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August 11, 2006

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

Dear Sirs:

Re: Proposed Amendments to 25 PA. Code Chapter 123, Mercury Emission Reduction Requirements for Electric Generating Units, ID #7-405 (#2547)

Dear Sirs:

Enclosed are comments of the Pennsylvania Coal Association in connection with the above-referenced docket, along with a one page summary of the comments. If you have any questions, please contact me.

Sincerely,

Peter Glaser

cc: George Ellis, Pennsylvania Coal Association

SUMMARY OF LEGAL COMMENTS OF PENNSYLVANIA COAL ASSOCIATION ON PROPOSED AMENDMENTS TO 25 PA. CODE CHAPTER 123, MERCURY EMISSION REDUCTION REQUIREMENTS FOR ELECTRIC GENERATING UNITS, ID #7-405 (#2547)

The Pennsylvania Coal Association ("PCA") believes that two provisions of the proposed regulations violate the Commerce Clause of the United States Constitution. The Commerce Clause forbids state action that "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Proposed Section 123.209(g) is likely unconstitutional because it effectively provides preferential treatment for coal-fired Electric Generating Units ("EGUs") using bituminous coal in the allocation of allowances from the proposed supplemental allowance pool. Proposed Sections 123.206(b)(1) and (2) are also likely unconstitutional because they provide that EGUs using bituminous coal are presumed to comply with the proposed emission standards if they install certain pollution control technology.

The purpose and effect of these provisions is to promote the continued utilization of Pennsylvania coal (which is exclusively bituminous) in complying with the mercury standards, as the Department has candidly and repeatedly stated. However, such purpose and effect are improper under the Commerce Clause. Federal courts have overturned state laws that attempted to favor in-state coal over out-of-state coal, including for purposes of complying with air quality standards. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995); *Alliance for Clean Coal v. Bayh*, 72 F.3d 556 (7th Cir. 1995).

PCA thus is concerned that the obvious constitutional defects of the rule will ultimately prove counter-productive to Pennsylvania coal because if these provisions were removed from the rule as a consequence of litigation, the rule's severe emission rate limitations would be applied on a plant-by-plant basis, encouraging fuel-switching to lower-mercury, out-of-state coals.

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June 1, 2006

Honorable Mary Jo White
Honorable Raphael J. Musto
c/o Senate Environmental Resources and Energy Committee
Room 168
State Capitol Building
Harrisburg, PA 17120-3021
Phone: 717 787-9684

Honorable William F. Adolph, Jr.
Honorable Camille "Bud" George
c/o Environmental Resources and Energy Committee
Pennsylvania House of Representatives
Room 110, Ryan Legislative Office Bldg.
Harrisburg, PA 17120-2020
Phone: 717 787-1248

Re: Constitutionality of Proposed Amendments to 25 Pa. Code Chapter 123, Mercury Emission Reduction Requirements for Electric Generating Units

Dear Madam and Sirs:

This letter examines the constitutionality of certain proposed amendments to 25 Pa. Code Chapter 123, entitled "Mercury Emission Reduction Requirements for Electric Generating Units" (hereinafter "Proposed Mercury Rule"). It was prepared at the request of the Pennsylvania Coal Association and the United Mine Workers of America who asked us to provide it to you because of your interest in this issue.

In our opinion, proposed Section 123.209(g) is flatly unconstitutional. Proposed Section 123.209(g) effectively provides preferential treatment for coal-fired Electric Generating Units ("EGUs") using Pennsylvania coal in the allocation of allowances from the proposed supplemental allowance pool. Such preferential treatment, if challenged in Court, is highly likely to be found to violate the Commerce Clause of the United States Constitution.

Proposed Sections 123.206(b)(1) and (2) raise constitutional issues as well. Under these provisions, coal-fired EGUs using 100 percent bituminous coal are presumed to comply with Pennsylvania's proposed coal-fired EGU emission standards if they install certain pollution control technology. The purpose of these sections is to promote the continued utilization of Pennsylvania coal in complying with the mercury standards. Such purpose is improper under the Commerce Clause.

By way of background, the Proposed Mercury Rule establishes two types of emission limitation requirements for coal-fired EGUs. First, Section 123.205 establishes emissions standards measured either in pounds of mercury per gigawatt-hour or in percent control of total mercury as measured from the mercury content of the coal as fired. Under Sections 123.206(b)(1) and (2), these emissions standards do not apply to coal-fired EGUs using 100 percent bituminous coal if the units install certain pollution control technology.

