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THE SOUTHWESTERN PENNSYLVANIA GROWTH Alliance

July 7, 2006

Pennsylvania Environmental Quality Board
P. O. Box 8477
Harrisburg, Pa 17105-8477

Re: Comments on proposed revisions to Pennsylvania's New Source Review air pollution rules

Ladies and Gentlemen:

The Southwestern Pennsylvania Growth Alliance (Growth Alliance) submits the attached comments and one page summary on the proposed revisions to Pennsylvania's New Source Review air pollution rules published for comment in the Pennsylvania Bulletin on April 29, 2006. The Growth Alliance is a ten-county partnership of public officials and private business leaders from Allegheny, Armstrong, Beaver, Butler, Fayette, Greene, Indiana, Lawrence, Washington, and Westmoreland Counties and the City of Pittsburgh. The mission of the Growth Alliance is to identify problems and opportunities which are critical to the economic growth of the region and to seek support from state and federal officials in responding to those issues.

In summary, our comments fall into three major categories:

- The rule, as proposed, would create a competitive disadvantage for southwestern Pennsylvania employers;
- Pennsylvania Department of Environmental Protection has provided insufficient justification for a Pennsylvania-specific rule instead of adopting the federal program;
- The language in the proposed rule perpetuates the uncertainties associated with new source permitting in Pennsylvania.

We appreciate your consideration of our full comments and welcome any questions.

Sincerely

Barbara McNees

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Director

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cc: Southwestern Pennsylvania Growth Alliance Steering Committee
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Dennis Yablonsky, Secretary, Department of Community and Economic Development
Eugene DePasquale, Deputy Secretary for Community Revitalization and Local Government Support, Department of Environmental Protection
Ken Bowman, Regional Director, Department of Environmental Protection
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Southwestern Pennsylvania County Commissioners/Executives
Pittsburgh Regional Alliance
Senator Mary Jo White, Chair, Senate Environmental Resources and Energy Committee
Representative William Adolf, Chair, House Environmental Resources and Energy Committee
Kathryn Zuberbuhler Klaber, Executive Vice President, Allegheny Conference

Southwestern Pennsylvania Growth Alliance
Summary of Comments
Nonattainment New Source Review
July 2006

Creating a competitive disadvantage for southwestern Pennsylvania employers

The PADEP has not substantiated its premise that the proposed rules will reduce air pollution to any noticeable extent, but the proposal does increase the burden on industry by requiring duplicative reports, changing some longstanding practices without explanation, and forcing many plant improvements into a costly and time consuming permit process not faced by employers in other states (e.g., Ohio and West Virginia).

PADEP has not changed parts of the current rule that discourage economic development. PADEP should encourage the reactivation of plants by extending the time to file reactivation and maintenance plans, and Emission Reduction Credit (ERC) applications, to three years from the last date of operation. PADEP should encourage modernization of plants by discontinuing the aggregation of federally exempt emission increases.

Insufficient justification for a Pennsylvania-specific rule instead of adopting the federal program

PADEP's decision to continue its old construction permit rules and reject federal reforms will hinder efforts to encourage plant expansions and new investment in southwestern Pennsylvania. PADEP has not provided sufficient justification for the need for a state-only rule. Ohio adopted the federal rules in 2004 and West Virginia adopted them in 2005. For reasons detailed in the attached comments, the federal rules are significantly more friendly to plant modernization and improvements. Pennsylvania should adopt the federal rules to maintain an even playing field for southwestern Pennsylvania, and avoid a multi-layer set of regulations on modernizing plants – at the federal, state, and Allegheny County jurisdictions.

Perpetuating the uncertainties associated with new source permitting

The text of the proposed rule is unclear, internally inconsistent and so ambiguous as to be incomprehensible, even to experts in the air quality field. The proposed rule makes a complex system even more complex and expensive (e.g., by requiring analysis of multiple pollutants from past operations for five years for nonattainment New Source Review, 10 years for Prevention of Significant Deterioration, and 15 years for deminimus aggregation, all of which can apply to the same permit.) Manufacturers will be forced to hire experts when facing any issue of plant modernization, further increasing costs of projects and delays to important economic development in Pennsylvania.

