Stopping Polluters with Local Ordinances in Pennsylvania

affordable, democratic, grassroots legal solutions where the people power is

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This report and related information available online at
www.EnergyJustice.net/ordinances

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NIMBY vs. NIABY

This toolbox is not about helping "not in my backyard" (NIMBY) groups, but helping groups take a "not in *anyone*'s backyard" (NIABY) approach. If a polluting industrial facility is not acceptable for one community, it's not ethically acceptable to advocate for it to be built elsewhere. Usually, we're helping groups evolve from NIMBY to NIABY mode.

Evolving to NIABY mode includes gaining an understanding of how the polluting industry is often unnecessary, and of what the best alternatives are. Some of the best support you'll get comes from others communities who have "been there and done that," and it's important to extend this solidarity to other communities if you expect to get this sort of help. We strongly encourage community groups to reach out and serve as allies to other communities that may be targeted next, if the same company tries again elsewhere. We offer networking opportunities like email discussion lists specific to certain industries, and can provide you contacts in other communities where they've dealt with the same company or type of facility.

There is a strong history of stopping a bad project in one place, then helping the next community stop them again until they give up altogether. In the aggregate, grassroots environmental justice activism is not about reshuffling the deck chairs on the Titanic, but has been successful at knocking out 50% or more of entire waves of industrial development in recent decades. In some industries, like proposed trash incinerators, the success rate is over 99%.

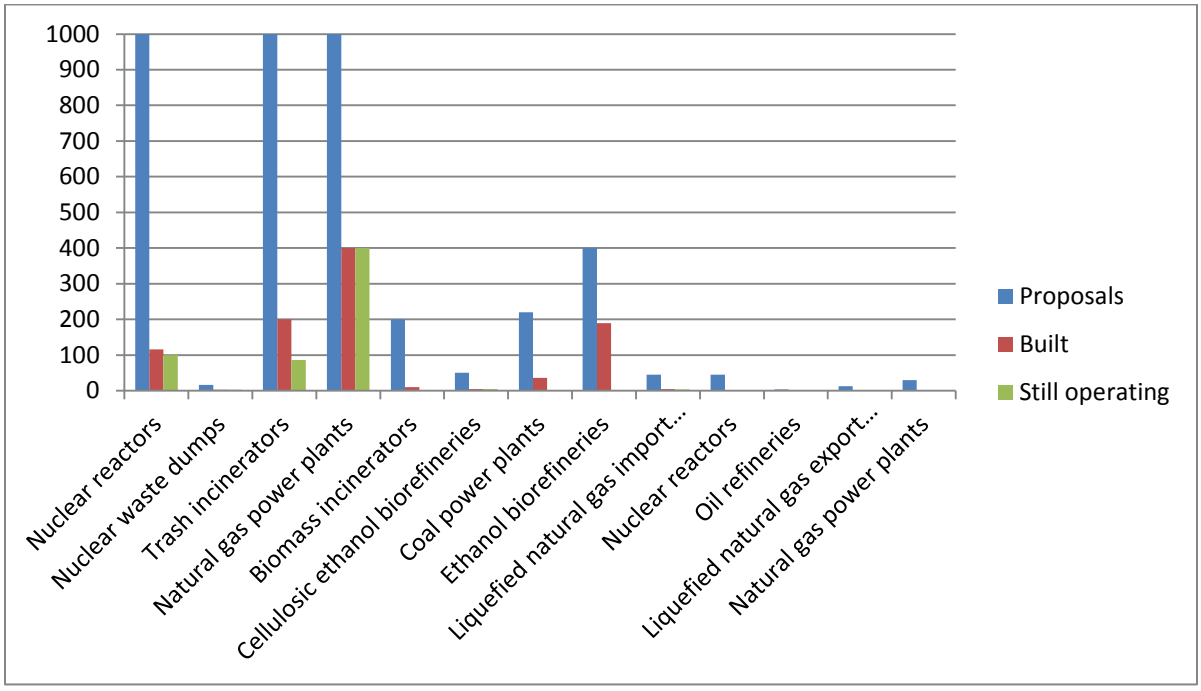
It is with this understanding that our approach does not include zoning approaches that push polluter from one part of a township to another unless such approaches truly prevent the polluting facility in the jurisdiction altogether.

The Power of Grassroots Resistance to Dirty Energy

50-99% of various waves of proposed dirty energy development since the 1970s have been crushed by well-networked grassroots community activism

Years	Technology	Proposals	Built	Still operating
1970s	Nuclear reactors	Goal: 1,000 by 2000	116	99
1980s-90s	Nuclear waste dumps	16	3	3
1980s-now	Trash incinerators	*1,000*	*200*	80
1995-2005	Natural gas power plants	*1,000*	400	400
1997-now	Biomass incinerators	*200*	*10*	
2000-now	Cellulosic ethanol biorefineries	*50*	*5*	*5*
2004-2012	Coal power plants	220	36	
2005-2008	Ethanol biorefineries	400	189	
2003-2013	Liquefied natural gas import terminals	45	5	4
2004-now	Nuclear reactors	45	0	0
2006-now	Oil refineries	4	0	
2008-now	Liquefied natural gas export terminals	30	2	
2011-now	Natural gas power plants	*300+*		

Many numbers are rough estimates, especially those in italics.



Why Local Ordinances?

There is a long history of successful community opposition to polluting industries, especially in stopping proposals before they're built. This is true for a range of polluting industries, including:

- nuclear facilities
- coal, oil and gas power plants
- oil and biofuel refineries
- landfills
- biomass and waste incinerators
- crematoria

How to lose

Before discussing how to win, it's important to understand how most grassroots community groups lose, when fighting proposed industrial polluters.

The formula goes like this:

1) Local group gets organized to fight facility
2) Group realizes that there are technical and legal issues, such as local zoning approvals and state environmental permitting processes
3) Group members attend local and state hearings, testify, get ignored and see permissions granted no matter the quality of the testimony
4) Group hires lawyers to appeal decisions
5) Group members sit back and disengage, assuming that lawyers fire silver bullets and will win the day, and feeling unqualified to help
6) Grassroots fundraising drops away as members disengage, and group loses ability to see legal battle through to completion
7) Having no local political strategy to keep people engaged, group drops down to one or a few people trying to remain as watchdogs, without a strong base or means to win

Even where groups manage to keep their lawyers and expert witnesses funded through to completion of a legal battle, it's uncommon for groups to win, since the zoning and regulatory systems are not designed to ban polluting industries. To the contrary, these legal regimes were developed within a corporate-influenced political system to allow for all sorts of polluting facilities to exist within certain parameters. Sometimes you can get lucky and find a silver bullet within existing

rules that knocks them out of the park. More often than not, the remedies in the regulatory system just allow you to get a slightly less bad version of what you'd rather not have at all.

For this reason, it's important to write your own rules – at the local level, where the people power is.

Two ways to win…

The two most common ways that grassroots groups stop proposed polluters are:

Appeal state permits until company gives up and investors walk away	**Community gets local government to stop it**
Very expensive	Affordable
Highly technical	Accessible
Takes place in distant courtrooms	Takes place in local town hall
Disempowering	Empowering
Community members disengage	Community gets engaged
Plays within existing rules that allow pollution	Can write new rules to stop pollution
Does not build power	Builds power for future local victories
Hard to provide this sort of legal support to all the grassroots groups needing it	Easily replicable; can support many grassroots groups with this strategy

The first (expensive) route is risky. Permit appeals rarely actually win. It's the delay that kills projects when investors walk away. The risk is that – as community members disengage, expecting lawyers to handle it – groups often lose their ability to fundraise to keep the legal challenge going and then lose altogether.

If your group is resourced enough to tackle both a legal challenge *and* the local politics, that's great, but if you have to choose where to allocate resources, your best chances are usually at the local political level. This is usually true no matter how corrupt and hopeless things might seem in local government. It's not easier at the state or federal level.

Stopping projects at the local level:

Most projects that are stopped at the local level are stopped through zoning approaches or other powers that local governments have over land use. This toolkit is focused on another approach: ordinances. However, let's cover a few points about zoning first.

Local governments have quite a bit of power over land use, especially if they've adopted zoning. More rural communities are less likely to have zoning and may be politically adverse to it where there are strong, libertarian "don't tell us what we can do with our land" attitudes.

However, even in such areas, local ordinances (without adopting full-blown zoning) can create set-back distances between polluting industries and residents.

Where there is a zoning process, it will take place before a Zoning Hearing Board that is appointed by the local elected officials. This board is quasi-judicial and will have its own solicitor (lawyer), different than the one representing the municipality. If there are hearings before a Zoning Hearing Board, sign up as a party in the proceeding and testify to whatever you can (especially if you see reasons why what they want to do doesn't fit within the zoning ordinance, and you feel they don't deserve a variance or special exception). This will preserve your right to appeal the decision later, should it come to that.

Two types of power

There are two types of power: money power and people power. The other side will always have more money power.

Our power is that we have the truth on our side, and with that truth and good outreach and organizing, we can build people power. People power can often overcome money power.

Don't get them confused and try to fight money power with money power (your experts vs. their experts). They'll always have more than you do. This is why many legal-heavy organizing approaches lose.

What brings bad ideas to your community is not that they have the science and truth on their side, but that they have money and politics on their side. It's important to fight money power over politics with people power over politics.

Truth isn't enough. Don't expect that you can dump a pile of documents on the desk of those in power and expect that the truth matters, whether in local government, in court, or in state agencies. Without the people power to back it up, facts sadly don't matter. They aren't enough.

Winning with local ordinances

The local ordinance approach is a powerful way to win, as it involves setting stricter standards than state and federal laws. If the ordinance is drafted properly, if passed, there's a good chance that it'll succeed.

Local ordinance approaches are more compatible with grassroots organizing for several reasons:

1) It's more affordable. Rather than doing endless bake sales to fund lawyers, it takes minimal legal support to draft a good ordinance, and if it's adopted, the legal costs are socialized, as the municipality is the one to defend it. If they have legal liability insurance, those costs are covered by insurance. In other cases, non-profits like Energy Justice Network can assist in defending ordinances they draft and recommend.
2) It's accessible. It keeps the battle in the community, where you can engage the public to pressure your local politicians, rather than having a technical and legal battle focused in distant courtrooms.
3) It's empowering. Getting more protective laws passed locally is a victory that people in the community can own, and can apply to future cases should they come up. It also builds power and clout for future local campaigns in the community.
4) It's replicable. It's not hard to take a local ordinance in one place and customize it for another community. In this sense, it's relatively easy to get help from non-profits providing this kind of support. However, asking larger environmental groups, environmental law clinics or other legal providers for help in appealing permits is like pulling teeth. It's not unusual to ask as many as ten organizations that provide free legal help on environmental matters and to be turned down by all ten. It takes a lot of resources, and groups providing this sort of support can only do so for a limited number of cases.

Winning before you win

Just like victories in permit appeals often come before the appeal is even decided, a campaign for a local ordinance can result the same way.

The key to a victory is often delay. New projects need investors. Investors are averse to risk. Smaller companies are particularly vulnerable – especially the ubiquitous LLCs that have no history, but aim to line up permits before selling out to larger companies.

Investors can be kept at bay with political or legal uncertainty. If a permit isn't settled due to an appeal, investors will usually wait until the appeal is resolved. Similarly, if politicians are considering adopting more protective laws, or if an initiative process is underway to put such laws on the ballot, investors will shy away until that threat goes away.

Knowing that local governments can trip them up, some companies have given up just because they see that local officials aren't on their side. Creating uncertainty by running candidates opposed to the polluting company can also keep investors away until they know that the local politics are securely in their favor.

For these reasons, campaigning for a local ordinance, including potentially running for local office, is important to keep the investors uncertain. Doing so forces you to do the sort of organizing that could cause you to win a different way than expected, so don't give up on the idea just because it seems you can't win over (or take over) your local government.

Before we go into how to get an ordinance passed, it's important to evaluate which local government is involved and understand the nature of municipalities and counties in Pennsylvania. Usually this is clear, but don't assume it always is.

Step one is to figure out the exact footprint of the project you're fighting. Is it all squarely within the borders of one municipality, or does it cross into another municipality? Are there pieces of related infrastructure that cross into other municipalities? Perhaps there are pipelines or roadways or rail infrastructure that need to be used or built which go through neighboring municipalities. For reasons explained in the section under preemption, it's not so easy to go after pipelines, roads or rail transportation, but sometimes there are options. One option that has been used in Pennsylvania before is to set weigh limits on local roads that trucks going to a landfill need to use – limits which can be adopted by a neighboring affected municipality that doesn't have anything to lose, and isn't seeing the tax benefit (or host fees) that the host municipality may be dazzled by.

For every municipality where the footprint of the project exists, those municipal officials are your most important target. County legislatures can also adopt ordinances, and where they're more friendly than the local municipal officials, it could make sense to work for an ordinance at the county level. That often requires organizing a lot more people, though, so it's usually best to focus on the municipality.

Resolutions vs. Ordinances

Ordinances are laws with general rules of continuing effect. Resolutions deal with specific matters such as authorization of contracts, salaries, appropriations and budget transfers. A resolution, when it's not used to authorize certain municipal actions, are non-binding statements without the force of law. It basically is an expression by the governmental body of what they think. Ordinances are legislative acts, which have the force of law.

While this toolkit focuses on ordinances, it's worth pointing out when a resolution could be appropriate. Resolutions are easier to get passed, as they don't carry the same risk of being sued. They can also be easy to get passed because it allows the elected officials to make it look like they did something even though it doesn't carry the weight of law, like an ordinance.

Resolutions can be useful to politically influence other levels of government, like passing a resolution urging the county, state or federal government to take a certain action. They can also be used to scare off an unwanted polluter. For example, with a resolution that spells out some reasons why the local government doesn't think that a nuclear waste dump in town is a good idea, it might be enough to scare off the company, since they'd realize that if there are the votes for a resolution, then the same elected body could potentially pass a restrictive ordinance or disapprove a request by the company.

How to get an ordinance passed

There are two ways to get a law passed: by the elected officials voting to adopt it, or by bringing the matter directly to the voters through an initiative petition in the rare places where such rights exist. If you're lucky enough to be in a place that has an initiative process, and if your local officials are not completely cooperative, exerting your right to an initiative is a great way to go. If not, you can skip this section and go straight to the section on getting your local officials to pass it.

Initiative & Referendum (I&R)

In most places you must secure the cooperation of the local legislative body (Council, Supervisors, Commissioners) to get an ordinance passed. But in more than 50 municipalities (plus a handful of counties) there's another way! They have the right of citizen Initiative & Referendum (I&R) written into their Home Rule charters.

Referendum is (usually) a method for citizens to nullify or change an ordinance that the local legislature recently passed. Referendum efforts must be started very promptly after passage (usually within 10 of passage of the ordinance) and there is relatively little time in which to collect the signatures (as little as 10 days in some places, as much as 60 days in others).

Initiative is (usually) a method for citizens to propose and pass a new ordinance without having to rely on the cooperation of the local legislature. They collect signatures from their fellow residents, present the petition to the municipality and if the council doesn't want to pass it themselves, it goes to the ballot.

There are some restrictions on the subject matter of I&R. Common off-limits subjects are budgets, capital projects, appropriation of money, levy of taxes, and salaries of employees. Ordinances that are at odds with state or federal laws are pre-empted, of course.

The **process and details for I&R vary massively** among Home Rule Charters, so your first step is always to find the charter of YOUR muni and read it very, very carefully.

If a municipality has I & R, there are some fairly common elements in the process.

1. **Petitioners Committee.** A certain minimum number (usually 5, but as low as 1 and as high as 50) of "qualified electors" (i.e., registered voters in the muni) request a petition from the Clerk or Manager or Secretary. In a couple of places they'll charge you a small fee for their trouble. Sometimes you don't have to establish a petitioners committee in advance of petitioning; you just do it when you file the petitions.
2. **Petitioning Period.** You (usually) have a limited number of days during which to get signatures from qualified electors. It can range anywhere from

three weeks to three months. With a referendum it might be as little as 10 days.

3. **Signature Requirement.** The petition must be signed by a certain minimum number of qualified electors. Very seldom is this a set number, like 250 or 800 or 2,000. Normally you have to do some research and math to figure it out. You might need to calculate 5%-35% of votes cast for mayor or governor in the last local or general election. Or you might need to find out the number of registered voters at the last municipal or general election. Either way, you'll need to do research.
    a. Start with the county elections board. Contact info is available at http://www.votespa.com (Voting & Elections > Be Prepared > County Contact Information). If they're well organized, helpful and responsive they should be able to give you all the numbers you need. If they're not…
    b. Votes cast. Local newspapers might have published detailed breakdowns of election results.
    c. Registered Voters. Voter lists identify the municipality and the registration date. You can either persuade a candidate to part with the voter list that she used in the last election, or you can order a whole county's worth of voter info for $20. https://www.pavoterservices.state.pa.us/Pages/PurchasePAFULLVoterExport.aspx
4. **Amendment.** If you didn't have enough signatures when you filed, you might be able get a few more days to collect more.
5. **Notarization.** You must get each petition sheet notarized.
6. **Validation.** Some official or other checks that the signatures and notarizations are valid, and if there are enough signatures, then the clerk presents the petition to the governing body.
7. **Consideration.** The governing body may choose to pass the ordinance.
8. **Ballot.** If they don't, then it goes to the board of election to appear on the ballot.

Again (this cannot be overstated), each Home Rule Charter is different, and you must read yours thoroughly.

Allegheny County:
Bethel Park Borough
Clairton City
Hampton Township
McCandless Town
McKeesport City
Monroeville Borough
Mt Lebanon Township
O'Hara Township
Penn Hills Township
Pine Township
Upper St Clair Twp
West Deer Township
Whitehall Borough

Berks County:
Reading City

Blair County:
Tyrone Borough

Bucks County:
Chalfont Borough

Cambria County:
Johnstown City
Portage Borough

Centre County:
Ferguson Township

Chester County:
Coatesville City
Elk Township
Malvern Borough
Tredyffrin Township
West Chester Borough

Delaware County:
Chester Township
Middletown Township
Radnor Township
Upper Providence Twp

Elk County:
St. Mary's City

Erie County

Lackawanna County:
Carbondale City
Scranton City

Lebanon County:
Lebanon City

Lehigh County:
Allentown City
Hanover Township
Whitehall Township

Luzerne County:
Kingston Borough
Kingston Township
Nanticoke City
Wilkes Barre Twp

Mercer County:
Farrell City
Hermitage City
Sharon City

Montgomery County:
Cheltenham Township
Horsham Township
Norristown Borough
Plymouth Township
Whitemarsh Township

Northampton County:
Easton City

Venango County:
Franklin City

Washington County:
Peters Township

Westmoreland County:
Greensburg City
Latrobe Borough
Murrysville Borough

See Appendix D for a map.

The boilerplate Third Class City Code, in Section 1030, also allows for I&R, but it bans so many subjects, and the requirements are so onerous that this is nearly impossible for initiatives and a very formidable path for referenda:

- It takes ONE HUNDRED (100) qualified voters to even *request* a petition from the City Clerk.
- The petition is available only IN THE CITY CLERKS OFFICE, on business days (during at least 9am-7pm, how generous), where it must be signed, in person, in front of either the clerk or one or the clerk's two deputies.
- An initiative is available for only FIFTEEN (15) business days, and a referendum for only 10 business days.
- The minimum number of valid signatures is 20% of the votes cast for all mayoral candidates in the last mayoral election.

That last one is a common requirement, but good luck getting that many people to go so far out of their way in so short a timeframe. If the general citizenry is carrying torches and pitchforks to council meetings, you might have a chance at a referendum.

Timing considerations

If you want your initiative to be on the ballot within the next year, you have to plan carefully. Get out a calendar and a copy of your Home Rule Charter, and start counting backwards from Election Day. Here are a few examples of thing to look out for when calculating your timeline:

How many days in advance of Election Day does the election board need to receive the proposed ordinance?
Is there a requirement for a Court review of the petition?
How many days may Council sit on the petition before sending it to the election board?
Hoe many days does the Clerk have to certify the results before sending it to Council?
Do you get a chance to amend the petition and how many days are allowed for that?
How many days are allowed for petitioning?
How many days may the Clerk take to get a petition form to you after you request one?

In some places these are specified in detail, in others it may be unclear. When you add them all up, you'll probably realize that you need to start the process many months before your target Election Day.

Signature goals

How many signatures? Whatever your minimum requirement is, double it. Plan to get at least half again as many signatures as are required, and set a goal of getting twice as many. So if you need 3,000 signatures, aim to file with at least 4,500 and make sure that your volunteers' goal is 6,000. A good petitioner might expect to have a validity rate around 70%. A bad one could have a validity rate around 5% or worse, so training petitioners is very important.

Validity. The signatures most likely to be found valid have legible printing, the signature, name, and address all match their most recent voter registration, the date is in sequence with the other signatures on the sheet, and most importantly the person IS REGISTERED TO VOTE IN YOUR MUNICIPALITY.

Verification. If you have volunteers who are better with data than they are with people, and you've managed to get your hands on a voter list, it can be very useful to have them verify signatures as petitions start to come in. They can give the organizers a handle on what proportion of the signatures are invalid (and thus how many extra signatures will need to be collected). It can be useful to know which petitioners are doing a particularly bad job so they can get extra training or be redirected to another task.

Signature gathering tips

Petition in pairs. Pair up shy people with outgoing people, pair up experiences petitioners with beginners. Petitioning can be discouraging at times, and a buddy system can help keep people going.

Appearance. Ask your volunteers to dress so that they look approachable.

Materials. Make sure your volunteers are well equipped:

- Clipboard (with a large pocket taped to the back for fliers) or foamboard with 2 big rubber bands around it
- Several good writing pens
- Fliers or brochures explaining why people should sign the petition (in multiple languages if your community has non-English language populations)

- Voter registration forms
- Sign-up sheet in case they recruit people to help

Basic ways to circulate petitions.

1. Door-to-door (for greater efficiency, use a street list of registered voters)
2. Event tabling (get permission to have a table at community fairs, charity concerts, etc.)
3. Public crowds (sidewalk, playgrounds, outside of grocery stores, school sporting or music events, bus stops, anywhere people are standing in line.)
4. People you encounter in you daily life (family, friends, club & church members)

Local. Go to places and events that draw a high proportion of people who are residents of your municipality. 100 signatures gathered at a car show are not impressive if none of them are registered to vote in your town.

Rates. A good petitioner in a big, receptive crowd might get upwards of 30 signatures an hour. A good petitioner going door-to-door in a compact neighborhood when most people are at home might get 5 in an hour. Be careful not to overestimate the rate at which you can get signatures. Start early and go out often.

Petitioning at polling places. If your petitioning period happens to include an election day (whether primary, special or general) DO NOT WASTE THE OPPORTUNITY. Every person is a registered voter and they're coming to you! Make sure that you have a volunteer at every polling place, for at least the busiest hours (morning rush, & late afternoon through evening). Keep at least ten feet away from the entrance of the polling place, and ask voters to sign the petition on their way OUT, after they've voted.

Private property. If you are petitioning on private property, you might be asked to leave. Sidewalks are public, so as long as you don't block traffic you should be fine there. On the other hand, supportive business owners might invite you in to petition.

Alcohol. If you have a chance to petition at an event where alcohol is served, get signatures as people are going IN, while they're still sober, can sign legibly and won't spill beer on your petition.

Address. A person may be served by your Post Office, and thus think that they live in your municipality, but actually live in a different one. Or they may live in your muni but not realize it because they're served by a different Post Office. This is especially likely to be an issue in townships.

Names. Clerks have a lot of leeway when they are verifying the signatures that you've collected. They might disqualify any name that doesn't exactly match how they're registered to vote – nicknames, maiden names, middle name or initial , or Jr./Sr. might run afoul of a hostile Clerk. With that in mind, ask voters to sign exactly as they are registered to vote.

Legibility. The Clerk usually has a very short time in which to verify a huge number of signatures. If any names are hard to read, they might not pass muster just because the Clerk doesn't have time to devote to figuring it out. With that in mind, ask signers to print their names and addresses very legibly.

Cautions.
Don't alter what a signer has written, even to correct/add a date or complete an address – have them do it.
Don't remove the text of the ordinance from the petition. The signer must have the opportunity to read the proposed ordinance.

Train your volunteers. If there's anyone friendly to your cause who has prior petitioning experience of ANY kind - whether for political candidate campaigns, or issue advocacy – ask them to do a training for your volunteers. There's a lot about body language and use of your voice that can make a person's petitioning more or less successful. Each volunteer needs to develop a rap that's both accurate and easy for them to say. Role playing helps tremendously.

=*=*= Voice of Experience =*=*=

When approaching someone, slow down as you get closer to them, so that you're approaching in a confident, non-threatening, warm manner. Never have your hands behind you. Look onto their eyes as you approach, in order to make eye contact. If you have multiple people you're approaching, share eye contact with whomever is the first and easiest person to get eye contact with and hold it (don't shift between the people, or you might lose them all).

If they're walking somewhere, you need to slow them down so that they'll listen to you. It helps to use your body language and movement to signal to them that they should slow down. If you have to adopt their pace and walk with them for a few feet, do so, then start slowing down, which will cause them to slow down with you.

Wear a genuine, warm smile and start with a simple "hi" -- and if you need another second to grab their attention and slow them down, add a "how ya doing?" as you're still smiling and looking them in their eyes. If you're dealing with someone who is standing still, you can start with this verbal introduction even if you don't have eye contact yet. Even if they're facing away from you, they'll usually get the idea that you're talking to them and turn around to face you and listen. People who are standing still need to be approached more slowly than others.

Now that you have their attention, start with: **"Are you registered to vote in [X]?"** (Where X is the Borough, Township, City or County in which you are trying to get this ordinance on the ballot.)

Many people answer "yes" with relief, thinking that you are trying to register them to vote. If they answer "no" and don't have some elaborate excuse never to vote, you can pursue trying to get them registered, if you have registration forms. For the majority who say "yes," reply with, **"Great! We're collecting signatures from REGISTERED VOTERS who would like the chance to PROTECT OUR AIR on election day."** (Or whatever short phrase conveys the basic purpose of your ordinance.) Speak this part *slowly* and evenly and stress the parts in CAPS, because this is the crux of your message and your one chance to make this work or not. Slow down, speak clearly, maintain eye contact and a positive, genuine demeanor and make sure that the "registered voters" part registers with them (that's the transition from your initial question, connecting them personally to why you want THEM).

As you're saying all of this, have the petition-side of the clipboard facing them, so that it's obvious the entire time that all you want is for them to sign. As you're waiting for them to absorb what you're asking them to do, gently approach them with the pen and clipboard, so that you're almost handing it to them, making it easy for them to proceed.

After a couple of seconds pass, if they haven't clearly accepted or rejected your offer or asked you a question, follow up with more explanation, like the following sentence which can also be used when they're in the process of signing:

"We're trying to get a clean air ordinance for [our town] – the text is here." Point out where they can read it for themselves. If they're still somewhat hesitant, say **"this doesn't mean you have to vote for it, it only means you think that citizens should have the chance to see it on the ballot."**

When people are ready to sign, you'll need to walk people through the petition signing process. (Some petitions are well designed and some are not.) It usually goes something like this: "Sign here and print your name here.... print the address where you're registered to vote... and the date is seven - twenty - fifteen...." Gently take the petition from them, maintain eye contact and a warm smile and say "thank you... have a GREAT day!" ...or if they have friends/family in tow, turn to them and ask "would you like to sign as well?" [Having a "good" or "nice" day is overdone; a "great" day makes you seem more energetic and enthused.]

Signing or not signing is contagious. If one person in a group signs, others are likely to -- and vice-versa.

If they seem particularly interested, ask for their contact info.

Other tips during the signing process:

- Stand balanced. This may be unusual for some, but stand so that your legs are both straight rather than having one knee bent. This improves your posture and makes you seem more confident. Appearing confident is very important. Seeming unsure of yourself will be noticed and will make others unsure about signing.

- Don't say anything like "don't worry, this won't get you on any mailing lists or anything" unless THEY raise the concern. Otherwise, it makes it seem like you might be lying to them and you may be raising a concern for them that they don't

already have. In fact, don't say ANYTHING that could instill doubt or mistrust in you. Their trust in YOU is important for them trusting in your petition.

Have answers prepared for basic questions, for example:

* Why do we need this? – "Because a big polluting company might be coming to our area and our current ordinances aren't designed to handle that."

* Doesn't the state handle this stuff? - "The state allows municipalities to have stricter rules on air pollution." "Pollution laws aren't based on health standards, just on what polluters can afford to do."

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Getting your Existing Local Officials to Pass an Ordinance

In case you're sighing right now, thinking that your local government is the most corrupt and hopeless ever, and that they'd *never* pass an ordinance for you, please take a deep breath and read on. We hear this from all over, and it's not just your town. Corruption is endemic, and "good ol' boy" networks tend to run many local governments. This doesn't mean it's hopeless or that higher levels of government are easier. It just means that you have to be savvy, bold and organized to win – and that you may need to read on to the next section on running for local office (but don't skip this one, as it's a necessary step in the "kick the bums out" strategy).

The first step in any campaign is "ask nicely and get denied." If you ask nicely and get what you want, you're either extremely lucky or you're not asking for enough. The point is to make your demand and be able to document how you were shot down so that when you have to escalate the pressure, your escalation is justified by their refusal to be reasonable and protect their constituents, as you're demanding.

There isn't a specific order this needs to happen in, so if you already know your local officials and how to influence them, go with what makes sense to you and others you know who understand the local politics.

If you're just starting to figure it out, start with your local government meetings. Look up their website or call your town hall and find out what their public meeting schedule is. There will be a public comment toward the beginning or end of the meeting when you can get up and speak – usually for 2-5 minutes. Use this as an opportunity to voice your concern about the proposal. Don't expect them to take a position on the spot, though you can ask and urge them to state where they stand. Just know that they probably won't respond in that moment.

If you're just getting started, now is probably not the time to be asking them to adopt an ordinance yet. Your initial goal is to get the issue on their radar, letting them know that the public is concerned.

The more people who show up and voice concern, the better. Displaying people power is far more important than sharing factual information about potential harms, though both are important. Showing up regularly with an organized body of people can be very powerful. Some communities make up shirts or pins or

colored arm-band ribbons to wear to show who is there for your cause. The more diverse your group is (in every sense), the better.

Attend all of the general public meetings of your local elected officials as you can. They probably meet one, two or four times a month. Take notes on who they are and any statements they make that are relevant to your issue. Make sure you know their names and anything else that helps you understand them (their professions, who they listen to and take advice from, their hobbies and interests, etc.).

If you have the capability, videotape the meetings. This lets your officials know that they're being held accountable and can improve their behavior (after they get over it, as they may not like the idea at first, if meetings aren't normally videotaped). Some community watchdogs have been successful in plucking out particularly egregious excerpts of public meetings and posting the videos online for the community to see how their local officials act in meetings.

It'll be important to know your rights regarding public meetings in Pennsylvania. The Open Government Guide by the Reporters Committee for Freedom of the Press is an excellent resource. See: www.rcfp.org/rcfp/orders/docs/ogg/PA.pdf (and for other states, start at www.rcfp.org/ogg). The state guides cover open meetings as well as open records laws, and apply to all state, county, municipal and school board meetings and agencies.

One-on-one meetings with each elected official can be most effective. Pressuring them in public meetings before their colleagues can be challenging for the most well-meaning elected official if they haven't yet had a chance to really get educated on the matter. Make sure you have them educated about the problem, about your proposed solution, and what the ramifications are of passing a local ordinance. You need to get to where you have at least one local elected official to be your champion who will introduce the ordinance. Once you're there, you can then campaign to get the votes of their colleagues.

These individual meetings are important so that you know where each elected official stands. You need to see where your votes are, so you can get a majority. Sometimes you need a veto-proof super-majority in case where there's a mayor who is likely to veto the ordinance.

Based on your meetings, rank them all one to five. Give a one to those who will oppose you no matter what. Give a five to those who are fully on board and

willing to sponsor or co-sponsor your ordinance. Undecided and waffling officials get a three. Your aim is to work to shift each one a notch at a time toward a five. Work to get your opponents to a space where they're less adamant about it, or are neutral. Perhaps you can get some to abstain instead of vote against your ordinance. Work on the ones in the middle to get them willing to vote your way.

Power mapping

In any campaign, you have targets. Targets are the individual people who can give you what you want. In this case, these are your local elected officials. Then, in a community group exercise, you want to map out your secondary targets. The more people in your group meeting, the better, but stick to those you trust – don't invite half the town.

Secondary targets are the people who have influence over your primary target. This could be their spouse or other family members, their doctor, clergy, neighbors, friends, drinking buddies, business people, etc. Also, map out which of your local elected officials follow the lead of their fellow officials. Often you have power dynamics where one official will defer to another, perhaps following their leadership just on certain issues. Also, state legislators, Congresspeople, leaders of their local political party, or other people in the political world could be important secondary targets with heavy influence.

Campaign contribution research can sometimes be helpful here. At your county board of elections, you can research who gives campaign contributions to your local officials' campaigns. Sometimes people run as a slate and have a joint committee that helps get multiple officials elected at once. Regardless, figure out what their committees are, and who donates to them. You may be surprised. You probably won't find the company you're fighting in there (but sometimes you will!). However, you'll probably find developers, local law firms that work for the municipalities, and other politicians. Finding the other politicians might be the most helpful in doing power mapping.

Once you have these secondary targets mapped out for all of your elected officials, start mapping out who the members of your group have the most influence with. From these relationships, you can start building your campaign, understanding who should talk to whom, and what neighborhoods you should flyer or go door-knocking in first.

Good organizing covers many other bases. It could involve making and distributing yard signs and signs in local business windows, written petitions, call-in days, online action alerts that email your local officials (we can help you set those up), tagging your officials on social media (Facebook, Twitter) if they use them, letters to the editor of your local paper, rallies and more. Read some community organizing guides and speak to other organizers for ideas.

Overcoming resistance

There are some standard responses you should be prepared to respond to.

"We'll get sued and we can't afford it."

The solicitor's job is to be cautious and keep the municipality from being sued. Solicitors are not known to be creative and adventurous types, and they likely don't know this area of law unless it's closely related to zoning. Chances are, the elected officials will seek the advice of the solicitor, and the solicitor will tell them that it's risky and not to do it.

It's important to convince the solicitor that the ordinance is legal and will hold up in court if challenged. We can help you do that, if we're working with you on an ordinance.

It's also important to have a plan for if the municipality gets sued. After all, companies will sometimes sue even if they have no case… and it still costs money to defend. One important thing to have in place before pursuing a local ordinance is legal liability insurance. This is the coverage that pays the lawyers if a polluter tries to get the ordinance struck down in court. Most do already have it, but, especially if you are in a rural township that's never done anything exciting, it can't hurt to make sure.

It can also help defray legal costs if legal help is available from other sources. Any ordinances that Energy Justice Network drafts are ones that we're willing to help defend at a reasonably low cost.

In some situations, if the municipality is really cash-strapped and the residents are very organized and committed, with strong buy-in from the community, it can be worth having the community express that they're even willing to have their taxes raised temporarily if needed to have their municipality defend their

community from a grave threat to their health, environment and property values.

"You're asking us to do something no one has done before."

This is easy. Just point to other places that passed them. Between 2007 and 2013, three Pennsylvania communities passed local air pollution laws that we drafted, stopping proposed crematoria by holding them to stricter standards that the companies weren't willing to comply with. They were West Reading Borough (Berks County), Kulpmont Borough (Northumberland County), and Peters Township (Washington County). See www.actionpa.org/ordinances/ for more details. One of these (Kulpmont) was challenged in federal court with five constitutional claims, and the ordinance was upheld on all counts when the borough's legal liability insurance covered the legal defense. Many other sorts of local environmental ordinances have been passed by Pennsylvania municipalities over the years as well.

"You can't regulate them now that they've already applied for ____."

This is called "grandfathering." The concept applies in zoning situations, which is what local officials and solicitors are most used to. However, it does not apply to air pollution laws. You can have an air polluting facility up and running already and still adopt an air pollution law with requirements that apply to it. The state and federal governments do this whenever they apply new air pollution regulations to existing facilities.

"It's the state's job to regulate this. Don't you trust the DEP to do their job?"

Don't let them pass the buck. Politicians are famous for diverting responsibility to others. There's a reason why local governments are authorized by the state to do certain things, like adopt stricter air pollution laws. Some state and federal laws set floors, not ceilings, and local governments have the right and duty to protect health, safety and welfare of their residents (see Appendix A), and to preserve your right to clean air and pure water (PA Constitution, Article 1, Section 27).

The Pennsylvania Department of Environmental Protection (DEP) does not do an adequate job. It's valid and justified for local government to regulate industry more strictly in order to protect public health. DEP is notorious for

being favorable to industry, and laws are not protective when they do not require adequate pollution monitoring and are not subject to adequate enforcement and steep enough fines to change polluter behavior.

Bringing in outside experts can sometimes help persuade local officials. Lawyers or environmental consultants have usually been brought in to help advise on local ordinances. We can help advise your local officials if they need that sort of support to move forward.

Sometimes, the best way to influence your local officials, if they're not being cooperative, is to run against them. Entrenched elected officials understand one language: votes and whether their seat is at risk.

EXAMPLE: In 2007, we were working with a grassroots group we helped organize in Erie, PA to stop the world's largest tire incinerator from being built. By 2009, we had some traction to get a local air pollution ordinance passed. City council formed a committee to study it, and brought in speakers. We had a few favorable votes on city council. Out of seven council members, we thought we had three solid votes and might be able to get as many as five. We needed five to overcome the likely veto by the mayor. The local group ran anti-incinerator candidates in the 2009 primary election. Leading up to the election, we had seven out of seven votes (but the ordinance wasn't drafted yet). The threat that these elected officials might lose their seats over the tire incinerator was enough to get them to agree to vote against it by supporting the ordinance in development. However, after all of the incumbents won the primary election and defeated the activist challengers, support for the ordinance fell to two out of seven.

What we learned from this is that you can create windows of opportunity to pass an ordinance, even if you aren't likely to win by running for office. The possibility that you might win could be enough to buy you votes. Thankfully, in the Erie situation, the incinerator was defeated the next year through other means (a zoning challenge was part of it).

Replacing your local officials

Running for local office is an excellent tactic to win, and should be seriously attempted, even if you think you can't win, or if you can't take a majority in one election cycle.

Why you should run….

1) It talks to local officials in a language they understand -- their political future. They can ignore you forever if you're speaking before them, but not if you're challenging their seat directly.

2) It gets you media coverage you'd normally not get. You can hold a sign on a street corner forever and get ignored, but the moment you're a candidate, you're news.

3) It forces you to do the sort of organizing you ought to be doing anyway, in any campaign, and within a time frame: talking to lots of people one-on-one, whether at the polls or at their doors beforehand.

4) No matter how hopeless it seems, your chances of winning change are always strongest at the local level. It's far easier to win there than in the courts, in the state legislature, before regional commissions, or before the companies themselves.

One of the hardest parts can be finding people willing to run. If good people don't run for office, who will?

Sometimes people feel that they aren't qualified to be an elected official. If that's the case, have them attend public meetings and witness the local officials in action. Ask people to think about whether they can do a better job than those they see in the front of the room at these meetings. Sadly, in many cases, the answer will be an easy "yes."

Candidates need support. It takes time and money to run. It doesn't take huge amounts of money, compared to larger elections, but printing materials, making signs, distributing them… all takes time and money. It'll be easier to convince someone good to run if you can get them help getting copies donated, babysitting their kids, or whatever other sort of support they need.

Trust is also key. Make sure you're running people you know are in it for the right reasons. Opportunists abound, and we've heard numerous examples where local activists get someone elected, just to have them sell out once in office.

