November 16, 2012

Alec and Victoria Loorz
Kids vs. Global Warming

Ashley Funk


Dear Ms. Funk and Mr. and Ms. Loorz:

This letter is in response to your October 2, 2012 petition to the Environmental Quality Board (EQB) requesting a rule to regulate fossil fuel carbon dioxide emissions in Pennsylvania to achieve an atmospheric concentration of 350 ppm of carbon dioxide. In accordance with 25 Pa. Code § 23.2 (relating to departmental review), the Pennsylvania Department of Environmental Protection (Department or DEP) has examined the petition to determine if it meets the following conditions: (1) the petition is complete as required by § 23.1 (relating to petitions); (2) the petition requests an action that can be taken by the EQB; and (3) the requested action does not conflict with Federal law. The Department has determined that your petition does not meet the established criteria.

In your petition you state that Article I, (Declaration of Rights) Section 27 (Natural Resources and the Public Estate) of the Pennsylvania Constitution gives the Department all the authority it needs to protect Pennsylvania’s air, even without legislative action, and that the petition cannot be denied on the basis of Section 4.2 of the Pennsylvania Air Pollution Control Act (APCA), because it would be an unconstitutional application of the statute. However, Article I, Section 27 cannot be read in isolation—this provision must be interpreted within the context of the body of case law that Pennsylvania courts have established related to the implementation of Article I, Section 27. Clearly, Pennsylvania is committed to the conservation and maintenance of clean air under Article I, Section 27 of the Pennsylvania Constitution. Department of Environmental Resources v. Locust Point Quarries, 483 Pa. 350, 359; 396 A.2d 1205, 1210; (1979). To that effect, through Section 4002 of the APCA, the legislature declared as policy the protection of air resources, for among other things, to the degree necessary for the protection of the health, safety and well-being of the citizens. Id. As a result, there can be no doubt from a reading of the APCA that the legislative intent is to clean the air under the powers granted in the State Constitution. Bortz Coal Company v. Commonwealth, 2 Pa. Comw. 441, 447; 279 A.2d 388, 392 (1971).

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The Pennsylvania General Assembly's clear intent to regulate environmental concerns including air quality, through legislation, such as the APCA, means that the environmental concerns mandated by Article I, Section 27 have been achieved through the legislative process. See Concerned Residents of the Yough, Inc., v. Department of Environmental Resources, 162 Pa. Commw. 669, 689; 639 A.2d 1265, 1275; 1994 (The General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste, consequently, the balancing of environmental concerns mandated by Article I, Section 27 of the Pennsylvania Constitution has been achieved through the legislative process). Consequently, Article I, Section 27 does not give the Department the authority to disturb that legislative scheme. Community College of Delaware County v. Fox, 20 Pa. Commw. Ct. 335, 358; 342 A.2d 468, 482 (1975).

Furthermore, Article I, Section 27 does not give the Department the authority to alter or expand its powers under the APCA. See also Borough of Moosic, Petitioner v. Pennsylvania Public Utility Commission, 59 Pa. Commw. 338, 344; 429 A.2d 1237, 1240 (1975), and Pennsylvania Game Commission v. Pennsylvania Department of Environmental Resources, 97 Pa. Commw. 78, 88; 509 A.2d 877, 883 (1986).

Specifically, under 25 Pa. Code § 23.2(2), a petition must request an action that can be taken by the EQB. To the extent that your petition requests DEP to promulgate a rule to regulate fossil fuel carbon dioxide emissions to achieve a concentration of 350 ppm atmospheric carbon dioxide by 2100, Section 4.2(c) of the APCA, 35 P.S. § 4004.2(c), prohibits the EQB from adopting, by regulation, an ambient air quality standard for a specific pollutant that is more stringent than an air quality standard adopted by U.S. Environmental Protection Agency (EPA). To date, EPA has not established an ambient air quality standard for carbon dioxide or any other greenhouse gas (GHG) emissions. Because your petition for rulemaking would require the EQB to establish a carbon dioxide ambient air quality standard, we believe that your request is not an action that can be taken by the EQB to address the regional and global impacts of carbon dioxide emissions. The adoption of an ambient carbon dioxide standard would be national in its scope and beyond any action that can be taken by the EQB. Consequently, your petition does not meet the established criteria under 25 Pa. Code § 23.2.

The petition would require the Department to publish annual progress reports on statewide greenhouse gas emissions which must include “an accounting and inventory for each and every source of all greenhouse gas emissions within the state, without exception.” The development of an annual GHG emissions inventory consistent with the framework outlined by the petitioners is beyond the action that can be taken by the EQB. The Pennsylvania General Assembly has mandated under Section 4 of Pennsylvania Climate Change Act, 71 P.S. §§ 1361.1 – 1361.8 (2008, July 9, P.L. 935, No. 70 ) (herein after Act 70 of 2008) that the Department, in consultation with the Climate Change Advisory Committee, annually compile an inventory of greenhouse gas emissions emitted in this Commonwealth from all sources. This statutorily prescribed inventory addresses “GHG emission trends and the relative contribution of major sectors, including, but not limited to, the transportation, electricity generation, industrial, commercial, mineral and natural resources, production of alternative fuel, agricultural and domestic sectors.” Section 4 (c) of Act 70 of 2008 specifies that the GHG emissions inventory and the baseline of GHGs shall be presented to the Governor, the General Assembly and the Climate Change Advisory Committee every three years as part of the
Commonwealth's climate change action plan. The GHG emissions inventory criteria and reporting provision in your petition are contrary to the explicit mandates established under Act 70 of 2008. The Department's duties for the development of Pennsylvania's Climate Change Action Plan and the GHG emissions inventory are prescribed by act. Consequently, the petition does not meet the established criteria under 25 Pa. Code § 23.2 because you have requested a rulemaking action that cannot be taken by the EQB.

Pursuant to 25 Pa. Code § 23.1(a)(4), the petition must identify the “types of persons, businesses and organizations likely to be impacted by this proposal.” While the petition does contain a generalized statement about potential impacts, it does not identify “types of persons, businesses and organizations likely to be impacted by this proposal.” Consequently, your petition does not meet the specified criteria in Section 23.1(a)(4).

While your petition is not appropriate for submittal to the EQB, the Department welcomes your interest in the rulemaking process and your commitment to the protection of the public health and the environment. If you have any questions, you may contact me at 717.783.8727 or by e-mail at mtate@pa.gov.

Sincerely,

Michele Tate
Regulatory Coordinator

cc: Our Children’s Trust
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