious odor which may be inimical to the public health, safety and welfare or which unreasonably interferes with the comfortable enjoyment of life or property. The statutory emphasis on "public health" and "unreasonable interference" clearly implies that there must be a public interest sufficiently strong enough to require a lawful business to invest in odor control equipment.

The regulatory definition of malodor – in the current regulation – is consistent with the state statutory definition by requiring proof that the odor be "an odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public."

Caselaw requires the Department, in order to prove an odor violation, to present the testimony of more than one complainant to demonstrate a public nuisance because of the subjective nature of a community's perception of odors.

The current regulatory definition of malodor has withstood a challenge based upon "void for vagueness." Suit was brought on the grounds the regulation required an odor must discomfort "the public" before action can be taken. The Third Circuit Court of Appeals held Pennsylvania's odor emission regulation is not unconstitutional and noted the words "annoy" and "discomfort" have long been used in both common law and statutory law.

PROPOSAL

DEP proposes to amend the definition of malodor at 121.1 by deleting "an odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public" and replacing it with "an objectionable odor which is first identified by a member of the public and subsequently documented by the Department in the course of an odor investigation to be an objectionable odor."

DEP also proposes to add a definition of "odor investigation" which would be "an investigation of the source and frequency of odors which may include, but is not limited to, an inspection of a facility, surveillance activities in the area of a facility, affidavits, or odor logs."

Currently, the presumptive remedy for malodors is incineration. DEP proposes to amend the regulation to state that Best Available Technology (BAT) is required. If a malodor exists after five years following implementation of BAT, then DEP may require a new BAT determination.

DEP says the proposed regulation "streamlines both the complaint and investigation process and establishes clear limits of responsibility for facility owners."

COMMENTARY

Frankly, we don't agree with this assessment. PCIC fears the proposal will make dealing with malodors more contentious, more bogged-down in procedure and legal wrangling, more costly, and ultimately less responsive to the public and the demands of good environmental stewardship.

By removing annoyance and discomfort to the public from the definition of malodor, the Department is moving beyond its statutory authority to address "air pollution." The essence of malodor regulatory history is to balance public nuisance with economic burdens on business. The proposal sets no standards to determine or evaluate when an odor is "objectionable." The absence of annoyance and discomfort to the public makes the proposed regulation so subjective as to make enforcement arbitrary.

It is our very strong belief that malodor remedies should be reached on a case-by-case process involving the firm, the citizens who make complaints, and the Department. There should be a continuum of response that takes into account a firm's adherence to the social contract and demonstration of "good neighbor" behavior.

RECOMENDATIONS

The definition of malodor must maintain the common law traditions of "annoyance and discomfort to the public." A single complaint should not trigger an investigation. This is a waste of governmental, as well as industry resources. In the Bay Area Air Basin of California, for example 10 "validated" complaints are required to trigger an investigation. The concept of incident validation is an important one. Validation requires the Department to show that "yes" there was an odor; "yes" it caused a public nuisance or annoyance; and "yes" the Department confirmed that the suspected source was indeed the origination

point of the odor. (Often people will assume they know the source of the odor and report it without determining that shifting wind conditions are bringing an odor from an unusual source.)

Let me suggest another concept that should be present in the definition. In order to trigger Departmental action, it should be demonstrated that the alleged malodor is both systematic and routine (ie. a part of a facilities normal operations). This can be demonstrated through a record of complaints.

A malodor complaint which is the result of an incident or process upset at a facility should not result in a formal odor investigation or in the requirement to implement BAT as the corrective action. The validation process can be used to determine whether an odor is ongoing or resulted from a one time occurrence The Department's response should differ with this determination.

The validation process should also use metrics to reduce subjectivity and demonstrate the degree of public discomfort caused by an odor. Several jurisdictions employ the ASTM butanol odor intensity scale. This system uses a binary scale from 1 to 8 in which every point on the scale indicates the doubling of the concentration butanol ($C_4H_{10}O$) in the control air. Air samples from a site are then compared with the control. Level 1 or 2 on the scale probably won't result in any complaints. Level 2 or 3 may result in complaints. Higher levels indicate air concentrations of odors that are detectable and objectionable. Trigeminal "irritation" usually starts at Level 5. Such a procedure in Pennsylvania might actually result in the streamlining the agency seeks in this amendment. (More information on these techniques is available from the Air & Waste Management Association which has done much in the area.)

PCIC believes that an odor investigation should be defined as a multi-step progression of actions. Initiation of an investigation, after validated complaints have been reviewed, should require the suspected source to work proactively with the citizens who filed complaints to understand the problem and rectify or implement corrective action to the citizen's and DEP's satisfaction. Often, operational changes or leak detection and repair activities may be the appropriate remedy to eliminate or reduce the source of the malodor.

Failure on the part of the source to conduct meaningful corrective action in a responsible manner could drive the process to more prescriptive measures: up to and including ordering the implementation of BAT controls for the malodor. A order to install and maintain BAT, should not, however, be the expected outcome of an odor investigation. Ordering BAT means the system of mediated understanding and cooperation has failed; not succeeded.

When BAT is ordered, PCIC does not believe that incineration should be the presumptive remedy for malodor – especially for volatile organic compounds (VOCs). Incineration is not the only option which is effective at controlling emissions. Worse, incineration wastes fuel (since there is little or no fuel value in the odors themselves) and could potentially generate other regulated emissions.

The Department should encourage facilities to identify the solution to the malodor which has the lowest total environmental impact. Alternative control technologies such as scrubbing, biofiltration, adsorption, and closed loop vapor balancing all have the potential to reduce or control malodorous emissions below the level which would trigger a malodor. In addition, as noted earlier, operational changes and leak detection and repair activities may be more appropriate for eliminating or reducing the source of the malodor. The facility in question should be afforded greater flexibility in identifying control technologies or operational changes to eliminate the malodor problem. The facility should be required to demonstrate, based on sound engineering practices or past practice, that the proposed solution will deliver the expected result. Continued citizen complaints would, of course, trigger another investigation and additional departmental action.

If a firm is ordered to install BAT, it should be granted a 10 year operating period before a review of the technology is required. Validated odor complaints resulting from a different process or piece of equipment within the same facility, would of course, trigger a new odor investigation. However, it is important that firms have some stability in their regulatory framework.

RELATED ISSUE: MALODOR IN THE SIP

Unlike most states, Pennsylvania's odor regulation is part of the State Implementation Plan and appears to be federally enforceable. This means the odor regulation may be an "applicable requirement" for major sources subject to Title V permitting. Notwithstanding any proposed revision to the malodor regulation, PCIC believes the SIP should be revised to eliminate the malodor regulation. Malodors are a particularly appropriate area for local community standards and should not be federally enforceable. In addition, the malodor regulation does not bear any relation to attainment or maintenance of a National Ambient Air Quality Standard.

Thank you again for the opportunity to present our views. I will be happy to take your questions, or obtain additional information for you on the points raised in these comments.

Original: 1877
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September 23, 1997

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TESTIMONY BEFORE THE EQB
REGULATORY BASICS INITIATIVE #3
MALODORS
PA BULLETIN 27(34): 4341-4343, August 23, 1997

I THANK THE CHAIRMAN AND THE EQB MEMBERS FOR THE OPPORTUNITY TO TESTIFY TODAY. I AM NANCY F. PARKS, AND I REPRESENT THE 19,000 MEMBERS OF THE SIERRA CLUB, PENNSYLVANIA CHAPTER TODAY. I AM CHAIR OF THE PENNSYLVANIA CHAPTER'S CLEAN AIR COMMITTEE AND I ALSO SERVE ON THE SIERRA CLUB'S NATIONAL AIR COMMITTEE – OF WHICH I AM PAST CHAIR FOR 1995/1996 – AND THEIR TRADING TASK FORCE.

I HAVE SERVED ON THE DEPARTMENT OF ENVIRONMENTAL RESOURCES AIR AND WATER QUALITY TECHNICAL ADVISORY COMMITTEE (AWQTAC) FOR MORE THAN FOUR YEARS, AND I HAVE BEEN APPONITED THIS YEAR TO THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S AIR TECHNICAL ADVISORY COMMITTEE (AQTAC). THUS I AM INTIMATELY FAMILIAR WITH THE DISCUSSIONS THAT HAVE TAKEN PLACE WITHIN EACH ADVISORY COMMITTEE MEETING BETWEEN INTERESTED PARTIES AND THE REGIONAL OFFICE AND CENTRAL OFFICE DEP STAFF.

BEFORE I DESCRIBE MY COMMENTS TO YOU CONCERNING THIS REGULATION, I MUST ENTER A POLITE PROTEST. IT IS A DISTURBING TREND THAT THE EQB HAS SCHEDULED THESE REGULATORY HEARINGS DURING THE DAY AND IN INACCESSIBLE LOCATIONS. AIR REGULATIONS, AND IN PARTICULAR, THIS MALODOR REGULATION ARE OF INTENSE CONCERN TO THE PUBLIC AT LARGE; THE GENERAL PUBLIC, THAT IS. THESE REGULATORY HEARINGS SHOULD TAKE PLACE IN THE EVENING, SO THAT THOSE WORKING DURING THE DAY WITH LITTLE TO NO OPPORTUNITY TO TAKE A DAY OFF, COULD BE HERE TO EXPRESS THEIR VERY IMPORTANT OPINIONS. THESE HEARINGS SHOULD ALWAYS BE HELD AT THE LOCATIONS WHERE THEY ARE OF THE MOST INTEREST. IN THE CASE OF MALODORS, DEP'S DESCRIPTION TO AWQTAC OF THE OCCURRENCE OF MALODOR COMPLAINTS SHOWED THAT OF THE MORE THAN 600 COMPLAINTS THAT DEP RECEIVES EACH YEAR ON ODORS, THAT ABOUT 300 ARE REPORTED IN PHILADELPHIA AND ABOUT 300 IN

PITTSBURGH; YET THERE IS NO HEARING AT ALL IN PHILADELPHIA, WHILE THE KING OF PRUSSIA LOCATION IS COMPLETELY INACCESSIBLE TO PUBLIC TRANSIT, AND THE PITTSBURGH SITE IS LOCATED ON AN ISLAND WHERE PUBLIC TRANSIT IS LIMITED.

THE SIERRA CLUB REQUESTS THAT EQB MAKE IT A POLICY THAT ALL REGULATORY HEARINGS BE HELD IN THE EVENING, THAT THEY BE HELD IN THE FIELD AT THE LOCATIONS WHERE INTEREST IS GREATEST, AND THAT ONLY LOCATIONS ACCESSIBLE TO PUBLIC TRANSIT BE USED.

COMMENTS

NOTE: Any time that I use the word "public" below, I mean the general public, which does not include the affected sources under this regulation. Affected sources concerns must always be clearly separated from the concerns of the Pennsylvanians that these air pollution sources affect.

I must tell you from the start that the Sierra Club can not support this proposed regulatory revision in its current form. Specifically:

Under SECTION 121.1 Definitions, the Sierra Club believes that the definition of "Malodor" should be changed to delete from this definition the words at the end of the definition, "... to be an objectionable odor".

It is the right of the general public to decide if an odor is objectionable to them. It should not be a subjective decision of a DEP staff person or inspector. Only the person experiencing the malodor at a particular time and place can identify an odor as objectionable to their person; it will depend entirely on that person, their experience and their sensitivity to the odor.

Under "Malodor": We praise DEP for their change to this definition that allows a single individual to complain to DEP of an objectionable malodor.

Under "Odor Investigation": Delete the words, "... the source and frequency of ...". The number of times a malodor is smelled and identified by a member of the public has no relevence to whether or not the odor must be controlled. Any attempt to add a frequency requirement to this regulation would be viewed by the Sierra Club as an attempt to further weaken this regulation and would, in fact, make its use by the public mote. Pennsylvanians have a constitutional right to clean air, therefore they have a right to live without objectionable, dangerous or life-threatening odors. The Sierra Club would not take lightly the denial to our 19,000 members the right to complain about odors and to receive a report from DEP into an investigation on this objectionable odor.

Under Section 123.31 Limitations, the Sierra Club believes that the addition of a new section (c) should be deleted. **The** Best Available Technology (BAT) contemplated under this proposed revision of the regulation will not provide reasonable protection to the public. Since the public in Pennsylvania have a constitutional right to

clean air, they have the right to be protected from odors that are objectionable, but that may also be life threatening or difficult to live with. Period.

This section should also be deleted because of the loophole that allows good people to be exposed to objectionable odors for at least a five year period if the BAT does not work to end the problem. If a source possesses an air permit, then a review is done at the end of every five years; unfortunately, I fear that it may also mean that the review of BAT may be delayed for as much as 10 years. Specifically, if a source has a Title V permit and its review is not up for another four year period at the time the odor is identified and documented by DEP to be malodorous, then that source will pass through that regular 5 year permit window – i.e. in four years - without the BAT review requirement being triggered. Does DEP intend that the BAT review be triggered when the source is one year into its next permit cycle? Or does DEP intend that that would then allow the malodor source to continue for another five years, since the BAT review would occur during its next regular permit review at the end of another 5 years? That would allow a period of time when the public would suffer exposure to be almost 10 years.

For the use of a BAT to be acceptable to the public and to the Sierra Club's members, the review would need to be no longer than two (2) years after installation. The Sierra Club also feels that BAT is inadequate to protect the public and that the decision as to what BAT is likely to be in any given instance is far too open to manipulation and negotiation by the affected sources, and that politics would have too great a role in that decision. DEP would also need to create a mechanism to chose BAT, that the public could feel assured would be independent of the affected source or of politics.

