PWIA

Pennsylvania Waste Industries Association
A Chapter of the National Solid Wastes Management Association

The Pennsylvania Waste Industries Association ("PWIA") appreciates the opportunity to submit these written comments concerning the Tentative Order published in the Pennsylvania Bulletin on February 11, 2006 (36 Pa.B. 785) ("Tentative Order") as part of the *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification; Doc. No. M-00051865*. The Advanced Energy Portfolio Standards Act (the "Act") includes provisions on the standards and processes for qualifying alternative energy systems and certifying alternative energy credits. In the Tentative Order, the Public Utility Commission (the "PUC" or "Commission") presents alternative interpretations for some of the more complicated of these provisions, and requests comments regarding these alternative interpretations.

Introduction

PWIA is the Pennsylvania chapter of the National Solid Wastes Management Association, a non-profit organization that represents the interests of the North American waste services industry. PWIA members include both privately held and publicly traded companies, and own and operate numerous commercial solid waste facilities throughout the Commonwealth. In addition to solid waste landfills, our members operate resource recovery facilities, recycling facilities, transfer stations and collection operations. One of PWIA's primary missions is to advance the safe, efficient, and environmentally responsible management of solid waste, and to promote sound public policy affecting the management of solid waste.

Tentative Order, Section B: Allocation of Agency Responsibilities Regarding Alternative Energy System Qualification and Credit Certification Processes

Section B of the Tentative Order discusses in general terms the delineation of responsibilities imposed by the Act on the Commission and on the Department of Environmental Protection ("Department" or "DEP"). In specific terms, the Commission "tentatively concludes" that it has the responsibility and power to make "[f]inal determinations on resource qualification." (See Section B of the Tentative Order.) In other words, the Commission has determined that it has sole final decision-making authority regarding whether a generation facility is qualified for alternative energy status.

The Commission's responsibilities are set forth at 73 P.S. § 1648.7(a), and the Department's responsibilities are provided at 73 P.S. § 1648.7(b) (collectively, "Responsibility Provisions"). While the Commission noted that the Responsibility Provisions are less than clear regarding which agency has authority to determine whether

a generating facility qualifies for alternative energy status, it found that 73 P.S. § 1648.3(e) clarified this ambiguity. The Commission tentatively concluded that not only does it have authority for final determinations regarding resource qualification, but that "the power to promulgate regulations establishing standards and processes for resource qualification and alternative energy credit creation" is vested exclusively in the Commission.

PWIA agrees with the Commission's interpretations regarding the delineation of responsibilities and authority for promulgating regulations establishing standards and processes for resource qualification and alternative energy credit creation. PWIA agrees with the Commission that only the Commission (or its agent the program administrator, which must be an independent entity pursuant to 73 P.S. § 1648.3(e)(2)) has authority to make final determinations on resource qualification.

Tentative Order, Section C: DEP's Role in Qualification of Alternative Energy Systems

Section C of the Tentative Order discusses possible roles for the Department in participating in the qualification of alternative energy systems. This section of the Tentative Order reiterates that the Department does not have authority to make resource qualification decisions ("As noted in the prior section, the Commission does not conclude that § 1648.7(b) should be read to find that DEP adjudicates resource qualification decisions."). Two competing roles for the Department are discussed in Subsection *1. Certification of Questions of Fact and Law* and Subsection *2. DEP as Expert Witness*.

The Department's responsibilities are promulgated at 73 P.S. § 1648.7(b) ("Section 7(b)"), which states[1]:

> Department responsibilities.--The department shall ensure that all qualified alternative energy sources meet all applicable environmental standards and shall verify that an alternative energy source meets the standards set forth in section 2.

The reference to "standards set forth in section 2" is to the definition section of the Act, which primarily defines the types of fuels and processes of generating energy that can qualify as alternative energy sources.

The Commission discusses two options for using the Department in the qualification process. The first option involves "certifying questions" of both fact and law to the Department (See Subsection *1. Certification of Questions of Fact and Law*). Under this option, the Department would make binding determinations on particular applications.

