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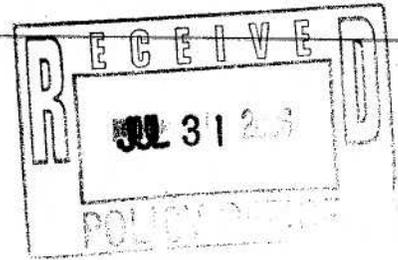
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INDEPENDENT REGULATORY
REVIEW COMMISSION

July 28, 2006

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Environmental Quality Board
Rachel Carson State Office Building
15th Floor
400 Market Street
Harrisburg, PA 17101-2301

Re: Proposed Rulemaking - Nonattainment New Source Review
25 Pa. Code Chapter 127, Subchapter E

Dear Chair and Members of the Environmental Quality Board:

Waste Management of Pennsylvania, Inc. ("Waste Management") provides these comments concerning the Department's proposed regulation, entitled "Nonattainment New Source Review", published in the Pennsylvania Bulletin on April 29, 2006, 36 Pa. Bull. 1991 (the "Proposed NSR Regulation"). The Proposed NSR Regulation would amend the Department's current regulations implementing New Source Review requirements for nonattainment areas ("NSR").

The Proposed NSR Regulation constitutes the Board's response to comprehensive revisions made by the United States Environmental Protection Agency ("EPA") to the federal NSR program ("NSR Reform"). However, the proposed NSR Regulation differs from the federal NSR Reform package in many significant respects. In general, if promulgated, the Proposed NSR Regulation would render Pennsylvania's NSR Regulations significantly more stringent than Pennsylvania's current NSR regulations, and significantly more stringent than the federal NSR Reform regulations, especially in Southeastern Pennsylvania. These overly stringent regulations would directly interfere with economic development in Pennsylvania and place Pennsylvania businesses at a significant competitive disadvantage relative to other states. In this context, Waste Management provides the following comments concerning the Proposed NSR Regulation.

Significance Threshold in Southeastern Pennsylvania

EPA has promulgated a revised National Ambient Air Quality Standard ("NAAQS") for ground-level ozone. The revised ozone NAAQS considers ambient concentrations over an eight-hour average, rather than the shorter term evaluation (one hour) considered under the former standard. By all accounts, the revised ozone NAAQS constitutes a more stringent standard than the former one-hour ozone standard, and is more protective of human health and the environment. Indeed, many more regions of the country are designated as nonattainment for the revised ozone NAAQS.

EPA has also promulgated regulations governing implementation of the revised ozone NAAQS. Those regulations have clarified that the former one-hour ozone standard is no longer in effect; accordingly, classification of each nonattainment area is now based upon the revised eight-hour ozone NAAQS. Under the currently applicable eight-hour standard, the five-county Southeast Pennsylvania Region is classified as a moderate ozone nonattainment area.

As with all ozone classifications, the federal NSR Program establishes significance thresholds for applicability of NSR standards to new sources or major modifications of existing major sources. Historically, the Department has consistently adhered to the federal significance thresholds for consistent implementation of Pennsylvania's NSR regulations and to avoid the imposition of any undue economic disadvantage for Pennsylvania facilities.

In response to EPA's rulemaking and guidance concerning the transition from the former one-hour ozone NAAQS to the revised eight-hour ozone NAAQS, the Department filed specific objections with EPA, arguing for the preservation of existing regulatory standards for areas classified as in severe nonattainment with the one-hour ozone NAAQS. Pennsylvania contended within its submittals to EPA that the alternative interpretation adopted by EPA through its transition policy would result in "back-sliding," by allowing areas that had not yet attained the one-hour ozone NAAQS to be made subject to less stringent requirements (based on the location of such sources in areas classified as in moderate nonattainment with the revised eight-hour ozone NAAQS). EPA clearly and specifically disagreed with the Department's contention, explaining that effective implementation of the revised eight-hour ozone NAAQS, consistent with long-standing implementation of NSR under the Clean Air Act, required adherence to appropriate classifications, and application of associated standards, including significant thresholds, under the current, rather than former, NAAQS-based classifications. Pennsylvania has sought judicial review of this determination.

