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Via email
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Group Against Smog and Pollution Comments Regarding *Policy for Air Toxics Review of Installation Permit Applications*, Final Committee Proposal (May 25, 2012)

The Group Against Smog and Pollution (GASP) submits these comments regarding the proposed *Policy for Air Toxics Review of Installation Permit Applications* ("ATR"). GASP had the privilege of serving on the Air Toxics Review Development Committee ("the ATR Committee"), and we offer these comments in support of the proposed policy. While we do not believe any substantive changes to the proposal are merited, we do suggest several clarifications to the policy language that we believe are necessary to ensure the final policy is implemented in a manner consistent with the intent of the Committee.

I. The proposed ATR was developed by a diverse, balanced group

The ATR Committee was made up of a diverse, balanced group of environmentalists, academics, regulators, and industry representatives, who spent over two years developing the proposed policy. Throughout the process the Committee aimed to maximize the public health benefits of the policy while minimizing the burden on the County Air Quality Program and regulated entities. Despite the diversity of interests among the ATR Committee members the Committee unanimously approved the final policy.

II. The proposed ATR adds certainty to the air permitting process while imposing no new requirements on industry

As a matter of both state law and county regulation, the County Air Program is required to ensure a proposed source will not endanger public health.[1] The proposed policy does not vary substantially from the air toxics review procedure the County Air Program is already obligated to perform. Thus the ATR places no new burdens or obligations on the Air Program or regulated entities, it merely formalizes and adds predictability to the County's existing procedures. If anything, the proposed policy

[1] 35 P.S. §§ 4002(a), 4006.1(d), 4012(a); Article XXI §§ 2101.02.c.1, 2101.02.c.5.A, 2101.11.a.3.

reduces regulatory burdens and increases flexibility by (1) providing procedures for emissions offsetting[2] and (2) considering risk across pollutants, thereby allowing applicants to achieve applicable risk levels by reducing emissions of those pollutants that can be most cost effectively controlled.[3]

III. The ATR does not create a "binding norm" and thus need not be enacted as a regulation.

Opposition to the 2009 proposed update the County's air toxics guidelines was based in part on the assertion the air toxics created a "binding norm" and thus could only be enacted as a regulation. This argument was not persuasive in 2009 and is equally inapplicable to the current proposed ATR.

In order to differentiate between regulations, which must undergo a full review process, and policy, which may be enacted more informally, Pennsylvania has adopted the "binding norm test."[4] "Put simply, if a pronouncement is binding upon the Agency, it is a regulation. A policy statement merely announces the agency's tentative intentions for the future. The key is the extent to which the challenged pronouncement leaves the agency free to exercise discretion to follow or not follow the announced policy in an individual case."[5]

Under the proposed ATR the county air program retains sufficient discretion to make enactment as a policy appropriate.The argument that the Air Toxics Policy must be enacted as a regulation runs contrary to the Pennsylvania Commonwealth Court's decision in *Home Builders Association of Chester and Delaware Counties v. PA DEP*.[6] In *Chester* the court concluded that a DEP stormwater policy was properly enacted as a policy. The *Chester* court based its decision on the existence of a DEP disclaimer similar to that found in ACHD air toxics policy[7] and the fact that DEP, like ACHD in the Air Toxics Policy at issue, retained the discretion to diverge from the policy on a case-by-case basis.[8]

IV. Clarifications

GASP offers the following clarifications to potentially ambiguous language in the current draft of the proposed ATR. We believe these clarifications reflect the intent of the ATR committee.

Section IV.a ¶ 3 currently reads:

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[2] ATR § VI.
[3] ATR § IV.
[4] Pa. Human Relations Comm'n v. Norristown Area School, 473 Pa. 334, 374 A.2d 671 (1977).
[5] Dauphin Meadows, Inc. v. Pa. Dep't of Envtl. Prot., EHB Docket No. 99-190-L at 13 (Apr. 27, 2000) (citations omitted).
[6] Home Builders Ass'n of Chester and Delaware Counties v. Pa. Dep't of Envtl. Prot, 828 A.2d 446 (Pa. Cmwlth. 2003), affirmed, 844 A.2d 122 (Pa. 2004).
[7] ATR § I
[8] *Chester*, 828 A.2d at 451

> "If the MICR from the proposed IP plus other nearby existing permitted sources is greater than 1 x 10^{-4} (one in ten thousand) beyond the fence-line, the Department will not approve the IP."

This stage of the ATR review would consider risk from other nearby existing permitted sources; however, in the case of an ATR review of a proposed modification to an existing facility this language does not explicitly state that other permitted sources within the applicant facility must be included in the analysis. However, it would be illogical and, GASP believes, contrary to the intent of the ATR Committee to include nearby sources while simultaneously excluding other sources within the applicant facility. Thus GASP suggests this language be modified to read:

> "If the MICR from the proposed IP**, other permitted sources within the applicant facility, and** ~~**plus**~~ other nearby existing permitted sources is greater than 1 x 10^{-4} (one in ten thousand) beyond the fence-line, the Department will not approve the IP."

This same clarification should be made to the analysis of noncancer health effects in § IV.b ¶ 3

Sincerely,

Joe Osborne
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Group Against Smog & Pollution