The Tentative Order does not cite authority under the Act for this option, and in fact states "[i]t must be recognized that by certifying a question to DEP, the Commission is

[1] Additional and shared duties not relevant to the Tentative Order are set forth at 73 P.S. § 1648.7(c), which generally require the Commission and the Department to cooperate, and to prepare an annual report regarding results of the Act.

delegating some of its authority to another state agency. The program administrator would be bound by DEP's findings of fact or law on a particular application in its initial determination."

The alternative to certifying questions to the Department is for the DEP to serve as an expert witness to the Commission. This option is discussed briefly in Subsection *2. DEP as Expert Witness*. Under this option, the Department would offer written or oral testimony, as appropriate, on whether a source meets the definition of alternative energy source in § 1648.2. The administrator would not be bound by the Department's testimony, if it found other information more persuasive.

The Tentative Order states that it finds the "certification of question" approach to be the correct option, based on the "plain language of the Act." PWIA respectfully disagrees.

The Act precludes delegation of decision-making authority on resource qualification to the Department. As the Commission found and stated in Section B, final determinations on resource qualification must be made by the Commission, as required under § 1648.3(e). The Department's role is advisory, not determinative.[2] PWIA respectfully suggests that certification of questions to the Department, where the Commission would be bound by the Department's determination, is inconsistent with the findings of Section B and § 1648.3(e) of the Act and is an improper delegation of the Commission's responsibility.

Tentative Order, Section C: DEP's Role in Qualification of Alternative Energy Systems; 3. Confirmation of Compliance with Environmental Regulations

Tentative Order, Section E. Maintaining Alternative Energy System Status

The Tentative Order notes that the Department is required to "ensure that all qualified alternative energy sources meet all applicable environmental standards" but that the Act is not clear as to the proper remedies where a source is not meeting all applicable environmental standards. However, the Tentative Order acknowledges that in only one case, direct combustion of Municipal Solid Waste, does the definition include compliance with applicable environmental laws.

There are fourteen (14) categories of sources that can qualify as alternative energy sources in the Act. Thirteen (13) of these categories are defined as sub-definitions within "Alternative energy sources," and there is no reference to compliance with environmental laws. The remaining source, Municipal Solid Waste, is defined separately. This specific definition, and only this specific definition, requires compliance "which the Department of Environmental Protection has determined...[with all] current environmental standards, including but not limited to...the Clean Air Act... and the Solid Waste Management Act." The Tentative Order assumes that because the (wholly separate) definition of Municipal Solid Waste specifically requires a compliance determination by the

[2] Assuming the Department's role in certification is determinative, judicial review would lie before the Environmental Hearing Board, not the Commission.

Department, that the General Assembly intended this requirement to be incorporated into the definition of each of the other thirteen source categories. PWIA does not believe this is consistent with the plain language of the Act.

As the PUC set forth in Section A, the plain language of a statute should not be disregarded in pursuit of unstated legislative intent when the words are clear and free of ambiguity. 1 Pa.C.S § 1921(b). It also can be presumed that the legislature did not intend an interpretation that is absurd or unreasonable. 1 Pa.C.S. § 1922(l). For many of the thirteen source categories, the Clean Air Act and/or the Solid Waste Management Act simply do not apply. For example, it is unreasonable to assume that the legislature intended that the definition of "solar thermal energy" would require an active determination by the Department that the facility complies with the Solid Waste Management Act and the Clean Air Act, as neither of these Acts would ever apply to the typical solar thermal energy generating facility. Interpreting the Act to include an active determination by the Department of compliance with environmental laws based on the definition of combustion of Municipal Solid Waste is inconsistent with the plain language of the Act and normal rules of statutory construction.

