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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 11, 1999

Honorable James M. Seif, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17105

Re: IRRC Regulation #7-345 (#2009)
Environmental Quality Board
Interstate Ozone Transport Reduction

Dear Chairman Seif:

Enclosed are our Comments on your proposed regulation #7-345. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact James M. Smith at 783-5439.

Sincerely,

Robert E. Nyce
Executive Director

REN:wbg
Enclosure
cc: Sharon Freeman
Barbara Sexton
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-345

INTERSTATE OZONE TRANSPORT REDUCTION

JUNE 11, 1999

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to reasonableness, economic impact, implementation procedures, timetable for compliance, feasibility and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Protection of Pennsylvania's competitive interests. - Reasonableness, Economic Impact and Implementation Procedures

The federal interstate ozone transport reduction program will affect 22 states and the District of Columbia. The design and timing of the program affects the competitiveness of the affected industries in each state. The Pennsylvania House of Representatives unanimously approved House Resolution No. 182, a concurrent resolution specifically directed at this rulemaking. As of the date of these comments, the concurrent resolution was sent to the Senate for consideration. House Resolution No. 182 resolved, in part, the following:

RESOLVED, That the Department of Environmental Protection revise its proposed regulations implementing the SIP Call (29 Pa.B. 1319, March 6, 1999) to give effect to the purpose and intent of this resolution, namely, to ensure that major fossil-fired steam electric generating units in Pennsylvania are not subject to emission control requirements more stringent than, or on a compliance schedule sooner than, those required by Phase II of the OTC Memorandum of Understanding, until and unless similar generating units in each state adjacent to Pennsylvania are subject to a comparable schedule of equivalent emission control requirements established in approved State Implementation Plans adopted in conformance with: (1) the EPA's Regional Ozone Transport Rulemaking; (2) the Federal Implementation Plans promulgated in accordance with the EPA's proposed Ozone Transport Federal Implementation Plan; or (3) a final rulemaking granting the relief requested in the petition filed by Pennsylvania on August 14, 1997, pursuant to section 126 of the Clean Air Act;

Several commentators requested that language be added to the regulation to protect Pennsylvania's competitive interests. They are concerned that the rules may not go into effect in

all states at the same time as planned. They are also concerned that ongoing court challenges may change the compliance deadlines and technical requirements. The commentators proposed adding language which would hold off implementation of the requirements until the overall program requirements are uniformly adopted.

The unanimous adoption of House Resolution No. 182, and the concerns of the commentators raise serious concerns with the proposed regulation. Pennsylvania's industries could be competitively disadvantaged if they comply with requirements not imposed on adjacent states. Pennsylvania's industries could also be burdened if they must make investments to comply with this regulation, but the underlying federal requirements are subsequently modified by the courts. For these reasons, language should be added to the regulation to protect Pennsylvania's competitive interests.

2. Transition to Chapter 145. - Reasonableness, Implementation Procedures and Clarity

The EQB requested comment on how to create as few additional administrative requirements as possible. Comments were submitted on minor conflicts between existing equipment requirements and the requirements of the new regulations. For example, the proposed regulation requires reporting in tons per hour, but one commentator's existing equipment records in pounds per hour. To deal with minor conflicts, the EQB should either incorporate a waiver process or reference an existing waiver process whereby a regulated NO_x source could apply to the Department of Environmental Protection (DEP) for a waiver.

3. Section 145.2. Definitions. - Clarity

"Electric generating unit" and "Non-electric generating unit"

The terms "electric generating unit" and "non-electric generating unit" are used in Section 145.40. Each type of facility is allocated a portion of the state NO_x budget allocation. However, these terms are not defined in Section 145.2. The EQB should define these terms for clarity.

"Nameplate capacity"

The term "Nameplate capacity" is used in Section 145.4(1) *Applicability*. The model federal rule has a definition of "nameplate capacity." However, this definition was omitted in the proposed rulemaking. The EQB should add the federal model definition of "Nameplate capacity" for clarity.

"NO_x allowances held or hold NO_x allowances"

The definition of "NO_x allowances held or hold NO_x allowances" appears to have a typographical error. One portion reads "...submitted for recordation this subchapter,...." The EQB should clarify this definition in the final-form regulation.

"NOx allowance transfer deadline"

The definition of "NOx allowance transfer deadline" specifies November 30 as the annual deadline to submit allowances for compliance. Commentators requested that the deadline be changed to December 31 to give them greater flexibility to identify cost-effective means for compliance. The EQB should consider changing the deadline to December 31, or explain the need for the November 30 deadline.

"NOx Budget Trading Program" and "State"

The definitions of "NOx Budget Trading Program" and "State" use the phrase "under this subchapter." This phrase gives the impression that other states would fall under the requirements of Pennsylvania's regulation. For clarity, the EQB should modify these definitions.