DEP has indicated that the BAT determinations and requirements could be included in the SIP. That would be a good idea considering the inconsistencies and loopholes created by the proposed revision to the current regulatory language.

Additionally, the Sierra Club believes that under Section 123.31(d), parts (d)(2,3,4,5) should be deleted. The inclusion of these additional exemptions significantly weakens a regulation that has already and for a long time found it difficult to protect the public from disgusting odors. There is no good reason to protect these activities from public complaint. If they cause objectionable odors then one of two things should happen: either they should be regulated at the start and they should be liable for complaints, or they should never be permitted in residential neighborhoods.

Up until this point, my comments have addressed two of the tree questions that DEP have proposed for public comments. That is:

1. ***In documenting whether an odor is objectionable, how should the frequency of occurrence and the extent of public objection be evaluated?***

Recommendation: That a single individual be permitted to lodge a formal complaint

and that a single occurrence of an objectionable odor should trigger an investigation.

3. ***Is the five year review period for BAT the appropriate time frame?***

Recommendation: No. BAT is unacceptable unless it can be reviewed every two years, and the mechanism to chose BAT is independent of negotiation by the affected source.

2. *Should the Department retain its long- standing minimum requirements for malodors resulting from emissions of VOC's.*

I must admit to complete surprise when I read this question. I have no recollection of this discussion taking place at AWQTAC. Neither do I have any notes on this aspect of the malodor issue. Therefore, I will deal with this primarily during my written comments to the EQB to be submitted before October 29th, 1997.

I will say though, that VOC's are listed under the Clean Air Act Amendments of 1990, section 112 as toxic air pollutants, with a requirement that a MACT technology be applied. Section 112 also says that DEP must do their own MACT determination if EPA does not conclude their own in a timely manner. I hope that DEP is not suggesting that Pennsylvania comply with less than the minimum requirements of the Clean Air Act, and use a BAT for VOC's instead of the required MACT.

In conclusion, it is obvious that the occurrence of malodors is especially important to our membership. The Sierra Club believes that DEP should be expanding and strengthening this regulation, and not effectively eliminating this regulation as we see happening through these proposed regulatory revisions.

RECOMMENDATIONS

1. This regulation should be strengthened;
2. Single member of the public should be able to file complaint;
3. Response of the DEP to a complaint should be immediate;
4. That inspections of the facility/source should be immediate and should be unannounced;
5. That all manner of investigation techniques should be available to DEP, not just the unannounced inspection of a facility or source, surveillance activity, affidavits or odor logs;
6. That in order to accomplish this demanding task, we believe that the regional offices, particularly in Philadelphia and Pittsburgh areas, should have dedicated staff to work on odor complaints; and
7. That in order to accomplish this demanding task, we believe that the regional offices, particularly in Philadelphia and Pittsburgh areas, should have its air staff increased until it is adequate to address the need to combat odor exposures to the public; depending on the needs of that regional office.

Thank you.

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September 23, 1997

I have studied the PA Bulletin Vol. 27, No. 34, of 23 August 1997 and find one provision, 123.32(d), to be most objectionable.

This provision would exclude "agricultural commodities in their unmanufactured state." In other words, hog waste would no longer be considered objectionable. This notion is completely unrealistic, especially considering the hog factories (Confined Animal Feeding Operations) of thousands of hogs with an annual output of upwards of five (5) million gallons of waste.

My community of Clearville PA in Bedford County is slated for two of these factories, which will require an additional 36 finishing houses of 2000 hogs in each one. The net hog waste production is estimated at 81 million gallons per year at full production.

You may say that Act 6 (The Nutrient Management Act) will help prevent the stench from this enormous amount of hog waste. Not so, as odor reduction acts such as injecting or plowing down the waste are not required. Additionally, there are no set backs between fields receiving the hog waste and homes, public parks, churches, schools, hospitals, and populated areas. The real tyranny of Act 6 is that it precludes townships and municipal bodies from passing an ordinance that is more restrictive or protective of the public. It also preempts all existing ordinances.

The counties of Fulton, Susquehanna, Franklin, Tioga, Lancaster, and Perry have also been targeted for hog factories.

Why are these concentrated hog feeding operations (CAFOs) proliferating in Pennsylvania? I believe that the thoughtless pursuit of exports and production at any cost with a complete disregard to the future viability of family farms and the ecological problems CAFOs create are at the heart of the problem. This gigantic explosion of hog production is not for our domestic consumption. It is targeted for feeding the Pacific Rim. That part of the world has experienced recent outbreaks of hoof-and-mouth disease and has an intimate knowledge of the staggering host of bacterial and viral problems which thrive in concentrated animal and human populated areas. Is it in our long-term interests to thrust these risks on our children and grandchildren? We must ask ourselves a very timely question. Are we willing to assume these long-term human and ecological problems which have the potential of requiring the expenditure of billions of clean-up dollars, completely destroying a clean area, ruining a quality of healthy life and fracturing community so that it is no longer viable or livable?

We in Pennsylvania must prepare and address the future which could be a duplicate of what has been planned for hog factories in Kentucky. The Livestock Task Force News Update of August 8, 1997, announced that a subsidiary of Vall, Inc. of Spain intends to build a 24,000 sow operation in Kentucky, which will produce over 1/2 million pigs per year and millions of gallons of hog waste. We in Pennsylvania could find ourselves facing a similar planned factory of comparable size in the future.

The proposal of excluding agricultural commodities in their unmanufactured state is not in the best interests of our sustainable future.

I implore you to exclude this provision from the malodor regulatory revisions.

Karl Novak

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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE, DEMOCRATIC CHAIRMAN
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RULES COMMITTEE

TESTIMONY BEFORE THE ENVIRONMENTAL QUALITY BOARD - TITLE 25, CHAPTERS 121 and 123 (MALODORS) SEPTEMBER 23, 1997

THANK YOU, MR. CHAIRMAN, FOR THE OPPORTUNITY TO SPEAK ON THESE REGULATIONS. I AM REPRESENTATIVE CAMILLE "BUD" GEORGE, DEMOCRATIC CHAIRMAN OF THE ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES.

SIMPLY PUT, THE ADMINISTRATION'S PLAN TO SIGNIFICANTLY WEAKEN THE TOOLS THAT CITIZENS HAVE TO COMPLAIN AND ACT AGAINST INDUSTRIAL PLANTS AND BUSINESSES THAT PRODUCE FOUL ODORS SHOULD BE ABANDONED. INCLUDED IN THESE CHANGES IS A FIVE-YEAR BAR ON COMPLAINTS AGAINST MALODORS ONCE A BUSINESS HAS TRIED TO FIX THE PROBLEM THROUGH THE USE OF BEST AVAILABLE TECHNOLOGY (BAT). I DO NOT SUBSCRIBE TO THE ARGUMENT THAT THE CAPITAL INVESTMENTS MADE FOR THE PURPOSES OF BAT WOULD MAKE IT TOO EXPENSIVE TO CONTROL ODORS. BUSINESSES BUY NEW COMPUTERS, FAX MACHINES, AUTOMOBILES, AND OTHER CAPITAL INVESTMENTS EVERY YEAR. THERE IS NO LOGIC IN NOT REQUIRING BUSINESSES TO DO THE SAME TO REDUCE AN OUTSTANDING FOUL ODOR. IF A BUSINESS CANNOT BE A GOOD NEIGHBOR, THEY SHOULD NOT GET A FIVE-YEAR VACATION FROM TRYING.

MOREOVER, THE PROPOSED CHANGES WILL ALSO COMPLETELY PROHIBIT ANY COMPLAINTS FROM BEING FILED AGAINST RESTAURANTS AND PRIVATE RESIDENCES.

I ALSO BELIEVE THE CHANGES PROPOSED IN THIS RULEMAKING SET UP A NEW LOOPHOLE THAT WILL ALLOW THE DEP TO EXEMPT THOUSANDS OF BUSINESSES FROM FOLLOWING EVEN THESE WEAKENED RULES IN THE FUTURE BY DETERMINING THEM TO BE OF MINOR SIGNIFICANCE. ALTHOUGH THE DEP HAS WORKED CLOSELY WITH THE REGULATED INDUSTRIES ON THIS REGULATION, THEY HAVE NOT DISCLOSED WHAT TYPES OF ODORS THEY ARE PLANNING TO DESCRIBE AS "OF MINOR SIGNIFICANCE," THUS EXCLUDING THEM FROM ALL MALODOR REGULATIONS. WE DO NOT KNOW WHAT BUSINESSES WILL BE COVERED, WE DO NOT KNOW WHAT PLANTS WILL BE COVERED, AND WE IN THE GENERAL ASSEMBLY WILL NOT HAVE A CHANCE TO REVIEW THE ADDITIONS TO THE LIST THROUGH THE

NORMAL REGULATORY REVIEW PROCESS, INCLUDING REVIEW BY THE STANDING COMMITTEES AND THE INDEPENDENT REGULATORY REVIEW COMMISSION.

FINALLY, COMPLAINTS ABOUT ODORS MAKE UP A SIGNIFICANT NUMBER OF THE TOTAL ENVIRONMENTAL COMPLAINTS FILED IN PENNSYLVANIA. AS A MEMBER OF THE GENERAL ASSEMBLY AND THE ENVIRONMENTAL QUALITY BOARD, I BELIEVE IT IS OUR DUTY TO ENSURE THE QUALITY OF THE AIR WE BREATHE, IN ACCORDANCE WITH THE PENNSYLVANIA CONSTITUTION.

THIS REGULATION IS A STEP BACKWARD. I URGE THE DEPARTMENT TO DO WHAT IS RIGHT AND DELETE THE FIVE-YEAR BAT PROVISION, AS WELL AS THE PROVISION ALLOWING THE DEP TO ADD ADDITIONAL EXEMPTIONS WITHOUT GOING THROUGH THE STANDARD REGULATORY PROCESS.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY.

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Comments of Group Against Smog and Pollution on
Regulatory Basics Initiative #3 (Malodors)
Title 25: Pennsylvania Code Chapters 121 and 123

Public Hearing, September 25, 1997 at 1:00 pm,
Department of Environmental Protection, Southwest Regional Office

Hello, my name is Marie Kocoshis. Thank you for the opportunity to speak today on the proposed rulemaking regarding malodors (Title 25: Pennsylvania Code Chapters 121 and 123). I am making a statement on behalf of the Group Against Smog and Pollution.

This proposed rulemaking, part of the Regulatory Basics Initiative, is a significant weakening of the previous Pennsylvania code and as such, is an appalling affront to citizen involvement in air quality enforcement. In reality, this proposed rulemaking will prevent there from ever being another odor complaint in Pennsylvania. We are concerned that this is removing a constitutional right and putting the business community's interests ahead of citizens' interests.

A malodor is an early warning system for the public -- often the first and only clue that something is wrong. Depending on the source of the odor (in particular those from chemicals), by the time an individual smells the odor, public health has already been put at risk, and an individual or community may have been exposed to a toxic dose.

In chapter 121.1 on definitions, we object to the phrase at the end of the malodor definition "to be an objectionable odor." This subjective phraseology allows the Pennsylvania DEP to make the determination that this odor is objectionable, and this right belongs to the public. We believe that the change which allows a single member of the public to identify a malodor (objectionable to them) is a preferred revision.

The new language regarding odor investigation is disturbing in that it now requires a complex investigation which may or may not include an inspection of a facility by a Pennsylvania DEP inspector. The affidavits (no matter by whom) will provide a totally subjective opinion -- one subjective opinion against another. There is no value in that -- the public deserves a more objective response and by one qualified to make a determination.

We suggest that within this definition the word "frequency" be deleted. Odor control strategy should not be determined by how frequent a malodor is identified by the public.

Subsection (c) of Chapter 123.31 is the most egregious of these revisions. To the public, it means that there is no control of odors; and this whole section should be

deleted. The provision that a facility will be exempt for five years with the best available technology (BAT) is unacceptable. The public will have to wait five years for a review that the Pennsylvania DEP "may" do and during that time complaints will be stifled. If citizens (under this proposed subsection (c) have no recourse under Pennsylvania DEP regulations, what recourse will that have when a source continues to produce objectionable odors? Will their only recourse be to declare it a nuisance? Or will there be no recourse?

The addition of exemptions under (d) #2, 3, 5 further weaken this regulation that already cannot effectively protect the public. These exemptions should be removed. We strongly object to subsection (e) which allows the Pennsylvania DEP to add exemptions. It is a very disturbing precedent to leave so much discretion in the hands of the Pennsylvania DEP. The Pennsylvania Bulletin is not an acceptable place to publicize the Pennsylvania DEP's intention to modify the exemption list and will not adequately inform the public about changes and public comment periods. The announcement of any changes and comment periods must be in a publication with wide circulation and contained in the main body of the publication.

We believe this regulation should be strengthened, not further weakened as in the proposed rulemaking. The public deserves an immediate response from the Pennsylvania DEP -- site inspection should be immediate and unannounced. Malodors are a threat to the public and deserve serious response and/or corrective action from the Pennsylvania DEP. The proposal of a five-year exemption for a facility using best available technology is an insult to the community. It says we just have to live with it. These proposed revision would take away the right of the public to have a say in the enforcement of air pollution controlling regs in their neighborhood, thus effectively depriving them and the right to safe and healthy environment. We strongly urge you to withdraw these weakening revisions.

