



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

September 28, 2016

TELEPHONE: (570) 826-2519

FAX: (570) 820-4838

VIA FIRST CLASS MAIL

Herrick Township Board of Supervisors
ATTN: Nancy Harvatine
34 Harv Farm Road
Thompson, PA 18645

New Milford Township
ATTN: Michael Briechle, Esq.
19730 State Route 11
New Milford, PA 18834

Susquehanna County Commissioners
ATTN: Michael J. Giangrieco, Esq.
Susquehanna County Courthouse
P.O. Box 218
Montrose, PA 18801

Re: Proposed Clean Air Quality Ordinance

Dear Ms. Harvatine, Mr. Giangrieco and Mr. Briechle:

I am writing in response to your recent inquiries directed to the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") regarding the passage of an air pollution control ordinance, or "Clean Air Ordinance", in your respective communities. The Department has been provided with a copy of a proposed ordinance for New Milford Township, which we understand is the model proposed for Susquehanna County and Herrick Township. The Department has seen a very similar model used previously for proposed ordinances in both Allentown and Mount Pocono Borough and believes that an ordinance based on that model would likely be preempted by the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. § 4001 *et seq.* ("Air Pollution Control Act") and the Department's rules and regulations promulgated thereunder. Terms in the model also conflict with certain Department regulatory requirements and the Department believes the ordinance presents enforcement hurdles.

As the Department has stated previously, with limited exception, the Pennsylvania General Assembly has determined that the Department has the exclusive authority to regulate the types of stationary sources that the proposed ordinance seeks to address. Under the Pennsylvania Air Pollution Control Act, the Department has a number of powers and duties for regulating "air contamination sources," as that term is defined in Section 3 of the Act, 35 P.S. § 4003. For example, under Section 6.1, no person may construct, install or modify a stationary air contamination source or control equipment unless that person has applied to and received a written plan approval from the Department, or unless construction installation or modification is

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Michael J. Giangrieco, Esq.
Michael Bricchle, Esq.

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specifically authorized to be conducted without written approval under the rules and regulations of the Department (36 P.S. § 4006.1(a)). In addition, the Department has the power and duty to, among other things, implement provisions of the federal Clean Air Act in the Commonwealth (35 P.S. § 4004(1)); require new sources to demonstrate that the source will reduce or control emissions by using best available technology (35 P.S. § 4006.6(c)); require owners and operators of air contamination sources to install and maintain monitoring equipment or methods as the Department may reasonably prescribe, and sample emission in accordance with methods, procedures, locations and intervals as reasonably prescribed by the Department (35 P.S. §§ 4004(5) and (6)); require owners and operators of sources to establish, maintain and make records and information available in a manner that the Department may reasonably prescribe (35 P.S. §§ 4004(3) and (4)); and issue orders to persons owning or operating air contamination sources if the sources are emitting or likely to emit air contaminants in excess of any rate provided under the Act, regulation of the Department, a plan approval or permit, or at a level likely to cause “air pollution”, as defined under the Air Pollution Control Act (35 P.S. §§ 4004 and 4010.1). The Department may also assess civil penalties under the Air Pollution Control Act (35 P.S. § 4009.1). Essentially the Act provides the Department with the authority to implement an air pollution regulatory program that covers permitting, the operation of sources and enforcement.

In addition to the powers and duties given to the Department by the General Assembly, the Environmental Quality Board (“EQB”) also has regulatory powers over air emissions sources, such as the power and duty to, among other things, adopt rules and regulations for the prevention, control, reduction and abatement of air pollution, including the establishment of maximum allowable emission rates of air contaminants from sources (35 P.S. §§ 4005(a)(1) and (2)); designate the control efficiency of air pollution control devices or equipment required for specific sources (35 P.S. § 4005(a)(1)); adopt rules and regulations for the protection of public health and safety for periods when the accumulation of air contaminants in any area attains levels that could pose a health threat to the public (35 P.S. § 4005(5)); adopt rules and regulations to implement provisions of the Clean Air Act (35 P.S. § 4005(8)); and adopt rules and regulations for the approval, rescission and suspension of approval of local air pollution control agencies (35 P.S. § 4005 (a)(6)). The EQB is a critical part of the comprehensive framework designed to regulate sources of air emissions in the Commonwealth. Provisions adopted by the EQB are codified and enforced by the Department, consistent with the Department’s powers and duties under 35 P.S. § 4004.