Learning how to run, and who to run against…

First, you need to know who is up for election and when. You can find this out at your County Board of Elections, or find it online through a state database, available here: http://munstatspa.dced.state.pa.us/EAOReports.aspx?M=L

In case that link stops working by the time you read this, try tracing this path. Go to www.newpa.com, then click on "Municipal Statistics" on the right side under "Popular Topics," then click on "Local Government Officials Information."

To be able to download the information, you must use Internet Explorer, and have to revert to the settings from an older version. To do that, go to the settings (gear icon on the upper right) and go to "Compatibility view settings." Add "state.pa.us" then close the window. Now it should work.

You can then type "Pennsylvania" in the top box if you want the entire state (or pick just the jurisdiction you want to find), then click the "view report" button at the bottom. You can then use the drop box in the upper right to download the data in Excel or other formats.

Note that, where the data says "year term ends," the previous year is when the next election will take place. So, if it says the term ends in 2018, the official's seat is next up for election in 2017.

Term are most commonly 4 years, but in second class townships, officials have six-year terms and they're staggered so that one seat comes up every odd-numbered year. In cities and boroughs, you can take a majority over in one year if the timing is right as, half the time, a majority of seats are up at one time.

Pay attention to what political parties are represented. Are they all Republicans? All Democrats? Evenly split? How are most voters registered? How many vote? What was the margin of victory in the previous elections? You can get most of this information, including a digital copy of a list of all voters in the municipality, from your county's Board of Elections. You can also contact us for access to voter database files, which we may be able to provide.

Since you want to try to win, run as a candidate in whatever party usually wins, even if you're a Democrat and you have to switch parties to run as a Republican. Parties don't matter so much on the local level, and putting up a real challenge is

more important than party affiliation. If things are evenly split, run in either, or get other candidates so that you can run people in both major party primaries.

Pennsylvania doesn't let people run as an independent or third party in the general election (except as a write-in) if they've already ran and lost in the primary election that year. So, if you run candidates in the primary and lose, try to have other people lined up to be able to run in the general election as an independent or third party candidate.

If you missed the February-March deadlines to gather signatures to get onto the primary election ballot, you'll need to run as an independent or third party candidate, anyway. Deadlines for filing signatures to get on the November ballot as a third party or independent are in the first few days of August. If you missed that deadline, you can still run as a write-in candidate. Pennsylvania election calendars can be found here: https://www.portal.state.pa.us/portal/server.pt/community/election_calendar/12721 or http://www.seventy.org/tools/elections-voting/2015-election/election-calendar

Write-in campaigns can win!

Two of the best examples both occurred in Pennsylvania boroughs in the midst of battles over proposed ethanol biorefineries in 2007.

Mayfield Borough

Northeast Ethanol, LLC sought to build an ethanol biorefinery in Mayfield Borough (Lackawanna County). We heard that a DEP hearing was coming up and tried to reach out to community leaders we knew in nearby towns to see if anyone was interested in fighting it. Hearing nothing, we went to the hearing and were pleasantly surprised to see a couple hundred upset residents filling the place. All were against the ethanol plant except for one guy who lived on the fenceline who wasn't sure. We distributed our factsheet about the environmental impacts of ethanol biorefineries and testified against the plant receiving a DEP permit. Asking one of the residents for some blank paper, we made a sign-up sheet and collected a few sheets of names of people willing to get organized to stop the project.

There were two local officials present, who were both against the plant, but were quite demoralized, as they were outnumbered on borough council. The other five

and the mayor were all for the plant. We looked up the spreadsheet we had downloaded of local elected officials in the state, and noticed that four seats were up in just two months. We reassured them that, with what we saw in that room, with so many upset residents and the upcoming election opportunity, they were not alone and it wasn't hopeless. It was September – after the August deadline – so any campaign would have to be as write-in candidates.

Residents organized and ran four people for the four seats, campaigning for those two months. In an off-year, when turn-out is usually low because there aren't the state and national elections that take place in even years, they had a record 2/3rds voter turnout and 2/3rds of the vote was for their slate of write-in candidates! They took over the borough in just two months. Once taking office in the new year, the new council instructed the mayor that all communications with the Northeast Ethanol had to come through the council, and they put an end to the proposal!

Curwensville Borough

Earlier the same year, we heard from a resident of Curwensville, PA (Clearfield County). He was concerned about a plan by Sunnyside Ethanol, LLC to build a waste coal burning ethanol biorefinery on a toxic waste site in the middle of town, across the tracks from his daughter's elementary school, and in a town that has thermal inversions that would trap pollution locally.

We visited for a week and worked with him to research the project, develop flyers and start reaching out to the community. Most people wanted it, willing to take anything for jobs. (What some residents may later have come to realize is that another ethanol refinery of the same large size was planned in Clearfield Borough, just eight miles away, and was the only one to be built in the state, just to be shut down for good within a few years, leaving a hulking useless industrial facility and no jobs.)

Like Mayfield, four of the borough council seats were up for election, but it was after the August deadline to get on the ballot as an independent or third party. Amazingly, only two of the incumbents were running for the four seats and two seats has no candidates on the ballot! Apparently, some of the incumbent council members didn't bother getting the tiny number of required signatures to get on the ballot, and just to get their buddies to write them in.

The resident we were helping out couldn't get anyone else to run, but launched his write-in campaign on election day, giving no one any warning. He worked the one polling place in town all day, seeking a two-year seat that was up, even though there were also four-year seats open. He ended up winning both the two-year seat **and** the four-year seat!

He took the four-year seat, but was still just one of seven council members, quite outnumbered on the ethanol controversy. However, in one critical meeting, where they barely had quorum and the company needed a local approval in time for a state permit process, he walked out of the council meeting, denying them quorum so that the vote couldn't take place. Had he stayed, he would have been outvoted. This helped contribute to the demise of the proposed biorefinery.

Types of groups you can try to reach out to

The more diverse a group you have, the better your chances to win. Politicians get more worried when they see unlikely allies working together on something. Organizing across racial lines is especially powerful, but challenging to pull off, considering the deep trust gap that exists for good reasons. Look through this list and brainstorm with your group about how it applies to your community. Drop these into a spreadsheet, and for each category, see if there are organizations in your area that fit. Make columns for the specific group name, contact people and their contact info, which person in your group is in charge of connecting with them, any notes you want to keep, and priorities or deadlines for initial outreach to take place.

You should try to customize the message to each audience to appeal to their interests, and send the most appropriate speaker should they be open to hearing a presentation. Contact us for help in customizing messages to various audiences.

- Anti-poverty groups
- Businesses and business associations / green business alliance (American Sustainable Business Council may be able to help you identify local companies: www.asbcouncil.org) / Minority and Women-Owned Business Enterprise Networks
- Chamber of Commerce (anyone with a business can join, go to their events, network and ask to speak)
- Churches/synagogues/mosques/temples/etc.
- Civic groups (Rotary, Lions Club, Elks, Masons, Kiwanis, scouts, etc.)

- Disability-oriented support groups (autism, learning disabilities, cancer, etc.)
- Environmental, watershed and conservation groups
- Farmers / agriculture organizations / community supported agriculture farms (find on www.localharvest.org/csa/) / farmers markets / urban garden networks
- Farmworker support groups and immigrant rights groups
- Homeowners associations / neighborhood ("civic" or "community") associations
- Other local governments in the area
- Physicians and medical / public health organizations
- Political parties (local, county or campus Democrat, Republican or Green Party groups, or even Tea Party groups that you can often appeal to on economic or land owner rights grounds if you pitch it right)
- Race/cultural identity-based organizations (Latino/a groups, NAACP, Jewish/Italian/Irish/etc. groups)
- School boards / parent-teacher organizations / colleges and universities
- Seniors groups
- Sportsman's groups (hunters, fishers...)
- Student organizations (find schools at www.campusactivism.org/searchschool.php)
- Taxpayer organizations
- Unions (teachers unions, Service Employees International Union locals, etc.)
- Womens' groups (especially including nursing groups)
- Youth groups

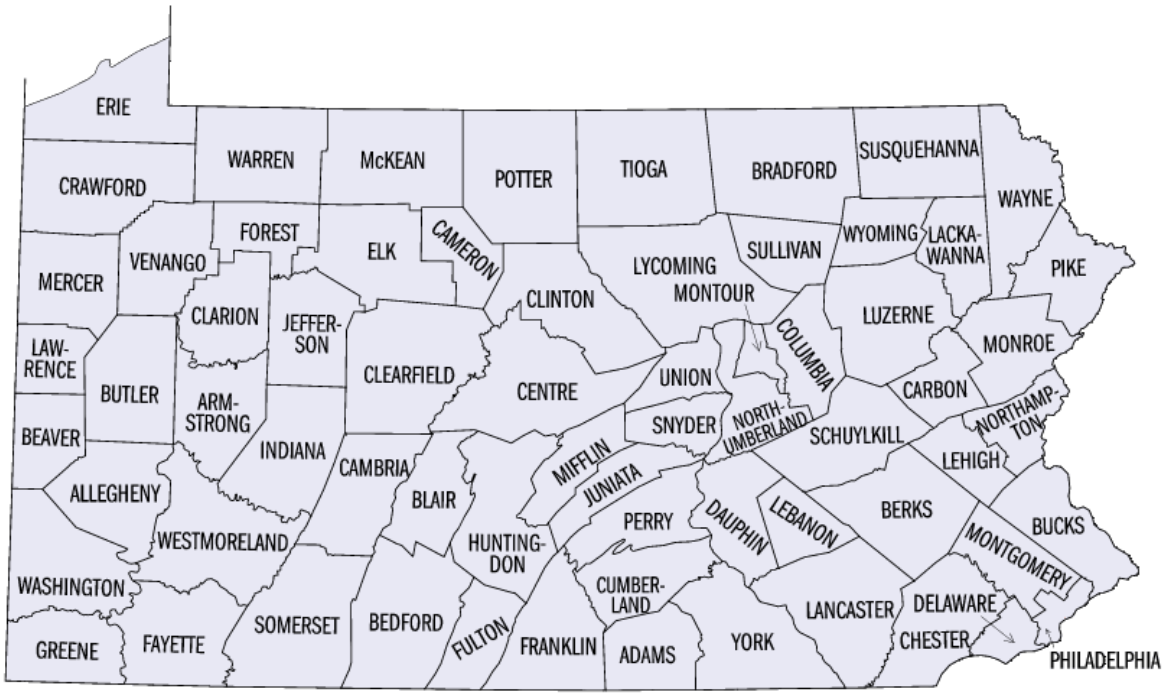
A Quick Guide to Pennsylvania's Local Governments

COUNTIES

County Commissioners Association of PA: www.pacounties.org 717-526-1010
County Code:
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1955/0/0130..HTM

Counties are the most basic subdivision of the state. Their responsibilities include conducting elections and maintaining voter rolls, running courts and juries, and law enforcement. Some counties might also take on other functions, for example: tax collection on behalf of smaller levels of government (municipalities, school boards, etc.), property assessment, public health and welfare administration, community colleges, libraries, hospitals, and development planning

There are 67 counties in Pennsylvania. Philadelphia County merged into the City of Philadelphia in 1952. Six others (Allegheny, Delaware, Erie, Lackawanna, Lehigh, Northampton) have County Home Rule Charters.



Counties are normally governed by three elected County Commissioners. Other elected officials can include three auditors or one controller, a treasurer, a coroner, a recorder of deeds, a prothonotary, a clerk of courts, a clerk of the orphan's court,

a register of wills, a sheriff, a district attorney, and two jury commissioners. Elected positions may vary a bit according to a county's class.

Instead of County Commissioners, the Home Rule counties elect County Councils and a County Executive.

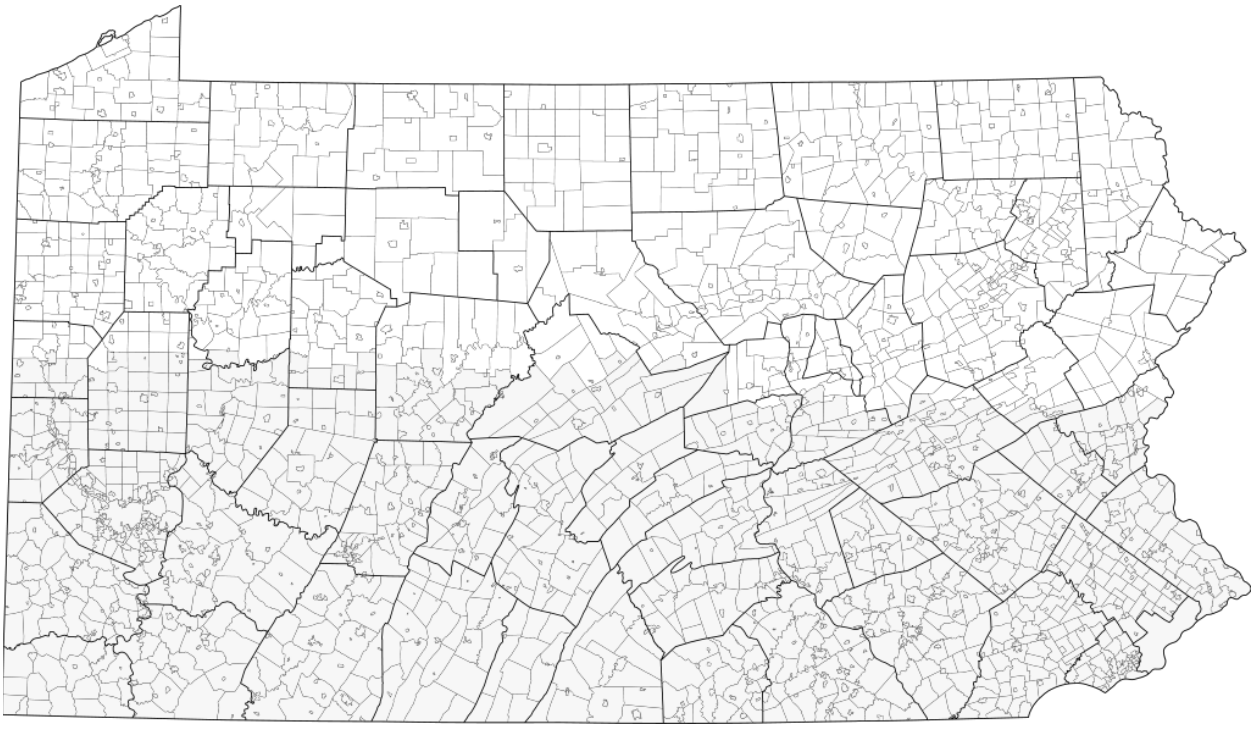
County Classes – Pop. Thresholds - #s as of 2015, *Home Rule Counties in italics*

First Class	1,500,000 or more	*Philadelphia*
Second Class	800,000 to 1,499,999	*Allegheny*
Second Class A	500,000 to 799,999	Bucks, *Delaware*, Montgomery
Third Class	210,000 to 499,999	Berks, Chester, Cumberland, Dauphin, *Erie*, *Lackawanna*, Lancaster, *Lehigh*, *Luzerne*, *Northampton*, Westmoreland, York
Fourth Class	145,000 to 209,999	Beaver, Butler, Cambria, Centre, Fayette, Franklin, Monroe, Schuylkill, Washington
Fifth Class	90,000 to 144,999	Adams, Blair, Lawrence, Lebanon, Lycoming, Mercer, Northumberland
Sixth Class	45,000 to 89,999	Armstrong, Bedford, Bradford, Carbon, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Greene, Huntingdon, Indiana, Jefferson, McKean, Mifflin, Perry, Pike, Somerset, Susquehanna, Tioga, Venango, Warren, Wayne
Seventh Class	20,000 to 44,999	Juniata, Snyder, Union, Wyoming
Eight Class	less than 20,000	Cameron, Forest, Fulton, Montour, Potter, Sullivan

MUNICIPALITIES

Pennsylvania Municipal League: http://www.pamunicipalleague.org/

Every bit of land in the state is also subdivided into municipalities. Mostly, municipal borders stay within the lines of county borders, but a dozen munis do straddle county lines (Bethlehem being the largest example). Thus, residents of Pennsylvania are subject to the powers of their municipal government, their county government, the Commonwealth of Pennsylvania, and the federal government (and also a school district).



Generally, a municipality in Pennsylvania is either a Township, a Borough or a City. State law provides several default municipal charters, but most cities, several counties, and a small minority of boroughs & townships have Home Rule Charters, Optional Charters or Optional Plans.

A Home Rule Charter is remarkable in that it allows the municipality to act in any way that's not specifically limited by state law. This allows significantly more leeway than all other forms of municipal government which may only act in ways specifically authorized by state law.

Just because a place has a name, post office, or a census designation does not mean that it is a governing municipality or legal entity.
Example 1: Boalsburg is an unincorporated village within Harris Township, Centre County.

Municipalities are generally responsible for providing local services like street paving and plowing, police & fire. A few townships in very remote parts of the state see their duties ending there, but most get involved in additional services such as water & sewer, parking & traffic control, planning & zoning, code enforcement, parks & rec, trash collection, libraries, health, and business licensing.

Muni. Classes – Pop. thresholds – numbers as of 2014 (*Home Rule in italics*)*

City First Class	1,000,000 or more	1 charter granted in 1951 by act of state legislature (*Philadelphia*)
City 2nd Class	250,000 to 999,999	1 adopted Home Rule charter in 1974 (i.e., *Pittsburgh*)
City 2nd Class A	80,000 to 249,999	1 adopted Home Rule charter in 1974 (i.e., *Scranton*)
Cities Third Class	Under 250,000 and **not** electing to become 2A cities.	1 charter granted in 1873 by act of state legislature (i.e., Parker City) 18 standard form (e.g., Bradford, Monessen, Pottsville, Washington) 11 Optional Charters (e.g., Bethlehem, Erie, Harrisburg, Lancaster) 3 Optional Plans (i.e., Altoona, DuBois, Hazleton) *20 Home Rule(e.g., Allentown, Chester, Reading, Wilkes Barre)*
Boroughs	Not population based	936 standard form (e.g., Chambersburg, Plum, Pottstown, West Mifflin) 2 Optional Plans (i.e., Quakertown, Weatherly) *20 Home Rule(e.g., Bethel Park, Norristown, State College)*
Townships 1st Class	At least 300 people per square mile and electing to become 1st Class Twp.	80 standard form (e.g., Abington, Lower Merion, Ridley) 1 Optional Plan (i.e., Bristol) *12 Home Rule(e.g., Upper Darby, Haverford, Penn Hills)*
Townships 2nd Class	Population density under 300 per sq mi. OR over 300 & not electing for 1st.	1,433 standard form (e.g., Lower Paxton, Lower Makefield, Warminster) 5 Optional Plans (e.g., Bensalem, Lower Saucon, College) *16 Home Rule (e.g., Tredyffrin, Horsham, Hampton, Ferguson)*

**Strictly speaking, since they don't operate under the Township/Borough/Third Class City Codes, they are not technically Townships/Boroughs/Third Class Cities in the eyes of the state, but "Home Rule Municipalities".*

TOWNSHIPS SECOND CLASS
Second Class Township Code:
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1933/0/0069..HTM
PA State Association of Township Supervisors: www.psats.org 717-763-0930

These are the more rural townships, with low population density and large land areas. They're less likely than other municipalities to have zoning and nuisance laws, so polluters may find them an easier target.

The Code specifies 3 or 5 supervisors, elected at large. Three is the default, but a resolution by the board or a petition by 5% of the electorate can get the question on the ballot to raise the number to 5 (or if already at 5 to reduce it to 3 again).

TOWNSHIPS FIRST CLASS
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1931/0/0331..HTM First Class Township Code
PA State Association of Township Commissioners:
www.pamunicipalleague.org 717-232-6540

These are located close to high population centers, and can be quite densely developed. Townships tend to have more land area than boroughs, so polluters with a large physical footprint are likely to be proposed in townships.

The Code specifies at least 5 commissioners for 1st Class townships:
without wards – 5 elected at large
less than 5 wards – 1 from each ward, the rest elected at large
5 or more wards – 1 from every ward

BOROUGHS
Boroughs & Towns Code:
http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=37
PA State Association of Boroughs: www.boroughs.org 717-236-9526

This is not a population-based classification in PA - the largest boroughs are much larger than the smallest cities.

Boroughs are more likely to have town centers and to be concerned with public services and nuisance prevention. Since they tend to have smaller land areas on

which to put sprawling development, you might have an easier time raising concerns about the effect of a polluter on the character and livability of the community.

The Code specifies 7 council members for boroughs without wards. Boroughs with wards have 1 or 2 members each.

THIRD CLASS CITIES
Third Class City Code:
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1931/0/0317..HTM

Generally speaking, cities were like boroughs in origin, but at a certain point they decided that a City form of government structure would be more beneficial for them.

Commission form has been the default form of city government in the PA Code since 1931. Elected officials consist of 1 Mayor, 4 or 6 Council members, 1 Controller, 1 Treasurer. The mayor is president of the council, and the 5 or 7 of them are called a Commission. Each council member is in charge of a city department.

> Aliquippa, Arnold, Beaver Falls, Bradford, Butler, Connellsville, Corry, Duquesne, Jeannette, Lower Burrell, Monessen, Monongahela, New Kensington, Pottsville, Shamokin, Sunbury, Uniontown, Washington.

Optional Charter. From 1957 to 1972 the state legislature made available to Third Class Cities an Optional Charter, which provided the choice of either a Mayor-Council form or a Council-Manager form. These forms shifted the administrative functions from the council members onto the elected Mayor or the appointed Manager.
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1957/0/0399..HTM

Mayor-Council form differs in that 5, 7, or 9 Council members are elected. The mayor does not sit on council, can veto ordinances (veto can be overruled by a 2/3 vote of council), is in charge of all city departments, and proposes the budget.

> Bethlehem, Erie, Harrisburg, Lancaster, New Castle, Williamsport, York.

Council-Manager form also has 5, 7, or 9 elected Council members, but there is no elected mayor. A manager is appointed by Council who is then responsible for executing the decisions of council and running the city departments.

Lock Haven, Meadville, Oil City, Titusville.

Special cases: Parker City was chartered by an act of state legislature in 1873, with an 8-member council and a mayor who chairs the council and breaks ties. Philadelphia was granted a Home Rule Charter by the state legislature in 1951.

Home Rule Charter and Optional Plans Law, passed by the PA legislature in 1972, opened up alternative forms of government to all municipalities and counties. A smattering of munis had already gotten the state legislature to give them non-standard charters – notably Philadelphia & Pittsburgh – but the vast majority of the 70+ Home Rule Charters in PA have been established under the terms of this law.

Almost a dozen have gone for Optional Plans, which do not provide for I&R. The law doesn't require I&R in Home Rule Charters either, but most municipalities going the Home Rule route have included it.

Hall of Shame

Home Rule does not guarantee a citizen right to Initiative & Referendum. What cities **didn't** put I&R in their Home Rule charters? Chester, Philadelphia, Pittsburgh, Pittston, Warren, Wilkes Barre.

SECOND CLASS CITIES

Second Class City Law:
http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1901/0/0014..HTM

There are two classes of Second Class City in PA: Second Class (that's Pittsburgh) and Second Class A (that's Scranton). Scranton doesn't even meet the population threshold anymore, but they haven't gone through the process to be reclassified as a Third Class City.

FIRST CLASS CITY (that means Philadelphia)
First Class City Home Rule Act:
http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1949/0/0155..PDF

Philadelphia would need an entire guide of its own. See the Committee of Seventy's website: http://www.seventy.org

A few other types of local government entities are good to know about…

SCHOOL DISTRICTS
Pennsylvania School Boards Association: https://www.psba.org/

The ~500 school districts in Pennsylvania are responsible for the public education of children in the K-12 grades. Their boundaries do not necessarily follow municipal boundaries. Some are within one municipality, others encompass municipalities (or parts of them), and they easily cross county borders. Every bit of land in PA is in a school district. They have taxing authority on property within their borders, and have elected boards.

AUTHORITIES
Municipal Authorities Law:
http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/53/00.056..HTM
Pennsylvania Municipal Authorities Association:
http://www.municipalauthorities.org/

Authorities are creations of a government (at any level) which are charged with a particular task or service, such as water, sewer, waste, housing, parking, transit, bridges, etc. Generally the service is an expensive one to build and maintain, and authorities have more flexibility for going into debt for capital projects than municipalities do. Waste authorities are the ones most likely to propose a trash incinerator. Redevelopment authorities may try to bring in any number of polluting projects to commercial or industrial zones.

Authorities have appointed boards, and considerable independence from the governments that created them, so they are not easily influenced by voters. Authorities have at least 5 board members. Authorities set up by multiple government bodies must have at least one board member from each body, so they might have more than five.

Preemption: What You Can or Can't Do at the Local Level

"Think globally, act locally." So goes the famous environmental maxim. Unfortunately, it's sometimes not legal to "act locally" depending on what state you're in, and what issue you're trying to tackle. In many states, county and municipal governments are prohibited from passing their own environmental laws. Pennsylvania is no exception.

To understand what is locally possible, one must understand the concept of preemption. Preemption doctrine is organized as follows:

Savings clause: language that preserves the rights of lower levels of government to act

Preemption:

- Express: language forbidding action by lower levels of government
- Implied: where there is no express savings or preemption clause and the court interprets the statute to be preemptive
  - Field preemption – court interpretation that the statute is so comprehensive that it "occupies the field"
  - Conflict preemption – court interpretation that a conflict exists such that a law at a higher level of government must trump the lower one because both are impossible to enforce simultaneously

For a local ordinance in Pennsylvania to be possible, it has to not be preempted by both federal and state law, and has to be within the realm of what is allowed by the state. First, a quick overview of key issues that the federal government allows, or disallows at the state or local levels:

Federal Preemption and Savings Clauses

Federal Government Authorization of State Regulation (Savings Clauses) [1]		
Air pollution (all but motor vehicles)	Clean Air Act	42 U.S.C. § 7416
Solid and hazardous waste management	Resource Conservation and Recovery Act	42 U.S.C. § 6929
Water pollution	Clean Water Act	33 U.S.C. § 1370
Federal Semi-Preemptive Clauses (preempting states in some areas, but not others)		
Toxic chemicals	Toxic Substances Control Act	15 U.S.C. § 2617
Protecting Non-Human Animals	Endangered Species Act	16 U.S.C. § 1535(f)
Coal mining	Surface Mining Control and Reclamation Act	30 U.S.C. § 1254(g)
Express Preemption (federal laws set floor and ceiling)		
Pesticide issues	Federal Insecticide, Fungicide, and Rodenticide Act	7 U.S.C. § 136v(b)
Air pollution from vehicles	Clean Air Act (motor vehicle emissions section)	42 U.S.C. § 7543(a)
Natural gas interstate pipelines, compressor stations and liquefied natural gas import/export terminals	Natural Gas Act (interstate shipment or import/export of gas)	15 U.S.C. § 717(b)
Implied Preemption[2] (courts interpret federal laws to set floor *and* ceiling)		
Nuclear facilities	Atomic Energy Act of 1954	42 U.S.C. §§ 2011-2296
Hazardous waste shipping	Hazardous Materials Transportation Act	49 U.S.C. §§ 1801-1812

You may have already experienced the frustration of not being able to locally control some of these things. Communities trying to stop interstate gas pipelines and gas compressor stations have already had to battle the Federal Energy Regulatory Commission (FERC), which has exclusive jurisdiction here (except on air pollution from compressors… more on that below). There has also been a lot

[1] The savings and "semi-preemptive" clauses are compiled neatly, and described more fully, in: Paul S. Weiland, "Federal and State Preemption of Environmental Law: A Critical Analysis," 24 Harv. Envtl. L. Rev. 237 (2000).
[2] The preemptive effect of the Atomic Energy Act of 1954 and the Hazardous Materials Transportation Act were found to be implied in *Jersey Central Power & Light Co. v. Lacey*, 772 F.2d 1103 (1985).

of frustration over the inability to locally do much of anything about Bakken crude oil trains that are so notorious for fires, spills and explosions that people are now calling them "bomb trains." The oil refineries in the Philadelphia area are now the largest destination for these crude oil trains, but no one has yet identified a local strategy to deal with them. On many nuclear issues, the federal preemption has also been a long-standing frustration.

Air and water pollution, and solid waste regulation are the main areas left open to states to regulate, though there are other possible realms to intervene as well. Much of this comes down to whether the *state* allows local governments to act in these areas. What does Pennsylvania allow its local governments to do? Air pollution regulation is the main avenue left open, though set-back distances and some other local approaches are still options. Before we get into specific examples of what can be done, let's look at how preemption works in Pennsylvania.

Understanding Preemption Law in Pennsylvania

Even where federal law allows stricter state laws, it's usually up to the state whether the local governments can be stricter than state and federal law. For this, we must understand state-to-local preemption.

Pennsylvania courts start with the presumption that local ordinances are valid. In 1993 the Commonwealth Court held that: "In analyzing a home rule municipality's exercise of power, an appellate court begins with the view that it is valid absent acts of the general assembly, or the charter itself, and resolves ambiguities in favor of the municipality."[3]

In Pennsylvania, express preemption must be explicit, with language that "specifically bars local authorities from acting on a particular subject matter."[4] Only where a state statute (law) is silent on the issue of preemption is it appropriate

[3] *McSwain v. City of Farrell*, 154 Pa. Commw. 523, 624 A.2d 256 (1993).
[4] *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598 (2011).

for a court to do an implied preemption analysis.[5,6,7] In doing so, if a statute does not express "monopolistic domination," compatible local ordinances are to be deemed acceptable.

In 1959, the Supreme Court of Pennsylvania set out one if its earlier pronouncements on state-to-local preemption in the Commonwealth, stating:

> "Where the Act is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the salutary scope of the Act, the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute's objectives."[8]

[The terms "Act" and "statute" refer to state laws, and "ordinance" refers to local laws.]

Pennsylvania's Supreme courts disfavors implied preemption, though lower courts haven't always obeyed this law of the land, as we'll see later.

Implied preemption, where the court decides that a local law isn't allowed because the state law "occupies the field" or is in conflict with the local law, should only be applied if the state law doesn't clearly allow or forbid stricter local laws.[9]

Pennsylvania's Commonwealth Court declared in 2005 that (implied) field preemption is inappropriate and that (implied) conflict preemption should not be found lightly:

> "It is the policy of the Pennsylvania courts to disfavor a finding of preemption 'unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected.' *** In fact, the General Assembly preempts a field only where the

[5] *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971).
[6] *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951).
[7] *Holt's Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153-54 (2011).
[8] *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 394 Pa. 466, 147 A.2d 326 (1959).
[9] In *Council of Middletown Twp., Delaware Cnty. v. Benham*, 514 Pa. 176, 180-184 (1987)

> state has retained all regulatory and legislative power for itself and no local legislation is permitted."[10]

Pennsylvania Supreme Court reviewed the Commonwealth's preemption law extensively in 2011, stating:

> "[T]he General Assembly must clearly evidence its intent to preempt. *** Such clarity is mandated because of the severity of the consequences of a determination of preemption. *** The General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking."[11]

Pennsylvania courts have not been inclined to find conflict preemption lightly. In 1971, the PA Supreme Court stated:

> "In determining whether, by the enactment of the specific statute, the Commonwealth completely barred a municipality's enactment of an ordinance relating to the same field, courts will refrain from striking down the local ordinance unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected."[12]

Pennsylvania Supreme Court further explains, in 2001, that "[c]onflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible."[13]

An ordinance establishing additional requirements is not a conflict and is not preempted unless it conflicts with a *purpose* of the state statute.[14]

Making all of this more complex, but in a good way, is the 2013 Pennsylvania Supreme Court ruling[15] that struck down provisions of Act 13. Act 13 took away

[10] *Hartman v. City of Allentown*, 880 A.2d 737 (2005).
[11] *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 609-10 (2011).
[12] *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971).
[13] *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 610-11 (2011).
[14] *Moyer v. Gudknecht*, 67 A.3d 71, 76 (Pa. Commw. Ct. 2013).

the ability of local governments to regulate the oil and gas industry, in order to overcome resistance to fracking. The Supreme Court held that the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) creates an obligation on all levels of government in the state to protect the people's rights to clean air and pure water. This was used to strike down express preemption in Act 13. It remains to be determined whether this decision may lead to finding that other PA laws with express preemption are invalid.

A more detailed analysis of preemption in Pennsylvania is outlined in the legal brief in Appendix B.

[15] *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (2013).

Environmental Preemption in Pennsylvania

Air Pollution Ordinances

Federal law allows the states to have stricter air pollution laws, and Pennsylvania's state air pollution law, in turn, allows local governments to have their own – even stricter – laws.

Most federal environmental laws have clauses that enable states to have stricter laws of their own – effectively setting a national regulatory "floor." The Clean Air Act (CAA), at 42 U.S.C. § 7416, allows states to have stricter air pollution laws than the federal floor:

> § 7416. Retention of State authority
>
> Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) **nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution**; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

This statute and case law flowing from it have made it clear that the federal Clean Air Act does not prevent states or local governments from adopting and enforcing air pollution laws that are stricter than federal laws and regulations. In 1975, the 8th Circuit of the federal court system stated that "States may adopt and enforce emission standards and control strategies even more stringent than the federal [air standards]" [16] and concluded that "the States are free to adopt limitations even stricter than the federal, and it cannot be contended that the States are limited in their implementation plans to doing no more than assuring that the national

[16] *Union Electric Co. v. Environmental Protection Agency*, 515 F.2d 206, 213 (1975).

standards are to be met and maintained."[17] This unambiguous conclusion was affirmed a year later by the U.S. Supreme Court, which concluded that "the States may submit implementation plans more stringent than federal law."[18]

The Clean Air Act does not necessarily give local governments a right to have stricter laws, however. Even though it plainly speaks of "the right of any State or political subdivision thereof to adopt or enforce" air pollution laws, political subdivisions of states are creatures of each state and only have this right if the state allows them to, according to two federal circuit courts. Those federal circuits do not include Pennsylvania and are not binding on Pennsylvania, but there is a good chance that if you rely on the Clean Air Act as your sole authority for a stricter local air law in Pennsylvania, the courts would follow these other decisions and decide that it's really up to the state.

This was addressed in 1990, when East Providence, Rhode Island had tried to block a proposed coal-burning power plant with a local law banning the commercial use of coal anywhere in the city. The U.S. District Court found that Rhode Island's state laws preempted the ordinance and that the Clean Air Act did nothing to save the city's ordinance:

> [T]he congressional finding that state and local governments should have primary responsibility for controlling air pollution (42 U.S.C. § 7401(a)), is not a grant of power to local governments. Local governments are subordinate to the states; any grants of authority must come from the state legislatures, not from Congress. Thus, this Court does not need to examine the federal law for the purposes of this decision, and will concentrate on Rhode Island's laws and regulations governing air pollution. If the state has preempted East Providence's Ordinance, its validity cannot be saved by a grant of authority from Congress.[19]

This unfortunate conclusion was reaffirmed in the 6th Circuit in 1993, when they stated that "nowhere does the CAA affirmatively grant local governments the independent power to regulate air pollution."[20] In that case, the city of Madison Heights, Michigan tried to stop a trash incinerator from being built in their city by

[17] *Id.* at 220.
[18] *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 265 (1976).
[19] *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828, 833 n.11 (1990).
[20] *Southeastern Oakland County Resource Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (1993).

passing a local ordinance. The city noted that the proposed incinerator would be within 100 feet of a community park, 300 feet of a school, 550 feet of a residential subdivision, and 700 feet of a senior citizens center.[21] Due to concerns for public health, the city passed an ordinance in 1990 to regulate the location of air pollution sources, including solid waste incinerators.[22] The court concluded that the ordinance was invalid because it was preempted by the state's solid waste management law and that the federal Clean Air Act did not give the city a right to have stricter air pollution laws.[23] Thus, the "right" that the Clean Air Act speaks of is not a right unless the state gives their local governments that right.

Thankfully, Pennsylvania has a savings clause that permits all counties and municipalities in the state to adopt their own air pollution laws that are as strict or stricter than the state's Air Pollution Control Act. The saving provision states:

> 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.[24]

A further provision in the code specifies that, for purposes of uniformity, the "the civil and criminal penalties and equitable remedies for air pollution violations" in any local ordinance must be the same penalties and remedies as the state law provides, and that if they are inconsistent, the state's provisions shall apply.[25] The state allows, and encourages, the "double-jeopardy" effect of polluters being fined twice – once by the state and again by the local government – spelling this out in the penalty provision, saying that "the purpose of this act is to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth."[26] In order to determine whether an ordinance is not less stringent than state law, the ordinance must establish emissions standards that can be compared with the state Air Pollution Control Act.[27]

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[21] *Id.* at 167.
[22] *Id.*
[23] *Id.* at 169.
[24] 35 P.S. § 4012(a).
[25] 35 P.S. § 4012(g).
[26] *Id.*
[27] *Ridgeway Zoning Hearing Bd. v. Buehler Lumber Co.*, 19 Pa. D. & C.3d 780 (1981).

The Air Pollution Control Act also contains provisions allowing first class counties (Philadelphia) and second class counties (Allegheny County) to have their own air pollution control programs that take on DEP's full role in air pollution regulation in those two counties. In fact, both counties had their own air pollution laws before there was a federal Clean Air Act or a state Air Pollution Control Act. Despite requirements that they gain state approval in order to be exempt from the state also regulation air pollution in those counties, the state never regulated air pollution in those two counties, even though their county air pollution programs weren't officially approved until 1998.

The need for DEP approval for air pollution control *programs* in these two counties has been used by industry to confuse a judge in Lehigh County, who ruled with the polluter that a local air pollution ordinance proposed for the City of Allentown is not legal because it constitutes a "program" and thus requires DEP approval. So far, this faulty decision only applies in Lehigh County until further legal action gets it corrected. See Appendix B for more details.

The provisions allowing all counties and municipalities to have stricter air laws, and the provisions pertaining to programs in the two largest counties, do not conflict with one another. Thus, municipalities in Allegheny County may use their authority to adopt more stringent laws than the county's law (which takes the place of the state's enforcement of its Air Pollution Control Act) and the federal Clean Air Act.

Waste Regulation Ordinances

The Resource Conservation and Recovery Act (RCRA) grants broad authority to states, allowing them to have stricter laws regarding solid and hazardous wastes. 42 U.S.C. § 6929, the section titled "retention of State authority" states:

> "[N]o State or political subdivision may impose any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by such regulations… Nothing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations…."

Pennsylvania's solid waste law is called the Solid Waste Management Act (SWMA).[28] There is no express preemption in the SWMA. It stated:

> (a) Each municipality shall be responsible for the collection, transportation, processing, and disposal of municipal waste which is generated or present within its boundaries….
> (b) In carrying out its responsibilities, any such municipality may adopt ordinances . . . for the storage and collection of municipal wastes which shall not be less stringent than, and not in violation of, the rules, regulations, standards, and procedures of the department….[29]

However, the Pennsylvania Commonwealth Court (and some federal courts, following their lead), has found field preemption numerous times, prohibiting local regulation of the operations of waste disposal facilities, falling back on this logic:

> Given the legislature's specific, detailed provision that municipalities may regulate the "storage" and "collection" of solid waste, the exclusion of "disposal" from the definition of "storage", and the obvious omission of any other permitted areas, we conclude that the legislature did not intend municipalities to have the power to regulate any aspects of the operation of a sanitary landfill.[30]

The provision of the law that sparked this court interpretation in the 1985 decisions was repealed three years later in the enactment of a state law on radioactive waste disposal and is no longer on the books.[31]

For the most part, courts have stated that local governments can regulate *where* a facility goes, but not *how* they operate.[32] A federal court summed it up saying that "when the land use in question is the management or disposal of solid waste, most local ordinances are preempted" by the SWMA.[33]

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[28] 35 P.S. §§ 6018.101-1018.1003.
[29] 35 P.S. § 6018.202, as quoted in *Monroeville v. Chambers Dev. Corp.*, 88 Pa. Commw. 603, 491 A.2d 307 (1985).
[30] *Monroeville v. Chambers Dev. Corp.*, 88 Pa. Commw. 603, 491 A.2d 307 (1985).
[31] 35 P.S. § 6018.202 was repealed by § 905(b) of Act 1988, Feb. 9, P.L. 31, No. 12.
[32] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987).
[33] *Phoenix Resources, Inc. v. Duncan Township*, 155 F.R.D. 507, 513 (M.D. Pa. 1994).