In conclusion, we believe that once again these proposed regulations are pro business. The business community is treated with a great deal of respect and the citizens are afforded none. These proposed regs are anti-citizen and anti-community and are just wrong. We call upon the Pennsylvania DEP to do what is right for the citizens and reject these weakening amendments.

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(5)

HOUSE DEMOCRATIC WHIP IVAN ITKIN
DEP HEARING ON ODOR EMISSIONS
SEPT. 25, 1997

LAST YEAR, GOVERNOR TOM RIDGE INTRODUCED A PLAN CALL "LINK TO LEARN," PUTTING COMPUTERS IN CLASSROOMS.

THEN HE PROPOSED SELLING OFF THE STATE STORES, WHICH WOULD INCREASE UNDERAGE DRINKING. WE CALLED THAT "LINK TO DRINK."

NOW, GOVERNOR RIDGE IS SUGGESTING THAT PLANTS BE ALLOWED TO SPEW FOUL-SMELLING AIR FOR FIVE YEARS. I'D CALL THAT "LINK TO STINK."

THIS GOVERNOR IS ABSOLUTELY DETERMINED TO HAND OVER CONTROL OF THIS STATE TO CORPORATIONS. WHATEVER HE CAN DO TO HELP BUSINESSES, HE DOES – EVEN AT THE EXPENSE OF CITIZENS' WELL-BEING, SAFETY, AND COMFORT.

THIS GOVERNOR BRAGS ABOUT THE LOW WAGES THAT

WORKERS WILL TOIL FOR.

HE OPENS MORE HIGHWAYS UP TO BIGGER, MORE DANGEROUS TRUCKS.

HE CALLS SELLING LIQUOR STORES HIS TOP PRIORITY – AS IF THAT'S WHAT MOST PENNSYLVANIANS WORRY ABOUT AT NIGHT.

HIS ENVIRONMENTAL PERMIT PROCESS IS OBSESSED WITH TURNAROUND TIME, WITH LITTLE REGARD FOR ACTUALLY REVIEWING A PLAN'S ENVIRONMENTAL IMPACT.

AT EVERY TURN, HE UNDERMINES THE DAILY LIVES OF PENNSYLVANIA'S WORKING PEOPLE, AND THIS PROPOSED REGULATION FITS NEATLY IN THAT PATTERN.

FOR INSTANCE, USE OF THE WORD "CONTROL" IN SECTION C IS AMBIGUOUS. I'M AFRAID THAT "CONTROL" DOESN'T ACTUALLY MEAN ELIMINATING THE PROBLEM. INSTEAD, IT COULD MEAN THAT A PLANT JUST HAS TO SHOW THAT IT TRIED REAL HARD TO FIX THE PROBLEM. THIS

CREATES A BIG PROBLEM, BECAUSE THAT'S WHEN THE FIVE-YEAR GRACE PERIOD KICKS IN.

SO, SAY JOE PLANT-OWNER INSTALLS THE BEST AVAILABLE TECHNOLOGY. IT DOESN'T "CONTROL" THE TERRIBLE EMISSION THAT'S BEEN PLAGUING NEIGHBORS, BUT THEN, SIX MONTHS LATER, NEW TECHNOLOGY COMES ALONG THAT COULD DO THE TRICK.

THE NEIGHBORS ARE SAVED, RIGHT?

WRONG. JOE PLANT-OWNER GOT A FIVE-YEAR REPRIEVE STRAIGHT FROM THE GOVERNOR. HE DOESN'T HAVE TO DROP A DIME.

AT THAT POINT, THE NEIGHBORS HAVE NO RECOURSE. LEGALLY, THEY CAN'T FORCE JOE PLANT-OWNER TO MAKE A CHANGE. IF THEY TRY THE TIME-HONORED METHOD OF PUBLIC PRESSURE, JOE PLANT-OWNER CAN HIT THEM WITH A LIBEL LAWSUIT, BECAUSE WE DON'T HAVE AN ANTI-SLAPP LAW IN THIS STATE.

ONCE AGAIN, THE WORKING CITIZEN IS BOXED IN BY RIDGE ADMINISTRATION POLICY. THEY'RE BREATHING UNSAVORY, AND POSSIBLY EVEN UNHEALTHFUL AIR. THEY CAN'T ENJOY A DAY IN THEIR OWN BACKYARD WITHOUT GAGGING. THEIR CHILDREN COME DOWN WITH MYSTERIOUS RESPIRATORY AILMENTS, AND THEY CAN'T DO ANYTHING ABOUT IT FOR FIVE YEARS.

RIGHT NOW, YOU'RE PROBABLY THINKING, "OKAY, IF CITIZENS ARE SO BURNED UP ABOUT THIS POLICY, WHERE ARE THEY? WHY HASN'T ATTENDANCE AT THESE HEARINGS BEEN BETTER?"

TO WHICH I RESPOND: THAT'S JUST WHAT THE RIDGE ADMINISTRATION WANTS. THE AVERAGE PENNSYLVANIAN HAS ENOUGH TO WORRY ABOUT WITHOUT HAVING TO WONDER WHAT'S IN THE PENNSYLVANIA BULLETIN EVERY WEEK. THEY HAVE TO TRUST PUBLIC OFFICIALS TO MAKE WISE DECISIONS ON THEIR BEHALF.

AND THAT'S WHEN TOM RIDGE STRIKES, WHEN NOBODY'S LOOKING. HE SNEAKS THROUGH DECISIONS THAT AREN'T WISE, AND THAT ONLY BENEFIT BUSINESSES.

I URGE YOU TO ACT ON BEHALF OF ALL CITIZENS, WHETHER OR NOT THIS REGULATION DIRECTLY AFFECTS THEM RIGHT NOW. MANY CITIZENS DON'T HAVE A PROBLEM WITH PLANT ODORS CURRENTLY, BUT IT COULD HAPPEN TO ANYONE AT ANY TIME, MAKING A HOME THEY LOVE INTOLERABLE.

THIS PROPOSED REGULATION COMPOUNDS THE PROBLEM BY LEAVING HOMEOWNERS DEFENSELESS AGAINST AN INSIDIOUS PROBLEM. ON THEIR BEHALF, I URGE YOU TO REJECT THIS MISGUIDED PROPOSAL. THANK YOU.

Original: 1877
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(2)

Comments of Tina Daly before the ENVIRONMENTAL QUALITY BOARD: Public Hearing on the Proposed Amendments to Air Quality Regulations: Malodors. September 29, 1997, King of Prussia.

The PA DEP and the EQB should schedule public hearings at a time that working citizens can attend, such as in the evening – certainly not during the working day. Further, hearings should be held close to problem areas. For example, odor problems do not proliferate in King of Prussia., My point is that by holding hearings in the day time in up scale areas the DEP is showing it doesn't want to hear from the affected public.

Your proposed definition of an odor allows DEP staff to decide if the odor is objectionable. Please rewrite the definition so that the public will decide what is objectionable.

The number of times an odor is noticed by the public has no relevance to whether or not that odor must be controlled.

Best Available Technology, what ever it is or may be, will not protect the public.

Five years – that is how long a facility could emit odors before it must end this form of pollution. That is outrageous and totally unacceptable. Did industry write these regulations? Does DEP have any interest in protecting the public?

This regulation will injure human beings across this Commonwealth. DEP has deregulated the management of waste – we now plead for waste businesses to locate here. By accepting General Permitting and Beneficial Use we are quickly becoming a dump and odors are a big concern. We have exempted many industries, such as farming, including hog factory factories from these regulations. PA must go back to permitting and regulating. These regulations are inappropriate and too weak.

We believe an individual should be able to file a complaint and that DEP should have to respond immediately.

We believe that inspections of facilities should be unannounced. We believe DEP must build up an adequate staff to deal with odor issues.

Enough is enough of deregulation.

Thank you.

Pennsylvania Environmental Network

Tina Daly Co-Chair Sludge Team
1880 Pickering Road
Phoenixville, PA 19460

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(4)

Testimony by Jane Garbacz
Comments on Proposed Amendments to the Air Quality Regulations
Executive Summary

In the Notice of Proposed Rulemaking, it is stated that "this proposal streamlines both the complaint and investigation process and establishes clear limits of responsibility for facility owners. I disagree. There is not one thing listed in this proposal that streamlines the complaint and investigation process. I do not see anything different from what the Department has been doing for years. Why must an objectionable odor be first identified by a member of the public? While this would be the case in many instances, isn't DEP supposed to be the expert ? If DEP personnel are out on the road, and an objectionable odor permeates the air, they should have the authority to investigate immediately. Response time is key in verifying odor violations. The definition should be changed to: "...OBJECTIONABLE ODOR WHICH IS FIRST IDENTIFIED BY A MEMBER OF THE PUBLIC OR AN EMPLOYEE OF THE DEPARTMENT..."

The proposal for subsection (c) of Section 123.31 states :

"...IF A PERSON CONTROLS MALODOROUS AIR CONTAMINANTS FROM A SOURCE THROUGH THE USE OF THE BEST AVAILABLE TECHNOLOGY FOR ODORS FOR THAT SOURCE, AS DETERMINED B Y THE DEPARTMENT, THEN NO ADDITIONAL MEASURES WILL BE REQUIRED TO FURTHER REDUCE RESIDUAL ODORS. AFTER 5 YEARS FOLLOWING IMPLEMENTATION OF THE BEST AVAILABLE TECHNOLOGY, IF A MALODOR EXISTS, THE DEPARTMENT MAY REQUIRE A NEW DETERMINATION OF AND IMPLEMENTATION OF BEST AVAILABLE TECHNOLOGY FOR ODORS.

What is "Best Available Technology for Odors" (BATFO)? Best Available Technology means different things in different programs, e.g. BAT, BACT, BDT, BCT, BPT, etc. In many cases, the best available technology is not necessarily best. Other factors come into play resulting in a lesser technology. Will economic considerations be a feature of BATFO? Energy considerations? Social considerations? Something else? How can anyone know without a definition? And what will be the scenario if no technology exists to control objectionable odors? It should also be noted that "residual odor" is never defined. How does it differ from the original malodor? Does it differ in detectability? Intensity? Characteristics? Frequency? Duration? Hedonics?

In the Summary of Regulatory Revisions it is stated that subsection (c) of Section 123.31 will "create certainty for both the public and facility operators concerning the extent of responsibility for emissions of malodorous air contaminants." Since facility operators bear responsibility for the malodorous air contaminants coming from their facilities,DEP should create certainty regarding the extent of that responsibility. However, in this proposal, the property rights of citizens and their quality of life will be violated.In effect, the Department wants to grant a five-year license for a continuing violation of the Air Pollution Control Act. The way this regulation is written, in order to limit the facility owner's responsibility , DEP must transfer some of the responsibility to neighboring citizens. If the so - called "residual odors " are nauseating or give you a headache , deal with it. Embarrassed to invite guests over? Get over it. Can't open windows because of the smell? Aircondition. And for those who feel the residual odors from the Best Available Technology for Odors is worse than the original malodor, notify DEP in five years. Yes, this proposal creates certainty for the facility owner. Unfortunately, the only certainty created for members of the public is the uncertainty of how residual odors may affect them. However, there is a way to create certainty for both the facility owner and the public. Enforce the law. Make it clear that notices of violation and/or penalties will be issued when the law is violated. DEP won't have to get into issuing Best Available Technology for Odors Determinations. And the terms " Residual odors" and "BATFO" won't even need to be defined.

The 5 year odor license isn't the only controversial part of the proposal. While the present regulations exempt the production of agricultural commodities in their unmanufactured state , DEP is proposing additional exemptions: private residences, restaurants, materials odorized for safety purposes, and other sources or classes of sources determined to be of minor significance by the Department. While I am aware that Section 4.1 of the Commonwealth's Air Pollution Control Act prohibits the EQB from regulating agriculture, I disagree with the other exemptions. While odorizing materials for safety may be a worthwhile endeavor, if the odor causes discomfort, an investigation may be warranted and an adjustment made in the type of oderant utilized. Deregulating private residences could have some unfortunate consequences. Odors emanating from private residences are usually symptoms of problems which need investigation. Illegal drug labs and other criminal activities have been discovered in private homes and criminals prosecuted due to malodor complaints. Numerous activities at a private residence as well as restaurants could necessitate an odor investigation. While most local municipalities would deal with the aforementioned problems under nuisance ordinances, if the Department deregulates them what will be the impact?

Particularly troublesome is the fact that DEP has a tentative list of other sources or classes of sources that will be exempted. The EQB should demand to see this list in order to ascertain what "minor significance" means.

I believe that the proposed regulations are an affront to any citizen who lives in proximity to any undesirable land use.The rule is especially cruel when it is a known fact that waste facilities are concentrated in poor and/or minority communities. Numerous times I have attended meetings where DEP personnel have acted sympathetic to people living in communities inundated with waste facilities. Countless times I have heard such remarks as: "It's not our fault. We feel your pain. There's nothing we can do." That was the old DER." Well this is the new DEP. Will citizens' olfactory nerves have to deal with residual odors from Plant A + residual odors from Plant B + residual odors from Plant C, etc., etc.? Not to mention all the other risks from emissions, truck traffic, synergistic effects, etc. Will DEP announce to the legislature how compliance is improved and fail to mention that deregulation is a major factor?

The importance of odors in human terms is related primarily to psychological stress. Offensive odors can cause poor appetite for food, lowered water consumption, impaired respiration, nausea and vomiting, and impaired mental faculties. Offensive odors can lead to the deterioration of personal and community pride, interfere with human relations, discourage capital investment, lower socioeconomic status, and deter growth. Odors can scare people; there is always the uncertainty over how the odors will affect one's future health or the health of family members. For example, will the odors cause cancer? All of these problems can result in a decline in market and rental property values, tax revenues, payrolls, and sales.