Notwithstanding, the applicability of EPA's current NSR significance thresholds in virtually all other jurisdictions, and the pendency of Pennsylvania's judicial challenge to EPA's position, the Board has proposed through the Proposed NSR Regulation to implement a unique program in Southeastern Pennsylvania, which would result in substantial prejudice to

Pennsylvania's businesses in this region. In particular, the Board acknowledges that the five-county Southeastern Pennsylvania Region is appropriately classified as a moderate nonattainment area under the revised eight-hour ozone NAAQS. The Board further acknowledges that, under EPA's revised regulation and transition guidance, this region should therefore be subject to the NSR significance levels applicable to moderate ozone nonattainment areas.¹ However, the Department proposes to impose a substantially more stringent significance emission level for application to the Southeastern region, notwithstanding that the classification of the Southeastern Pennsylvania under the revised ozone NAAQS is identical to most other areas of the Commonwealth.

The Board's proposed significance threshold for sources in Southeastern Pennsylvania is made even more severe due to additional revisions to the current NSR regulation included within the Proposed NSR Regulation (discussed below).

Waste Management specifically objects to the Board's proposal to ignore the appropriate classification of the five-county Southeastern Pennsylvania region as a moderate ozone nonattainment area, and instead impose NSR significance thresholds that would apply only to a severe ozone nonattainment area. In this respect, the Proposed NSR Regulation is inconsistent with long-standing Pennsylvania regulatory practice, neither equivalent to nor consistent with the federal NSR Regulations, isolates Southeastern Pennsylvania for disadvantageous and overly-burdensome treatment without any regulatory basis and would contribute to a competitive disadvantages for business in Southeastern Pennsylvania.

Aggregation of De Minimis Emission Increases

The federal NSR regulatory program has established specific standards for consideration of "contemporaneous" emission increases and the determination of whether a proposed modification would trigger NSR. In general, under the federal program, a source owner is obligated to aggregate net emission increases occurring within the five-year period prior to the submittal of an application for a proposed modification, only if the modification would itself result in a significant net emission increase. However, the Board previously determined to incorporate into its NSR regulations the requirement for sources evaluating NSR applicability to aggregate emission increases occurring during the appropriate contemporaneous period.

For severe ozone nonattainment areas, the Department identified the same five-year period for the contemporaneous netting evaluation as used under federal law. However, the Department has interpreted its NSR Regulation to require sources located in moderate ozone

¹ Indeed, the Board acknowledges that, under the Department's own current regulations, sources in Southeastern Pennsylvania must currently be evaluated under the moderate nonattainment provisions of Pennsylvania's current NSR Regulations.

nonattainment areas to aggregate emission increases over an extended timeframe.² In particular, the Department has contended that such sources must evaluate any emission increase that occurred at the facility since 1991, unless such emission increase has already been considered within an NSR determination. Therefore, in the context of any minor proposed modification of a facility located in a moderate ozone nonattainment area (or indeed anywhere in Pennsylvania which is designated in attainment with the ozone NAAQS because it is located in the Northeast Ozone Transport Region ("OTR")) that would result in an increase of one ton per year or greater of emissions of volatile organic compounds ("VOCs"), the facility must evaluate every de minimis emission increase during the past 15 years to determine whether the aggregation of all such emission increases would exceed the NSR significance threshold. Although NSR applicability in this circumstance may not result in the imposition of the most stringent emission control standards, lowest achievable emission rate ("LAER"), the facility would nonetheless be required to undergo NSR permitting, and the attendant significant delay in permit issuance, and to purchase emission reduction credits ("ERCs") to offset the aggregate emission increases during the past 15 years. The cost of such ERCs will almost certainly exceed \$100,000.

This unjustifiable scheme for emission aggregation constitutes a significant impediment to facility modernization, modifications that would achieve enhanced efficiency and minor changes that may enhance a business' economic position. Few source operators would undertake a modification that results in a de minimus emission increase if such modification would trigger the application of NSR, the commensurate delay in permit review and issuance, and a regulatory obligation to expend more than \$100,000 to secure ERCs (if they are even available). The Department should use this opportunity to amend its current NSR regulations to eliminate this anachronistic requirement.

