

ALLEGHENY COUNTY HEALTH DEPARTMENT  
ADMINISTRATIVE ORDER

CLEAN AIR COUNCIL,	:	In Re: Clean Air Council’s Notice of
	:	Appeal of denial of extension of 30-day
Appellant,	:	public comment period
	:	
v.	:	
	:	
ALLEGHENY COUNTY HEALTH	:	
DEPARTMENT,	:	
	:	
Appellee.	:	

**INTRODUCTION**

This appeal involves a challenge by an environmental organization to a denial of its request for an extension of a public comment period. In October of 2016, the Clean Air Council (“Council”) appealed a decision by the Allegheny County Health Department (“ACHD”) denying the Council’s request to extend the public comment period for a proposed Title V Permit for the Allegheny Ludlum steel mill in Brackenridge, Pennsylvania.

The Council makes three claims. First, that the denial of the extension request violates federal regulations that require permitting agencies to provide “adequate notice” for public notice and comment. Second, that the denial of the extension request is an unlawful “binding norm” under Pennsylvania law. And third, that the denial of the request violates the Pennsylvania Constitution’s Environmental Rights Amendment.

I find that the ACHD’s denial of the Council’s extension request did not violate federal law, state law, or Pennsylvania constitutional law.

## **EVIDENCE**

1. The following exhibits were offered into evidence jointly by the ACHD and the Clean Air Council:
  - J1—Right-to-know request, initial response
  - J2—Request for extension of public comment period
  - J3—Clean Air Council’s right-to-know request
  - J4—Email dated 10/4/16
  - J5—Public notice
  
2. The following exhibits were offered into evidence by Clean Air Council:
  - A1—Pennsylvania Constitution
  - A2—E-mail
  - A3—Dropbox e-mail
  - A4—Email dated 10/18/16
  - A5—Email
  - A6—Email
  - A7—Email
  - A8—Email
  - A9—Email
  
3. The following exhibits were offered into evidence by the ACHD:
  - D1—Email dated 10/19/16
  - D2—Email dated 10/7/16
  - D3—Email response
  - D4—News release

## **FINDINGS OF FACT**

Based on my review of the evidence and having resolved all issues of credibility, I find the following facts:

1. Clean Air Council is an environmental non-profit group located in Philadelphia, Pennsylvania. Its Executive Director and Chief Counsel is Joseph Minott. (Hearing Transcript (“H.T.”) at 12).
  
2. The Allegheny County Health Department is a local health agency organized under the Local Health Administration Law, 19 P.S. §§ 12001-12028. The ACHD has been delegated authority to regulate air quality pursuant to the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q.

3. Allegheny Ludlum is a steel mill in Allegheny County. (H.T. at 184).
4. As Allegheny Ludlum is considered a major source of air pollution, it is required by Title V of the Clean Air Act to have an Operating Permit. The purpose of a Title V Operating Permit is to incorporate in one document all the requirements included in a facility's existing installation permits and any applicable regulatory requirements. (H.T. at 13, 38, 181-83).
5. Allegheny Ludlum has eight installation permits that were issued after a 30-day public comment period. (H.T. at 202). Installation permits are construction permits that are required any time a facility intends to install a new piece of equipment or make a change to the operation of existing equipment. (H.T. at 181-83).
6. On September 30, 2016, the ACHD published in the Pittsburgh Post-Gazette a notice for public comment for a draft Title V Operating Permit for Allegheny Ludlum. (H.T. at 191; Ex. J5). The notice stated that written comments for the draft permit were due by October 31, 2016, and a public hearing was scheduled for October 31, 2016. *Id.*
7. JoAnn Truchan, ACHD's Acting Section Chief of Engineering and Permitting in the ACHD's Air Quality Program, reviewed the Title V Operating permit and support documentation for Allegheny Ludlum on or around September 30, 2016, before the notice of public comment was published. (H.T. at 193-94).
8. On October 4, 2016, Joseph Minott received a copy of the Allegheny Ludlum draft Operating Permit and technical support documentation. (H.T. at 22, 37-38; Ex. J4).
9. On or before October 7, 2016, Clean Air Council drafted a request to the ACHD for a 90-day extension of the public comment period for the Allegheny Ludlum draft Operating Permit, and to move the public hearing back three months. (H.T. at 47-49; Ex. D2).
10. On October 13, 2016, Clean Air Council submitted a Right-to-Know request through the Allegheny County Office of Open Records. (Ex. J3). During a phone conversation with ACHD document manager Carl Dettlinger, Clean Air Council lawyer Logan Welde informed Mr. Dettlinger that he would like the ACHD to produce "everything" in the Allegheny Ludlum file, nearly 2,000 files. (H.T. at 218-19).

