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Senate Environmental Resources and Energy Committee

Senator Mary Jo White
Chairman

Patrick Henderson, Executive Director

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September 22, 2006

The Honorable Kathleen A. McGinty, Chair
Environmental Quality Board
15th Floor Rachel Carson Building
P.O. Box 8477
Harrisburg, PA 17105-8477

RE: Proposed Rulemaking: Mercury Emission Reduction Requirements for Electric Generating Units (#7-405)

Dear Chairperson McGinty:

We are writing on behalf of the Senate Environmental Resources and Energy Committee to provide comments and express our serious concerns regarding the above referenced proposed rulemaking.

Summary of Concerns & Objections

The question before the Environmental Quality Board (EQB), and by extension the Independent Regulatory Review Commission (IRRC) and the Senate and House of Representatives oversight committees, is whether the proposed rule drafted by the Department of Environmental Protection (DEP) provides any added benefits to Pennsylvanians and their environment over those to be achieved under the federal Clean Air Mercury Rule (CAMR).

For the reasons outlined below, we have concluded that this rule provides no added public health or environmental benefit to the Commonwealth and its citizens, violates provisions of the United States Constitution, and is significantly harmful to the public interest. Our committee held three public hearings on this issue and solicited input from a wide variety of witnesses, including the U.S. Environmental Protection Agency (EPA), DEP, sportsmen and environmental organizations, public health experts and toxicologists, coal operators and organized labor groups, electric generators and business representatives. Information collected by the Committee is available online at www.SenatorMJWhite.com/environmental.html and deserves serious review and consideration in evaluating this proposed rulemaking.

Public Health/Environmental Benefits

The overriding concern and interest of each member of this Committee is to reduce mercury emissions from coal-fired power plants in a manner that best protects the public's health

and our environment. Unfortunately, a perception has been created, fueled in part by DEP, that failure to embrace the proposed state-specific mercury plan equates to a lack of concern for public health. Nothing could be further from the truth.

As stated above, the question before the Committee in evaluating the proposed rule is not whether reductions in mercury emissions from power plants are appropriate, but whether a state-specific rule will provide any significant or commensurate benefit than those to be achieved under CAMR. We note (and DEP has acknowledged) that significant reductions in mercury emissions will be achieved as a co-benefit through implementation of the federal Clean Air Interstate Rule, a separate federal rulemaking designed to further reduce sulfur dioxide and nitrogen oxides.

We find the argument that the DEP rule will better protect Pennsylvanians unconvincing. Under the DEP rule, emissions must be reduced 90% by 2015. Under CAMR, and Senate Bill 1201, which was approved by this Committee, mercury emissions must be reduced by 86% no later than 2018. The three year timeframe difference does not seem significant, particularly when one considers that CAMR provides incentives for early and deeper reductions than mandated by the state-specific rule. Additionally, we note that the petition submitted by various interest groups which initiated the rulemaking sought a 2007 compliance date. The petitioners have not objected to DEP's intention to schedule full compliance in 2015 rather than the suggested 2007; therefore, it would not appear the three year difference between the proposed rule and CAMR (2015 v. 2018) is of major significance.

Since both CAMR and the proposed rule will result in substantially similar reductions in mercury emissions from Pennsylvania coal-fired power plants, the issue is whether there is a demonstrable difference in mercury deposition and, consequently, human ingestion between the two plans. While no member of the Committee, or the General Assembly, has to our knowledge dismissed the real concerns of mercury on public health and especially the unborn, we are troubled by repeated mischaracterizations by DEP and advocacy groups as to 1) the extent of the problem relative to the U.S. population 2) the proportionate responsibility for this problem assigned to coal-fired power plants and 3) the alleged impact the proposed rule would have in addressing this problem.

Perhaps the most misrepresented data concerns the study by the U.S. Centers for Disease Control and Prevention (CDC) which measured mercury blood levels in people. Despite the U.S. having the most stringent health-based standard for mercury blood levels in the world, the CDC found that "no women in the survey had mercury levels that approached" the 58 micrograms per liter which is associated with neurodevelopmental effects on fetuses. Dr. Gail Charnley, a toxicologist, testified before our Committee that the average mercury blood level in women of childbearing age was .83 micrograms per liter, and that none of the cross-section of women who were tested in the United States has levels even approaching 85 micrograms per liter, which is the value calculated by the National Academy of Sciences as being associated with a 5% change in memory test performance. Statements that 600,000 women and one-sixth of all newborn children are at risk are inflammatory, irresponsible and taken entirely out of context.