Not only does the Proposed NSR Regulation fail to take advantage of this opportunity, but the Board now proposes to extend this requirement to sources located in the Southeast Pennsylvania area. In particular, the Proposed NSR Regulation would not only subject sources in the Philadelphia region to the significance thresholds otherwise applicable only in severe nonattainment areas, but would also extend the excessive and burdensome emission aggregation provisions to these same sources. Under the Department's current regulations, sources located in areas classified as severe nonattainment are subject to the more stringent significance thresholds, but required emission aggregation is limited to the five-year contemporaneous period. At a minimum, to the extent that the Board determines to subject facilities located in Southeast Pennsylvania to significance thresholds applicable to severe nonattainment areas (notwithstanding that the area is classified as a moderate ozone nonattainment area), and to the further extent that the Board determines to preserve its excessive emission aggregation procedures for moderate nonattainment areas, the Board should amend the Revised NSR Regulation so as not to extend the application of this fifteen year aggregation requirement to

² The Department's regulations apply the same standards to regions of the Commonwealth located within the Northeast Ozone Transport Region (the "OTR"), even if the area has not been designated as nonattainment.

sources in Southeast Pennsylvania that will be subjected to significance thresholds otherwise applicable only in severe nonattainment areas.

Evaluation of Emission Increases

Perhaps the most commendable and effective aspect of the Department's current NSR regulation is the methodology used for evaluating emission increases associated with modifications to existing major sources. Specifically, the Department's NSR regulations provide that, in evaluating whether a modification to an existing major source results in a significant net emission increase, source owners should compare the potential-to-emit of the relevant pollutants prior to the modification to the source's potential-to-emit the same pollutant following modification. Under this "potential-to-potential" test, a source owner could engage in "modifications" of an existing major source without triggering NSR, if emissions from the source following the modification would continue to comply with applicable permit limits.

This approach compared favorably to EPA's former emission increase methodology, which required the comparison of the "actual" emissions for a source prior to a modification with the potential-to-emit of the source following modification. EPA's "actual-to-potential" test caused tremendous controversy and significant disagreements in evaluating emission increases, and was never applied uniformly.

Recognizing the deficiencies of its actual-to-potential test, EPA revised this aspect of its NSR regulations within its NSR Reform rules. Under its revised NSR regulations, EPA now requires a facility to evaluate emission increases resulting from a modification by comparing the actual emissions of the source prior to the modification with its projected actual emissions following modification. Further, in projecting future actual emissions, source operators should not include any emission increases resulting from increased business activity that the source could currently accommodate, prior to the modification. This "demand growth exclusion" recognizes changes in business cycles, and encourages, rather than penalizes, sources to benefit from an increase in business activity that did not result from the modification to the source. Within the Proposed NSR Regulation, the Department purports to generally adopt EPA's actual-to-future actual test with consideration for demand growth exclusion. In reality, however, by proposing changes to EPA's methodology, the Department has effectively proposed an actual-to-potential test, without adequate protection for demand growth.

Specifically, under EPA's revised regulations through NSR Reform, a facility undertaking a modification must project the future actual emission rates for the modified source, excluding emission increases associated with demand growth. The facility must maintain records for a period of five years or ten years, depending upon the circumstance, to demonstrate that emission increases resulting from the modification do not exceed the facility's projections for future actual emission rates, to the extent that such exceedance would have resulted in NSR applicability.

Most significantly, EPA's actual-to-future actual test provides a significant improvement over the actual-to-potential test previously applied by EPA, by eliminating the "Hobson's Choice" previously faced by source operators. In particular, under the actual-to-potential test, a source owner proposing to undertake any physical change or change in the method of operation of an existing major source, where such proposed change does not qualify for a specific exemption from the definition of "modification", could face NSR applicability even if the proposed modification would not result in any actual emission increase. Specifically, because a source operator typically maintains emission rates at a level that is meaningfully less than its annual permit limit, the differential between past actual emission rates and future potential emission rates would often exceed the significance level. As a "solution" to this dilemma, EPA had stated that the source operator was free to voluntarily accept a reduced permit limit, such that the differential between the past actual rate and the new permit limit would not exceed the significance level for the NSR pollutant(s). Source operators routinely objected to a requirement to forego operational flexibility and the opportunity for increased production activity currently authorized under existing permits, merely to avoid the application of NSR for a proposed modification that would not result in any significant actual emission increase.

