Response to DEP Opinion Letter on Legality of Allentown Clean Air Ordinance

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BACKGROUND:

Preemption means that a higher level of government disallows a local level of government from doing something. There are two types of preemption: express preemption and implied preemption. Express preemption means that the higher level of government has written into law that the lower level of government cannot do something.

The opposite of an express preemption clause is a "savings clause." A savings clause is language in the law that expressly says that the more local government *can* have stricter laws. The federal Clean Air Act has a savings clause (at 42 U.S.C. § 7416) that allows states to have stricter air pollution laws than federal law. This allows Pennsylvania to have its own Air Pollution Control Act. The Pennsylvania Air Pollution Control Act has its own savings clause (at 35 P.S. § 4012) that allows local governments to have stricter air pollution laws than state or federal law. A full copy of 35 P.S. § 4012 is available here: www.actionpa.org/ordinances/35ps4012.html

Implied preemption only applies where the state does not say whether local government has or doesn't have the right to be stricter (which is not the case here). In states like New Hampshire and Rhode Island, courts have used a type of implied preemption (called field preemption) to declare local air pollution laws illegal by saying that the state does such a complete job at regulating air pollution that it "occupies the field" and preempts local laws, even though nothing expressly says so in the law. Again, this doesn't apply to PA since we have a savings clause.

WHY THE DEP LEGAL OPINION IS WRONG:

In the 2nd and 3rd paragraphs of their letter, DEP is implying that the implied field preemption applies by pointing out where the PA General Assembly gave DEP and the Environmental Quality Board powers to regulate air pollution. This is irrelevant since the General Assembly also expressly providing a savings clause that grants all counties and municipalities broad powers to do stricter air pollution laws. This is granted here:

> **35 P.S. § 4012. Powers reserved to political subdivisions**
>
> **(a) Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act or the rules and regulations promulgated under either this act or the Clean Air Act. This act shall not be construed to repeal existing ordinances, resolutions or regulations of the aforementioned political subdivisions existing at the time of the effective date of this act, except as they may be less stringent than the provisions of this act, the Clean Air Act or the rules or regulations adopted under either this act or the Clean Air Act.**

Furthermore, the General Assembly expressed their intent, in the same section of the state Air Pollution Control Act, that local governments provide "additional and cumulative" efforts to reduce air pollution:

35 P.S. § 4012(g)

…<u>It is hereby declared to be the purpose of this section</u> [which states that local and state penalties must be uniform] <u>to enunciate further that the purpose of this act is to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth.</u>

35 P.S. § 4012.1a. Construction

Nothing in this act shall be construed as stopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate pollutions forbidden under this act, or abate nuisances under existing law. <u>It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth</u>, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision of this act, or the granting of any plan approval or permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights. No courts of this Commonwealth having jurisdiction to abate public or private nuisance shall be deprived of such jurisdiction to abate any private or public nuisance instituted by any person for the reason that such nuisance constitutes air pollution.

In the fourth paragraph of DEP's letter, they admit that "the city does have the authority to enact ordinances under Section 12(a) of the APCA, 35 P.S. § 4012(a)," but points out that the authority is limited. The only limit on the authority is in 35 P.S. § 4012(g), which requires that any penalties in local air pollution laws are uniform. The penalties in the Allentown Clean Air Ordinance are no stricter than those set in state law and the ordinance language is copied nearly word-for-word from the state law.

In the fourth paragraph of DEP's letter, they also argue that the Allentown Clean Air Ordinance "would institute an air pollution control program" and that only first and second class counties may do so. It is true that 35 P.S. § 4012(b)-(f) grants authority to Philadelphia and Allegheny Counties (the only first and second class counties in PA) to adopt their own air pollution control programs (and they have). However, the Allentown Clean Air Ordinance would not constitute a "program." A "program" allows these counties to do air permitting *in place of* DEP and requires that the counties have regulatory permitting and enforcement staff to do all of the functions of DEP, and to replace DEP's role in those counties – which is why those county programs are subject to DEP approval. 35 P.S. § 4012(a) allows all other counties and municipalities to create air pollution laws that are *in addition to* DEP's regulation. These laws are not subject to DEP approval. While the City of Erie was considering a similar ordinance in 2008-2009 to regulate major air polluters while facing the threat of the world's largest tire incinerator, DEP was part of the conversations and never argued that Erie would be preempted. (For political reasons, and because the incinerator was later stopped by other means, an ordinance was not passed in Erie.) At least three other Pennsylvania municipalities have adopted very similar ordinances under this section – ordinances which require continuous monitoring, real-time emissions data disclosure, and stricter emissions limits – and have not been preempted by state law. One was challenged and upheld in federal court in 2008 (*C.J. Lucas Funeral Home et. al. v. Borough of Kulpmont et. al.*). The matter of state preemption (which would be a stronger argument, if valid, than the constitutional claims that were tossed out of court on summary judgment) wasn't even brought up because there is no argument to be made there. See www.actionpa.org/ordinances/ for more information.