11. On October 17, 2016, the ACHD received a request by Allegheny Ludlum for an extension of the public comment period. (Ex. A8). The ACHD denied this request. *Id.*
12. On October 17, 2016, the ACHD also received a request from Clean Air Council and several other environmental groups<sup>1</sup> for a 90-day extension of the public comment period for Allegheny Ludlum's draft Title V Operating permit, and to move the public hearing back three months. (H.T. at 193; Ex. J2). Clean Air Council offered the following reason for the extension:

This permit represents the accumulation of many complex regulatory and technological developments since 1995, when the Title V application was submitted. We believe a ninety-day extension is warranted for all interested parties, to allow them the time to review the documents and provide meaningful comments on the proposed permit. (Ex. J2).

13. On October 18, 2016, the ACHD denied Clean Air Council's request for an extension of the public comment period. (H.T. at 145-46, 197). Ms. Truchan denied the request on the basis that Clean Air Council failed to provide a good technical reason for extending the public comment period. (H.T. at 108, 146, 196-97).
14. On October 18, 2016, ACHD assistant solicitor Jason Willis communicated to Clean Air Council and other interested parties that the request for an extension of the public comment period was denied. (Ex. A4). Ms. Truchan asked Mr. Willis to draft the ACHD's denial of the request due to several of the involved parties being lawyers. (H.T. at 198). Ms. Truchan advised Mr. Willis that the request was being denied because the Clean Air Council had submitted a "blanket request" and failed to provide any technical reason for the request. (H.T. at 117, 151-52).
15. On October 28, 2016, the ACHD submitted to Clean Air Council the ACHD's response to their Right-to-Know request.
16. On October 28, 2016, Clean Air Council filed a Notice of Appeal of the ACHD's decision to deny their request for an extension of the comment period.

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<sup>1</sup> These groups include: PennEnvironment, Clean Water Action, Citizens for Pennsylvania's Future, American Lung Association in Pennsylvania, Environmental Integrity Project, Group Against Smog and Pollution, and Sierra Club PA Chapter. These groups did not appeal the denial of the extension request.

17. On October 31, 2016, the ACHD conducted a public hearing on the draft Title V Operating Permit for Allegheny Ludlum. Clean Air Council offered oral testimony at this hearing, and submitted written comments. (H.T. at 54).

## DISCUSSION

In an administrative appeal of a final agency action of the ACHD, the appellant “shall bear the burden of proof and the burden going forward with respect to all issues.” Article XI § 1105.D.7. Therefore, the Council bears the burden of proving by a preponderance of the evidence that the ACHD’s denial of its extension request violated federal and state law.

The burden of proof is the first bone of contention here. The Council argues that the ACHD improperly said that the burden of proof is “abuse of discretion.” (*Council Brief* at 3). The Council is incorrect. It conflates the burden of proof in a civil matter (preponderance of the evidence) with the standard of review for an agency’s discretionary decision (abuse of discretion). Pennsylvania law is clear on this point. *See Germantown Cab Co. v. Public Util. Comm’n*, 97 A.3d 410, 414 n. 7 (Pa. Commw. Ct. 2014) (“The scope of review in cases involving discretionary acts of an agency is limited to determining whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency’s functions or duties.”); *see also ACHD Reply to Clean Air Council’s Merits Brief* at 1). The Council, therefore, has the burden of proving by preponderance of the evidence that the ACHD abused its discretion in denying the Council’s extension request.

**I. The ACHD did not violate Federal “Adequate Procedures” Regulations.**

After reviewing the evidence and evaluating the arguments in this case, I find that the ACHD did not run afoul of any applicable federal regulations regarding adequate procedures.

**A. Regulatory Text**

The Council contends that the ACHD violated federal regulations when it denied the request for extension because it did not provide adequate procedures for public notice. (*Council Brief* at 8).

The applicable federal regulations require that permitting authorities “provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.” 40 C.F.R. § 70.7(h). The ACHD’s Air Pollution Control regulations mirror this requirement, stipulating that the ACHD “provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.” Article XXI § 2103.11.e.

