



GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 19, 2013

Jerry A. Snyder
City Solicitor
Allentown City Council
435 Hamilton Street
Allentown, PA 18101

Re: Public Comment on Bill 26 Clean Air Ordinance

Dear Mr. Snyder:

Based on your discussions with the legal staff of the Pennsylvania Department of Environmental Protection ("Department"), I have learned that Allentown City Council is considering the enactment of a municipal ordinance to require, among other things, monitoring, data disclosure, emission limits, fees, and penalties for new waste-to-energy facilities to be located in the City of Allentown. It is the Department's view that such an ordinance is preempted by the Pennsylvania Air Pollution Control Act ("APCA"), 35 P.S. §§ 4001 *et seq.*

With limited exception, the Pennsylvania General Assembly determined that the Department has the exclusive authority to regulate the types of sources that the proposed ordinance seeks to address. For example, the APCA gives the Department the power to require owners and operators to install monitoring equipment and sample air emissions. *See* 35 P.S. § 4004 (5) and (6). The APCA gives the Department the authority to set the terms and conditions necessary to assure the proper operation of an air contamination source. 35 P.S. § 4006.1(b.1). The Department also has the authority to require that new sources demonstrate that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, using the best available technology. 35 P.S. § 4006.6(c). The Department also has the duty to issue orders to enforce the provisions of the APCA and its regulations. 35 P.S. § 4004(9)(i).

Moreover, the General Assembly, through the APCA, has empowered the Pennsylvania Environmental Quality Board to adopt rules and regulations to prevent, control, reduce, and abate air pollution throughout Pennsylvania. 35 P.S. § 4005(a)(1). Among other things, these rules establish maximum allowable emissions rates and require the installation of air pollution control devices to protect public health and the environment. *See generally* 25 Pa. Code Subpart

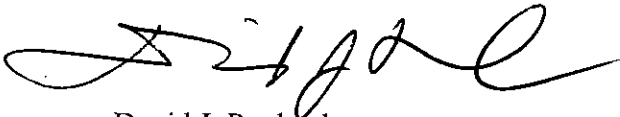
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C, Article III. By and large these regulations are applicable throughout the entire state. Furthermore, it is the Department that implements and enforces these regulatory requirements.

While the city does have the authority to enact ordinances under Section 12(a) of the APCA, 35 P.S. § 4012(a), that authority is limited. In essence, the proposed ordinance would institute an air pollution control program that establishes emissions rates, monitoring requirements, fees, and penalties for new facilities within the city limits. Only counties of the first and second class are authorized to enact such comprehensive air pollution control programs and only with the approval of the Department. *See* 35 P.S. § 4012(b). All other municipalities, including the City of Allentown, are subject to the administrative procedures under the APCA for the abatement, reduction, prevention, and control of air pollution. Consequently, the Department believes that if "Bill 26 Clean Air Ordinance" is enacted it is likely to be preempted by the APCA.

Should you wish to discuss this further, you may contact me at the following number:
717-787-4449.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Raphael", written in a cursive style.

David J. Raphael
Chief Counsel

cc: John T. Marchetto
Assistant City Solicitor