These court decisions came down repeatedly, even though Pennsylvania preemption doctrine is to not find field preemption if the statute is not explicit in its intent to preempt an area of law.

In a 2003 case,[34] the Pennsylvania Supreme Court finally came to accept that there is no field preemption that can be properly applied to the SWMA, but it was a narrow plurality decision (some judges agreed with the result of the case for different reasons), so technically, it's not binding precedent.[35] The primary legislative statement of the purposes of the SWMA is "to establish and maintain a cooperative state and local program."[36]

The courts still maintain preemption by (inappropriately) finding conflict preemption very lightly, even where it's not "impossible" to enforce both local and state law, as the standard goes. The decisions often find that there's a conflict if the local law is stricter or even duplicative of state requirements under the SWMA.

What local governments have been told they **can't** do

- Impose onerous conditions which will interfere with the day-to-day operation of a waste disposal facility.[37,38,39] Requirements cannot "stand as obstacles to the accomplishment and execution of the full purposes and objectives of the legislature" as expressed in the SWMA.[40]
- Regulate transportation, processing or disposal of municipal waste.[41]
- Require waste operators to obtain permits and pay user fees.[42]
- Require licensing for the disposal of sewage sludge on farm fields or in strip mines[43,44,45]
- Require stricter geological and engineering standards for landfills than the state sets.[46]

[34] *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*, 575 Pa. 479, 836 A.2d 912 (2003).
[35] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).
[36] Contained in 35 P. S. § 6018.102, as interpreted in *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*.
[37] *Southeastern Chester County Refuse Authority v. Board of Supervisors*, 118 Pa. Commw. 392, 545 A.2d 445 (1988).
[38] *Abbey v. Zoning Hearing Bd. of the Borough of E. Stroudsburg*, 126 Pa. Commw. 235, 559 A.2d 107, 112 (1989).
[39] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).
[40] *Id.*
[41] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987).
[42] *Id.*
[43] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003). The local registration requirement was deemed duplicative of the Pennsylvania Department of Environmental Protection's permit system, and a "substantial obstacle to the SWMA's goal of orderly and efficient land application of sewage sludge."
[44] *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*, 575 Pa. 479, 836 A.2d 912 (2003).
[45] *Greater Greensburg Sewage Authority v. Hempfield Township*, 5 Pa. Commw. 495, 291 A.2d 318 (1972).

- Set stricter pH requirements for land application of sewage sludge (prohibiting levels that DEP would allow is seen as a conflict and is preempted).[47]
- Refuse to issue, to suspend, or to revoke a site registration based on a violation of the Pennsylvania Department of Environmental Protection's (DEP's) regulations that have been incorporated into the local ordinance.[48]
- Regulate sewage sludge differently from how the SWMA does.[49]
- Regulate air pollution from solid waste facilities.[50,51] (Note: this is particularly ripe for legal challenge, considering the newer cases finding that field preemption does not apply to SWMA, and given that the Air Pollution Control Act authorizes stricter local air pollution laws)
- Regulate noise pollution, vehicle maintenance, and fencing at a landfill.[52]
- Regulate a landfill's hours of operation.[53,54] Note that another case found that regulating allowed hours of trucking is permitted (see below).
- Limit the design, capacity and size of waste disposal facilities.[55]
- Restrict the type or volume of waste to be processed at a trash transfer station, or require that storage of the waste must be inside the building in closed containers and such waste must be transported to a landfill within 24 hours.[56]

[46] *Greene Township v. Kuhl*, 32 Pa. Commw. 592, 379 A.2d 1383 (1977).
[47] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).
[48] *Id.*
[49] *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (2006). Since the ordinance did not regulate "in the manner authorized by the SWMA," the township exceeded its grant of authority under 53 P.S. § 67101.
[50] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987).
[51] *Crown Wrecking Co., Inc. v. Township of Ross*, 93 Pa. Commw. 268, 500 A.2d 1293 (1985).
[52] *Id.*
[53] *Id.*
[54] *Monroeville v. Chambers Dev. Corp.*, 88 Pa. Commw. 603, 491 A.2d 307 (1985).
[55] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987).
[56] *Hill v. Zoning Hearing Board of Maxatawny Township*, 597 A.2d 1245 (1991).

What local governments have been told they **can** do

- Determine the allowable locations for waste facilities, so long as it's not too restrictive and does not constitute "spot zoning."[57,58]
- Require a landfill to have public liability insurance, ensure the availability of safe and adequate access over public roads, the ceasing of landfill operations within 24 hours notice by the local government (the case doesn't explain under which conditions, but it seems related to the next point), the supplying of water within 24 hours of discovery to a neighbor whose water supply may be contaminated, and the limitations put on the height of the landfill.[59]
- Municipal solicitors are expressly authorized to commence actions at law (seeking money damages) and in equity (seeking specific actions, including closing down) to restrain violations of the SWMA.[60] It is the purpose of the SWMA to allow local governments and individual persons to enforce the law, providing additional and cumulative remedies (on top of state enforcement).[61]
- Require or conduct tests and monitoring in order to help the state enforce SWMA regulations, so long as they're not at odds with SWMA and DEP regulations. Provisions mandating groundwater tests by qualified hydrologists, and regulating the hours within which the transportation of sewage sludge may occur, are consistent with SWMA's goal of protecting the public health, safety, and welfare or the environment.[62]
- Require building permits.[63]
- Require permits for connecting to local sewer lines.[64]

[57] *Id.* "…our opinion also contains clear statements – which should not be overlooked – of this court's repeated conclusion that the present SWMA does not preempt local zoning provisions as such…. this court has concluded, the internal content of the SWMA quite explicitly recognizes local zoning regulations and indicates that local zoning is not preempted by the enactment of the statute itself nor by administrative implementation of it, short of issuance of a certificate of public necessity by the Environmental Quality Board, which applies only to hazardous waste facilities."
[58] *Abbey v. Zoning Hearing Bd. of the Borough of E. Stroudsburg*, 126 Pa. Commw. 235, 559 A.2d 107 (1989).
[59] *Southeastern Chester County Refuse Authority v. Board of Supervisors*, 118 Pa. Commw. 392, 545 A.2d 445 (1988).
[60] *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*, 575 Pa. 479, 836 A.2d 912 (2003). References Pa. Stat. Ann. tit. 35, § 6018.604(b), which reads: "In addition to any other remedies provided for in this act, upon relation of any district attorney of any county affected, or upon relation of the solicitor of any municipality affected, an action in equity may be brought in a court of competent jurisdiction for an injunction to restrain any and all violations of this act or the rules and regulations promulgated hereunder, or to restrain any public nuisance or detriment to health."
[61] 35 P.S. § 6018.607.
[62] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).
[63] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987).
[64] *Id.*

Hazardous Waste Ordinances

One thing to look out for, should the state try again to site a commercial hazardous waste facility again: "Issuance of a certificate of public necessity under this section shall suspend and supersede any and all local laws which would preclude or prohibit the establishment of a hazardous waste treatment or disposal facility at said site, including zoning ordinances."[65]

In one case, however, a zoning approach was allowed to create a set-back distance from a proposed (and later defeated) hazardous waste landfill. Read on…

Zoning, Bans and Set-back Distance Ordinances

Entire books have been written on zoning. This is not one of them. However, zoning and zoning-like approaches have often been successful in stopping proposed polluters in Pennsylvania.

In a battle against a hazardous waste landfill proposed in Lancaster County, North Codorus Township used a zoning ordinance to prohibit the facility from locating within 500 yards of any structure occupied by humans. While the Commonwealth Court held that Solid Waste Management Act did not permit the township to set geological or engineering standards stricter than those established by the SWMA, it was not prohibited from applying zoning restrictions relating to aesthetics, population density, and accessibility.[66] Since the township has a "substantial interest in protecting and promoting the public health, property values and aesthetics of the community," the waste company failed to meet its burden of showing that the 500-yard setback requirement "was not substantially related to the public health, safety, and welfare of the community."[67] The ordinance was upheld.

In 2008, an ordinance we wrote was adopted by Kulpmont Borough, Northumberland County in response to a plan for a crematorium in a dense residential neighborhood. In addition to air pollution regulations, it contained a set-back distance of 300 yards (900 feet) from "all residential and institutional properties at which people (whether related or unrelated) reside, including but not limited to homes, dwellings, apartments, condominiums, boarding houses, hotels

[65] 35 P.S. § 6018.105(h)
[66] *Sunny Farms, Ltd. v. North Codorus Township*, 81 Pa. Commw. 371, 474 A.2d 56 (1984).
[67] *Id.*

or motels, continuing care facilities, personal-care homes, intermediate-care facilities, or skilled nursing facilities, nursing homes or long term care facilities, prisons, correctional facilities, group homes, mobile homes and mobile home parks." The ordinance was defined to measure the distance from the property boundary, regardless of where the dwelling or building footprint is on the property.[68] The ordinance was challenged with five constitutional claims and was fully upheld in federal court.

Setbacks can be done even without zoning ordinances, without being considered zoning. "Setbacks are not exclusively hallmarks of zoning," according to the Commonwealth Court in 1991.[69] That decision upheld a local ordinance regulating solid waste management activities, requiring that they take place at least 500 feet from any habitable building, at least 3 miles from ground water, and that vehicles hauling solid waste must use roads at least 900 feet outside the township. It's unclear from the case how the last two parts worked, since nowhere is likely to be three miles from ground water and the regulation of road use outside the township doesn't seem possible or legal.

Zoning can be used to restrict where landfills go, based on aesthetics, population density, and accessibility.[70]

Zoning laws cannot go too far, however. If a zoning law is too restrictive, it can be subject to curative amendment[71] or might be considered spot zoning,[72] and can be stricken down.[73]

Outright bans have suffered a similar fate. In Alsace Township, Berks County, a nearby lead smelter seeking to dump its waste on its property in the township was blocked by a zoning ordinance that totally excluded industrial waste disposal facilities in the township.[74] The Commonwealth Court affirmed a judgment that the ordinance was invalid based on the state's Solid Waste Management Act

[68] http://www.actionpa.org/ordinances/Kulpmont-Set-Back-Distance.pdf
[69] *IA Constr. Corp. v. Bradford*, 143 Pa. Commw. 302, 598 A.2d 1347 (1991).
[70] *Greene Township v. Kuhl*, 32 Pa. Commw. 592, 379 A.2d 1383 (1977).
[71] *Id.*
[72] The Commonwealth Court articulated the true nature of spot zoning in *Pace Resources v. Shrewsbury Township Planning Commission*, 89 Pa. Commonwealth Ct. 468, 492 A.2d 818 (1985).
[73] *Township of Plymouth v. County of Montgomery*, 109 Pa. Commw. 200, 531 A.2d 49 (1987). The court found that ordinances effectively shrinking the resource recovery district and imposing prohibitive design requirements were invalid because they were adopted in order to exclude the proposed facility rather than in furtherance of a master zoning plan.
[74] *General Battery Corp. v. Zoning Hearing Bd.*, 29 Pa. Commw. 498 (1977).

preempting the field of solid waste regulation and concluding that since the state is authorized to protect water quality, "waste disposal facilities do not have the obvious potential for polluting air or water or otherwise creating uncontrollable health or safety hazards."[75] This absurd conclusion – especially absurd in light of the extensive lead contamination suffered by that community for years to come – was used to override the township's power's to protect its residents based on nuisance and public health grounds.

Sewage Sludge Regulation Ordinances

As the solid waste ordinance section about describes, many sewage sludge ordinances have been stricken down, in whole or in part, by court interpretations of implied preemption under the Solid Waste Management Act. There are additional laws that make it a challenge to limit the dumping ("land application") of sewage sludge as fertilizer on farm fields.

The Nutrient Management Act, passed into law in 1993, had an express preemption clause, and defined sewage sludge (also known by its public relations term, "biosolids") as a nutrient, preventing local governments from restricting its use with local laws. It was used to take on a growing movement to ban or heavily restrict sludge dumping on farms. It stated:

> "no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this act and the regulations promulgated thereunder. Nothing in this act shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this act and the regulations promulgated under this act."[76]

In the 2003 Rush Township case in Centre County, where the federal court invalidated an ordinance regulating the dumping of sewage sludge in strip mines, the Nutrient Management Act was found not to preempt this, because it wasn't an

[75] *Id.* at 502.
[76] 3 Pa. Stat. Ann. § 1703 (now repealed and replaced).

agricultural use covered by the Act. However, the SWMA was used to negate most of the ordinance.[77]

In 2005, the Pennsylvania legislature replaced the Nutrient Management Act with Act 38 as part of the Agriculture, Communities, and Rural Environment (ACRE) initiative.[78] The ACRE law has both preemption and a savings clause:

> 3 P.S. § 953. Limitation on local ordinances
>
> (a) Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.
>
> (b) Direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold shall be authorized, notwithstanding municipal ordinance, public nuisance or zoning prohibitions. Such direct sales shall be authorized without regard to the 50% limitation under circumstances of crop failure due to reasons beyond the control of the landowner.
>
> 3 P.S. § 956. Saving clause
>
> (a) This act shall not be construed to invalidate any contract made prior to its effective date nor shall it be construed to apply to any suit brought prior to its effective date.
>
> (b) The provisions of this act shall not affect or defeat the intent of any federal, state or local statute or governmental regulation except nuisance ordinances as they apply to any normal agricultural operation.

[77] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).
[78] http://extension.psu.edu/plants/nutrient-management/educational/nutrient-management-act-38/pennsylvania-s-nutrient-management-act-act-38-who-is-affected

The ACRE law (which incorporated the Right-to-Farm Act), sewage sludge ordinances have continued to be attacked, with the courts finding that dumping sewage sludge on farm fields is a "normal agricultural operation."[79]

A 2004 law journal article[80] posed several suggestions for local sewage sludge ordinances that might survive preemption. These suggestions would need to be re-evaluated under the newer ACRE law, but are listed here as possibilities to explore:

- A tipping fee to cover a municipality's cost for sampling and analyzing individual loads of sewage sludge. The District Court found preempted a $40.00 per ton tipping fee in the Rush Township ordinance because it was related to the requirement of a Land Application Registration.[81] Although the District Court did not consider whether the tipping fee, by itself, was preempted, such fees likely are preempted because they conflict with the PADEP's regulations and general permit scheme, which establish a stream-lined approach that facilitates beneficial use of "biosolids."
- Ordinances that mirror state restrictions and avoid using nuisance law might survive SWMA and ACRE preemption.
- Ordinances that enforce against sludge that contains pollutants above limits, or exceeds the pathogen density and vector attraction reduction requirements established by the DEP.
- Ordinances that enforce against land application of sludge that is contrary to the pollutant loading rate requirements of state regulations, that are applied at a rate greater than the agronomic rate or a greater rate approved for land reclamation, or that are applied in any manner that violates other applicable permit conditions or regulations of the DEP.

Municipalities also may be able to enact and enforce ordinances that require:

1. notice 30 days before the First Land Application of a particular generator's biosolids within the municipality;
2. notice before First Land Application where the PADEP has not made a determination that the land application site meets suitability requirements;

[79] *Solid Waste Management Act. Commonwealth v. East Brunswick Twp.*, 980 A.2d 720 (2009).
[80] "Tales of Townships and Sewage Sludge: Do Pennsylvania Statutes Preempt Local Regulation of Use of Biosolids?", 75 PA Bar Assn. Quarterly 87 (2004).
[81] *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003).

3. notice before each land application so that appropriate municipal officials may obtain samples of the biosolids and observe and inspect their application;
4. verbal notice to a municipality within twenty-four hours, and written notice within five days of the verbal notice, by a permitee or other person after it becomes aware that a biosolid, applied to land within the municipality, was not in compliance with a state quality standard;
5. written notice of storage of biosolids at a land application site for more than seven days; and
6. requirement of a building permit for, and submittal of documents concerning, biosolids storage areas, their design and location.

If an ordinance imposes requirements and fees greatly in excess of those of the DEP, a court is likely to find them preempted. For example, an ordinance is likely to be preempted if it requires (a) an application and permit for every load of sludge that is land applied, (b) a municipality's sampling and analysis of every load before land application, and (c) fees for the cost of the sampling and analysis. Such an ordinance is contrary to PADEP rules, which provide a streamlined procedure for land application of sludge from generators eligible to operate under the state's general permits. That procedure requires monitoring only monthly, bimonthly, quarterly, or annually, depending on the amount of sludge involved.[82]

Water Ordinances

There are several sections of water law, including regulating water pollution, water use, stormwater, drinking water, and floodplains.

The Clean Water Act preserves the right of state and local governments to have stricter water pollution laws.

> 33 U.S.C. § 1370. State authority
>
> Except as expressly provided in this Act [33 USCS §§ 1251 et seq.], nothing in this Act [33 USCS §§ 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting

[82] "Tales of Townships and Sewage Sludge: Do Pennsylvania Statutes Preempt Local Regulation of Use of Biosolids?", 75 PA Bar Assn. Quarterly 87 (2004).

> discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [33 USCS §§ 1251 et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [33 USCS §§ 1251 et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Pennsylvania has a Clean Streams Law which does not seem to have any preemptive language, leaving things open for local water pollution laws to be tested. It preserves the rights of local governments to enforce the Clean Streams Law and federal Clean Water Act, though it doesn't expressly allow stricter laws. It states:

> The collection of any penalty under the provisions of this act shall not be construed as estopping 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. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth, and nothing in this act contained 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 in this act, or the granting of any 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.[83]

It may not be possible to have an ordinance where local officials can write citations. Any authority in personnel to issue citations must be conferred by the legislature and must be express.[84]

Municipalities, to the extent that their sewage treatment plants have not been privatized, could have the power to control what chemicals are dumped down the train. Sewage treatment plants – commonly now known as publicly-owned treatment works (POTWs), or waste water treatment plants (WWTPs) – commonly have programs passed in the form of an ordinance. The terms and conditions of pretreatment ordinances vary dramatically from one municipality to another.

Water use in much of the state is determined by river basin commissions. The Delaware River Basin Commission (DRBC) and Susquehanna River Basin Commission (SRBC) are administered by representatives of the federal government and the multiple states within their watersheds. Their decisions supersede local requirements with federal preemption. Attempts in the 1990s by Pennsylvania municipalities to regulate groundwater withdrawals under SRBC jurisdiction were found to be federally field preempted. The courts found that SRBC is "the single administrative agency empowered to oversee these resources" and that "such a grant of authority vests the Commission with control over all the water resources within its jurisdiction, and defeats any notion that local governing bodies… may attach conditions to a project it has approved."[85] Local ordinances and zoning may not regulate water withdrawal, allocation of groundwater or conditions relating to mitigating adverse effects of groundwater withdrawal.

Floodplains, on the other hand, are not preempted. In 1992, The Commonwealth Court rules that local governments are not preempted by state laws on floodplain management, clean streams, sewage, dams and encroachments. Municipalities may promulgate supplemental or additional regulations which are reasonable and do not offend the spirit of state regulatory provisions.[86]

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[83] 35 P.S. § 691.701.
[84] *Commonwealth v. Domin*, 684 A.2d 211 (1996).
[85] *Levin v. Board of Supervisors*, 669 A.2d 1063, 1076 (Pa.Cmwlth. 1995), aff'd, 689 A.2d 224 (Pa. 1997), quoting *State Coll. Borough Water Auth. v. Board of Supervisors*, 659 A.2d 640, 644 (Pa.Cmwlth. 1995), app. denied, 670 A.2d 145 (Pa. 1995).
[86] *In re Appeal of Hoover, 608 A.2d 607 (Pa.Cmwlth. 1992).*

Designing an Ordinance

Constructing the Right Ordinance

Designing a good ordinance can be a challenge and should involve a lawyer if you want the ordinance to have a chance of standing up in court.

That said, there are approaches that don't involve trying to stand up in court. The Community Environmental Legal Defense Fund (CELDF), initially based in Pennsylvania, has been quite successful in getting communities to pass ordinances that are, in effect, acts of legal civil disobedience. They are not designed to hold up in court, but to challenge the legal framework by asserting rights not recognized by the courts.

CELDF's typical ordinance has asserted that corporations are not legal "persons" with the rights of personhood that the courts have (misguidedly) handed them since the late 1880s. They tell community groups what they want to hear: that they can use local ordinances to ban anything, and the ordinances purport to do that. Their newer ones also aim to create local declarations of rights, assert the rights of nature and more.

Ordinances are considered legal and enforceable until challenged in court. Since most of CELDF's ordinances have not been challenged, they're still on the books in many localities. However, where they've been challenged, they usually either get withdrawn by the local government before it can go through the courts, or they get stricken down in court.

That said, challenging corporate personhood and asserting rights is important, and we encourage interested communities to pursue CELDF ordinances, but to also adopt backup ordinances that have a better chance of surviving court challenge. This "package deal" would be more effective in preventing a legal challenge in the first place, as it makes it far harder for a corporation to expect to win the full legal challenge to be able to pursue business as usual. Do not let anyone tell you that combining both ordinance approaches is not possible or compatible. They are.

Totally banning an industry from a county or municipality is likely not to hold up in court, for two reasons:

1) it'll be considered exclusionary zoning subject to curative amendment (the courts forcing the local government to "cure" the zoning ordinance to allow the unwanted use), or due to preemption; and/or
2) it'll be preempted by one of the state's environmental laws because it bans something the state law permits, as the courts have sometimes framed their stretched concept of conflict preemption.

That said, there is a glimmer of hope in one of the Commonwealth Court's rulings, from 1982:

> When an ordinance totally excludes a legitimate business use, such a proscription may stand only where a substantial relationship of the ban to health, safety and the general welfare appears. The duty of persuading the tribunal that a total ban of a legitimate business use bares a substantial relationship to the public health, safety, and general welfare is imposed on the municipality.
>
> The applicant who shows that the use he proposes is permitted by special exception and that the specific requirements of the ordinance are met has demonstrated that what he proposes is something which the governing body of the municipality has determined should be allowed, is appropriate, and presumptively consistent with health, safety and general welfare. The burden of persuasion that general non-objective standards contained in the ordinance cannot be complied with is on the party objecting to the application. A use permitted by special exception is a permitted use, and the burden of persuasion that health safety and welfare will be adversely affected is not satisfied by showing effects no different from or greater than those which normally attend the thus permitted use.[87]

In other words, if the municipality can show that the proposed use would harm public health, safety and welfare more than normal permitted uses, exclusionary zoning might be tolerated by the courts. Given the Commonwealth Court's track record, though, don't count on it.

The same Commonwealth Court, more recently (in 2006), stated:

[87] *Moyer's Landfill v. Zoning Hearing Bd.*, 69 Pa. Commw. 47, 450 A.2d 273 (1982).

> Local legislation cannot permit what state statute or regulation forbids, or prohibits what state enactments allow. The fact that the Legislature has enacted a statewide regulatory scheme relating to a certain use does not, in itself, preclude a local municipality from also regulating in that area with a subordinate power to make additional regulations in furtherance of the purpose of the general law, and as may be appropriate to the necessities of a particular locality, and which are not in themselves unreasonable.[88]

The best way to go to survive court challenge would be to find the sweet spot between outright banning a use and regulating it lightly enough that a company would find the regulations tolerable. A good ordinance can be a *de facto* ban by setting reasonable regulations that are strict, but technically possible, where many companies will choose not to put up with the financial burden or accountability of complying. This might result in the court having to determine what is "reasonable" – which can be a very vague space where we wouldn't want the courts to be making decisions.

What is "reasonable" can vary a lot depending on whether you're an affected industry, or would be a pollution-affected resident. However, the courts are pretty industry-friendly and would likely lean heavily toward what an industry would think is reasonable. Nonetheless, an ordinance needs to be strong enough to be effective, and our defenses of them need to assert the rights of local governments to pass laws protecting health, safety and welfare under their charters, the obligations under the Environmental Rights Amendment to protect the people's right to clean air and pure water, and the proper interpretations of implied preemption doctrine, which the courts have been butchering.

Clean Air Ordinance approaches

Local air pollution ordinances are the best way to go in Pennsylvania, as the law is the most clear about permitting stronger local ordinances. DEP even provides model air ordinances regulating outdoor wood-fired boilers and open burning.[89] It's a useful avenue, since most noxious facilities have an air pollution impact of some sort.

[88] *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1035 (2006).

[89] www.portal.state.pa.us/portal/server.pt/community/general_information/21814/open_burning_information/1830010

Nearly all facilities with smokestacks do not monitor what they are putting into the air on a day-to-day basis. Permits only tend to require three pollutants – CO, NOx and SO_2 (none of the toxic ones) – to be monitored on a continuous basis. Several other pollutants are tested once per year; many not at all. Annual testing is like having a speed limit where a speed trap is set just one day a year, there are signs warning "speed trap ahead" and the driver's brother runs the speed trap (the companies do their own testing). In reality, air polluting facilities are "speeding" many other days of the year, with excessive emissions during startup, shutdown and malfunction times, when testing is not done. The technology exists to continuously monitor over 40 pollutants, yet DEP permits do not require the use of this state-of-the-art technology.

Air ordinances we've draft and have had passed do three main things:

1) require additional pollutants to be continuously monitored
2) require that the data on those emissions be reported to a public website real-time
3) set strict emissions limits so that the source is as clean as it can be

These seem like reasonable conditions, and most people assume that the state would already require such conditions. To date, these ordinances have been enough to dissuade proposed polluters from wanting to build facilities where such ordinances exist. This says a lot for how much companies are getting away with when they get to pollute without knowing what is really coming out of their stacks.

Learn more about Continuous Emissions Monitoring here:
www.ejnet.org/toxics/cems

Model Ordinances

In addition to the ordinances here, you may want to check out others from a variety of sources, such as:

Air Pollution Ordinances in PA:
http://www.actionpa.org/ordinances
[These are ordinances we developed and had passed under our ActionPA project.]

Center for Health, Environment and Justice Local Ordinance Fact Pack:
http://chej.org/wp-content/uploads/Local-Ordinance-PUB-119.pdf

DISCLAIMER: Please consult us before using any draft ordinances in this section. While some may be good starting points for your community, they often need to be customized to the local situation. Also, they may need to be updated to account for the latest case law set by Pennsylvania courts. Finally, the presence of ordinances in this section does not mean that they have been tested in court in all ways, if at all. Provision of these ordinances does not constitute legal advice.

Community Environmental Legal Defense Fund model ordinances:
http://celdf.org/ordinances

PA Department of Environmental Protection model ordinances:
Open burning and outdoor wood-fired boilers:
http://www.portal.state.pa.us/portal/server.pt/community/general_information/21814/open_burning_information/1830010
Stormwater ordinance:
http://www.lrkimball.com/elkcounty/Docs/Dep_Model_Ordinance.pdf

The Pennsylvania State Association of Township Supervisors also has model ordinances available to its members via a password-protected section of their website: www.psats.org. Their model oil and gas ordinance (drafted before the Robinson decision, and likely not as strong as it ought to be) is here:
http://energy.wilkes.edu/PDFFiles/Issues/PSATS%20Model%20Zoning%20Ordinance.pdf

Links to ordinances on outdoor wood-fired boilers across the country:
http://freedomofair.webs.com/modelordinances.htm

Noise ordinances:
http://www.nonoise.org/lawlib/states/states.htm

http://www.fdle.state.fl.us/Content/getdoc/7062dbf7-f60b-4190-8666-72c5deeadcf1/Dooley-pat-paper-pdf.aspx

Ordinances in this section include:

- Borough of Kulpmont Air Pollution Control Ordinance
- Borough of Kulpmont Set-back Distance Ordinance
- City of Allentown Clean Air Ordinance
- County Low Level Radioactive Waste Ordinance

The two ordinances in Kulpmont were combined and adopted in 2007. They were challenged and upheld in federal court in 2008. This and two other ordinances like it, were passed in communities concerned about proposed crematoria. None of the three proposals were built. Copies of the other ordinances are available at www.actionpa.org/ordinances

The legal decision upholding the Kulpmont ordinance is particularly valuable to read. Find it in Appendix C.

The Allentown ordinance was introduced as an initiative and adequate signatures were gathered, but the Board of Elections refused to put it on the ballot and litigation over this is still pending. The trash and sewage sludge incinerator that sparked this effort is effectively dead now, though the litigation continues. Documents relating to the ordinance and the litigation around it are available at www.stoptheburn.org/documents

The Low Level Radioactive Waste Ordinance has been adopted in this or similar forms in about a dozen counties in the 1990s, in the course of several years of resistance to the building of a multi-state nuclear waste dump. The dump was never built, and this ordinance strategy was part of the large equation in frustrating that siting effort.

Borough of Kulpmont Air Pollution Control Ordinance

Borough of Kulpmont Air Pollution Control Ordinance

BOROUGH OF KULPMONT
NORTHUMBERLAND COUNTY, PENNSYLVANIA
ORDINANCE NO. _____

AN ORDINANCE OF BOROUGH OF KULPMONT, NORTHUMBERLAND COUNTY, PENNSYLVANIA ESTABLISHING AIR QUALITY MONITORING AND EMISSION STANDARDS AND PROVIDING FOR CIVIL PENALTIES FOR AIR POLLUTION.

WHEREAS, the United States of America Clean Air Act, as amended, including Amendments of 1990, and the Commonwealth of Pennsylvania Air Pollution Control Act of January 9, 1960 (P.L. 2119) (35 P.S. Section 4001, et seq.), as amended, provide in part for the better protection of the health, general welfare and property of the people of the Commonwealth by the abatement, reduction and prevention of the pollution of the air by smokes, fumes, gases, odors, mists, vapors, and similar matter, or any combination thereof; and

WHEREAS, the Federal and Commonwealth Legislatures have granted the power to local municipalities to adopt more stringent air pollution standards than those provided within the cited Acts pursuant to 35 P.S. Section 4012; and

WHEREAS, local municipalities have been empowered with the right to enact ordinances in protecting and preserving the ambient air quality; and

WHEREAS, Borough of Kulpmont ambient air quality is a matter of vital concern to the residents of the Borough; and

WHEREAS, the Borough of Kulpmont Council is of the opinion that increased introductions of air contaminants within the Borough would have an adverse effect on the ambient air quality; and

WHEREAS, the Borough of Kulpmont Council has determined that the impact of increased air contaminants should be borne by those introducing the contaminants; and

WHEREAS, the Borough of Kulpmont Council has determined that existing Federal and Commonwealth standards of Air Pollution Control measures are less stringent than desired; and

WHEREAS, pursuant to the Borough Code of the Commonwealth of Pennsylvania to prohibit nuisances, including, but not limited to accumulations of garbage and rubbish, and the storage of abandoned or junked automobiles, on private or public property, and the carrying on any offensive manufacture or business.

WHEREAS, the Borough finds that the Pennsylvania Department of Environmental Protection does not possess sufficient staff, funding, or resources to continuously verify compliance with applicable environmental protection requirements;

WHEREAS, Pennsylvania ranks number one in releases of mercury pollution from coal and oil-fired power plants;

WHEREAS, Pennsylvania is one of 19 states with a statewide fish consumption advisory due to mercury contamination and is one of only 3 states where the *general population* is asked to restrict their consumption of *all* types of fish from *any* body of water in the state;

WHEREAS, Pennsylvania ranked third-highest for mercury contamination among the 13 states studied between 1997 and 2002;

WHEREAS, Pennsylvania's is heavily polluted with dioxin from power plants and incinerators, particularly the 30 years of excessively high dioxin pollution from the Harrisburg trash incinerator;

WHEREAS, the incineration of bodies, body parts, infectious and chemotherapeutic wastes collectively represent the second largest known sources of dioxin and mercury pollution in the U.S., according to the U.S. Environmental Protection Agency;

WHEREAS, incinerators in Pennsylvania are not required to use modern equipment that can continuously monitor mercury and dioxin emissions;

WHEREAS, as required by 35 P.S. §4012(a), the Borough finds that the provisions of this Ordinance are not less stringent than those of the Clean Air Act, the Pennsylvania Air Pollution Control Act, or the rules and regulations promulgated thereunder;

NOW, THEREFORE, IT IS HEREBY ORDAINED AND ENACTED BY THE Borough of Kulpmont COUNCIL, Northumberland County, Pennsylvania, and IT IS HEREBY ENACTED AND ORDAINED by the authority of the same AS FOLLOWS:

ARTICLE I - TITLE, PURPOSE AND AUTHORITY

Section 1. SHORT TITLE

This Ordinance shall be known and may be cited as the "Borough of Kulpmont Air Pollution Control Ordinance".

Section 2. PURPOSE

The purpose and intent of this ordinance is to ensure that the operation of any incinerator of bodies, body parts, infectious and/or chemotherapeutic wastes within Borough of Kulpmont, Northumberland County, Pennsylvania does not degrade the ambient air quality so as to adversely impact the health, safety, general welfare and property of the people of Borough of Kulpmont and does not adversely impact plant and animal life or the comfort and convenience of the public and the natural resources of the Commonwealth through the addition of mercury or dioxin/furan pollution to the ambient air and to exercise the authority granted to the Township under the Pa. Air Pollution Control Act.

Section 3. APPLICABILITY

This ordinance shall apply and be in full force and effect in Borough of Kulpmont, Northumberland County, Pennsylvania.

Section 4. AUTHORITY

This Ordinance is enacted pursuant to the authority granted to Borough of Kulpmont by all relevant Federal and State laws and their corresponding regulations, including, without limitation, the following:

Pennsylvania Constitution, Article I, Section 27;

Air Pollution Control Act 35 P.S. § 4012, which preserves the rights of municipalities to adopt air pollution ordinances and regulations not less stringent than the requirements of the Clean Air Act, the Pennsylvania Air Pollution Control Act, or rules and regulations promulgated thereunder;

Solid Waste Management Act, 35 P.S. § 6018.101 et seq., which preserves the rights and remedies of municipalities concerning solid waste within their borders;

Municipal Waste Regulations, 25 Pa. Code §§ 271 and 275, et seq; and

Clear Air Act, 42 U.S.C. § 7401, et seq.

ARTICLE II - DEFINITIONS

The following words and phrases when used within this Ordinance, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this Article:

(1) Corporation – Any corporation organized under the laws of any state of the United States or any country. The term "corporation" shall include all entities that possess limited liability characteristics, including limited partnerships, limited liability partnerships, non-profit organizations, business trusts, limited liability corporations, governmental bodies and municipal authorities organized under the laws of any state or the United States or any country.

(2) Person – Natural persons, not including corporations.

(3) Biowaste Incinerator – Any structure or machine operated for the combustion (oxidation) of any combination of the following: deceased human or other animal bodies or body parts, or waste that is otherwise regulated as pathological, infectious or chemotherapeutic waste. Biowaste incinerators shall include, but are not limited to medical waste incinerators, pathological waste incinerators and crematoria.

(4) Facility – a biowaste incinerator.

(5) TEQ_{DF}-WHO_{98} – a unit of measurement for dioxins and furans, standardized to toxic equivalents, calculated in accordance with the World Health Organization's 1998 method.

(6) Continuous Emissions Monitoring System (or "CEMS") – a pollution monitoring system that can provide emissions data for a sampling period that covers the entire operating time of a facility. Such devices used in this Ordinance must be certified by the U.S. Environmental Protection Agency's Environmental Technology Verification (ETV) Program or its successor agency.

(7) Borough Council – The Borough of Kulpmont, Northumberland County, Pennsylvania Council.

(8) Owner – The person or corporation that has the legal right of proprietorship of a facility. In cases of emergency, facility operators may be notified in lieu of owners to promote timely responses to the emergency.

(9) Responsible Party – If the facility is owned and operated by a person, the responsible party is that natural person. If the facility is owned and/or operated by a corporation, this term shall include all officers and directors of any corporation that owns or operates the facility.

ARTICLE III - CERTIFICATIONS AND MONITORING

Section 1. Certifications Required By Owners to the Borough Council. As a requirement for the operation of a biowaste incinerator which may release mercury or dioxins/furans and thereby cause air pollution or adverse environmental effects, the Borough Council shall, in considering the type of facility and degree of potential air pollution or potential adverse environmental effects, require certain certifications by the owner of said facility.

(a) The owner of a facility shall certify that any facility under their control will not exceed the limits for contaminants specified within this ordinance.

(b) The owner of a facility shall certify that funds are available in escrow to cover any fine or penalty levied by this ordinance for reason of exceeding set limits of contaminants from any source under their control.

(c) The owner of a facility shall certify that monies will be made immediately available to fund any and all air pollution monitoring of the facility.

(d) The Borough Council may demand any further proof or require the posting of a bond by the owner of a facility as deemed necessary to ensure compliance with any certification and may require the owner to recertify on an annual basis.

(e) Certifications shall not be transferred or assigned to any other person or corporation.

(f) All certifications required under this ordinance shall be made under oath, and subject to the penalties of perjury and false swearing.

Section 2. Air Pollution Monitoring.

(a) The operator of a facility mu st monitor for mercury and dioxins/furans at all times when the facility is in operation. A Continuous Emissions Monitoring System (CEMS) must be used to monitor mercury and dioxins/furans. CEMS for which there exist U.S. Environmental Protection Agency or Pa. Department of Environmental Protection standards must also comply with all such standards. CEMS must be used to measure mercury concentrations on a standard basis for direct comparison with the mercury standard in Article IV Section 1(a). CEMS must be used to measure dioxin/furan concentrations on a standard basis for direct comparison with the dioxin/furan standard in Article IV Section 1(b). It shall be unlawful for any person or corporation to construct, assemble, install or modify, operate or continue to operate any facility which emits or which may emit mercury or dioxins/furans within Borough of Kulpmont, Northumberland County without full compliance with the provisions of this Section.

(b) Pollution monitoring shall be conducted by an engineering firm approved by the Borough Council with results becoming the property of Borough of Kulpmont, Northumberland County, Pennsylvania. All costs of monitoring shall be borne by the person or corporation owning the facility, with the owner of the facility receiving immediate notice if emissions which are subject to the CEMS requirements under this Ordinance exceed 85% of any emissions limitation established by law or regulation, and also if such limitation is exceeded. The owner of the facility shall furnish funding for the monitoring on an advance quarterly basis by cash or certified check made payable to the Borough and drawn upon a bank authorized to do business within the Commonwealth of Pennsylvania. Failure to make advance payment within two working days of the end of each quarter shall require cessation of operation of the facility until such time as payment is received by the Borough.

(c) The engineering firm shall ensure that monitoring data is available in real-time to Borough computers in a format acceptable to the Borough, where they shall be archived and made immediately available on the Borough's website at the expense of the facility owner. Quarterly summary data, specifying mercury and dioxin levels compared to the limits specified in this Ordinance shall be published in the most widely-read local newspaper at the expense of the facility owner. The engineering firm shall ensure that the Borough Council and the facility owner or operator are immediately notified when contaminant levels exceed 85% of, or violate, the maximum levels allowed under this Ordinance and shall duly note the person(s), date and time such notification was given.

(d) CEMS must be started up at least twelve (12) hours before the commencement of facility operation, unless the manufacturer of the CEMS certify, and Borough engineers agree, that the equipment can sample accurately with a shorter warm-up time.