Although the Council concedes that the ACHD provided at least 30 days for public comment and 30 days’ notice in advance of the public hearing, it contends that “adequate procedures” may require more than 30 days’ notice. (*Council Brief* at 8). This is bare conclusion and speculation. The Council provides no statutes, case law, or other source of law for its contention that 30 days’ notice was not “adequate.” As such, I find the Council’s argument lacking.

## **B. Adequacy of 30-Day Comment Period**

The Council's next argument is that under the circumstances of this case, the 30-day comment period was not adequate. In its brief, the Council observes, "There were voluminous documents to be reviewed, based on twenty years of activities since the time the application was filed." (*Council Brief* at 9). Indeed, the ACHD provided more than 2,000 documents to the Council two days before the deadline for public comment. (Ex. A3).

Though the number of documents was voluminous and the turnaround period was tight, there is no indication that the ACHD's actions violated applicable regulations. The Council does not cite to any legal authority to suggest that the ACHD violated federal "adequate procedures" requirements by holding a 30-day comment period for the Allegheny Ludlum Title V Permit.

As an ancillary point, the Council complains that the ACHD scheduled the public hearing on Halloween, which is "celebrated throughout the United States as a family event." (*Council Brief* at 9; H.T. at 140). Although Tim Curry may be right that "anything can happen on Halloween,"<sup>2</sup> that "anything" does not include a day off for most workers. If the ACHD had scheduled the public hearing on Christmas, Yom Kippur, or Thanksgiving, that would be one thing. But most people do not get a day off on Halloween, unless it falls on a Saturday or Sunday. Halloween 2016 fell on a Monday.

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<sup>2</sup> *The Worst Witch*, Dir. Robert Young. Perfs. Tim Curry, Fairuza Balk, Diana Rigg, Charlotte Rae. Central Independent Television, 1986.

### **C. The ACHD's Reasons for Not Extending the Comment Period**

The parties also disagree as to why the ACHD decided not to grant the Council's extension. The Council argues that the ACHD denied the extension as part of an unlawful blanket policy against granting extensions. (*Council Brief* at 12). The ACHD counters that JoAnn Truchan, ACHD's Section Chief of Engineering and Permitting in Air Quality, denied the permit because the Council did not "give a good technical reason for why that would require a 90-day extension." (*Allegheny County Health Department's Post-Hearing Memorandum in Opposition to Appellant's Notice of Appeal* ("ACHD Brief") at 10; H.T. at 197).

The ACHD has the better argument. The Council seizes on Ms. Truchan's "technical reason" response, claiming it violates federal "adequate procedures" requirements for public comment. (*Council Brief* at 16). There are two problems with the Council's reasoning. First, the Council does not draw any legal nexus in their brief between Ms. Truchan's "technical reason" response and federal regulations on adequate procedure requirements. The Council merely begs the question.

Second, in this context, when Ms. Truchan referred to a "technical reason," it is fair to infer that she meant a specific reason that was unique to this case. This is borne out by her testimony shortly before her statement that she denied the permit because the Council did not give a good technical reason. Ms. Truchan testified that she extended the comment period in a previous case because the permit at issue



involved a new technology that did not exist in the United States at that time, and the parties were given to weeks to examine the technology. (H.T. at 188).

Here, there was no reason for the extension that was unique to this case. The reason the Council wanted an extension was to have more time to “review voluminous documents[.]” (*Council Brief* at 10). That is not a reason specific to the Allegheny Ludlum steel mill, the permittee at issue here.

## **II. The ACHD Did Not Apply an Unlawful “Binding Norm.”**

The Council’s next argument is that the ACHD’s denial of the extension request constitutes an unlawful “binding norm” under Pennsylvania law. (*Council Brief* at 17). The Council cites *Dept. of Env’tl Resources v. Rushton Mining Co.*, 591 A.2d 1168, 139 Pa. Commw. Ct. 648 (1991) for the proposition that the ACHD applied an unlawful blanket policy against granting extensions.