In 1992, I served on a subcommittee of the Southeast Regional Round table that was totally devoted to the problem of malodors. Jim Rue, most recently a Deputy Secretary of DEP, was the Regional Director and attended most of the subcommittee meetings. I still have a copy of the draft report. While improvements have been made regarding the complaint coordinator and tracking system and there have been some success stories, many of the same problems identified by the group remain. While I would acknowledge some improvement and do not mean to be overly critical, many of the problems identified in 1992 persist:

-Citizens do not believe their complaints are taken seriously by the Department.
-Response time is too slow, and in some cases non-existent. This affects citizens' confidence in the agency.
-Follow-up is too slow, if at all.
-Failure to respond in the beginning causes more time in the end.
-When the Department does stop the problem, it takes a long time because of negotiations with the polluter rather than enforcing the law.
-NOVs are rarely issued. Jim Rue said that Central Office had apparently sanctioned this policy in the Southeast region.
-Many polluters are never taken to court or made to pay for violations even when the violations are well documented.
-In some cases, the Department has misled citizens regarding the status of abatement activities, court cases, etc.
-Dishonesty has led to citizens initiating actions such as: appealing to the EHB or other court actions, and calling newspapers or government officials.
-Abatement actions are usually not taken until large groups or politicians become involved.
-Odor problems are given low priority; they should be high priority. The Department does not know the seriousness or extent of the health threat so it should respond as if it were serious. Odor problems directly affect citizens.
-Department needs to differentiate between isolated incidents and continuing or repetitive complaints; there is a need to respond when an odor is fresh.
-Department must respond on repeated violations, and must not let complaints die. People do not continue to call.
-Department must treat odor logs seriously and not consider them to be end of response or merely as a tool in an enforcement action. They can be an effective tool in dealing with the problem, and can convince citizens that they are participating in a solution to the problem.
-More staff should be scheduled for the night shift--when most odors occur. Pagers, car radios, etc. should be used.
-NOVs should be issued if there is a violation; industry takes them seriously; they must be used on a regular basis. Their usage gives the Department a negotiating position at the bargaining table; citizens believe that they are the proper enforcement response.
-Air Quality Bureau should not be afraid to use criminal summary proceedings or refer cases for civil penalties.
-New Air Statute provides for Department attorneys to represent inspectors in summary proceedings;bigger fines and potential jail time can act as powerful enforcement and bargaining tools; civil section allows assessment of civil penalties and requires prepayment of civil penalty in order to appeal fine; local officials may use new act.
-New act does not use term MALODOR but instead makes it easier to enforce whenever there is any odor that "unreasonably interferes with the comfortable enjoyment of life or property."

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Environmental Quality Board
Hearing on Amendments to Air Quality Regulations
9-29-97

The legal notice for this hearing claims the proposal for these "unthinkable" and "indefensible" changes to DEP air quality regulations came from the "public," as well as the regulated community.

ACE wants to know just what private citizen, in this state, thinks it is safe or healthy to lower regulations on the very air we need for survival.

Who would insist that their families, friends and neighbors be forced to have their lives ruined by the stench of "any" kind of corporate pollution.

People in our area were tortured by the stench of the Pottstown Landfill for many years. They couldn't enjoy their homes indoors or outdoors. The stench permeated their furniture and clothes, [illegible] they were forced to keep their windows closed all year long and purchase air filters they could not afford. Picnics, walks and other enjoyable outdoor activities were not possible for these citizens.

Many of them suffered severe headaches, nausea and developed severe asthma and allergies.

Pennsylvania citizens do not intend to continue to tolerate any more abuse to our environment, because DEP employees want to make their jobs more convenient by accommodating big business and industry. This plan to change air regulation abandons every citizen in this state. A five year check on odors is the same as no check at all.

Pennsylvania DEP is trying to wash its hands from the responsibility of helping people in this state overcome such abuse. Why? Is it too much trouble for DEP to do the job we pay it to do or is the pressure from the regulated community too much for DEP employees to withstand?

Donna Madaras Cuthbert

Donna Madaras Cuthbert

ACE

The Alliance For A Clean Environment

549 Vine St.

Stowe PA 19464

September 15, 1997

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Original: #1877
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Gentlemen:

Re: DEP's Regulatory Basics Initiative
Proposed Amendments to Title 25, Chapter 91

My name is Randall Hurst and I am an environmental consultant with a prominent Pennsylvania environmental engineering firm. My qualifications include twelve years as a wastewater treatment plant operator (A-1 operator's license), ten years as a consultant, a Masters degree in Environmental Pollution Control from Penn State, and certification as a Senior Qualified Environmental Professional by the Institute of Professional Environmental Practice in Pittsburgh. In addition I am a law student at Widener University School of Law in Harrisburg. I am a member of the Water Environment Federation and the Pennsylvania Water Environment Association (PWEA), although the comments in this letter do not represent the official views of any of these associations.

Having attempted to advise municipal clients on the meaning and interpretation of various state regulations, I welcome the Department of Environmental Protection's Regulatory Basics Initiative (RBI) as a chance to clarify many obscure or obsolete regulations and to correct instances of vague and ambiguous clauses, technically incorrect provisions, and unnecessary and onerous requirements. I participated actively and submitted a number of comments during the comment stage of the RBI as a member of the PWEA's Government Affairs Committee. As an educated technician, and a student of environmental law, I am keenly interested in the success of the Initiative. The comments enclosed with this letter are, therefore, considered and substantive. The success of the RBI relies heavily on the quality of the final product. My comments are intended to aid the Department in achieving that goal, and not to embarrass or harass the Department or to effect substantive changes in the law. I hope that they are considered with the seriousness with which they were prepared.

If you require additional information or clarification of the comments, I can be reached at (717) 763-7212, extension 2417 during normal working hours.

Sincerely,

Randall G. Hurst, QEP

ONE PAGE SUMMARY OF COMMENTS ON

DEP's PROPOSED REVISIONS TO CHAPTER 91

Submitted by Randall G. Hurst, QEP ((717) 763-7212, ext. 2417)

Definitions

- Certain proposed definitions are inexact paraphrases of terms in the Clean Streams Law. The differences may be construed as meaning the Department intends a different meaning than in the Act. This can create confusion, certainly not a goal of these amendments. Definitions that are not intended to differ from those in the Act should be worded the same. Definitions intended to add new meaning should be clearly different.

- The definition of "NPDES Permit" is amended to include, in addition to the common meaning of a permit, "requirements" issued by DEP. This constitutes an unacceptable expansion of the meaning of a Permit and will result, unavoidably, in litigation to determine the meaning of the new definition. A Permit is a document, it is not "requirements" not contained in a document. The proposed definition conflicts with the goals of the regulatory basics initiative to provide regulations no more restrictive than EPA requirements unless necessary. It is not a "return to basics."

- A special problem involves the proposed definitions of "Industrial Waste" and "Sewage." The Clean Streams Law's definition of "sewage" is restricted to human excrement (toilet wastes), probably because the Assembly in 1937 did not foresee the variety of so-called "grey water" wastes (from, e.g., dishwashers and washing machines) now routinely accepted from residential sources. The proposed definition ignores the grey water component of "sewage" and copies the Clean Streams Law language, restricting "sewage" to human (toilet) wastes. This implies that normal **commercial** grey water (from, e.g., lunch rooms and custodial cleaning) is to be regulated as "industrial waste," since industrial waste includes everything except sewage. This absurd result can be avoided by defining a universally accepted term—"sanitary sewage"—which encompasses the Act's definition of "sewage" as well as other normal residential-type wastes. "Industrial waste" should be defined as excluding "sanitary sewage," thus providing a meaningful definition in accord with current accepted terminology.

Incorporation of Policy Statement by Reference

The revision at §91.15 allows DEP to require compliance with "water quality standards and protection levels at Chapter 93 and Chapters 16 and 95." Chapters 93 and 95 are regulations, adopted following the administrative code. The Chapter 16 criteria, however, have **not** been adopted as regulations and do not have the force of law. Since DEP has chosen to retain the Chapter 16 provisions in the form of a Policy Statement, it cannot then elect to by-pass the regulatory review process by incorporating them by reference in an actual regulation. The concern is simple; a policy statement such as Chapter 16 is, **by definition**, non-binding. The proposed text at §91.15 appears to be an attempt to create a "binding policy," which DEP may not do. A suggested alternative is to allow DEP to consider the water quality criteria in Chapter 16 when determining if dischargers are in compliance with the water quality standards adopted by regulation in Chapter 93.

COMMENTS ON

DEP's PROPOSED REVISIONS TO CHAPTER 91

Introduction

The Department of Environmental Protection's Regulatory Basics Initiative is intended, among other things, to make regulations more understandable and less onerous to comply with. The proposed amendments to Chapter 91, published in the *Pennsylvania Bulletin* on August 23, 1997 are an admirable attempt to simplify and clarify one of the Department's more complicated regulations. In any attempt at such an extensive re-writing, some errors or oversights are bound to occur. The comments below are motivated by the same concerns as those of the Department—to promulgate rules that are simple, understandable, fair, and in accord with Federal and state statutory requirements. I believe that the revisions suggested in the comments below will help the Department achieve these goals.

Definitions

The selection of terms for inclusion in the definitions section of the regulation invites confusion. The existing regulation invokes by reference the definitions in the Clean Streams Law (35 P.S. § 691). See existing §91.1. The text goes on to state "In addition, the following words and terms, when used in this article, have the following meanings . . . ." This indicates that the defined terms provided in § 91.1 are either not included in the statute or are intended to have a different meaning than that in the statute. This is an acceptable way to add new terms or to make it clear that the Department, in its discretion, intends to use a term differently than the Assembly intended. However, several terms included in the proposal are inexact paraphrases of the Clean Streams Law definition. It appears that the Department intends to change the definitions to the slightly different wording it provides. However, in doing so, the result is uncertainty about the intended meaning. The preamble, at *Pa. Bull.* 4344, indicates the proposed definitions are "new or revised." This further complicates any attempt to determine the meaning of the terms. Are the proposed definitions intended to merely re-state the Clean Streams Law terms, or are they intended to be "new or revised" and so have a different meaning than the same terms in the statute?

If DEP intends that the definitions provided by the Assembly in the Clean Streams Law are to be retained, then the addition of definitions in the regulation is unnecessary; if, however, it is merely access to the terminology that is intended, then the definitions in the regulation should be the same as those in the statute. On the other hand, if the Department intends to revise the statutory definitions (i.e., to change their meaning so as to be different than the same terms in the statute), then the results require further clarification, as the new text is far from clear. Several of the terms discussed below are of concern for this reason.

National Pollutant Discharge Elimination System (NPDES) Permit

The definition expands the definition of Permit to include "requirements issued by [EPA or] the Department to regulate the discharge of pollutants . . . ." While the intent of this definition may be to limit its application to Permits issued under the Act, the inclusion of the additional term "requirements" might be construed as extending the Department's powers to allow any orders or directions issued by Department personnel, whether or not subject to notice and opportunity for comment, to be considered as having the enforceability of NPDES permits. The power to compel compliance with NPDES Permits should not be extended by inference to include the power to compel compliance with any Departmental notice or letter without the opportunity for review and comment. The phrase "or requirements" should be deleted.

Industrial Waste

Understanding the definition of industrial waste proffered by the proposal requires reference to the Clean Streams Law, specifically section 1 (35 P.S. §691.1). This is so because the definition, by its use of the term "establishment," appears in common terms to encompass the discharge from any non-residential facility, including hotels, laundromats, and insurance office rest rooms. It is only by reference to the statute's definition of "establishment" that one becomes aware that the application is restricted to industrial manufacturing facilities. To avoid confusion on this issue of applicability, we suggest that either (1) the Statute's definition of "establishment" be included in the regulation, or (2) that the definition of ***industrial waste*** not be included so those affected will consult the statute, finding both applicable definitions presented together.

Second, if it is the Department's intent to merely recite the statutory definition, the definition should be provided ***ver batim***. Revisions of text imply an intent to revise meaning, especially since the preamble (***Bulletin*** page 4344) states the object of the proposed changes is to provide "new or revised definitions."

There is also an interface with the definition of "sewage," discussed below, in that industrial waste is "all substances, whether or not generally characterized as waste [but not] sewage." As discussed below, this definition is so all-encompassing that the water from an industrial lunch room sink or from cleaning the floors in the office portion of an industrial plant will be regulated as industrial waste. A proposed solution to this unintended absurdity is provided in the discussion next below.

Sewage

Attempts to redefine common terms in unusual ways do not comport with the objectives of the Regulatory Basics Initiative. The relevant terms regarding forms of wastewater have been in use for the last twenty-five years and have been generally accepted by regulators and permittees. Specifically, the term "sewage" (or "wastewater")

generally means the combined wastes conveyed by collection systems to sewage treatment works. Thus, "sewage" includes "sanitary sewage," "industrial wastes," and (for combined systems) "stormwater." The term "industrial wastes" generally has the meaning ascribed in the proposed definition; "sanitary sewage" is defined as, e.g., "normal household wastes and other wastes having the same characteristics as those generated by domestic activity, including cleaning, laundering, and toilet wastes," thus, toilet wastes from hotels, offices and other similar facilities as well as so-called "graywater" wastes from dishwashing and laundering are all considered "sanitary sewage." (We need not discuss the definition of "stormwater" in this comment (but see the following comment).)