(e) Exhaust gases may not be released into the atmosphere until they have cooled to below 200 degrees Centigrade in order that all dioxins and furans can be monitored. Dioxin/furan emissions monitors must be placed at a point where the exhaust gases have cooled to below 200 degrees Centigrade. Dioxin and furan measurements must be standardized to TEQ_{DF}-WHO_{98} units.

(f) Where applicable, non-detects shall be measured at half the detection limit.

(g) The facility owner and operator shall furnish written consent for the inspection of the facility at any time by the designees of the Borough Council for the purpose of assuring compliance with this Ordinance. Such designees shall be permitted entry upon any property or into any building, premises or place on which or within which a biowaste incinerator may be located and to inspect the emissions monitoring equipment as may be necessary to ensure that such equipment is operational, is operating properly and is being used as intended by the manufacturer and in accordance with this Ordinance.

(h) Exceeding the established levels of contaminant releases as may be shown by continuous emissions monitoring shall constitute prima facie evidence that a violation has occurred.

(i) The facility owner and operator shall permit the installation of such monitoring devices, measuring equipment, indicators or alarms as deemed necessary by the engineering firm approved by the Borough Council.

(j) Violation(s) of any provision within this section shall constitute a misdemeanor and penalties may be assessed whether or not the violations were willful.

Section 3. Proof of Financial Responsibility. As a requirement for the operation of any biowaste incinerator which may release mercury or dioxins/furans and thereby cause air pollution or adverse environmental effects, the Borough Council shall, in considering the type of facility and degree of potential air pollution or potential adverse environmental effects, require proof of financial responsibility or security assuring the proper construction, operation, and maintenance of CEMS in the form of a bond or other legal instrument of a form acceptable to the Borough Council, payable to Borough of Kulpmont which guarantees proper construction, repair, operation and maintenance, inspections and monitoring of the facility and removal if necessary. The amount of such bond or legal instrument shall be sufficient to cover all costs of entry, correction, repair, operation, maintenance, inspection, or monitoring of the CEMS in the event of failure by the owner to comply with the provisions of this ordinance, or any order issued hereunder.

ARTICLE IV - MERCURY AND DIOXIN EMISSION LIMITS

Section 1. Emission Limits.

(a) Mercury Emissions – The mercury emissions limit for each biowaste incinerator shall be 0.05 mg/Nm3. It shall be unlawful to emit more than this limit. In calculating compliance with this limit, data may be averaged on a three hour basis. Such averaging shall not include data from times when combustible materials are not being burned in the incinerator.

(b) Dioxin/Furan Emissions – The dioxin/furan emissions limit for crematoria and other facilities that operate sporadically and which burn human bodies or animal carcasses shall be 400 nanograms per body TEQ_{DF}-WHO_{98}. For other types of biowaste incinerators, the dioxin/furan emissions limit shall be 2 nanograms per kilogram (ng/kg) TEQ_{DF}-WHO_{98}. It shall be unlawful to emit more than this limit. In calculating compliance with this limit, data may be averaged on a weekly basis. Such averaging shall not include data from times when combustible materials are not being burned in the incinerator.

(c) In cases where the average weekly emissions exceed the mercury or dioxin/furan emissions limit, waste feed shall be cut off and operations shall be immediately ceased until corrective action is taken.

Section 2. Adoption and Incorporation of Other Limits and Standards

To the extent a more stringent standard, limit, or requirement for the emission of air contaminants or a standard of performance for any facility defined in this Ordinance as a biowaste incinerator is not expressly set forth herein, the Borough adopts and incorporates by reference herein the standards, limits, and requirements for the emission of air contaminants, and standards of performance for stationary sources, as promulgated by the U.S. Environmental Protection Agency pursuant to the Clean Air Act or by the Commonwealth of Pennsylvania pursuant to the Air Pollution Control Act or any other relevant statutes. It is expressly the intent of the Borough in adopting these standards, limits, requirements, and standards of performance, to make them independently enforceable by the Borough of Kulpmont.

Section 3. Best Available Technology

To the extent that either the U. S. Environmental Protection Agency or the Pennsylvania Department of Environmental Protection determines that a control technology is reasonably available to reduce or minimize the emission of air contaminants from a stationary source, each stationary source within the Borough shall modify its facility so as to utilize the control technology within such time as the Borough Council may reasonably determine. The Borough Council shall notify the facility of the time period within which it must modify the facility to utilize the control technology. It shall be the responsibility of the facility to obtain such permits and approvals for the modification of the facility as are necessary under state and federal law.

Section 4. Unlawful Conduct.

It shall be unlawful for any person or corporation to:

(a) Fail to comply with any provision of this Ordinance including but not limited to the provisions of section 2 above;

(b) Violate or assist in the violation of any of the provisions of this ordinance.

(c) Attempt to circumvent any provision of this Ordinance through misrepresentation or failure to disclose all relevant facts. Nothing in this Ordinance shall be construed to affect the application of provisions of the Crimes Code, Title 19 of the Pennsylvania Consolidated Statutes relating to perjury, false swearing or unsworn falsification to authorities.

(d) Intentionally obstruct, impair or interfere with the administration of this Ordinance by the Borough Council or their designees by force, violence, physical interference or obstacle or any other unlawful act. Nothing in this Ordinance shall be construed to affect the application of Section 5101 of the Crimes Code, Title 2le of the Pennsylvania Consolidated Statutes as to obstructing administration of law or other governmental function.

(e) Tamper or interfere with any sample, process, device, equipment, computer hardware or software, indicator or alarm, report, electrical power, pipe, gas or other media so as to affect or alter any sample, process, device, equipment, indicator or alarm, report, electrical power, pipe, gas or other media used in the gathering and analysis of samples or the reporting of sample analysis as may be required the Borough Council in the administration of this ordinance.

ARTICLE V - DECLARATION OF PUBLIC NUISANCES

The emission of mercury or dioxins/furans into the atmosphere of Borough of Kulpmont except in conformity with this Ordinance is hereby declared to be public nuisance, abatable in the manner prescribed by law.

ARTICLE VI - COMPLIANCE ORDERS

Whenever the Borough Council has reason to believe that there has been a violation of this Ordinance or other State or Federal Law, or any of the rules and regulations promulgated pursuant thereto or a misrepresentation of any certification, the Borough Council shall, in addition to any other remedy available to it, and in the absence of an emergency situation requiring prompt action, give written notice of such violation to, the owner or operators of the facility, and therein order such corrective measures as are deemed reasonable and necessary to cure the violation. This notice shall state the nature of the violations and shall allow a reasonable time for the performance of the necessary corrective measures. If the owner or operator of the facility fails to carry out the corrective measures set forth in the notice, within the time period stated therein, the Borough Council shall institute such other actions as may be deemed necessary to terminate the violation.

ARTICLE VII - CRIMINAL PENALTIES

In accordance with the Pa. Air Pollution Control Act, 35 P.S. 4012(g), providing that civil and criminal penalties for air pollution violations be uniform throughout the Commonwealth, and further providing that "the penalties and remedies set forth in this act be the penalties and remedies available for enforcement of any municipal air pollution ordinances or regulations, and shall be available to any municipality, public official, or other person having standing to initiate proceedings for the enforcement of such municipal ordinances or regulations" the criminal and civil penalties for violation of this Ordinance shall be the following:

Section 1. Notwithstanding any other provisions herein, any responsible party that violates any provision of this Ordinance or any of the rules and regulations pursuant hereto or who misrepresents any certification upon conviction of such offense in a summary proceeding shall be subject to a fine or no less than Two Hundred Dollars ($200) and no more than Two Thousand Five Hundred Dollars ($2,500), plus costs of prosecution or, in default of the payment of such fine, be imprisoned for not less than one (1) day and no more than one (1) year. Each day of violation or misrepresentation of certification shall constitute a separate offense and each one percent (1%) above the mercury or dioxin/furan emissions limit shall also constitute a separate offense. Violations of both the mercury and dioxin/furan limit shall constitute separate offenses.

Section 2. Any responsible party that, within two years after a conviction in a summary proceeding as provided in Section I above engages in unlawful conduct as defined in this ordinance is guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than Five Hundred Dollars ($500) nor more than Five Thousand Dollars ($5,000) for each separate offense or, in default of the payment of such fine, to imprisonment for a period of not less than one (1) day and no more than one year. Each day of violation or occurrence of misrepresentation of certification shall constitute a separate offense.

In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this Ordinance, the Borough may initiate criminal proceedings against the responsible party pursuant to 35 P.S. Section 4009.

ARTICLE VIII - CIVIL PENALTIES

(a) Any responsible party that violates any provision of this Ordinance, or any compliance order issued pursuant to Article VI hereof, shall pay to the Borough of Kulpmont a civil penalty in the amount assessed by Borough Council. The penalty may be assessed whether or not the violation was willful. The civil penalty so assessed may not exceed Ten Thousand Dollars ($10,000.00) per day for each violation. In determining the amount of the penalty, the Borough may consider the willfulness of the violation; damage to air, soil, water or other natural resource or their uses; financial benefit to the person or corporation in consequence of the violation; deterrence of future violations; cost to the Borough; the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation is voluntarily reported; other factors unique to the owners or operators of the source or facility; and other relevant factors.

(b) When the Borough proposes to assess a civil penalty, it shall inform the owner of the proposed amount of the penalty. The owner charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full, or if the owner wishes to contest the amount of the penalty or the fact of the violation to the extent not already established, the owner shall forward the proposed amount of the penalty to the Borough within the thirty (30) days period for placement in an escrow account with any Commonwealth bank.

ARTICLE IX - ABATEMENT AND INJUNCTIONS

Notwithstanding any other provision herein, if the Borough Council finds any person or corporation is operating a facility without complying with the requirements of this Ordinance, or any of the rules and regulations promulgated thereunder, the Borough Council may, in addition to other remedies that may be available to it, order the immediate discontinuance of such violations, or order other compliance. Failure to comply with such an order of discontinuance, or any other order of compliance issued by the Township, shall constitute a violation of this Ordinance. In addition to all other remedies, upon a failure to comply with such order, the Borough may secure a temporary restraining order, a preliminary injunction, a permanent injunction or other appropriate relief or declare the operation a public nuisance, and order the immediate abatement of same, with the costs of such abatement to be borne and assessed in accordance with law.

ARTICLE X - SEVERABILITY

Each separate provision of this Ordinance shall be deemed independent of any other provision of this Ordinance, and if any provision, sentence, clause, section or part hereof is held to be illegal, invalid or unconstitutional or inapplicable to any person, corporation or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts of this Ordinance or their application to other parts or circumstances. It is hereby declared to be the legislative intent that this Ordinance would have been enacted as if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included herein, and as if the person, corporation or circumstances to which this Ordinance, or any part hereof is inapplicable had been specifically exempted therefrom.

ARTICLE XI - EFFECTIVE DATE

That this Ordinance shall become effective upon enactment

DULY ENACTED AND ORDAINED THIS DAY OF 2006.

ATTEST:

Borough of Kulpmont Set-back Distance Ordinance

ORDINANCE NO. ___

AN ORDINANCE OF THE BOROUGH OF KULPMONT TO PROTECT RESIDENTIAL PROPERTIES FROM ADVERSE IMPACTS OF AIR POLLUTING COMMERCIAL AND INDUSTRIAL FACILITIES AND TO DECLARE AND PROHIBIT CERTAIN ACTIVITIES AS NUISANCES

The following ordinance is hereby adopted by the Council of the Borough of Kulpmont:

Section 1. Purposes and Findings

(a) Purposes. This Ordinance is intended to serve and further the following purposes:

1. To protect and advance the public health, safety and welfare of residents of the Borough;
2. To ensure that air polluting facilities do not adversely impact the health, safety and welfare of residents of the Borough;
3. To create a minimum isolation and buffer distance between residential activities and air polluting facilities which may be incompatible with one another;
4. To minimize the potential for nuisance conditions created by commercial and industrial operations, including noise, odors, dust, smoke, fumes, gases, pollution, emissions of air contaminants, and other similar effects;
5. To declare and prohibit certain activities and conditions which may, or do, constitute nuisances;
6. To exercise the Borough's powers which are conferred upon it by the Borough Code, and the Pa. Pollution Control Act.

(b) Findings. In considering the adoption of this Ordinance, the Borough of Kulpmont makes the following findings:

(1) This Ordinance is also enacted under the authority of the Pennsylvania Air Pollution Control Act, 35 P.S. §4012, which reserves to municipalities, including Boroughs, the power to enact 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".

(2) The public health, safety and welfare of the residents of the Borough require that air polluting facilities not be conducted in close proximity with residential uses, which are inherently incompatible;

(3) The Borough's current ordinances do not adequately protect residents of the Borough from the adverse effects of air polluting facilities;

(4) Air polluting facilities are, or can be with substantial probability, incompatible with the comfort, convenience, health, and welfare of residents of the Borough if conducted in close proximity of residential properties;

(5) Air polluting facilities that cause noise, odors, and releases of air contaminants, when conducted in close proximity to residential properties, constitute a nuisance.

(6) Prohibiting air polluting facilities in close proximity to properties on which residents reside can minimize the potential for nuisance conditions and the potential for adverse effects upon the public health, safety and welfare;

(7) In conformity with 35 P.S. §4012, the requirements imposed by this Ordinance are not "less stringent than the provisions of this [Pennsylvania Air Pollution Control] Act, the Clean Air Act, or the rules and regulations promulgated under either this Act or the Clean Air Act."

(8) The Commonwealth of Pennsylvania's regulations prohibit the following facilities within 300 yards of a school, park or playground: municipal waste landfills (Pa. Code § 273.202 (a)(18)(i)), construction/demolition waste landfills (Pa. Code § 277.202 (a)(15)(i)), waste transfer facilities (Pa. Code § 279.202 (a)(6)(i)), composting facilities (Pa. Code § 281.202 (a)(8)(i)), incinerators or other waste processing facilities (Pa. Code § 283.202 (a)(6)(i)). Incinerators or other waste processing facilities are also prohibited within 300 yards of any occupied dwelling (Pa. Code § 283.202 (a)(3)(ii)).

Section 2. Definitions.

(a) As used in this Ordinance, the following terms shall have the following meanings. If a term is not defined herein, but is defined in the Pa. Air Pollution Control Act, or the federal Clean Air Act, then the definition in such Acts shall apply to this Ordinance.

1. "Air polluting facilities" shall mean for the purposes of this Ordinance:

(a) Any commercial or industrial facility requiring any sort of permit under the Pennsylvania Air Pollution Control Act, or the federal Clean Air Act, for the release of contaminants to the air.

(b) Facilities shall not be defined as "air polluting facilities" solely due to the use (or proposed use) of combustion systems used only to heat the air and/or water in the facility's buildings.

2. "Facilities" include the land, structures and other appurtenances or improvements where the relevant activities are allowed, permitted, or take place, including the entire lot, parcel or tract of land upon which the Facilities are located.

3. "Residential Properties" shall mean all residential and institutional properties at which people (whether related or unrelated) reside, including but not limited to homes, dwellings, apartments, condominiums, boarding houses, hotels or motels, continuing care facilities, personal-care homes, intermediate-care facilities, or skilled nursing facilities, nursing homes or long term care facilities, prisons, correctional facilities, group homes, mobile homes and mobile home parks. The term shall refer to the entire lot, parcel or tract of land upon which the residential or

institutional use is situated and shall not be limited to the dwelling or building footprint or curtilage.

4. “Person” shall mean any natural person, including any individual.

5. “Entity” shall include any partnership, corporation, association, limited liability company or similar entity, institution, cooperative, enterprise, municipal or state authority, Federal Government or agency, state government or agency, or any other legal entity which is recognized by law as the subject of rights or duties. Said term shall also mean any officer, director, partner, employee, trustee, or other person who acts on behalf of any of the foregoing with respect to a matter governed by this Ordinance, or who authorizes the Entity to act with respect to a matter governed by this Ordinance.

Section 3. Prohibition of Air Polluting Facilities In Close Proximity To Residential Properties.

No Person or Entity shall maintain, erect, construct, utilize or operate any Air Polluting Facilities within three hundred (300) yards of any Residential Properties located within Borough of Kulpmont.

Section 4. Declaration of Nuisance and Provision for Abatement.

It is hereby declared that the operation of any Air Polluting Facilities within three hundred (300) yards of any Residential Properties is a nuisance and is prohibited, and shall be abatable in the manner otherwise provided by law.

Section 5. Limitation of Ordinance to New Facilities and Exclusion of Existing Facilities

The requirements of this Ordinance shall apply only to Facilities whose construction is not complete as of the effective date of this Ordinance. This Ordinance shall not apply to Facilities completely constructed and in operation as of the effective date of this Ordinance.

Section 6. Enforcement, Violations and Penalties.

The enforcement of this Ordinance shall be by action brought before a district justice in the same manner as provided for the enforcement of summary offenses under the Pennsylvania Rules of Criminal Procedure. Any Person or Entity who shall violate any provision of this ordinance shall, upon conviction thereof, as a summary offense, be sentenced to pay a fine of not more than One Thousand ($1,000.00) Dollars for each such violation; and shall be subject to imprisonment to the extent allowed by law for the punishment of summary offenses.

Each and every day, or portion thereof, of violation of the prohibitions contained in Sections 3 and 4 hereof shall constitute a distinct and separate offense. A distinct and separate offense shall arise for each section of the Ordinance found to have been violated. Each and every day during which such unlawful construction, utilization, or operation continues shall be deemed a distinct and separate offense. The imposition of the fines and penalties herein prescribed shall not

preclude the Borough from instituting actions at law or in equity to restrain, correct or abate a violation of this Ordinance.

Section 7. Rights and Remedies Cumulative.

This Ordinance is intended to supplement existing law with respect to the subject matter contained herein and is not intended to restrict, limit, or supplant any other remedy for the conduct prohibited in Section 3 and 4 hereof. It is declared to be the purpose of this Ordinance to provide additional and cumulative remedies to protect the public interest. Nothing in this Ordinance 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 with respect to air pollution or nuisances.

Section 8. Severability.

The provisions of this Ordinance are severable and if any provision, sentence, clause, section or part thereof shall be held illegal, invalid, unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to him or to other persons and circumstances. It is hereby declared to be the legislative intent that this Ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had not specifically been exempted therefrom.

Section 9. Repealer

All other Borough Ordinances or resolutions or parts thereof that were adopted prior to this Ordinance and which are inconsistent with this Ordinance are hereby repealed.

Section 10. Enactment and Effective Date.

That this Ordinance shall become effective upon enactment

DULY ENACTED AND ORDAINED THIS DAY OF 2006.

ATTEST:

City of Allentown Clean Air Ordinance

City of Allentown Clean Air Ordinance

CITY OF ALLENTOWN
LEHIGH COUNTY, PENNSYLVANIA
ORDINANCE NO. _____

AN ORDINANCE OF CITY OF ALLENTOWN, LEHIGH COUNTY, PENNSYLVANIA ESTABLISHING AIR QUALITY MONITORING AND EMISSION STANDARDS AND PROVIDING FOR CRIMINAL AND CIVIL PENALTIES AND OTHER ENFORCEMENT ACTIONS

WHEREAS, the United States of America Clean Air Act, as amended, including Amendments of 1989, and the Pennsylvania Air Pollution Control Act of January 9, 1960 (P.L. 2119), as amended, provide in part for the better protection of the health, general welfare and property of the people of the Commonwealth by the abatement, reduction and prevention of the pollution of the air by smokes, fumes, gases, odors, mists, vapors, and similar matter, or any combination thereof; and

WHEREAS, the Federal and Commonwealth Legislatures have granted the power to local municipalities to adopt more stringent air pollution standards than those provided within the cited Acts, as affirmed by the adoption of section 12 of Act 95 of 1992, 35 P.S.§4012; and

WHEREAS, local municipalities have thus been empowered with the right to enact ordinances in protecting and preserving the ambient air quality; and

WHEREAS, Allentown's ambient air quality is a matter of vital concern to the residents of the City; and

WHEREAS, the City of Allentown is of the opinion that increased introduction of air contaminants within the City would have an adverse effect on the ambient air quality; and

WHEREAS, the City of Allentown has determined that the impact of increased air contaminants should be borne by those introducing the contaminants; and

WHEREAS, the City of Allentown has determined that existing Federal and Commonwealth standards for air pollution monitoring and control are less stringent than desired, as they do not require state-of-the-art pollution prevention, monitoring or emissions reduction technology, do not reflect the current scientific understanding of the impact of environmental toxins on human health, and do not account for multiple, additive, cumulative and synergistic effects of pollutants on health; and

WHEREAS, pursuant to 53 P.S. § 37403, the City is empowered to prohibit nuisances, including, but not limited to accumulations of garbage and rubbish, and the storage of abandoned or junked automobiles, on private or public property, and the carrying on any offensive manufacture or business;

WHEREAS, the City of Allentown finds that the Pennsylvania Department of Environmental Protection does not possess sufficient staff, funding, or resources to continuously verify compliance with applicable environmental protection requirements;

WHEREAS, there are many pollutants that could be released into the City's air for which no monitoring is required or for which monitoring is too infrequent to serve as an accurate indicator of annual emissions, given that occasional tests

do not capture or measure emissions during start-up, shutdown or malfunction conditions, and do not capture or measure variations in emissions due to variability in fuels, feedstocks, processes, or changes in operating conditions;

WHEREAS, as required by 35 P.S. §4012(a), the City of Allentown finds that the provisions of this Ordinance are not less stringent than those of the Clean Air Act, the Pennsylvania Air Pollution Control Act, or the rules and regulations promulgated thereunder;

WHEREAS, the residents of Allentown deserve to be protected from unnecessary air pollution by having the City's industries operate as good neighbors, using the cleanest, least-polluting operating methods and technologies as are available in their industry;

WHEREAS, the Precautionary Principle states that: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof;"

WHEREAS, the City of Allentown finds that the Precautionary Principle is a more appropriate risk management method than the traditional risk assessment model used by environmental regulatory agencies;

NOW, THEREFORE, IT IS HEREBY ORDAINED AND ENACTED BY THE PEOPLE OF THE CITY OF ALLENTOWN, AS FOLLOWS:

ARTICLE I – TITLE, PURPOSE AND AUTHORITY

Section 1. Short Title

This Ordinance shall be known and may be cited as the "City of Allentown Clean Air Ordinance."

Section 2. Purpose

The purpose and intent of this ordinance is to ensure that accurate and complete information is available to the City and general public about pollutants released from new air polluting facilities within the City of Allentown, Lehigh County, Pennsylvania, and to exercise the authority granted to the City under the Pa. Air Pollution Control Act.

Section 3. Applicability

This ordinance shall apply and be in full force and effect in City of Allentown, Lehigh County, Pennsylvania.

Section 4. Authority

This Ordinance is enacted pursuant to the authority granted to the City of Allentown by all relevant Federal and State laws and their corresponding regulations, including, without limitation, the following:

Pennsylvania Constitution, Article I, Section 27;

Pennsylvania Air Pollution Control Act, 35 P.S. § 4012, which preserves the rights of municipalities to adopt air

pollution ordinances and regulations not less stringent than the requirements of the Clean Air Act, the Pennsylvania Air Pollution Control Act, or rules and regulations promulgated thereunder.

ARTICLE II – DEFINITIONS

The following words and phrases when used within this Ordinance, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this Article:

(a) Air pollution permit – any authorization from the Department allowing a facility to legally emit air pollutants, including an Air Quality Plan Approval, Title V Operating Permit, Federally Enforceable State Operating Permit, conditions placed on a facility in a Request for Determination (RFD) of Requirement for Plan Approval, or a Consent Order and Agreement.

(b) City – The City of Allentown, Pennsylvania.

(c) Commercially available – A system that is currently offered for purchase by equipment vendors for the proposed application, and for which service contracts can be obtained for a fee. The determination of commercial availability does not include an analysis of the costs of the system.

(d) Continuous Emissions Monitoring System (or "CEMS") – A pollution monitoring system capable of sampling, conditioning, analyzing, and providing a record of emissions at frequent intervals and meets U.S. Environmental Protection Agency or Department data acquisition and availability requirements. The sampling frequency capability sufficient to qualify a system as a CEMS for the purposes of this ordinance shall at a minimum deliver a monitoring sample (i) once per minute or (ii) any lesser frequency of interval that still provides sufficient data for a direct determination of compliance with all applicable emission limitations imposed by the Department for the Facility, but in no case may the frequency of interval for monitoring samples be less than once per hour.

(e) Department – The Pennsylvania Department of Environmental Protection, or any successor state agency responsible for air pollution permitting.

(f) Entity – All entities which are the subject of legal rights and duties, including those which possess limited liability characteristics, corporations, companies, partnerships, limited partnerships, limited liability partnerships, non-profit organizations, business trusts, limited liability corporations, societies, foundations, institutions or other association of persons, governmental bodies and municipal authorities organized under the laws of any state or the United States or any country.

(g) Facility – A New Air Polluting Facility, as defined by this ordinance.

(h) Hazardous Air Pollutants (HAPs) – A pollutant regulated under Section 112 of the Clean Air Act.

(i) New Air Polluting Facility – Any facility, located in the City of Allentown, that commences operation after the effective date of this ordinance, which produces energy or disposes of waste by combusting a Solid Fuel or Waste or gases produced from Solid Fuel or Waste, and which is capable of processing at least one ton per day.

(j) Person – Natural persons, not including corporations or other entities.

(k) Owner – The person or Entity that has the legal right of proprietorship of a Facility.

(l) Operator – Each person or Entity that operates a Facility.

(m) Responsible Party – If the facility is owned and operated by a person, the responsible party is that natural person. If the facility is owned and/or operated by an Entity, this term shall include the Entity and all officers, directors, and general partners or trustees of any Entity that owns or operates the facility. If the Owner and Operator are separate entities, both Owner and Operator shall be considered responsible parties and shall be jointly and fully responsible for compliance with all aspects of this ordinance.

(n) Solid Fuel or Waste – Any municipal waste, residual waste or hazardous waste as defined by 25 Pa. Code §271.1 or 25 Pa. Code §287.1, coal refuse as defined by 52 P.S. §§30.51–30.101, biomass as defined by 52 Pa. Code § 75.1, or other material that is solid at ambient temperatures.

(o) TEQ_{DF}-WHO_{98} – A unit of measurement for dioxins and furans, standardized to toxic equivalents, calculated in accordance with the World Health Organization's 1998 method.

ARTICLE III – MONITORING REQUIREMENTS

Section 1. Air Pollution Monitoring

(a) The Owner and Operator of any New Air Polluting Facility operating within the City of Allentown shall install and operate continuous emissions monitoring systems (CEMS) for all pollutants listed in Section 2 and shall monitor and disclose information on emission of pollutants as required under Sections 2 and 3 at all times when the Facility is in operation.

(b) CEMS for which there exist U.S. Environmental Protection Agency or Pennsylvania Department of Environmental Protection standards must also comply with such applicable standards. The facility shall observe the requirements and procedures in 25 Pa. Code 139.101 and the latest revision of the Department's Continuous Source Monitoring Manual to the extent that the requirements in that manual do not conflict with the requirements of this ordinance. The facility shall seek certification and approval for each CEMS without respect to whether the facility's plan approval or operating permit from the Department requires continuous emission monitoring for a given pollutant. CEMS operation required under this ordinance shall be conducted regardless of whether the Department has certified and approved the CEMS. In the event of denial, the facility shall make necessary adjustments to CEMS equipment or procedures in order to obtain Department certification and approval, unless: (1) the Department indicates that it cannot provide the same for that particular pollutant, (2) the approval could only be obtained by adjusting monitoring to the extent that it would no longer satisfy minimum standards of "continuous" monitoring as defined in this ordinance, or (3) the Department refuses to certify CEMS that are not required under permits issued by the Department.

(c) Pollution monitoring results shall become the property of the City of Allentown. All costs of monitoring shall be borne by the person or Entity owning the Facility.

(d) Emissions monitors must be started up at least twelve (12) hours before the commencement of Facility operation, unless the manufacturer of the monitors certify that the equipment can sample accurately with a

shorter warm-up time.

(e) Exhaust gases may not be released into the atmosphere until they have cooled to below 200 degrees Centigrade in order that all dioxins and furans can be monitored accurately and completely. Dioxin/furan emissions monitors must be placed at a point where the exhaust gases have cooled to below 200 degrees Centigrade. Dioxin and furan measurements must be standardized to TEQ_{DF}-WHO_{98} units for reporting purposes under this Ordinance. Reporting of dioxins and furans shall be in TEQ_{DF}-WHO_{98} units as well as all other measurement methods available from the dioxin/furan CEMS.

(f) Where applicable, non-detects shall be reported as half the minimum detection limit.

(g) The Facility Owner and Operator shall furnish to the City written consent for the inspection of the Facility at any time by the designees of the City for the purpose of assuring compliance with this Ordinance. Such designees shall be permitted entry upon any property or into any building, premises or place on which or within which a New Air Polluting Facility may be located and to inspect the emissions monitoring equipment as may be necessary to ensure that such equipment is operational, is operating properly and is being used as intended by the manufacturer and in accordance with this Ordinance.

(h) If additional chemicals can be monitored with the equipment required to monitor the pollutants regulated under this Ordinance, the emissions of these additional chemicals shall also be reported. If CEMS equipment is capable of reporting categories of chemicals in more detail (for example, separate readings for NO and NO_2 as opposed to a total reading for NOx), this increased level of detail must be reported.

Section 2. Pollutants to be Continuously Monitored

(a) Continuous Emissions Monitoring Systems ("CEMS") equipment shall be used to monitor, measure and disclose the emission of all pollutants for which the Department sets permitted emissions limits (or limits under which the facility must remain in order to avoid more stringent regulation) in the Facility's air pollution permit, provided that CEMS for the pollutant are commercially available. The determination of commercial availability shall be made according to the 5-year review schedule in Section 3. If there are multiple emission point sources at a facility, separate CEMS shall be installed on each and every non-fugitive emission point source at the Facility for which permit limits apply.

(b) If a Facility's air pollution permit sets a limit for Hazardous Air Pollutants as a category or on a single generic, non-specified Hazardous Air Pollutant or both, the Facility must use CEMS to monitor and disclose emissions of all chemicals and chemical groups classified by the U.S. Environmental Protection Agency as Hazardous Air Pollutants in Section 112 of the Clean Air Act, provided that CEMS for such chemicals or chemical groups are commercially available.

(c) A Facility must continuously monitor and disclose emissions of dioxins and furans, even if dioxins and furans are not specifically regulated by the facility's air permit, if:

i. the facility is regulated, classified or otherwise known as being of an industry listed as a known or suspected source of dioxin and furans in Chapter 1, Table 1-5 of the U.S. Environmental Protection Agency's "Inventory of Sources and Environmental Releases of Dioxin-Like Compounds in the United States: The Year 2000 Update" or a substantially similar chart in any succeeding report; or

ii. any process connected to or leading to the non-fugitive air emission point source exceeds 300 degrees Celsius.

(d) A Facility operating any type of fluidized bed combustor must continuously monitor and disclose emissions of nitrous oxide (N_2O) even if this pollutant is not specifically regulated by the facility's air permit.

(e) A Facility operating air pollution control devices that inject ammonia to control emissions must continuously monitor and disclose emissions of ammonia even if this pollutant is not specifically regulated by the facility's air permit.

(f) A Facility operating any combustion source must continuously monitor and disclose emissions of the following pollutants even if these pollutants are not specifically regulated by the facility's air permit:

i. Carbon Dioxide (CO_2) & Carbon Monoxide (CO)
ii. Hydrochloric Acid (HCl) & Hydrofluoric Acid (HF)
iii. Nitrogen Oxides (NOx)
iv. Sulfur Oxides (SOx)
v. Particulate Matter (PM)
vi. Volatile Organic Compounds (VOCs)
vii. Polycyclic Aromatic Hydrocarbons (PAHs)
viii. Arsenic, Cadmium, Chromium, Lead, Manganese, Mercury, Nickel, Selenium & Zinc

Section 3. Five Year Review for Commercial Availability

(a) New Air Polluting Facilities must go through the following process in order to determine which pollutants must be continuously monitored. Nothing in this section shall prevent the City from making a determination of which CEMS are commercially available and must be used by a Facility that has not yet gone through this review process. The review process shall be conducted every five years, with the initial review commencing 60 days after the effective date of this ordinance and subsequent reviews commencing one year prior to every fifth anniversary of the effective date of this ordinance (years 4, 9, 14, 19, etc.).

(b) New Air Polluting Facilities must submit a list of all air pollutants regulated by their air pollution permits to the City, specifying which of those pollutants can be monitored by CEMS that are currently commercially available at the time of submission. The list shall separately include and evaluate CEMS availability of each Hazardous Air Pollutant if Hazardous Air Pollutants are regulated generically in their permit. These submissions shall be made to an official designated by the city. Submissions shall be made by all Facilities and are due to the City on the day that the review process commences.

(c) The City shall make the submissions available for public review within two business days of when the City receives them. Within 60 days of the commencement of the review process, the City shall publicly notice and conduct a public meeting where Facility owners, operators and the general public may comment on the submissions and on whether CEMS technology is available for the pollutants regulated under this ordinance. The City shall accept public comments for a period of 30 days after the public meeting.

(d) If there is any dispute over whether CEMS technology is commercially available for any of the pollutants regulated under this ordinance or for the specific application of CEMS at one or more specific Facilities, the City shall hire an environmental consultant to research and evaluate whether the technology is available for the

proposed application. The consultant must be familiar with current state-of-the-art CEMS technology and the U.S. Environmental Protection Agency's Environmental Technology Verification (ETV) Program. Facility owners and operators must provide pertinent information to the consultant at the consultant's request. The consultant shall report to the city on whether CEMS are commercially available for the proposed application. The consultant shall report to the city no later than 60 days after the closing of the public comment period. The consultant shall be paid with application fees described in Article VIII.

(e) The City shall make public the consultant's report within two business days of receipt of the report. Based on the consultant's report and public comments, the City shall release a final list of the pollutants for which CEMS shall be considered commercially available for the period until the next five-year review. If there are special circumstances that make CEMS technology for a given pollutant available for some Facilities and not others, the list may include facility-specific qualifications. The City shall publish the final list which shall be released no more than 180 days after the commencement of the review process. In order to evaluate the consultant's report and the public comments, the City may convene a seven-to-nine (7-9) person CEMS evaluation committee to meet in an open, public meeting to make recommendations to the City. No persons with financial, organizational or familial ties to any owner or operator of a Facility shall be eligible for committee membership.

(f) CEMS required by this ordinance that are deemed commercially available by the City shall be installed and shall be fully operational, submitting data to the City as required in Article IV. New CEMS that are determined to be commercially available in the second or subsequent review processes must be installed and must be fully operational, submitting data to the City as required in Article IV, no later than one year following the commencement of that review process, which shall fall on every fifth year following of the effective date of this ordinance (years 5, 10, 15, 20, etc.).

Section 4. Hazardous Air Pollutant Monitoring Exemptions

(a) If a Facility is required under this ordinance to use commercially available CEMS for all Hazardous Air Pollutants (HAPs), per Article III, Section 2(b), due to a generic limit on HAPs in their air pollution permit or the requirements of Article III, Section 2(f), the Facility's Owner, Operator or other Responsible Party can seek an exemption for the monitoring of certain HAPs, even if CEMS are commercially available, if they demonstrate that their process cannot emit the pollutant(s) in question.

(b) An exemption must be sought through a written application, justifying how a particular stack or other emission source cannot emit a given pollutant because of the nature of the process generating the emissions from such stack or source. The application must include test results for the relevant compounds and elements in all feedstocks or other inputs into the process leading to the air emissions source, including chemicals injected in the pollution control process. Sampling of feedstocks and inputs into the process must be representative of the range of variability in their chemical makeup.

(c) All sampling must be conducted in coordination with an environmental consultant selected and retained by the City. The Facility Owner must pay the City for all costs related to the retention of this consultant and associated costs for laboratory testing of samples. The responsibility to cover these costs is independent of the license fees required in Article VIII.

(d) The City's consultant shall recommend which tests must be conducted to make an informed decision on whether the Facility is capable of emitting the pollutant in question, and the Facility is required to conduct any such tests as are deemed necessary by the City's consultant. All sampling must be conducted using split samples, with one

of each sample going to the consultant retained by the City, and the other to a laboratory of the Facility Owner's choosing. The City's consultant shall have the samples tested and shall compare them to the samples done by the Facility Owner.

(e) The City's consultant shall report to the City on whether the sampling results are similar enough to represent an accurate estimation of the chemical makeup of the feedstock or input in question, and shall recommend to the City whether the Facility shall be exempted from monitoring a given Hazardous Air Pollutant.

(f) No exemptions shall be granted for pollutants for which monitoring is required under Article III, Sections 2(c) and 2(d).

(g) No exemptions shall be granted to point sources where air emissions originate from the combustion of a Solid Fuel or Waste (or gases derived from such Solid Fuel or Waste) where the Solid Fuel or Waste is known to be highly variable in its chemical composition, which includes but is not limited to municipal solid waste, construction and demolition waste or municipal sewage sludge.

(h) Each City-granted exemption from the CEMS requirement shall be for a specific pollutant at a specific stack or source at a specific Facility. Such exemption shall be applicable only to the emission of that given pollutant at such stack or source and shall be valid only under the circumstances set forth in the application justifying the exemption. Such exemption shall automatically expire if the circumstances under which the exemption was granted change, including any change in feedstock of other chemical inputs. Any exemptions obtained must be renewed on a five-year basis and shall be timed to coincide with the five-year review outlined in Section 3, so that any testing begins after each review period commences and the City's exemption determination is made no later than 180 days after each review period commences.

Section 5. Unlawful Conduct

It shall be unlawful for any person, Entity, or other Responsible Party to:

(a) Fail to comply with any provision of this Ordinance;

(b) Violate or assist in the violation of any of the provisions of this ordinance.

(c) Attempt to circumvent any provision of this Ordinance through misrepresentation or failure to disclose all relevant facts. Nothing in this Ordinance shall be construed to affect the application of provisions of the Crimes Code, Title 19 of the Pennsylvania Consolidated Statutes relating to perjury, false swearing or unsworn falsification to authorities.

(d) Intentionally obstruct, impair or interfere with the administration of this Ordinance by the City or their designees by force, violence, physical interference or obstacle or any other unlawful act. Nothing in this Ordinance shall be construed to affect the application of Section 5101 of the Crimes Code, Title 2le of the Pennsylvania Consolidated Statutes as to obstructing administration of law or other governmental function.

(e) Tamper or interfere with any sample, process, device, equipment, computer hardware or software, indicator or alarm, report, electrical power, pipe, gas or other media so as to affect or alter any sample, process, device, equipment, indicator or alarm, report, electrical power, pipe, gas or other media used in the gathering and analysis of samples or the disclosure of sample analysis as may be required by the City in the administration of

this ordinance.

ARTICLE IV – DATA DISCLOSURE

Section 1. Website for Data Disclosure

(a) No later than 60 days after the effective date of this ordinance, the City shall procure a computer consultant to establish the website, to be owned by the City, where Facilities shall submit the data required to be disclosed by this ordinance. The website and any software needed to be developed for it, shall be completed and ready for use no later than eight (8) months after the effective date of this ordinance. The software shall be designed to automatically present the data that the City is required to present under Section 2. Facility owners and operators must cooperate with the computer consultant, providing relevant CEMS data, CEMS vendor contacts and other such information as may be needed for the efficient and effective design of the website and corresponding software.

(b) In addition to the requirements for the software outlined in Section 2, the software must be designed to immediately alert by email designated city officials – and other parties who sign up to be notified – any time emissions at a Facility exceed that Facility's air pollution permit limitation. The City must designate an enforcement officer who will receive emailed alerts of emissions exceedances.

