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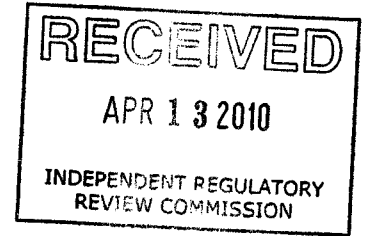
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2818

April 12, 2010



Via Electronic Mail
Environmental Quality Board
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400 Market Street
Harrisburg, PA 17101-2301

Re: Proposed Rulemaking - Nonattainment New Source Review
25 Pa. Code Chapters 121 and 127

Dear Chair and Members of the Environmental Quality Board:

On behalf of one of its clients, Manko, Gold, Katcher & Fox, LLP provides these comments concerning the Environmental Quality Board's proposed regulation entitled "Nonattainment New Source Review" published in the Pennsylvania Bulletin on February 6, 2010 (the "Proposed NSR Amendments"). The Proposed NSR Amendments would amend Pennsylvania's current regulations implementing New Source Review requirements for nonattainment areas ("NSR") to incorporate and implement federal requirements for particulate matter less than 2.5 micrometers (PM_{2.5}) and its precursors.

The Proposed NSR Amendments constitute the Board's response to revisions made by the United States Environmental Protection Agency ("EPA") to the federal NSR program in May, 2008. (See 73 Fed. Reg. 28321, May 16, 2008, hereinafter the "Federal PM_{2.5} NSR Rule") However, the Proposed NSR Amendments differ from the Federal PM_{2.5} NSR Rule in several important respects. In general, if promulgated, the Proposed NSR Amendments would render Pennsylvania's NSR regulations significantly more stringent than the Federal PM_{2.5} NSR Rule. 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.



A fundamental difficulty with the Proposed NSR Amendments is the Board's attempt to meet the requirements of the Federal PM_{2.5} NSR Rule by applying Pennsylvania's existing NSR provisions to PM_{2.5}. Because Pennsylvania's existing NSR rules were developed specifically to address particular issues relating to Pennsylvania's ozone nonattainment areas, and have been amended many times over many years, the rules are not suited in many respects to also address PM_{2.5}. The application of these longstanding ozone nonattainment NSR concepts to PM_{2.5} will create undue burdens on the regulated community, will discourage new projects, and will have an adverse economic impact on Pennsylvania's industrial facilities. In this context, the Board must meet its obligation under the Pennsylvania Air Pollution Control Act, 35 P.S. §4001 *et. seq.* ("APCA") to demonstrate that these more stringent than federal requirements are necessary to achieve or maintain ambient air quality standards for PM_{2.5}. Relying on past determinations relevant to ozone nonattainment is not sufficient. Additionally, for each provision of the Proposed NSR Amendments that is more stringent than the Federal PM_{2.5} NSR Rule, the Board should conduct a specific evaluation under section 5(a) of the Pennsylvania Regulatory Review Act, 71 P.S. §745.5 to ensure that, in light of the adverse economic effects of the Proposed NSR Amendments, the regulation is promulgated in the public interest.

Finally, there are several aspects of the Proposed NSR Amendments that, although purportedly intended to clarify existing regulatory provisions governing ozone nonattainment areas, are ambiguous and require clarification in order to ensure consistent application of the rules in a manner which does not discourage new projects at existing sources.

Fugitive Emissions of PM_{2.5}

In prior applications of the NSR rules, the Department of Environmental Protection ("Department") has made the determination that fugitive emissions should be considered in determining the potential to emit, actual emissions and actual emission increases associated with a new or modified facility. In this context, the Department has relied on the language of 25 Pa. Code §127.204, which notes that such determinations must include "flue emissions, stack and additional fugitive emissions, material transfer, use of parking lots and paved and unpaved roads on the facility property, storage piles...." In this respect, the Department's application of the Pennsylvania rule is more stringent than its federal counterpart, which provides that fugitive emissions shall not be included in determining whether a source is a major stationary source unless the source belongs to a category of sources specifically listed in the federal regulations, as derived pursuant to section 302(j) of the Clean Air Act, 42 U.S.C.A. §7602(j) ("CAA"). See e.g. Appendix S to Part 51 – Emission Offset Interpretative Ruling, Section II.A.4(iii) (hereinafter, "Appendix S").¹