Comments to Proposed Revisions to Pennsylvania's New Source Review Rules

The Southwestern Pennsylvania Growth Alliance (Growth Alliance) submits these comments on the proposed revisions to New Source Review air pollution rules published for comment in the Pennsylvania Bulletin on April 29, 2006 at 36 Pa. Bull. 1911. The Growth Alliance is a ten-county partnership of public officials and private business leaders from Allegheny, Armstrong, Beaver, Butler, Fayette, Greene, Indiana, Lawrence, Washington, and Westmoreland Counties and the City of Pittsburgh. The mission of the Growth Alliance is to identify problems and opportunities which are critical to the economic growth of the region and to seek support from state and federal officials in responding to those issues. The Growth Alliance has been active in recent air pollution issues, including attainment of the one-hour ozone standard in southwestern Pennsylvania, implementation of the 8-hour ozone standard, and designations associated with fine particulate matter (PM2.5) air standards. The Growth Alliance's primary interest in this matter is related to the impact of the proposed rules on the competitiveness of Southwestern Pennsylvania business and on maintaining healthful air quality in our region.

General Comments

Pennsylvania's existing rules on construction of new sources of air pollution are different and more complex than those of Ohio and West Virginia, which are less than a one-hour drive to the west and south of our region. Southwestern Pennsylvania loses business development opportunities to these states that have faster permit processes and better-defined control requirements.

Modernization of existing plants can be "modifications" regulated under these "NSR" rules. Obtaining a "Plan Approval" air construction permit can take up to two years (a serious impediment to modernization) and cost from a few thousand dollars to over $200,000, thereby increasing the cost of operating a manufacturing facility in southwestern Pennsylvania. The existing system penalizes businesses that want to upgrade and modernize existing plants and reduce air pollution. Reform and simplification of NSR rules for plant modifications has been a hot topic in air regulation for 15-20 years at federal and state levels. Federal rule changes were published in 2002 and were made effective in 2003 and 2004, and have been adopted in many states, including Ohio (OAC 3745.31.24 effective October 28, 2004) and West Virginia (Regulation 19 amendments June 1, 2005). The Pennsylvania Department of Environmental Protection (PADEP) continues to implement the old system of permitting and has generally resisted changes at the federal and state level.

The proposed rule makes a complex permit process more complicated and expensive. Instead of creating a disincentive for plant modernizations and the associated costly and time-consuming NSR construction permitting process, it should be the government's policy to encourage employers to invest in their plants to use less energy and raw materials or become more efficient because these improvements lead to lower

environmental pollution, as well as improved economic viability. For most industrial sources (excluding power plants), the air pollution impacts are insignificant, and often result in a decrease in air pollution.

The Growth Alliance also rejects the PADEP's premise that federal NSR reforms and the narrower reach of the permit program under the federal revisions will lead to more air pollution and give Pennsylvania a reason to regulate more strictly than the Air Pollution Control Act or federal rules require. Section 4.2 of the Pennsylvania Air Pollution Control Act provides "Control measures...shall be no more stringent than those required by the Clean Air Act...." The preamble to the proposed rule simply makes the unsupported assertion "the Board has determined that not all of the EPA's final regulatory provisions are sufficiently protective of the air quality needs of this Commonwealth."

The PADEP has not provided data to support the contention that Pennsylvania's proposed rule is necessary to meet air quality standards. The preamble contains only references to Pennsylvania's largely unsuccessful, legal challenge to the federal rules. What is the expected reduction in Pennsylvania air contaminants from this rule? What is the additional incremental reduction compared to the new federal NSR rules? If there is a difference, is it significant? The PADEP contends its approach is necessary to meet the 8-hour ozone standard, but monitoring data in southwestern Pennsylvania show we are meeting the new standard in much of the region, and will be able to meet the standard fully with existing regulations.

