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LESLIE A. LEWIS JOHNSON, 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

May 12, 2010

Honorable John Hanger, Chairman  
Environmental Quality Board  
Rachel Carson State Office Building  
400 Market Street, 16th Floor  
Harrisburg, PA 17101

Re: Regulation #7-450 (IRRC #2818)  
Environmental Quality Board  
New Source Review

Dear Chairman Hanger:

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](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director

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Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee  
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee  
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee  
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee  
Robert A. Mulle, Esq., Office of Attorney General  
Andrew Clark, Esq., Office of General Counsel

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-450 (IRRC #2818)

### New Source Review

May 12, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the February 6, 2010 *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. General. – Fiscal Impact; Consistency with other regulations; Reasonableness; Clarity.**

There appears to be some inconsistency between the Regulatory Analysis Form (RAF) and Preamble as to whether this proposed regulation is consistent with or more stringent than federal regulations. Item #24 of the RAF states that the proposal is not more stringent than federal standards. Meanwhile, the Preamble or Order includes the following statement:

To the extent that any of the proposed revisions are more stringent than any Federal requirements, these revisions are reasonably necessary in order to attain and maintain the PM<sub>2.5</sub> NAAQS [National Ambient Air Quality Standard for fine particulate matter equal to and less than 2.5 micrometers in diameter].

Some commentators indicated that the proposed regulation is inconsistent with and more stringent than federal rules and standards. Department of Environmental Protection (DEP) staff members indicate that the existing regulations for the New Source Review (NSR) program are more stringent than the comparable federal rules and standards. The provisions are the result of previous rulemakings adopted by the EQB. This proposed rulemaking would apply them to PM<sub>2.5</sub>.

Section 4.2(b) of the Air Pollution Act (35 P.S. § 4004.2(b)) states that “control measures or other requirements adopted” to implement ambient air quality standards “shall be no more stringent than those required by the Clean Air Act” except under specific conditions or “if the board [EQB] determines that it is



reasonably necessary” to exceed minimum federal requirements for the Commonwealth to achieve or maintain air quality standards, to prevent assessment of federal sanctions, to satisfy federal requirements that apply to Pennsylvania, or to comply with the final decree of a federal court. When the EQB adopted the existing provisions in Chapters 121 and 127, these rules and standards did not include PM<sub>2.5</sub>. To the extent that this proposed regulation is more stringent than federal rules and standards for PM<sub>2.5</sub>, the EQB and DEP should provide a justification for exceeding federal standards and requirements. The EQB should explain why, how and when it made the determination that it was necessary to be more stringent than the federal NSR program in controlling and reducing PM<sub>2.5</sub> in Pennsylvania.

As a part of this determination, the EQB and DEP should identify the specific standards and provisions that apply to PM<sub>2.5</sub> and are different from the federal program with cross-references to the specific federal rules and standards. Where there is a difference, the need for the state rule should be explained and justified. What impacts will the proposal have on Pennsylvania businesses and industries that are competing with the same types of businesses and industries in other jurisdictions? What impact will it have on keeping businesses and industries in Pennsylvania, and attracting new companies to locate in Pennsylvania? Answers to these questions and related information should be provided with the final-form regulation.

A related concern is the response to item #25 on page seven of the RAF. The response claims that “a number of neighboring states with PM<sub>2.5</sub> nonattainment areas are also currently working on amendments to their NSR programs to meet the requirements published by the EPA.” Yet, it also states that none of these states have proposed their drafts, and “it is not anticipated that these regulations [this proposed rulemaking] will place this Commonwealth at a competitive disadvantage.” There are two concerns. First, if the neighboring states have not yet unveiled proposed drafts of rulemakings, what is the assurance that Pennsylvania industries will not be placed at a competitive disadvantage? Second, if other states are adopting regulations which are consistent with the federal program while the EQB program is more stringent, the EQB and DEP should explain the impact on the competitiveness of Pennsylvania businesses and industries. Coordinating a regional response with the neighboring states may provide a better result for air quality and also help insure that industries in different states are not placed at a competitive disadvantage.

## **2. Section 121.1. Definitions. – Fiscal Impact; Consistency with other regulations; Clarity.**

*Regulated NSR [New Source Review] pollutant -*

The proposed regulation amends this existing definition. These changes include a statement identifying sulfur dioxides (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>)



as precursors to PM<sub>2.5</sub> in all PM<sub>2.5</sub> nonattainment areas. The proposal is similar to language in the federal regulations at 40 CFR § 51.165(a)(xxxvii), except that Section 51.165(a)(xxxvii)(C)(3) indicates that a state may make a demonstration to the EPA that NO<sub>x</sub> emissions from sources in a specific area are not a significant contributor to that area's ambient PM<sub>2.5</sub> concentrations. The information in the Preamble and accompanying materials with the proposed regulation does not provide any information on whether the DEP has identified areas where NO<sub>x</sub> emissions are not a significant contributor to PM<sub>2.5</sub> concentrations. This information should be provided with the final-form regulation.