¹ Note that EPA is currently engaged in a reconsideration of its prior rulemaking determination that fugitive emissions should only be considered for purposes of evaluating emissions increases associated with proposed modifications at sources belonging to the listed source categories. See "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Inclusion of Fugitive Emissions; Final Rule; Stay" 75 Fed. Reg. 16012 (March 31, 2010). This rulemaking process would not alter EPA's longstanding rule that fugitive emissions are not considered in major source determinations unless the source is within a listed source category.

Accordingly, to the extent that fugitive emissions are considered in determining the potential to emit of all sources, Pennsylvania has expanded the scope of NSR to encompass sources of fugitive emissions which are not listed within the source categories identified in the federal regulations. In the context of PM2.5, this aspect of Pennsylvania's NSR program could affect many more sources than intended under the federal program, and would have an even more extreme effect than the consideration of fugitive emissions of volatile organic compounds ("VOC") and nitrogen oxides ("NOx") in the context of ozone nonattainment. In particular, fugitive emissions of PM2.5 may result from a broad array of activities at industrial facilities, including activities which may be ancillary to facility production processes. In addition, because calculation methods for such sources may be imprecise, emissions of fugitive PM2.5 may be overestimated. For example, under Pennsylvania's program, a facility could be considered a major source for purposes of PM2.5, even if its PM2.5 emissions originate solely from materials handling activities, use of paved and unpaved roads, storage piles and other fugitive sources. Given the low NSR significance threshold for PM2.5, along with Pennsylvania's de minimis aggregation requirements (discussed in more detail below), such a source could easily become subject to NSR requirements for PM2.5. Since fugitive emissions of PM2.5 may be adequately controlled in most cases through standard dust management techniques, the application of Lowest Achievable Emission Rate ("LAER") and the obligation to secure offsets in this context would be prohibitive and well beyond the intent of the federal rules.

To our knowledge, fugitive emission sources have not been previously accounted for in any PM2.5 attainment plan for Pennsylvania. The Department should not rely on the inclusion of fugitive emissions of criteria air pollutants in that context to demonstrate attainment and maintenance of federally mandated National Ambient Air Quality Standards ("NAAQS"). For attainment planning purposes, the Department should ensure the imposition and enforcement of existing Chapter 123 fugitive dust requirements or otherwise impose best management plans for control of fugitive PM2.5 emissions in order to control such emissions. From a regulatory standpoint, existing provisions governing the consideration of fugitive emissions in NSR applicability determinations have not been extended to PM2.5, and the Board should not seek to do so in the context of this rulemaking. Proper handling of this issue at the outset will avoid a future contention that the requirement cannot be changed due to the anti-backsliding provisions of section 172(e) of the CAA, 42 U.S.C.A. 172(e).

In light of the above, the Proposed NSR Amendments should be revised to exclude fugitive emissions in the context of major source determinations for PM2.5, except for source categories specifically listed in the federal regulations. Further, the Department should follow the federal rule (as it continues to be developed) with respect to the consideration of fugitive emissions in the evaluation of emission increases caused by modification projects.

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. See e.g. Appendix S, at Section IV.I.1(i). Therefore, for PM2.5, the Federal PM2.5 NSR Rule would require the aggregation of net emission increases over a five-year contemporaneous period only if the increase in emissions from the proposed modification exceeds the 10 ton per year significance threshold for PM2.5.

