



GROUP AGAINST SMOG & POLLUTION

**1133 South Braddock Ave., Suite 1A
Pittsburgh, PA 15218
412-924-0604
gasp-pgh.org**

August 26, 2019

VIA EMAIL

Allegheny County Health Department
Air Quality Program
301 39th St., Bldg. 7
Pittsburgh, PA 15201
aqcomments@alleghenycounty.us

**Re: Comments of Group Against Smog and Pollution, Regarding
Proposed Revisions to Article XXI's Provisions Relating to Fees**

Dear Sir or Madam:

Please accept these comments regarding proposed revisions to Article XXI's provisions related to fees, which I am submitting on behalf of the Group Against Smog and Pollution ("GASP"). According to the notice posted on its website, the Allegheny County Health Department (the "Department") is accepting comments on the proposed revisions through 11:59 pm on August 26, 2019.

Very truly yours,

/s

John K. Baillie
Senior Attorney

**COMMENTS OF THE GROUP AGAINST SMOG AND POLLUTION
REGARDING PROPOSED REVISIONS TO ARTICLE XXI'S PROVISIONS
RELATING TO FEES**

The Group Against Smog and Pollution (“GASP”) offers these comments to the Proposed Revisions to Sections of Article XXI of the Allegheny County Health Department’s Rules and Regulations related to Air Quality Permit Fees. Specifically, ACHD proposes to make several changes to Article XXI’s provisions relating to the fee schedule for ACHD’s Air Quality Program, including:

- Replacing ACHD’s existing annual permit administration fee for operating permits with an annual permit maintenance fee in an amount to be set by the Board of Health;
- Establishing application fees, in amounts to be set by the Board of Health, for general installation permits and general operating permits; and
- Establishing fees, in amounts to be set by the Board of Health, for applications for: plantwide applicability limits; ambient air impact modeling done in connection with certain plan approval applications; risk assessments; and requests for determination.

Although the proposed revisions would establish several new types of fees, they would not establish the amounts of such fees. The Board of Health would do so, presumably at some later date.

The intent of the proposed revisions to Article XXI is to allow ACHD to maintain a fee schedule for its Air Quality Program that is consistent with the fee schedule used by the Pennsylvania Department of Environmental Protection’s (“DEP”) Air Quality Bureau.¹ Pennsylvania’s Environmental Quality Board (the “EQB”) has recently proposed to revise DEP’s air quality fee schedule in essentially the manner that ACHD proposes, although (unlike ACHD)

¹ See Proposed Revision to Allegheny County’s Portion of the Pennsylvania State Implementation Plan for the Attainment and Maintenance of National Ambient Air Quality Standards, Revision Tracking No. 92, at 21.

the EQB has specified dollar amounts for its proposed increased and new fees.² The EQB has asserted that the proposed fee increases and new fees are necessary because the revenue generated by DEP's existing air quality fee schedule is not sufficient to fund the operations of DEP's Air Quality Bureau.³ The EQB also asserted that the proposed revisions to the fee schedule are authorized by section 6.3(a) of Pennsylvania's Air Pollution Control Act (the "APCA"), which provides:

This section authorizes the establishment of fees sufficient to cover the indirect and direct costs of administering the air pollution control plan approval process, operating permit program required by Title V of the Clean Air Act, other requirements of the Clean Air Act and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Compliance Advisory Committee and Office of Small Business Ombudsman. This section also authorizes the board by regulation to establish fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act.⁴

The Independent Regulatory Review Commission (the "IRRC") issued comments to the proposed revisions to DEP's fee schedule on July 17, 2019. In its comments, the IRRC questioned whether the proposed revisions were fully consistent with section 6.3.⁵ More specifically, the IRRC noted arguments raised by forty-seven Republican members of the Pennsylvania House of Representatives that subsections 6.3(c) and 6.3(j) of the APCA were intended by the General Assembly to prescribe specific and limited types of fees that could be charged to Title V and non-Title V sources of air pollution, respectively, and that other fees (including many of the fees proposed by the EQB) are not authorized by the APCA.⁶ The IRRC

² 49 Pa.Bull.1777 (April 13, 2019).

³ *See id.*, at 1777-79.

⁴ 35 P.S. § 4006.3(a).

⁵ 35 P.S. § 4006.3.

⁶ Comments of the Independent Regulatory Review Comm'n, Environmental Quality Bd. Regulation #7-536 (IRRC #3231), at 3 (July 17, 2019).

further commented that the proposed revisions would so substantially change DEP's fee schedule as to require legislative review, and that it could not determine that the proposed revisions were in the public interest based on the EQB's explanation of the proposed revisions to DEP's fee schedule.⁷ The IRRC asked the EQB to work with the forty-seven lawmakers and other interested parties to resolve these issues before proceeding with the rulemaking.⁸

I. ALLEGHENY COUNTY'S HOME RULE CHARTER PROVIDES COUNTY COUNCIL WITH THE AUTHORITY TO MAKE THE PROPOSED REVISIONS TO ARTICLE XXI'S PROVISIONS RELATED TO FEES

The Technical Support Document for the proposed revisions to Article XXI's provisions relating to fees does not identify the legal basis for County Council's authority to make the proposed revisions.⁹ It is clear, however, that such authority exists: Allegheny County's Home Rule Charter generally provides the County with the authority to exercise all powers not denied by Pennsylvania's Constitution, Pennsylvania's statutory law, and the Home Rule Charter itself.¹⁰ Indeed, the Charter specifies that County Council has the power to "levy taxes, fees, or service charges ... as permitted by law,"¹¹ and provides that the County's Home Rule Powers "shall be construed broadly in favor of the County."¹²

There is no constitutional or statutory bar that would bar County Council from making the proposed revisions to Article XXI's provisions related to fees. Subsections 6.3(c) and 6.3(j) of the Air Pollution Control Act, which the IRRC found might preclude the EQB from making

⁷ See *id.*, at 3-4.