*Significant -*

The amendment to this definition is similar to the federal language at 40 CFR Section 51.166(b)(23)(i), which includes the following:

PM<sub>2.5</sub>: 10 tpy [tons per year] of direct PM<sub>2.5</sub> emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a PM<sub>2.5</sub> precursor under paragraph (b)(49) of this section.

The one difference is that that the proposed regulation does not include the language “unless demonstrated not to be a PM<sub>2.5</sub> precursor.” What is the reason for this inconsistency?

**3. Section 127.203. Facilities subject to special permit requirements.**  
**Section 127.203a. Applicability determination.**  
**Section 127.204. Emissions subject to this subchapter. – Fiscal impact; Implementation procedure; Consistency with other regulations; Reasonableness; Clarity.**

There are concerns with amendments and language in Sections 127.203, 127.203a and 127.204 that appear to be interrelated. Commentators expressed concerns with the “aggregation of de minimis emission increases,” “proposed project” emissions and “fugitive emissions.”

First, commentators are concerned that the existing rules for a “proposed de minimis emission increase” in Section 127.203a(a)(2) combined with the changes in the proposed regulation, including Sections 127.203 and 127.204, will create requirements that are more stringent than federal rules and standards for PM<sub>2.5</sub>. They claim that application of these existing rules to other pollutants may be justified but it was not the intent of federal law or regulations to apply them to PM<sub>2.5</sub>. They contend that it will impose unnecessary burdens on Pennsylvania businesses and industries.

Second, commentators expressed concern and confusion with the amendment to Section 127.204(a) and the term “fugitive emissions.” Specifically, the use of this term in this proposed regulation and the existing provisions of Chapter

127 are different from the description of the term found in federal regulations at 40 CFR § 51.165(a)(1)(iv)(C). For example, Section 127.204(a) includes “use of parking lots and paved and unpaved roads on the facility property.” Similar words do not appear in the description of “fugitive emissions” in the federal rules. Commentators are concerned that the proposed regulation would impose a regulatory framework that is well beyond the intent of federal rules and standards, and would create unnecessary costs and restrict competition and economic growth.

Third, the “de minimis” and “fugitive” emissions provisions are also problematic because the “significant” emission rate for PM<sub>2.5</sub> is set by federal rule at ten tons per year [10 TPY]. Except for the pollutant “lead,” this is low. For example, PM<sub>10</sub> is set at 15 TPY, NO<sub>x</sub> is 40 TPY, and carbon monoxide is 100 TPY. Commentators are concerned that the “significant” rate for PM<sub>2.5</sub> combined with this proposed regulation will act as a frequent trigger requiring Pennsylvania businesses and industries to invest more funds in offsets or emissions control technology than their competitors in neighboring states.

Fourth, a related concern is the addition of the phrase “including the emissions from the proposed project” in Sections 127.203(b)(2) and (3). New language in Section 127.203a(a) also requires the inclusion of “the estimate of an emissions increase” from a new project. The apparent redundancy is confusing. The EQB should explain the intent of and need for both amendments.

In these related areas of concern, the EQB needs to clarify and justify its intent, or revise the final-form regulation to make it clear and consistent with federal rules and standards for PM<sub>2.5</sub>.

#### **4. Section 127.210. Offset ratios. – Fiscal impact; Implementation procedure; Consistency with other regulations; Reasonableness; Clarity.**

Commentators expressed concerns with the basis or rationale for the amendments in this section. One area that is unclear is the phrase “unless interpollutant offsetting is authorized for a particular pollutant as specified in subsection (a).” One commentator refers to approval by the U.S. Environmental Protection Agency of interpollutant trading in the five-county southeastern region of the state. Are there other situations where interpollutant offsetting might be authorized? If so, what impact will this section have on those approved interpollutant offsets or trades?



### Facsimile Cover Sheet



Phone: (717) 783-5417  
Fax #: (717) 783-2664  
E-mail: [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)  
Website: [www.irrc.state.pa.us](http://www.irrc.state.pa.us)

**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

**To:** Debra L. Failor  
**Agency:** Environmental Quality Board  
**Phone:** 7-2814  
**Fax:** 705-4980  
**Date:** May 12, 2010  
**Pages:** 6

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-450 (IRRC #2818). 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:** *Karen Brady* **Date:** 5-12-10