The definition proposed for "sewage" is an inexact re-wording of the definition in the Clean Streams Law at 35 P. S. § 691.1, and appears to be an attempt to define "sewage," as what is commonly called "sanitary sewage," thus creating a dichotomy with common usage, and creating the opportunity for confusion among dischargers.

The term "sewage" as defined in the Clean Streams Law ("any substance that contains . . . excrementitious . . . discharge from the bodies of human beings or animals") is more restrictive than the term "sanitary sewage" as defined above, since it does not, by its terms, encompass graywater. The statute's definition is unchanged from when it was originally enacted in 1937. At that time, the nature of sanitary sewage service to households was rudimentary and the variety of appliances that generated wastewater were not as extensive as they are today. Thus, the statute's definition of sewage, which essentially is restricted to toilet wastes, was adequate and descriptive in 1937. However, it is reasonable to assume that the intent of the Assembly, even then, was to differentiate sanitary, domestic wastes from industrial wastes, not to narrowly restrict the definition to toilet wastes alone. Thus, updating the terminology to reflect current usage, by provision and definition of the term "sanitary sewage," does not flout the law, but clarifes it.

Further, the definition in the statute, and the one proposed, by omitting references to domestic-type wastes that are not "excrementitious discharges from the bodies of human beings" leaves the status of gray water uncertain. Placed in juxtaposition with the definition of industrial waste, which includes all substances that are not "sewage," the discharge of, e.g., cleaning water from the office cafeteria in a factory becomes an industrial waste. It is difficult to believe that this is the intended result. Thus, it would be appropriate for the regulation to update the terminology to reflect current usage. This is easily done by defining a new term—"sanitary sewage"—to include all normal domestic-type wastes, whether generated by residential or commercial activities. The definition of "industrial waste" should be modified to exclude "sanitary sewage" rather than excluding "sewage."

A second concern with the proposed definition of sewage is that, as proposed, it can be parsed in two ways, leading to uncertainty about how it is to be applied. One way is to assume that the definition is intended to be the same as the one in the Clean Streams Law (35 P. S. § 691.1). In this case, the text would limit the definition of sewage to that containing only human bodily wastes. As discussed above, this leads to the reclassification

of some grey water wastes as "industrial waste." Alternatively—assuming that DEP intends by its rewording and inclusion in the regulation to adopt a new and different term—the definition could be read as follows: "a substance that contains waste products, or [a substance that] contains excrementitious or other discharge from the bodies of human beings or animals." This would essentially mean that sewage is any substance containing wastes. Since "industrial waste" is defined as including everything except sewage, the result is that industrial waste must contain no wastes and the term "industrial waste" would only apply to non-contact cooling water. Thus, each of these possible readings of the proposed regulation leads to an unacceptable result. The substitution of the definition suggested above—sanitary sewage—would alleviate any confusion in this regard.

Third, the proposed definition does not exclude biosolids (stabilized sanitary sewage sludge) from regulation as "sewage." By adopting the definition of "sanitary sewage" proposed above, confusion as to whether biosolids are regulated by Chapter 91 would be avoided.

The proposed modification—define "sanitary sewage," re-define "industrial waste" to exclude sanitary sewage, and avoid the use of the term "sewage"—would avoid confusion by using commonly accepted terminology. It would not conflict with the Clean Streams Law since it merely updates the terminology to reflect the intent of the Assembly. And, importantly, it would achieve the objective of the Regulatory Basics Initiative to clarify and simplify the regulations.

Stormwater

Oddly, stormwater is proposed to be defined as the runoff of stormwater. This circular definition is not very useful. The Department should be able to come up with a more meaningful definition.

Water quality management permit

The last sentence of the proposed definition—referring to "Part II Permits"—applies to both parts (i) and (ii) of the definition and should be displayed as "flush text" at the left margin, indicating that it is part of the whole definition, not a clarification of part (ii) only. Alternatively, the last sentence could be added as a parenthetical to the beginning of the definition. As written, the text is ambiguous because of its physical location.

Other Provisions

Inclusion by reference of guidelines at Chapter 16

Proposed section 91.15 indicates that the Department will require sources of pollutants to comply with the water quality standards at Chapter 16 (along with Chapters 93 and 95). Chapter 16 is a statement of Department guidance and is not a regulation.

Some of the guidance in Chapter 16 is technically flawed and has been objected to on numerous occasions by many industrial and municipal dischargers, (without, it is noted, adequate response by DEP). One reason the regulated community has not protested Chapter 16's errors more vigorously is that it is subject to Department discretion as a consequence of its status as (non-binding) policy. Perhaps because of its recognition of the inadequacies of Chapter 16, the Department has elected not to pursue notice and comment rulemaking for these provisions and has made it clear that this document is policy. A policy is, by definition, not binding.

Since Chapter 16 has been adopted in an intentionally nonbinding form, it is improper to attempt to require universal compliance with its provisions through incorporation by reference in a regulation. If reference is to be made to Department policy in a regulation, then the reference must acknowledge that policy documents are not made binding by the reference, and that inclusion by reference does not constitute rule making with regard to the referenced policy. To do otherwise is to flout the basic rules of administrative procedure.

A more appropriate and accurate incorporation of the Chapter 16 policy is to state that the Department will consider the water quality criteria adopted in its guidance policy at Chapter 16 in determining if the water quality standards in Chapters 93 and 95 are being complied with. "Compliance" with Chapter 16 cannot be made mandatory.

September 9, 1997

Original: #1877
Copies: Tyrrell
Sandusky
Wyatte
Bereschak

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Gentlemen:

Re: DEP's Regulatory Basics Initiative
Proposed Amendments to Title 25, Chapter 94

I have reviewed the proposed changes to the referenced regulation as published in the *Pennsylvania Bulletin* on August 23, 1997. I have two important objections to the proposed change which I wish to bring to your attention.

FIRST. The proposed amendment at § 94.13(a) adds the word "influent" to the existing requirement to install flow measuring equipment. This is a significant and potentially very expensive change for many POTWs. A significant number of the POTW treatment plants in the Commonwealth have installed **effluent** flow meters, either as part of original construction or during plant upgrades. Effluent flow meters measure the quantity of effluent discharged to the environment. Since these meters provide important information about environmental impact, they are of more value in measuring environmental compliance than influent meters. Further, such meters have been approved by DEP as facility modifications. DEP has not indicated that measuring effluent flow is objectionable for any reason, and in fact has encouraged it. Thus, **influent** flow meters are unnecessary.

In addition to being unnecessary, the proposed rule change to install **influent** flow meters would have serious financial consequences for many municipalities, while providing **no environmental benefit.** Installation of influent flow meters can cost from as little as $5,000 to over $50,000 depending on the size of the meter, the kind of meter selected, and the difficulty of installation. Such an expense should not be imposed frivolously. I

note with concern DEP's "finding" that the proposed rule change does not impose new regulatory requirements and will impose no additional costs on anyone. This is far from accurate. The cumulative cost across the Commonwealth of this onerous new provision could amount to millions dollars in unnecessary expenditures.

The revision should not include the new term "influent" at § 94.13(a). (See also suggested text to replace the proposed revision following the next comment.)

SECOND. The proposed amendment to § 94.13(a) revises the existing text, which is simple and easily understandable, to make it vague and unclear. Compliance with the new requirement is problematic because the new text cannot be understood in plain English. Specifically, the existing text, which requires that treatment plants install flow meters when the flow exceeds (or is projected to exceed) 100,000 gallons per day, is unambiguous and has never, to my knowledge, raised any question or resulted in litigation. Compare the simple and clear existing text with the proposal:

"A sewage treatment plant **or other part of a facility** which receives or will receive within the next 5 years, flows exceeding 100,000 gallons per day shall be equipped [to measure the influent flow.] The permittee of the **sewage facility** shall install equipment **within 6 months of the final day for submitting the annual report** . . . ." [Emphasis added.] This text raises the following questions, unanswered by the regulation or the accompanying preamble in the *Bulletin*:

- What is a "part of a facility"? Does the term include pumping stations? Does each primary clarifier constitute a "part of a facility"? How about the final clarifiers? Must an influent flow meter be placed on each and every treatment tank? The answer is hidden in the murk of undefined terms and vague language. It invites litigation.

- What is a "sewage facility"? Is it the same as a "facility"? If so, why were two different undefined terms used in the same clause? If different, what does the term "facility" mean?

- When must the influent flow meter be installed? Does "within 6 months" mean **before** the report is due, or **after**? If it means before, and the regulation is promulgated in November, 1997, must all POTWs install influent meters by March 31, 1998?

If it is the intent of DEP to "clarif[y] the . . . regulatory language [and] eliminate confusion regarding the regulations and promote compliance" it has failed to do so. The proposed text at § 94.13(a) is guaranteed to lead to confusion and, perhaps, litigation as POTWs and dozens of Department personnel struggle to interpret the new requirements with no guidelines and no definitions. The only change necessary to the existing language is to clarify when a treatment plant experiencing increasing flows might need to install a new flow meter. Suggested new text is provided below to update the clause (existing text is used, with additions in **boldface**):

> If the hydraulic loading on the **sewage treatment** plant exceeds 100,000 gallons per day or will exceed 100,000 gallons per day in the next 5 years, and if the plant is not equipped to continuously measure, indicate and record the flow **through the plant**, equipment to continuously measure, indicate and record the flow shall be installed. **If the treatment plant is not equipped with such flow measuring and recording equipment, a schedule for installation of such equipment shall be included in the annual report required under § 94.12 of this Chapter in which it is first reported that (1) the flow exceeds 100,000 gallons per day or (2) is projected to exceed 100,000 gallons per day within the next 5 years.**

Because of the short time available in which to review the proposed regulation and prepare comments, the Pennsylvania Water Environment Association (PWEA)was not able to prepare and officially adopt comments. Therefore, these comments are submitted by myself acting as an individual and do not represent the opinions or endorsement of my employer or of the Pennsylvania Water Environment Association. However, my communications with various members of the PWEA indicates that these comments reflect the views and concerns of many municipal permittees. It is my hope that, on review, the Department will amend its proposal as suggested above, to better achieve its intent to clarify and simplify the regulations without adding unnecessary and substantial costs to the many affected municipal permittees.

Very truly yours,

RANDALL G. HURST, QEP

I may be contacted at (717) 763-7212, ext. 2417

Original: 1877
Copies: Tyrrell
Sandusky
Legal (2)

EQB
Environmental Quality Board

p.o. box 8477 · harrisburg, pa. 17105-8477 · (717) 787-4526

October 17, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. George Gemmel, Amity Township

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

Original: 1877
Copies: Tyrrell
Sandusky
Legal (2)

I N T E R O F F I C E M E M O R A N D U M

Date: 08-Oct-1997 11:55am EST
From: ATSHIP
ATSHIP@aol.com@PMDF@DER003
Dept:
Tel No:

TO: Regcomments (Regcomments@a1.dep.state.pa.us@PMDF@

Subject: proposed rule making malodors

The Board of Supevisors of Amity Township directed me to comment on the proposed rule making, DEP, EQB, 25 Pa. Code, Chapters 121 and 123, Regulatory Basics Initative - 3.
The Board understands the direction taken by the DEP and the Governors office regarding the streamlining of the regulatory process and the need to reduce the economic impact of the regulations as part of an overall plan to encourage business growth in the State. Unfortunately these regulations compromise the regulatory authority of the local municipalities and the quality of life of the residents within the communities being affected by the malodor problems.

Should DEP/EQB proceed as presented many portions of the State will have a lower quality of life than some third world countries. Property values will plummet accompanied by associated loss of retirement investment these properties represent. Local municipalities will have their powers of enforcement neutralized leaving them unable to respond to legitimate complaints and concerns to their constituents.

The 5 year window of operations opportunity accompanied by weak enforcement of current requlations offers little comfort to the victims of unscrupulous plant owners/operators.

In conclusion Amity Township supports economic development in the State, encourages efficiency of governmental operations but stands firmly against the destruction of the quality of life of its residents.

George Gemmel
Township Manager
Amity Township
2004 Weavertown Road
Douglassville, PA 19518

Pittsburgh P-G 9-26-97

Foes of odors: Regulations changes stink

By Don Hopey
Post-Gazette Staff Writer

Environmentalists, citizens groups and a state representative are holding their noses over proposed changes to the state's odor regulations that they say would weaken, if not end, enforcement against offending industries.

The proposal, part of the state's Regulatory Basics Initiative, would change the definition of malodor and the way the state Department of Environmental Protection responds to odor complaints, and limit the types of odors regulated.

The changes also exempt industries that install so-called "Best Available Technology" to control odors from making further improvements for five years, even if odor complaints continue.

"This proposed rule-making is a significant weakening of the state regulations, and will prevent there from ever being another odor complaint in Pennsylvania," Marie Kocoshis, president of the Group Against Smog and Pollution, testified at an Environmental Quality Board hearing yesterday in Pittsburgh.

Approximately 30 percent of the citizen complaints received by the DEP are for bad odors. The department investigates those complaints now, but says it is difficult to document and resolve them under the current regulations.

Rep. Ivan Itkin, D-Point Breeze, testified that the proposed malodor changes would tie the hands of citizens whose homes and yards are fouled by industrial odors.

"Last year, Gov. Ridge introduced a plan called 'Link to Learn,' putting computers in classrooms ..." Itkin said. "Now Ridge is suggesting that plants be allowed to spew foul smelling air for five years. I call that 'Link to Stink.'"

