



July 27, 2005

The Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
15th Floor Rachel Carson Building
P.O. Box 8477
Harrisburg, PA 17105-8477

**Re: Response to Petition for the Development of
Regulations to Control Mercury Emissions from
Coal-Fired Utility Boilers**

Dear Chairperson McGinty:

We are writing to express our serious concerns regarding the Department of Environmental Protection's (DEP) response to the rulemaking petition filed on August 9, 2004 by Citizens for Pennsylvania's Future and other organizations. This petition requested the Environmental Quality Board (Board) adopt regulations to reduce mercury emissions from coal-fired utility boilers located in Pennsylvania. As you know, this petition has troubled us since its inception. Our initial concerns were expressed by our staff at the October 19, 2004 Board meeting.

Having reviewed DEP's response to the petition, we would like to offer the following comments. While we agree that mercury is a serious pollutant that needs to be addressed, there is an overriding concern of pursuing individual state action on a pollutant that is a national and even global problem. Our comments are offered in recognition of the fact that the U.S. Environmental Protection Agency (EPA) finalized its Clean Air Mercury Rule on March 15, 2005.

DEP's response includes an extensive analysis of federal regulation of hazardous air pollutants under the Clean Air Act. And, while DEP is correct in saying that it is the policy of the Commonwealth, codified under the Air Pollution Control Act (Act 787 of 1959) "*to protect the air resources of the Commonwealth to the degree necessary for, among other things, the protection of public health, safety, and well-being of its citizens*", we also assert that it is the policy of the Commonwealth not to adopt air quality standards that are more stringent than applicable federal standards except in limited circumstances. A discussion and analysis of the limitations imposed by the General Assembly on DEP is not included in the response.

The Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
July 27, 2005
Page 2

In the response document, DEP states that it does not believe the petitioner's suggested regulatory language "is best for Pennsylvania". Given that analysis, perhaps the matter should end there. The department, however, goes on to suggest that an expanded regulatory approach for mercury should be developed. DEP's regulatory approach would include not only electric generating units but also other sources of mercury; a method for assessing mercury "hotspots"; the development of clean coal technologies; and an approach that considers the capacity and reliability of our electric grid infrastructure.

We believe that this approach goes far beyond the petitioner's request and what the Board directed DEP to study. We would suggest that if the department would like to proceed with the above regulatory approach, it request the proper statutory authority from the General Assembly. The regulation of mercury has proven to be a complex issue and whatever mercury control strategy is adopted, it will have broad energy and economic implications for Pennsylvania. The proper place for debate on this issue is within the General Assembly and not through the regulatory process.

Under the Board's petition policy and procedures, DEP is charged with making a recommendation on whether the Board should "approve the action requested in the petition" (25 PaCode §23.6). Such an explicit recommendation is lacking in the report. However, DEP does recommend the development of a proposed rulemaking for consideration by the Board "that effectively reduces the emissions of mercury in Pennsylvania". Essentially setting aside the petitioner's suggested language – but then utilizing receipt of the petition to recommend regulatory changes – may also have unintended consequences because DEP is now charged with returning to the Board with a proposed rulemaking within six months – approximately the middle of November 2005 (25 PaCode §23.8). We seriously question whether DEP can craft such a comprehensive proposed rulemaking and solicit input from the Air Quality Technical Advisory Committee within this timeframe.

As you know, on May 18, 2005 DEP announced that it had joined in litigation with ten other states against EPA over its final mercury reduction rule. The department asserts that the cap-and-trade approach employed by EPA is illegal. At this point, this litigation remains unresolved. Simply put, until the U.S. Court of Appeals issues a ruling, Pennsylvania regulators – regardless of their personal views on a cap-and-trade approach – remain unsure if they can legally use such a program. Separately, DEP has also filed a Petition for Review before the U.S. Court of Appeals challenging EPA's determination that it is not appropriate to regulate mercury emissions as a hazardous air pollutant under the federal Clean Air Act, as well as joined a petition for reconsideration which was filed on July 18, 2005. These three actions have the net effect of preventing the department from understanding the full parameters within which it seeks to craft a Pennsylvania-specific mercury reduction rule.

The Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
July 27, 2005
Page 3

Additionally, based on consideration of available data, we remain unconvinced that a cap-and-trade program would result in mercury “hot spots”. Recognized data indicates that a significant proportion of the mercury deposited in Pennsylvania originates from outside North America. The federal mercury rule, which will reduce emissions by 70% by 2018, is only expected to result in a 7% reduction in mercury deposition. U.S. utilities contribute only about 2% of the global anthropogenic mercury emissions, raising serious questions over whether even U.S. residents – let alone Pennsylvanians – would be the recipients of the benefits of a more-stringent state-specific mercury emission standard.

At this point, we do not support a Pennsylvania-specific mercury emission standard which may be in conflict with the state Air Pollution Control Act, disregards Executive Order 1996-1 by failing to justify a compelling and articulable Pennsylvania interest and is the subject of litigation involving the Commonwealth and U.S. EPA. Furtherance of a state-specific mercury standard threatens to place Pennsylvania businesses and consumers at a severe competitive disadvantage without providing commensurate or even measurable health or environmental improvements to its citizens. For these reasons, we strongly urge DEP to reconsider its intentions to craft a Pennsylvania-specific mercury emission rule.

Thank you for your review and consideration of our comments and concerns.

Sincerely,

Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee

William F. Adolph, Jr., Chairman
House Environmental Resources
& Energy Committee

Raphael J. Musto, Democratic Chairman
Senate Environmental Resources
& Energy Committee

cc: Senate Environmental Resources & Energy Committee Members
House Environmental Resources & Energy Committee Members