Since significant pollution is transported from sources outside Pennsylvania, and states to the upwind of southwestern Pennsylvania have adopted the federal rules, it seems unnecessary to implement anything other than the federal rules in our region.

The PADEP's analysis of the impact of this proposal required under the Regulatory Review Act is superficial and incorrect. The benefit is an undescribed and unquantified improvement in air quality. Compliance costs will allegedly be reduced through "enhanced operational flexibility under Plant-wide Applicability Limits (PALs)." The increased cost to the majority of sources who will not choose to use a cumbersome, expensive, and perpetual PAL process is ignored. The PADEP's assertion that paperwork will decrease is quite unbelievable as the PADEP wants to force plants (who would not be regulated under federal, Ohio or West Virginia construction permit programs) into a complicated and lengthy permit program. The EQB should require the PADEP to perform the impact analysis required under the Regulatory Review Act.

Specific Comments

1. The PADEP Should Adopt Federal NSR Rules (including 10 year look back and demand growth)

The Growth Alliance believes a Pennsylvania NSR rule will cause no measurable additional reduction in air pollution, but will place southwestern Pennsylvania at a

significant disadvantage to other states (e.g., Ohio and West Virginia) when decisions on locating new plants or investing in plant upgrades are made.

The PADEP contends that following the federal rule will increase air pollution, but in the last three years the PADEP has not supported this assertion with any data or projections of the additional reductions anticipated from this Pennsylvania rule. The PADEP claims the rule is necessary for ozone attainment in the Philadelphia area, but has provided no data on impact, or justification for why a statewide rule is necessary. The Air Quality Technical Advisory Committee asked for support of the PADEP's position and did not receive it. No additional justification was provided to the Environmental Quality Board (EQB) with this rule.

The Growth Alliance believes the difference between the federal rules and this proposed rule is small in terms of emission reduction. In fact, the PADEP proposed rule may well result in no emission reductions at all. However, the Regulatory Review Act clearly places the burden of justifying the basis for the rule on the PADEP. The EQB should conclude there is no basis for a separate Pennsylvania NSR rule and should adopt the federal rules.

The PADEP should follow the 2004 federal rules on the baseline period and demand growth. The older federal rules and Pennsylvania's existing and proposed rules contain a five-year baseline period. The federal rule was changed to 10 years to provide a fairer way of measuring existing production capacity, and air pollution emissions, in cyclical industries such as metals production. The PADEP appears to favor administrative convenience over a fair system. The PADEP also argues that it is good to be "more protective", meaning more burdensome, by extending coverage of the construction permit program to situations where market demand alone allows use of existing capacity to increase production. The air construction permit was intended to require modern controls for new plants and new plant modifications, not to extort additional controls from existing plants that are using existing plant capacity. The demand growth concept in the federal rules attempts to compensate for market fluctuations and the Growth Alliance supports this concept.

PADEP contends a 10-year look back period would be too difficult to administer, but cannot support this argument. The federal Prevention of Significant Deterioration (PSD) program, which Pennsylvania has incorporated by reference, regulates using a 10-year look back, so a 10-year period already applies in Pennsylvania for PSD pollutants. Ohio, West Virginia, and numerous other states use a 10-year period for PSD and NSR.

Furthermore, the PADEP has the data it needs to evaluate historic emissions over a 10-year period. Since 1992, 25 PA Code Subsection 135 has required air pollution sources to make annual reports and keep records of air emissions. The records needed to verify baseline emissions are available for a 14-year period, and the PADEP cannot arbitrarily determine that five years is enough time to compensate for business fluctuations. The PADEP itself uses a 15-year look back in 25 PA Code Subsection 127.211(b) 1 for adding up federally exempt past modifications, requiring calculation of increases back to

1991. Use of a 15-year look back further contradicts the PADEP's position that 10 years is somehow too long for calculation of NSR baseline.

