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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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Pennsylvania Public Utility Commission
P.O. Box 3265
400 North Street
Harrisburg, PA 17105-3265

Attention: Secretary

RE: 36 Pa.B. 6289, Proposed Subchapter D

To Whom It May Concern:

Enclosed for submittal are an original and 15 copies of comments of the Pennsylvania Waste Industries Association's comments regarding the above-referenced proposed regulations.

Thank you.

Sincerely yours,

Tara L. Flynn

TLF
enclosures
cc w/enc: Tim O'Donnell, P.E.

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PWIA

Pennsylvania Waste Industries Association
A Chapter of the National Solid Wastes Management Association

The Pennsylvania Waste Industries Association ("PWIA") appreciates the opportunity to submit these written comments concerning the proposed regulations published in the Pennsylvania Bulletin on October 14, 2006 (36 Pa.B. 6289) ("Proposed Subchapter D" or "Proposed Regulations"), as part of the *Implementation of the Alternative Energy Portfolio Standards Act of 2004.* The Proposed Regulations, prepared by the Public Utility Commission (the "PUC" or "Commission"), would be codified at 52 Pa. Code §§75.51—75.62. The Alternative Energy Portfolio Standards Act (the "Act") includes provisions on the standards and processes for qualifying alternative energy systems and certifying alternative energy credits.

Generally, the Proposed Regulations set forth compliance procedures for electric distribution companies and electric generation suppliers. PWIA is wholly supportive of the Act and its goal, including, for the most part, Proposed Subchapter D. Our specific comments are limited to three narrowly focused issues: 1. the Proposed Regulations' divergence from the Act in defining "Biologically derived methane gas"; 2. the definition of "major environmental violation"; and, 3. the apparent delegation to the Department of Environmental Protection ("Department" or "DEP") of the Commission's non-discretionary adjudicatory duties regarding alternative energy system qualification.

Introduction

PWIA is the Pennsylvania chapter of the National Solid Wastes Management Association, a non-profit organization that represents the interests of the North American waste services industry. PWIA members include both privately held and publicly traded companies, and own and operate numerous commercial solid waste facilities throughout the Commonwealth. In addition to solid waste landfills, our members operate resource recovery facilities, recycling facilities, transfer stations and collection operations. One of PWIA's primary missions is to advance the safe, efficient, and environmentally responsible management of solid waste, and to promote sound public policy affecting the management of solid waste.

Proposed Regulations, §75.52 Fuel and technology standards for alternative energy sources.

The Act defines "Alternative energy sources" to include fourteen individual categories (See 73 P.S. §1648.2 "Alternative energy sources" and "Municipal solid waste"). As the Commission recognizes in Section B of the Discussion portion of its Proposed Rulemaking Order ("Preamble to the Proposed Rule"), in certain instances the Act "did not specifically define what constitutes each particular source." The Commission fills

these definitional gaps through application of "the plain language of the Act, DEP's draft technical guidance document[1] distributed in early 2005, and comments received through the implementation proceeding."

PWIA supports and agrees with the Commission's use of its rulemaking authority to more fully define the scope of eligibility where the legislature has not spoken. However, the Proposed Regulations should not and cannot disregard the plain meaning of the statute when its words are clear and free from ambiguity (See 1 Pa.C.S § 1921(b)). Specifically, we refer to the definition of "Biologically derived methane gas" in the Proposed Regulations at §75.52(a)(7):

> (7) *Biologically derived methane gas.* Electricity produced from methane from the anaerobic digestion of organic materials from yard waste, such as grass clippings and leaves, food waste, animal waste and sewage sludge. This source also includes landfill methane gas.

The Proposed definition limits biologically derived methane gas to methane that has been produced by "anaerobic digestion of organic materials". The definition of Biologically derived methane gas in the Act does not limit this source to anaerobic digestion. Specifically, the Act states:

> (8) Biologically derived methane gas, which shall include methane from the anaerobic digestion of organic materials from yard waste, such as grass clippings and leaves, food waste, animal waste and sewage sludge. The term also includes landfill methane gas.

The definition in the Act indicates that "anaerobic digestion of organic materials" is a subset of biologically derived methane gas, not the limiting constraint. While this difference in wording may appear minor, it is not. If the requirement for anaerobic digestion of organic materials is included, it will then require confirmation by the regulating authority (i.e. the Department or the Commission). Proving anaerobic digestion may be difficult and/or costly.

In addition, the Act states that all landfill methane gas is within this source category. While this appears to be the intent and most likely reading of the Proposed Regulation, the placement within the definition of the modifier "anaerobic digestion" adds ambiguity to the definition as it pertains to landfill methane gas.