Under its NSR Reform approach, EPA has eliminated this Hobson's Choice. A source operator proposing to undertake a modification now must project the actual emission increase associated with the modification (exclusive of demand growth), and compare this emission rate with baseline actual emissions. Only if this differential -- the emission increase actually resulting from the change -- exceeds the significance level would the proposed modification trigger NSR.

The Board states within the preamble to the Proposed NSR Regulation that its revised NSR program would also utilize an actual-to-future actual approach. However, in significant contrast to EPA's emissions test, the Board would require the source owner to accept a permit limit equivalent to the projected future actual emission rate following modification. In other words, regardless of the terminology that the Board applies to the test, the Proposed NSR Regulation would effectively impose an actual-to-potential test, because it would require the facility's projected actual emission rate to become an enforceable permit limit for NSR purposes.

The Preamble to the Proposed NSR Regulation suggests that emissions associated with demand growth would not be restricted by this new permit limit, if the permittee can demonstrate, in advance, that a hypothetical emission increase could be accommodated without the modification. However, if the permittee cannot prospectively demonstrate, to the satisfaction of the Department, that the facility could accommodate the entire relevant emission increase without the modification, then the permittee would not fully preserve the demand growth exclusion authorized by EPA -- for emission increases unrelated to the modification and fully

authorized prior to the permit change³. Further, the Department's approach completely shifts the burden to the permittee to justify that any emission increase would not result from the modification. Moreover, EPA's approach reflected in NSR Reform is based on the reasonable presumption that an emission increase occurring more than five years after the modification (where no exceedance of an existing permit limit occurs) is unlikely to be caused by the relevant modification. The Department disregards this presumption, and would impose the new emission limitation as a perpetual restriction, apparently believing that an increase of emissions that occurs for the first time many years after a modification nonetheless was likely due to the modification, rather than a change in business circumstance.

The Department's prior potential-to-potential emission evaluation sought to acknowledge and protect a facility's continued authorization to engage in a level of business activity reflected in a previously-issued permit, without triggering NSR. Although the actual-to-future actual emission test is neither as straightforward nor as protective in this regard, EPA's approach at least seeks to confine the NSR evaluation to the actual emission increases associated with a modification, and avoid the imposition of more restrictive permit conditions simply to prevent NSR applicability. Through the Proposed NSR Regulation, the Board proposes to forego its more appropriate potential-to-potential test in favor of an emission increase evaluation that is inconsistent with federal NSR Reform, and directly contrary to the Board's own philosophy in establishing and applying the potential-to-potential test. The approach reflected in the current language of the Proposed NSR Regulation is likely to meaningfully restrict economic growth, investment in production efficiencies and modernization of equipment designed to enable a facility to increase business activity without causing any associated significant net emission increase.

Baseline Actual Emission Rate

Because the Board proposes to evaluate net emission increases resulting from modifications by considering past actual emission levels, the Board proposes to define the baseline actual emission rate that a facility must use in this calculus. EPA likewise recognized the need to specify the methodology for establishing this baseline value through its NSR Reform package. EPA made the determination that a facility should be afforded the opportunity to identify any twenty-four consecutive month timeframe during the prior ten years as representative of the facility's actual emission rates. EPA specifically acknowledges that a ten year timeframe is more likely to accommodate fluctuations in business cycles, and enable the facility operator to identify an appropriate, representative baseline emission standard. However, to the extent that these past actual emission rates reflect less stringent regulatory or permit-based obligations than currently applicable to the facility, EPA requires the permit applicant to reduce these emission projections consistent with currently-applicable standards.

³ In addition, it is not clear from the proposed regulatory language that the portion of the future actual emission rate that merely accommodates demand growth would be excluded from the calculus of the net emission increase resulting from the modification.

In this context as well, the Board has proposed to depart from EPA's approach in a manner that is detrimental to Pennsylvania's business interests. First, rather than affording each facility the opportunity to consider ten years of operations in order to accommodate variations in business cycles, the Department proposes to restrict that timeframe to five years. Therefore, unlike most states which will implement a version of NSR that tracks EPA's programs, Pennsylvania would impose an NSR standard that generally prevents a facility from looking beyond the most recent five years to identify a more representative timeframe.

