

ALVIN C. BUSH, CHAIRMAN
DAVID M. BARASCH, ESQ.
ARTHUR COCCODRILLI
DAVID J. DEVRIES, ESQ.
JOHN F. MIZNER, ESQ.
KIM KAUFMAN, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL
LESLIE A. LEWIS JOHNSON, DEPUTY CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

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

August 30, 2006

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-399 (IRRC #2535)
Environmental Quality Board
Nonattainment New Source Review

Dear Chairperson McGinty:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

wbg

Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation #7-399 (IRRC #2535)

Nonattainment New Source Review

August 30, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the April 29, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Comments of the U.S. Environmental Protection Agency - Protection of public health; Effect on natural resources; Consistency with other regulations; Reasonableness; Implementation procedure; Need; Clarity.

On July 25, 2006, Judith A. Katz, Director, Air Protection Division, U.S. Environmental Protection Agency Region III (EPA Region III), submitted written comments on this proposed regulation to the EQB. The EPA Region III comments raised several issues directly related to our criteria. One impetus for this proposed regulation was major revisions to the federal regulations for Nonattainment New Source Review (for example, see 67 FR 80186, *Federal Register*, December 31, 2002). EPA Region III conveyed serious concerns in its comments and warned that it may be prohibited from approving portions of this proposed regulation as revisions to the State Implementation Plan (SIP). We share the same comments, questions and concerns expressed by the EPA Region III and incorporate them into the Commission's comments on this proposed regulation.

2. Differences between federal and state programs - Protection of public health; Effect on natural resources; Consistency with other regulations and statutes; Reasonableness; Implementation procedure; Need; Clarity.

In the preamble, the EQB identified several areas of the proposed regulation that are more stringent than the federal regulations. Several commentators, including the Pennsylvania Chamber of Business and Industry (PCBI), Pennsylvania Chemical Industry Council (PCIC) and Electric Power Generation Association (EPGA), expressed significant concerns with these provisions. The following paragraphs summarize examples of these concerns.

“Look back” provision for calculating baseline emissions

This provision allows permittees to “look back” in calculating baseline emissions. Federal regulations allow entities to select any two consecutive years in the preceding ten years as their

baseline. In the case of utilities, they can use any two consecutive years in the preceding five years as their baseline. The proposed regulation would apply the five-year look back period to all entities, not just utilities.

Both PCIC and PCBI contend that the EQB is not being realistic. The “ten-year” look back is designed to incorporate economic variations in different markets and their impact on plant operations and emissions into the baseline calculation. It allows for the development of a more representative sample of past emissions and provides a better baseline for new sources, modifications and plantwide applicability limits (PALs).

Best available technology and PALs

Another difference is in Section 127.218 relating to PALs. Under federal provisions, a plant operator is not required to install emission controls on new emission units under an existing PAL if the facility is able to continue to meet its PAL emissions cap. Concerning the proposed regulation, the preamble states:

Under the Commonwealth’s proposed approach in § 127.218, the owners and operators of new emission units added under an existing PAL will need to reduce or control emissions by using the best available technology as required under section 6.6(c) of the APCA.[Air Pollution Control Act] (35 P. S. § 4006.6(c)).

This characterization of Section 6.6(c) of the APCA is not completely accurate. This subsection of APCA reads:

The department is **authorized** to require that new sources demonstrate in the plan approval application that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, by using the best available technology.
[Emphasis added.]

Hence, the EQB and Department of Environmental Protection (DEP) are authorized to require use of the best available technology (BAT). However, the EQB also has the discretion not to require BAT within a PAL and its regulation could mirror the federal approach.

Again, the commentators urge that the EQB adopt the federal approach. The PAL emissions cap provides environmental protection and makes BAT unnecessary as long as the cap is maintained. By adding BAT, the EQB removes a primary incentive for using PALs.

Five-county southeastern region

The proposed regulation retains the severe ozone nonattainment standard for facilities that emit or have the potential to emit at least 25 tons per year (tpy) of volatile organic compounds (VOCs) and nitrogen oxides (NO_x) in the southeast five-county region (Bucks, Chester, Delaware, Montgomery and Philadelphia). The federal regulations have re-classified this area as “moderate” nonattainment for ozone. Commentators are concerned that the proposed regulation will restrict economic growth in the region. They claim that businesses and industries in the region have already worked very hard to reduce emissions. Further reductions will not be

obtainable except at significant expense which will be a disincentive to development and investment in the five-county area.

Conclusion

These are three examples of areas where the proposed regulation is more stringent than the federal rules. We have two concerns concerning these three examples and all the areas where the proposed regulation exceeds federal regulations adopted under the Clean Air Act.

First, the statutory directive to not exceed the standards of the Clean Air Act is repeated throughout Sections 4.2(a), (b) and (c) of the APCA. They read:

(a) In implementing the requirements of section 109 of the Clean Air Act, the board may adopt, by regulation, **only those control measures or other requirements which are reasonably required**, in accordance with the Clean Air Act deadlines, to achieve and maintain the ambient air quality standards or **to satisfy related Clean Air Act requirements**, unless otherwise specifically authorized or required by this act or specifically required by the Clean Air Act.