Consistent with the federal program, Pennsylvania’s currently effective NSR regulations would require a source to aggregate net emission increases over a five-year contemporaneous period if the emission increase from the project exceeds the emission rate that is significant. See 25 Pa.Code §127.203a(1)(ii). The Proposed NSR Amendments would extend this requirement equally to sources of PM2.5. However, consistent with Pennsylvania’s current regulations, the Proposed NSR Amendments would also require any de minimis emission increase (defined in 25 Pa. Code §121.1 as an emission increase that is less than the emission rate that is significant) to be aggregated with net emission increases over a 10-year contemporaneous period. See 25 Pa. Code §127.203a(a)(2). Although NSR applicability in this circumstance would not result in the imposition of 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 10 years.

The aggregation of de minimis emission increases is inappropriate for PM2.5. The concept was originally introduced to the Pennsylvania NSR provisions as a means of addressing increases of VOC and NOx in ozone nonattainment areas. While such provisions may have had their foundation in section 182 of the CAA, 42 U.S.C.A. §7511a, neither the CAA provisions nor the Federal PM2.5 NSR Rulemaking contemplate application of these provisions to PM2.5. Additionally, as noted above, the Board has not demonstrated that aggregation of de minimis emission increases is necessary to achieve and maintain the NAAQS for PM2.5.

De minimis aggregation is particularly problematic for PM2.5 sources for several reasons relating specifically to the low significance threshold for PM2.5. First, as a general matter, the requirement of de minimis aggregation and a ten-year contemporaneous period are likely to result in NSR applicability for projects which may be minor in nature. Second, as noted above, the inclusion of fugitive emissions in calculating net emission increases of PM2.5 over the 10-year contemporaneous period will result in higher calculations of PM2.5 emissions than otherwise intended under the Federal PM2.5 NSR Rule. Third, at the current time, PM2.5 ERCs are extremely scarce and extremely expensive. The logistical and financial burden of securing these credits will weigh heavily on sources of PM2.5 emissions.

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 minimis 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 significant sums of money to secure ERCs (if they are even available). Given the adverse effect of de minimis aggregation on PM2.5 sources, and the Department's failure to justify that such aggregation is necessary to achieve and maintain the PM2.5 NAAQS, the provision should be revised to exclude PM2.5 and its precursors.

Application of NSR to PM2.5 and its Precursors

The Proposed NSR Amendments require clarification with respect to the manner in which NSR will be applied to PM2.5 and its precursors. In particular, consistent with the Federal PM2.5 NSR Rule, the Proposed NSR Amendments have identified sulfur dioxide ("SO2") and NOx as precursors to PM2.5 in the revised definition of "regulated NSR pollutant." Further, the Proposed NSR Amendments identify significant emission rates for SO2 (40 tons per year) and NOx (40 tons per year). However, the Proposed NSR Amendments fail to clarify that each "regulated NSR pollutant," including PM2.5 and its precursors, will be evaluated separately with respect to major source determinations and evaluations of emission increases associated with modification projects.

Given the unique considerations associated with the identification of precursors to a nonattainment pollutant which is itself regulated, the Board should clarify the relationship of major stationary source status for PM2.5 emissions and significant net emission increases for its precursors. In particular, the Board should clarify that NSR will be applied on a pollutant-specific basis. For example, a source that qualifies as a major stationary source of a specific pollutant (e.g., PM2.5) triggers NSR applicability only if the source undertakes a modification that results in a significant net emission increase of the same pollutant (i.e., PM2.5). By contrast, a facility that qualifies as a major stationary source of PM2.5 emissions, but not a major stationary source of SO2 or NOx, would not trigger NSR applicability for SO2 or NOx due to a projected emission increase of those pollutants exceeding their significance thresholds. Since numerous additional sources may be regarded as major stationary sources for PM2.5 based upon designations of nonattainment within Pennsylvania, and the consideration of fugitive emissions (discussed above), this clarification is critical.