"Unit"

Commentators are concerned that the definition of "unit" does not clearly include cement kiln systems. This may affect their ability to "opt-in." The EQB should clarify the definition of "unit" to include cement kiln systems.

4. Section 145.4. Applicability. - Economic Impact, Need, Reasonableness and Clarity

We have two concerns with Section 145.4. First, Section 145.4(1) specifies that the regulation is applicable to units with a capacity greater than or equal to 15 MWe. The model federal rule uses a cutoff of 25 MWe. The EQB should explain the need to regulate units between 15 and 25 MWe and the economic impact this would have on existing and future units or adopt the federal limit.

Second, some commentators suggested adding a Section 145.4(3) regarding an exemption for units that accept a 25-ton ozone season limit. We note that the model federal rule has this exemption in Section 96.4(b). Why wasn't this exclusion included in Pennsylvania's regulations?

5. Section 145.6. Standard requirements. - Need and Reasonableness

Subsection (e) requires records to be kept onsite, at the source, for five years. Cost savings could be realized by keeping these records in central files for multiple units and made available upon request. Why is it necessary to keep this information onsite?

Portions of the model federal rule were not included in the proposed rulemaking. Specifically, the regulation does not include Sections 96.6(c)(8) and 96.6(f)(1) and (2) regarding recording allowances and liability for violations. Why didn't the EQB include these provisions?

6. Section 145.21. NOx budget permit applications. - Timetable for Compliance and Clarity

We have two concerns with Section 145.21. First, Paragraph (b)(1) requires permit applications to be filed within six months after the effective date of the final-form regulation. There is a possibility that Pennsylvania's permit applications would be required much earlier than

would be required by the federal model rule. The EQB should explain the need to require applications within six months of publication of the final-form regulation.

Second, Section 145.21 also does not provide a timetable for DEP to respond to the applications. The EQB should add a provision stating when DEP must act on a complete application.

7. Section 145.30. Compliance certification report. - Need

This section specifies November 30 as the annual deadline to file the compliance certification report. Commentators requested that the deadline be changed to December 31 to give them greater flexibility to identify cost-effective means for compliance. The EQB should consider changing the deadline to December 31, or explain the need for the November 30 deadline.

8. Section 145.40. State trading program budget. - Clarity

Subsections (1) and (2) use the phrase "tons per season." For clarity, the EQB should designate these as "tons per control period" to be consistent with definitions in Section 145.2.

9. Section 145.42. NO_x allowance allocations. - Need and Reasonableness

Allocation method

Commentators suggested several changes to the NO_x allowance allocation method in Section 145.42. Suggestions included the following:

- Change the allocation method for the year 2006 and thereafter,
- Subsection (a)(2) should be revised to give DEP more discretion,
- The EPA's SIP contains inaccuracies that should be corrected,
- Allocation of NO_x allowances should be changed to provide more incentives for low emission units,
- Allocation periods should be longer,
- Allocations should be modified to better accommodate future planning,
- The size of the set-aside pool in Subsection (d) should be reduced.

On the other hand, several commentators advocate adopting EPA's allocation approach without changes, despite its flaws. Any method will create some degree of advantages and disadvantages. The EQB should explain why the method used in the proposed rulemaking is the best alternative.

Exception to 0.15 lb/MMBtu allocation

Paragraph (b)(1) contains the phrase "or allowable emission level, whichever is lower." This additional criteria is not in the federal model rule. Why is this criteria needed?

10. Section 145.54. Compliance. – Reasonableness, Economic Impact, Feasibility and Clarity

Although the penalty provisions in Subsection (d) are contained in Chapter 123 and the federal model rule, the penalties can be severe. Specifically, Subsection (d) requires:

- A deduction of three NOx allowances for every ton of excess emissions,
- Each ton of excess emissions will be viewed as a separate violation, and
- A fine. The potential exists for a violator to be penalized up to \$25,000 a day for every day in the 153-day control period.

Under these provisions, a violation could result in a fine of up to \$3.8 million and a loss of allocations in the next control period. The EQB should explain the need and reasonableness of these deductions and penalties.

Subsection (d)(3) indicates the fines will be assessed under "the Clean Air Act or the act." It is not clear what penalties apply. For clarity, the EQB should reference the specific provisions in "the Clean Air Act or the act" which contain the applicable penalties for the violation.

11. Section 145.55. Banking. – Economic Impact, Reasonableness and Clarity.

Subsection 145.55(c)(9) allows facilities to carry over allowances they banked from 2000 to 2002 to the program under Chapter 145. We have four questions concerning the implementation of this provision.

