



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SECRETARY

January 5, 2012

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Clean Air Council Petition to the Administrator to Make a Finding that Pennsylvania is Failing to Implement Requirements in its State Implementation Plan; and to Apply Sanctions Relating to these Alleged Failures.

Dear Administrator Jackson:

This letter is in response to the Clean Air Council (CAC) Petition in the above matter, which was submitted to the U.S. Environmental Protection Agency (EPA) on November 28, 2011.

Introduction

This Petition lacks merit and based on the longstanding and documented facts in this matter, EPA should promptly dismiss this without any further action. The Pennsylvania Department of Environmental Protection (DEP) and the EPA should not be unnecessarily distracted by this contrived and irrational petition from the important and serious work our agencies perform. Indeed, if this were a federal court filing it would likely be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure for being a filing made in bad faith. Also, as EPA should be painfully aware, EPA has been sued over the situation and shoulders the blame for what CAC is complaining about.

As EPA and CAC are well aware, Pennsylvania is implementing and acting in full compliance with our latest state regulation of 2008. The latest State Implementation Plan (SIP) submittal of 2009, embodying that 2008 regulation, was submitted to EPA for its approval in April 2009, but has not yet been approved by EPA. This Petition takes the bizarre position that Pennsylvania is guilty of not acting in conformance with a prior 1996 regulation that is no longer even on the books in Pennsylvania. Again, Pennsylvania is implementing and acting in compliance with our latest state regulation of 2008 and our latest SIP submittal of 2009. We are as disappointed with EPA and share in CAC's concern that EPA has inexplicably not yet approved the 2009 Pennsylvania SIP submittal, a submittal that has been sitting on EPA's desk for almost three years. There is no need to remind you that two other environmental advocacy groups, Sierra Club and WildEarth Guardians, have sued EPA over its unreasonable delay nationwide in approving a long list of submitted SIPs including, ironically, ours. Perhaps CAC's time would have been better served by suing EPA for nonfeasance in failing to perform one of its basic functions in a timely manner, rather than submitting this frivolous petition against DEP.

As explained more fully below, the Pennsylvania Department of Environmental Protection (DEP) is implementing and acting in compliance with its current regulations related to public notice under 25 *Pa. Code* §§ 127.44 (relating to public notice) and 127.45 (relating to contents of

notice), which were submitted to EPA for approval as a revision to the SIP in April 2009. These current regulations, including relevant air quality permitting actions in the Commonwealth, provide sufficient opportunity for public review and comment pending EPA approval of the SIP revision. The DEP has also held public hearings, at the request of the CAC, on minor source permitting actions. Consequently, DEP believes that this Petition is meritless and should be summarily rejected.

Background

On March 24, 2007, the Pennsylvania Environmental Quality Board (EQB), an independent entity responsible for the adoption of DEP regulations, proposed changes to the public notice provisions in 25 Pa. Code §§ 127.44 and 127.45, which were last amended in November 1994. See 37 Pa.B. 1317. These proposed changes were recommended by DEP to expedite the permitting of minor sources that have minimal potential for adverse environmental impact, and which typically have little public interest, while, at the same time, assuring the public has an opportunity to thoroughly review and comment on the proposals. This proposal was accompanied by a 60-day public comment period and three public hearings which were held in Norristown, Harrisburg, and Pittsburgh, Pennsylvania on April 27, 2007. The public comment period closed on May 25, 2007.

The EQB received comments from the CAC on these proposed changes, which erroneously claimed that DEP was no longer publishing notices in the *Pennsylvania Bulletin* related to minor air contamination sources. As DEP explained in its comment and response document to this proposal, the proposed changes to § 127.44 clarify DEP's current practice of publishing notices of receipt and intent to issue for plan approval applications for certain minor sources for which there is little to no public interest or concern. The proposed subsection (a) specified that DEP will publish in the *Pennsylvania Bulletin* a notice of receipt and intent to issue for each minor source plan approval application that DEP receives. The notice would also be accompanied by a 30-day public comment period as required under the proposed subsection (e).

Furthermore, should DEP determine that there is substantial public interest in a particular minor source plan approval application, additional public notice provisions under § 127.45 would apply. Consequently, there remains adequate notice and the opportunity to comment on the proposed approval of minor source applications.

These changes from proposed to final rulemaking were submitted to the Region 3 Office on July 25, 2007. The DEP did not receive any adverse comments on the draft final-form regulation.

The DEP consulted with the Air Quality Technical Advisory Committee (AQTAC) during the development of this final rulemaking. On July 26, 2007, the AQTAC concurred with DEP's recommendation that the EQB consider the final amendments. Additionally, DEP consulted with the Citizens Advisory Council during the development of the amendments. The amendments to the notice provisions were approved by the EQB as a final-form regulation on February 19, 2008. This final rulemaking became effective as Pennsylvania law upon publication in the *Pennsylvania Bulletin* on May 24, 2008. See 38 Pa.B. 2365.

