

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-561 (IRRC #3310)

### Additional RACT Requirements for Major Sources of NO<sub>x</sub> and VOCs for the 2015 Ozone NAAQS

November 12, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the August 7, 2021 *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. Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Possible conflict with or duplication of statutes or existing regulations.**

*Revision to the State Implementation Plan (SIP) and review and approval by the United States Environmental Protection Agency (EPA)*

The Preamble to this proposed rulemaking states that it would amend Chapter 121 and Chapter 129 to adopt additional presumptive reasonably available control technology (RACT) requirements and RACT emission limitations for certain major stationary sources (sources) of oxides of nitrogen (NO<sub>x</sub>) and volatile organic compound (VOC) emissions in existence on or before August 3, 2018, to address the 2015 8-hour National Ambient Air Quality Standards (NAAQS) established by the EPA under the authority of the Clean Air Act (CAA) (42 U.S.C.A. §§ 7401 –7671q). This rulemaking is often referred to as RACT III. RACT I and RACT II rulemakings were previously promulgated by the EQB in 1994 and 2016, respectively.

Section 110 (a) of the CAA gives states the primary responsibility for meeting NAAQS and requires each state to adopt and submit to the EPA a SIP needed to enforce NAAQS. According to the EQB, a SIP includes the regulatory programs, actions and commitments a state will carry out to implement its responsibilities under the CAA. Once approved by the EPA, a SIP is legally enforceable under federal and state law. This proposed rulemaking will be submitted to the EPA for approval as a revision to the Commonwealth's SIP after it is promulgated as a final regulation.

The EPA Region III has submitted comments on the proposed rulemaking. The comments:

- Stress that for RACT II case-by-case sources, additional analysis under RACT III is still required, even if no significant changes in control technologies have occurred and the additional analysis must be part of the regulatory record;
- State that any extension of the compliance date beyond January 2023 is contrary to EPA’s implementing regulations and is not approvable for RACT purposes; and
- Pose questions related to implementation procedures for public participation and comment on case-by-case RACT determinations, the type of information that must be submitted by sources for review by the Department of Environmental Protection (DEP), compliance dates, determination of compliance related to averaging plans, data used to calculate costs associated with the rulemaking, and clarity issues.

In the Regulatory Analysis Form (RAF) submitted with the proposed rulemaking, the EQB states the following: “If the EPA finds that a state has failed to submit an acceptable SIP or failed to implement the requirements of an approved SIP, sanctions will be imposed.” Since this rulemaking must ultimately be approved by the EPA before it can be incorporated as part of the Commonwealth’s SIP, it is important the EQB work with EPA to ensure that the issues raised above are adequately addressed in the final-form rulemaking. We ask the EQB to review the concerns raised above and to amend the rulemaking or provide further explanation on implementation procedures to ensure compliance with EPA requirements.

*Ability of the regulated community to comply with the rulemaking and the Commonwealth’s obligation to implement its SIP in a timely fashion*

A major concern raised by the regulated community relates to the timing of the finalization of the rulemaking, the effective date of the rulemaking and their ability to comply with the revisions that are being made. They contend that the current schedule associated with this rulemaking will not allow sources sufficient time to assess the impact of the regulation on their operations. In addition, some industries, whose operations make it difficult to shut down to install control technologies, will have difficulty meeting the stricter requirements. Some of the commentators have offered alternative schedules for compliance. As noted above in the summary of comments submitted by EPA, any compliance date beyond January 2023 would not be in compliance with EPA regulations.

We ask the EQB to review the concerns of the regulated community related to timely compliance and the unique nature of their operations, in conjunction with EPA requirements for the Commonwealth’s SIP and, if possible, provide regulatory flexibility for these organizations. Regardless of any flexibility that may or may not be possible, we urge the EQB and DEP to continue to the work they have been doing to educate the affected industries on what will be expected of them once this rulemaking is finalized.

**2. Direct and indirect costs to the Commonwealth, its political subdivisions and to the private sector; The nature and estimated costs of legal, consulting or accounting services which the public or private sector may incur.**

We have four concerns regarding the RAF submitted with the proposed rulemaking. First, comments submitted by the regulated community suggest that fiscal analysis in the RAF

underestimates the cost of compliance with the rulemaking. For example, it is noted that the RAF does not include an estimate for sources that will need to spend time and resources on legal and technical advisory services to comply with presumptive limits or a case-by-case demonstration. Commentators also contend that the RAF and the Technical Supporting Document (TSD) submitted with the rulemaking underestimate the number of facilities that will have to install additional RACT and fail to account for the cost of new equipment that will be required to meet the new limits imposed by the rulemaking.

Second, commentators state that lower presumptive emissions required by the rulemaking will necessitate case-by-case alternative RACT limits and compliance schedules that DEP will have to review and approve. However, the cost to DEP associated with the additional petitions has not been quantified in the RAF.