The plain meaning of the Act is clear. For "municipal solid waste" facilities seeking to qualify as alternative energy sources, environmental compliance must be maintained. For other facilities seeking to qualify as alternative energy sources, they must meet the plain language of the provision in the Act that defines that type of facility. The definition of an alternative energy source for each of the other thirteen categories does not discuss environmental laws or compliance and is not ambiguous. An active determination of environmental compliance is not required under this portion of the Act.

This interpretation, of course, does not impede in any manner the Department's existing enforcement authority or its obligations under Section 7(b). The Department's duty to ensure that all applicable environmental standards are met is, as suggested at one point in Tentative Order (see Subsection 3), no more than a clarification that DEP has all of its normal enforcement tools available, including fines and penalties. The Department has issued draft Technical Standards[3] which discuss general principles of its intentions to implement Section 7(b).

The Tentative Order states that facilities already certified to alternative energy system status will lose this status should they fail to maintain compliance with applicable environmental laws. One mechanism for determining compliance is the annual certification required to be submitted to the Department pursuant to the Secretarial Letter issued on December 20, 2005, as discussed in Section E. These forms require a certification of compliance for the preceding year.

[3] These standards are available from the Office of Energy and Technology Deployment, and at http://www.depweb.state.pa.us/energy/lib/energy/docs/section2technicalguidancefinal.pdf. This draft guidance document was first made available in February 2005, and its availability does not appear to have been published in the Pennsylvania Bulletin. While the Department has accepted comments on the document, to the best of our knowledge there has been no formal comment period, no formal request for comments, and no published response to any of the submitted comments. However, an attachment to the Secretarial Letter issued on December 20, 2005 adopts at least a portion of this draft document.

The Tentative Order is silent regarding the status of Alternative Energy Credits ("AE Credits") earned while a facility was operating out of compliance. However, the Department's draft Technical Guidance indicates that "major environmental compliance violations" will result in a retroactive disqualification of previously awarded AE Credits.[4] Neither explicit nor implied authority for retroactive disqualification is found in the Act. We respectfully submit that the retroactive revocation of previously generated AE Credits is a serious impediment to participation in the program.

PWIA supports the revocation of improperly earned AE Credits (i.e., the source itself never qualified as an alternative energy source under the Act). However, we are unaware of any other green energy portfolio program where AE Credits earned through legitimate means are revoked based on areas of environmental non-compliance, especially where the environmental non-compliance may be totally unrelated to energy generation. This interpretation would have unintended adverse consequences on the effectiveness of the Act.

On a related note, the Tentative Order does not address the role of the Department or compliance certifications for out-of-state facilities participating in the program. The draft Technical Guidance's cursory discussion of verifying compliance for out-of-state facilities participating in Pennsylvania's program is disheartening. At a minimum, these facilities will not be held to the higher environmental standards that exist in Pennsylvania.

There remain a number of open issues regarding the Technical Guidance, including a number of key undefined terms, such as "Major environmental compliance violations". It is unclear what, if any, nexus is required to the power generation activity. Many of the facilities that could theoretically participate in the program are physically large, operationally complex, and often built and operated in distinct subdivisions, often as separate corporate entities.

The importance of these issues lies in eliminating uncertainty in the program. To the extent that AE Credits generated under this program are at risk for being devalued or disqualified after their generation and transfer to an electric distribution company or electric generation supplier, then the benefits of participation intended by the General Assembly similarly are at risk. This has the potential to impact every participant in the program, and the effects will be felt especially heavily at the pre-construction financing stage.

Conclusion

PWIA and its members believe the Act has significant potential to bring real environmental benefits to Pennsylvania. Adopting clear regulations that foster the

[4] The Tentative Order is silent in regard to the proper venue to challenge a finding of "major environmental compliance violations." Arguably, exclusive jurisdiction would lie before the Environmental Hearing Board, which appears contrary to the power vested in the Commission to implement the Act.

development of alternative energy sources and that provide certainty in the certification of credits is the key to success.

Thank you for the opportunity to comment on the draft Technical Guidance. Please feel free to contact me directly should you wish to discuss our comments in more detail.

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