The proposed rule makes a complex system even more complex and expensive by requiring analysis of multiple pollutants from past operations for two years for fine particulates, five years for nonattainment New Source Review, ten years for Prevention of Significant Deterioration, and fifteen years for deminimus aggregation, all of which can apply to the same permit.

The proposed rule contains additional new recordkeeping and reporting requirements at 127.203a(a)7. The PADEP has not explained why it needs more data, or an additional report, from the same sources that are already required to file Annual Emission Reports under Chapter 135. This requirement is redundant, burdensome and creates more unnecessary paperwork for the PADEP to review. We propose this provision be deleted.

The PADEP has not identified a rational justification for continuing its old programs and rejecting all aspects of national and federal NSR reform. Pennsylvania should adopt the federal NSR rules to keep its industry and economic climate competitive with other states. Pennsylvania should include provisions such as Pollution Control Projects and Clean Units in the event they are restored by future legal or regulatory action. If emission decreases are necessary to attain the ozone standard in Philadelphia, the PADEP can and should adopt emission reduction rules targeted at specific sources that affect Philadelphia, not attempt back-door reductions through a permit program that increases cost to business throughout the state.

2. The PADEP Should Eliminate Aggregation of DeMinimis Emissions

Pennsylvania has an air construction permit rule (25 Pa. Code § 127.211(b) 1) requiring the addition of all small (federally exempt) emissions increases from process modifications since 1991, for nonattainment pollutants. Federal law, and the law in each state surrounding Pennsylvania, is that "de minimis" emissions increases are not regulated until a major modification, (a single project resulting in emissions increases above PSD significance levels) occurs. Pennsylvania's "look back" is now more than 15 years, and covers all projects, not a single major project.

The impact of the Pennsylvania aggregation rule is to force Pennsylvania industry to obtain major source construction permits under the PSD and NSR program for minor changes that are not regulated as major modifications by federal law, or the laws of Ohio, West Virginia, Maryland, New Jersey, Delaware or New York. Requiring a major source construction permit or PSD permit results in extra costs to Pennsylvania businesses in the process of modernizing their plants, in the form of: (a) additional engineering work and air modeling analysis for permit applications, (b) additional permit fees, (c) extra costs to purchase Emission Reduction Credits (ERCs), (d) the risk of state or federal enforcement actions, and (e) third party permit appeals that would not occur in neighboring states. These costs make Pennsylvania less competitive.

NSR/PSD construction permits also require significantly more work from PADEP staff, and delays timely action on other construction permit applications. In the past, the PADEP has considered reduction of its workload by reducing the scope of coverage to bigger sources. The 1996 Regulatory Basics Program Report by PADEP agrees that Section 211(b) 1 is stricter than federal law. The report contends Pennsylvania law allows, not requires, this regulation. No compelling Pennsylvania interest in this regulation was identified. In the June 1996 PADEP response to comments on the RBI reports, PADEP stated, "the PADEP will revise the 'de minimis increase' provision in a manner consistent with federal regulations."

Existing Section 127.211(b) 1 should simply be deleted. Pennsylvania businesses continue to bear unnecessary costs, and have been prosecuted for violation of this rule. New plants and plant expansions are located in states that do not punish business for becoming more efficient or expanding, by imposing restrictions EPA does not require.

3. The PADEP Should Change its Plant Reactivation and ERC rules

While making minor improvements to the ERC trading rules at section 125.206-209, the PADEP has not proposed to change parts of these NSR rules that restrict economic improvement pertaining to the reactivation of shutdown sources.