Second, EPA's approach through NSR Reform recognizes that a source operator is in the best position to identify representative emissions based on past activities, and therefore allows the permit applicant the discretion to identify the relevant twenty-four month baseline period. Under the Board's Proposed NSR Regulation, Pennsylvania businesses would not be afforded that discretion; instead, the regulation would leave the Department as the arbiter of which timeframe shall be deemed most representative. Not only does this proposed approach substantially restrict the flexibility afforded to Pennsylvania businesses, but it greatly complicates the NSR analysis, and therefore will lead to further delays in permitting.

Specifically, under EPA's approach, there should be little uncertainty as to the propriety of the permit applicant's designation of the relevant twenty-four month period for identification of baseline emission rates. Therefore, in most cases, the permit applicant can proceed with preparation of its application with confidence that it is using the appropriate baseline values for purposes of its NSR evaluation, and valuable time would not be wasted on evaluating the propriety of this designation as part of the permit application review process. However, under the Board's proposed approach, if the permit applicant wishes to propose a specific twenty-four month period as reflecting representative actual emission conditions, the Department will perform its own analysis and reach its own decision. This will undoubtedly require a fairly extensive exchange of information and potential disagreement between the applicant and the Department. These concerns can be -- and should be -- avoided if the Department simply adopts the federal approach toward identifying baseline actual emission rates.

In addition, as discussed above, the Department's current NSR program has provided for the evaluation of emission increases by comparing the current potential emission rate for the source with the future potential emission rate after the modification. The Department has acknowledged the benefits of this approach, and it is our understanding that the Board would propose continuation of the potential-to-potential test if it could be approved by EPA. To the extent that the Board would prefer to utilize a potential-to-potential test, the Board should attempt to approximate that approach through its revised NSR regulations to the greatest extent possible. Clearly, a higher baseline actual emission rate more closely resembles the current potential emission rate for a source than a lower baseline emission rate that is selected merely because the allowable timeframe for consideration is constrained.

For all of these reasons, Waste Management objects to the Board's proposal to limit to five years the timeframe from which the baseline actual emission rate would be selected, and to assign to the Department, rather than the permit applicant, the authority to make such selection.

Significance Threshold for PM-10

Without significant discussion within the preamble or otherwise, the Board has proposed to modify the existing nonattainment NSR regulations in Pennsylvania through the Proposed NSR Regulation by substantially reducing the threshold for major stationary source status relative to emissions of particulate matter with a diameter between 2.5 microns and 10 microns ("PM-10"). Both the existing Pennsylvania regulatory program and the federal regulations (both prior and subsequent to NSR Reform) establish a major source threshold of 100 tpy for emissions of PM-10. Inexplicably, the Board has proposed to lower this threshold to 70 tpy through the Proposed NSR Regulation.

In the absence of any stated rationale for this proposal, it is impossible to comprehend the basis for the Board's position in this context. Pennsylvania's NSR regulations are already substantially more stringent than the federal program with respect to control of particulate matter emissions because Pennsylvania's program requires consideration of fugitive emissions from all source categories in evaluating NSR applicability. By contrast, under the federal NSR program, only sources within a limited listing of source categories must include fugitive emissions in evaluating whether the facility qualifies as a major stationary source of PM-10. Pennsylvania's prior determination to consider fugitive particulate matter emissions in evaluating NSR applicability has significant implications. It is virtually impossible to accurately measure fugitive particulate emissions associated with most source types. Therefore, facilities typically rely upon highly conservative emission factors for projecting particulate matter emission rates. By all accounts, these highly conservative emission factors almost certainly substantially overstate actual particulate matter emissions from regulated sources. Should the Board substantially reduce the major source threshold for PM-10, as identified in the Proposed NSR Regulation, many proposed sources which do not cause significant particulate matter emissions will inappropriately be made subject to NSR.

Moreover, the Department's regulations and permitting philosophy already impose upon Pennsylvania sources specific requirements to minimize fugitive particulate emissions. These requirements apply regardless of NSR applicability. For this reason, the application of NSR to numerous additional sources (based upon conservative estimations using emission factors and a reduced major source threshold) will not have material environmental benefit.⁴ Instead, these facilities will endure a substantially delayed permit review process due to NSR applicability and a significant increase in costs to acquire emission reduction credits.