First, the regulation is not clear regarding how Pennsylvania will maintain compliance in 2003 if all of the banked allowances carried forward are used in that year. The EQB should explain how DEP will ration the banked NOx allowances to assure that Pennsylvania does not exceed its NOx allocation.

Second, the regulation does not allow facilities to carry over allowances banked in 1999. Why can't allowances banked in 1999 be carried forward?

Third, the section provides emission reduction credits for years 2001 and 2002. It is not clear if a facility can carry forward banked allowances and also receive emission reduction credits. The EQB should clarify whether a facility will receive credit for both a banked allowance and emission reductions, or if the facility will only be credited once.

Finally, Subsection (c)(10) provides that the compliance supplemental pool for Pennsylvania is 13,716. Why is it necessary to include the specific allocation in the regulation, especially if EPA may change it?

12. Section 145.70. General Monitoring. – Need, Economic Impact and Reasonableness

Commentators expressed concern with the new monitoring requirements established in this rulemaking. They observe that regulated facilities incurred significant costs to comply with the monitoring requirements in Chapter 123 (which started in 1999). Now they would have to

make further adjustments. The Commentators recommend that the monitoring requirements in Chapter 123 be maintained.

The Preamble states the monitoring requirements are consistent with the existing NOx budget rule. The monitoring requirements contained in this rulemaking are the same as those contained in the EPA's model rule. However, there is no mandate that Pennsylvania must follow the EPA model rule.

We have two concerns with Section 145.70. First, the need to impose any variance in existing monitoring requirements is not clear. Has the EPA stated or implied that existing monitoring requirements are not acceptable under the new program? The EQB should consider maintaining the current monitoring requirements for those facilities currently in compliance with existing monitoring requirements.

Second, if alterations are necessary, the EQB should provide an analysis of the additional costs generated by the new monitoring requirements. The EQB should then explain why these additional costs are necessary.

13. Section 145.71. Initial certification and recertification procedures. – Consistency and Reasonableness

The EPA expressed concern that Subsection (b)(3) does not require DEP to issue certification disapproval within 120 days. Adding a specific time period would provide notice to facilities of when the DEP will take action. The EQB should consider including this timeframe.

14. Section 145.74 Recordkeeping and Reporting – Clarity

Subsection (d)(1) provides that NOx budget units shall meet the annual reporting requirements of this subchapter. Clarification of whether “annual” refers to the term “control period” as defined in Section 145.2 is needed.

15. Section 145.101. Applicability. - Reasonableness, Economic impact and Clarity

Brake horsepower standard vs. emission based standard

In Subsections (a), (b) and (c), the EQB uses brake horsepower to determine which internal combustion engines (ICE) must comply with Subchapter B. Commentators suggested using emission-based standards, such as one ton of NOx per day, to determine which ICEs must comply. Since emissions control is the ultimate goal, why does the EQB use brake horsepower instead of emissions to determine which ICEs must comply with Subchapter B?

Exemptions

We have four concerns with the exemption in Subsection (d). First, Subsection (d) may be overly prescriptive. Commentators are concerned that the language does not allow sufficient flexibility to exempt standby diesel generators. Why does the EQB need limitations such as a unit having “the sole purpose of providing emergency electric service to the facility where it is

located"? Why does the EQB need to prescribe anything beyond the limitation to 208 hours of operation?

Second, the exemption is limited to electric generation units. Why wouldn't the exemption apply to ICEs used for other purposes?

Third, the regulation does not include a EPA exemptions for start-up, shutdown, and malfunction emissions that do not exceed 36 consecutive hours. Why didn't the EQB include these exemptions?

Finally, commentators stated there are instances where compliance costs are high, but the reduction of NOx is minimal. The regulation does not address alternatives when a NOx reduction may not be cost effective. The EQB should consider adding a process where a NOx source could ask for alternatives, or waivers if compliance costs are excessive in relation to the reduction of NOx.

16. Section 145.102. Definitions. - Need and Clarity

We could not find the defined term "permitted capacity factor" in the body of this subchapter. Is this term needed?

17. Section 145.143. Standard requirements. - Need, Economic impact and Reasonableness

Commentators state that the federal model rule does not have an emissions rate or an emissions cap for cement kilns. They also state that the regulation does not allow alternatives for compliance such as the use of low-NOx burners or mid-kiln firing systems. Meeting the emissions rates is the only option available. The commentators believe the proposed standards will disadvantage 30 to 50 percent of the cement plants in Pennsylvania. The EQB should explain the need to vary from the federal model rule and explain why options available under federal guidelines were not included in Pennsylvania's regulation.

18. Section 145.144. Reporting, monitoring and recordkeeping. - Reasonableness

The regulation does not include EPA exemptions for start-up, shutdown and malfunction emissions. Why didn't the EQB include these exemptions?