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April 18, 2012

Via First Class and Electronic Mail

Arleen Shulman
Chief, Division of Air Resource Management
Bureau of Air Quality
P.O. Box 8468
Harrisburg, PA 17105-8468

Re: Control Measures under Consideration by the Ozone Transport Commission
42 Pa.B. 1471 (March 17, 2012)

Dear Ms. Shulman:

The Clean Air Council ("Council") submits the following comments regarding the notice filed by the Pennsylvania Department of Environmental Protection ("PA DEP") on March 17, 2012 requesting comments on the Control Measures under Consideration by the Ozone Transport Commission.

The Council is a non-profit environmental organization headquartered at 135 South 19th Street, Suite 300, Philadelphia, PA 19103. The Council's mission is to protect everyone's right to breathe clean air. For more than 40 years, the Council has fought to improve air quality across Pennsylvania.

Background

The Ozone Transport Commission ("OTC") is a multi-state organization created under sections 176A and 184 of the Clean Air Act. The OTC advises the United States Environmental Protection Agency ("EPA") on ozone transport issues and is authorized to develop and implement control measures to reduce ground-level ozone and its precursors in the Ozone Transport Region ("OTR"). The OTR is comprised of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, northern Virginia, and the District of Columbia.

On March 17, 2012, PA DEP published a notice in the Pennsylvania Bulletin requesting comments on the Control Measures under Consideration by the Ozone Transport Commission

for the attainment and maintenance of the ozone National Ambient Air Quality Standards (“NAAQS”). Comments are due by April 18, 2012.

The OTC has requested that the mobile, stationary, and area source and modeling committees identify control measures and develop model rules, if necessary, for consideration by the OTC to reduce ozone and its precursors, volatile organic compounds (“VOCs”) and nitrogen oxides (“NO_x”). The OTC may consider final action during its annual meeting on May 24, 2012. The adoption of memoranda of understanding, resolutions, or other actions would commit the signatory states to pursue the adoption and implementation of the following control measures:

- Updated controls to reduce VOCs from consumer products
- Updated controls to reduce VOCs from industrial degreasing operations
- Limits on idling of nonroad diesel vehicles and equipment to reduce NO_x

The Council generally supports the OTC’s efforts to adopt control measures to reduce VOCs from consumer products and industrial degreasing operations and to reduce NO_x by limiting idling of nonroad diesel vehicles and equipment. The following comments are intended to promote consistency of and strengthen the proposed model rules. In regards to the Model Rule for Consumer Products, the Council takes issue with:

- Exemptions 4(a), 4(b), 4(c), 4(e), and 4(i);
- Enforcement of exemptions’ applicability;
- Timing of “Innovative Products” exemption determinations;
- Revoking “Innovative Products” exemptions;
- Reporting;
- Variances; and
- Violations.

In regards to the Model Rule for Solvent Degreasing, the Council takes issue with:

- Emissions reporting and
- Exemptions.

In regards to the Model Rule for Nonroad Diesel Equipment Anti-Idling, the Council takes issue with:

- The Mobile Source Committee Update;
- Time limit on idling;
- Exemption (1);
- Exemption (2);
- Penalties; and
- Requiring a Written Company Idling Policy.

Model Rule for Consumer Products

Summary

The Model Rule for Consumer Products (“Consumer Products Rule”) applies to “any person who sells, supplies, offers for sale, distributes for sale, or manufactures for sale consumer products.” The Consumer Products Rule attempts to reduce VOC emissions from consumer products. The rule contains a list of exemptions and allows manufacturers to apply for variances. The rule also provides a section for “Innovative Products” which provides further exemptions from the rule.