(c) The City shall archive and preserve all digital data submitted under this ordinance until five years after the date when there are no more facilities required to submit data to the City under this ordinance.

Section 2. Disclosure of Emissions Data

(a) CEMS Data Disclosure

i. The Owner and Operator of any New Air Polluting Facility operating within the City of Allentown shall transmit CEMS data collected at the facility to a publicly-available website managed by the City. All CEMS data that is available to the operator in a digital format shall be supplied real-time through an Internet feed to the city's website. Data shall be submitted to the city's website no later than twenty-four (24) hours after the data is available to the facility Owner or Operator.

ii. The Owner and Operator of any New Air Polluting Facility is responsible for CEMS data disclosure upon start-up of the facility. For any additional CEMS required on a New Air Polluting Facility after the 5-year review, the data disclosure shall start once the new CEMS are installed.

iii. The Owner and Operator of any Facility is required to immediately notify the Department of any violations of state or federal air pollution permit limits detected by CEMS required by this ordinance.

iv. Any gaps in CEMS data reporting, or violations of emissions limits imposed by state or federal air pollution permits or by this ordinance, shall be explained by the Facility Operator in the data reported to the Borough.

(b) Air Emission Stack Test Data Disclosure

i. The Owner and Operator of any New Air Polluting Facility operating within the City of Allentown shall disclose stack test data for any air pollution stack tests conducted at the facility that are required by state or federal permits. This data shall be submitted to the publicly-available website managed by the City no later than twenty-four (24) hours after the data is available to the facility Owner or Operator.

ii. The Owner and Operator of any New Air Polluting Facility is responsible for data disclosure of all stack tests conducted prior to start-up and upon start-up of the facility.

(c) All data submitted to the City's website must be supplied in formats prescribed by the City.

(d) The City shall publicly display the data received in real-time. Data will be displayed in line charts for each pollutant, including a line showing the level of each applicable emissions limit for such pollutant, as well as a calculated line displaying rolling averages in cases where regulatory limits are based on such averages. Any changes to those application emissions limits must be incorporated within the data submittals by the effective date of the change. All data submitted to the website must be archived and made available for download in a commonly available spreadsheet or database format.

(e) The City shall compile summary charts listing all violations of any applicable emissions limits per pollutant for each facility reporting under this ordinance. Daily, weekly, monthly and yearly summaries of emissions levels, and violations shall be made available in an easily understandable presentation format. Emissions trend data shall be presented in line charts as well, showing the totals for all reporting facilities, as well as facility-specific trends from the beginning of the reported data set through the most recent year.

(f) Annual summary data, specifying total emissions levels of all pollutants which are regulated by local, state or federal permits, a list of exceedances for each pollutant (including the date of the exceedance, the amount of the emission and a comparison to the limit exceeded), shall be published conspicuously in the most widely-read local newspaper of general circulation within the City at the expense of the Facility Owner.

Section 3. Disclosure of Regulatory Documents

(a) Copies of all digital files exchanged between a New Air Polluting Facility regulated under this ordinance and any state or federal environmental regulatory agencies shall be uploaded to a documents section for the facility, hosted on the City's website, regardless of where the document originated. This shall be done in a format acceptable to the City. Digital documents generated or received after the effective date of this ordinance must be uploaded within three (3) business days of when they were transmitted to the regulatory agency or received by either the Facility's Owner, Operator or any contractor acting on behalf of the Facility owner or operator. Digital documents generated or received prior to the effective date of this ordinance must be uploaded within 365 days of the effective date of this Ordinance.

(b) Copies of inspection reports, notice of violations, penalty assessments, permit applications, required reporting, compliance certifications and any other correspondence between a New Air Polluting Facility regulated under this ordinance and any state or federal environmental regulatory agency must be uploaded to the City's website in a commonly-used document format acceptable to the City. The Facility Owner is responsible for any scanning and other actions and expenses necessary to make this information available to the City. Documents generated or received after the effective date of this ordinance must be uploaded within seven (7) days of when a document is sent to an agency or received by either the Facility's Owner, Operator or any contractor acting on behalf of the Facility owner or operator. Documents sent or received prior to the effective date of this

ordinance, if they are relevant to active permits or ongoing permitting processes must be uploaded within 90 days of the effective date of this Ordinance. Upon request of any resident of the City, any documents longer than 20 pages must also be made available at the Facility Owner's expense in paper copies in a local library, City Hall or other facility that is open to the public and available during work days and with some evening or weekend hours amounting to at least five hours per week. If such evening and weekend hours aren't available at a publicly-available facility in the City, the facility owner must provide a place where documents are made available to the general public for viewing and copying upon request.

ARTICLE V – EMISSIONS LIMITS

Section 1. Emission Limits

(a) All New Air Polluting Facilities must meet the following pollution limits:

Carbon Dioxide (CO_2):	120.0	lbs/mmbtu
Nitrogen Oxides (NOx):	0.18	lbs/mmbtu
Sulfur Dioxide (SO2):	0.01	lbs/mmbtu
Dioxins/Furans (PCDD/F):	1.5	ng TEQ_{DF}-WHO_{98} per kg of waste combusted

(b) It shall be unlawful to emit more than these limits. In calculating compliance with the limits on CO_2, NOx and SO_2, data may be averaged on a three-hour basis. In calculating compliance with the dioxin/furan limit, data may be averaged on a daily basis. Such averaging shall not include data from times when combustible materials are not being burned in the incinerator.

(c) In cases where the average weekly emissions exceed the emissions limit, waste feed shall be cut off and operations shall be immediately ceased until corrective action is taken.

Section 2. Adoption and Incorporation of Other Limits and Standards

To the extent a more stringent standard, limit, or requirement for the emission of air contaminants or a standard of performance for any facility regulated by this Ordinance is not expressly set forth herein, the City adopts and incorporates by reference herein the standards, limits, and requirements for the emission of air contaminants, and standards of performance for stationary sources, as promulgated by the U.S. Environmental Protection Agency pursuant to the Clean Air Act or by the Commonwealth of Pennsylvania pursuant to the Air Pollution Control Act or any other relevant statutes. It is expressly the intent of the City in adopting these standards, limits, requirements, and standards of performance, to make them independently enforceable by the City of Allentown.

Section 3. Best Available Technology

To the extent that either the U.S. Environmental Protection Agency or the Pennsylvania Department of Environmental Protection determines that a control technology is reasonably available to reduce or minimize the emission of air contaminants from a stationary source, each stationary source within the City shall modify its facility so as to utilize the control technology within such time as the City may reasonably determine. The City shall notify the facility of the time period within which it must modify the facility to utilize the control technology. It shall be the responsibility of the facility to obtain such permits and approvals for the modification of the facility as are necessary under state and federal law.

ARTICLE VI – DECLARATION OF PUBLIC NUISANCES

The emission of pollutants into the atmosphere of the City of Allentown except in conformity with this Ordinance is hereby declared to be public nuisance, abatable in the manner prescribed by law.

ARTICLE VII – COMPLIANCE ORDERS

Whenever the City has reason to believe that there has been a violation of this Ordinance or other State or Federal Law, or any of the rules and regulations promulgated pursuant thereto or a misrepresentation of any certification, the City shall, in addition to any other remedy available to it, and in the absence of an emergency situation requiring prompt action, give written notice of such violation to, the Owner or Operators of the Facility, and therein order such corrective measures as are deemed reasonable and necessary to cure the violation. This notice shall state the nature of the violations and shall allow a reasonable time for the performance of the necessary corrective measures. If the Owner or Operator of the Facility fails to carry out the corrective measures set forth in the notice, within the time period stated therein, the City shall institute such other actions as may be deemed necessary to terminate the violation.

ARTICLE VIII – FEES

Facilities subject to this ordinance shall be obligated to pay fees to the City for the operation of the programs under this ordinance.

Section 1. Initial Licensing and Fee

All Facilities subject to this ordinance must obtain a CEMS license by submitting an application to the City providing all required information and tendering payment of $5,000. A responsible official at the Facility must sign the application. All funds received through this Article will be placed in a dedicated account by the City to be used exclusively for the installation, operation and maintenance of all hardware, software or other equipment necessary to receive and process monitoring data and other documents from subject Facilities and post such material to the web for public access. In addition to this base fee, subject facilities must also submit $250 per CEMS for which they will submit data to the City under this ordinance. Payment must be made 60 days prior to the date on which CEMS data submittals are scheduled to commence.

Section 2. Annual license fee

All Facilities subject to this ordinance shall pay an annual CEMS license fee, subsequent to the initial application, of $1,000, as well as an additional $250 per CEMS for which they will submit data to the City under this ordinance in years subsequent to the initial application. The facility shall submit a form certifying that the information in the application remains accurate or specifying any changes. Payment must be made 60 days prior to the anniversary of the date on which CEMS data submittals commenced.

ARTICLE IX – PENALTIES

In accordance with the Pa. Air Pollution Control Act, 35 P.S. 4012(g), providing that civil and criminal penalties for air pollution violations be uniform throughout the Commonwealth, and further providing that "the penalties and remedies set forth in this act be the penalties and remedies available for enforcement of any municipal air pollution ordinances or regulations, and shall be available to any municipality, public official, or other person having standing to initiate proceedings for the enforcement of such municipal ordinances or regulations" the criminal and civil penalties for violation of this Ordinance shall be the following:

Section 1. Criminal Penalties

(a) Any person, Entity, or Responsible Party who negligently violates any provision of this Ordinance commits a summary offense and shall, upon conviction, be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than two thousand five hundred dollars ($2,500.00) for each separate offense and, in default of the payment of such fine, may be sentenced to imprisonment for ninety (90) days for each separate offense. For purposes of this subsection, a summary offense may be prosecuted before any district justice in the county where the offense occurred. There is no accelerated rehabilitative disposition authorized for a summary offense.

(b) Any person, Entity or Responsible Party who intentionally or willfully violates any provision of this Ordinance commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not less than one thousand dollars ($1,000.00) nor more than fifty thousand dollars ($50,000.00) for each separate offense or to imprisonment for a period of not more than two (2) years for each separate offense, or both.

(c) Any person, Entity or Responsible Party who knowingly makes any false statement or representation in any application, record, report, certification or other document required to be either filed or maintained by this Ordinance commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not less than two thousand five hundred dollars ($2,500.00) nor more than fifty thousand dollars ($50,000.00) for each separate offense or to imprisonment for a period of not more than two (2) years for each separate offense, or both.

(d) For purposes of this section, a person, Entity or Responsible Party acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Section 2. Civil Penalties

(a) In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this Ordinance, the City may assess a civil penalty for the violation. The penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed Twenty-five thousand dollars ($25,000.00) per day for each violation. In determining the amount of the penalty, the City shall consider the willfulness of the violation; damage to air, soil, water or other natural resources or their uses; financial benefit to the person, Entity or Responsible Party in consequence of the violation (hereinafter "violator"); deterrence of future violations; cost to the City, the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which

compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the Owners or Operator of the source or facility; and other relevant factors.

(b) In accordance with the Air Pollution Control Act, 35 P.S. §4012(g), which provides that "any action for the assessment of civil penalties brought for the enforcement of a municipal air pollution ordinance or regulation shall be brought in accordance with the procedures set forth in such ordinance," an action for the assessment of a civil penalty under this section of this Article shall be brought in accordance with the following procedures:

When the City proposes to assess a civil penalty, it shall inform the violator of the proposed amount of the penalty. Such assessment shall be a final action of the City, appealable in the manner provided by law. The violator charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full, or, if the violator wishes to contest the amount of the penalty or the fact of the violation to the extent not already established, the violator shall forward the proposed amount of the penalty to the City within the thirty (30) day period for placement in an escrow account or post an appeal bond to the City within thirty (30) days in the amount of the proposed penalty, provided that such bond is executed by a surety licensed to do business in the Commonwealth and is satisfactory to the City. If, through administrative or final judicial review of the proposed penalty, it is determined that no violation occurred or that the amount of the penalty shall be reduced, the City shall, within thirty (30) days after such determination, remit the appropriate amount to the violator with any interest accumulated by the escrow deposit. Failure to forward the money or the appeal bond at the time of the appeal shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty unless the appellant alleges financial inability to prepay the penalty or to post the appeal bond. Appeals from the assessment of a civil penalty shall be as provided by law. If any violator liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall constitute a debt of such violator and shall constitute a lien on all property owned by said violator when a notice of lien incorporating a description of the property of the violator subject to the action is duly filed with the Prothonotary of the court of common pleas where the property is located. The prothonotary shall promptly enter upon the civil judgment or order docket, the name and address of the violator, as may be appropriate, and the amount of the lien as set forth in the notice of lien. Upon entry by the prothonotary, the lien shall attach to the revenues and all real and personal property of the violator, whether or not the violator is solvent. The notice of lien, filed pursuant to this subsection, which affects the property of the violator shall create a lien with priority over all subsequent claims or liens which are filed against the violator, but it shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien under this subsection.

Section 3. Determination of Penalties for CEMS Reporting and Emission Limit Violations

(a) On a quarterly basis, an environmental engineer retained by the City at the expense of the Owners of the Facilities regulated under this ordinance, shall review the data reported to the City and recommend appropriate penalties for non-compliance with CEMS reporting requirements and any emission limits established in accordance with this ordinance.

(b) Penalties shall be assessed for any gaps in CEMS data availability as well as for any exceedances of emissions limits. The engineer may use Department CEMS and emissions limit penalty assessment procedures as a guide, but shall not allow exceptions for excess emissions during soot blowing, start-up, shutdown, or malfunctions. The engineer shall review any stated reasons for each exceedance or data unavailability and take this into consideration when recommending appropriate penalties.

ARTICLE X – ABATEMENT AND INJUNCTIONS

Notwithstanding any other provision herein, if the City finds any person or Entity is operating a New Air Polluting Facility without complying with the requirements of this Ordinance, or any of the rules and regulations promulgated thereunder, the City shall, in addition to other remedies that may be available to the City, order the immediate discontinuance of such violations, or order other compliance. Failure to comply with such an order of discontinuance, or any other order of compliance issued by the City, shall constitute a violation of this Ordinance. In addition to all other remedies, upon a failure to comply with such order the City shall secure a temporary restraining order, a preliminary injunction, a permanent injunction or other appropriate relief or declare the operation a public nuisance, and order the immediate abatement of same, with the costs of such abatement to be borne and assessed in accordance with law.

ARTICLE XI – CITIZEN ENFORCEMENT

Any City resident shall have standing and authority to bring an action to enforce this Ordinance's provisions.

ARTICLE XII – SEVERABILITY

Each separate provision of this Ordinance shall be deemed independent of any other provision of this Ordinance, and if any provision, sentence, clause, section or part hereof is held to be illegal, invalid or unconstitutional or inapplicable to any person, Entity or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts of this Ordinance or their application to other parts or circumstances. It is hereby declared to be the legislative intent that this Ordinance would have been enacted as if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included herein, and as if the person, Entity or circumstances to which this Ordinance, or any part hereof is inapplicable had been specifically exempted therefrom.

ARTICLE XIII – EFFECTIVE DATE

That this Ordinance shall become effective immediately.

ORDAINED AND ENACTED THIS _____ DAY OF _____ 2013.

ATTEST:

County Low Level Radioactive Waste Ordinance

_____ COUNTY ORDINANCE NO_____

REGULATING THE SITING AND OPERATION OF LOW LEVEL RADIOACTIVE WASTE FACILITIES WITHIN THE COUNTY; ESTABLISHING THE POSITIONS OF ENVIRONMENTAL CONTROL OFFICER AND INSPECTOR; ESTABLISHING AN ENVIRONMENTAL ADVISORY COUNCIL; SETTING PROCEDURES FOR THE HANDLING OF SITING AND OPERATING PERMIT APPLICATIONS; ESTABLISHING PROCEDURES FOR SECTION 318 STUDY FUNDING; AND ESTABLISHING FEES, REMEDIES AND PENALTIES.

ARTICLE I: TITLE

Section 101. Title.

This Ordinance shall be known as the "_____ County Low Level Radioactive Waste Ordinance."

ARTICLE II: PURPOSES AND AUTHORITY

Section 201. Purposes.

The Purposes of this Ordinance shall be:

A. To protect the health, safety and general welfare of all citizens of the County by preventing exposure to airborne radioactive substances, in accordance with provisions of the Federal Clean Air Act of 1990, and to radioactive substances in all other media.

B. To preserve the natural environmental qualities of all the land, flora and fauna within the County.

C. To promote the sustainable economic well-being of the County by preserving and protecting agriculture and agriculture-related activities.

D. To promote the sustainable economic well-being of the County by preservation of camping, hunting, fishing and other recreational opportunities for the residents of the County and for tourism.

E. To preserve the values of a healthy environment for this and future generations.

F. To protect against the infliction of psychological or emotional stress on County residents from the reasonable fear of exposure to radiation.

Section 202. Interpretation.

This Ordinance shall be liberally interpreted to give priority to the purposes stated in Section 201 over such considerations as the economics of the nuclear industry, or efficiency or scheduling factors at any level of government.

Section 203. Authority.

This Ordinance is adopted pursuant to the authority granted to the County by all relevant state and federal laws, including, but not limited to, the following:

A. The Pennsylvania Constitution, Article I, Section 27;

B. The Pennsylvania Municipalities Code and County Code.

C. The Low Level Radioactive Waste Disposal Act, Act of February 9, 1988, P.L. 31, Act No. 12, 35 P.S. Section 7130.101 et seq.;

D. Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, 35 P.S. Section 4001 et seq. as amended;

E. The Appalachian States Low Level Radioactive Waste Compact Act of 1985, 35 P.S. section 7125.1, et seq;

F. The Pennsylvania Low Level Radioactive Waste Disposal Regional Facility Act, Act of July 11, 1990, P.L. 436, Act. No. 107, 35 P.S. Section 7131.101, et seq;

G. Clean Air Act as amended, 42 U.S.C. Section 7401 et seq. (especially sections 7416, 7422);

H. The Energy Policy Act of 1992;

I. The U.S. Pollution Prevention Act (1991);

J. The National Environmental Policy Act of 1969, 42 U.S.C.A. Sections 4321 to 4370a.

K. Any other state or federal laws which explicitly or implicitly give jurisdiction over this matter to the County of _____.

ARTICLE III: DEFINITIONS

Section 301. Definitions.

The following terms shall have the meanings defined in this section wherever they are used in this Ordinance:

Above Ground Facility is a monitored, retrievable facility above grade level constructed with triple dedicated engineered barriers isolating the contents from the biosphere.

Buffer Zone is the portion of the waste site that is controlled by the licensee and that lies under the waste units, and between the waste units and the site boundary.

Compact States are Pennsylvania, Delaware, Maryland and West Virginia.

Container is the inner-most solid enclosure which encompasses the radioactive waste, and shall be sealed and leak-proof and which includes a means for controlled off-gassing of radioactive decay products into another container.

Containment means the isolation of radioactive waste substances and radiation from the biosphere for the full hazardous life of the waste by means of engineered barriers and waste site design.

County means the County of _____.

Department means the Pennsylvania Department of Environmental Protection, or any successor agency having regulatory authority over radioactive waste.

Environmental Control Officer means an individual who is or shall become a permanent resident of the County, whose full compensation shall be reimbursed to the County by the low-level waste facility operator. The basic minimum qualifications for employment shall include the highest appropriate formal training and experience available; the officer shall remain current and abreast of issues and information affecting the disposal of nuclear waste.

Facility Records means all information regarding origin, contents, transport and other relevant data for all low level radioactive waste and mixed wastes at the Facility.

Fill means fill, grout, or other material which is placed in void spaces between radioactive waste containers or waste modules within the waste unit to provide structural strength against subsidence or collapse.

Hazardous Life means the amount of time it takes for the LLRW to decay to levels such that unrestricted use of the site or of the waste could not result in exposure to total radioactive levels higher than the radioactivity measured at the site prior to its use for storage or disposal.

Inspector means an individual appointed by and reporting to the County Commissioners to perform inspections of all activities at the waste facility, as provided under Section 318 of the Low Level Radioactive Waste Disposal Act. The Inspector's full compensation shall be reimbursed in full to the County by the low-level waste facility operator.

Institutional Control Period is the period of time during which active surveillance, monitoring and care is maintained and any necessary remediation is conducted, and which shall extend to thirty (30) years after the estimated hazardous life of the waste.

Leak Proof means the engineered design feature which eliminates the inflow or outflow of solid, liquid or gaseous material by any means, including selective absorption, adsorption or ion exchange, except into a container through a control valve.

Low Level Radioactive Waste or **LLRW** means radioactive waste as defined in Section 11(e)(2) of the Atomic Energy Act of 1954, codified as amended at 42 U.S.C. Section 2014(e)(2), or in the LLRW Act or the Low Level Radioactive Waste Disposal Regional Facility Act, Act of July 11, 1990-107, 35 P.S. Section 7131.101, et seq. as amended, whichever is more inclusive.

LLRW Act means the Pennsylvania Low Level Radioactive Waste Disposal Act of February 9, 1988, P.L. 31, Act No. 12, 35 P.S. Section 7130.101 et seq.

Mixed Waste means Low Level Radioactive Waste that either (1) contains hazardous waste listed in the Code of Federal Regulations 40 CFR Part 261, subpart D; or (2) exhibits any of the hazardous characteristics identified in 40 CFR Part 261 Subpart C.

Monitoring Zone means a ten (10) mile radius from the perimeter of the waste site.

Operator means the entity licensed by the Department to develop, operate, close and decommission the Appalachian Compact Regional Low-Level Radioactive Waste Disposal Facility.

Public Access to Information means public availability of all historical and current information related to low-level radioactive waste and the Waste Facility and associated information on preservation of the environment, protection of the people, flora and fauna, and all matters related to the health, safety and welfare of the County. Such documentation shall be stored and open to public scrutiny. The Public Access to Information shall be at both the County's library and at the library which is the closest and most accessible to residents affected by the Waste Site. It shall include copies of all required records and facility records as defined herein. Public Access shall include whatever other measures of disseminating information to the public as shall from time to time be deemed necessary by the County Commissioners on advice from the Environmental Control Officer and/or the Environmental Advisory Council. All matters related to the establishment, operation and/or maintenance of public access to information shall be determined by the County and shall be at the sole expense of the operator.

Required records means independent, daily water well, surface water, soil, gas and oil well, plant and continuous air sampling, as well as human and animal surveys or tests as shall be requested by any individual or health professional and recommended by the Environmental Advisory Council. Such required records shall be kept regarding the waste facility, waste site, the ten mile monitoring area, and the area within the County as well as affected municipalities. Such data collection shall commence with the issuance of the siting permit and be required and directed by the County. Copies shall be kept at the respective offices of the affected municipality (ies) and the County Planning Department, as well as being available through the Public Access to Information. Any costs associated with such required records shall be borne by the operator.

Required Services means fully funded and appropriately trained fire, emergency, medical, support, transportation, development, maintenance, and environmental resources personnel, along with necessary staff, facilities and equipment and other benefits deemed necessary which shall be provided at the sole expense of the operator for the welfare of the County residents. Such benefits shall be fully in place and functioning prior to the operation of the waste facility, free to the recipients, and shall continue through the Institutional Control Period.

Significant threat means a threat of causing injury by the following conduct: violating any Federal or Pennsylvania environmental quality standard; contaminating groundwater, surface water, flora, fauna, or air so as to pose an immediate hazard to human health by exposure to any substance that causes injuries, including but not limited to: genetic injury, short or long latency cancer, leukemia, immuno-deficiency disorders, endocrine disorders, or that causes the death of fish or wildlife; causing the extinction or threatening the viability of any endangered species or any species placed on a "threatened" or "special concern" list; contributing to an accumulation of radioactive or hazardous toxic substances in fish or wildlife, so that such fish or wildlife are rendered unfit for human consumption, or disrupting a food chain in an ecosystem.

Triple Dedicated Engineered Barrier means the three Leak Proof structures, referred to in this ordinance as a Container, Waste Module and Waste Unit, each of which is independently required to ensure the containment and isolation of radioactive waste from the biosphere for the hazardous life of the waste.

Waste Facility means the area where radioactive waste is stored, including the site and all improvements thereon (including engineered units, buildings, laboratories, ancillary structures and equipment), but not including the buffer zone.

Waste Module means a second Leak Proof engineered structure harboring the Containers within a waste unit.

Waste Site means the property on which the waste facility is located, including the buffer zone.

Waste Unit means the third and outermost Leak Proof engineered structure containing the Waste Modules, which in turn contain the waste Containers.

Well sampling means the testing of piezometer wells drilled at appropriate depths at appropriate distances around the perimeter of the waste facility, as well as the testing of all public and private water wells within three miles of the boundary of the waste site.

ARTICLE IV: ADMINISTRATION

Section 401. Environmental Control Officer.

The County Commissioners shall appoint an Environmental Control Officer, who shall have the authority and whose duties shall be as follows:

A. To receive and to review all applications required under this Ordinance, and to make recommendations to the Environmental Advisory Council regarding the action to be taken thereon;

B. To assure that the operator of any waste facility that may be permitted under this Ordinance fully complies with all the provisions herein;

C. To initiate and to prosecute all legal actions required to enforce this Ordinance;

D. To regularly review the Public Access to Information to assure that the information contained therein is current and adequate to the needs of the County;

E. To conduct regular and periodic inspections, including unannounced inspections, to assure continued compliance with all the provisions of this Ordinance;

F. To have the unrestricted and immediate right to enter onto the waste facility on demand and to have immediate and unrestricted access to any part of said facility and its records to assure compliance with the provisions of this Ordinance;

G. To receive and review all reports relating to fees and surcharges made by or payable by the operator of the facility to the County, as well as the power to collect all such fees and surcharges which may become delinquent and to collect all penalties assessed by the County;

H. To assure that all studies required under the LLRW Act for the benefit of the County are performed in a timely, thorough and professional manner to safeguard the health and safety of the residents of the County;

I. To protect the health and safety of the residents of the County; and

J. To have and perform such other duties as may be from time to time imposed by the County.

The Environmental Control Officer may also serve as an Inspector.

Section 402. Inspectors.

The County shall appoint two Inspectors, who shall be or become residents of the County and who shall have the authority and whose duties shall be to perform inspections of all activities at the waste facility under a written agreement with the Department. The Inspectors shall have the right of independent and immediate access at will to inspect any and all records and activities at the site and to carry out joint inspections with the Department. The Inspectors shall report their findings to the Environmental Control Officer.

The Inspectors shall also have such additional powers as are granted under the LLRW Act, and particularly Section 502 thereunder.

Section 403. Environmental Advisory Council.

There is hereby created an Environmental Advisory Council, consisting of no fewer than seven and no more than nine residents of the County, who shall be appointed by the County Commissioners with the advice and consent of the Host Municipality and Affected Municipalities and shall represent a cross-section of County residents (including 2 or more residents of the Host Municipality, 2 or more residents of Affected Municipalities, a physician, an engineer, and representatives of a public-interest environmental organization) and who shall have the authority and whose powers and duties shall be:

A. Recommend a person to be appointed as Environmental Control Officer;

B. To review all applications required under this Ordinance and together with the Environmental Control Officer and to make recommendations thereon to the County Commissioners;

C. To conduct a study on behalf of the County of any potentially suitable sites in any application; to apply for funding of said study and to expend the funds so provided for all necessary technical assistance, subject to approval of the County Commissioners, as provided in Section 318(a) of the Low Level Radioactive Waste Disposal Act;

D. To conduct an evaluation of each license application; to make application for funds to conduct such evaluation, and to expend the funds so provided for all necessary technical assistance, subject to the approval of the County Commissioners, and to prepare and propose to the County findings regarding said applications for inclusion in licensing proceedings as provided on Section 318(a) of the Low Level Radioactive Waste Disposal Act;

E. To counsel and assist the Environmental Control Officer and the Inspectors in the performance of their duties;

F. To study and make recommendations to the County for the adoption of ordinances and regulations necessary for the protection of the environment of the County, its land, flora and fauna, and the health of its residents; and

G. To exercise such powers as would be otherwise granted to any Environmental Advisory Council established pursuant to the Act of December 21, 1973, P.L. 425, Act No. 148, 53 P.S. Section 11501 et seq., as amended.

Section 404. Surcharges.

A. The operator of a waste facility shall establish and levy a surcharge, at a rate determined from time to time by resolution of the County, for all waste disposed at the Facility.

B. On or before the tenth (10th) day of each month, the operator shall pay to the County all of the surcharges collected during the preceding calendar month. Each payment shall be accompanied by a report, in a form approved by the County, of the date, exact source, amount, radiological content, and surcharge for each deposit of LLRW made at the facility, and its placement within the facility.

C. The County shall arrange an independent audit on an annual basis of the financial records of the Facility, paid for by the operator.

D. The operator shall be financially responsible for all uncollected charges and surcharges.

E. The County may on thirty (30) days notice amend the surcharge rate to meet any or all expenses permitted under Section 318(f) of the LLRW Act.

F. All of the monies collected as surcharges shall be placed into a special account provided under Section 405 of this Ordinance.

Section 405. Special Account.

A. All fees collected pursuant to Section 404 (F) of this Ordinance shall be deposited into a special account, designated as the "Low-Level Radioactive Waste Special Account," and shall be used for the following purposes:

1. all fees, expenses and other costs of administering this Ordinance;

2. payment of compensation and overhead expenses of the Environmental Control Officer, the Inspectors and other county employees in so far as their duties relate to the administration of this Ordinance;

3. expenses of the Environmental Advisory Committee and its members; and

4. a reasonable fee payable to the County for the administration of this Account.

B. The funds held in the LLRW Special Account shall not be available for payment of any costs associated with abatement of any public nuisances or radiation damage created by operation of the LLRW Facility, nor for payment of any penalties incurred by the operator for any reason.

C. This Account shall be under the control and management of the County Commissioners. The funds in the Account shall be used solely for the County expenses related to the LLRW facility that are not otherwise reimbursed to the County. The funds shall not be used for General Fund purposes.

ARTICLE V: SITING

Section 501. Requirement of Permit.

No waste facility shall be constructed within the County without first obtaining a Siting Permit under this Ordinance.

Section 502. Application.

An application for a Siting Permit shall be made on a form provided by the County. The application shall be submitted at the same time as the applicant submits its Potentially Suitable Sites Application to the Environmental Quality Board under Section 307 of the LLRW Act. The application shall be accompanied by a non-refundable application fee of one million dollars ($1,000,000.00) The application fee shall be deposited by the County to a special account and shall be used solely for the purposes of administering this Ordinance, including application completeness and pre-siting studies, but shall not be the sole source of income for the administration thereof.

An application for a Siting Permit under this Ordinance shall contain the following documentation:

A. A site plan identifying the location and function of all structures on the waste site, including engineering drawings and specifications of each structure;

B. Proof of ownership of the site, or a contract conveying rights to the site by the owner;

C. A property survey of the site by a registered licensed surveyor showing contours of five-foot intervals, description of perimeter land use and zoning within a two mile radius of the site, and proximity to any structure, or other feature such as stream or well, within one thousand (1,000) feet of the waste site;

D. All necessary licenses and permits from local, state, and federal agencies, along with the associated application materials submitted to those agencies;

E. A proposed emergency control and evacuation procedure plan, subject to such amendments and additions as the County may designate after public hearing;

F. An environmental impact study as defined in N.E.P.A., Section 102(2)(c), 42 U.S.C. Section 4332, which shall also include, but not be limited to, consideration of the following: site-specific soil analysis on a 50' grid, core sample to bedrock; leachate analysis; titles, easements and dedications; oil, gas and mineral rights; hydrology of the site, groundwater, aquifers; fauna, fauna habitat and migratory survey, with proof that no species of concern are present on the site; storage of fuel; security police, fire and medical qualifications; a radiation background study based on monthly sampling data for three years prior to the date of application; meteorology, topology and predicted deposition patterns of airborne pollution; an assessment of risk of experiencing one fatality per one million population attributable to the facility, which must include calculations of maximum concentrations of contamination under emergency conditions, such as a worst case accident scenario or the failure of an air pollution control unit, and such other factors as the County Commissioners may from time to time determine;

G. Baseline health studies of the entire population of the County and of Affected Municipalities, whether or not within the County or the State, within ten (10) miles of any site boundary (including buffers), which shall be initiated at the time of **submission of the 3 candidate sites to the EQB and shall continue to be conducted for a minimum of three years thereafter**. All data, while protecting the names and identifications of individuals, shall be made available free of charge to the County Commissioners, the Planning Commission, the Environmental Advisory Council, the Environmental Control Officer and to each medical facility serving the affected area. Summaries of data, so written as to preserve the privacy of the individuals surveyed, shall be made available free of charge upon request to any resident of the County or the affected area. The health studies shall include data of a nature found to be significant by states and countries dealing with low level radiation contamination, e.g. the Belarus Government in studying the aftermath of the Chernobyl accident;

H. An evaluation of the quantity and nature of all wastes proposed to be stored at the Facility, including the chemical and physical forms, specific isotopes, number of curies and half-lives;

I. An evaluation of the operator applicant's financial qualifications and compliance history and those of its subcontractors, its affiliated companies, and participants whose activities may impact operation of the site;

J. A compliance history for the applicant and operator of the site performed by an independent agency acceptable to the County but at the sole cost of the applicant;

K. As soon as it is available, the site characterization prepared by the applicant and the Department, showing with specificity how the site has been shown to satisfy State criteria in the LLRW Act and Department regulations (25 Pa. Code, Chapter 236).

Section 503. Application Processing.

A. The Siting permit application shall be submitted to the Environmental Control Officer, who shall review the same to determine whether the application contains all of the necessary documents and the application fee. The ECO is authorized use part or all of the application fee to hire engineers and other experts to review the application for safety and compliance, to determine whether the environmental impact study has thoroughly considered all criteria set forth, and to make other determinations deemed important to the completeness of the application. If the application is not deemed complete, the ECO shall return the application to the applicant with a written notification of its deficiencies. If the application is complete, the ECO shall refer the application to the Environmental Advisory Council, with copies to the County Commissioners, the County Planning Commission, the Solid Waste Coordinator, the Solid Waste Authority, the Conservation District, the Director of the County Emergency Management Agency, the Communications Control Officer and the Public Information repository. No hearing on an application shall be held until the application has been so filed and made available to the public for a period of at least ninety (90) days.

B. After review and study of the application, the Environmental Advisory Council shall submit its findings and recommendations to the County Commissioners. All other agencies named above shall submit their findings to the Commissioners.

C. The Commissioners shall give due consideration to all comments and recommendation submitted by the various agencies and the public, and especially by the Environmental Advisory Council, but shall not be bound thereby.

D. The Environmental Advisory Council and the County Commissioners shall hold a series of at least three public hearings, over a period of at least sixty days, throughout the County on each application. At least one hearing shall be held in each Affected Municipality. The applicant shall appear at all such public hearings and shall answer all reasonable inquiries made by the Environmental Advisory Council, the County Commissioners, or members of the public present at any of said hearings. The Environmental Advisory Council shall, and any citizen or citizen group may, provide independent expert witnesses and other testimony for these hearings. The hearings shall be recorded and transcribed. All hearing costs shall be paid by the applicant.

E. The Environmental Advisory Council and the County Commissioners may engage the services of whatever expert consultants deemed necessary to proper and full evaluation of the application. The reasonable fees and expenses of these consultants shall be paid by the applicant.

F. The County Commissioners shall take action on the application within ninety (90) days after the decision on the Potentially Suitable Sites Application is made by the Environmental Quality Board, unless there remain unresolved issues. Any unresolved issues shall be brought by the County first to the EQB, then to a Court of proper jurisdiction for resolution. Not withstanding the foregoing, the County Commissioners shall not be required to take action on a permit application until the applicant has fully complied with Section 318(f) of the LLRW Act and the funding scheme has been approved by the designated host municipality (ies).

Section 504. Minimum Site Requirements.

The minimum site requirements for any Facility shall be:

A. The site shall have geological characteristics such that all applicable state and federal emissions requirements may be met without the use of dedicated engineered barriers, other than the entrance described in Section 604(B) of this Ordinance;

B. There shall be no active, inactive, or abandoned water wells or other wells, including gas, oil or brine wells, or other manmade underground structures within two miles of the periphery of the site, including the buffer areas;

C. Surface features at the site shall be designed to direct water drainage away from waste units at velocities and gradients which will not result in erosion. No water shall drain from the waste site to any offsite location or into any aquifer without the permission of the Environmental Control Officer. Water shall be collected in an appropriate holding facility and there tested and shown to be free from radiation and hazardous contaminants and safe for drinking purposes;

D. No waste site (including the buffer zone) shall be located in recharge zones for sources of public or private drinking water, the headwaters of any waterway, any currently designated or previously designated wetlands, floodplains, tidal coastal zone, or in the habitat for any threatened or endangered species (wildlife or vegetation), or species of special concern. The National Wetlands Inventory maps from the United States Department of Interior shall be used as a guide to wetlands locations for the purposes of this Ordinance;

E. No waste site shall be located in an agricultural security area as designated pursuant to the Agricultural Area Security Law, Act of June 30th, 1981, P.L. 128, Act No. 43, as from time to time amended;

F. No waste site shall be located in any area disqualified by law or regulation or the qualifications contained in the Evaluation Screening Manual; and

G. The site shall not contain any limestone or similar formation. Such a formation cannot be removed to meet the requirements that make a site suitable for a LLRW Facility.

ARTICLE VI: OPERATION

Section 601. Operating Permit.

No waste facility shall be constructed or operated within the County unless an Operating Permit is first obtained and the non-refundable application fee paid pursuant to this Ordinance.

Section 602. Application.

When an operator submits a license application to the Department, the operator shall simultaneously make application to the County for an Operating Permit under this Ordinance. The application shall be on a form provided by the County and shall be accompanied by a non-refundable application fee of three million dollars ($3,000,000.00). The application shall be accompanied by a complete copy of the license application filed with the Department. The application shall set out the chemical and physical forms, specific isotopes, half-life, and number of curies of each substance expected to be present in any radioactive air emissions, along with the appropriate formulas for calculating the weight equivalent to one curie, and the number of millirems associated with potential exposures to one curie of each substance. The application fee shall be deposited by the County into a separate account and shall be used solely for purposes of administration of this Ordinance.

Section 603. Processing Procedure.

A. The application for the Operating Permit shall be filed with the Environmental Control Officer. The ECO shall review the application to determine whether it is complete and in full compliance with this Ordinance. If it is not complete, the ECO shall return the application to the operator with written notification of its deficiencies. If the application is complete, the ECO shall refer the document as specified in Section 503(A) of this Ordinance, and shall advertise an open Public Comment Period in newspapers of county-wide and local circulation.

B. The Environmental Advisory Council shall evaluate the application and prepare and submit to the County Commissioners its findings and recommendations thereon.

C. Upon receipt of the findings and recommendations of the Environmental Advisory Council, the County Commissioners shall further review the application and prepare and submit its findings and recommendations to the Department for inclusion in the licensing procedure.

D. As part of its deliberations, the Commissioners shall advertise with at least sixty (60) days public notice, and hold at least three public hearings throughout the County. At least one hearing shall be at the appropriate public facility closest to the Waste Site. Additional hearings may be scheduled at the request of the Host or Affected Municipalities. The Environmental Advisory Council and the operator shall attend and participate under oath in all such hearings; and the operator shall provide such documentation and testimony of expert witnesses, also under oath, as may be necessary to fully answer all reasonable inquiries put forth therein by any member of any agency or of the public. At the expense of the operator, a record of these hearings and transcripts of the same shall be made publicly available in a timely manner in the public information repositories.

Section 604. Design Standards.

