



GROUP AGAINST SMOG & POLLUTION

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June 5, 2017

VIA e-mail (PublicHealthComment@AlleghenyCounty.us)

Attn: Max Slater
Article XI Comments
Allegheny County Health Department
542 Fourth Ave.
Pittsburgh, PA 15219

Re: Comments Regarding Proposed Revisions to Article XI of the Rules and Regulations of the Allegheny County Health Department

Dear Mr. Slater:

The Group Against Smog and Pollution (“GASP”) offers the following comments regarding proposed revisions to Article XI of the Rules and Regulations of the Allegheny County Health Department (the “Department”). According to the notice provided on the Department’s website, the Department is accepting comments regarding the proposed revisions to Article XI through 5 p.m. on June 5, 2016. GASP also submitted comments on or about December 12, 2016 regarding a previous set of proposed revisions to Article XI.

GASP is a nonprofit organization that works to promote a healthy, sustainable environment with a particular focus on improving air quality in Pittsburgh and surrounding regions.

1. Article XI Should Explain the Basis for the Department’s Jurisdiction Over Appeals from the Department’s Own Final Orders

Article XI should include a preamble that sets forth the basis for the Department’s assertion of jurisdiction over appeals from the Department’s own final orders.

Because the Department is a “local agency,”¹ jurisdiction over appeals from the Department’s final orders lies with the Allegheny County Court of Common Pleas.²

¹ See 2 Pa. C.S. § 101 (defining “local agency” to mean “[a] government agency other than a Commonwealth agency”).

² See 2 Pa. C.S. § 752 (providing that a person aggrieved by a local agency’s adjudication has the right to appeal to the court vested with jurisdiction by Title 42 of the Pennsylvania Consolidated Statutes);

Further, no provision of the Local Health Administration Law,³ the Second Class County Code,⁴ or the General Local Government Law⁵ displaces the Court of Common Pleas' jurisdiction over "appeals from government agencies, except Commonwealth agencies."⁶ A preamble explaining the basis for the Department's jurisdiction over appeals from the Department's final orders would help reduce confusion.

2. GASP Supports Revising Article XI to Provide Thirty Days to Appeal the Department's Final Orders

GASP supports revising Section 1104.A of Article XI so that a Notice of Appeal of an action by the Department must be filed within thirty days of "receipt of" written notice of the action. Currently, Section 1104.A provides that a Notice of Appeal must be filed within ten days of such notice. In many instances, ten days is likely to be insufficient for an interested person who might be adversely affected by a final decision of the Department to file a Notice of Appeal, especially if the appellant must obtain copies of the Department's action and supporting documents from the Department to support its appeal. Thirty days is, however, likely to be sufficient for an interested person to obtain necessary materials and prepare a Notice of Appeal. Further, a thirty-day window to file a Notice of Appeal is consistent with the appeal periods provided by the Pennsylvania Rules of Appellate Procedure⁷ and some state agencies in Pennsylvania, including the Pennsylvania Environmental Hearing Board.⁸

Section 1104.A should specify that a Notice of Appeal must be filed within thirty days of "receipt of written notice or issuance" of the action appealed from so that it is consistent with Section 1104.D, which specifies that an action of the Department becomes final if no appeal is taken within thirty days of "receipt of written notice or issuance."

42 Pa. C.S. § 933(a)(2) (vesting the courts of common pleas with jurisdiction over local agencies' final orders).

3 16 P.S. §§ 12001 – 12028.

4 16 P.S. §§ 3101 – 6302.

5 53 Pa. C.S. §§ 101 – 9113.

6 42 Pa. C.S. § 933(a)(2).

7 *See* Pa. R.A.P. 1512(a)(1) (concerning petitions for review of agencies' quasijudicial orders).

8 *See* 25 Pa. Code § 1021.52(a).

3. GASP Supports Revising Article XI to Require a Third-Party Appellant Provide Notice of its Appeal to a Permittee Whose Facility is the Subject of the Appeal

GASP agrees that third-party appellants should be required to provide a copy of any Notice of Appeal “to the permittee whose permit is the subject of the appeal” as Section 1104.C will require. The Department should consider further revising Section 1104.C to state that such permittees are indispensable parties within the meaning of proposed Section 1104.3 (concerning Joinder of Indispensable Parties).

4. GASP Supports Revising Article XI Should to Permit an Amendment as of Right Within Thirty Days of Filing

GASP supports the addition of Section 1104.E, which provides that a Notice of Appeal may be amended as a matter of right within thirty days of filing, and by leave of the Director or Hearing Officer thereafter. Currently, Article XI does not provide such a right to amend a Notice of Appeal. In some cases, an appeal may require documents that must be obtained from the Department pursuant to the Right to Know Law.⁹ Because the Department may take up to thirty days to produce such documents, a party may not have access to them when it files its Notice of Appeal. Allowing an amendment as of right within thirty days will help parties narrow their appeals by eliminating issues as necessary based on such documents, and thus help streamline the Article XI appeals process by eliminating unnecessary issues.