Exemption 4(a)

Exemption 4(a) states that the “regulation shall not apply to any consumer product manufactured in (OTC STATE) for shipment and use outside of (OTC STATE).” Exemption 4(a) potentially is overly broad and undermines the OTC’s purpose of ensuring ozone reduction in the OTC region. First, the exemption applies to consumer products manufactured in an OTC state for shipment and use outside of that OTC state. This exemption does not address the broader OTC region because it still allows consumer products to be shipped and used within the OTR. Second, manufacturers of applicable consumer products will have difficulty identifying which products are manufactured for shipment and use outside of their state as compared to those manufactured for shipment and use inside of their state. The Council does acknowledge, however, that regulating consumer products manufactured for shipment and use outside of the OTC region may not be necessary to ensure ozone reductions in the OTC region. Therefore, the Council suggest amending Exemption 4(a) to read: “This regulation shall not apply to any consumer product manufactured in an OTC state for shipment and use outside of the OTR.”

Exemption 4(b)

Exemption 4(b) contains a flaw similar to that of Exemption 4(a). Exemption 4(b) provides that the regulation does not require compliance with Section 3(a) if the consumer product is 1) not sold to a retail store in (OTC STATE), 2) intended for use outside (OTC STATE), 3) reasonably prudent precautions that it’s not distributed to (OTC STATE). This exemption, like Exemption 4(a), looks only to the state level, whereas the OTC should look at emissions from a regional perspective.

Exemptions 4(c) & 4(e)

Exemption 4(c) provides that “the medium volatility organic compound (MVOC) content standards specified in section 3(a) for antiperspirants or deodorants, shall not apply to ethanol.” This exemption completely removes any limit on ethanol for antiperspirants or deodorants. Ethanol, in general, is a contributor to ozone, yet the antiperspirant and deodorant industries are given a free pass from having to develop products that do not cause environmental externalities. The OTC should provide a limit on ethanol in antiperspirants or deodorants that provides an incentive to the industry to create ozone-friendlier consumer products.

Exemption 4(e) also provides an exemption from section 3(a) for antiperspirants or deodorants, exempting VOCs that contain more than 10 carbon atoms per molecule and for which the vapor pressure is unknown, or that have a vapor pressure of 2 mm Hg or less at 20 °C. The Council urges PA DEP to investigate these limits to determine whether they provide sufficient protection to public health and the environment, particularly to the OTC's purpose of reducing ozone.

Exemption 4(i)

Exemption 4(i) provides, in part, that “[t]he VOC limits specified in Section 3(a) shall not apply to . . . insecticides containing at least 98% para-dichlorobenzene” (*p*-DCB). The OTC's decision to exempt insecticides containing at least 98% *p*-DCB is particularly confusing considering that the OTC recognized the harm caused by *p*-DCB when it proposed in Sections 3(n) and 4(i)(2) to prohibit its use in solid air fresheners and in Section 7(a)(9)(vii) when it required reporting of the total amount of *p*-DCB.

In addition to *p*-DCB's contribution to ozone pollution, the U.S. Department of Health and Human Services (DHHS) has determined that *p*-DCB may be a carcinogen. Further, EPA has set a maximum contaminant level of 75 µg *p*-DCB per liter of drinking water. The U.S. Occupational Safety and Health Administration has set a maximum level of 77 parts per million of *p*-DCB in the workspace. Even further, California describes *p*-DCB as “known to the State to cause cancer.”

The Council understands that *p*-DCB is relied upon by the insecticide manufacturing industry; however, the OTC should provide an incentive to find a replacement for *p*-DCB that avoids placing the public at a continued health risk. The Council requests that PA DEP investigate the implications of this exemption and urge the OTC to eliminate this exemption or to drastically decrease the percentage *p*-DCB that constitutes an exemption.

Enforcement of Exemptions' Applicability

The Consumer Products Rule lacks language that provides any verification that manufacturers of applicable consumer products are applying exemptions in an honest manner. Section 5(b) provides an elaborate process for verifying “Innovative Products” exemptions, but no similar procedures are provided for standard exemptions under Section 4. The Council requests adoption of exemption verification procedures that prevent industry subterfuge and ensure that manufacturers comply with the Consumer Products Rule.