Clarification of Ozone Nonattainment Provisions

In the context of the Proposed NSR Amendments, the Board has sought to clarify 25 Pa. Code §127.203, governing "Facilities subject to special permit requirements." These provisions apply specifically to sources of VOC and NOx in the five-county Philadelphia area. As a general matter, these existing provisions are confusing on their face, and are unclear with respect to their

interplay with the applicability requirements set forth in section 127.203a. However, the language proposed in the context of the Proposed NSR Amendments would, at best, further confuse these existing provisions, and would at worst render these provisions more stringent.

The provisions of section 127.203(b)(2) and (3) apply to sources of VOC and NO_x in the five-county Philadelphia area. They are based on section 182(c)(7) and (8) of the Clean Air Act, 42 U.S.C.A. §7511a, which establish special rules for modifications of sources in serious ozone non-attainment areas. The provisions appear to offer sources triggering NSR an opportunity to use internal offsets at a ratio of 1.3 to 1 to avoid the control requirements of NSR. Additionally, pursuant to section 127.203(b)(2), for sources with a potential to emit less than 100 tons per year which elect not to offset at the required ratio, Best Available Control Technology (“BACT”) is substituted for LAER.

The Proposed NSR Amendments, through a purported clarification of these provisions, would add ambiguous language that could render these provisions more stringent. First, section 127.203(b)(2) and (3) would be amended to clarify that “emissions from the proposed project” would be included in determining whether the facility potential to emit is greater than 100 tons or less than 100 tons for these purposes. Since there is a benefit under paragraph (b)(2) for sources with a potential to emit less than 100 tons per year (the substitution of BACT for LAER), this “clarification” would render that benefit unavailable to certain facilities for which potential to emit would increase above 100 tons per year only after a proposed project is operational. This interpretation is inconsistent with prior applications of these provisions, and inconsistent with Clean Air Act provisions which evaluate a facility’s potential to emit prior to emissions increases associated with a proposed project. Accordingly, the proposed language should be removed.

Second, the Proposed NSR Amendments would add a sentence to section 127.203(b)(1)(i), stating that “[t]he aggregated VOC or NO_x emissions must meet the applicability requirements of paragraph (2) or (3).” However, when evaluated in the context of subparagraphs (2) and (3), use of the phrase “aggregated emissions” is ambiguous, especially in light of the language discussed above related to inclusion of the “emissions of the proposed project” in the source’s potential to emit. For example, if the “aggregated emissions” are intended to be equivalent to the “emissions of the proposed project” that would be included in the source’s potential to emit for these purposes, there may be some double-counting of emissions toward the source’s potential to emit (i.e. some portion of the aggregated emissions would already be accounted for in the source’s potential to emit). This language should be clarified, and should not require emissions associated with a proposed project (aggregated or otherwise) to be included within the determination of potential to emit for application of sections 127.203(b)(2) and (3).

In addition to addressing the above-referenced provisions of 25 Pa. Code §127.203(b)(2) and (3), the Board should clarify the provisions of section 127.203(b)(1), as they relate to aggregation requirements for sources within the five-county Philadelphia area. In particular, the Board should clarify, consistent with the provisions of section 127.203a, that five-year

contemporaneous aggregation is required only for proposed emission increases that exceed the significant emission rate for a pollutant, and that ten-year contemporaneous aggregation is required only for proposed emission increases that are de minimis.² Section 127.203(b)(1) should not be interpreted to require both five and ten-year aggregation for sources in the Philadelphia region.

Conclusion

In promulgating a state-specific NSR regulatory program for PM2.5, the Board should strive for the same objectives identified by EPA in the Federal PM2.5 NSR Rule. This goal is not only consistent with the federal mandate that Pennsylvania's NSR program be "equivalent" to the revised federal NSR requirements, but it also would ensure that Pennsylvania businesses are not placed at a significant competitive economic disadvantage relative to other states.

Very truly yours,

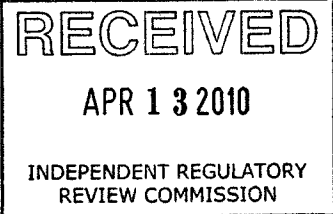


Carol F. McCabe

For MANKO, GOLD, KATCHER & FOX, LLP

CFM/vc/10017.