Implementation of an air pollution control program in the Commonwealth is also shared with the Philadelphia Department of Health Air Management Services and the Allegheny County Health Department. These agencies implement programs in Philadelphia and Allegheny Counties, respectively, pursuant to 35 P.S. § 4012(b), which allows counties of the first

Nancy Harvatine
Michael J. Giangrieco, Esq.
Michael Briechele, Esq.

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(Philadelphia) and second (Allegheny) class to have their own programs. Both programs have been approved by the Department and meet the requirements of the Air Pollution Control Act, the federal Clean Air Act and the rules and regulations promulgated under both of those Acts. The agencies in these counties have executed agreements with the Department that define the working relationships between the Department and the local air pollution control programs.

With the exception of Philadelphia and Allegheny Counties, the administrative procedures for the abatement, reduction, prevention and control of air pollution in the Air Pollution Control Act are applicable in political subdivisions throughout the Commonwealth. Any agency intending to operate an air pollution control program within confines of a political subdivision of the Commonwealth must be approved by the Department. Counties, cities, towns, townships and boroughs may enact air pollution ordinances under 35 P.S. § 4012(a) that are not less stringent than the provisions of the Air Pollution Control Act, the federal Clean Air Act or the regulations promulgated under either of those statutes; however, the development of an air pollution control *program*, which the Department believes is being proposed in the draft New Milford Township ordinance, is limited to counties of the first and second class (*i.e.* Philadelphia and Allegheny Counties). Smaller municipalities in the Commonwealth have enacted ordinances regulating things such as dust, noise, open burning, odors and even the regulation of wood fired boilers. The proposed ordinance provided from New Milford Township goes beyond those types of ordinances, providing for a program with monitoring requirements, stack testing and data collection, emission limits, fees and penalties. The Department believes this is more comprehensive than what is allowed under 35 P.S. § 4012(a), providing for a regulatory program that in some cases conflicts with Department requirements.

For example, Article V, Section 3 of the proposed ordinance related to Best Available Technology requires “each stationary source” to modify the facility to install control technology to reduce emissions “within such time as the Township may reasonably determine.” Aside from the possibility that Susquehanna County, Herrick Township and New Milford Township might impose conflicting time frames for the installation of control equipment if all were to adopt this ordinance, this provision does not account for Department permitting requirements associated with the installation of control equipment on a source. (*See* 25 Pa. Code § 127.11 “a person may not cause or permit the installation of an air cleaning device on an air contamination source unless the construction, modification . . . or installation has been approved by the Department.”). A similar issue may arise in relation to Article VII and the language allowing for ordering corrective action measures. To impose time requirements for modifications to, or installation of equipment on, a source without the source first acquiring a permit from the Department would run afoul of state law. Furthermore, control technologies advance over time and some sources may not necessarily be compatible with or capable of meeting those technological advancements. Therefore, it may be impossible for the source to install and utilize the new technology based on

Nancy Harvatine
Michael J. Giangrieco, Esq.
Michael Briechle, Esq.

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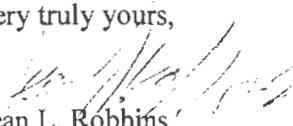
the local government's demands. Best available technology requirements are developed on a case by case basis and determined by the Department. (*See 25 Pa. Code § 127.1, "New sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology as determined by the Department as of the date of issuance of the plan approval for the new source."* Emphasis added). For these and other reasons, this "Best Available Technology" provision conflicts with state law requirements.

The ordinance also faces other enforceability and implementation challenges. It calls for access to inspect emissions monitoring equipment to ensure that equipment is operating properly (Article III, Section 1(g)); the compiling of daily, weekly, monthly and yearly summaries of emissions levels and violations (Article IV, Section 2(e)); the maintenance of a website for data disclosure (Article IV, Section 1); and the adoption of limits for the purpose of making them "independently enforceable" (Article V, Section 2). Dedicated technical staff would be required to implement these provisions and Department regulations already impose monitoring, recordkeeping and reporting requirements, and contain enforcement provisions. Therefore, in addition to preemption concerns, there appear to be very challenging practical obstacles to the enforcement of the proposed ordinance.

The Department believes that the proposed ordinance is preempted, and is not compatible in several ways with the regulatory programs of the Department under the Air Pollution Control Act and Air Resources Regulations. The Department also questions some of the factual findings contained in the "Wherefore" clauses that form the basis for the ordinance, and what appears to be an attempt to target certain types of facilities. In essence, it is not clear to the Department that passing the proposed ordinance, as drafted, would be a practical and legally defensible measure.

I hope that this information is helpful and appreciate your time and consideration.

Very truly yours,



Sean L. Robbins
Assistant Counsel