Myron Arnowitz, regional director for Clean Water Action, said it was "illogical to amend regulations to eliminate an area where you're getting a lot of complaints." He said DEP should be devoting more personnel to investigate odor complaints instead of stifling citizen complaints by exempting industries that install equipment to suppress odors from making improvements for five years.

> *"Ridge is suggesting that plants be allowed to spew foul smelling air for five years."*
>
> **Rep. Ivan Itkin**

"Despite its name, Best Available Technology isn't. There are control technologies that are more stringent and should be used where complaints continue, but that are ignored by this proposed regulatory change," Arnowitz said.

He said the proposed exclusion of materials odorized for safety reasons, such as natural gas, could create safety hazards.

David Strong, the EQB member who chaired the hearing, said after it concluded that he didn't agree with the testimony he heard.

"I see these changes as helping the department get a better handle on regulating malodors. I don't see them as weakening the regulations," he said.

Wilder Bancroft, who is in charge of the Allegheny County Health Department's investigation of complaints about odors from the Tapco animal rendering plant on Neville Island, said the county hadn't taken a position on the state's proposed regulatory changes.

"We're looking at it, studying it. I don't think it would put our efforts to regulate odors out of business," Bancroft said.

The proposed regulatory changes are part of the state's Regulatory Basics Initiative, a review of exist-

SEE ODOR, PAGE C-6

Odor opponents say proposed changes stink

ODOR FROM PAGE C-1

ing regulations to identify and change those that are more stringent than federal law, lack clarity or impose disproportionate costs on the regulated community.

Public comment on the proposed changes will continue through Oct. 28. Then the EQB and the Legislature must approve them.

The board has a third and final malodors hearing scheduled for King of Prussia on Monday. Written comments are also being accepted until Oct. 28, and should be addressed to the Environmental Quality Board, P.O. Box 8477, Harrisburg PA 17105-8477.

State Government Relations

Original: 1877
Copies: Tyrrell
Sandusky
Legal (2)

Sun Company, Inc.
212 North 3rd St-Suite 101
Harrisburg PA 17101
717 232 5634
FAX 717 232 0691

October 28, 1997

Environmental Quality Board
15 th Floor
Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, Pa. 17105-8477

To Whom It May Concern: (Re: The Malodor Proposals at PA 25, §121.1 and 123.31)

Sun Co. operates petroleum refineries and related facilities in Pennsylvania that are affected by the subject changes to the malodor regulation. Detailed comments are attached to this summary.

Our first comment supports the BAT for Odors approach at §123.31(c); however, we recommend that the existing paragraph at §123.31(a) be deleted because it is redundant to the BAT approach and is additionally either impossible or ineffective in application, or impossible to enforce, depending on the odor source.

Our second comment strongly recommends that the concept of annoyance or discomfort to the public be retained in the Malodor definition. A singular complaint should not necessarily lead to a Malodor finding. The Department must retain the authority to terminate an investigation based on common sense and consistency with the Penna. statute definition for "air pollution".

In the context of our first two comments we support the addition of an "odor investigation" requirement which improves objectivity in discovery and mitigation, and we support the 5 year protection on any BAT finding which protects the mitigation process from second guessing.

Our fourth comment is in regard to the existence of this regulation in the Pennsylvania SIP. To our knowledge no other state has placed its' odor regulation in the SIP. The Department should be concerned that this invites Federal enforcement in matters that should be resolved at a local and state level. Furthermore, this regulation does not meet the criteria for placement in the SIP according to the Pennsylvania Statute. While the Board and the Department may not be able to address this anomaly as part of a Malodor amendment, we respectfully request that the Board and the Department first give serious consideration to its' implications in the present rulemaking and then take it into deliberation for a SIP change.

Very Truly Yours,

Gary C. Furlong

Gary C. Furlong
Sr. Env. Consultant - Air

COMMENTS OF SUN CO. INC.
TO THE PROPOSED MALODOR REGULATION CHANGES AT
PA TITLE 25, §121.1 AND §123.31

1) The malodor limitations specified at §123.31 (a) should be deleted, and new paragraph (c) should stand alone in pointing to control measures appropriate to odor control.

The preamble to this proposal says that existing paragraph (a) refers to VOC odor sources, an interpretation not supported by the plain language of this paragraph. Whether or not paragraph (a) refers to VOC, it stipulates a type and a degree of control that is over-control in some circumstances, under-control in other circumstances, and impossible to apply in still other circumstances. Presumably that is why paragraph (a) also has the caveat that techniques other than incineration may be applied , etc.. We suggest that paragraph (a) be deleted in its entirety. New paragraph (c) provides a better degree of flexibility to the Department in approving technologies and degrees of control appropriate to odor sources.

2.) Frequency of occurrence, the extent of public objection, and other data must be carefully considered by the Department in establishing a malodor. The Department must reserve judgment regarding single occurrences. The elements of annoyance and discomfort to the public should not be removed from the definition of Malodor.

The Department has asked for comment on how frequency of occurrence and the extent of public objection be evaluated. Odors can originate from diverse sources, and many odors may be caused by temporary conditions or circumstances outside the control of a source. Also, odors will vary in characteristic from those that are objectionable to any exposed person or a group of persons (i.e., the public) to those that are objectionable to one person. Since there is no instrument to measure odor objectionability, the Department will always have to rely on subjective criteria for action after an initial complaint. We suggest that a single complaint and/or a single occurrence should not in themselves lead to a malodor finding. The investigation by the Department may indeed find that a particular first occurrence was an abnormality that needs no further attention; or it may find that a single-individual complaint is not indicative of the general public response. We believe the Department must therefore reserve to itself the authority to terminate an investigation based on common sense. To reserve this authority, the Department should retain the concept of the public in the Malodor definition as opposed to a single individual. Furthermore, the concepts of annoyance and discomfort in the existing Malodor definition have historic standing in common and statutory law (e.g., the recent Pa. Third Circuit Court of Appeals case involving the current definition), and should be retained in the Malodor definition. This would keep the definition of Malodor consistent with the statutory definition of "air pollution" which includes odors among the substances of concern when they are "--inimicial to public health, safety or welfare --".

Based on the discussion above, we strongly urge the Department to adopt a Malodor definition as follows:

Malodor - An objectionable odor which causes annoyance or discomfort to the public that is first identified by a member of the public and subsequently documented by the Department in the course of an odor investigation to be an odor which is objectionable to the public.

3.) In the context of our comments above, other additions to the regulation are appropriate.

We support the concept of "odor investigation" added to the regulation because it adds order to the malodor discovery and reduction process that is lacking in the existing regulation. Furthermore, the addition of §123.31(c) seems to focus attention toward controls appropriate to the type of odor source determined by an investigation. The 5 year protection on a measure applied after a thorough process by the source and the Department also seems appropriate since the measure applied is by definition the best available at the time.

4.) The Placement of this malodor regulation in the Pennsylvania SIP is not appropriate according to the Pennsylvania Statute.

We respectfully bring to the Board's attention the fact that the subject regulatory section is included in the Pennsylvania SIP for attainment of the standards of the Clean Air Act. To our knowledge Pennsylvania is the only state with its' malodor regulation in the SIP. There is no Federal rule or Clean Air Act requirement that indicates this is appropriate.

As a SIP rule the malodor regulation is subject to Federal enforcement, a potential complication to both the Department and to the state's industrial citizens in solving what should be strictly local and state level problems.

The malodor regulation does not fit the pattern of a SIP regulation as stipulated in the Pennsylvania Statute, Chapter 23, §4004.2 - Permissible actions [of the board]. The malodor regulation does not, relative to the Statute at §4004.2(b): (1) help achieve or maintain ambient air quality standards; (2) satisfy related Clean Air Act Requirements as they specifically relate to the Commonwealth; (3) prevent an assessment or imposition of Clean Air Act sanctions; or (4) comply with a final decree of a Federal court. In absence of meeting these criteria, the malodor regulation is more stringent than what is required by the Clean Air Act or the Pennsylvania Statute.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner

v. No. 2046 C.D. 1996

FRANKLIN PLASTICS CORPORATION, Respondent ARGUED: February 3, 1997

ORIGINAL: 1877
COPIES: Tyrrell
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Legal(2)

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE JIULIANTE FILED: April 7, 1997

The Department of Environmental Protection (DEP) appeals from that portion of the Environmental Hearing Board's (EHB's) June 19, 1996 order sustaining Franklin Plastic Corporation's (Franklin's) appeal at EHB Docket No. 90-361-E as to the alleged May 15, 1989, May 14 and November 16, 1990 violations of 25 Pa. Code §123.31(b).[1] That regulation provides as follows:

[1]This regulation was promulgated pursuant to the Air Pollution Control Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §§4001-4015.

> (b) A person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated.

A "malodor" is defined as "[a]n odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code §121.1. We conclude that the EHB did not err in determining that DEP failed to establish that the odors caused annoyance and discomfort to the public and, therefore, affirm.

Background

Franklin owns Vy-Cal Plastics, a plastics manufacturer in Conshohocken, Pennsylvania. On May 15, 1989, May 14 and November 16, 1990, DEP issued notices of violation for malodors to Vy-Cal pursuant to 25 Pa. Code §123.31(b). On February 11, 1994, EHB member Judge Ehmann held a de novo hearing and concluded that DEP failed to sustain its burden of establishing a malodor violation on May 15, 1989 because it failed to confirm that, on that day, there was any complaint from the public that the odor was objectionable. As for the other two malodor violations at issue, May 14 and November 16, 1990, the EHB assessed civil penalties of $3,500.

Franklin appealed from the EHB's February 11, 1994 order and this Court issued Franklin Plastics Corporation v. Department of Environmental Resources, 657 A.2d 100 (Pa. Cmwlth. 1995)

(Franklin I). In that case, this Court vacated the EHB's February 11th order and remanded the matter "for further hearing to permit Franklin an opportunity to fully cross-examine [DEP air quality district supervisor Francine] Carlini and to consider Franklin's appeal based upon the supplemented record." Id. at 104.

On August 1, 1995, the EHB conducted a remand hearing and on June 19, 1996, it issued a second adjudication. Having changed its previous position as to the requirements for proving a malodor, this time it determined that DEP failed to bear its burden of proof for all three malodor violations because it failed to call "additional witnesses from the public to provide evidence as to whether or not the odor from the Vy-Cal plant was causing discomfort and annoyance to the public in Conshohocken." (EHB's June 19, 1996 Adjudication at 17.) Specifically, the EHB noted that

> [w]hile the number of witnesses which have to be called from the public in order to bear the Department's burden of proof . . . will depend on the circumstances, we hold that in the absence of some other means of proof, the Department has a duty to call more than one member of the public to testify subject to cross-examination that the odor caused annoyance and discomfort to them.

(Id.)

In addition, the EHB indicated that the adjudication had been prepared from a cold record because Judge Ehmann had resigned from the EHB prior to the issuance of a second adjudication. It cited Lucky Strike Coal Co. v. Department of Environmental

Resources, 547 A.2d 447 (Pa. Cmwlth.), petition for allowance of appeal denied, 521 Pa. 607, 555 A.2d 117 (1988) in support of adjudicating the case from a cold record. In Lucky Strike, the EHB board members who issued the adjudication were not the same ones present at the time of hearing. We held that, there being no evidence that the EHB did not review and consider the record before issuing its adjudication, it must be presumed that the board members, whether or not present at all sessions, considered the evidence presented. We concluded that "all that is required to meet due process is that the Board review and consider the record before an adjudication is issued." Id. at 449.

DEP filed a timely appeal of the EHB's June 19, 1996 order.

Issues

The primary issue before us for review is whether the EHB erred in determining that DEP failed to establish that Vy-Cal's odors caused annoyance and discomfort to the public.[2] Our scope of

[2]In its Statement of Questions Involved, DEP lists two additional issues: 1) whether DEP's issuance of a July 25, 1990 administrative order was a lawful and appropriate exercise of its discretion; and 2) whether the civil penalty assessment of $3500 against Franklin was an appropriate assessment. Although DEP did not adequately brief these issues, they are subsumed in the primary issue as set forth above. In other words, if we were to find that the EHB erred in determining that DEP failed to meet its burden of proof, then DEP's issuance of its administrative order and the original $3500 assessment for the May 14 and November 16, 1990 malodor violations would have been appropriate.

(continued...)

review of EHB decisions is limited to determining whether it committed any errors of law, constitutional violations, or whether necessary fact-findings are unsupported by substantial evidence. T.R.A.S.H., Ltd. v. Department of Environmental Resources, 574 A.2d 721 (Pa. Cmwlth.), petition for allowance of appeal denied, 527 Pa. 659, 593 A.2d 429 (1990).[3]

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[2](...continued)

In addition, we note that DEP raises issues in the Argument portion of its brief that it failed to include in its Statement of Questions Involved. An appellant's failure to include issues argued in its brief in its Statement of Questions Involved may result in a waiver and dismissal of those issues. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703, 708-09 n.6 (Pa. Cmwlth. 1995). We will, however, consider several of the "issues" raised in DEP's argument as some are suggested by the issue of whether the EHB erred in determining that DEP failed to meet its burden of proof. See Coraluzzi v. Commonwealth, 524 A.2d 540 (Pa. Cmwlth. 1987) (applied Pa. R.A.P. 2116(a)'s provision that "ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.")