The Committee acknowledges the responsibility of sufficiently protecting all people, but policymakers, including DEP, must be guided by sound science and facts.

Trading & Hotspots

We encourage DEP to utilize the cap and trade system authorized by CAMR. Cap and trade is a proven mechanism to utilize market-based incentives for electric generators to comply with a mandated reduction in a cost-effective way. We are concerned that the proposed rule's prohibition of trading discourages early and over-compliance and artificially inflates costs to Pennsylvania generators and subsequently electricity customers. Existing trading programs, particularly with regard to the acid rain program, have been extremely successful. We urge and request DEP to review "Emissions Trading and Hot Spots: A Review of the Major Programs" by Byron Swift (http://www.senatormjwhite.com/environmental/060606/swift-060606.pdf).

The primary contention raised by DEP with trading is that it will not ensure reductions from Pennsylvania-based generators, and will lead to toxic "hotspots" in and around communities that host coal-fired power plants. DEP Secretary McGinty has stated repeatedly that, with a cap and trade program, there are no assurances that we will see even an ounce of mercury reduction in the Commonwealth. Such a statement is completely disingenuous. For example, we know that mercury emissions from Pennsylvania power plants have already declined 33% just since 1999. Moreover, the Committee and DEP are aware of several recent major announcements concerning upcoming installation of enhanced pollution control equipment at Pennsylvania power plants – investments in the multiple billions of dollars. Indeed, DEP's own estimate is that at least 90% of all electricity generated in Pennsylvania by 2015 will come from facilities with enhanced pollution control equipment. The statement that Pennsylvania generators will simply buy their way into compliance, and subsidize reductions in other states, is totally without merit.

Moreover, we note with interest and request clarification of the statement made by DEP Secretary McGinty before the House Environmental Resources and Energy Committee at that Committee's September 12, 2006 hearing on mercury reduction efforts. Secretary McGinty made the claim that the incremental cost of this proposed rulemaking was only $2 million (compared to $1.7 billion capital cost increase and $161 million annualized operating cost increase estimates from industry experts). In attempting to minimize the cost of the DEP plan, Secretary McGinty stated that it will be cheaper for a Pennsylvania generator to purchase and install mercury-specific pollution control equipment than it would be to purchase credits on the open market. If this statement is true, DEP should explain why it believes a state-specific rule is necessary? It appears quite unreasonable and contradictory for DEP to argue that generators would voluntarily purchase compliance credits from out-of-state generators that are more expensive than simply installing the equipment themselves.

DEP has also argued that higher deposition in the vicinity of power plants substantiates the hotspot claim. DEP prominently cites data referenced in a May 31, 2006 press release. In doing so, DEP fails to acknowledge two critical pieces of information: 1) the power plants

upwind from the monitoring station had reduced their mercury emissions by an average of 47% (the Seward plant had a 98% reduction in mercury emissions) and 2) there was no evidence showing where the deposited mercury actually originated. The deposition monitoring results actually showed that despite major reductions in local mercury emissions, there was no reduction in local deposition. The conclusion is that the mercury must be coming from somewhere else. It should be noted that 1% of mercury emissions worldwide come from U.S. based coal-fired power plants.

Even if one were to accept the hotspot argument, to make a public health connection you need to establish that such local emissions fall on a local body of water, and that local residents are consuming locally-caught fish in significant quantities. Such a link is totally lacking in the analysis offered for the proposed rulemaking. In fact, we know that trout raised in hatcheries are generally safe to eat without limit; that 80% of the fish consumed by Pennsylvanians comes from outside the Commonwealth (i.e. tuna and other salt-water fish); and that according to recent Pennsylvania Fish and Boat Commission/Penn State studies, 92.7% of wild trout caught in the Commonwealth are released. We fail to see, and are therefore requesting information, on what added tangible benefit Pennsylvania residents will receive with regard to reduced fish consumption advisories or reduced mercury content in fish caught and consumed from Pennsylvania waterways compared to those achieved under CAMR.

Constitutionality of Proposed Rule

Under the proposed rule, DEP intends to "protect" Pennsylvania coal by giving priority in meeting emission requirements to certain facilities which, in part, use 100% bituminous coal. DEP states that it established this preference to address apparent inequities in CAMR that might encourage electric generators to "fuel-switch" to lower mercury content sub-bituminous coal mined primarily in western U.S. states. While we join in the desire to promote the use of Pennsylvania coal, we are concerned that this preference could actually encourage Pennsylvania generators to utilize bituminous coal mined in other eastern states, such as Kentucky and West Virginia, since coal mined in these states generally has significantly less mercury content than Pennsylvania-mined bituminous coal. Despite misstatements by DEP to this effect, the terms "Pennsylvania coal" and "bituminous coal" are not interchangeable. The proposed rulemaking establishes a preference for "bituminous coal". Any shortcomings in the federal CAMR with regard to potential negative impact on Pennsylvania coal production are not remedied here, and in fact could be exacerbated.