⁴ As discussed above, the Department's interpretation of its de minimis emission aggregation rules substantially increases the potential for ensnaring sources in the NSR without achieving material environmental benefits magnify this problem.

Once classified as a major stationary source, a facility will be subjected to NSR review for each modification that results in a projected emission increase -- potentially using the Board's objectionable proposed methods, as addressed above -- of as little as 15 tons per year. Because the Department requires fugitive emissions to be considered in this analysis, and such emission increases are calculated through the use of conservative emission factors, many facilities will be made subject to NSR merely because of fugitive emissions of particulate matter, including those simply associated with construction activity.

For these reasons, Waste Management respectfully suggests that the Board amend the Proposed NSR Regulation by restoring the major source threshold of 100 tpy for PM-10, consistent with both current Pennsylvania NSR regulations and federal standards, including because there is no regulatory or other legal basis for the Board's proposed change to this threshold. Waste Management also respectfully requests that the Board utilize the opportunity presented by this rulemaking to improve the existing NSR regulation by eliminating the requirement to include fugitive emissions of particulate matter associated from the types of emissions that must be included in the evaluation for NSR purposes of emission increases associated with the construction of a new source or modification.

In addition, the Board should clarify the NSR regulations concerning the relationship of major stationary source status for PM-10 emissions and significant net emission increases for other nonattainment pollutants. In particular, since numerous additional sources may be regarded as major stationary sources for PM-10 based upon new designations of nonattainment within Pennsylvania, it becomes increasingly important for the Board to clarify that a source that qualifies as a major stationary source of a specific pollutant (e.g., PM-10) triggers NSR applicability if the source undertakes a modification that results in a significant net emission increase of the same pollutant (i.e., PM-10). By contrast, a facility that qualifies as a major stationary source of PM-10 emissions, but not a major stationary source of VOCs or NO_x, which is located in a moderate ozone nonattainment area would not trigger NSR applicability for ozone due to a projected emission increase of VOCs of 45 tpy.

Plantwide Applicability Limits

EPA has established, for the first time, a regulatory basis for utilizing plantwide applicability limits ("PAL") as an appropriate permitting mechanism to avoid NSR applicability. The Department, to its credit, has recognized the value of PAL permitting for some time, and utilized its authority under the state permitting program to issue PAL permits in appropriate cases. An historic limitation on the potential use of PALs in Pennsylvania, however, has been EPA's refusal to allow the same approach to be used to avoid PSD applicability for emissions of attainment pollutants from the same source.

EPA has now provided the opportunity to alleviate this obstacle, by incorporating PALs into federal NSR Reform. Ironically, however, the Board now proposes to erect the same

historic obstacle to a more widespread application of PALs, by proposing a Pennsylvania-specific NSR regulatory program that does not mirror the federal program with respect to PAL permitting. As the Department acknowledges, the Proposed NSR Regulation does not track the PAL permitting provisions of federal NSR Reform.

In addition to the obstacle to use of PALs imposed by the general inconsistency of Pennsylvania's PAL program with federal PAL permit standards, the significant distinctions reflected in the Proposed NSR Regulation would materially diminish the value of an PAL. In particular, under the federal NSR Reform program, facility owner may construct or modify an air emission source at a facility subject to a PAL without triggering permit review requirements, if the emissions from such new or modified source could be accommodated within the PAL emission cap. By contrast, under the Board's proposed approach to PAL permitting, although the emissions from a new or modified source may be accommodated by the existing PAL emissions limit, the facility owner would nonetheless require a plan approval for the proposed new or modified source, and demonstrate that emissions from such new or modified source will satisfy best available technology ("BAT") standards.

