Notice of Final-Omitted Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code Chapter 123)
(Standards for Contaminants - Repeal)

Order

The Environmental Quality Board (Board) amends Chapter 123 (relating to standards for contaminants) to read as set forth in Annex A. The purpose of this final rulemaking is to repeal the "state-specific" requirements to reduce mercury emissions from coal-fired electric generating units (EGUs) with a nameplate rated capacity of more than 25 megawatts that produce electricity for sale as set forth under §§ 123.201–123.215 (relating to standards for contaminants mercury emissions) (Pennsylvania Mercury Rule).

These amendments will repeal §§ 123.201-123.215, which were approved as final rulemaking by the Board on October 16, 2006, and adopted as final on February 16, 2007, effective February 17, 2007 (37 Pa.B. 883).

Notice of proposed rulemaking is omitted under section 204(3) of the act of July 31, 1968, P.L. 769, No. 240 (45 P.S. § 1204(3)). Paragraph (3) provides that an agency may omit the notice of proposed rulemaking if the agency for good cause finds that notice of proposed rulemaking procedure is in the circumstances impracticable, unnecessary, or contrary to the public interest. Omission of notice of proposed rulemaking for the repeal of the Pennsylvania Mercury Rule is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§ 1201 and 1202) is, in this instance, impracticable, unnecessary and contrary to the public interest. As more fully explained below, on December 23, 2009, the Pennsylvania Supreme Court upheld an order which declared §§ 123.201-123.215, the Pennsylvania Mercury Rule, invalid. *See* 986 A.2d 48.

These amendments were adopted by order of the Board at its meeting of _____.

A. Effective Date

These amendments are effective upon publication in the *Pennsylvania Bulletin*.

B. Contact Persons and Information

For further information, contact Krishnan Ramamurthy, Chief, Division of Permits, Bureau of Air Quality, 12th Floor, Rachel Carson State Office Building, P. O. Box 8468, Harrisburg, PA 17105-8468, (717) 783-9476; or Robert "Bo" Reiley, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This rulemaking is available electronically through the Department of Environmental Protection's (Department) web site at www.depweb.state.pa.us (Keyword:

Public Participation).

C. Statutory Authority

The final-omitted rulemaking is being made under the authority of section 5 of the Air Pollution Control Act (APCA) (35 P.S. §4005). Section 5(a) of the APCA grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth.

D. Background of the Amendments

Under Section 112(n)(1)(A) of the Federal Clean Air Act (CAA), Congress directed the US Environmental Protection Agency (EPA) to perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions of hazardous air pollutants (HAPs) by EGUs (42 U.S.C.A. § 7412(n)(1)(A)). Under this same subparagraph, the EPA is further directed to regulate these units, if the agency finds such regulation is appropriate and necessary after considering the results of the study.

On February 28, 1998, the EPA fulfilled its statutory obligation, under section 112(n)(1)(A) of the CAA, when it released its "Study of Hazardous Air Pollutant Emissions from Electric Steam Generating Units – Final Report to Congress."

On December 20, 2000, the EPA concluded, based upon the findings of its 1998 report and on information subsequently obtained, that in accordance with section 112(n)(1)(A) of the CAA, the regulation of mercury emissions from electric utilities was "appropriate and necessary." See 65 FR 79825. As a result of these findings, the agency added these units to the list of source categories to be regulated under section 112(c) (42 U.S.C.A. § 7412(c)). The EPA was then required to establish emission standards for this source category under Section 112(d) of the CAA (42 U.S.C.A. § 7412(d)).

On August 9, 2004, Citizens for Pennsylvania's Future, PennEnvironment, Pennsylvania Federation of Sportsmen's Clubs, Pennsylvania NOW, Pennsylvania State Building and Construction Trades Council, Pennsylvania Trout, Planned Parenthood Pennsylvania Advocates, Sierra Club Pennsylvania Chapter, Women's Law Project and WomenVote PA filed a petition for rulemaking, under 25 *Pa. Code* Chapter 23 (relating to Environmental Quality Board Policy for processing petitions--statement of policy), requesting that the Board adopt regulations to reduce mercury emissions from EGUs located in this Commonwealth.

On March 29, 2005, the EPA published a final rule entitled "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List." See 70 FR 15994. As a result of this conclusion, the EPA removed coal- and oil-fired EGUs from the section 112(c) list.

On March 15, 2005, the EPA finalized the Clean Air Mercury Rule (CAMR). The final rulemaking published on May 18, 2005, established standards of performance for mercury for

new and existing coal-fired EGUs, as defined in section 111 of the CAA (42 U.S.C.A. § 7411). See 70 FR 28606. The CAMR establishes a "cap-and-trade" program by which mercury emissions from new and existing coal-fired EGUs are capped at specified, Nationwide levels.

In response to CAMR and associated EPA actions, on May 18, 2005, petitions for review challenging these final agency actions were filed with the U.S. Court of Appeals for the D.C. Circuit. In addition to Pennsylvania, State challengers included California, Connecticut, Delaware, Illinois, Maine, Massachusetts, New Hampshire, New Mexico, New Jersey, New York, Rhode Island, Vermont and Wisconsin. The petitions for review asserted that the Delisting Rule did not follow the procedures set forth in section 112(c)(9) of the CAA for removing a pollution source from section 112 (namely, oil- and coal-fired EGUs).