In *Rushton*, the Commonwealth Court held that the Department of Environmental Resources (“DER”)’s attachment of a series of standard conditions to coal mine activity permits constituted a regulation, rather than a general policy statement. 139 Pa. Commw. Ct. at 663. Because these conditions were regulations, and were not promulgated pursuant to the Common Documents Law, the DER lacked the statutory authority to issue them. *Id.*

The *Rushton* court emphasized the difference between a regulation and a general policy statement. A regulation is a rule which establishes a “binding norm,” meaning that it “establishes a standard of conduct which has the force of law.” *Id.* at 657 (citing *Pa. Human Relations Comm’n v. Norristown Area School*, 374 A2d 671

(Pa. 1977)). A general policy statement, by contrast, does not establish a binding norm; it merely “announces the agency’s tentative intentions for the future.” *Rushton*, 139 Pa. Commw. At 658. A key practical difference between regulations and policy statements is that regulations do not afford agency employees discretion in application in individual cases. *Id.* at 659.

Here, the Council contends that the ACHD’s refusal to extend the comment period was a binding norm because it was part of a “blanket policy against extensions[.]” (*Council Brief* at 19). In support of its argument, the Council focuses on an email from ACHD lawyer Jason Willis, stating that the ACHD was “disinclined to extend” the comment period. (*Council Brief* at 18; Ex. D3).

But even if one takes the Council’s argument at face value that the ACHD’s disinclination to extend the comment period “was the essence of its response,” (*Council Brief* at 18-19) the Council’s binding norms argument falls flat. This is because a disinclination is a reluctance, not a refusal. Although the ACHD generally has a policy against granting extensions of comment periods, ACHD officials still have discretion in deciding whether to grant an extension in each case. The testimony by JoAnn Truchan illustrates this:

“Q (by Mr. Welde): Okay. Did you analyze and weight the circumstances and the reasons for the extension request?”

A: (by Ms. Truchan): Yes...After receiving Ms. Calderazzo’s e-mail, I reviewed the circumstances, I reviewed the permit, and I sent an e-mail to Sandra Etzel, who was the former Section Chief of Permitting and Engineering, and Jayme Graham, who is the head of Air Quality, to let them know my recommendation and to ask

their advice on how best to approach answering Ms. Calderazzo's email." (H.T. at 161, 163).

The testimony from Ms. Truchan indicates that she had the discretion to grant or deny the request as she saw fit. Thus, the ACHD's disinclination to grant extensions is a general policy statement rather than a de facto regulation with a binding norm.

### **III. The ACHD Did Not Violate the Environmental Rights Amendment.**

The Council's final argument is that the ACHD's denial of its extension request violated the Pennsylvania Constitution's Environmental Rights Amendment (the "Amendment"). I find this argument unpersuasive. The Environmental Rights Amendment reads:

"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." Pa. Const., Art. I § 27.

Although the Amendment emphasizes the importance of environmental protection, the Council has cited no case law, statutes, or other legal source suggesting that the ACHD's denial of an extension of the comment period in any way runs afoul of the Amendment.

In fact, leading case law on the Amendment indicates that courts interpret the Amendment narrowly, and are generally disinclined to find that Commonwealth agency actions violate the Amendment. *See, e.g., Payne v. Kassab*, 312 A.2d 86 (Pa.

Commw. Ct. 1973); *Concerned Residents of the Yough v. Dept. of Env'tl. Resources*, 639 A.2d 1265 (Pa. Commw. Ct. 1994).

Pennsylvania courts have held that agency actions generally comply with the Amendment as long as the agency complies with all applicable statutes. *See Snelling v. Department of Transp.*, 366 A.2d 1298 (Pa. Commw. Ct. 1976). *See also* Widener University Environmental and Natural Resources Law Clinic, *A Citizen's Guide to Article I, § 27 of the Pennsylvania Constitution* (2010).

The bottom line is that the Council has shown no connection between the Amendment and the ACHD's denial of its request for an extension. Because I have found that the ACHD has not violated applicable statutes and regulations, it has not violated the Amendment, per the framework outlined by Pennsylvania courts.

## **CONCLUSION**

Based on the evidence presented during the Hearing, I find that the ACHD's denial of the Council's request for an extension of the comment period did not violate federal or state law, or the Pennsylvania Constitution.

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Max Slater, Esq.  
Administrative Hearing Officer  
Allegheny County Health Department

### Copies Sent To:

*Counsel for Clean Air Council:*  
Ernest Logan Welde, Esq.  
135 S. 19<sup>th</sup> Street, Suite 300  
Philadelphia, PA 19103

*Counsel for ACHD:*  
Jeffrey Bailey, Esq.  
301 39<sup>th</sup> Street, Building 7  
Pittsburgh, PA 15201