The concept behind a PAL is to afford a facility flexibility to manage its business operations as long as it maintains emissions of relevant pollutants within appropriate limits. Whether the facility chooses to install additional controls on certain sources, limit operations of existing sources or otherwise maintain its emissions within its PAL emission cap, the facility ensures that emissions are limited, the environment is protected, and the Facility owner has flexibility to make operational decisions, consistent with the facility's own business plan. This flexibility is substantially reduced to the extent that the source owner must secure a plan approval and comply with BAT for every proposed modification and new source construction. If the facility owner elects to substantially reduce emissions from existing sources (beyond that otherwise required by regulation) in order to accommodate the construction of a new source that would substantially benefit the facility's business plan, and such emission reductions from existing sources can be accommodated more cost effectively than compliance with source-specific BAT for the proposed new emission unit, the fundamental concept of PAL permitting should allow this approach. Instead, under the Board's approach, a facility owner loses the flexibility to over-control existing sources and thereby avoid less cost effective controls for new sources, since BAT must be independently evaluated for the new or modified source.

Moreover, a significant benefit afforded by PALs is the ability to avoid permitting, notably including the required time associated with air permitting for proposed modifications or new sources that can be accommodated within a PAL cap. In the current global economy, the ability of a business to immediately respond to changing business conditions is critical to its ultimate success, and even continued viability. However, under the Proposed NSR Regulation, the significant timing benefit of other PAL programs will not be available in Pennsylvania. Instead, a facility owner confronted with the opportunity to take advantage of business conditions by instituting a time-sensitive modification cannot elect to perform the modification,

even if any associated emission increase can be satisfied within the existing PAL emission cap, without first securing a plan approval and completing a BAT evaluation. Compare, e.g., New York Department of Environmental Conservation's Title V Permit issued to Delphi Automotive Systems LLC at pages 34-37, Condition 28 (available at <http://www.dec.state.ny.us/website/daradata/boss/afs/permits/929090001800498.pdf>) (allowing for addition or replacement of spray booths, coating equipment, degreasers, hoxboxes, braze furnaces, etc. so long as resulting emissions do not exceed PAL limit and meet other pre-specified criteria).

Waste Management strongly suggests that the Board revise its proposed approach to PAL permitting to achieve consistency with the federal NSR Reform program and eliminate the need for state plan approval issuance and BAT evaluation in circumstances in which a new source or a modification of an existing source would not result in an emission increase beyond that authorized under the existing PAL.

Disincentives to Environmentally Beneficial Projects

The Proposed NSR Regulation is likely to prevent construction of many worthwhile projects, including those that provide environmental benefits. Of specific relevance to Waste Management's operations, we continually look for opportunities to pursue renewable energy projects for efficient and environmentally-protective management of energy-rich landfill gas collected from our facilities. The Department has actively endorsed such renewable energy projects as consistent with the Commonwealth's goal of pursuing innovative, environmentally-protective alternative energy generating opportunities. See, e.g., Governor Rendell, Secretary McGinty, A Primer for the Commonwealth of Pennsylvania for Developing Landfill Gas Utilization, (DEP Document No. 2500-BK-DEP3172) (August/2004) ("Landfill Gas Primer"). Moreover, these projects are recognized internationally as providing substantial net benefit in the context of avoiding greenhouse gas emissions.

Under the Department's current NSR regulations, Waste Management can pursue these valuable renewable energy projects without the additional cost and time-delay inherent in NSR applicability, by ensuring that these projects will result in no increase in permitted emission rates. Specifically, to the extent that collected landfill gas is currently managed at our facilities using other combustion technology, such as enclosed flares, Waste Management ensures that the allowable emissions from proposed renewable energy technology will not exceed the permitted emission rates imposed on the existing combustion devices. In this regard, Waste Management is enabled to pursue renewable energy projects in a cost effective manner, which yields net environmental benefits relative to existing landfill gas combustion operations.

The same result is typically achieved under the federal NSR program through the changes resulting from NSR Reform. These renewable energy technologies will not result in a significant net emission increase in actual emissions of regulated pollutants, and therefore will not be rendered subject to NSR under a true actual-to-future actual emission test.