Every Facility subject to this Ordinance shall meet the following minimum design requirements:

A. The waste facility shall be designed for zero release of radioactivity in the form of effluents and shall not permit liquid or gaseous infiltration or emissions through any engineered cover, bottom, side or entrance;

B. The waste facility shall be an above-ground facility, mounded with earth and capped for tornado protection, with a sealed entrance permitting access so that leaking containers can be easily and safely located and removed or repaired;

C. No containers or waste modules are to be covered by any type of material that could cause loss of integrity of the containers or the waste modules if recovery of the waste is undertaken.

Section 605. Minimum Operating Standards.

Every waste facility subject to this Ordinance shall be operated in conformance with each of the following standards:

A. No radioactive emissions into the outdoor atmosphere from the waste site or any waste unit shall be permitted to exceed or cause exposures which exceed the limits established under applicable federal and state law or regulation or regulations established by the County Commissioners in accordance with provisions of the Clean Air Act as amended. Each waste container and module shall be monitored so as to minimize the possibility of any radiation releases and so as to allow retrieval and removal of any leaking container prior to radioactive emissions escaping to the atmosphere, in accordance with Section 604(A) of this Ordinance.

B. The waste facility shall be designed and operated to achieve containment for the hazardous life of the waste. Prior to construction, the waste facility design shall be modeled and analyzed to demonstrate that its performance and its interaction with the environment at the waste site will conform to the requirements of this Ordinance. The facility design shall demonstrate complete radioactive waste containment, maintained for any maximum disruptive event, external or internal.

C. The waste facility design and operation shall be upgraded from time to time as safer technologies are devised and demonstrated to the satisfaction of the County. The County may hire consultants to investigate said technologies at the expense of the operator.

D. The operator shall perform active and passive monitoring which shall detect any releases of radioactivity from the waste containers or the waste modules into the waste units to insure there shall be no releases from the waste units into the buffer zone during the entire Institutional Control Period. The operator shall provide the Environmental Control Officer with continuous verification of its performance of these monitoring requirements and permit the Environmental Control Officer access to the monitoring equipment without prior notice. The County may require the operator to install a parallel monitoring system to be operated by the County at the operator's expense.

E. The waste facility shall accept only waste with those physical and chemical properties for which it was designed and which it is capable of containing in isolation for the entire hazardous life of the waste as defined herein.. All facility records shall be retained for the Institutional Control Period. Complete copies of all facility records shall be forwarded to the ECO no later than the tenth of each month for the previous month, and immediately on request of the ECO. Where the facility encounters radiation readings in excess of allowable limits, the Environmental Control Officer shall be notified within two (2) hours.

F. All classes of waste shall be segregated unless they were mixed as they were generated. Classes of wastes A, B, and C, and mixed wastes as defined in 10 CFR, Section 61.55 (1989), shall be contained for their full hazardous lives. No waste greater than class C shall be accepted even though it may have been diluted to a lower level of radioactivity.

G. No radioactive materials generated outside the Appalachian Compact States and not designated as waste prior to shipment into Pennsylvania or other Compact states, but thereafter declared to be waste, shall be disposed of or stored in the County. No waste generated outside the United States shall be disposed of or stored in the County, even if the company generating the waste has its corporate headquarters, is incorporated, has offices or receives such waste at its facilities or through a port of entry in one of the Appalachian Compact States.

H. In the event that radioactive substances from the waste facility contaminate an area outside the waste site, the operator shall notify the Environmental Control Officer or any Inspector and the Emergency Management Agency and shall promptly clean up all contamination and restore all such contaminated areas to their pre-existing and uncontaminated state.

I. No LLRW facility shall accept waste for more than thirty (30) years. No additional radioactive waste shall be stored, disposed of or treated anywhere in the County after that thirty (30) year period.

J. Routine operations of the waste facility shall be conducted solely between the hours of 9:00 am and 5:00 pm, Mondays through Fridays, excluding and legal holidays recognized by the Commonwealth of Pennsylvania.

K. No waste shall be accepted at the facility except between the hours of 9:00 am and 5:00 pm, Mondays through Fridays, excluding and legal holidays recognized by the Commonwealth of Pennsylvania.

L. The waste facility shall at all times be operated in strict compliance with all applicable laws and regulations of all federal, state and local agencies having jurisdiction over the site.

Section 606. Air Pollution Control Standards.

Any waste facility subject to this Ordinance shall comply with the following minimum standards:

A. No radioactive substance or waste generated by any government agency or pursuant to a federal or state government contract or license, nor as defined by the Nuclear Regulatory Commission (NRC) Section 11(e) of the Atomic Energy Act of 1954, codified as amended at 42 U.S.C. Section 2014(e)(2) in the Low Level Radioactive Waste Policy Act Amendment of 1985 and in effect as of January 1, 1986, or in the LLRW Act, nor any substance that may be redefined as being within an expanded exemption, as Below Regulatory Concern (BRC), or otherwise deregulated by the NRC or any other federal agency, shall be received for treatment, recycled, incinerated, deposited in any sewer or be accepted in any solid, liquid, residual, or hazardous waste facility or in any other place in the County except in a LLRW facility holding an Operating Permit under this Ordinance and having adequate safeguards to prevent the release of radioactive substances into the air, as defined herein.

B. No operator shall cause or permit the direct or indirect release of radioactive substances into the air, whether in gaseous, particulate, mist, vapor or other form, or through any pathway, except in compliance with air pollution control standards included in the Operating Permit obtained under this Ordinance.

C. No Operating Permit may be granted under this Ordinance where the Environmental Advisory Council determines that the zero-release design goal will not be met under routine operating conditions or worst-case accident scenarios.

Section 607. Emergency Management Plan.

The operator shall develop, maintain and yearly upgrade a plan for responding to all reasonably anticipated emergency events which might occur at the Facility or outside the Facility due to an event occurring within the Facility or in route to or from the Facility. The operator shall provide the Environmental Control Officer, the County Emergency Management Agency, the Emergency Management Coordinators for the affected municipalities, each fire company in the County, and Communications Control Office with copies of the plan and all amendments, updates and revisions thereto. The operator shall provide evidence satisfactory to the ECO that the operator has reviewed its emergency management plan on at least a quarter-annual basis. The plan shall also coordinate those fire, police and ambulance services which are likely to respond first to an emergency, as well as the County Emergency Management planning, training and central dispatch facilities which may be required to support the handling of any anticipated emergency events at the facility. The operator shall provide funds to the Emergency Management Agency for specialized training in emergency response and equipment to use of emergency response teams.

Section 608. Disclosure of Transporters.

On or before the tenth of each month the operator shall provide the Environmental Control Officer with a list of the names and business addresses of all persons, firms or corporations which provided transportation of wastes to the Facility the previous month, including a copy of all manifests. The Environmental Control Officer may request, and the operator shall provide, such information on a more frequent basis as the Environmental Control Officer deems necessary. Copies of such reports shall be provided to the Emergency Management Agency and the County Solid Waste Coordinator, Solid Waste Authority, County Planner, and both libraries which serve as public information repositories.

Section 609. Access to Records.

All required records and facility records shall be available to the ECO and the Inspectors at all times. The operator shall provide reasonable assistance in locating, identifying and reviewing all information contained in any such records.

Section 610. Liability Insurance.

The operator shall provide, and maintain continuously in effect, a policy of general liability insurance, including liability for personal injury or property damage resulting from any release of radioactivity or other hazards into any part of the environment, in the minimum amount of one hundred million dollars ($100,000,000.00) per occurrence. The County shall be identified as a party to be notified of any cancellation, expiration or change in said policy. The operator shall provide the Environmental Control Officer with proof of renewal at least thirty (30) days prior to renewal.

ARTICLE VII: FUNDING OF STUDIES AND EVALUATIONS

Section 701. Bonding.

A. At the time of making application for a Siting Permit under this Ordinance, the applicant shall submit a bond in a form and with security approved by the County in the amount of two million dollars ($2,000,000.00) as guaranty of reimbursement by the applicant of all reasonable expenses incurred by the County to evaluate the Potentially Suitable Sites Application and the application of the Siting permit, as provided under Section 318 (a) of the LLRW Act, to the extent that such expenses are not funded by the Department.

B. At the time of the application for an Operating Permit, the applicant shall submit a bond, in a form and with security approved by the County, in the principal sum of three million dollars ($3,000,000.00) as guaranty of reimbursement of all reasonable expenses incurred by the County to conduct an independent evaluation of the license application under Section 318(b) of the LLRW Act and the Operating Permit application under this Ordinance, to the extent that funds are not made available by the Department.

Section 702. Reimbursement.

The operator shall reimburse the County in full for all reasonable expenses, including, but not limited to, engineering and consultant fees, attorney's fees, and all out of pocket expenses incurred by the County to perform the studies and evaluations provided under this Ordinance and under Section 318 of the LLRW Act within thirty (30) days after submission of a requisition.

Section 703. Nonpayment of Requisitions.

No permit required under this Ordinance shall be issued by the County until all requisitions submitted under Section 702 of this Ordinance have been paid in full by the operator.

ARTICLE VIII: FINANCIAL RESPONSIBILITY

Section 801. Financial Responsibility.

The operator shall, upon issuance of the Operating Permit and before beginning operations at the Facility, submit in a form, with security, and of an amount acceptable to the County, a performance bond to assure the County of the proper operation and closure of the Facility and of compliance with this Ordinance. This bond shall be in addition to any bond or other security demanded under any state or federal law, regulation or agency. The County shall be named as a party to be notified should the bond be in any manner in jeopardy, whether through the activities of the operator, the bonding company or of any governmental entity.

ARTICLE IX: PENALTIES AND REMEDIES

Section 901. Civil Penalties.

A. Any person, owner or operator who violates or causes a violation of any of the provisions of this Ordinance shall, upon conviction in a summary proceeding, be liable for a penalty of not more than $1,000.00 for each separate offense and in default thereof, shall be imprisoned for a term of not more than ninety (90) days. Each day of a continuing violation shall be considered a separate offense. Each type of violation shall be considered a separate offense.

B. Any person whose violation is of a nature that it may pose a significant threat as defined herein shall be liable for a penalty of not less than $1,000.00 nor more than $25,000.00 for each separate offense. Each day of a continuing violation shall be considered a separate offense.

C. Any person who knowingly fails to report any release of radioactivity or radioactive materials, or who knowingly and willfully fails to remedy any violation that may pose a significant threat as defined herein may, in addition to the above civil penalties, be liable for criminal prosecution commensurate to the risk of harm to the public and to the environment. These penalties may include imprisonment of any responsible officer, employee or agent of the operator.

D. Whenever an operator has been notified in writing of a violation of this Ordinance which involves a significant threat of harm to human life, the operator shall immediately cease and desist in such violation. If the operator does not immediately cease and desist, the operator shall be liable to the County for a civil penalty not exceeding $100,000.00 for each offense and for each day that such offense continues. This provision is not limited to affect the operator's liability for consequential or punitive damages for any violation.

Section 902. Abatement.

The violation of any of the provisions of this Ordinance relating to the emission of pollutants into the environment surrounding the Facility shall be considered a public nuisance per se. The operator shall abate such nuisance immediately, and shall report it to the Environmental Control Officer. If the Environmental Control Officer or any Inspector finds such a nuisance and it has not been reported by the Operator, it shall be considered a major violation of this Ordinance.

Section 903. Injunctive Relief.

In addition to any other remedies provided under this Ordinance or any state or federal law or by action of any state or federal agency, the County shall have the right to pursue injunctive relief to halt and abate any release of pollutants from the facility, to mitigate any damages therefrom, and to clean up the same. In the alternative, the County may halt, abate and clean up the release and shall be reimbursed by the operator for the same.

Section 904. Reimbursement of Litigation Costs.

By applying for a permit under this Ordinance, the operator agrees to reimburse the County in full for all reasonable costs of litigation, including but not limited to investigative costs, attorney fees, and expert's fees incurred by the County in the successful prosecution of any violation of this Ordinance and the successful pursuit of any legal remedy provided under this Ordinance.

Section 905. Termination of Permits.

If the operator is delinquent in the payment of any surcharges for a period of thirty (30) days, or if the operator is in default of any other provision of this Ordinance after notice and reasonable opportunity to cure said default, the Environmental Control Officer or the County may revoke the Operating Permit.

Section 906. Citizen's Suits.

A. Nothing in this Ordinance shall be construed to limit the right of private citizens of the Commonwealth to pursue any civil action against the operator in the manner provided by law.

B. In any successful action to enforce provisions of this Ordinance, the Court may award reasonable attorney's fees and other litigation costs to any citizen or citizen's group in addition to any other relief awarded.

ARTICLE X: SEVERABILITY

Section 1001. Severability.

It is the specific intent of the County Commissioners that if any section or provision of this Ordinance is judicially held to be invalid, such holding shall not affect the validity of the remaining sections and / or provisions of the Ordinance, and all such sections and / or provisions shall remain in full force and effect.

ARTICLE XI: EFFECTIVE DATE

This Ordinance shall take effect immediately upon adoption.

ADOPTED this _____ day of _____ 19 ____ .

County of _____:

_____

Attest: _____

_____ _____

Chief Clerk Board of Commissioners

Appendix A

Duties of Municipalities to Protect Health and Welfare

Second Class City Code[1]
Act of Mar. 7, 1901, P.L. 20, No. 14

Section 2. Every city of the second class within this Commonwealth is hereby declared to be a body corporate and politic, and shall have perpetual succession, and shall have power:

XLIII. **To make all such ordinances, by-laws, rules and regulations**, not inconsistent with the Constitution and laws of this Commonwealth, **as may be expedient or necessary**, in addition to the special powers in this section granted, **for the** proper management, care and control of the city and its finances, and the maintenance of the peace, good government and **welfare of the city**, and its trade, commerce and manufactures, and the same to alter, modify and repeal at pleasure; and to enforce all ordinances by inflicting penalties upon inhabitants or other persons for the violation thereof, not exceeding three hundred dollars ($300) for any one offence, recoverable with costs, together with judgment of imprisonment, not exceeding ninety days, if the amount of said judgment and costs shall not be paid. (XLIII amended June 24, 1959, P.L.478, No.104)

XXXIII. **To make regulations to secure the general health of the inhabitants, and to remove and prevent nuisances.**

[1] http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1901/0/0014..HTM

Third Class City Code[2]
Act of Jun. 23, 1931, P.L. 932, No. 317
(Reenacted and amended Mar. 19, 2014, P.L.52, No.22)

Article XXIV

Section 2435. Local Self-Government.--**The council of each city shall have power to enact, make, adopt, alter, modify, repeal and enforce in accordance with this act ordinances, resolutions, rules and regulations**, not inconsistent with or restrained by the Constitution of Pennsylvania and laws of this Commonwealth, **that are** either of the following:

(1) **Expedient or necessary for the** proper management, care and control of the city and its finances and the maintenance of the peace, good government, **safety and welfare of the city** and its trade, commerce and manufactures.

Section 1050.
(b) **Ordinances dealing with the following subjects may be made effective upon final enactment:**
(3) **Ordinances for the preservation of the public peace, health**, morals, safety and in the exercise of the police powers of the city government, **and for the prevention and abatement of nuisances.**

[2] http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1931/0/0317..HTM

First Class Township Code[3]

XXVI. Nuisances. To prohibit and remove any obstruction or nuisance in the streets and highways of the township; to make regulations respecting pigpens, slaughter houses, manure pits, drains, dumps, cesspools, and similar conditions, to prohibit and remove any noxious or offensive manufacture, art or business, or dangerous structure, or weeds, or any other nuisance whatsoever, on public or private grounds, prejudicial to the public health or safety, or to require the removal of the same by the owner or occupier of such grounds; in default of which, the township may cause the same to be done and collect the cost thereof, together with a penalty of ten per centum of such cost, in the manner provided by law for the collection of municipal claims or by action of assumpsit without the filing of a claim, or may seek relief by bill in equity.

XXVII. Ashes, Garbage, Rubbish and Refuse Materials. To make regulations relative to the accumulation of manure, compost and the like; to prohibit accumulation of ashes, garbage, rubbish and other refuse materials upon private properties including the imposition and collection of reasonable fees and charges for the collection, removal and disposal thereof, and to prescribe fines and penalties for the violation of such regulations; to collect, remove and dispose of or to provide, by contract or otherwise, for the collection, removal and disposal by incineration, land fill or other methods of ashes, garbage, rubbish and other refuse materials; and to prescribe penalties for the enforcement thereof. Any such contract may be made for a period not exceeding three years: Provided, That this limitation shall not apply to contracts entered into with any other political subdivision or with any municipality authority. To acquire any real property and to erect, maintain, improve, operate and lease, either as lessor or lessee, facilities for incineration, land fill or other methods of disposal, either within or without the limits of the township, including equipment, either separately or jointly, with any other political subdivision or with any municipality authority in order to provide for the destruction, collection, removal and disposal of ashes, garbage, rubbish and other refuse materials; and to provide for the payment of the cost and expense thereof, either in whole or part, out of the funds of the township and to acquire and to maintain lands and places for the dumping of ashes, garbage, rubbish and other refuse material. To fix, alter, charge and collect rates, and other charges for the collection, removal and disposal of ashes, garbage, rubbish and other refuse materials and the costs of including the payment of any indebtedness incurred for the construction, purchase, improvement, repair, maintenance and operation of any

[3] http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1931/0/0331..HTM

facilities therefor, and the amount due under any contract with any other political subdivision or with any municipality authority furnishing any of such services or facilities. To incur indebtedness and issue bonds for the costs of the construction, purchase, improvement and repair of any facilities for the collection, removal and disposal of ashes, garbage, rubbish and other refuse materials, including equipment to be used in connection therewith. To make appropriations to any other political subdivision or any municipality authority out of its general funds or out of any other available funds, including the proceeds of bonds of the township for the construction, purchase, improvement, repair, maintenance and operation of any facilities for the collection, removal and disposal of ashes, garbage, rubbish and other refuse materials. In the event that any such bonds were issued for such purposes, pursuant to a vote of the electors, any appropriation of such proceeds as above set forth shall not be deemed such a change of purpose from that for which such bonds were issued as shall require the question to be again submitted to a vote of the electors under any existing law. Any such funds appropriated as herein authorized, which represent the proceeds of any bonds heretofore or hereafter issued by the township for the above purposes, shall be used by such other political subdivision or municipality authority for or toward the purpose or purposes for which such bonds were issued. (XXVII amended July 1, 1955, P.L.251, No.78)

XXIX. **Smoke Regulations. To regulate the emission of smoke from chimneys, smokestacks and other sources**, except locomotive smokestacks.

XLIV. Health and Cleanliness Regulations. **To make such regulations as may be deemed necessary for the health**, safety, morals, **general welfare, cleanliness, beauty, convenience and comfort of the township and the inhabitants thereof.**

Second Class Township Code[4]

Act of May. 1, 1933, P.L. 103, No. 69
(Reenacted and amended Nov. 9, 1995, P.L.350, No.60

Section 607. Duties of Supervisors.--**The board of supervisors shall**:
(1) **Be charged with** the general governance of the township and **the execution of legislative, executive and administrative powers in order to** ensure sound fiscal management and to **secure the health, safety and welfare of the citizens of the township.**

Borough Code[5]

BOROUGHS AND INCORPORATED TOWNS (8 PA.C.S.) AND LAW AND JUSTICE (44 PA.C.S.) - CONSOLIDATING THE BOROUGH CODE
Act of Apr. 18, 2014, P.L. 432, No. 37

Session of 2014
No. 2014-37

§ 1202. Specific powers.
The powers of the borough shall be vested in the council. In the exercise of any specific powers involving the enactment of an ordinance or the making of any regulation, restriction or prohibition, the borough may provide for enforcement and penalties for violations. The specific powers of the borough shall include the following:

(5) **To make regulations as may be necessary for the health, safety, morals, general welfare** and cleanliness and beauty, convenience, comfort and safety of the borough.

[4] http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1933/0/0069..HTM
[5] http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=37

County Code[6]

Section 509. Ordinances and Resolutions.--(a) The board of commissioners may adopt resolutions and ordinances prescribing the manner in which powers of the county shall be carried out and generally regulating the affairs of the county.

(c) **The board of county commissioners may also prescribe fines and penalties not exceeding one thousand dollars ($1,000) for a violation of a** building, housing, property maintenance, **health**, fire **or public safety code or ordinance and for water, air and noise pollution violations**, and not exceeding six hundred dollars ($600) for a violation of any other county ordinance, which fines and penalties may be collected by suit, brought in the name of the county, in like manner as debts of like amount may be sued for. ((c) amended Mar. 2, 1988, P.L.107, No.21)

(d) Any person violating any of the ordinances adopted by the board of county commissioners pursuant to this section shall, upon conviction thereof at a summary proceeding, be sentenced to pay such fine as may be prescribed in such ordinances by the county commissioners but not in excess of one thousand dollars ($1,000), to be paid to the use of the county, with costs of prosecution, or to be imprisoned for not more than ten days, or both. ((d) amended Mar. 2, 1988, P.L.107, No.21)

[6] http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1955/0/0130..HTM

Appendix B

Pennsylvania Preemption Law Analysis in Motion for Summary Judgment in Allentown Clean Air Ordinance Initiative Case

IN THE LEHIGH COUNTY COURT OF COMMON PLEAS
ALLENTOWN, PENNSYLVANIA

Richard D. Fegley, Diane E. Teti,	**:**
Edward F. Beck, and Marvin M. Wheeler	**:**
v.	**:**
Lehigh County Board of Elections	**:**
Matthew T. Croslis, Doris A. Glaessmann, and	**: ELECTION MATTER**
Jane M. George	**:**
In their official capacity only	**: Docket No: 2013-C- 3436**
Chief Clerk, Lehigh County Board of Elections	**:**
Timothy A. Benyo	**:**
In his official capacity only	**:**

PLAINTIFF' BRIEF IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

A. ISSUES PRESENTED

1. **Whether any Challenge to the Petition filed on April 15, 2013 after April 22, 2013 is barred by the challengers failure to comply with the mandatory 7 day period for filing objections under the Pennsylvania Election Code, 25 P.S. § 2937?**

2. **Whether the Lehigh County Board of Elections has the authority to override the initiative process of the Allentown Home Rule Charter?**

3. **Whether Allentown's status as a home rule municipality, and the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) militate in favor of the City's power to adopt the Allentown Clean Air Ordinance and favor of the people's right to consider and adopt it?**

4. **Whether federal and state air pollution laws intended to allow Pennsylvania municipalities to adopt stricter air pollution laws?**

5. **Whether 35 P.S. 4012(a) or 35 P.S. 4012(b)-(f) applies to the City of Allentown?**

6. **Whether the requirement of DEP approval, which applies only to First and Second Class Counties, is due to the fact that these counties are empowered to replace DEP's air pollution regulatory role?**

7. **Whether the legislative intent behind 35 P.S. 4012 was to allow municipalities to provide additional and cumulative remedies above and beyond those of the PA Air Pollution Control Act?**

8. **Whether the Air Pollution Control Act contains express preemption of municipalities' rights to adopt air pollution laws stricter than state law?**

9. **Whether an implied preemption analysis is appropriate since the Air Pollution Control Act is not silent on the issue of preemption?**

10. **Whether the Air Pollution Control Act contains field preemption that prevents county and municipal rights to adopt air pollution laws stricter than state law?**

11. **Whether any specific provision of the Allentown Clean Air Ordinance conflicts with the Air Pollution Control Act?**

12. **Whether a conflict between one or more specific severable provisions of the Allentown Clean Air Ordinance and the Air Pollution Control Act authorizes the Lehigh County Board of Elections to keep the entire ordinance from consideration of the voters?**

B. LEGAL ARGUMENT

1. Any Challenge to the Petition filed on April 15, 2013 after April 22, 2013 is barred by the challengers failure to comply with the mandatory 7 day period for filing objections under the Pennsylvania Election Code, 25 P.S. § 2937.

The Allentown Clean Air Ordinance Initiative Petition, which contained approximately 3,500 signatures, was filed on April 15, 2013. It is

undisputed that there was never any objection or challenge filed by an Allentown citizen to the Air Pollution Initiative. The last day to challenge the Petitions was April 22, 2013, coincidently, Earth Day. 25 P.S. § 2937.

The seven days for filing and serving objections runs from the last day for filing such petitions. *In re Morrison Wesley*, 946 A.2d 789 (Pa. Cmwlth.) *aff'd per curiam*, 596 Pa. 457, 944 A.2d 78 (2008) (where because of heavy snow, Governor extended the date for filing petitions, the time for filing objections was similarly extended based on statutory language). This is true regardless of when such petitions were actually filed. *In re Petition of Werner,* 662 A.2d 35 (Pa. Cmwlth. 1995) (citing *In re: Referendum for Sunday Movie Picture Exhibitions in Borough of Waynesboro,* 383 Pa. 162, 117 A.2d 699 (1955) as mandating such analysis). The seventh day includes the entire day even if the gubernatorial extension of time to file the petitions is extended for only part of a day. *In re James,* 596 Pa. 442, 944 A.2d 69 (2008) (even though governor's extension of time to file petitions extended only until noon, objections could be filed until 5:00 p.m. on the last day). The objections must be filed in the appropriate court within the time period, but if filed in the wrong court, the objections may be transferred. *In re Keller*, 994 A.2d 1165 (Pa. Cmwlth. 2010). Postmarks are not likely to preserve a filing date. *See In re Nomination Petition of*

Acosta, 525 Pa. 135, 578 A.2d 407 (1990) **(stressing mandatory nature of statutory language and need for expeditious action by the courts)**. (Emphasis added). The Governor appears to have the authority to extend this deadline if a natural disaster occurs. *See In re James*, 596 Pa. 442, 944 A.2d 69 (2008) (Supreme Court reversed Commonwealth Court decision holding Governor's extension of time to file petitions did not permit extension of time to file objections; validity of extension apparently accepted without question).

Intervenor, Delta Thermo Energy A, LLC ("DTE"), tried to circumvent the mandatory seven (7) day provision of 25 P.S. § 2937 by showing up at the Board of Elections on August 27, 2013 to object to putting the question of the City of Allentown Clean Air Ordinance initiative on the November 2013 City of Allentown ballot. In essence, DTE is 127 days late with its concern over the petition as to the Board of Elections. DTE is barred from arguing against the Clean Air Ordinance initiative petition for failure to comply with 25 P.S. § 2937 and the board of elections lacked the authority to entertain a late challenge to the initiative.

There are two important concerns for this Court in dealing with an election code matter that involves the very basic right of the citizens of Allentown to petition their government for redress of grievances, First

Amendment of the United States Constitution, and the right to vote for a candidate or a referendum or initiative. *In re Motion Picture Exhibitions on Sunday in Borough of Hellertown*, 354 Pa. 255, 47 A.2d 273 (Supreme Court treats initiatives under the same election code rules as candidate's nomination petitions and papers).

Our Supreme Court in *In re Nomination Petition of Flaherty*, 564 Pa. 671, 770 A.2d 327 (2001), stressed that "the Election Code must also be liberally construed in order to protect a candidate's right to run for office and the voters' rights to elect the candidate of their choice. *In re Nomination Petition of Wesley*, 536 Pa. 609, 613, 640 A.2d 1247, 1249 (1994)." Further, "A party alleging the defects in a nominating petition has the burden of proving such. *In re Nomination Petition of Johnson*, 509 Pa. 347, 502 A.2d 142 (1985); *In re Nomination Petition of Wagner*, 102 Pa.Commw. 174, 516 A.2d 1276 (1986), aff'd, 510 Pa. 584, 511 A.2d 754 (1986)." *Flaherty, supra*.

Where the court is not convinced of the validity of the challenge, the candidate or in this case, the citizen's initiative, the challenge must be resolved in favor of the ballot by putting the initiative on the 2014 November Ballot in Allentown. *Flaherty*, *supra*.

2. The Lehigh County Board of Elections had neither the discretion nor the power to overrule the initiative procedures in the Allentown Home Rule Charter.

The Lehigh County Board of Elections performs a necessary and important function as a part of the democratic process in our form of government, but it has nothing to do with the substantive questions to be put to the voters on the 2013 Lehigh County Municipal Ballot. If the law prescribes that a question may be placed on the ballot, the county board must perform that duty.

The Allentown City Charter states quite clearly and succinctly:

> **SECTION 1002 INITIATIVE AND REFERENDUM**
>
> A. Initiative. The qualified voters of the City shall have the power to propose ordinances to the Council. **If Council fails to adopt *a proposed* ordinance, the initiative process *gives* the qualified voters of the City the opportunity to adopt or reject *the proposed* ordinance at a *primary, municipal or general* election. (11/6/01)** (emphasis added).

The source of the authority and structure of county boards of elections, including the Lehigh County Board of Elections, is the Pennsylvania Election Code, 25 P.S. § 2641 *et seq*. The Election Code mandates the existence of such boards in and for each county of the Commonwealth, with jurisdiction over the conduct and form of primary and general elections in each county. Section 302 of the Election Code delineates the powers and duties of county boards, seriatim, in paragraphs

(a) through (o). With the exception of paragraph (o), these deal with the mechanics of specific election procedures; paragraph (o) is a catch-all authorization to county boards to perform such other duties as may be prescribed by law. 25 P.S. § 2642(o). It is this latter provision, read in context with the provisions of § 1002(A) of the Allentown City Charter that provides the authorization to the Lehigh County Board of Elections to place the challenged referendum on the township ballot. "**The duties of the County Board of Elections are purely ministerial. They are prescribed by the Pennsylvania Election Code. They are given no discretion.**" (Emphasis added), *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951).

To allow the unelected Board of Elections to usurp the power to defeat the clear right of citizens to this process clearly outlined in the Allentown City Charter is unprecedented. The Board has no discretion in this matter, *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951), but to abide by the terms of Allentown City Charter. Anything less makes a sham of Article 9, Section 2 Home Rule of the Pennsylvania Constitution.

No case law has overturned the Pennsylvania Supreme Court precedent in *Shoyer*, and surely has not granted the sort of sweeping authority that the Board of Elections claims to have to judge an ordinance's legality. In fact, none of the law cited by this court, the County Board of

Elections or the intervening party has shown otherwise.

As this court pointed out in the October 2, 2013 opinion in this matter:

> "the Pennsylvania Supreme Court has already enjoined presentation of ballot questions to the electorate where an ordinance would be ineffective, beyond the power of the jurisdiction, or illegal. See *Pennsylvania Gaming Control Board v. Philadelphia*, 593 Pa. 241, 928 A.2d 1255 (2007); *Deer Creek Drainage Basin Auth. v. County Board of Elections of the County of Allegheny*, 475 Pa. 491, 381 A.2d 103 (1977); *Citizens Committee to Recall Rizzo v. Board of Elections*, 470 Pa. 1, 367 A.2d 232 (1976)."

This makes our point. It was not the Boards of Elections that made these judicial decisions. It was the Pennsylvania Supreme Court.

The cases also make clear that Boards of Elections roles are primarily ministerial. "When certification occurs, under 53 P.S. § 13109, the Philadelphia County **Board of Elections is obligated** to cause a question to be printed on the ballot." (Emphasis added). *Pennsylvania Gaming Control Board* at 252. "Therefore, once the Board of Elections had determined that the proposed referendum met the procedural requirements of Section C-1192 [of the Home Rule Charter of West Deer] – a finding not challenged here – it became the **duty of the Board** to place the referendum question before the voters of West Deer." (Emphasis added). *Deer Creek Drainage Basin Auth.* at 505.

Citizens Committee to Recall Rizzo was a political anomaly, arguing that the Board of Elections' duties are both ministerial and deliberative, but then explaining the deliberative functions in fairly ministerial terms, where the deliberation is merely a matter of determining validity of signatures, notarizations and affidavits, not complex preemption analysis:

> "The language of that section imports a duty which is partially ministerial and partially deliberative. As to the ministerial aspect of the Board's duty, there appears to be little doubt that the Board is obliged to 'complete its examination of the petition within fifteen days and shall thereupon file the petition if valid or reject it if invalid.' This duty is purely ministerial in the sense that the Board is required to act on the validity of the petition within the prescribed time frame. *See, e. g., State v. Scott*, 52 Nev. 216, 285 P. 511 (1930). …in reaching the decision of whether to accept the petition, the Board is accorded the ultimate discretion as to the validity of the petition. In exercising that discretion the Board was bound to do so in good faith and in a legally sound manner. The discretion, in other words, was not unrestrained. *Tanenbaum v. D'Ascenzo*, 356 Pa. 260, 51 A.2d 757 (1947). …the Board could not base its determination on arbitrary and capricious grounds or an erroneous interpretation of law." *Citizens Committee to Recall Rizzo* at 11-12, 15.

The Lehigh County Board of Elections misrepresents these cases to the court. In their response filed with this court on September 24, 2013, they state: "The facial legality of a proposed ordinance is a proper issue for review by an Election Board in considering whether a proposed ballot question is properly put on the ballot by an Election Board. *Pa. Gaming Control Board vs. City Council of Philadelphia*, 593 Pa. 241,250, 928 A.2d

1255, 1260 (2007)." There is nothing on the pages cited, or in the case at large, that supports their statement. This is one of the cases where it was the Supreme Court that did the considering and the Election Board that was ordered to follow the result of that consideration.

The Lehigh County Board of Elections goes on to state:

> "In fact an Election Board has a duty to ensure that a referendum question that is invalid and would have no legal effect is not presented on the ballot so as to avoid unnecessary voter confusion and the unjustified expenditure of public resources on an inoperative election, as well as protecting the interests of all parties. *Deer Creek Drainage Basin Authority vs. County Board of Elections of Allegheny County*, 475 Pa. 491, 381 A.2d 103 (1977)." Board of Elections response #31, Sept. 24, 2013.

Again, they misrepresent the cases they cite. *Deer Creek* mentions duties only three times. The first, quoted above, shows that an Elections Board has a duty to place the referendum question before the voters once it determines that the proposed referendum met the procedural requirements in the home rule charter. The other references to duties state that "[i]f the law prescribes that a question may be placed on the ballot, the county board must perform that duty," *Deer Creek* at 503-04, and "[a]s above stated, the Board of Elections made no such determination; it was merely preparing, as was its duty, to place the question on the ballot pursuant to instructions from the Township acting under its home rule charter." *Deer Creek* at 505, n.6.

Nothing in this supports the assertion that a Board of Elections has a duty or discretion to judge the legality of ordinances.

The Board of Elections and intervenor both raise the cases of *Hempfield School Dist. v. Election Bd. of Lancaster Cnty.*, 57 4 A.2d 1190 (Pa. Commw. Ct. 1990) and *Blythe v. Bd. of Elections of Schuylkill*, 143 Pa.Cmwlth. 341,600 A.2d 231 (1991). These are both Commonwealth Court cases and are trumped by Supreme Court precedent, which overwhelmingly has held that a Board of Elections' job is ministerial. Nevertheless, these cases do not prove anything to the contrary. They are cases showing just that non-binding referenda are not permitted on the ballot in Pennsylvania, and that election boards are not empowered to put such measures on ballots. *Hempfield* states:

> "Nowhere is it provided in the Election Code that county election boards have the discretion to authorize non-binding referenda questions on the ballot. The phrase as hereinafter provided in Section 2645 makes clear that the **election boards only have discretion to place questions on the ballot when the Election Code specifically grants them that discretionary power**. Analysis of the succeeding provisions of the Election Code fails to demonstrate any instances in which the Election Board is conferred discretion to place a question on the ballot." (emphasis added) *Hempfield* at 89.

Blythe held the same. Neither case is relevant, as the Allentown Clean Air Ordinance is not a non-binding referendum, but a lawful proposed ordinance.

The Board of Elections also cites, in their appeal brief to the Commonwealth Court on Sept. 30, 2013, page 1266 from *Bell vs. Lehigh County Board of Elections*, 729 A.2d 1259, 1266 (Pa.Cmwlth. 1999) to support their statement that "proposed ordinances may not contravene constitutional principles nor other superseding statutes." Interestingly, there is no page 1266 in that short decision, where the Commonwealth Court chose not to rule on the merits. This is hardly a rival to Supreme Court precedent.

Finally, the Board of Elections argues in point #30 of its Sept. 24, 2013 response to our initial filing in this court that "[a] county Board of Elections has quasi-judicial functions such that it is more than a mere ministerial body." To back this up, they cite two cases, both predating *Shoyer*: *In Re: Nomination Papers of American Labor Party*, 352 Pa. 576, 579, 44 A.2d 48, 50 (1945) and *Boord vs. Maurer*, 343 Pa. 309, 312-13,22 A.2d 902,904 (1941).

In Re: Nomination Papers of American Labor Party states that "[t]he Election Code makes the County Board of Election more than a mere ministerial body. It clothes it with quasi-judicial functions," citing *Boord v. Maurer*, 343 Pa. 309, 312, which states the same and elaborates that "[e]ach County Board of Election may make regulations, not inconsistent with this

act or the laws of this Commonwealth to govern its public sessions, and may issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections in the county under the provisions of this act." Both cases expound on how a Board of Elections is empowered to receive and determine the sufficiency of nomination petitions, certificates and papers of candidates, and the like. Nowhere does it even imply that a Board of Elections may judge the legality of an ordinance for an initiative. Such a duty falls squarely with the courts and outside of the duties of election boards.

3. Allentown's status as a home rule municipality, and the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) militate in favor of the City's power to adopt the Allentown Clean Air Ordinance and favor of the people's right to consider and adopt it.

The City of Allentown is a home rule municipality. Under the concept of home rule, the ability of a locality to exercise municipal functions is limited only by its home rule charter, the **Pennsylvania Constitution**, and enactments of the General Assembly. *City of Philadelphia v. Schweiker, 579 Pa. 591, 605 (2004)*; 53 P.S. § 2961. In addition, grants of municipal power to a home rule municipality are to be "liberally construed in favor of the municipality." 53 P.S. § 2961. Thus, in

analyzing a home rule municipality's exercise of power, ambiguities are resolved in favor of the municipality. *Holt's Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153 (2011).

Constitutional obligations trump the General Assembly. We were recently reminded of this when preemption provisions in Pennsylvania's Act 13 of 2012 were overturned in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (2013) because they were found to be an unconstitutional violation of the Environmental Rights Amendment, Article 1, § 27 of the Pennsylvania Constitution. The unconstitutional parts of Act 13 "purport[] to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations." *Robinson* at 978.

The Environmental Rights Amendment, cited as a source of authority in the Allentown Clean Air Ordinance states:

> 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.

The Pennsylvania Supreme Court reminds us that "the constitutional obligation binds all government, state or local, concurrently." *Robinson* at 952. The Court repeatedly points out that "all existing branches and levels

of government derive constitutional duties and obligations with respect to the people." *Id.* at 977; similar language at 963. More specifically, the Court explains:

> "This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust. **The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania's government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. <u>This includes local government.</u>**" (Emphasis added) *Id.* at 956-57.

Historically, our courts have viewed municipalities as more subservient to the General Assembly, but any such restraints must be understood as secondary to constitutional obligations.

> "We recognize that, as the Commonwealth states, political subdivisions are 'creations of the state with no powers of their own.' *Fross v. County of Allegheny*, 20 A.3d 1193, 1202 (Pa. 2011). Municipalities have only those powers 'expressly granted to them by the Constitution of the Commonwealth or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers.' <u>Id.</u> Within this construct, the General Assembly has the authority to alter or remove any powers granted and obligations imposed by statute upon municipalities. <u>See, e.g., *Huntley*, 964 A.2d at 862</u> (even where state has granted powers to act in particular field, such powers do not exist if Commonwealth preempts field). By comparison, however, **constitutional commands regarding municipalities' obligations and duties to their**

> **citizens cannot be abrogated by statute.** See *Mesivtah*, 44 A.3d at 9**… Moreover, the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties**. Cf. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 196-97 (Pa. 1971)." *Robinson* at 977.