At public hearings held by the Senate Environmental Resources and Energy Committee, and in comments submitted to the EQB by the Unions for Jobs and the Environment, Pennsylvania Coal Association and others, serious questions have been raised as to whether this proposed rulemaking violates the Commerce Clause of the U.S. Constitution. The Attorney General's office has also expressed reservations as to the constitutionality of this proposal.

In reviewing this matter, DEP has taken these concerns out of context. The question is not whether the DEP rule bears a resemblance to the Illinois Coal Act - as DEP has argued - but

whether the rule runs afoul of the guidance given by the federal courts to the states - namely that any statute or regulation, no matter how creative, which makes coal from another state a "less desirable compliance alternative" violates the Commerce Clause. DEP has repeatedly stated to the public, media, General Assembly, its own advisory committees and others that this rule is specifically intended to make western sub-bituminous coal a "less desirable compliance alternative". For a detailed legal discussion on these concerns, we invite DEP to review the June 1, 2006 letter received by the Committee from Troutman Sanders LLP (http://www.senatormjwhite.com/environmental/060606/UMWA.pdf)..

We question the ability of DEP to objectively evaluate this legitimate concern, since it issued a press release on May 30, 2006 stating that the rule was constitutional. DEP's defense demonstrates that it does not or chooses not to seriously weigh the substance of the constitutional question.

Recent indications are that DEP may revise its final rule to remove the preference afforded to generating facilities which utilize 100% bituminous coal. The Committee, however, is charged with evaluating the proposed rulemaking before it, which contains the bituminous coal use preference. In the event that the final rule removes this preference, it must be noted that one of DEP's major justifications for crafting a state-specific rule – to "protect" Pennsylvania coal – is lost. We also note that, as of September 22, 2006 DEP's website still prominently advocates for the state-specific mercury rule as a means that "protects and grows the market share for Pennsylvania bituminous coal."

Electricity Generating, Pricing and Competitive Impacts

Several specific concerns of the Committee include:

- Impact on Commonwealth generating capacity and reliability, including concerns of the Public Utility Commission
- Impact on electricity prices for residential, commercial and industrial consumers
- Placing Pennsylvania generators at a competitive disadvantage with out-of-state generators, and in some cases in-state generators.

Extensive comments have been submitted to DEP by the regulated and business community regarding the fiscal impact of the proposed rulemaking. We urge DEP to evaluate and respond to these concerns. Additionally, a more substantive cost-benefit analysis, as required by the Regulatory Review Act, should be commissioned prior to final adoption of this rule. The wide disparities in capital and operating costs, and alleged commensurate public health and environmental benefits of the proposed rule relative to CAMR, should be an indication that significant refinement of the cost-benefit analysis is appropriate.

Executive Order 1996-1

Executive Order 1996-1 (Regulatory Review and Promulgation) dictates that, when federal regulations exist, a state regulation shall not exceed federal standards unless justified by a compelling and articulable Pennsylvania interest or required by state law. To our knowledge, Executive Order 1996-1 has not been amended or rescinded, and therefore is still applicable to this proposed rulemaking. We do not believe that DEP has met the burden imposed by the Executive Order necessary to exceed federal regulations regarding mercury emission reductions from coal-fired power plants.

Public Participation Process

DEP and several advocates of the Department's rulemaking routinely note that an extensive workgroup process was initiated to help craft this rulemaking. It is often noted by these entities that since representatives of organized labor, coal operators, business and electric generators participated in the discussions of the workgroup, members of the General Assembly should not voice their objections or concerns with the proposed rule. The implication is that the final product has been sanctioned by all participants as a reasonable, if not entirely satisfactory, compromise.

To the contrary, we are very concerned that the mercury workgroup process, as utilized by DEP, was simply a façade intended to portray the thoughtful consideration and crafting of a state-specific mercury rule while in reality doing nothing more than codifying a pre-determined outcome: a rule which requires site-specific control technology which may not be commercially available and affordable, discourages the use of Pennsylvania-mined bituminous coal, imposes huge costs on electric generating units, and by extension their commercial, industrial and residential customers and fails to provide any commensurate public health or environmental benefit.