Timing of “Innovative Products” Exemption Determinations

Section 5(b)(4) would require a state agency to determine whether an application for exemption is complete within 30 days of receipt of the exemption application. Further, Section 5(b)(5) would require a state agency to “determine whether, under what conditions, and to what extent, an exemption” would be permitted within 90 days after an application has been deemed complete. Section 5(b)(5) also permits the applicant and the state agency to “mutually agree to a longer time period for reaching a decision” Neither Section 5(b)(4) nor Section 5(b)(5) provide answers for a state agency's failure to determine either whether an application is

complete within 30 days or whether an exemption is permitted within 90 days after the agency determines an application is complete. The Council requests that PA DEP urge the OTC to address this gap in the exemption procedures and add language clarifying that an exemption is not granted until the agency explicitly grants the exemption, and that a tolling of 30 days for a completion determination or 90 days for an exemption determination does not automatically result in an exemption being granted.

Revoking "Innovative Products" Exemptions

Section 5(b)(7) states that manufacturers of a product that received an exemption must notify the state agency "in writing within 30 days of any change in the product formulation or recommended product usage directions, and shall also notify the [state agency] within 30 days if the manufacturer learns of any information which would alter the emissions estimates submitted to the [state agency] in support of the exemption application." This provision requires notice of any changes that would increase emissions estimates, but it does not provide a mechanism for revoking the exemption if the change would in fact result in an increase in emissions. The Council requests that a mechanism be added that allows the state agency to revoke an exemption if a change would result in an increase in emissions.

Reporting

Reporting requirements under Section 7(a) are not mandatory and only activate upon a state agency's request for information. Even then, manufacturers are allowed 90 days' notice in advance of any request for information. Reporting requirements should be mandatory for all applicable consumer products at least on a yearly basis. Mandatory reporting would serve as a strong enforcement mechanism that would help ensure widespread compliance with the Consumer Products Rule. The Council understands that under some circumstances reporting may be burdensome for the state agency, but even so, manufacturers should be given no more than 24 hours' notice in advance of any request for information. Allowing manufacturers to have 90 days' notice is excessive if manufacturers are properly maintaining their records.

Variances

Section 8 permits the state agency to issue variances to eligible manufacturers based on certain hardship factors. Under Section 8(c), all of the following factors must be satisfied before a variance can be granted:

- (1) that, because of reasons beyond the reasonable control of the applicant, requiring compliance with section 3 would result in extraordinary economic hardship;
- (2) that the public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants which would result from issuing the variance;
- (3) that the compliance report proposed by the applicant can reasonably be implemented, and will achieve compliance as expeditiously as possible.

The phrasing of the second element, the “public interest” element, is problematic. The “public interest” is a vague term that would provide state agencies with unbridled discretion over variance determinations. Weighing the public interest in mitigating hardship to the applicant against the public interest in avoiding increased emissions of VOCs threatens to erode any improvements that the Consumer Products Rule could provide. The Council suggests, as a solution to this issue, that state agencies be required to notify the public in advance of making any variance determination and to provide for public comment, as well as a public hearing if the agency receives substantial comments or if the agency believes a public hearing is necessary to verify its understanding of the public interest.

Violations

A Violations subsection appears within the Alternative Control Plan for Consumer Products section. Violations, however, should appear as a separate section to promote clarity and to avoid confusion as to the applicability of Violations to the entire Consumer Products Rule, as opposed to only the Alternative Control Plan for Consumer Products section.

Model Rule for Solvent Degreasing

Summary

The Model Rule for Solvent Degreasing (“Solvent Degreasing Rule”) applies to “all persons who own or operate batch-loaded cold cleaners, remote reservoir cold cleaning machines, open-top vapor degreasers, all types of conveyORIZED degreasers, and air-tight and airless cleaning systems that carryout solvent degreasing operations with a solvent containing [VOCs].” Examples of solvent degreasing operations regulated by this rule include “the removal of dirt, grease, oil, or other contaminants and coatings from parts, products, tools, and machinery.” The Solvent Degreasing Rule requires exemptions to be determined on a case-by-case basis and permits partial exemptions so that, rather than mandating a full exemption, a state agency can impose some higher VOC limit if reasonable.