⁸ See *id.*, at 2.

⁹ See Proposed Revision, *supra* note 1, at 21.

¹⁰ Allegheny County Home Rule Charter, § 1.13-1303.

¹¹ *Id.*, § 1.4-402(b).

¹² *Id.*, § 1.13-1304(a).

similar revisions to DEP's air quality fee schedule, purport to apply only to "the board,"¹³ meaning the EQB,¹⁴ not to Allegheny County specifically or state or local agencies that have authority to make or administer air pollution control regulations generally. Section 12 of the APCA, which authorizes DEP to delegate to Philadelphia and Allegheny Counties the authority to implement their own air pollution control programs, does not purport to restrict those counties' authority to establish fees relating to their programs.¹⁵ Even DEP's October 30, 1998 Approval of ACHD's Air Quality Program does not purport to limit Allegheny County's power to establish fees to be charged by that program.¹⁶

Accordingly, County Council has the authority to revise Article XXI's provisions relating to fees in the manner requested by ACHD.

II. ALTHOUGH IT IS DESIRABLE FOR ACHD'S AIR QUALITY FEE SCHEDULE TO BE GENERALLY CONSISTENT WITH DEP'S, ACHD MUST DEMONSTRATE THAT THE FEE SCHEDULE IS SUFFICIENT TO SUPPORT THE OPERATIONS OF ITS AIR QUALITY PROGRAM

It is generally desirable for the fee schedule used by ACHD's Air Quality Program to be similar, if not identical, to the fee schedule used by DEP's Bureau of Air Quality. Consistent fee schedules should help level the playing field between Allegheny County and the rest of Pennsylvania and avoid facilities' siting and other operational decisions being distorted by the fee schedule. Provided that the fee schedule that is ultimately adopted by DEP's Bureau of Air Quality follows the form proposed by the EQB in April 2019, the proposed revisions to Article

¹³ See 35 P.S. § 4006.3(c) and (j).

¹⁴ See 35 P.S. § 4003 (defining "Board," when used in the APCA, to mean the EQB).

¹⁵ See 35 P.S. § 4012.

¹⁶ See PENNSYLVANIA DEPT. ENVTL. PROT., BUREAU OF AIR QUALITY CONTROL, Allegheny County Air Program Approval with Conditions (Oct. 30, 1998).

XXI's provisions relating to fees will allow the Board of Health to keep ACHD's air quality fee schedule consistent with DEP's.

However, consistency is not the most important consideration in structuring the fee schedule. The fees for ACHD's Air Quality Program must be set so that they raise enough revenue to fund the program's operations, even if that means they are not consistent with DEP's air quality fee schedule. The Clean Air Act requires that the fees imposed on Title V sources in Allegheny County must be "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer" ACHD's Title V permit program.¹⁷ Similarly, because ACHD's Air Quality Program receives little or no funding from Allegheny County itself, the fees paid by non-Title V sources in the County must also generate sufficient revenue to fund the non-Title V side of that program. If the proposed revisions to Article XXI's provisions relating to fees are ultimately enacted by County Council, the Board of Health must set fees in amounts that will generate revenue sufficient to fund the operations of ACHD's Air Quality Program.

III. THE PROPOSED REVISIONS TO ARTICLE XXI'S PROVISIONS RELATING TO FEES WILL PROPERLY SHIFT THE COSTS OF MAINTAINING ACHD'S AIR QUALITY DIVISION TO REGULATED ENTITIES BASED ON THOSE ENTITIES' DEMAND FOR ACHD'S RESOURCES

A significant amount of the staff time and resources of ACHD's Air Quality Program is devoted to evaluating applications for permits and requests for determination for which Article XXI currently imposes no, or only nominal, fees. The polluters who file such applications and requests for determination are thus being given a free ride, courtesy of the facilities that do pay fees to ACHD. The proposed revisions to Article XXI's provisions relating to fees will put an

¹⁷ See 42 U.S.C. § 7661a(b)(3).

end to this, by empowering the Board of Health to establish fees for such applications and requests, and thereby make such polluters pay for the work that they require ACHD to do.

IV. FURTHER ACTION ON THE PROPOSED REVISIONS TO ARTICLE XXI SHOULD BE DELAYED PENDING RESOLUTION OF THE CONCERNS RAISED IN THE IRRC'S COMMENTS REGARDING THE PROPOSED REVISIONS TO DEP'S AIR QUALITY FEE SCHEDULE

If the goal of the proposed revisions to Article XXI's provisions related to fees is to keep the fee schedule for ACHD's Air Quality Program consistent with the fee schedule used by DEP's Bureau of Air Quality, ACHD should delay its proposed revisions until the questions noted by the IRRC (and discussed above) have been resolved, so that ACHD knows what the final form of the EQB's proposed revisions will be, and can revise proposed revisions to its own fee schedule accordingly.