On April 14, 2009, DEP submitted this final rulemaking as a revision to the Pennsylvania SIP. This SIP submittal was deemed administratively complete by operation of law on October 14,

2009, because EPA failed to issue a completeness determination in accordance with Section 110 (k)(1)(B) of the Clean Air Act (CAA), 42 U.S.C. §7410 (k)(1)(B).

Section 110(k)(2) of the CAA obligates EPA to approve or disapprove a SIP revision within 12 months after it is determined or deemed a complete SIP submittal. As a result of the SIP submittal being deemed complete, EPA should have acted on the submittal by October 2010. However, EPA has never done its duty to approve that revision to the Pennsylvania SIP.

Indeed, EPA has been the subject of numerous lawsuits throughout the country for its failure to take action on SIP submittals from various States. For instance, EPA has recently agreed to set deadlines to approve or deny State air pollution control plans affecting more than 20 States as part of settlements in two separate lawsuits by environmental groups. See *WildEarth Guardians v. Jackson*, N.D. Cal., No. 3:11-cv-00190, notice of proposed consent decree filed 8/25/11; *Sierra Club v. Jackson*, N.D. Cal., No. 3:10-cv-04060, proposed settlement filed 8/10/11. The proposed consent decree would establish deadlines for EPA to approve or deny 20 "infrastructure" SIPs to implement, maintain, and enforce the 2006 national ambient air quality standards for fine particulate matter.

Closer to home, on December 7, 2011, Sierra Club sued EPA for its failure to take action on SIP submittals from eight States, including Pennsylvania. See *Sierra Club v. Jackson*, D.D.C. 11-cv-02180. Ironically, the 2008 revised Pennsylvania regulation, which is at issue in the CAC Petition, is also one of the SIP submittals at issue in this federal lawsuit.

Implementation of the Current Regulations

As previously noted, the current regulations under 25 Pa. Code §§ 127.44 and 127.45 are Pennsylvania law and are being implemented as such. Furthermore, contrary to the CAC's assertions that the amended notice provisions are radically different than the 1994 provisions, they merely codify DEP's streamlined practice of publishing notices of receipt and intent to issue for minor source plan approval applications for which there is little to no public interest.

The CAC's use of the petition process under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, to petition EPA to issue a "failure to implement" finding and apply sanctions under the CAA because Pennsylvania is implementing a validly promulgated regulation is an abuse of that process and the agency should not consider the Petition. Furthermore, CAC's characterizations that DEP is "not making a good faith effort to fully inform concerned citizens about the construction or modification of natural gas facilities" are false.

DEP has expanded the public participation process in appropriate instances to include public meetings and public hearings. Indeed, CAC has been present at and a party to such public hearings and has been complimentary of DEP in this regard. In fact, CAC just wrote to DEP at the end of December thanking DEP for organizing and facilitating a public hearing for the Barto Compressor Station in Penn Township, Lycoming County. The letter says that the CAC "applauds the decision to have a hearing and believes that it was an effective platform for residents to voice their concerns and opinions about the station." The letter goes on to say that the hearing was "well-facilitated and run efficiently. The PA DEP remained unbiased in their treatment of testifiers during both the question and answer session and the public testimony portion of the hearing." CAC also said that it appreciated our "choice of location for this hearing as it allowed residents near the Barto Station to attend and participate." CAC further says it was

“impressed with the DEP representation at the hearing, including Mr. Zaman, (Air Quality Manager) and the PA DEP engineers. The variety of PA DEP expertise present was very helpful in answering technical and regulatory questions related to the compressor station.” CAC goes on to say “this action alone shows that PA DEP is interested in engaging the public on this important issue.” A copy of CAC’s letter is enclosed.

All minor source plan approval applications for natural gas facilities in Pennsylvania are noticed in the *Pennsylvania Bulletin* for a 30-day public comment period as required under § 127.44. The content of those notices includes the following:

- (1) The name and address of the applicant.
- (2) The location and name of the source or facility at which the construction, modification, reactivation or installation is proposed.
- (3) A brief description of the proposed action, including a brief description of the:
 - (i) Air contamination source to be constructed, modified, reactivated or installed.
 - (ii) Air cleaning device or control technology required including best available technology.
 - (iii) Type of conditions being placed in the plan approval with reference to applicable State and Federal requirements.
- (4) The type and quantity of air contaminants being emitted.
- (5) The name and telephone number of a person to contact at DEP for additional information.
- (6) A statement that a person may oppose the proposed plan approval by filing a written protest with DEP, at the appropriate regional office described in § 121.4 (relating to regional organization of DEP).

These procedures were followed for the July 16, 2011, and September 3, 2011, *Pennsylvania Bulletin* notices for Laser Northeast Gathering Co., LLC (Laser) referred to in the CAC Petition.