Third, the RAF quantifies the expected reduction of NO<sub>x</sub> emissions at approximately 9,000 tons per year (TPY) from engines, turbines and municipal waste combustors. A quantification of the expected reduction of Volatile Organic Compounds (VOCs) was not provided in the RAF.

Finally, Question #23 of the RAF states that the total estimated cost to the regulated community will be \$38,500,000 for the last half of fiscal year 2022-2023 and then \$77,000,000 per year thereafter. It is our understanding that these estimated costs were based on an earlier draft of this proposed rulemaking and the actual cost estimates are lower and properly calculated under Question #19 of the RAF.

We ask the EQB to review the contentions of the commentators regarding inaccurate fiscal impact data in the RAF and TSD, and if appropriate, provide updated information about the number of sources and facilities that will be affected by the rulemaking, the costs associated with compliance for the regulated community and also the costs associated with additional case-by-case reviews by DEP. We also ask the EQB to quantify the expected reduction of VOCs that could result from this rulemaking and to quantify the costs of meeting the lower VOCs standards. Finally, we ask the EQB to update Question #23 of the RAF.

### **3. Glass melting furnaces. – Possible conflict with or duplication of statutes or existing regulations; Need; Reasonableness; Fiscal impact; Implementation procedures.**

A commentator that operates a flat glass plant has submitted comments stating that this rulemaking should not impose presumptive RACT limits on their operation because their business is currently subject to comprehensive, industry-specific regulations for glass melting furnaces found at §§ 129.301 – 129.310. They contend that glass melting furnaces were not subject to RACT II and the Preamble to this rulemaking offers no explanation why limits are now being imposed. The commentator states that the regulatory requirements for their operation imposed under this rulemaking will conflict with the existing regulations. If their operation will be subject this rulemaking, they request that operational flexibility regarding start-up, shut-down and idling of their furnaces currently provided in existing regulations be added to this proposal. They also request additional time for compliance with the rulemaking. Finally, they disagree with the cost estimates provided for their operation in the TSD.

We ask the EQB to clarify in the Preamble to the final-form rulemaking whether RACT III requirements will apply to glass melting furnaces beyond what is already required under §§ 129.301 – 129.310. If additional compliance is required, the EQB should explain why it is needed and how this current rulemaking will be implemented with the existing regulatory requirements. Additionally, the EQB should ensure that there is no conflict between the regulations. We also ask the EQB and DEP to work with the commentator and provide assistance with compliance timeframes and cost estimates.

#### **4. Protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.**

Two comments were received from environmental advocacy organizations. The New Jersey Department of Environmental Protection also submitted comments. The comments state that this rulemaking is overdue and urge its final adoption as soon as possible. The comments also suggest stricter emissions limits for certain types of sources, such as steel producing facilities, coal-fired power plants and municipal waste combustors, and also call for greater protection for an environmental justice community in Chester County. We ask the EQB to review the recommendations of this group of commentators and provide responses in the Preamble to the final-form regulation. If any of the recommendations are adopted, the EQB should quantify the fiscal impact associated with the more stringent requirements and include that information in the RAF. Finally, if the recommendations are adopted, the EQB should educate affected sources about the changes as soon as possible to assist with compliance obligations.

#### **5. Section 129.111. Applicability. – Clarity; Implementation procedures.**

This section establishes applicability requirements for the owners and operators of major NO<sub>x</sub> emitting and major VOC emitting facilities, or both, for which RACT requirements have otherwise been established in Chapter 129. We have two concerns.

First, under Subsection (a), several commentators believe the phrase, “that were in existence on or before August 3, 2018”, as it relates to major emitting facilities is vague. Would this standard apply to a facility that was built, but not yet operating as of that date? We recommend this subsection be clarified in the final-form regulation.

Second, Subsection (c) provides exemptions for facilities that have the potential to emit less than a certain amount of NO<sub>x</sub> or VOCs. A commentator states that an owner or operator that originally determined that a source is exempt may later determine that the source is not exempt. For this reason, the commentator suggests that the final rulemaking include provisions that provide compliance date obligations for these sources under this particular circumstance. In the Preamble to the final-form rulemaking, we ask the EQB to explain how this provision will be implemented under the scenario described above, and if appropriate, amend the final rulemaking accordingly.

**6. Section 129.112. Presumptive RACT requirements, RACT emission limitations and petition for alternative compliance schedule. – Clarity; Reasonableness; Whether the regulation is supported by acceptable data.**

This section establishes that the owners and operators of major NO<sub>x</sub> emitting and major VOC emitting facilities, or both, shall comply with the specified presumptive RACT requirements and RACT emission limitations, and provides a mechanism for requesting an alternative compliance schedule. We have five concerns.