Sections 127.11a and 127.215 require a shutdown source which may restart to file a "maintenance plan" within one year of the last date of operation. If the maintenance plan and reactivation plan are not filed by the deadline, an attempt to restart the plant is treated as new construction, through the full Plan Approval and NSR/PSD process. This is costly, time consuming, and is a serious impediment to restarting a manufacturing plant.

The ERC rules at section 127.207(2) require an application to bank emission credits also be filed within one year of the last date of operation. The PADEP interprets these rules as requiring an owner or successor to choose between a maintenance plan or banking ERCs within one year. The decision is irrevocable as there are no regulatory provisions reconciling these independent requirements.

There is no federal requirement for maintenance plans or ERC applications within a year, and we have not found another state adjacent to Pennsylvania with similar requirements for maintenance plans or ERC applications. The PADEP has agreed the one-year filing deadline is arbitrary and imposed for the administrative convenience, not for air quality benefits.

The PADEP's adoption of the one-year deadline and its interpretation of these rules is a serious impediment to economic development and the restart of temporarily closed facilities. Earlier this year we spoke to an individual who purchased the assets of a closed plant in bankruptcy 50 weeks after it last operated. During the frenzy of completing the acquisition and without an adequate understanding of the air permit rules or plant operations, but in an attempt to comply and preserve his options, he filed maintenance plans for two furnaces and ERC applications for two furnaces within the

one-year deadline. In 2006 he wanted to restart two of the furnaces, and hire approximately 100 workers. The projected air emissions were fairly small, less than 200 tons per year NO_x and 50 tpy SO_x. The furnaces under maintenance plans need to be rebuilt at a cost of millions of dollars. The "ERC" furnaces could be placed in operation immediately. Under existing regulations he could not switch between maintenance plan furnaces and ERC application furnaces (for the four adjacent furnaces, all of which met the operational requirements of a maintenance plan) and would need to get NSR/PSD permits as a new plant. He has abandoned plans to restart the facility.

The loss of jobs resulting from arbitrary deadlines and inflexible interpretations is a serious setback for southwest Pennsylvania and the Commonwealth. If a deadline for maintenance plans and ERC applications is necessary for any legitimate regulatory function (Ohio, other states, and the federal rules do not have them) the respective deadlines should be deleted or changed to three years from last operation. If market events dictate a plant with a maintenance plan will not restart, it should be allowed to convert to an ERC application and allow another facility the chance to use the offsets. The Commonwealth's interest in creating manufacturing jobs should encourage plants that have banked ERCs to be able to convert to maintenance plans, restart facilities and create jobs.

4. The Text of the Rule is Unintelligible

The proposed rule is written so poorly that neither laypersons nor even air quality professionals are able to follow it. The text of the proposed rule is unclear, internally inconsistent and so ambiguous as to be incomprehensible. After years of discussion at AQTAC, even experienced air practitioners, including the contributors to these comments who have 70 years combined experience in air permitting, cannot follow the regulatory text. The EQB should require the PADEP to rewrite the rule so it can be understood without extraneous explanation, and without ad hoc interpretation by PADEP staff.

The "Applicability Determination" provision, 127.203a, was unclear in its prior version and may be worse as proposed. This section is supposed to explain what projects are covered by this rule. Subpart (i) gives contradictory directions on how to proceed, first directing calculations under parts (2) and (3) and then saying the answer is found by going to paragraph (4). The terms "net emission increase" and "significant net emissions increase" have different meanings, depending on which of the eight subparagraphs of 203a(a)4 is used. Subpart (1) also tells the reader to find significant net emissions increase in the definitions [127.201(a)] as well as subpart (4) [203a(4)]. The text of 203a(a)1 states:

> The owner or operator of the facility shall calculate in accordance with the provisions under paragraphs (2) and (3) whether a net emissions increase that is significant as defined in subsection 127.201a (relating to definitions) will occur. The procedures for calculating whether a net emissions increase that is significant will occur at the major facility are contained in paragraph (4). If the project causes a net emissions increase

that is significant, the project is a major modification for the regulated NSR pollutant.