The timetable for finalizing these regulations is very troubling. DEP has announced its intention to submit a final rule to the EQB at the Board's October 17, 2006 meeting. Therefore, DEP ostensibly intends to review and respond to all comments received from the public, IRRC and the standing oversight committees in a period of approximately three to five weeks. This does not appear to be a reasonable timetable for responsible review and consideration of the extensive comments which have been submitted to DEP by various affected entities, particularly the regulated community. Additionally, while DEP has stated that it is required to finalize a state plan by November 17, 2006, both the Department and affected stakeholders know that should the Commonwealth fail to finalize its state plan by this date, a temporary federal plan would be instituted. There is, therefore, no compelling reason for not taking time to give meaningful review to all submitted comments. Further, we suggest the Department utilize the Advanced Notice of Final Rulemaking process to solicit comment and input on its revisions.

We agree in principle with the September 5, 2006 comments submitted to the EQB by the organization Citizens for Pennsylvania's Future (Pennfuture). In filing objections to an unrelated

rulemaking, Pennfuture states that the rulemaking process must not be "a hollow formality to ratify a decision to which the rulemaking body is already committed". Pennfuture further states that basic principles of due process demand that the EQB not make any advance commitment to a specific outcome in a rulemaking process or otherwise prejudge the issues presented for review. However, that is exactly what DEP has done with this rulemaking (i.e. trading prohibition; site-specific reduction mandate). Additionally, it is disingenuous for DEP to utilize the timeframe requirements of CAMR to justify its "expeditious" handling of a final regulation when the Department has alleged that CAMR is not only fundamentally flawed, but actually illegal.

DEP has viewed the public comment period as a public opinion poll, rather than a genuine opportunity to solicit and consider substantive comments. It must be acknowledged that the vast majority of the comments received were form emails or letters drafted by advocacy organizations to "run up the numbers". While public interest in a proposed regulation or legislation is always welcome, we must question the underlying substantive value realized in a rulemaking process from such an orchestrated campaign. For example, in the preamble to the proposed regulation (pg 13), the Air Quality Technical Advisory Committee identified eight different issues that it wanted to solicit public comment on. These issues ranged from the results of the "Stuebenville" study, the pre-cleaning of coal, how the department could encourage over-compliance, and the advantages and disadvantages of the supplemental pool of credits. Of the thousands of comments that the EQB received, very few seem to have addressed these important issues.

We note a 1987 U.S. Court of Appeals for the District of Columbia ruling which recognized the right – and we would say responsibility – of a promulgating agency to ignore mass mail campaigns which offer little original subject matter for consideration. In that particular case, the EPA chose not to give proportionate weight to the vast majority of comments which supported less stringent clean water standards. "The substantial-evidence standard has never been taken to mean that an agency rule-making is a democratic process by which the majority of commenters prevail by the sheer weight of numbers," the Court of Appeals ruled. While this ruling may not be binding on DEP, it certainly should guide any promulgating agency on how to draft and revise a responsible rule.

Conclusion

In addition to the substantive policy concerns over the implications of this rule, we express for the record our disappointment over how DEP has portrayed this issue to the public, media and members of the General Assembly. DEP routinely has mischaracterized Senate Bill 1201, legislation we introduced to implement CAMR (which passed the Senate June 20, 2006 by a 40-10 bipartisan vote), as providing no benefit to the public and stating that Pennsylvania would not see any reduction in mercury emissions. DEP has repeatedly framed significant issues surrounding this debate out of context.

Specifically, legislators have been accused by DEP of seeking to stop the public process of reducing toxic mercury, of being hypocrites for supporting legislation prohibiting mercury in vaccines (when this bears no relevance to the issue of mercury from coal-fired power plants), and of saying we do not care about young children, mothers or other at-risk citizens. These and many other comments are clearly presented out of context and unworthy of an intelligent discussion on reducing mercury emissions and protecting public health.

This issue is too important to have genuine concerns disregarded. We urge DEP and members of the EQB and IRRC to thoughtfully consider these and all comments intended to help craft a responsible mercury emission reduction plan for the Commonwealth.

Thank you for your consideration of the Committee's comments.

Sincerely,

Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee

Raphael J. Musto, Democratic Chairman
Senate Environmental Resources
& Energy Committee

cc: Attorney General Tom Corbett
Senator Brightbill
Senator Mellow
Representative Adolph
Representative George
PUC Chairman Wendell Holland
Secretary Crawford