Second, Section 123.207 establishes a program of annual emission limitations for coal-fired EGUs. Under this program, total annual mercury emissions from all coal-fired EGUs cannot exceed 56,960 ounces for Phase I (January 1, 2010-December 31, 2014) and 22,464 ounces for Phase 2 (all years after 2014). All coal-fired EGUs are required to hold allowances in order to emit mercury, with the total number of allowances limited to these ceiling amounts. A system is established for allocating allowances to existing and new operators, with new operators entitled to 5 percent of Phase I allowances and 3 percent of Phase 2 allowances.

Section 123.208 creates a supplemental pool of allowances comprised of unused allowances. Under Section 123.209(g), allowances in the supplemental pool are allocated according to the following system of preferences: "(1) Each owner or operator of a standby unit as defined under § 123.202 (relating to definitions); (2) Each owner or operator of an existing affected EGU that is a CFB combusting 100% waste coal or bituminous coal along with any approved non-coal fuels; (3) Each owner or operator of an existing EGU combusting 100% bituminous coal that is controlled by an air pollution control device configuration of SCR, CS-ESP or FF, WFGD and mercury-specific control technology; (4) Each owner or operator of an existing affected EGU combusting 100% bituminous coal that is controlled by an air pollution control device configuration of SCR, CS-ESP or FF and WFGD; (5) Each owner or operator of an existing affected EGU combusting 100% bituminous coal that is controlled by an air pollution control device configuration of WFGD and mercury-specific control technology; (6) Each owner or operator of an existing affected EGU combusting 100% bituminous coal that is controlled by an air pollution control device configuration of CS-ESP or FF and WFGD; (7) Each owner or operator of an existing affected EGU based on the air pollution control technologies and measures that have been installed and are operating to control emissions of air contaminants, including mercury."

We believe that this Section 123.208 system of preferences, combined with the Section 123.209(b)(1) and (2) presumptions, violates the Commerce Clause of the United States Constitution. The Supreme Court has adopted a two-tiered approach to determining the validity of state regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578 (1986). The first tier is often referred to as the "virtual *per se*" rule. This rule is applied when a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Id.* at 579. In such cases, the Court has "generally struck down the statute without further inquiry." *Id.* (citation omitted). A statute can be saved under this analysis only if the state shows that the law "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon,* 511 U.S. 93, 101 (1994) (internal quotations and citations omitted). But this showing must "pass the strictest scrutiny" and "[t]he State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Id.* (internal quotations and citations omitted).[1]

The Section 123.209(g) system of preferences is almost certainly a *per se* violation of the Commerce Clause under the first tier because it is intended to "favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp.* at 579. Although the second through sixth preferences are phrased to prefer "bituminous" coal, as opposed to "bituminous coal produced in Pennsylvania," plainly the purpose and effect of these preferences are to favor Pennsylvania coal over our-of-state coal. All Pennsylvania coal is bituminous coal. Although there are other sources of bituminous coal in the country, these coals to some extent suffer a competitive disadvantage as against Pennsylvania coal because of the additional transportation costs. Thus, the proposed bituminous coal preference will disproportionately favor Pennsylvania coal. Moreover, there are subbituminous coals that could potentially compete in the Pennsylvania market because of their lower sulfur content (indeed, it is our understanding that there is subbituminous coal currently being used in Pennsylvania). Thus, any system that favors bituminous coal over other forms of coal favors Pennsylvania coal by disfavoring these non-Pennsylvania subbituminous coals.

However, one does not have to speculate as to the protectionist purpose and effect of the Section 123.209(g) system of preferences. The Pennsylvania Department of Environmental Protection ("DEP") candidly states that the Proposed Mercury Rule (and specifically Sections 123.208, 123.206(b)(1) and (2)) was specifically designed to protect Pennsylvania coal. According to press releases on DEP's website, one of the principal motivations for the Proposed

[1] The second tier is for cases where a statute "has only indirect effects on interstate commerce and regulates evenhandedly." Because the Proposed Mercury Rule likely violates the Commerce Clause under the first tier, we do not examine the second tier here.

Mercury Rule is DEP's view that the federal Clean Air Mercury Rule ("CAMR") would lead to a reduction in the use of Pennsylvania coal. Some of the recent titles of these press releases are "Federal Mercury Rule Will Export Jobs, Energy Dollars From Pennsylvania"; "EPA Mercury Reduction Rule Penalizes Pa. Coal, Threatens Pa. Coal Mining Jobs"; and "EPA Mercury Reduction Proposal Penalizes Pennsylvania Coal, Plan Harms State Economy by Favoring Western Coal."