However, under the Board's Proposed NSR Regulation, Waste Management will likely determine not to pursue many renewable energy projects because of the likely application, and associated scheduling and economic implications, of NSR applicability. Typically, a landfill experiences variations in landfill gas generation rates depending upon the age of the landfill, the waste disposal rate and other factors. At various stages in the life of the landfill, emission increases result from the expected increase in landfill gas generation rate, and are fully accounted for, projected and authorized by applicable permit terms. However, a comparison between past actual and projected emission rates yield, in some cases, a significant increase, not as a result of the modification, but rather because of the expected increase in landfill gas generation that has already been accounted for through applicable permit limits. Under the Board's approach, Waste Management must translate its projected actual emission rate for the renewable energy project into a permitted limit. Waste Management cannot accept a substantially reduced permit limit to avoid NSR applicability merely to pursue a voluntary renewable energy project while there remains a reasonable possibility that the landfill gas generation rate for the facility may increase in the future.

Further, the Board's proposal to maintain the de minimis emission aggregation provisions of the existing NSR regulation, which the Department interprets to require consideration of every emission increase over a 15-year period, and extend these requirements to the Southeastern Pennsylvania area while otherwise applying the significant emission threshold for severe ozone nonattainment areas in this region, would result in many projects being made subject to NSR merely because of minor changes at the facility over an extended timeframe. The applicability of NSR in these circumstances provides no material environmental benefit, but substantially reduces the probability that a source owner will elect to pursue environmentally beneficial projects, including renewable energy projects at municipal solid waste landfills. This is contrary to the principles expressed in PADEP's Landfill Gas Primer.

Conclusion

EPA promulgated the NSR Reform package to simplify the complex, often-misinterpreted and inconsistently applied NSR program. In promulgating a revised state-specific NSR regulatory program, the Board should strive for the same objectives identified by EPA. This goal is not only consistent with the federal mandate that Pennsylvania's NSR program be "equivalent" to the revised federal NSR requirements, that also would ensure that Pennsylvania business is not placed at a significant competitive economic disadvantage relative to other states.

First, the Board should utilize the opportunity afforded it through this regulatory revision process to improve the existing NSR program, notably by eliminating the unjustified and archaic requirement applied by the Department in moderate ozone nonattainment areas to aggregate de minimis emission increases from all prior insignificant activities at the site, since 1991, as part of the NSR evaluation.

Second, to the extent that the Department interprets federal NSR requirements as prohibiting Pennsylvania from maintaining its potential-to-potential test, which has provided clarity and consistency while ensuring environmental protection, the Board should attempt to approximate this long-standing program to the extent possible. In this context, the Board should adopt the federal mechanism for calculating baseline actual emission rates. This approach would also appropriately assign to the business operator, rather than the Department, the responsibility for determining the appropriate baseline emission rate reflective of actual business operations.

Third, the federal NSR Reform package also identifies specific approaches that would eliminate the inconsistent application of NSR by simplifying the evaluation, and includes new features which attempt to balance environmental protection with necessary business flexibility. This is critical to economic growth in Pennsylvania. These programs notably include the revised emission testing methodology, consisting of a true actual-to-future actual test with full accommodation of demand growth, and a workable and flexible PAL permitting scheme. The Department's proposed NSR regulation departs from these federal programs in significant respect, and would thereby substantially reduce the operational flexibility afforded to Pennsylvania business. If a facility owner is faced with an election to invest money in existing sources located in Pennsylvania and those located in other states, and the Pennsylvania source is subject to additional permitting and the attendant delay for authorization of construction, many businesses will elect not to make their investment in Pennsylvania.

Finally, the Department's proposal to isolate the five-county region of Southeastern Pennsylvania for more stringent requirements than appropriate based upon the regional ozone classification is directly inconsistent with applicable regulatory standards, inequitably treats sources in this area both relative to other sources in Pennsylvania and in other states, and will negatively impact business development in these areas. At a minimum, to the extent that the Department intends to impose more stringent requirements upon the Southeastern Pennsylvania region than consistent with its classification as a moderate ozone nonattainment area, then the Department should not also impose the obligation that sources within this region evaluate de minimis emission increases over a fifteen year contemporaneous period, to the extent that this "look-back" provision is maintained at all in the regulation.

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We appreciate the opportunity to provide these comments concerning the Proposed NSR Regulation. We look forward to continued participation with the Board and the Department in further proceedings concerning this regulatory program. Please contact me if you should have any questions about these comments or these issues more generally.

Very truly yours,



Eli Brill, Esquire

cc: John Slade
Virendra Trivedi
Bart E. Cassidy, Esquire