Emissions Reporting

Section 6.0(a)(4) provides that any “person owning or operating any open-top vapor degreaser or airless/airtight cleaning system with a VOC-containing solvent shall record at monthly intervals . . . the monthly emissions (E) determined by the following equation: $E = Wa - Wb - Wc$.” First, the Council emphasizes that using an equation to determine emissions is a far less precise method of determining emissions than is testing actual emissions, although the Council does recognize that actual emissions testing may be expensive for some relatively smaller manufacturers. Second, regardless of whether an equation is used to determine emissions, VOC emissions should be determined more often than on only a monthly basis. For example, all VOC emissions attributable to a given month may have actually been emitted in only one day within that month. Such elevated levels of VOCs could put the public health at significant risk.

Exemptions

Section 7.0(a)(8) permits states to further broaden the exemptions listed in Sections 7.0(a)(1)-(7) and contemplates states' complete discretion over "the specification and handling of exemptions," which may be interpreted as providing states with the power to create additional exemption criteria for "[c]ertain critical, high precision cleaning requirements." In the interest of providing clarity, predictability, and improved air quality, the Council requests that PA DEP urge the OTC to provide a finite and specific list of exemptions that states must adhere to.

Model Rule for Nonroad Diesel Equipment Anti-Idling

Summary

The Model Rule for Nonroad Diesel Equipment Anti-Idling ("Anti-Idling Rule") "applies to any person, entity, owner, or operator of a property or location where a nonroad diesel engine is operated, owners and operators of a nonroad diesel engine, or the holder of the permit for the activity for which the nonroad diesel engine is being operated." In short, the Anti-Idling Rule intends to reduce NO_x by limiting idling of nonroad diesel vehicles and equipment. The purposes of operating nonroad diesel vehicles and equipment, for consideration of the applicability of this rule, include, but are not limited to: "construction, mining, landscaping, recycling, landfilling, manufacturing, warehousing, composting, airport ground support equipment, industrial activities, and other operations."

Mobile Source Committee Update

The Anti-Idling Rule's stated purpose "is to protect public health and the environment by reducing diesel engine emissions consisting of criteria pollutants, primarily particulate matter (PM), that result from unnecessary idling while conserving fuel from nonroad diesel engines." PART Env-A XXXX.01. To accompany the Anti-Idling Rule, the Mobile Source Committee provided a presentation entitled "Mobile Source Committee Update" for the OTC Committee Meeting. In that presentation, the Mobile Source Committee stated that "[n]onroad diesel engines are major sources of NO_x, PM_{2.5}, and toxic air pollutants." The Mobile Source Committee further acknowledged that "[m]any states prohibit unnecessary idling of highway diesel trucks, only a few (CT, MA, NJ, RI) prohibit it for non-road equipment." In addition, the Committee disclosed that it had hosted stakeholder calls with the following industry organizations:

- Associate General Contractors
- RRI Energy
- EMA, AGC, and other Manufacturers
- Associate General Contractors of New Jersey
- Marcellus Shale Coalition and Shell

Absent from this list are any environmental groups, who, in addition, were not given an opportunity to participate in a public hearing. The Council would like to see the OTC take

initiative to find a balance among groups it seeks input from and avoid a major imbalance of interests, such as the imbalance shown above.

Time Limit on Idling

The Anti-Idling Rule's general prohibition on idling does not yet contain an applicable time limit on idling. PART Env-A XXXX.05 provides two options: three consecutive minutes or five consecutive minutes. The Council urges PA DEP to advocate for a three consecutive minute limit on idling to ensure optimal protection of the public health and the environment.

Exemption (1)

In PART Env-A XXXX.06, Exemption (1) states that “[t]he idling limit does not apply to . . . [i]dling necessary to ensure the safe operation of the equipment and safety of the operator, including idling to verify that the equipment is in good working order, or other conditions specified by the equipment manufacturer in the manual or other technical document accompanying the nonroad diesel engine” Overall, this exemption is far too broad.

In regards to the first part of this exemption, the safety exemption, the Guidance for Implementation of Nonroad Idling Rule (“Guidance”) that accompanies the proposed Anti-Idling Rule states that “[i]dling is allowed to ensure the safe operation of the equipment.” The Guidance further states that this “[i]ncludes idling for . . . operating safety lights.” The Guidance should add the language “when necessary” after the phrase “operating safety lights.” The Guidance also states that Exemption (1) “[i]ncludes idling for . . . verifying that the equipment is in good working order.” The subjectivity and vagueness inherent in “verifying that the equipment is in good working order” opens the rule to abuse and should be tailored to provide clarity and compliance with the provisions of the Anti-Idling Rule.