While the Petition says that the CAC submitted comments on these notices about the lack of adequate public notice for these applications, the Petition fails to mention the subsequent actions that DEP took on these notices, which are consistent with the regulations that the CAC objects to. For instance, once the CAC filed its comments and objections to the issuance of the plan approvals, under § 127.46 (relating to filing protests), DEP, under § 127.48 (relating to conferences and hearings), held a public hearing on December 6, 2011, to allow the CAC to appear and give testimony. *See* 46 Pa.B. 6110, November 12, 2011.

Currently DEP is in the process of responding to the CAC comments and preparing the draft plan approval and concomitant review memo. At the conclusion of this process, DEP will prepare a notice in accordance with § 127.45(b), since DEP determined there is substantial public interest

related to the Laser plan approvals because of the CAC comments submitted during the initial public comment period. Among other things, that notice will include a brief description of the conditions being placed in the plan approval, a description of the procedures for reaching a final decision on the proposed plan approval, and a statement that a person may oppose the proposed plan approval by filing a written protest with DEP. *See 25 Pa. Code § 127.45.* In addition, DEP will provide another 30-day public comment period. *See 25 Pa. Code § 127.44(e).*

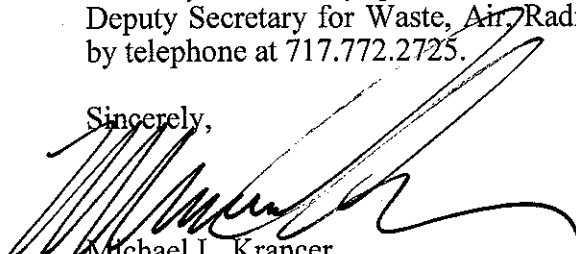
While the Petition takes issue with the fact that DEP is implementing its duly promulgated 2008 regulation rather than the repealed 1994 regulation, which I have noted is just silly, at the end of the day, under the 2008 regulations, CAC will have had three separate opportunities to comment on the proposed plan approvals for Laser operations. Under the repealed regulations and existing SIP elements, it would also have had three opportunities to comment on these applications. Through the process of omission, the CAC's Petition is misleading and overstates its objections with the current public comment process for minor sources in Pennsylvania, which process is consistent with both the Pennsylvania Air Pollution Control Act (APCA) 35 P.S. § 4001 *et seq.*, and the CAA. Therefore, the CAC Petition is without merit.

Conclusion

Given the facts, the CAC Petition is frivolous and should be denied promptly. The DEP urges EPA to take final action on the pending SIP submittal, which includes §§ 127.44 and 127.45. These regulations were duly promulgated in 2008 and were submitted to EPA as a revision to the Pennsylvania SIP in 2009. The regulations provide for adequate public comment and are consistent with both the APCA and CAA. In fact, under these regulations, CAC will have had three separate opportunities to comment on the Laser proposed plan approvals. Consequently, CAC's objections to these regulations and DEP's implementation of them are without merit. We urge EPA to dismiss the Petition and expedite the processing of the SIP revision.

Should you have any questions on the issues raised in this letter, please contact Vince Brisini, Deputy Secretary for Waste, Air, Radiation, and Remediation, by e-mail at vbrisini@pa.gov or by telephone at 717.772.2725.

Sincerely,

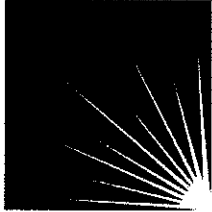


Michael L. Krancer
Secretary

Enclosure

cc: Shawn Garvin, Regional Administrator
PA Congressional Delegation

Clean Air Council



Protecting everyone's right to breathe clean air

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Philadelphia PA, 19103
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December 20, 2011

Dear Mr. Taber,

I write on behalf of the Clean Air Council ("the Council") to thank the Northcentral Regional Office of the Pennsylvania Department of Environmental Protection ("PA DEP") for organizing and facilitating a public hearing for the Barto Compressor Station in Penn Township, Lycoming County. The Council applauds the decision to have a hearing and believes that it was an effective platform for residents to voice their concerns and opinions about the station. The hearing was well-facilitated and run efficiently. The PA DEP remained unbiased in their treatment of testifiers during both the question and answer session and the public testimony portion of the hearing. We appreciate the choice of location for this hearing as it allowed residents near the Barto Station to attend and participate.

I personally want to thank you for attending both the December 15th hearing and for taking the time to introduce yourself and speak with me at the end of the hearing. I was impressed with the PA DEP representation at the hearing, including Mr. Zaman, and PA DEP engineers. The variety of PA DEP expertise present was very helpful in answering technical and regulatory questions related to the compressor station.

Again, we applaud the Northcentral Regional Office's decision to provide a venue for over 50 people to participate in what we understand to be the second-ever public hearing on a compressor station in Pennsylvania. This action alone shows that PA DEP is interested in engaging the public on this important issue. We urge PA DEP to listen to and take action on residents' concerns and suggestions. The Council looks forward to reading PA DEP's comment and response document addressing the concerns raised during the hearing. Again, thank you for your time and concern in this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Matt Walker
Clean Air Council
Community Outreach Coordinator