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[1] These draft Technical Standards are available from the Office of Energy and Technology Deployment, and at http://www.depweb.state.pa.us/energy/lib/energy/docs/section2technicalguidancefinal.pdf. The DEP's draft Technical Standards discuss, in general terms, its intentions towards implementing Section 7(b) of the Act. This draft guidance document is almost two (2) years old, having first been made publicly available in January 2005 (although its availability did not appear to have been published in the Pennsylvania Bulletin). While the Department has accepted comments on the document, to the best of our knowledge there has been no formal comment period, no formal request for comments, and no published response to any of the submitted comments. However, an attachment to the Secretarial Letter issued on December 20, 2005 adopts portions of this draft document.

PWIA suggests that the Proposed Regulations define Biologically derived methane gas in accordance with the language of the Act, specifically:

> (7) Electricity produced from biologically derived methane gas, including methane from the anaerobic digestion of organic materials from yard waste, such as grass clippings and leaves, food waste, animal waste and sewage sludge. This source also includes landfill methane gas.

Proposed Regulations, §75.53 Alternative energy system qualification, Subsection (h).

An existing (i.e. already qualified) alternative energy system that has major environmental violations may have its qualification suspended or revoked by the Commission. The term "major environmental violations" is defined as "those that cause significant harm to the environment or public health and result in a compliance order or penalty assessed by the Department." PWIA supports the intent of Proposed Regulation §75.53(h) to limit suspension/revocation of system status to only those environmental violations that are serious in nature.

It is unclear what, if any, nexus is required to the power generation activity. If the General Assembly's intent was to prevent companies from benefiting from improper generation of alternative energy credits, then the Proposed Regulations should require a link between the environmental non-compliance and power generation. This is important because many of the facilities that could theoretically participate in the program are physically large, operationally complex, and often built and operated in distinct subdivisions, often as separate corporate entities or by entirely different parties. As a result, it is reasonable to expect that some alternative energy sources may exist at locations that have environmental violations that are totally unrelated to the alternative energy system or operation.

In addition, the "compliance order" or "penalty" should be a final, unappealable action of DEP. The Environmental Hearing Board ("Board") has exclusive original jurisdiction over appeals from actions of the Department, including alleged violations and penalties. The Board can issue orders superseding actions, including allegations of violations and assessment of penalties, by the Department. As such, the Commission should not act on any allegation that a major environmental violation has occurred until the Department's decision is final (i.e. typically after 30 days of issuance of an order, or upon publication of the Board's decision and appeal period for disputed violations). To allow otherwise may create a situation where system status is suspended or revoked despite the fact that the Board finds that no violation occurred whatsoever.

In summary, the phrase "significant harm to the environment or public health" should be more proscriptive to ensure that the Proposed Regulations comport with the Act's intent to only suspend or revoke a system's status for serious environmental violations relating to the generation of electricity. In addition, the definition should clarify that only final

Department actions that are not the subject of further appeal should be considered for evaluation as a major environmental violation.

Proposed Regulations, §75.55 Alternative energy credit program administrator, Subsections (b)(4) and (6).

The Commission has the authority to appoint a program administrator that will act in the Commission's place in the performance of administrative functions related to operation of the Act and its implementing regulations (See Proposed Regulation §75.55(a) and 73 P.S. 1648.3(e)(2)). Many of the responsibilities and duties of the program administrator are set forth in Proposed Regulation §75.55(b). With the exception of the two interlocking provisions pertaining to environmental compliance (§75.55(b)(4) and (6)), PWIA agrees with and supports Proposed Regulation §75.55.

As the Commission stated in the Preamble to the Proposed Regulations, the Proposed Regulations encompass many of the statutory interpretations it previously made or discussed in its earlier implementation, tentative and final orders, including the January 31, 2006 tentative order *Implementation of the Alternative Energy Portfolio Standards Act: Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification*, Docket No. M-00051865 (entered January 31, 2006) ("January 31 Order"). The January 31 Order played an important role in the drafting of the Proposed Regulations ("The Commission has reviewed the comments to the January 31 Order, and found them to be informative and useful in developing these proposed regulations." 36 Pa.B 6289 "Background").

PWIA submitted comments to the Commission regarding the January 31 Order. PWIA commented that Section B and Section C of the January 31 Order were irreconcilable. This issue remains unresolved.

Section B of the January 31 Order stated that the Commission has sole authority for "[f]inal determinations on resource qualification" and "the power to promulgate regulations establishing standards and processes for resource qualification and alternative energy credit creation." As the Commission found and stated in Section B of the January 31 Order, final determinations on resource qualification must be made by the Commission, as required under § 1648.3(e). In Section C, however, the Commission suggested a process where questions of environmental compliance would be "certified" to the Department, and that the Commission would be bound by the Department's determination.

The Proposed Rulemaking appears to require the program administrator to reject all applications that the Department has determined to be noncompliant with environmental regulations. As the Proposed Regulation states in §75.55(b)[2]:

[2] This Proposed Regulation implements Proposed Regulation §75.53(f), which states that the environmental compliance must be "verified" by the Department before a facility may qualify under the Act. This

> The program administrator will have the following powers and duties in regard to the alternative energy system qualification:...(6) Reject application that the Department advises to be noncompliant with environmental regulations or §75.52.