The press releases state that one of the purposes of the Proposed Mercury Rule is to counteract the perceived disadvantage of Pennsylvania coal under CAMR by developing a substitute mercury control regime that would preserve and promote the use of Pennsylvania coal. For instance, the February 22, 2006 press release announcing the proposed rule begins with the words "Governor Edward G. Rendell today announced a state-specific mercury reduction proposal that protects and grows the market share for Pennsylvania bituminous coal ...." An April 17, 2006 press releases states that "Pennsylvania's proposed state-specific rule preserves the market share for bituminous coal by presuming compliance for electric generating units that burn 100 percent bituminous with advanced air control technologies. Governor Rendell's proposed rule will make it tougher to switch fuels, protecting and growing the market for Pennsylvania coal." There are numerous other statements in these and other press releases issued by DEP to the same effect.

Pennsylvania is not the first state to attempt to protect its in-state coal industry from competition from western coal brought about by federal clean air regulation. These laws have been uniformly struck down as protectionist. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Supreme Court invalidated an Oklahoma statute that attempted to require in-state utilities to utilize a certain amount of Oklahoma coal in preference to coal they were purchasing from Wyoming. In *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), the Court overturned an Illinois statute providing a number of incentives to in-state utilities to utilize Illinois coal, incentives that the Court characterized as a "none too subtle attempt to prevent Illinois electric utilities from switching to western coals as a Clean Air Act compliance option." *Id.* at 595. In *Alliance for Clean Coal v. Bayh*, 72 F.3d 556 (7th Cir. 1995), the Court rejected similar incentives in an Indiana law. According to the Court:

> The clear intent of the statute is to benefit Indiana coal at the expense of western coal. The fact that the [statute] does not explicitly forbid the use of out-of-state coal or require the use of Indiana coal, but "merely encourages" utilities to use high-sulfur coal by providing economic incentives does not make the [statute] any less discriminatory. As we stated in *Miller*:
>
> > The Illinois Coal Act cannot continue to exist merely because it does not facially compel the use of out-of-state coal. As

> recognized in *West Lynn Creamery*, even ingenious discrimination is forbidden by the Commerce Clause. 114 S.Ct. at 2215. By "encouraging" the use of Illinois coal, the Act discriminates against western coal by making it a less viable compliance option for Illinois generating plants. *Miller*, 44 F.3d at 596.

This holding is directly on point to the Proposed Mercury Rule. Of course, DEP is free to adopt more stringent mercury standards than CAMR. But it cannot discriminate against non-Pennsylvania coal by making it a less viable option for complying with the state's more stringent mercury standards. Plainly it is technically and economically possible for utilities to use subbituminous coal in order to comply with the state's more stringent standards; otherwise, DEP would have no reason for its system of in-state preferences. DEP freely admits that that system is proposed in order to promote the utilization of in-state coal as the preferred compliance option. The system is, therefore, openly protectionist and clearly illegal.

DEP yesterday issued a press release indicating that it believes the Proposed Mercury Rule is constitutional. Oddly, the press release focuses solely on the Section 123.206(b)(1) and (2) presumptions and never mentions the 123.209(g) preferences in allocating allowances from the supplemental pool. But there appears to be a factual flaw in DEP's analysis of the Section 123.206(b)(1) and (2) presumptions that affect the validity of DEP's conclusion that the presumptions pass constitutional muster. According to DEP, "the presumption of compliance only recognizes the established fact that mercury is removed with vastly greater efficiency from scrubbed plants burning bituminous coal than from scrubbed plants burning subbituminous coal." We are informed that, although this statement is true for Pennsylvania bituminous coal, it is not true for other bituminous coals with lower chlorine contents. Thus, the presumptions favor Pennsylvania coal specifically, not, as DEP, claims all bituminous coals no matter the source.

However, the overriding point regarding constitutional analysis is that other, non-Pennsylvania coals can be burned in a manner that satisfies Pennsylvania's proposed more stringent mercury standards. The 123.209(g) preferences combined with the Section 123.206(b)(1) and (2) presumptions are intended – deliberately and explicitly – to favor Pennsylvania coal as the preferred compliance option. For the reasons state above, those provisions are likely unconstitutional.

Sincerely,

Peter Glaser