Demonstrating the power and importance of the Environmental Rights Amendment versus other constitutional rights, the Court points out: "Generally, litigation efforts of private interests to limit the exercise of the General Assembly's police power to protect the environment by asserting competing constitutional rights have been unsuccessful, in recognition of the Section 27 imperative." *Id.* at 969.

As with any constitutional challenge, the **role of the judiciary** when a proper and meritorious challenge is brought to court includes the obligation to vindicate Section 27 rights. *Id.* at 968. The Environmental Rights Amendment "is more than statement of policy; it is intended to create [a] legally enforceable right to protect and enhance environmental quality." Pa. Legislative Journal-House at 2272, cited in *Robinson* at 952.

Says the highest court in our Commonwealth:

> "the citizens construe the Environmental Rights Amendment as protecting individual rights and devolving duties upon various actors within the political system; and they claim that breaches of those duties or encroachments upon those rights is, at a minimum, actionable. According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with

> constitutional duties. **Unless the Declaration of Rights is to have no meaning, the citizens are correct.**" (Emphasis added.) *Robinson* at 974.

The Environmental Rights Amendment received unanimous support in the Pennsylvania House and Senate, and with 4-to-1 approval at the polls, received more support at the ballot than any candidate seeking state-wide office or any of the other four proposed amendments in the referendum of May 18, 1971, the day it was adopted by the people. "To say the Environmental Rights Amendment was broadly supported by the people and their representatives would be an understatement." *Id.* at 962.

> Among the questions and answers distributed prior to the May 18, 1971 referendum and intended to aid voters in understanding the proposed constitutional amendment was the following:
>
> Q. Will the amendment make any real difference in the fight to save the environment?
> A. Yes, once [the amendment] is passed and the citizens have a legal right to a decent environment under the State Constitution, every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people's rights before it acts. If the public's rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate law suit . . . .
>
> Q. Will there be any "teeth" in the law, if passed?
> A. It will be up to the courts to apply the three broad principles [articulated in the amendment] to legal cases. However, having this law passed will strengthen substantially the legal weapons available to protect our environment from further destruction . . . . *Id.* at 952-53.

Despite these promises, there were no "teeth" until the *Robinson* case was recently decided, in which the Pennsylvania Supreme Court dusted off this dormant constitutional amendment and spelled out that these rights are self-executing, just as other constitutional rights are, and thus the courts may enforce these rights independently of any legislative action. *Id.* at 974-75.

No longer will the court assume that "mere compliance with the enabling statute and relevant regulations [is] sufficient to satisfy constitutional strictures." *Id.* at 967, n.53.

Just as Delta Thermo Energy (DTE) argued in its appeal brief of this case to Commonwealth Court, the Commonwealth in *Robinson*, argued on behalf of the oil and gas industry against "a 'balkanization' of legal regimes with which the industry would have to comply." *Id.* at 981. DTE argued that: "municipalities across Pennsylvania could create a patchwork of expansive, often inconsistent, comprehensive air pollution regulations… The result would be a tangled web of air pollution control programs establishing different requirements across Pennsylvania, frustrating the purpose of a state regulatory program." This is a common refrain from industry, even when arguing for federal preemption to prevent states having varied standards – just as Pennsylvania has long had its own Air Pollution Control Act – and the end of the industrial world has not come.

The PA Supreme Court dismisses this alarmist argument, stating in *Robinson* that: "If economic and energy benefits were the only considerations at issue, this particular argument would carry more weight. But, the Constitution constrains this Court not to be swayed by counter-policy arguments where the constitutional command is clear." *Robinson* at 981.

By nearly every pollution measure, Pennsylvania is among the four most polluted states in the nation. Clearly, decades of local government authority to regulate air pollution has not resulted in a prohibitive environment for corporations with smokestacks to set up shop in our state.

The Court in *Robinson* notes that "the Commonwealth fails to respond in any meaningful way to the citizens' claims that Act 13 falls far short of providing adequate protection to existing environmental and habitability features of neighborhoods in which they have established homes, schools, businesses that produce or sell food and provide healthcare, and other ventures, which ensure a quality of human life." *Id.* at 981.

Similarly, DEP has failed to provide adequate protection for the people's rights to clean air in the Lehigh Valley. This is evidenced, in part, by the fact that Allentown is described in a recent report as the nation's 11th

worst asthma capital[1] and that the Lehigh Valley is also the 14th worst in the nation for year-round fine particulate matter pollution and one of just a handful of regions where this pollution is getting worse.[2]

Clearly, Allentown's asthma and air quality would not be among the worst in the nation if the Department of Environmental Protection were adequately upholding the people's rights to clean air.

> "In relevant part, as we have explained previously, the Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly. See PA. CONST. art. I, §§ 25, 27." *Robinson* at 974.

The same can be said of the DEP. The people must have their rights to clean air protected, if not by DEP, then by their city… and if not by their city government, then by vote of the people who make up the city.

> "The right to 'clean air' and 'pure water' sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern 'clean air' and 'pure water' standards and, as with any other technical standards, the courts generally

[1] "Asthma Capitals 2013," Asthma and Allergy Foundation of America. www.asthmacapitals.com ; www.aafa.org/pdfs/2013_AC_FinalPublicList1.pdf

[2] "The State of the Air 2013," American Lung Association, p.14. www.stateoftheair.org/2013/assets/ala-sota-2013.pdf

> defer to agency expertise in making a factual determination whether the benchmarks were met." *Id.* at 953.

This gets to the very purpose of the Allentown Clean Air Ordinance. DEP cannot make a "factual determination whether the benchmarks were met" – in the air pollution permit for Delta Thermo Energy or for any other company that may build an incinerator in the city – because the pollution monitoring itself is inadequate. Permit requirements, for DTE and other smokestack industries, only require state-of-the-art continuous emissions monitoring for a handful of pollutants, while others go unmonitored all but one day of each year (at best).

DTE's permit requires that only five pollutants that can harm health of local residents be monitored continuously, plus the darkness of the smoke and the global warming pollutant, carbon dioxide. It requires continuous monitoring for only ONE toxic chemical (hydrochloric acid). For mercury, dioxins, lead, arsenic and a myriad of other toxic pollutants, they'll have to test one time each year (while on their best behavior) or not at all. This is unacceptable. It's akin to having a speed limit where a speed trap is set just one day a year, there are signs warning "speed trap ahead" and the driver's brother runs the speed trap (the companies do their own testing). In reality, incinerators are "speeding" many other days of the year, with excessive emissions during startup, shutdown and malfunction times, when testing is

not done. For pollutants like dioxins, annual 6-hour tests cannot pick up the actual emissions (highest during startup/shutdown/malfunction times) that have been shown to be 30-50 times higher when tested using continuous monitoring equipment.[3]

The main feature of the Allentown Clean Air Ordinance is that it would require real-time monitoring and disclosure of air pollutants, using state-of-the-art technology to ensure compliance with emissions limits. Such modern equipment is needed to guarantee safer operations in light of the fact that trash, sewage sludge and other waste streams are known to be highly variable in their content of metals and other toxins.

DEP – the very agency that has allowed the area to become one of the most air-polluted in the nation – is not an agency that can be trusted to set and enforce benchmarks for how clean Allentown's air should be. The people have a right to do better.

When the Pennsylvania Supreme Court struck down the preemption clause in Act 13, they noted that the law's one-size-fits-all regulatory approach "in **every type of pre-existing zoning district** is **incapable** of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life." (emphasis added) *Id.* at

[3] Wevers M. and De Fré R., "Underestimation of dioxin emission inventories," Organohalogen Compounds, Vol. 36, pp. 19-20 (1998). http://www.ejnet.org/toxics/cems/1998_DeFre_OrgComp98_Underest_DIoxin_Em_Inv_Amesa.pdf

979. The Court repeatedly took note of the fact that communities across the state differ, and that local laws ought to vary because uniform approaches are not appropriate and cannot account for local differences. Allentown is an area suffering from excessive air pollution, and its people have a right to clean air that is not being attained. Without adequate monitoring, enforcement and pollution controls, DEP permits and weak enforcement are **incapable** of securing these rights.

There is no legal uncertainty about whether Pennsylvania law preempts this ordinance, as the following legal arguments outline, but if there were, the Pennsylvania Constitution militates in favor of the plaintiff's efforts to bring this clean air decision to the people.

The Environmental Rights Amendment mentions "the people" in all three clauses, as the Pennsylvania Supreme Court pointedly and repeatedly reminds us in *Robinson*. Even more relevant than the Act 13 case on the rights of municipalities to pass laws regulating the oil and gas industry, this case is literally about bringing the right to clean air to the people. The people of Allentown have spoken in meeting the requirements to secure their right to bring the ordinance to the voters. The City of Allentown – and all Pennsylvania municipalities – have the right to adopt such an ordinance. The people now must have their constitutional right to clean air brought

before them for a vote, as the city, county and state have fallen down in their constitutional obligations to protect these rights.

4. Federal and state air pollution laws allow Pennsylvania municipalities to adopt stricter air pollution laws.

The federal Clean Air Act, at **42 U.S.C. § 7416**, allows states and municipalities to have stricter air pollution laws than the federal floor. It states:

> **§ 7416. Retention of State authority**
>
> Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) **nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution**; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, **such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.** (emphasis added)

It is under such authority that Pennsylvania's Air Pollution Control Act exists. This Clean Air Act authority also grants Allentown the right to adopt local air pollution laws as strict or stricter than the Clean Air Act.

Pennsylvania's Air Pollution Control Act, at **35 P.S. § 4012(a)**,

contains a standard savings clause designed to allow stricter local air pollution laws, just as many other states do. It states:

> **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. **(emphasis added)**

5. 35 P.S. 4012(a) applies to the City of Allentown, not 35 P.S. 4012(b)-(f).

35 P.S. § 4012(a) speaks specifically to the authority of cities (and counties and other municipalities), broadly. **35 P.S. § 4012(b)** applies only to first and second class counties and thus does not apply to the City of Allentown.

Nothing in **35 P.S. § 4012(a)** requires Department of Environmental Protection (DEP) approval. In fact, numerous other municipalities in the Commonwealth have adopted their own similar local air pollution ordinances under this authority, without any involvement from the

Department of Environmental Protection. Department of Environmental Protection approval is only required under **35 P.S. § 4012(b)-(f)**, which pertains to county air pollution control programs/agencies of the sort that take the place of Department of Environmental Protection's air pollution regulatory role, and which are allowed only in first and second class counties (Philadelphia and Allegheny Counties, respectively).

35 P.S. § 4012(b)-(f) states:

> (b) The administrative procedures for the abatement, reduction, prevention and control of air pollution set forth in this act shall not apply to any **county of the first or second class of the Commonwealth which has and implements an air pollution control program** that, at a minimum, meets the requirements of this act, the Clean Air Act and the rules and regulations promulgated under both this act and the Clean Air Act and **has been approved by the department**.
>
> (b.1) Provisions of this act pertaining to dust control measures shall not apply to portions of highways in townships of the second class where no businesses or residences are located.
>
> (c)(1) Whenever, either upon complaint made to or initiated by the department, the department finds that any person is in violation of air pollution control standards, or rules and regulations **promulgated pursuant to the grant of authority made in subsection (b)**, the department shall give notification of that fact to that person **and to the air pollution control agency of the county involved**.
>
> (2) If **such violation** continues to exist after **said notification** has been given, the department may take any abatement action provided for under the terms of this act.

(d) Whenever the department finds that violations of this act or the rules and regulations promulgated under this act are so widespread that such violations appear to result from a failure of the **local county control agency** involved to enforce those requirements, the department may assume the authority to enforce this act **in that county**.

(e) The department shall have the power to refuse approval, or to suspend or rescind approval, once given, to any **county air pollution control agency** if the department finds that **such county agency** is unable or unwilling to conduct an **air pollution control program** to abate or reduce air pollution problems within its jurisdiction in accordance with the requirements of this act, the Clean Air Act or the rules and regulations promulgated under both this act and the Clean Air Act.

(f) Whenever the department takes action **under the provisions of subsections (d) or (e)** of this section, it shall give written notification to the **air pollution control agency of the county** involved and such notification shall be an appealable action.

(emphasis added to show how subsections (c) through (f) are extensions of subsection (b) and all apply only to Philadelphia and Allegheny Counties so long as they continue to maintain county air pollution control agencies authorized under these subsections)

Simply put, **35 P.S. § 4012(b)-(f)** does not apply to the City of Allentown, since the City of Allentown is not a County of the first or second class, and since the proposed Allentown Clean Air Ordinance does not aim to replace the Department of Environmental Protection's air pollution regulatory role.

The authority for the Allentown Clean Air Ordinance is **35 P.S. § 4012(a)**, as stated in the ordinance itself.

35 P.S. § 4012(a) sets a floor, but not a ceiling. Pennsylvania's Air Pollution Control Act was adopted in 1960, and amended in 1966, 1972, 1992 and 1995. In the 1972 amendments, the General Assembly changed § 4012(a) from being a floor **and** a ceiling to just being a floor. The language used to state that cities and other political subdivisions could enact ordinances with respect to air pollution which will "not conflict with" the provisions of the Air Pollution Control Act. The 1972 amendments changed "not conflict with" to "not be less stringent than" – indicating an intent that political subdivisions be empowered to adopt local air pollution laws that are **as strict or stricter** than state and federal air pollution laws.

Many (primarily rural) Pennsylvania municipalities and some counties (outside of Philadelphia and Allegheny) have local air pollution ordinances under § 4012(a) authority, including open burning ordinances, ordinances regulating outdoor wood-fired boilers, ordinances regulating crematoria, and even some regulating hazardous or radioactive waste incinerators. These ordinances have many of the hallmarks of the Allentown Clean Air Ordinance, such as fees, emissions standards, pollution monitoring, inspections and enforcement, and civil and criminal penalties

for non-compliance. Some even go further, requiring permits. Some of these are even based on model ordinances for open burning and outdoor wood-fired boilers that DEP provides, containing these features.[4] One example is the City of Nanticoke's ordinance regulating outdoor furnaces that burn solid fuels.[5] The Allentown Clean Air Ordinance also seeks to regulate pollution from solid fuel burning facilities, but only new ones of a more industrial scale.

Far more comprehensive anti-pollution air ordinances have been held by this court to fall under § 4012(a). In 1976, and again in 1978, the case of *Commonwealth ex rel. Allegheny County Health Dept., Bureau of Air Pollution Control v. University of Pittsburgh* came before the Commonwealth Court.[6] In both cases, this Court referenced § 4012(a) as the source of authority for the county's 1972 anti-pollution ordinance, even though § 4012(b) existed at the time. The Allegheny County Health Department's Air Quality Program was not approved by DEP until 1998,[7] the same year that Philadelphia's Air Management Services program was

[4] Model ordinances are available from the PA Department of Environmental Protection website titled "Open Burning Information."
http://www.dep.state.pa.us/dep/deputate/airwaste/aq/openburn/openburn.htm
[5] City of Nanticoke Ord. No. 7-2009, regulating outdoor boilers burning solid fuels.
http://ecode360.com/14393508
[6] 26 Pa. Commw. 375 (1976); 37 Pa. Commw. 117 (1978).
[7] "Approval of the Allegheny County Air Quality Program," 28 Pa.B. 5528.
http://www.pabulletin.com/secure/data/vol28/28-44/1798.html

approved. The Allegheny County Health Department's Air Pollution Control Rules and Regulations, adopted June 15, 1972, were quite the comprehensive program, regulating a wide range of industries, setting ambient air quality standards, providing for inspections and emissions standards, requiring testing and reporting, and establishing permits and fees as well as civil and criminal penalties.[8] The Allegheny County ordinance is far, far more exhaustive than the Allentown Clean Air Ordinance, yet the Commonwealth Court found it authorized under § 4012(a), not even referencing § 4012(b) in either case, even though that subsection existed at the time. If there were any ceiling under § 4012(a), surely the Allegheny County ordinance would have exceeded it.

6. The requirement of DEP approval, which applies only to First and Second Class Counties, is due to the fact that these counties are empowered to replace DEP's air pollution regulatory role.

There is no requirement for Department of Environmental Protection (DEP) approval of local ordinances adopted under § 4012(a). That requirement is only under § 4012(b), which applies only to county-wide air pollution programs in first and second class counties where the program takes the place of DEP's air pollution regulatory role.

The measure of whether DEP approval is required is not about how

[8] Allegheny County Health Department, Air Pollution Control Rules and Regulations, June 1972. http://www.scribd.com/doc/173230184/ACHD-1970s-Air-Ordinance-Article-XVIII

comprehensive an air pollution ordinance is, but whether a local law in Philadelphia or Allegheny County aims to replace DEP's air regulatory role by creating a comprehensive program.

The U.S. Environmental Protection Agency spelled this out in their 1972 Compendium of State Air Pollution Control Agencies,[9] stating in their description of Pennsylvania's program:

> "**Local governments whose air pollution control agencies and programs have been approved by the State are relieved from the application of State air pollution control procedures within their boundaries** except insofar as the effects of local air contaminant sources extend beyond those boundaries." (emphasis added)

This is a reference to **35 P.S. § 4012(b)**, the part of the Air Pollution Control Act that sets up this arrangement. Again, § 4012(b) states that "[t]he administrative procedures for the abatement, reduction, prevention and control of air pollution set forth in this act shall not apply to any county of the first or second class of the Commonwealth which has and implements an air pollution control program."

This is not the language of preemption. § 4012(b) is merely stating that the state's Air Pollution Control Act does not apply in these limited locations (in these two counties that now have approved programs) and,

[9] "1972 Compendium of State Air Pollution Control Agencies," U.S. Environmental Protection Agency, September 1, 1971, p.79 (p. 86 in the online document viewer). http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=91004WDF.txt

conversely, that the Air Pollution Control Act (and DEP's authority to enforce it) still **does** apply everywhere else in the Commonwealth – even in places where political subdivisions choose to adopt additional and cumulative local air pollution laws under the § 4012(a) authority granted to them directly by the General Assembly.

25 Pa. Code § 133 spells out the criteria by which the Department of Environmental Protection (DEP) may approve a local air pollution control agency. The Allentown Clean Air Ordinance does not create an agency for which such approval is required. Even in cases where an ordinance adopted by a political subdivision other than Philadelphia or Allegheny County were to create an agency, that agency would not cause the political subdivision to be exempted from the DEP's concurrent enforcement of the Air Pollution Control Act since such exemption is only available to first and second class counties. **25 Pa. Code § 133.3(a)** states:

> "An agency intending to operate an air pollution control program within the confines of **a political subdivision of the Commonwealth to which the procedures for the abatement, reduction, prevention and control of air pollution as set forth in the act do not apply**, shall make application to the Department for approval of the agency and its program." **(emphasis added)**

This language refers back to language in **35 P.S. 4012(b)** that limits application to Philadelphia and Allegheny Counties, thus the requirement to

apply to the DEP applies only to these two counties, where administration of a county air pollution control program is permitted to take the place of the Department of Environmental Protection (DEP)'s air pollution regulatory role. The Allentown Clean Air Ordinance does not aim to take over the DEP's air pollution regulatory role. To the contrary, it aims to provide "additional and cumulative" efforts to reduce air pollution.

The "administrative procedures… shall not apply" language in § 4012(b) refers to exempting approved county air pollution programs from state air pollution regulation, which is further evidenced throughout the state code. See 25 Pa. Code § 122.2 (National Standards of Performance for New Stationary Sources), 25 Pa. Code § 124.2 (National Emission Standards for Hazardous Air Pollutants), 25 Pa. Code § 127.82 (Prevention of Significant Deterioration of Air Quality), and even the payment of emission fees to Philadelphia and Allegheny Counties instead of the state under 25 Pa. Code § 127.705 (applying to major air polluting facilities). 25 Pa. Code §§ 122.2 and 124.2 state:

> "The standards adopted in this chapter do not apply to sources located in areas under the jurisdiction of local air pollution control agencies approved under section 12 of the act (35 P. S. § 4012). The local agencies may or may not adopt such standards as they deem appropriate."

25 Pa. Code § 127.82 has nearly identical language:

> "The requirements adopted in this chapter do not apply to sources located in areas under the jurisdiction of local air pollution control agencies under section 12 of the act (35 P. S. § 4012). The local agencies may adopt such requirements as they deem appropriate."

The object of interpretation and construction of all statutes is to ascertain and effectuate the intent of the General Assembly. 1 P.S. § 1921(a). When the words of a statute are clear and free from all ambiguity, their plain language is generally the best indication of legislative intent. *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 608 (2011).

35 P.S. 4012(b) needs to be read for its plain language meaning. It states that the procedures of the Pennsylvania Air Pollution Control Act do not apply in first and second class counties if they have approved air pollution programs of their own. It does not have any preemptive language limiting what can be done in other political subdivisions. § 4012(b) merely exempts two counties from DEP's air regulatory authority under certain conditions, as is clear from EPA's 1972 summary of Pennsylvania's program as well as the four sections of the Pa. Code, cited above.

7. The legislative intent behind 35 P.S. 4012 was to allow municipalities to provide additional and cumulative remedies above and beyond those of the PA Air Pollution Control Act.

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) states, in part:

> "It is hereby declared to be the purpose of this section 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." (emphasis added)

35 P.S. § 4012.1a., titled "Construction," reiterates this intent, stating, in part:

> "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…"

The plain language interpretation of § 4012 is that DEP approval is not required under § 4012(a), since it is required under § 4012(b) but not mentioned in § 4012(a). The legislature had five opportunities to say otherwise: when the law was adopted in 1960 and when it was amended four times since; at least three of those times involved amending § 4012. The General Assembly chose never to restrict § 4012(a) with a requirement of state approval as they had § 4012(b).

8. The Air Pollution Control Act contains no express preemption of municipalities' rights to adopt air pollution laws stricter than state law.

Preemption doctrine is organized as follows:

Savings clauses[10] – language that preserves the rights of lower levels of government to act

Preemption clauses:

- Express: language forbidding action by lower levels of government
- Implied: where there is no express savings or preemption clause and the court interprets the statute to be preemptive
  - Field preemption – court interpretation that the statute is so comprehensive that it "occupies the field"
  - Conflict preemption – court interpretation that a conflict exists such that a law at a higher level of government must trump the lower one because both are impossible to enforce simultaneously

Pennsylvania preemption law is well established and follows these same principles seen around the country. The landmark case, *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) describes savings clauses, express preemption and possible field preemption:

> "There are statutes which expressly provide that nothing contained therein should be construed as prohibiting

[10] As the term "savings clause" seems to be new to some parties to this case, note its use in legal references and law journal articles on the topic, including: 32 A.L.R.3d 215 ("Although savings provisions of Federal Water Pollution Control Act Amendment of 1972…."); 67 A.L.R.4th 822 ("Although recognizing that it had been held that similar savings clauses in other federal environmental laws did not preserve the right to bring an action based on federal common law, the court indicated that actions based on state common law have been preserved." and "In addition to holding that a municipal ordinance was not pre-empted by federal hazardous waste legislation, where the federal law had a savings clause preserving common-law actions, the court... also held that the ordinance was not pre-empted by a state hazardous waste management act having a similar savings clause."); "Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations," 34 Ecology L.Q. 1147 (2007) ("Congress considered the preemption clause to be so clear that a savings clause protecting state police powers was 'unnecessary.'"); "Comment: Federal and State Preemption of Environmental Law: A Critical Analysis," 24 Harv. Envtl. L. Rev. 237 (2000) ("At times these basic three types of preemption may be combined. The Toxic Substances Control Act ('TSCA') combines a non-discretionary standard with a savings clause that allows some degree of regulation by lower units of government.")

> municipalities from adopting appropriate ordinances, not inconsistent with the provisions of the act of the rules and regulations adopted thereunder, as might be deemed necessary to promote the purpose of the legislation. On the other hand there are statutes which expressly provide that municipal legislation in regard to the subject covered by the state act is forbidden. Then there is a third class which, regulating some industry or occupation, are silent as to whether municipalities are or are not permitted to enact supplementary legislation or to impinge in any manner upon the field entered upon by the state; in such cases the question whether municipal action is permissible must be determined by an analysis of the provisions of the act itself in order to ascertain the probable intention of the legislature in that regard."

More recently, the Pennsylvania Supreme Court has outlined the three types of preemption in *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598 (2011):

> "There are three generally recognized types of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments. Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause.**"**

There is no express preemptive language anywhere in 35 P.S. § 4004

or § 4012 which "forbids" or "specifically bars" local authorities from acting on this subject matter. Thus, express preemption cannot and does not apply here.

Considering that only § 4012(a) can apply to the City of Allentown and the Allentown Clean Air Ordinance, and that there is no preemptive language in the text of § 4012(a), the doctrine of express preemption does not apply.

There is similarly no express preemptive language in § 4012(b). The language empowers two counties to replace the DEP's air pollution enforcement authority, but says nothing to restrict municipalities in any way. Any preemption to be found in 35 P.S. § 4012 must be implied because there is no express preemption language.

9. An implied preemption analysis is inappropriate since the Air Pollution Control Act is not silent on the issue of preemption.

Implied preemption is needed when a statute does not expressly state whether political subdivisions may or may not regulate the same subject matter. Implied preemption comes in two flavors: field preemption and conflict preemption.

In *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 394 Pa. 466, 147 A.2d 326 (1959), the Supreme Court of Pennsylvania set out one if its earlier pronouncements on state-to-local

preemption in the Commonwealth, stating:

> "Where the Act is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the salutary scope of the Act, the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute's objectives."

This welcoming attitude toward municipal ordinances ought to be applied in this case, especially since the Air Pollution Control Act is not even silent on "monopolistic domination" – it specifically does the opposite. The title of 35 P.S. § 4012 is "Powers reserved to political subdivisions." It explicitly allows stricter local air pollution ordinances in any county or municipality, and permits two counties to replace DEP's air pollution regulatory role if they adopt programs comprehensive enough to warrant exemption from the Air Pollution Control Act.

An implied preemption analysis is only appropriate where the statute is "silent" on preemption. The Pennsylvania Supreme Court has made this point repeatedly. A heavily cited case on the topic, *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971), states:

> "**When a statute is silent** as to whether municipalities are or are not permitted to enact supplementary legislation or to impinge in any manner upon the field entered upon by the state, the question whether municipal action is permissible must be determined by an analysis of the provisions of the act itself in order to ascertain the probable intention of the legislature in that

> regard. It is, of course, self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. If the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid.**"** (emphasis added)

Similarly, the aforementioned and most-cited *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) case states that implied preemption is appropriate for that "third class" of statutes where they do not expressly allow or disallow municipal legislation, but are "silent as to whether municipalities are or are not permitted to enact supplementary legislation."

More recently, the requirement that implied preemption takes place when a statute is "silent" is echoed in *Holt's Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153-54 (2011), where it states: "[i]n field preemption, a 'statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention.'"

The Pennsylvania Air Pollution Control Act is not "silent" on preemption. It falls into the first category outlined in *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) and described as:

> "statutes which expressly provide that nothing contained therein should be construed as prohibiting municipalities from adopting appropriate ordinances, not inconsistent with the provisions of

> the act of the rules and regulations adopted thereunder, as might be deemed necessary to promote the purpose of the legislation."

Since the Act is not silent on preemption, it does not fall into the class of statutes where an implied preemption analysis is applicable.

10. The Air Pollution Control Act contains no field preemption that prevents county and municipalities from adopting air pollution laws stricter than state law.

Field preemption is a type of implied preemption, analysis of which is not appropriate because the statute is not silent on the issue of preemption.

Field preemption is heavily disfavored in Pennsylvania. In *Council of Middletown Twp., Delaware Cnty. v. Benham*, 514 Pa. 176, 180-184 (1987), Pennsylvania's Supreme Court states:

> "The state is not presumed to have preempted a field merely by legislating in it. The General Assembly must clearly show its intent to preempt a field in which it has legislated. *** The test for preemption in this Commonwealth is well established. Either the statute must state on its face that local legislation is forbidden, or 'indicate[ ] an intention on the part of the legislature that it should not be supplemented by municipal bodies.' *** Total preemption is the exception and not the rule."

More recently, this court held, in *Hartman v. City of Allentown*, 880 A.2d 737 (2005):

> "It is the policy of the Pennsylvania courts to disfavor a finding of preemption 'unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual,

> material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected.' *** In fact, the General Assembly preempts a field only where the state has retained all regulatory and legislative power for itself and no local legislation is permitted."

The Pennsylvania Supreme Court reviewed the Commonwealth's preemption law extensively in the recent *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 609-10 (2011) decision, and states:

> "[T]he General Assembly must clearly evidence its intent to preempt. *** Such clarity is mandated because of the severity of the consequences of a determination of preemption. *** The General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking."

Since Pennsylvania does not play the implied field preemption game, and since the statute is not silent on issues of preemption, the arguments of the Board of Elections and the intervening party should fail when they make field preemption arguments by pointing to the fact that 35 P.S. § 4004 requires DEP to regulate certain things, a few of which overlap with areas that would also be locally regulated by the ordinance.

Arguments have been made that the court should imply that there is field preemption under § 4012(b) if an ordinance that would otherwise fall under § 4012(a) goes too far and constitutes a "comprehensive air pollution program." This analysis is inappropriate and invalid, and even if explored,

does not hold up to scrutiny.

This logic makes no sense as there is no ceiling expressed in § 4012(a), and since there is no mechanism for pushing a county or municipality into consideration under § 4012(b) when that subsection only applies to first and second class counties, of which the City of Allentown is neither.

Preemption under 35 P.S. § 4012 could only apply if one implies from § 4012(b) that *only* first and second class counties may establish the sorts of comprehensive air pollution programs that require state approval because the state's role in enforcing the Air Pollution Control Act is being replaced. This is a reasonable interpretation because it only allows exemptions from state enforcement of the Air Pollution Control Act under these circumstances. There is no basis to extend this logic to mean that any municipality cannot set up an air pollution control program (no matter how comprehensive it may or may not be) *that operates concurrently* with state authority, or to mean that the ordinance in question comes anywhere close to being a "program."

The fact that the Allentown Clean Air Ordinance does not purport to exempt the City from state enforcement of the Air Pollution Control Act should be sufficient to conclude that any implied preemptive effect of §

4012(b) does not apply.

§ 4012(b) does not preempt municipalities other than first and second class counties from having air pollution control programs of their own. It merely limits the granting of exemption from DEP air pollution regulatory authority to those two counties.

That said, the Allentown Clean Air Ordinance would not establish an air pollution control program. The 14 criteria for a program are set out in 25 Pa. Code § 133.4. The ordinance comes nowhere close to meeting those 14 criteria. The ordinance does not control air pollution from open burning operations. § 133.4(b)(1). It does not control nuisances caused by emissions from air contamination sources not subject to emissions standards. § 133.4(b)(3). It does not set up a plan approval system for prevention of air pollution from new air contamination sources. § 133.4(b)(4). It does not establish criteria for ambient air quality. § 133.4(b)(5). It does not establish air stagnation air quality levels. § 133.4(b)(6). It does not establish a source emission inventory. § 133.4(b)(8). It does not give the city authority to require air stagnation alert emission control plans. § 133.4(b)(11).

Of the remaining criteria that are partially met, the application of those criteria is narrowly limited. There are 58 active air permit facilities in

the City of Allentown. The ordinance would apply to none of them, since they are existing facilities and the ordinance only covers new facilities. The ordinance does not touch mobile sources of pollution. It does not affect small, residential-scale burners. It only applies to new facilities that would burn more than one ton per day of a solid waste or fuel. This is essentially limited to coal, waste coal, biomass, municipal, residual and hazardous wastes. It is extremely rare that such facilities are proposed – especially in the state's third largest city. Nationally, the U.S. Environmental Protection Agency just adopted carbon dioxide (CO_2) standards for new coal power plants, which essentially bans new conventional coal power plants, as only facilities with extremely expensive carbon capture and sequestration systems can comply, of which only a few are proposed nationally, and in places near oil deposits where the CO_2 can be used in enhanced oil recovery operations. Such a facility could not be built in the Allentown area. Due to these new federal regulations, it would be unreasonable to expect that a coal or waste coal burning facility would ever be built in the City of Allentown. CO_2 regulations are pending on waste and biomass burning facilities as well. Once they are adopted, it is also unreasonable to expect new waste or biomass burning facilities to be proposed. It is already quite rare that new waste or biomass incinerators are built in the U.S. – in part because they are

so unpopular, but also because trash and biomass incinerators are the first and second most expensive energy facilities to operate and maintain, according to the latest available data from the Energy Information Administration. Trash incinerators are also the most expensive to build, of all sorts of electric generating plants. Aside from Delta Thermo Energy's proposed trash and sewage sludge incinerator, very few, if any, other facilities would ever be covered by the ordinance.

Of the world of mobile and stationary air polluting sources, the scope of the ordinance is quite narrow and cannot be construed as a comprehensive air pollution program which, by definition, is one that covers a wide spectrum of sources, including ambient (background air) pollution levels, and including existing sources.

Due to the narrow scope of the ordinance and the fact that it does not establish a staffed agency of experts, or even meet most of the criteria for a program, there is no justification for defining it as a comprehensive air pollution program.

There is no ceiling in § 4012(a) which would push a local air ordinance into the realm of § 4012(b) if exceeded. This is clear from the plain language of § 4012(a) and in the fact that the ordinance falls far closer to the aforementioned City of Nanticoke ordinance regulating outdoor

furnaces that burn solid fuels, than it does to the comprehensive air pollution program that Allegheny County Health Department had in the 1970s, when this Court found that even that program fell under the authority of § 4012(a).

To establish a ceiling would be to draw a line in § 4012(a) that the General Assembly never created.

Rather than create a court-imposed arbitrary line that the General Assembly never envisioned, the court should abide by the plain language of the statute and find that the dividing line between § 4012(a) and § 4012(b) is not how far an ordinance goes, but whether the Department of Environmental Protection's air regulatory role is being replaced by exempting the jurisdiction from the procedures of the Air Pollution Control Act.

Even if it were appropriate for the court to do an implied preemption analysis of a statute that is not silent on preemption, field preemption is disfavored and cannot be found or justified for the statute in question.

11. No specific provision of the Allentown Clean Air Ordinance conflicts with the Air Pollution Control Act.

The only other option for finding preemption is conflict preemption – the second type of implied preemption, the analysis of which is inappropriate because the statute is not silent on the matter of preemption.

Pennsylvania courts have not been inclined to find conflict preemption lightly. *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971) explains:

> "In determining whether, by the enactment of the specific statute, the Commonwealth completely barred a municipality's enactment of an ordinance relating to the same field, courts will refrain from striking down the local ordinance unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected.**"**

In *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 610-11 (2011), the Pennsylvania Supreme Court further explains:

> "Conflict preemption is a formalization of the self-evident principle that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. *** **Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible.** *** In addition, under the doctrine of conflict preemption, a local ordinance will be invalidated if it stands 'as an obstacle to the execution of the full purposes and objectives' of a statutory enactment of the General Assembly. *** With regard to conflict preemption, *** the proper standard for invalidation of local ordinances, and also as to the potential coexistence of local enactments that supplement the statutory scheme or goals [is:] '[**w]here an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the**

> **ordinance is irreconcilable.' [Pennsylvania Courts] will refrain from holding that a local ordinance is invalid based on conflict preemption 'unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected**.'" (emphasis added)

In *Moyer v. Gudknecht*, 67 A.3d 71, 76 (Pa. Commw. Ct. 2013), this court held that:

> "the fact that the Ordinance imposes an additional requirement does not constitute a conflict. Additional requirements beyond those in a state statute are not preempted unless they conflict with a *purpose* of the statutory provisions." (emphasis in original)

Furthermore, this court held, in *Hartman v. City of Allentown*, 880 A.2d 737 (2005):

> "Municipal regulations more restrictive than state regulations are not in conflict with the state provisions because any other result would severely restrict municipal autonomy with respect to police power."

In this court's opinion, issued October 2, 2013, no conflicts were specified. The opinion points to the general categories of DEP's duties, outlined at 35 P.S. § 4004(1-27), and points out a few particular subsections – § 4004 (4), (5), (6) and (18) without making any claim of conflicts with these sections. While the proposed Allentown Clean Air Ordinance has some additional requirements that fall within the realm of § 4004 (4), (5) and (6) – but not (18) – the ordinance does not conflict with the purpose of

the Air Pollution Control Act, nor does it create any irreconcilable conflict with these parts of the statute. Simultaneous compliance with both the local ordinance and the state statute is not impossible.

If this court finds that there is any specific conflict between a provision of the proposed Allentown Clean Air Ordinance and some section of the Air Pollution Control Act, we urge the court to provide specific guidance on what irreconcilable conflicts exist that make it impossible to simultaneously comply with both the local ordinance and the state statute. This guidance is needed so that there is clarity for petitioners and for all county and municipal governments that may want to use their authority under § 4012(a) without a vague legal cloud leaving them in fear of lawsuits if they cross an unspecified line.

12. A conflict between one or more specific severable provisions of the Allentown Clean Air Ordinance and the Air Pollution Control Act does not authorize the Lehigh County Board of Elections to keep the entire ordinance from consideration of the voters.

The source of the authority and structure of county boards of elections, including the Lehigh County Board of Elections, is the Pennsylvania Election Code, 25 P.S. 2641 *et seq.* 25 P.S. 2642 (j) allows the Board to receive and determine the sufficiency of a petition. This means that it can determine if the petition meets the minimum number of qualified voter signatures and addresses to be allowed on the ballot. In this instance,

the Allentown City Clerk performed that function. The Board of Elections has nothing to do with the substantive questions to be put to the Allentown voters on the 2014 Lehigh County General Election Ballot. If the law prescribes that a question may be placed on the ballot, the county board must perform that duty. **"The duties of the County Board of Elections are purely ministerial. They are prescribed by the Pennsylvania Election Code. They are given no discretion."** (Emphasis added), *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951).

Whether the ordinance is legal, or if there are severable parts of the ordinance that may be in conflict with state law, is a matter for the courts, not an unqualified Board of Elections that lacks the expertise to make such decisions. As argued in issue #2 above, in no case has an elections board been found to have more than ministerial powers and "discretionary" powers to review petitions for sufficient and valid signatures, affidavits, notarization and the like. Even in the cases cited to justify illegal questions being kept off of the ballot, it was the Pennsylvania Supreme Court judging the legality, and instructing election boards in whether the questions could go to the ballot. Board of Elections have not made these decisions and are not empowered to.

Even if this court were to hold that there is a conflict between part of

the Allentown Clean Air Ordinance and the Pennsylvania Air Pollution Control Act, it is the courts' job to decide the legality of the ordinance, not the Board of Elections, and such a conflict needs to be specified so as to not cast a vague cloud of uncertainty across the Commonwealth that would leave municipalities not knowing what they can or cannot legally adopt under § 4012(a) authority. This clarity is also needed to that the petitioners in this case can pursue their right to clean air in a valid way. Unless this court finds that an implied preemption inquiry is justified, that a conflict exists that is impossible to reconcile, and that such conflicts are not readily severable, we urge the court to carefully follow the law and allow the Allentown Clean Air Ordinance initiative to be presented to the voters for consideration in the next election.

C. CONCLUSION

The proper law that governs this case is 35 P.S. 4012(a), which does not preempt the City of Allentown Clean Air Ordinance initiative but, in fact, empowers the city, and its people, to lawfully adopt it.

Additionally, the Board and the intervenor skirted the clear mandate of the Election Code to bring a timely challenge to an Initiative petition. 25 P.S. § 2937. This is a clear error of law.

The City of Allentown Clean Air Ordinance initiative should be on the November 2014 ballot for the voters to decide.