First, under Subsection (c)(8), a commentator has suggested that a “flare” be added to the list of equipment that must be installed, operated and maintained in accordance with the manufacturer’s specifications and with good operating practices. The commentator asserts that this piece of equipment is subject to presumptive RACT. If the addition of “flare” to this subsection improves the clarity of this provision, we suggest that it be added to the final-form rulemaking.

Second, the standard of 85 ppmvd NO<sub>x</sub> as a presumptive RACT emission limitation referenced in Subsection (g)(2)(iii)(A) has been questioned by a commentator that believes that existing technology does not allow for this level of compliance. They believe the standard will result in numerous alternative RACT submittals. We ask the EQB to explain the rationale for this standard in the Preamble to the final-form rulemaking.

Third, under Subsection (g)(1)(vi)(A) and (B), commentators have stated that the standards established for bituminous waste, such as gob, and anthracite waste, such as culm, are appropriate when measured as a 30-day rolling average. However, measuring those standards against an operating day compared to a 30-day rolling average is inappropriate because of the way in which combustion units using gob and culm as a fuel source operate. In the Preamble to the final-form regulation, we ask the EQB to explain the rationale for measuring emission limits for an operating day as required under Subsection (g)(1)(viii), instead of a 30-day rolling average.

Fourth, a commentator has questioned how the owner or operator of a unit firing multiple fuels can comply with the requirements of Subsection (g)(4) if beneficially-used process gases are used as fuels. In the Preamble to the final-form regulation, we ask the EQB to explain how this provision will be implemented under this scenario.

Finally, under Subsection (k), a commentator states that the rulemaking applies the same NO<sub>x</sub> limit for a direct-fired heater, furnace, or oven as the limit for indirect-fired furnaces established under RACT II. They ask for clarification on the basis for this decision. We ask EQB to include the rationale for this standard in the supporting documents and Preamble submitted with the final-form rulemaking.

**7. Section 129.113. Facility-wide or system-wide NO<sub>x</sub> emissions averaging plan general requirements. – Reasonableness; Need; Protection of the public health, safety and welfare and the effects on this Commonwealth’s natural resources.**

This section establishes an alternative mechanism for demonstrating compliance when a major NO<sub>x</sub> emitting facility is unable to meet the applicable RACT emission limitation. We have two comments.

A commentator has raised two issues with this section. First, the commentator believes the ability of an owner or operator to file for an averaging plan should not be contingent on one unit not being able to meet the NO<sub>x</sub> RACT limit. Facility-wide and system-wide averaging plans should be able to be submitted at the discretion of the owner or operator as part of an overall strategy to achieve and maintain the emissions specified in the regulation. The commentator also states that limiting the system-wide averaging to the same ozone attainment area imposes a restriction that is unnecessary and could force the early retirement of an affected unit. If the suggestions of the commentator provide greater regulatory flexibility and still satisfy EPA and SIP requirements, and are still protective of the health, safety and welfare and natural resources of the Commonwealth, we suggest that the final-form rulemaking be amended accordingly. If the suggestions of the commentator are not feasible, we ask the EQB to explain why that is so in the Preamble to the final-form regulation.

Another commentator has asked for clarification on how DEP will administer the aggregation for a facility, subject to a concentration-based NO<sub>x</sub> limit under Subsection (d), if that facility has two sources that are subject to the rulemaking. We ask the EQB to provide clarification on how this subsection will be administered in the Preamble to the final-form regulation.

**8. Section 129.115. Written notification, compliance demonstration and recordkeeping and reporting requirements. – Implementation procedures; Clarity.**

This section establishes notification, compliance demonstration, recordkeeping and reporting requirements for the owner and operator of an air contamination source subject to the rulemaking. Subsection (b)(4) requires owners and operators of combustion units and process heaters to demonstrate compliance on a daily averaging period. Commentators state that existing requirements under RACT II allow owners and operators to demonstrate compliance using a 30-operating day averaging period. They believe that the requirement of Subsection (b)(4) is a significant tightening of the presumptive limits for combustion units and process heaters. They note presumptive limits cannot be met using a daily average under certain operating conditions, such as the startup of a unit. In addition, clarification was requested on the term “daily average.” Given the concerns of the commentators, we ask the EQB to explain why the new requirement is needed and how this provision will be implemented in the Preamble to the final-form regulation.

**Miscellaneous clarity.**

- A commentator has suggested that § 129.112(e)(1) and (2) be amended to reflect changes in applicable federal regulations published in the Federal Register. We ask the EQB to review this potential amendment for inclusion in the final-form regulation.

- A commentator states that the standard of 0.6 gram NO<sub>x</sub> /bhp-hr in § 129.112(g)(3)(iv)(A) should be 2.0 gram NO<sub>x</sub> /bhp-hr. We ask the EQB to review this provision to ensure the correct standard is included in the final-form regulation.
- Under §129.112(k), commentators recommend the newly defined term “combustion unit” be included in this provision.