[3]DEP argues that this Court can substitute its discretion for that of the EHB with regard to the evaluation of the evidence in this case because the EHB made its findings of fact and conclusions of law from a cold record. It contends that Lucky Strike Coal Co. V. Department of Environmental Resources, 547 A.2d 447 (Pa. Cmwlth. 1988) is distinguishable from the case sub judice because the Lucky Strike petitioner failed to raise issues concerning what degree of scrutiny should be applied to facts and conclusions made on the basis of a cold record. We find DEP's argument to be without merit.

As in Lucky Strike, there is no evidence that the reconstituted EHB did not review and consider the record before issuing the June 19, 1996 adjudication. Thus, we presume that the board members, whether or not present at all sessions, considered the evidence presented. Accordingly, given the legion of cases holding that this Court may not substitute its discretion for that of the fact finder, we decline to usurp the EHB's role of fact finder in this case. T.R.A.S.H.,

(continued...)

Discussion

DEP had to prove, by a preponderance of the evidence, that Vy-Cal emitted an odor which caused annoyance or discomfort to the public and which the Department determined to be objectionable to the public. 25 Pa. Code §1021.101(a). For several reasons, DEP argues that the EHB erred in determining that the burden of proof was not met.

1. Scope of Remand:

In Franklin I, we vacated the EHB's February 11, 1994 order and remanded the case "for further hearing to permit Franklin an opportunity to fully cross-examine Carlini and to consider Franklin's appeal based upon the supplemented record." Id., 657 A.2d at 104. We specifically declined to address the parties' remaining arguments regarding the merits of the EHB's first adjudication due to our determination that Franklin "was precluded from eliciting crucial exculpatory evidence [from Ms. Carlini]

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[3](...continued)

In addition, we note that in workers' compensation cases, this Court has similarly held that, as long as due process was satisfied, it was proper for a workers' compensation judge to make credibility findings, findings of fact and conclusions of law even if he was not the one who presided over the taking of evidence. Izzi v. Workmen's Compensation Appeal Board (Century Graphics), 654 A.2d 176 (Pa. Cmwlth. 1995). The substitution of workers' compensation judges usually occurs when the original workers' compensation judge leaves office, becomes ill or dies. In the case sub judice, Judge Ehmann resigned from office. (EHB's June 19, 1996 Adjudication at 2.)

which restricted its ability to challenge the testimony and evidence DER presented." Id.

The reconstituted EHB admittedly interpreted our remand order as a directive to fully reconsider the remaining issues. (EHB's June 19, 1996 Adjudication at 3.) Specifically, the EHB in its second adjudication reexamined the burden of proof for malodors and found that, in light of its change of position as to the requirements for proving a malodor, it no longer finds that DEP met its burden because DEP failed to call more than one witness from the public to establish that the public was annoyed and discomforted by the malodors.

As a threshold matter, DEP argues that the EHB exceeded the scope of this Court's remand order in violation of Pa. R.A.P. 2591(a) by reconsidering the entire case, instead of just Ms. Carlini's additional cross-examination testimony.[4] Specifically, DEP argues that, since the EHB concluded that the additional evidence did not provide any basis for changing its previous decision, it was not permitted to change that decision.

Franklin contends that the EHB in its second adjudication followed this Court's remand directive because we instructed the

---

[4]Pa. R.A.P. 2591(a) provides as follows:

> (a) General Rule. On remand of the record the court or other government unit below shall proceed in accordance with the judgment or other order of the appellate court. . . .

EHB to permit further cross-examination of Ms. Carlini and then to consider Franklin's appeal in light of the supplemented record. Franklin points out that we did not restrict the EHB to consideration of only one or two issues and we directed it to consider Franklin's appeal on the basis of the newly enlarged record.[5]

In this case, it was for the EHB as the fact finder to weigh and consider Ms. Carlini's additional cross-examination testimony. See Duquesne Light Company v. Workmen's Compensation Appeal Board (Kraft), 416 A.2d 651 (Pa. Cmwlth. 1980) (having concluded that the referee denied employer its right to conduct reasonable cross-examination, we reversed and remanded the case for complete direct and cross-examination on the issue of notice of disability and directed the referee in his subsequent decision to include a fact-finding on when claimant should have known of his disability and its causal relationship with his employment). Even though the EHB stated that Carlini's additional testimony did not provide it with grounds for changing its prior decision, that does not mean that the EHB erred in reconsidering its position on the burden of proof for malodors.

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[5]In Joseph v. Workmen's Compensation Appeal Board, 568 A.2d 1001, 1003 (Pa. Cmwlth.), petition for allowance of appeal denied, 526 Pa. 642, 584 A.2d 323 (1990), we held that, where the Board remanded the case to the referee with directions to consider an insurance coverage issue and the referee amended his fact-findings and conclusions of law on other issues, he exceeded the scope of the Board's remand order.

As Franklin points out, we did not limit the EHB in our remand directive and, in fact, directed it to consider Franklin's appeal on the basis of the augmented record. Absent restrictive language in Franklin I, we conclude that the EHB did not exceed the scope of our remand order by reconsidering the remaining issues Franklin raised in its appeal. Compare Roetenberg v. Commonwealth of Pennsylvania, Office of Budget, 550 A.2d 825, 831 (Pa. Cmwlth. 1988) (in Roetenberg I, we remanded the case to the State Civil Service Commission to make findings as to whether two individuals were entitled to rehiring preferences or if one or both should have been rehired and in Roetenberg II, we held that the Commission did not exceed the scope of our remand order by considering on remand both the propriety of any recall as well as what individuals should have been recalled because our remand order and discussion in Roetenberg I were sufficiently broad to allow for that consideration) with Nigro v. Remington Arms Company, Inc., 432 Pa. Superior Ct. 60, 71, 637 A.2d 983, 988-89 (1993), petition for allowance of appeal denied, 540 Pa. 49, 655 A.2d 505 (1995) (Superior Court held that in a case where the Supreme Court had remanded a case to the trial court for disposition of plaintiff's remaining issues which were not addressed by the trial court, the trial court exceeded the scope of the Supreme Court's remand order by granting judgment notwithstanding the verdict).

2. Expanded Burden of Proof:

DEP contends that the EHB in its second adjudication created a new and unreasonable evidentiary burden by requiring virtually an infinite number of citizens to testify in order to prove that the public was annoyed and discomforted by the odors. DEP argues that, in order to meet its burden of proof, it need only establish that it received complaints which triggered investigations and that it need not present any testimony from the actual complainants.

We conclude that the EHB did not err in determining that DEP must present testimony from the public in order to establish the public's annoyance and discomfort with malodors. Although the number of members of the public required to testify may be problematic, that goes to the weight and legal sufficiency of the evidence and is a matter within the hands of the EHB as fact finder. T.R.A.S.H., 574 A.2d at 723.

3. Hearsay:

DEP argues that the EHB's finding in its second adjudication that the testimony of DEP employees as to numerous complaints from the public is hearsay flies in the face of our non-hearsay determination in Franklin I. Specifically, DEP contends that the testimony at issue was not hearsay because "such testimony was not offered for the truth of the matter asserted; the subsequent Department testimony on its investigation of the complaints went to the truth of the matter to be established."

(DEP's Brief at 39.) In other words, DEP seems to be arguing that, because the testimony of its employees as to citizen complaints was offered to establish that it determined that the odors were objectionable to the public and not offered as proof of the validity of those complaints, the employees' testimony was not hearsay and could still support DEP's burden of proof. We disagree.

In Franklin I, we concluded that the testimony from DEP employees Ms. Carlini and Mr. Breitenstein concerning various citizen complaints did not constitute hearsay "as counsel for DER assured the sitting Board member that the evidence was not being offered to establish the validity of any specific complaint but was being provided merely as background regarding the Department's enforcement activity in that area." Id., 657 A.2d at 102. In addition, we concluded that the EHB in its first adjudication "did not improperly consider the testimony as evidence of actual citizen complaints because it noted that the challenged testimony did not relate to a critical part of DER's case but was only probative of the history of prior complaints." Id. at 102-03.

Pursuant to 25 Pa. Code §121.1, DEP must establish that Vy-cal's odors caused annoyance or discomfort to the public and that it determined those odors to be objectionable to the public. The conjunctive "and" is not mere surplusage,[4] the burden is two-

[4] Southeastern Pennsylvania Transportation Authority v. Weiner, 426 A.2d 191 (Pa. Cmwlth. 1981).

pronged. DEP cannot rely on that testimony to establish that members of the public complained that the odors caused them annoyance and discomfort.

Accordingly, we decline to accept DEP's proffered new spin on its employees' testimony which would, in essence, "overrule" our holding in Franklin I that the testimony of DEP employees regarding evidence of citizen complaints constituted hearsay if DEP attempted to use it as proof of an essential part of its case. Our resolution of the hearsay issue in the prior appeal (Franklin I) between the same parties is the law of this case. Banker v. Valley Forge Insurance Company, 401 Pa. Superior Ct. 367, 374, 585 A.2d 504, 508, petition for allowance of appeal denied, 529 Pa. 615, 600 A.2d 532 (1991).

Conclusion

For the above reasons, we affirm the EHB's June 19, 1996 order.

JESS S. JIULIANTE, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner	:	
v.	:	No. 2046 C.D. 1996
FRANKLIN PLASTICS CORPORATION, Respondent	:	

O R D E R

AND NOW, this 7th day of April, 1997, the order of the Environmental Hearing Board dated June 19, 1996 is hereby affirmed.

CERTIFIED FROM THE RECORD
AND ORDER EXIT
APR 7 1997
Prothonotary

JESS S. JIULIANTE, Senior Judge

Original: 1877
Copies: Tyrrell
Sandusky
Wyatte
Bereschak

EQB
Environmental Quality Board

p.o. box 8477 harrisburg, pa. 17105-8477 (717) 787-4526

September 29, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. Carl Brown, Jr., BFI Waste Systems

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

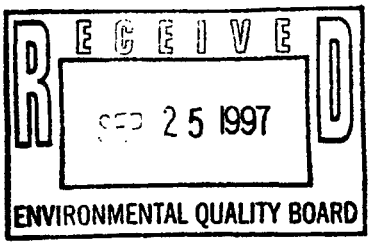
Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

Original: 18;
Copies: Tyrrell
Sandusky
Wyatte
Bereschak



Pennsylvania Environmental Quality Board
15th Floor, Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, Pa. 17105-8477

Sept. 24, 1997

RE: 25 Pa. Code Chs. 121, 123; Regulatory Basics Initiative #3 (Malodors)

Dear Sir or Madam:

Browning-Ferris Industries (BFI) appreciates the opportunity to comment on the above-referenced proposed amendments. We support their promulgation.

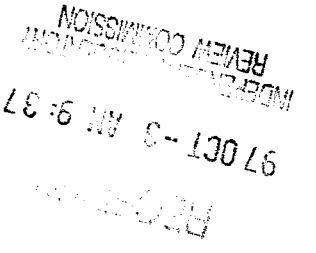
At the same time, BFI encourages the Department of Environmental Protection and the Environmental Quality Board to go further by (1) expressly providing that nuisance-based generic environmental standards may not be utilized as the basis for an enforcement action; and (2) endorsing legislation that would prohibit the use of nuisance-based lawsuits against facilities or operations that are in compliance with the regulations and have implemented best available technology.

If you have any questions or concerns regarding this submittal, please feel free to contact me at (610) 286-7876, extension 231.

Sincerely,

Carl Brown Jr.

Carl Brown Jr.
BFI Government Affairs Manager



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97 OCT -6 AM 9:05

INDEP. REGULATORY REVIEW COMMISSION

October 1, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. The Honorable Dan A. Surra, PA House of Representatives

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S K Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

DAN A. SURRA, MEMBER
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HOUSE BOX 202020
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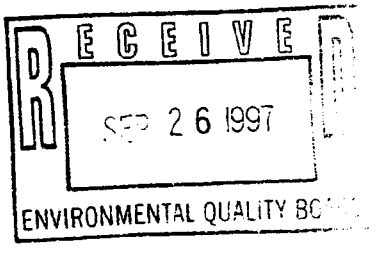
PHONE: (717) 787-7226

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES
ENVIRONMENTAL RESOURCES AND ENERGY
GAME AND FISHERIES
LABOR RELATIONS
POLICY

CAUCUSES
NORTHWEST CAUCUS, DEMOCRATIC VICE-PRESIDENT
LEGISLATIVE SPORTSMEN CAUCUS, TREASURER



September 25, 1997

James M. Seif , Secretary
Department of Environmental Protection
16th Floor, Rachel Carson State Office Building
Harrisburg, PA 17105-2063

Dear Secretary Seif,

I pen this letter to voice my concern over the Department's proposed changes to the Malodor Regulations. By the Department's own admission, a full 30% of citizen complaints to your agency deal with malodors. I t would seem by implementation of the proposed changes, the Department would be turning their backs on one of the most common problems experienced by the citizens of this Commonwealth.

What will be the determining factor of what is the best available technology? Who will make that decision? I am seriously concerned that the cost will be the overriding factor in these decisions and the citizens of this State will be forced to live with the problem for at least five years under this proposal.

Also, the proposal would allow the Department the latitude to add to the list of instances that are totally exempted from the malodor regulations with NO legislative oversight. I understand you desire to be able to expand that list should the need arise. However, I feel it is important that there must be some checks and balances to this process.

In my legislative district, I am dealing with a serious malodor problem from hydrogen sulfide and sulphur dioxide from a papermill. Residents of the community of Johnsonburg have been subjected to these gasses at levels that cause children and elderly people to gasp for breath, become watery eyed, and irritation to the respiratory systems. How will these changes help them?