Sections 111(c) and (d) of the CAA require each state to develop and submit to the EPA Administrator a procedure for implementing and enforcing the new source performance standards for new sources and emission guidelines for existing sources.

On June 24, 2006, the proposed Pennsylvania Mercury Rule was published in the *Pennsylvania Bulletin* for a 60-day comment period. See 36 *Pa.B.* 3185. The final Pennsylvania Mercury Rule was approved by the Board on October 16, 2006, and adopted as final on February 16, 2007, effective February 17, 2007. See 37 *Pa.B.* 883. Pennsylvania chose to implement the provisions of CAMR through the Pennsylvania Mercury Rule, codified at §§ 123.201-123.215.

On February 8, 2008, in *New Jersey v. Environmental Protection Agency*, 517 F.3d 574, 380, (D.C. Cir. 2008), the D.C. Circuit Court agreed with this Commonwealth's position, finding that the plain language of section 112 required that the EPA satisfy the requirements of section 112(c)(9) prior to removing a pollution source from section 112. The D.C. Circuit Court further observed that the EPA conceded that it had never made the findings that section 112(c)(9) would require in order to delist oil- and coal-fired EGUs. Thus, the D.C. Circuit Court determined that the Delisting Rule was unlawful and vacated it, the effect of which was that EGUs remain listed under section 112. The D.C. Circuit Court also found that once the Delisting Rule was declared invalid, CAMR no longer had a legal basis, and the Court vacated CAMR as well.

On September 15, 2008, PPL Generation, LLC, PPL Montour, LLC, and PPL Brunner Island, LLC, filed a Petition for Review in the Commonwealth Court's original jurisdiction, challenging the validity of the Pennsylvania Mercury Rule promulgated at §§ 123.201-123.215.

On January 30, 2009, the Commonwealth Court issued an order that invalidated the Pennsylvania Mercury Rule. The Commonwealth Court reasoned that because the D.C. Circuit Court had found that the Delisting Rule and CAMR were void *ab initio* (from the beginning, rather than from when the D.C. Circuit Court had declared it void), the EGUs must be deemed to have been always listed.

On February 6, 2009, the Acting U.S. Solicitor General filed a motion on behalf of the EPA to dismiss a petition for certiorari pending before the U.S. Supreme Court, which appealed the D.C. Circuit Court decision in *New Jersey*. That motion to dismiss stated that after the certiorari petition was filed, the EPA decided to act in conformity with the D.C. Circuit Court's

decision in *New Jersey* and to develop standards regulating power plant mercury emissions under section 112 of the CAA.

On appeal by the Commonwealth, on December 23, 2009, the Pennsylvania Supreme Court affirmed the Commonwealth Court order. The Pennsylvania Supreme Court noted that once the Delisting Rule was found to have no validity, the authorization and legal predicate for the Pennsylvania Mercury Rule ceased to exist.

On April 15, 2010, the U.S. District Court for the District of Columbia approved a consent decree that requires the EPA to propose technology-based standards to control emissions of mercury and other air toxics from fossil fuel-fired EGUs by March 2011 (*American Nurses Ass'n v. Jackson,* D.D.C., No. 08-02198, *consent decree entered* 4/15/10). A final rule must be issued by November 16, 2011. This final rule will take the place of CAMR, which was vacated by the D.C. Circuit Court of Appeals. Additionally, the requirements under this final rule will be adopted in their entirety and incorporated by reference in 25 *Pa. Code* Chapter 122 (relating to National standards of performance for new stationary sources). Therefore, at a minimum, fossil-fuel-fired EGUs operating in this Commonwealth will be subject to those standards.

E. Benefits, Costs and Compliance

Benefits

This rulemaking merely complies with the Pennsylvania Supreme Court decision in *PPL Generation, LLC v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 986 A.2d 48

Compliance Costs

This rulemaking will not require additional costs for compliance.

Compliance Assistance Plan

This rulemaking will not require a compliance assistance plan.

Paperwork Requirements

No additional paperwork will be required as a result of this rulemaking.

F. Regulatory Review

Under section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), on _____, the Department submitted a copy of this final-omitted rulemaking with notice of proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees). On the same date, the Department also submitted this rulemaking to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act

(71 P.S. §§ 732-101-732-506). In addition to the final rulemaking, IRRC and the Committees were provided with a copy of a detailed regulatory analysis form prepared by the Department.

Under section 5.1(j.2) of the Regulatory Review Act, on _____, the final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, and approved the final-omitted rulemaking.

G. Findings of the Board

The Board finds that:

(1) The amendments as set forth in Annex A are appropriate to repeal the Pennsylvania Mercury Rule.

(2) Use of the omission of notice of proposed rulemaking procedure is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§1201 and 1202) is, in this instance, impracticable, unnecessary and contrary to the public interest. The Pennsylvania regulations have been vacated by a state court order, necessitating prompt repeal.

(3) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in section C of this order and in the public interest.

H. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code,* Chapter 123, are amended by reserving and deleting §§ 123.201-123.215 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

JOHN HANGER
Chairman
Environmental Quality Board