Respectfully submitted,

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Appendix C

Kulpmont Ordinance Federal Court Opinion

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

C.J. LUCAS FUNERAL HOME, INC., and OAK LANE CREMATORY, INC.,	4:CV-07-0285
Plaintiffs,	(Judge Muir)
v.	(Complaint filed 02/13/07)
BOROUGH OF KULPMONT, et al.,	
Defendants	

OAK LANE CREMATORY, INC.,	4:CV-07-0499
Plaintiff,	(Judge Muir)
v.	(Removal petition filed 03/16/07)
BOROUGH OF KULPMONT, et al.,	
Defendants	

ORDER

March 27, 2008

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 13, 2007, Plaintiffs C.J. Lucas Funeral Home, Inc., and Oak Lane Crematory, Inc., filed a civil rights complaint containing 5 counts in this court. The Defendants in that matter are the Borough of Kulpmont, various members of that borough's council, and the borough's mayor. That action was assigned docket number 4:CV-07-0285. On March 16, 2007, those same Defendants removed to this court a declaratory judgment action filed against them in state court by Oak Lane Crematory, Inc. That removed action was assigned docket number 4:CV-07-

0499. By order dated January 8, 2008, we granted the Defendants' essentially unopposed motion to consolidate the two related cases.

On February 1, 2008, the Defendants filed a motion for summary judgment supported by a brief, exhibits, and a statement of undisputed material facts. The Plaintiffs' opposition brief, counter-statement of material facts, and exhibits were timely filed on February 28, 2008. The time allowed for the Defendants to file a reply brief expired on March 17, 2008. To this date no such brief has been filed. The Defendants' summary judgment motion is ripe for disposition.

Summary judgment is appropriate only when there is no genuine issue of material fact which is unresolved and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982). "When a motion for summary judgment is made and supported as provided in ...[Rule 56], an adverse party may not rest upon mere allegations or denials of the adverse party's pleading...." Fed. R. Civ. P. 56(e).

Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. Celotex

Corporation v. Catrett, 477 U.S. 317, 323 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Rule 56 provides that, where such a motion is made and properly supported, the adverse party must show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in their favor. Celotex Corporation v. Catrett, 477 U.S. 317, 322-23 (1986).

Because summary judgment is a severe remedy, the Court should resolve any doubt about the existence of genuine issues of fact against the moving party. Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981).

The United States Supreme Court has stated that in motions for summary judgment a material fact is one which might affect the outcome of the suit under relevant substantive law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Supreme Court also stated in Anderson that a dispute about a material fact is “genuine” if “the evidence is such that a

reasonable jury could return a verdict for the non-moving party." Id. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587 (1986).

When addressing such a motion, our inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)(emphasis added).

As summarized by the Advisory Committee On Civil Rules, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee note to 1963 Amendment. We will apply those principles in considering the Defendant's motion for summary judgment.

Before proceeding to set forth the undisputed material facts supported by the evidence of record, we pause to describe in more detail the statements of undisputed facts filed by the parties in connection with the pending dispositive motion. The Defendants' "Statement of Undisputed facts in Support of Motion for Summary Judgment ...," consists of 80 numbered paragraphs.

Local Rule 56.1 of this court, entitled "Motions for Summary Judgment," provides in relevant part as follows:

> A motion for summary judgment ... shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried.
>
> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.
>
> . . .
>
> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

M.D. Local Rule 56.1 (emphasis added).

Although the Plaintiffs on February 28, 2008, filed a "Counter Statement of Undisputed Facts in support of response to Motion for Summary Judgment of Defendants," that document consists of an entirely independent set of facts. The Plaintiffs' counter-statement in no way "respond[s] to the numbered paragraphs set forth in the statement" filed by the Defendants. As required by the second paragraph of Rule 56.1 we will accept the Defendants' statement of undisputed facts as admitted.

Although the Defendants were not required to do so, they declined to file any document in response to the Plaintiffs' proposed statement of undisputed material facts.

Based on the manner in which all of the proposed undisputed

material facts have been presented to us, none of the facts asserted by the parties is in dispute. Consequently, the only facts presented by the parties yet not set forth below are those which we have deemed to be immaterial.

The Borough of Kulpmont (hereinafter at times "Borough") is situated in Northumberland County, Pennsylvania. The Borough is a municipal corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania. It is a political body, with its principal office located at 860 Spruce Street, Kulpmont, Northumberland County, Pennsylvania. The Borough Council is the Borough's governing body. Defendants Myron Turlis, James Wisloski, Bruno R. Varano, Joseph A. Winhofer, Cheryl Ann Martino, Clarence Deitrick, and Michael Fantanarosa are the members of the Borough Council.

Defendant Borough Secretary Frank Chesney was the appointed Borough Secretary. Defendant Chesney had no power to vote on any Borough ordinance and he did not vote on the ordinance at issue in this case.

Defendant Paul Niglio was the appointed Borough Treasurer. Defendant Niglio had no power to vote on any Borough ordinance and he did not vote on the ordinance at issue in this case.

Defendant Robert M. Slaby is the Borough's mayor. The Pennsylvania Borough Code does not authorize a mayor to vote on the adoption of any ordinance.

The Borough does not have a zoning code or ordinance.

C.J. Lucas Funeral Home, Inc., is a Pennsylvania corporation with a registered business address within the Borough of 27 North Vine Street, Mount Carmel, Northumberland County, Pennsylvania. The corporate officers of C.J. Lucas Funeral Home, Inc., are C.J. Lucas, III, Sandra Lucas, and Christina Lucas. Oak Lane Crematory, Inc., is a Pennsylvania corporation with a registered business address within the Borough of 27 North Vine Street, Mount Carmel, Northumberland County, Pennsylvania. C.J. Lucas, III, set up Oak Lane Crematory, Inc., to perform cremations.

C.J. Lucas Funeral Home, Inc., owns a garage located 1054 Oak Street within the Borough. The garage is not attached to the funeral home and in the past it was used to store materials and as a workshop.

In July or August of 2006, the Plaintiffs applied to the provider of natural gas to the Borough for the installation of a large capacity natural gas line requiring a 140 foot long trench, 18 inches wide, to provide natural gas service to the garage. A building permit signed by Thomas Nowraski was obtained from the Borough for that purpose.

On October 4, 2006, C.J. Lucas Funeral Home, Inc., applied for a commercial building permit to construct a crematory at 1054 Oak Street. Prior to the submission of that application, Mr. Lucas had applied for and obtained from the Northumberland County

Planning Commission approval for a subdivision development plan to separate the parcel intended for the crematory from the parent parcel, on which the C.J. Lucas Funeral Home was located.

The location of the proposed crematory is within: 1) 50 feet of residential properties along Chestnut Street in the Borough; 2) 150 feet of residents located on Scott Street in the Borough; 3) 300 feet of a public playground and park; and 4) 300 feet of one large medical facility.

At the next scheduled Borough meeting On October 10, 2006, the residents of Kulpmont expressed their concerns that the emissions from the crematory would affect the health, safety and welfare of the residents living in close proximity to the location of the proposed crematory. During that meeting the Borough Council determined it would be helpful to have a town meeting with the owner of the funeral home and proposed crematory, and a request for same was submitted to C.J. Lucas, III.

On October 20, 2006, in response to Plaintiffs' October 4, 2006, application to the Borough for a commercial building permit to renovate the garage, the Borough's Code Inspector in his capacity as an independent contractor and not in any capacity as a Borough official or employee reviewed the permit and stamped the drawings attached to it "reviewed for code compliance."

The Pennsylvania Department of Environmental Protection

through its Bureau of Air Quality, and not the Borough or its agents, is responsible for interpreting and enforcing the Pennsylvania Air Pollution Control Act. The Pennsylvania Department of Environmental Protection is responsible for permitting and monitoring installation and operation of human crematories in Pennsylvania.

The Pennsylvania Department of Environmental Protection sent copies of its application procedures to counsel for Plaintiffs on October 16, 2006. The instructions for applying to construct or operate a crematory require the applicant to apply to the Pennsylvania Department of Environmental Protection before beginning construction on the crematory.

The natural gas line to the proposed crematory site was installed before the Plaintiffs applied for any Pennsylvania Department of Environmental Protection permit.

In November of 2006, Plaintiff C.J. Lucas Funeral Home, Inc., began construction/renovations to the garage behind its funeral home. The Plaintiffs began renovating the garage before they applied for any Pennsylvania Department of Environmental Protection permit.

The Borough Code Inspector’s review and approval of the renovation plans for the garage did not, in and of itself, authorize the Plaintiffs to construct or operate a crematorium.

By November 1, 2006, citizens of the Borough prepared

petitions expressing their concern about the proposed crematory which were not shared with Borough Council. However, it was explained to Borough Council that some citizens wanted the Borough Council to stop the crematory.

A town meeting, which was not a formal Borough Council meeting, was held in the first week of November 2006, and attended by residents of the Borough, a number of the defendants, C.J. Lucas, III, and a manufacturer of crematoriums. During that meeting the residents expressed concerns to Mr. Lucas about the health, safety and welfare of their community. Mr. Lucas advised the Borough that if the residents did not want the crematory located on Oak Street he would not go forward with the project.

During that meeting an attendee advised those in attendance that he had ordinances from West Reading, Pennsylvania, concerning the controlling of emission producing facilities (i.e., incinerators and crematories).

Defendant Winhofer, President of the Borough Council, requested Borough Solicitor William Cole to look into the issue of air quality for the Borough.

The Borough Solicitor received copies of the West Reading, Pennsylvania air pollution control ordinance and began drafting such a proposed ordinance for the Borough’s Council to review.

A Borough Council meeting was held on November 14, 2006. At that meeting Solicitor Cole explained in general terms and not in

complete detail the requirements for advertising and publishing any proposed Borough ordinance. The Solicitor indicated that he had reviewed the West Reading air pollution control ordinance and could use it to prepare a similar Borough ordinance.

A motion was made and approved by vote to advertise the Borough's intent to adopt the anticipated air pollution control ordinance. The Borough Council authorized the Solicitor at that meeting to advertise and publish an Air Pollution Control Ordinance for the Borough.

Defendant Winhofer at that time called an executive session without stating the purpose of the session.

After the vote on the proposed air pollution control ordinance an executive session was held to authorize advertisement of the Borough's intent to adopt that ordinance.

Council members did not understand the technical terms of the ordinance and they relied on the solicitor for an understanding of them.

On November 28, 2006, there was a special Borough meeting. By the November 28, 2006, meeting the Solicitor still did not have a final draft of an air pollution control ordinance. The Solicitor indicated that Borough Council members would receive the draft 4 or 5 days before the next meeting scheduled for December 12, 2006.

In December of 2006, Plaintiffs' attorney requested the

Borough to issue a letter stating that the Borough had no zoning ordinance so that Plaintiffs could complete and submit an application to the Pennsylvania Department of Environmental Protection for a crematory permit. The Borough solicitor advised that the Borough would not issue such a letter.

On December 4, 2006, the Borough advertised its proposed Borough Air Pollution Control Ordinance. The advertisement contains a very brief summary of the proposed ordinance.

Between December 4, 2006, and December 12, 2006, the Plaintiffs obtained copies of the proposed ordinance.

No version of the ordinance was ever filed in the Northumberland County Law Library for public review.

During the Borough Council meeting on December 12, 2006, representatives of the Plaintiffs requested the Borough to stay for 30 days the vote on adopting the Air Pollution Control Ordinance to allow Plaintiffs an opportunity to review the ordinance and determine if they could comply with the emission standards set by the ordinance.

The Borough Council agreed on December 13, 2006, to stay their vote in return for Plaintiffs' agreement to cease construction on the garage.

Between December 12, 2006, and the next Borough Council meeting on January 9, 2007, the Borough Solicitor amended the ordinance to include certain definitions, findings, and a

statement of purposes.

The above amendments are set forth in Article IX, Sections 6 and 7 of the ordinance. Section 6 relates to "Purposes and Findings," and section 7 deals with "Definitions." The above amendments did not alter the substantive provisions of the ordinance.

The Borough's administrative secretary did not circulate to Borough Council members the amended ordinance.

The revisions to the ordinance were not explained to Borough Council member Wisloski and he did not know what they were.

The changes to the ordinance were shown to and explained to Borough Council president, Defendant Winhofer.

The Borough did not re-advertise the amended ordinance because the Borough Council did not consider the amendments to change the substance of the original version of the ordinance.

On January 9, 2007, the Borough Council unanimously adopted Air Pollution Control Ordinance No. 2006-02, as amended. No public hearing was held before the ordinance was enacted. At least one Borough Council member stated that adoption of the ordinance directly addressed a request made by a number of citizens in a petition to stop the Plaintiffs' crematory. The specific terms of the ordinance were never reviewed at a public Borough meeting. The Borough Council's deliberations regarding the ordinance occurred in executive sessions.

When the air pollution control ordinance was considered and enacted, the Borough's general practice was to refer a proposed ordinance to a specific committee, submit it to the Borough Council at a public meeting, have council review it, authorize its advertisement, and then publicly discuss it at the next public meeting.

The Borough's air pollution control ordinance was a controversial one. Opposition to the proposed crematory was a significant, if not the exclusive, cause of enactment of the ordinance.

The Borough's air pollution control ordinance was adopted pursuant to the powers granted to boroughs by the Pennsylvania Borough Code. The Pennsylvania Air Pollution Control Act, 35 P.S. § 4012(a) also authorizes the Borough to enact the ordinance. The Commonwealth of Pennsylvania's regulations prohibit incinerators or other waste processing facilities from being located within 300 yards of a school, park, playground, or any occupied dwelling.

The ordinance prohibits or prevents any "Person" or "Entity" from maintaining, directing, constructing, utilizing, or operating "Air Polluting Facilities" within 300 yards of any residential properties in the Borough. The ordinance prohibits air polluting facilities from being located in close proximity to residential properties.

The ordinance does not apply to facilities completely constructed and in operation as of its effective date of January 9, 2007.

The Plaintiffs continue to use the crematory facilities which they had used prior to adoption of the ordinance. The Plaintiffs remain able to construct their own crematory at other locations consistent with Pennsylvania laws and regulations.

The Borough Council members had a legitimate interest in adopting the ordinance to protect the health, safety, and welfare of the Borough residents. The elected members of the Borough Council objected to the placement of a crematory on a site as close as Plaintiffs' close to residential properties.

The purpose and intent of the ordinance is to ensure that the operation of any incinerator of bodies, body parts, infectious or chemotherapeutic waste within the Borough does not degrade the ambient air quality so as to impact adversely the health, safety and general welfare and property of the people of the Borough. The ordinance attempts to prevent any adverse impact on plant and animal life or the comfort and convenience of the public and the natural resources of the Commonwealth through the addition of mercury or dioxin/furan pollution to the ambient air.

After Plaintiffs initiated these legal proceedings, the Borough continued to refuse to issue any letter to the

Pennsylvania Department of Environmental Protection stating that the Borough had no zoning. The Borough drafted and sent such a letter only after this court issued an order resolving the Plaintiffs' motion for a preliminary injunction, which required the Borough to issue the letter. In addition to the precise language that was required to be in the letter, the Borough set forth the reasons for its opposition to the crematory.

The Borough, prior to adopting the challenged ordinance, had not undertaken any efforts to eliminate pollution exposure to its residents. The Borough hired no engineers, consultants, or experts regarding air pollution or emissions by crematories.

Other than the two complaints consolidated in this matter, the Plaintiffs have not pursued any other remedies as a result of the Defendants' actions in this case.

Based on all of the above facts, the Defendants seek summary judgment on all of the claims brought against them in the two consolidated action.

In their motion the Defendants contend that "[t]here are no genuine issues of material fact" regarding Plaintiffs' claims against Defendants Paul Niglio and Frank, and that those Defendants are entitled to judgment as a matter of law because they had no power to vote on the challenged ordinance.

The Plaintiffs state the following in their brief opposing the Defendants' summary judgment motion:

> As a threshold matter, Plaintiffs would concur in the dismissal of their Complaint as to Defendants Paul Niglio and Frank Chesney. Neither of those gentlemen had a voting power within the Borough of Kulpmont, based on facts obtained from counsel and in discovery.

(Plaintiffs' Brief in Opposition to Summary Judgment Motion, p. 2) Pursuant to that concession by the Plaintiffs, we will grant the Defendants' motion for summary judgment on all of the claims directed at Defendants Niglio and Chesney.

The Defendants next contend that each individual Defendant is entitled to summary judgment on the claims asserted against those Defendants in their respective official capacities because those "claims are the same as the claims against the Borough of Kulpmont." (Brief in Support of Summary Judgment Motion, p. 5) The Defendants cite the United States Supreme Court case of McMillan v. Monroe County, 520 U.S. 781, 785 n.2 (1997), to support the proposition that "a suit against a government officer in his official capacity is the same as a suit against [the] entity of which [the] officer is an agent." The Plaintiffs do not acknowledge or address that contention in any manner.

The Borough of Kulpmont is a named Defendant. Consequently, the claims against the individual Defendants in their respective officials capacities are unnecessarily duplicative. For that reason summary judgments should be entered as to the claims brought against the individual Defendants in their respective official capacities.

We next consider the specific claims brought by the Plaintiffs in the two complaints consolidated in this action. The complaint filed in this court and assigned docket number 4:CV-07-285 contains the following 4 substantive[1] counts, all of which are based on 42 U.S.C. § 1983: 1) "Violation of 42 U.S.C. § 1983 Substantive Due Process," 2) "Violation of 42 U.S.C. § 1983 Procedural Due Process," 3) "Violation of 42 U.S.C. § 1983 Procedural Equal Protection," and 4) "Violation of 42 U.S.C. § 1983 Taking." The other complaint which was the one filed in the Northumberland County Court of Common Pleas, removed to this court, and assigned in this court docket number 4:07-CV-0499 is entitled that document "Action for Declaratory Judgment," and it is not divided into separate counts or claims.

In both complaints the Plaintiffs' assert the same constitutional due process, equal protection, and taking claims based upon the alleged procedural irregularities in the course of the Borough's enactment of the air pollution control ordinance.

The Defendants stated in the brief supporting their motion to consolidate the two actions that

[t]he above-referenced actions are related in that they are

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[1]A fifth count in the complaint is entitled "Injunctive relief." However, in that count the Plaintiffs merely request an additional form of relief and they do not assert another violation of substantive law. For that same reason we need not address the Defendants' argument that they are entitled to summary judgment with respect to the Plaintiffs' request for punitive damages.

> both actions to declare the Air Pollution Control Ordinance invalid and/or unconstitutional. The only difference is that in Lucas 4-07-CV-0285, Plaintiffs seek money damages for alleged violations of the Plaintiffs' civil rights.

(Brief in support of Motion to Consolidate, p. 2) The Plaintiffs' disagreement with those statements related strictly to the identity of the parties and witnesses involved in each case. The Plaintiffs did not take issue with the implicit conclusion that the claims in each of the two actions were similar, if not identical.

Our conclusion that the substantive claims in each complaint are identical is bolstered by the arguments made by the parties in the briefs which they filed in connection with the Defendants' pending dispositive motion. The only specific claims addressed by the Defendants in their motion and supporting brief are the federal ones listed above and found in the complaint assigned docket number 4:07-CV-0285. According to the Defendants, if they are entitled to summary judgments on those claims, then this entire consolidated matter will been decided in their favor and the case may be closed. The Plaintiffs do not contest that point.

The totality of the information presented to us, in conjunction with our review of the complaints filed in the matters assigned docket numbers 4:07-CV-0285 and 4:07-CV-0499, leads us to believe that the only claims to address in this case are those set forth in the complaint filed in action number 4:07-

CV-0285 and brought pursuant to 42 U.S.C. § 1983. In other words, there are no claims based strictly on Pennsylvania law.

With that understanding of the substantive claims presented, we will proceed to address the federal claims alleged in the complaint filed in action number 4:07-CV-0285.

The two essential elements of a viable § 1983 claim are that the conduct complained of was 1) committed by a person acting under color of state law, and 2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978).

The Plaintiffs bear the burden of proof at trial to establish those elements by a preponderance of the evidence. Consequently, in the context of the pending motions for summary judgment, they are required to provide a certain quantum of evidence (i.e., enough for a reasonable finder of fact to find in favor of the Plaintiffs) regarding those elements in order to avoid a summary judgment against them on the § 1983 claims. See Celotex Corporation v. Catrett, 477 U.S. 317, 325 (1986).

Before considering the question of whether any claim has been sufficiently pled, it is necessary to review the scope of a § 1983 claim. The statute is not an independent source of any substantive rights; it merely provides a remedy for the violation of a constitutional right where the violation was committed by a

person acting under color of state law. Baker v. McCollan, 443 U.S. 137, 144 n. 3, 99 S. Ct. 2689, 2694-95 n. 3 (1979); Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995).

> The United States Supreme Court
>
> has confirmed in countless cases that a § 1983 cause of action sounds in tort. [The Justices of that Court] have stated repeatedly that § 1983 "creates a species of tort liability," Imbler v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); ... Hague v. Committee for Industrial Organization, 307 U.S. 496, 507, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.)(describing a claim brought under a predecessor of § 1983 as seeking relief for "tortious invasions of alleged civil rights by persons acting under color of state authority"). We have commonly described it as creating a "constitutional tort," since violations of constitutional rights have been the most frequently litigated claims. .... In Wilson v. Garcia, [the Court] explicitly identified § 1983 as a personal-injury tort, stating that "[a] violation of [§ 1983] is an injury to the individual rights of the person," and that "Congress unquestionably would have considered the remedies established in the Civil Rights Act [of 1871] to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." 471 U.S., at 277, 105 S.Ct. 1938.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727, 119 S.Ct. 1624, 1647 (1999)(citing cases).

The first claim to consider is that in count 1, which is entitled “Violation of 42 U.S.C. § 1983 Substantive Due Process.” The United States Supreme Court and the Court of Appeals for the Third Circuit have held that

> the substantive component of the Due Process Clause is violated by executive action *only when “it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense*.”

United Artists Theatre Circuit, Inc. v. Township of Warrington,

316 F.3d 392, 399 (3d Cir. 2003)(quoting County of Sacramento v. Lewis, 523 U.S. 833, 847, 118 S. Ct. 1708 (1998)(emphasis added by Court of Appeals for the Third Circuit). Those courts acknowledge that "the measure of what is conscience-shocking is no calibrated yard stick," and that conduct which "shocks in one environment may not be so patently egregious in another." Id. (quoting Lewis, 523 U.S. at 847, 850)).

The Plaintiffs initially assert that the "shocks the conscience" standard does not control here because it applies only to cases involving zoning ordinances and "[t]his is not a 'land use case' at all." (Brief in Opposition to Motion for Summary Judgment, p. 5) That assertion is inconsistent with the Plaintiffs' statement in their complaint removed to this court to the effect that "[t]he adopted Ordinance contains zoning requirements." (Petition for removal, Exhibit A, p. 5) When the ordinance as whole and the Plaintiffs' objections thereto are considered, we are of the view that the consolidated actions are most accurately characterized as being based upon a land use dispute.

In addition, our research indicates that the United States Supreme Court and the Court of Appeals for the Third Circuit have applied the "shocks the conscience" standard to many different types of substantive due process claims. For instance, in the case of Collins v. Harker Heights, 503 U.S. 115, 128, 112 S.Ct.

1061, 117 L.Ed.2d 261 (1992), the United States Supreme Court stated "again that the substantive component of the Due Process Clause is violated by executive action *only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense*." (Emphasis in original); *See also* County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). We are convinced that the "shocks the conscience" standard applies to this case and that the ordinance at issue is best characterized for purposes of our analysis in this order as a zoning or land-use ordinance.

The undisputed material facts demonstrate that the air pollution control ordinance at issue was conceived and passed after a number of Borough citizens complained about the location of the proposed crematory. The Borough's ordinance effectively creates a buffer zone of 300 yards for the placement of such a facility. In our view those actions were entirely reasonable.

In their attempt to avoid summary judgment on their initial § 1983 claim, the Plaintiffs emphasize certain irregularities in the process employed by the Borough to enact the ordinance. Such circumstances include the facts that this ordinance was never considered by a committee, it was discussed among council members almost entirely in closed executive sessions, and the revisions to the original ordinance were never published before the final version of the ordinance became effective. As a practical

matter, those circumstances are not material because the entire Borough Council considered the ordinance, the public was at all times aware of the most important aspects of the ordinance, and the revisions did not materially differ from the original version of the ordinance which had been published.

The Plaintiffs further point to 1) the Defendants' persistent refusal to draft the letter for the Plaintiffs noting that the proposed crematory was not inconsistent with the Borough's zoning because the Borough had no such code, and 2) the bad faith exhibited by the Borough when it included language critical of the crematory in the letter sent to the Pennsylvania Department of Environmental Protection.

Courts have unanimously held that in a case such as this (i.e., involving a land use dispute) bad faith conduct amounting to a violation of state law is not sufficiently egregious to support an alleged violation of substantive due process rights. *See* Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000); Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999); Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991).

The Court of Appeals for the Third Circuit has commented that in order to establish a substantive due process violation a plaintiff is required to show egregious conduct on the part of a

defendant such as corruption, self-dealing, or an attempt "to hamper development in order to interfere with otherwise constitutionally protected activity at the project site, or because of some bias against an ethnic group." Eichenlaub v. Township of Indiana, 385 F.3d 274, 286 (3d Cir. 2004). No such conduct has been alleged or is supported by the evidence of record. In addition, no "otherwise constitutionally protected activity," such as conduct protected by the First Amendment has been alleged or established.

We are of the view that no reasonable finder of fact could conclude that the Defendants' actions may be properly characterized as arbitrary, or conscience shocking, in a constitutional sense. We will grant the Defendants' motion for summary judgment with respect to the substantive due process claim in count 1.

The next § 1983 claim to consider is that in count 2, which is entitled "Violation of 42 U.S.C. § 1983 Procedural Due Process." In that count the Plaintiffs contend that they are entitled to relief because "Defendants adopted the aforesaid Air Pollution Control Ordinance No. 2006-02 containing zoning provisions when Defendant, Borough of Kulpmont, does not have a zoning ordinance in place." (Complaint in action No. 4:07-CV-0285, p. 11, ¶66) However, the Plaintiffs have not cited, and we have not found after extensive research, any authority in support

of the proposition that a municipality is precluded from enacting an ordinance encompassing land use provisions where it does not have a zoning scheme in place.

As noted above, the Plaintiffs also rely upon the Borough's failure to follow its own established practices for enacting ordinances. Such procedural irregularities are irrelevant as a matter of law because, "the standard of procedural due process is not whether the municipality deviates from established procedure, but whether it deviates from constitutionally mandated procedure." C & M Group, Inc. v. New Britain Tp., 1991 WL 25684, *3 (E.D Pa. 1991)(Gawthrop, J.)(citing Eguia v. Tompkins, 756 F.2d 1130, 1139 (5th Cir.1985)).

Procedural due process claims are traditionally divided into pre-deprivation and post-deprivation sub-classes. In the context of this case, the dividing line between the two classes is the enactment of the air pollution control ordinance.

With respect to the material pre-deprivation events, it is undisputed that the Plaintiffs had notice of the proposed ordinance and discussed it with Borough officials. *See* Highway Materials, Inc. v. Whitemarsh Tp., Montgomery County, Pa., 2004 WL 2220974, *10 (E.D. Pa. 2004)(Kelly, J.)(noting that "meetings and conversations with Township officials" may be considered in determining whether pre-deprivation due process was constitutionally adequate). Moreover, the Plaintiffs were

actually provided with an opportunity to investigate their ability to comply with it before it became effective.

Although the precise language of the revisions found in sections 6 and 7 of the final version of the ordinance may not have been provided to the Plaintiffs before they became effective, those sections did not add any new limitations or substantive provisions. As a factual matter, in our view the Plaintiffs' receipt of actual notice of the substantive requirements set forth in the original version of the proposed ordinance renders immaterial any other defects regarding publication of the proposed ordinance and its revisions.

With respect to the requisite post-deprivation procedures, the Court of Appeals for the Third Circuit has held that the process provided in Pennsylvania's Municipalities Planning Code for challenging land use decisions is constitutionally adequate. *See* Midnight Sessions, Ltd. V. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991); Rogin v. Bensalem Township, 616 F.2d 680, 694-695 (3d Cir. 1980). The Plaintiffs have not presented any reason to remove this case from the scope of the holdings on those cases.

In light of the governing law and the undisputed material facts, we are of the view that no reasonable finder of fact could conclude that any pre- or post-deprivation violation of the Plaintiffs' due process rights occurred. We will grant the

Defendants' motion for summary judgment with respect to the Plaintiffs' procedural due process claim.

The next § 1983 claim to address is that in count 3, which is entitled "Violation of 42 U.S.C. § 1983 Equal Protection." In a case such as this one where no suspect class is involved, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249 (1985).

The Plaintiffs do not allege membership in any suspect class. Instead they argue that enactment of the ordinance imposes unconstitutionally disparate standards upon their proposed crematory. In effect, they claim to be a "class of one." Courts have held that "a 'class of one' can attack intentionally different treatment if it is 'irrational and wholly arbitrary.'" Eichenlaub v. Township of Indiana, 385 F.3d 274, 286 (3d Cir. 2004)(quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, 565, 120 S.Ct. 1073 (2000)).

In our view the ordinance's underlying goal of limiting the emission of certain substances, including mercury, into the air in close proximity of residences and a public park is rational. The totality of the evidence presented to us leads us to conclude that no rational trier of fact could find that the ordinance is

irrational or wholly arbitrary. We will grant the Defendants' motion for summary judgment on the Plaintiffs' equal protection claim.

The fourth and final substantive claim to consider is that in count 4 of the complaint, entitled "Violation of 42 U.S.C. § 1983 Taking." The Court of Appeals for the Third Circuit has noted that "Pennsylvania's Eminent Domain Code provides inverse condemnation procedures to which a land owner may seek just compensation with the taking of a property." Cowell v. Palmer Township, 263 F.3d 286, 290 (3d Cir. 2001).

It is undisputed in this case that the Plaintiffs have not yet attempted to avail themselves of those procedures. Consequently, their taking claim has been brought here prematurely and is not yet ripe for disposition. The Defendants are entitled to summary judgment on that claim as well.

We will explicitly limit the scope of this order's dispositive provisions to Plaintiffs' federal claims to allow them the opportunity to pursue any state claims in state court.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion for summary judgment (Document 50) is granted as provided in paragraphs 2 through 5 of this order.

2. The Clerk of Court shall enter judgment in favor of Defendants Paul Niglio and Frank Chesney as to all of

the federal claims brought against them.

3. The Clerk of Court shall enter judgment in favor of each individual Defendant as to every federal claim brought against them in their respective official capacities.

4. The Clerk of Court shall enter judgment in favor of the Defendants on all of Plaintiffs' federal claims.

5. The Clerk of Court shall close this case.

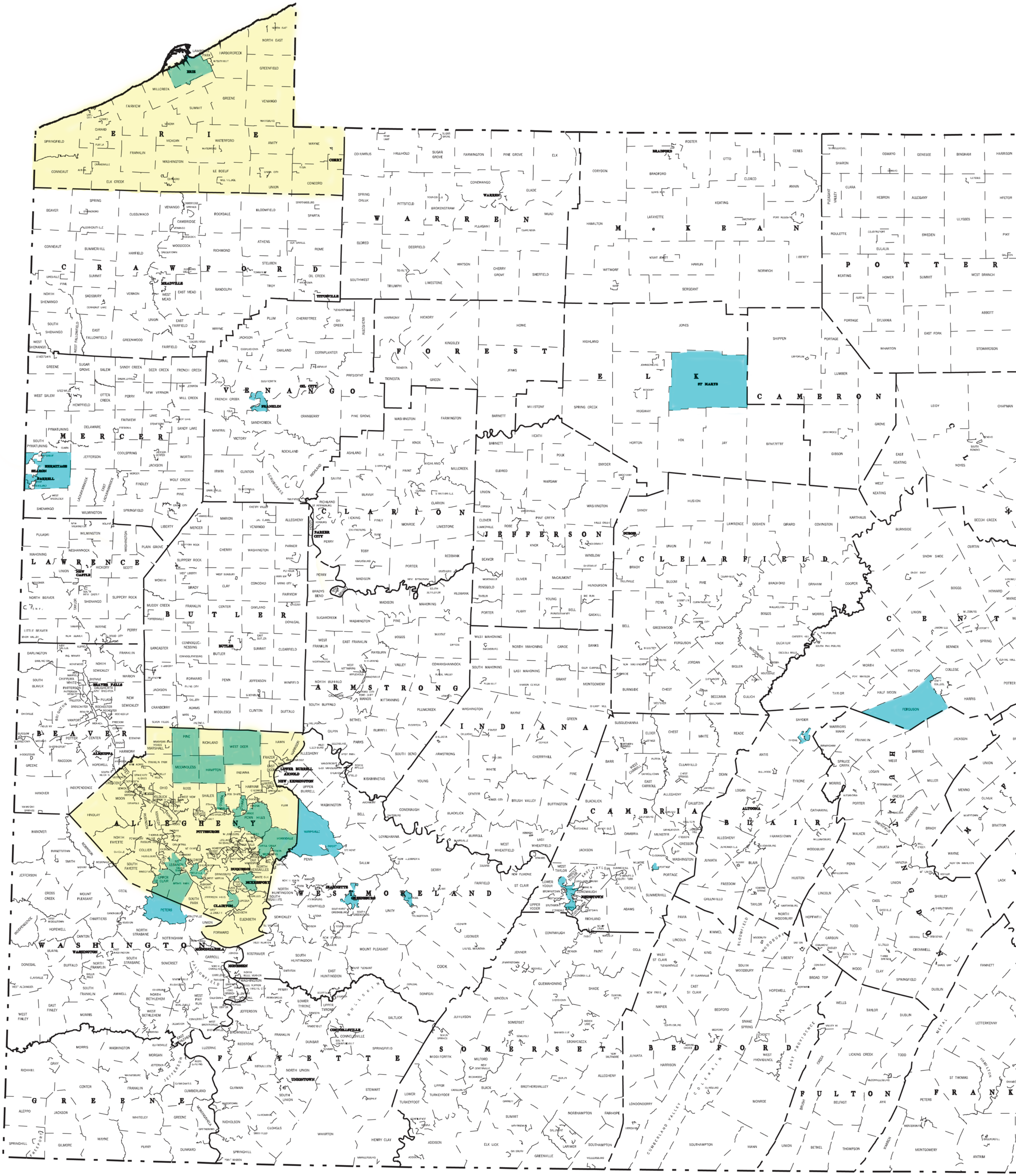
s/Malcolm Muir
MUIR, U.S. District Judge

MM:gja

Appendix D

Initiative and Referendum Map

Counties with initiative and referendum are highlighted in yellow.
Municipalities with initiative and referendum are highlighted in blue.



E R I E
C R A W F O R D
W A R R E N
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M E R C E R
C L A R I O N
J E F F E R S O N
C L E A R F I E L D
L A W R E N C E
B U T L E R
B E A V E R
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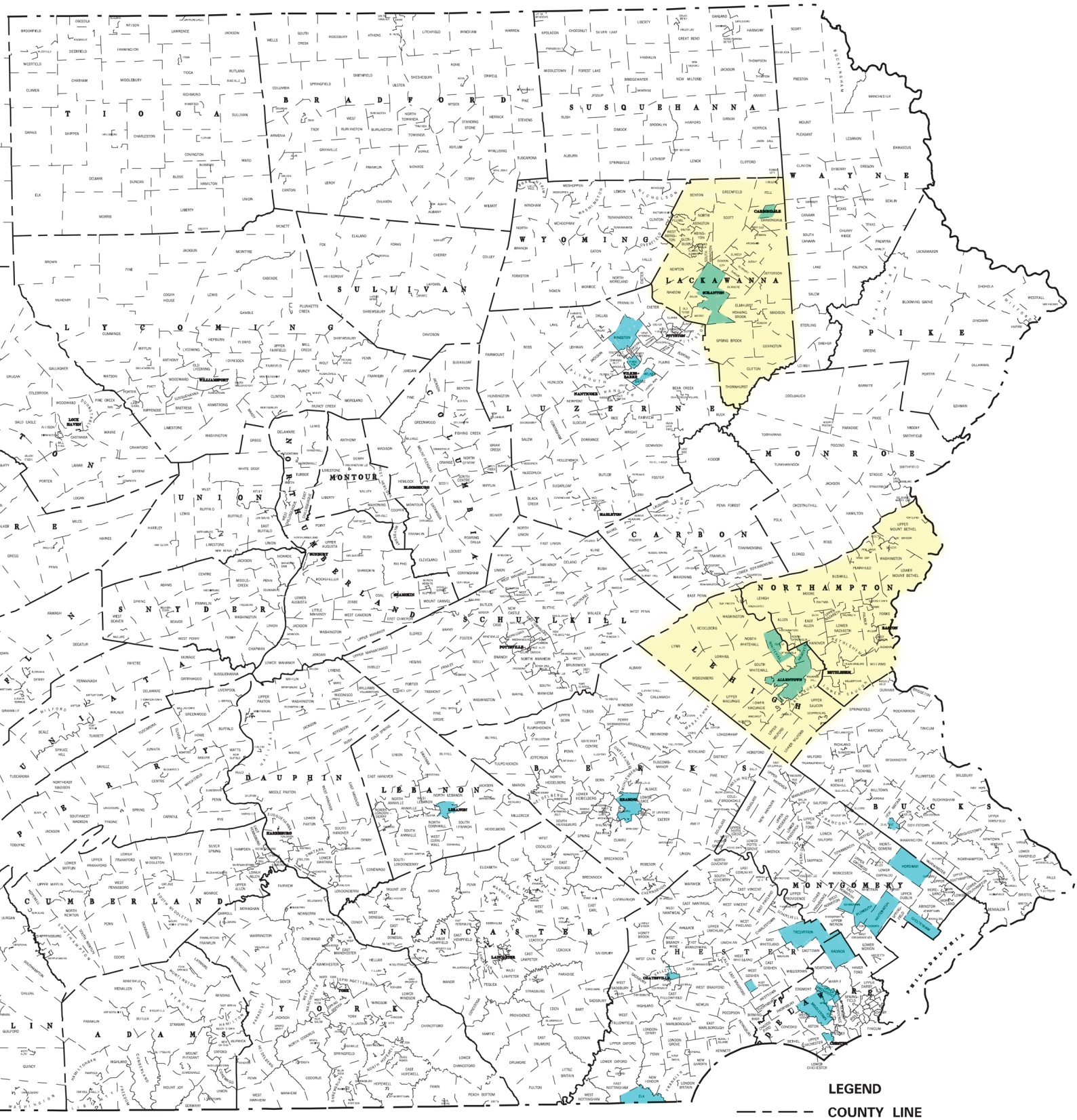
F A Y E T T E
S O M E R S E T
B E D F O R D
F U L T O N
G R E E N E
PITTSBURGH
ERIE
MEADVILLE
TITUSVILLE
OIL CITY
FRANKLIN
ST MARYS


LEGEND
COUNTY LINE
MUNICIPAL BOUNDARY LINE
STATE LINE

Glossary

Board of Commissioners – legislative body of a municipality, often used in Counties, 1st Class Townships

Board of Supervisors – legislative body of a municipality, often used in 2nd Class Townships

Boro – shortened form of Borough

Council – legislative body of a municipality, often used in 3rd Class Cities, Boroughs, Home Rule counties

DEP – Pennsylvania Department of Environmental Protection

Muni – shortened form of Municipality

Ordinance – a law passed by a county or municipality.

Qualified elector – a person who is registered to vote at an address within the municipality.

Twp – abbreviation of Township

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Energy Justice Network exists to build, support and network grassroots community organizations fighting dirty energy and waste industry facilities, primarily in the coal, gas and incineration sectors.

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