² The Board has proposed a clarification of aggregation procedures in 25 Pa.Code §127.203a. Subject to our comments above regarding de minimis aggregation for PM2.5 sources, we support the proposed language as promoting the clear and consistent application of aggregation requirements.



**Proposed Rulemaking - Nonattainment New Source Review
25 Pa. Code Chapters 121 and 127
Comments by: Manko, Gold, Katcher & Fox, LLP**

The Environmental Quality Board's proposed regulation entitled "Nonattainment New Source Review" published in the Pennsylvania Bulletin on February 6, 2010 (the "Proposed NSR Amendments") is more stringent than required under the federal nonattainment New Source Review ("NSR") program established for PM_{2.5}. The Proposed NSR Amendments differ from the federal PM_{2.5} NSR rule in several important respects that would render Pennsylvania's NSR regulations significantly more stringent than federal rules. Additionally, certain aspects of the proposed regulation are derived from existing Pennsylvania regulatory provisions that were developed specifically to address ozone nonattainment areas. Under the mandate of the Pennsylvania Air Pollution Control Act, 35 P.S. §4001 et. seq., the Board must specifically demonstrate that these provisions are necessary to achieve and maintain the National Ambient Air Quality Standard for PM_{2.5}.

Fugitive Emissions of PM_{2.5}: To the extent that the Proposed NSR Amendments would require the consideration of fugitive emissions in major source determinations, it is inconsistent with its federal counterpart, which provides that fugitive emissions shall not be included in determining whether a source is a major stationary source unless the source belongs to a category of sources specifically listed in the federal regulations. Since fugitive PM_{2.5} emissions may be present at a broad variety of industrial sources (relating to activities such as material handling, storage piles, paved and unpaved roadways), inclusion of fugitive emissions within a source's calculation of potential to emit may subject a large number of industrial facilities to NSR rules for PM_{2.5}. The Board has not demonstrated any need or air quality benefit associated with extending the NSR rules in this manner, and Pennsylvania should instead follow the federal rule for fugitive emissions of PM_{2.5}.

Aggregation of De Minimis Emission Increases: The Proposed NSR Amendments would require major sources to aggregate proposed de minimis emission increases with net emission increases over a 10-year contemporaneous period, in evaluating whether a significant net emission increase would result from a proposed modification project. Given the low significance threshold for PM_{2.5}, this requirement will likely result in NSR applicability for many small modification projects. In light of the high cost and relative scarcity of PM_{2.5} offsets, and the burden and delay associated with NSR permitting, this requirement will present a significant impediment to modification projects in Pennsylvania. Therefore, the requirement to aggregate de minimis increases of PM_{2.5} should be eliminated.

In addition to its comments relating to the more stringent than federal aspects of the Proposed NSR Amendments, the comments submitted by Manko, Gold, Katcher & Fox, LLP also contain requests for clarification. In particular, the Proposed NSR Amendments should be clarified to state that NSR requirements for PM_{2.5} and its precursors will be applied on a pollutant-specific basis. Additionally, the Board should clarify and amend its proposed revisions to existing provisions in 25 Pa. Code §127.203, governing sources of VOC or NO_x in the five county Philadelphia region.

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INDEPENDENT REGULATORY
REVIEW COMMISSION

From: Carol McCabe [CMcCabe@mgkflaw.com]
Sent: Monday, April 12, 2010 3:25 PM
To: EP, RegComments
Subject: Comments: EQG Proposed Rulemaking re: New Source Review
Attachments: PDF version Comments on Draft DEP NSR Regulations for PM2.5.PDF; PDF version Summary of Comments on Draft DEP NSR Regulations for PM2.5.PDF

Dear Sir / Madam,

Please accept for filing the following comments and comment summary regarding the Environmental Quality Board's proposed Nonattainment New Source Review rulemaking published on February 6, 2010. Please send me a confirmation of receipt of the comments.

Thank you,
Carol McCabe

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