The Proposed Regulations do not grant the program administrator any discretion to reject the Department's determination. In addition, the Department's determination is broad—"noncompliant with environmental regulations" as opposed to the more limited standard, discussed above, of "major environmental violation" that applies to existing qualified systems.

The Preamble to the Proposed Regulations state that the Commission "retains the ultimate authority to review and modify the decision of the program administrator....If the Administrator's decision was incorrect on the law or the facts, it will be modified by the Commission." However, based on the plain language of Proposed Regulation 75.55(b)(6), the Commission's review is limited to whether the program administrator followed the Department's decision, not whether the Department's decision was correct. Neither the Proposed Regulations nor 52 Pa. Code § 5.44 appear to permit review of the Department's underlying decision[3].

PWIA agrees with the analysis and conclusions expressed in the dissenting statement of Commissioner Fitzpatrick, as published in the Preamble of the Proposed Rule. Proposed Regulation 75.55 (b)(4),(5), and (6) do give the Department a decision-making role within the formal adjudicatory process under the Act and allow the Department to act as a party-litigant in the very same manner. While we agree with the Preamble's statement that the Commission should "utilize DEP's expertise in environmental matters to facilitate the efficient and correct implementation of the Act," we agree with Commissioner Fitzpatrick that this must be accomplished without delegating the Commission's ultimate decision-making authority. In short, the Department does not have final decision-making authority under the statute.

A closely related but separate issue is whether the Act requires a pre-qualification environmental compliance determination. The Act explicitly requires pre-qualification environmental compliance and permitting determinations of only one (1) type of facility[4]; the other thirteen (13) types of facilities are not subject to this environmental pre-

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verification includes a demonstration that all "necessary State and Federal environmental permits" have been obtained. The legality and suitability of Proposed Regulation §75.53(f) is the same as Proposed Regulation §75.55(b).

[3] In contrast, PWIA agrees that the Commission does have the ultimate authority, including the authority granted under 52 Pa. Code §5.44, to review decisions made under 75.53(h).

[4] The statutory definition of "Municipal Solid Waste", which is the type of source that combusts refuse for energy recovery, specifically includes compliance "which the Department of Environmental Protection has determined...[with all] current environmental standards, including but not limited to...the Clean Air Act... and the Solid Waste Management Act."

qualification based on the plain language of the Act. This distinction is recognized by the Commission in Section C.3. of the January 31 Order:

> The Act does provide that failure to comply with environmental standards would result in denial or loss of alternative energy status in at least one instance....The Commission believes that the General Assembly intended a uniform approach on this issue. [emphasis added]

The plain language of a statute should not be disregarded in pursuit of unstated legislative intent when the words are clear and free of ambiguity. 1 Pa.C.S § 1921(b). The Act provides in plain language that full compliance with all current environmental standards is required for Municipal Solid Waste incinerators—it is in the statutory definition. The Act clearly does not include this requirement in the definition of the other thirteen (13) types of alternative energy systems. The plain language of the Act should not be ignored to divine the General Assembly's unstated intent to impose these requirements across all of the source categories.

The Act does not require an active determination of environmental compliance for already qualified systems. 73 P.S. § 1648.7(b) merely reiterates the Department's existing duty to ensure that all applicable environmental standards are met, and is nothing more than a clarification that the Department has all of its normal enforcement tools available, including fines and penalties. The draft Technical Standards issued by the Department, which discuss procedures for evaluating compliance for already qualified systems, is in direct opposition to the Proposed Regulations[5].

In summary, PWIA believes that the existing inspection and enforcement powers of the Department remain unmodified by the Act, and that the Act does not require pre-qualification environmental reviews of eligible sources[6]. Should the Commission determine that these environmental reviews and approvals are necessary before a system is granted qualifying status, then it should not and cannot grant the Department final decision-making power as it currently proposes to do through the interaction of §75.55(b)(4) and §75.55(b)(6).

Conclusion

PWIA and its members believe the Act has significant potential to bring real environmental benefits to Pennsylvania. Adopting clear regulations with clear divisions of responsibility will foster the development of alternative energy sources. To that end, PWIA believes its important that the Commission maintain its final decision-making authority, as required under the Act.

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[5] See Footnote 1. The DEP draft Technical Standards are, for qualified sources, entirely "backward-looking" because they rely on certifications of past compliance (not current compliance) and impose retroactive revocation of AEC's already earned, awarded, and in some cases, sold. The Proposed Regulations do not allow for retroactive revocation of AEC's.

[6] With the exception of the aforementioned Municipal Solid Waste incinerators.

Thank you for the opportunity to comment on the Proposed Regulations. Please feel free to contact me directly should you wish to discuss our comments in more detail.

Tim O'Donnell

Tim O'Donnell, P.E.
President,
Pennsylvania Waste Industries Association