Mr. Secretary, the people of Pennsylvania are entitled to clean air by our constitution. This proposal does nothing to enhance that noble idea. I respectfully request that we go back to the drawing board in an effort that will protect both our businesses and citizens.

Sincerely,

Dan A. Surra, Representative
75th Legislative District

DAS/rls

cc: Environmental Quality Board
All House Members
Carol Browner, Director, EPA

Original: 1877
Copies: Tyrrell
Sandusky
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Bereschak

EQB
Environmental Quality Board

p.o. box 8477 · harrisburg, pa. 17105-8477 · (717) 787-4526

October 3, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. John W. Carroll, Pepper, Hamilton & Scheetz LLP
2. Mr. Michael J. Kelly

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

PEPPER, HAMILTON & SCHEETZ LLP

ATTORNEYS AT LAW

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WRITER'S DIRECT NUMBER
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Original: 1877
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September 29, 1997

The Honorable James M. Seif
Environmental Quality Board
15th Fl., Rachael Carson State Office Building
P. O. Box 8477
Harrisburg, PA 17105-8477

Dear Mr. Secretary:

This letter serves as comment to the Environmental Quality Board's ("EQB's") proposed regulatory changes to 25 Pa.Code § 121 as published in the Pennsylvania Bulletin on August 23, 1997. Specifically, I am writing to comment on the proposed change to the definition of "Malodor" in 25 Pa.Code § 121.1.

As proposed, the revised definition of malodor does little to address the regulatory ambiguities created by the current definition and perpetuates the regulation of private nuisances in derogation of the express statutory mandates of the Air Pollution Control Act.

The starting point for any analysis of the lawful scope of a regulation prohibiting malodors is the definition of "air pollution" as found at 35 P.S. §4003. That definition is essentially a codification of the common law of public nuisance. It states, inter alia, that a pollutant discharged in such place, manner or concentration as to be inimical to public health, safety or welfare, which is injurious to human, plant or animal life or to property, or which unreasonably interferes with the comfortable enjoyment of life or property, is subject to regulation. Odors generally do not impact health or safety and are not injurious to life. They may, however, be inimical to public welfare or unreasonably interfere with the comfortable enjoyment of life or property, and it is in those situations in which DEP may lawfully regulate.

The basic problem then with the proposed definition is that it allows the most sensitive member of the community to initiate Departmental action based upon an "objectionable

odor" standard, which we believe is no standard at all. Furthermore, even a person of normal sensitivities who complains of an objectionable odor may be experiencing merely a private nuisance, and not a public nuisance. Black's Law Dictionary defines a "private nuisance" as that which "includes any wrongful act which destroys or deteriorates the property of an individual or of a few persons . . . and causes them a special injury different from that sustained by the general public." Contrast Black's definition of a "public nuisance," which is "one which affects an indefinite number of persons, or all the residents of a particular locality . . . although the extent of the annoyance or damage inflicted upon individuals may be unequal." It is axiomatic that the Department may regulate matters that constitute a public nuisance; however, matters which constitute a private nuisance are already adequately addressed at common law. As the proposed definition is now written, situations may arise where the Department may be forced to devote public resources to resolving private matters. The Department should not engage itself in regulating disputes between private parties who for centuries have had a forum in the courts for settling such controversies.

The request for public comments solicits input on the question: "In documenting whether an odor is objectionable, how should the frequency of occurrence and the extent of public objection be evaluated?" In California, the law defines an air contaminant nuisance as one which causes detriment to a "considerable number of persons." The Bay Area Air Quality Management District Staff has determined that the "considerable number" criterion is met when five different households make complaints on the same day. While not advocating such a precise standard, we do urge that some element of community impact must be present before a purely private nuisance can be considered a public nuisance giving rise to agency action.

Alternatively, we, therefore, propose the following language:

> Malodor--An objectionable odor identified by the public and subsequently documented by the Department in the course of an Odor Investigation as one of such intensity, duration and community impact as to cause a substantial and unreasonable harm, injury or damage to the public.

We feel our proposed language creates a workable standard for identifying malodors. Such language not only benefits the Department by providing a clearer standard for enforcement proceedings, but also provides guidance to those affected to aid in compliance efforts. In addition, citizens retain their ability to voice their opinions on environmental matters.

While the Department is reviewing the malodor regulation, there is one other issue which should be taken into consideration. Currently, Pennsylvania is one of the few states which have included malodor regulations in their SIP. There is no reason to perpetuate this aberration. I therefore recommend that instead of submitting this proposed regulation to EPA as a SIP amendment, the Department take this opportunity to petition EPA to delete the malodor

regulations from the SIP. The malodor regulation has no relation to maintenance of the NAAQS and was probably inadvertently sent to EPA with an earlier package of regulations in the first place.

Additionally, in response to the question posed in the request for comments, "Should the Department retain its long-standing minimum requirements for malodors resulting from emissions of VOC," I would offer this response: "No." The incineration requirement at §123.31 may conflict with existing VOC RACT requirements for a source and may compel the waste of fuel and result in increased NOx emissions. Just as with any RACT control, there needs to be an assessment of technologic and economic feasibility before mandating additional control technology for existing sources.

Thank you for the opportunity to express these views on the proposed rulemaking package. I am including a one-page summary of these comments for the EQB members.

Sincerely,

John Carroll

John W. Carroll

Pepper, Hamilton & Scheetz LLP

Summary of Comments on Proposed Rulemaking Regulatory Basics Initiative #3 (Malodors)

As proposed, the revised definition of malodor does little to address the regulatory ambiguities created by the current definition and perpetuates the regulation of private nuisances in derogation of the express statutory mandates of the Air Pollution Control Act.

The starting point for any analysis of the lawful scope of a regulation prohibiting malodors is the definition of "air pollution" as found at 35 P.S. §4003. That definition is essentially a codification of the common law of public nuisance. It states, inter alia, that a pollutant discharged in such place, manner or concentration as to be inimical to public health, safety or welfare, which is injurious to human, plant or animal life or to property, or which unreasonably interferes with the comfortable enjoyment of life or property, is subject to regulation. Odors generally do not impact health or safety and are not injurious to life. They may, however, be inimical to public welfare or unreasonably interfere with the comfortable enjoyment of life or property, and it is in those situations in which DEP may lawfully regulate.

The basic problem then with the proposed definition is that it allows the most sensitive member of the community to initiate Departmental action based upon an "objectionable odor" standard, which we believe is no standard at all. Furthermore, even a person of normal sensitivities who complains of an objectionable odor may be experiencing merely a private nuisance, and not a public nuisance. Black's Law Dictionary defines a "private nuisance" as that which "includes any wrongful act which destroys or deteriorates the property of an individual or of a few persons . . . and causes them a special injury different from that sustained by the general public." Contrast Black's definition of a "public nuisance," which is "one which affects an indefinite number of persons, or all the residents of a particular locality . . . although the extent of the annoyance or damage inflicted upon individuals may be unequal." It is axiomatic that the Department may regulate matters that constitute a public nuisance; however, matters which constitute a private nuisance are already adequately addressed at common law. As the proposed definition is now written, situations may arise where the Department may be forced to devote public resources to resolving private matters. The Department should not engage itself in regulating disputes between private parties who for centuries have had a forum in the courts for settling such controversies.

Alternatively, we, therefore, propose the following language:

> Malodor--An objectionable odor identified by the public and subsequently documented by the Department in the course of an Odor Investigation as one of such intensity, duration and community impact as to cause a substantial and unreasonable harm, injury or damage to the public.

We feel our proposed language creates a workable standard for identifying malodors. Such language not only benefits the Department by providing a clearer standard for enforcement proceedings, but also provides guidance to those affected to aid in compliance efforts.

RR 2, Box 162AA
Clearville, PA 15535

September 25, 1997

Original: 1877
Copies: Tyrrell
Sandusky
Wyatte
Bereschak

Environmental Quality Board
15th Floor Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, Pennsylvania 17105-8477

Dear Sirs:

I most strongly object to provision 123.32(d) in the Pennsylvania Bulletin Vol. 27, No. 34, of August 23, 1997. As I understand it, this provision would exclude "agricultural commodities in their unmanufactured state" from malodor regulation. This would mean that hog waste would no longer be objectionable.

As a resident of Clearville in Bedford County, I am greatly alarmed at the immediate prospect of having two new hog factories (Concentrated Animal Feeding Operations) in Bedford County. These factories will add 500 million pounds of pig manure each year for disposal by "ammonia evaporation" and spreading on fields throughout Bedford County. Act 6 (the Nutrient Management Act) will not help prevent the stench from this huge amount of hog waste, as odor reduction acts such as injecting or plowing down the waste are not required. Additionally, there are no set backs between fields receiving the hog wastes and homes, public parks, churches, schools, hospitals, and populated areas. Act 6 also precludes townships and municipal bodies from passing an ordinance that is more restrictive or protective of the public, and it preempts all existing ordinances. The counties of Fulton, Susquehanna, Tioga, Lancaster and Perry have also been targeted for hog factories.

This gigantic explosion of hog production is not for our domestic consumption, but rather for the Pacific Rim. That part of the world has experienced recent outbreaks of hoof-and-mouth disease, and has an intimate knowledge of the stagering host of bacterial and viral problems which thrive in concentrated animal and human populated areas. Are we willing to assume long-term human and ecological problems which have the potential of requiring the expenditure of billions of dollars in clean-up, completely destroying a clean area, ruining a quality of healthy life and fracturing a community so that it is no longer viable or livable?

The proposal of excluding agricultural commodities in their unmanufactured would be a disaster for this county.

I urge you to exclude this provision from the malodor regulatory revisions.

Sincerely,

Michael J. Kelly

Original: 1877
Copies: Tyrrell
Sandusky
Legal (2)

EQB
Environmental Quality Board

p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

97 OCT 14 AM 8:53

October 7, 1997

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Malodors (RBI #3) (#7-325)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. and Mrs. F. P. Polesky, Jr.

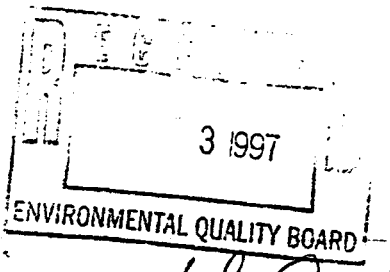
These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure



September 29, 1997

Environmental Quality Board
P.O. Box 8477
Harrisburg PA 17105-8477

Please do not change state regulations which are more stringent than federal law. As a resident of Pennsylvania, I wish to keep existing law on malodors, and if possible move to an even tighter control on noxious emissions. The burden that falls on companies is in no way extreme. The burden on the health of our community and children is great when emissions from polluting sources is increased or remains like it is.

In our area, odors can be sickening. They cause loss of sleep, allergies, nausea, bowel, skin, bronchial + nasal, tumors, illness, reduced school and work performance, and at times marital discord (over who has to get out of bed at 2 or 4 AM to shut every window and turn on air purifiers

and whole house filters) The burden of polluting factories has been proportionately greater in terms of dollars to our family. Is this fair? Our house value suffers; properties are sold to unsuspecting individuals. Older folks have noses so damaged that they can no longer smell the hazards that befall them. My children are often ill with respiratory problems, coincidentally on the same days that our air qualities are the poorest. I pay for their medicine.

Governor Ridge's proposal is definately a Link to Stink. I can't stand another five years worse than the current condition. I want my phone calls to the Air Quality Control to count. They must mean something because the only control a person has over foul air is a phone call to Allegheny County Air Pollution Control. Please don't tie our hands. People who cannot breathe

their own air are desparate indeed!

Can't we strive to be human and seek improvements in our technology without forgetting that what is "Best" today may not be good enough tomorrow. We need much more control over emissions, pollutants, and particulates.

When I was pregnant with my son, who also has severe allergies, I had to leave my own home to sleep in relative Stranger's homes - the nurses at my doctor's office - who were also suffering from allergies and understood how stressful the inability to breathe is. I have had to leave my home and stay in hotels in the middle of the night before I replaced all the windows on my house for over $10,000 - windows I can rarely enjoy, or trust to remain open through one night. How grateful I would be if I could move and not care and not try

to make some sense of
right out of something
peculiarly wrong - malodor.
It is too kind of a word for
what it really is. It's devastation
on a cellular level, frightening
to anyone so exposed as we
are to the daily fluctuations
and incensistencies of air flow
and its precious, as some see it,
cargo! It is a violator of home
and human body. Escape is
financial devastation to me and
my family. Those poor guys at the
factory can always hire someone
else to do their dirty work.
My family depends on me and
I cannot easily be replaced.

Even my dogs don't want to
go out before noon and the sun
has burned through the smog.
I can't walk them. I almost can't
open the door to let them out
because it stinks so bad.

Tom Ridge - your idea stinks!
And you can smell even worse if

come and stay at my house for a nice weekend. It's not relaxing. Not at all. And I don't get paid for putting up with this for the last 12 years.

I'm angry. This is senseless inaction. David Strong, I truly believe that you are wrong.

I thank Wilder Bancroft for his desire to continue to regulate odors. This has to be a continuous process to become effective. I have seen alot of improvement in the last six years and there is room for more - much, much more. We need to educate people, and, if necessary, impose a pollution tax to pay for energy producing factories pollution control devices. Let's seek solutions, not inaction. Please. Thank you all for your attention to this problem. It is a difficult one and is not easily solvable.

Sincerely

Jennifer Polesky R.N.

(Neighbor to Neville Island)