The term "net emission increase" is defined in 203(a)2 for existing units, which differs from the definition in 203(a)3 for new units, and in 203(a)4 is defined differently in at least four clauses. Clause 203a(a)4(i)A sends the reader to paragraph 6 and 5. Clause 203a(a)4(ii) requires a calculation based on the five years before construction. Clause 203a(a)4(iii) requires a calculation based on events 15 years before construction. Clause 203a(a)4(v) requires a calculation covering the time period since April 5, 2005. These different uses of the term "net emission increase" over a two-year, five-year, or 15-year time frame make this provision incomprehensible.

Compounding the confusion, 203a(a)2 directs the reader to Subpart 5, where defining "baseline" emissions requires use of two years of data before the application is submitted, not before construction begins as in subpart 4. This seems to assume the look back period is five years, not 15 years as specified in 203a(a)4(iii). Thus 203(a)2 incorporating (a)5 gives a different result than 203a(a)4(i)B. If multiple contemporaneous projects are included in the net emission increase over 15 years, does the PADEP mean to say two years before each of these projects?

Section 203a is the key part of the NSR rule, providing the overall framework for determining what is required. It should be rewritten to focus on the overall procedure, and the nuances and exceptions now interspersed throughout the rule should be moved elsewhere. The proposed language as drafted has numerous contradictions and inconsistencies and probably does not reflect what the PADEP means to say.

Other aspects of proposed section 203a represent an unexplained change from prior practice and should be critically examined and changed. At 203a(a)4(v) netting of fine particulate precursors can occur only after April 5, 2005 (the date the designations were final). The PADEP does not explain how this date was selected, and it seems to us it is possible a source could have reduced precursor emissions such as NO_x and SO_x before this date. The PADEP has allowed banking of NO_x and SO_x reductions as ERCs prior to this date. Why cannot these reductions be counted against a future increase? Does the PADEP intend there should be no offsets available to allow future modifications under the fine particulate standard?

At section 203a(a)4(viii)A, a decrease is creditable only if an ERC application is filed. The PADEP's past practice has been to consider any reduction, whether or not an ERC application was filed. Companies intending to use reductions as offsets against future increases may not wish to file the additional paperwork for an ERC application. The PADEP has been notoriously slow in processing ERC applications, and it seems the result will be an increase in minor paperwork the PADEP does not want to process. This provision seems designed to delay action on permits.

This proposed rule changes the time the ERCs must be secured from the date the new facility begins operating [under the current rule at 127.206(d) 2, continued unchanged] to

the date construction begins [under the new proposed language at 127.203a (a)4(viii) A]. The PADEP should provide an explanation of the rationale for these contradictory provisions. Obtaining the ERCs earlier consumes cash earlier in the construction process and adds to the cost of the project.

The PADEP has failed to provide an explanation for any of these changes, which have no discernable impact on air pollution but will make it more expensive to permit and build new plants or plant modifications. We believe we are entitled to public notice and the opportunity for comment on these changes, which have been buried in the proposed amendment.

5. Conclusion

The PADEP should encourage plant modernization and construction of new efficient and less polluting industrial plants. The proposed rule adds many levels of bureaucratic complexity without any demonstration of any real reduction in air pollution. The Commonwealth should make the permit rules less complicated and expensive, and should, for example, use the 10-year federal look back period rather than require an analysis of changes two years, five years, 10 years, and 15 years before the modification. The proposed rule is unclear, internally inconsistent and so ambiguous as to be incomprehensible. An unclear rule will lead to delays in processing permits and additional cost. Future economic development requires prompt action on permit applications to modernize plants.

The EQB should ask the PADEP to rewrite the proposed rule to make clear what the rule requires, and incorporate federal changes to the maximum extent. The PADEP should eliminate aggregation of deminimus emissions. The PADEP should change the time for filing ERC applications and reactivation plans to at least three years from one year.