(b) Control measures or other requirements adopted under subsection (a) of this section **shall be no more stringent** than those required by the Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act. This requirement shall not apply if **the board determines that it is reasonably necessary** for a control measure or other requirement to exceed minimum Clean Air Act requirements in order for the Commonwealth:

- (1) To achieve or maintain ambient air quality standards;
- (2) To satisfy related Clean Air Act requirements as they specifically relate to the Commonwealth;
- (3) To prevent an assessment or imposition of Clean Air Act sanctions; or
- (4) To comply with a final decree of a Federal court.

(c) The board **may not** by regulation **adopt** an ambient air quality standard for a specific pollutant which is **more stringent** than the air quality standard which the EPA has adopted for the specific pollutant pursuant to section 109 of the Clean Air Act [42 U.S.C.A. § 74090]. [Emphasis added.]

The statutory directive appears to be clear. The air quality standards, rules and procedures of the Commonwealth should be consistent with the federal standards and regulations.

Second, the discretion afforded to the EQB to exceed federal requirements is limited. Given the precision and primacy of the statutory directive, there is an obligation to explain how and why exceeding the federal regulations was determined to be "reasonably necessary." Therefore, the EQB must justify each exception to the statutory directive. The preamble does not contain sufficient information. For each point in the proposed regulation where a state provision is more

stringent than its federal counterpart, the EQB must fully explain and document the evidence and findings for each determination that exceeding federal rules is reasonable and necessary. This information needs to accompany the final-form regulation for each exception that is retained.

3. General - Consistency with other regulations; Reasonableness; Implementation procedures; Clarity.

Several commentators noted errors in the proposed regulation, or expressed concerns with format, and language that is confusing, repetitive or unclear in various sections.

For example, EPA Region III noted several differences between definitions of terms in the federal regulations and their counterparts in the proposed regulation.

The Allegheny County Health Department expressed several concerns regarding the structure and language in Sections 127.203a and 127.218.

A specific example of an error is Subsection 127.218(c)(2) which refers to the public participation requirements in Subsection 127.218 (d). The public participation requirement is actually discussed in Subsection 127.218(e).

Another problem is lengthy provisions such as Section 127.218(l)(1)(ii). This is an example of several items in one paragraph that could be re-formatted into a list. This section and other lengthy provisions could be clarified by being reformatted into a "list format" as described in the *Pennsylvania Code & Bulletin Style Manual* (See Section #2.5 (relating to section length) in Chapter 2 and Chapter 7 (relating to enumeration)).

Admittedly, federal regulations are not always clear or precise. However, re-writing and re-interpreting federal rules at the state level is a difficult and laborious task, and should only be done when it genuinely improves the clarity and effectiveness of public policy. Rather than attempt to "reinvent the wheel" or to re-define terms and re-write language from the federal regulations, the EQB should reference the appropriate federal rules wherever possible.

4. Sections 121.1 and 127.201a. Definitions. - Reasonableness; Need; Clarity.

General

Several commentators questioned the benefit of moving definitions to a new section in a different chapter. It is our understanding that DEP and EQB are reviewing this decision, and the definitions may return to Section 121.1 in the final-form regulation. We support retaining definitions in Section 121.1.

Applicability determination

This term is in Section 121.1 as an existing definition. If it and the new Section 127.203a are retained in the final-form regulation, then the existing definition should be amended to reference the new Section 127.203a.

Begin actual construction

This term does not appear to be used in the proposed regulation. The similar phrase “beginning actual construction” appears only one time in the proposed regulation. The EQB should either justify the need for this definition or delete it.

Major facility

The existing definition for this term in Section 121.1 reads: “A facility which has the potential to emit a pollutant equal to or greater than an applicable annual emissions rate in § 127.203.” The proposed definition contains over 15 subparagraphs or clauses containing substantive rules related to the definition. Substantive provisions in a definition are not enforceable. In the final-form regulation, the substantive provisions should be deleted from this definition and moved to another section that describes conditions applicable to a “major facility.” Another alternative would be to reference the corresponding item in the federal regulations.

5. Section 127.201b. Measurements. - Need; Clarity.

The need for or purpose of this section is unclear. It provides information for acronyms but does not define any terms. Terms, such as BAT, BACT, ERC, LAER and MACT, are listed but there is no indication of where they are defined. Definitions for these terms can be found in Section 121.1 and elsewhere. Section 127.201b should reference the definitions in Section 121.1 or from other sources as applicable.

Some terms, such as “continuous parametric monitoring system” and “continuous emissions rate monitoring system,” are already defined in Section 127.201a. Similar terms also appear in the federal regulations. It is not necessary to repeat them in this section.

Facsimile Cover Sheet



Phone: (717) 783-5419
Fax #: (717) 783-2664
irrc@irrc.state.pa.us

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

To: Debra L. Failor
Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 705-4980
Date: August 30, 2006
Pages: 7

RECEIVED
AUG 30 PM 12:19
INDEPENDENT REGULATORY
REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-399 (IRRC #2535). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Debra L. Failor Date: 8/30/06