5. GASP Supports Proposed Section 1104.F, which would Require that the Department Provide Copies of Publicly-Available Documents Concerning an Appeal to Parties that Request them

Proposed Section 1104.F may help streamline the Article XI appeals process by ensuring that parties have an opportunity to obtain many (if not all) of the documents they are likely to need to prosecute their appeals without resort to requests made pursuant to the Right to Know Law.

6. Section 1104 Should be Further Revised to Clarify that Notices of Appeal be Verified

Section 1104.G.4 would require parties to provide written verification in “administrative proceedings before the Hearing Officer,” but does not specify that Notices of Appeal be verified. In contrast, Section 1104.1.B of Article XI requires that

⁹ 65 P.S. §§ 67.101 – 67.3104.

petitions to intervene in an appeal be verified. The Department should revise Section 1104.G to clarify that Notices of Appeal must be verified.

7. Article XI Should Authorize Electronic Filing and Service

GASP agrees with commenters to the earlier proposed revisions to Article XI who requested that Article XI be revised to allow parties to file Notices of Appeals and other documents relating to appeals electronically. Article XI should also be revised to permit parties to serve documents relating to Article XI appeals electronically, and to require parties to provide email addresses where documents relating to an appeal may be served.

8. GASP Supports Revising Article XI to Expressly Grant a Right of Intervention in Appeals of the Department's Final Orders

Further, GASP supports the addition of Section 1104.1, which allows for parties to intervene in appeals. Currently, Article XI does not provide interested parties with an express right to intervene in appeals. Allowing interventions recognizes that non-parties may be significantly impacted by the Department's decisions, and creates a procedural mechanism for such parties to ensure that their concerns are heard by the Director or Hearing Officer.

9. Article XI's Proposed New Rules Regarding Consolidation and Substitution Will Help Simplify and Streamline the Appeals Process

Rule 1104.2 makes common sense changes to Article XI to permit the consolidation of related appeals and to clarify when and how parties to appeals may be substituted. Currently, Article XI does not delineate the circumstances in which appeals may be consolidated or in which parties may be substituted. Allowing the consolidation of related appeals will help conserve the Department's resources and should not adversely impact any party's rights. Clarifying when and how the substitution of a party may occur will help avoid confusion and unnecessary appeals, also without adversely impacting any party's rights.

10. Article XI Should Require Publication of Notice of Hearings on All Appeals

As written, proposed Section 1105.B.1 provides that the Director or Hearing Officer "may" cause notice of a hearing to be published. The use of the term "may" implies that the Director or Hearing Officer has the discretion to choose whether or not to publish notice of the hearing for any particular appeal.¹⁰ Section 1105.B.1 does not,

¹⁰ Cf. *Freedom Med. Supply, Inc. v. State Farm Fire & Cas. Co.*, 131 A.3d 977, 983 (Pa. 2016) (recognizing that a regulation's use of the word "'may' ... clearly imparts discretion").

however, identify the criteria that the Director or Hearing Officer should use to determine whether or not to publish notice of a hearing.

Because any particular appeal might affect the interests of members of the public other than the Department and the parties to the appeal, Article XI should not leave the determination of when to publish to the unfettered discretion of the Director or Hearing Officer. Section 1104.B.1 should be revised so that the Director or Hearing officer “shall cause notice of all hearings” to be published.

11. GASP Supports the Proposed Revision to Section 1105.C.7, which Describes the Burden of Proceeding and the Burden of Proof in Article XI Appeals

This proposed revision will reduce the possibility of confusion regarding which party bears the burden of proceeding and the burden of proof in Article XI appeals.

12. GASP Supports the Proposed Revision to Section 1108.1, which Specifies the Standards for Determining Motions to Dismiss in Article XI Appeals and Conforms them to the Standards Used under the Pennsylvania Rules of Civil Procedure and the Standards Used by the Environmental Hearing Board

This proposed revision will reduce the possibility of confusion regarding the standards that will be used to determine a motion to dismiss an Article XI appeal.

13. GASP Supports the Proposed Revision to Section 1112.1, which Specifies the Procedure for Computing Time in Article XI Appeals, and Conforms it to the Pennsylvania Rule of Civil Procedure 106

This proposed revision will reduce the possibility of confusion regarding the computation of time in Article XI appeals.

GASP appreciates the work the Department has put into updating and revising Article XI. Thank you for your consideration of these comments.

Very truly yours,

/s

John K. Baillie
Staff Attorney