In regards to the second part of Exemption (1), which exempts “other conditions specified by the equipment manufacturer in the manual or other technical document accompanying the nonroad diesel engine,” the Guidance adds that “[i]dling is allowed when necessary to meet specifications of the manufacturer’s operating manual or other applicable technical document.” The Guidance further states that “liable parties are responsible for providing the manufacturer’s operating manual to demonstrate the need for longer idling times.” In other words, all that manufacturers of nonroad diesel engines must do in order to avoid idling limits is to recommend idling in their manuals. The Council requests that PA DEP urge the OTC to close this gap and prevent abuse of the Anti-Idling Rule.

Exemption (2)

Exemption (2) exempts “[i]dling for testing, servicing, repairing, or diagnostic purposes” Neither the Model Rule nor the Guidance states whether such reasons must be the primary purpose for idling or to what extent such “testing, servicing, repairing, or diagnostic purposes” must be necessary for the exemption to apply. Exemption (2) should include the word “necessary” after “Idling,” similar to the requirement in Exemption (1), to prevent potential abuse of Exemption (2).

Penalties

PART Env-A XXXX.07 provides that “[p]enalties may be assessed to any person, entity, or operator who causes or allows idling of non-road diesel equipment in violation of this regulation to occur on property or locations under their control or during activities for which a permit was acquired.” The penalties provision is silent as to the actual amount of any penalties. The OTC should add penalty amounts and/or limits to the Anti-Idling Rule to provide the public with clarity and to deter future violations. If the penalty provision remains without language specifying the amounts and/or limits of penalties, then the provision should state that penalties may be assessed up to the maximum permissible amount allowed in the jurisdiction where the violation occurred.

The penalties provision goes on to state that “[a]ny person, entity, owner, or operator of a property or location where a nonroad diesel engine is located or operated will be held responsible for ensuring compliance of all contractors and subcontractors operating a nonroad diesel engine at that site. Owners and operators of a nonroad diesel engine may also be held responsible for complying with this regulation.” While this language provides a method of determining which parties may be “held responsible,” and prior language allows penalties to be assessed to certain parties, there is no language that ties the ability to assess penalties to those who may be “held responsible.” In other words, one interpretation of the penalties provision, as proposed, is that penalties can be assessed against “any person, entity, or operator who causes or allows” unlawful idling, while other individuals can be “held responsible” for the acts of others, but those two sets of parties can be mutually exclusive. The Council requests that additional language be added that clarifies that if an applicable party is “held responsible,” then that party is subject to penalties as if they actually caused or allowed unlawful idling under the Anti-Idling Rule.

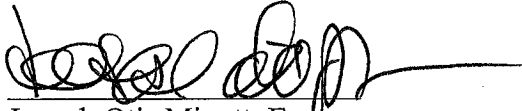
Requiring a Written Company Idling Policy

The Guidance indicates that the Anti-Idling Rule does not require owners and operators of nonroad diesel equipment to maintain a written company idling policy. The Guidance merely recommends that owners and operators adopt a written policy “to ensure that employees do not violate anti-idling regulations.” The Council agrees with the Guidance, insofar as it describes the beneficial effects of a written company idling policy. However, the Council requests that the Anti-Idling Rule require a mandatory written company idling policy that must be publicly posted. Enforcing an anti-idling regulation is difficult, and mandating that owners and operators maintain a written company idling policy will assist and supplement enforcement of the Anti-Idling Rule.

Conclusion

The Clean Air Council urges PA DEP to support the Control Measures under Consideration by the Ozone Transport Commission, taking into account options to strengthen it as provided by our comments of April 18, 2012. We appreciate the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joseph Otis Minott', with a long horizontal line extending to the right.

Joseph Otis Minott, Esq.
Executive Director
Clean Air Council