

January 31, 2022

Via email to airqualityregulations@dc.gov

Lauren Maxwell
Office of the General Counsel
1200 First Street, NE
Washington, DC 20002

Re: Proposed Rulemaking on Amendments to Nuisance Odor Requirements

Dear Lauren Maxwell,

On behalf of Empower DC, we share the comments below in response to the Department of Energy and Environment's ("DOEE") proposal to amend the Nuisance Odor Requirements 20 DCMR § 903 (the "proposed requirements"). Founded in 2003, Empower DC is a nonprofit community group working to organize and represent the interests of lower-income DC residents. For nearly two decades, Empower DC has worked with communities across the District, including the Brentwood neighborhood in Ward 5, on a range of issues such as environmental justice, pollution burdens, fair housing, public education, and the incorporation of racial equity analyses in city planning and zoning.

We appreciate DOEE's proposal to strengthen odor control requirements. Strengthening these requirements is critical because communities deserve to be protected from nuisance malodors that interfere with their reasonable enjoyment of life and property. While this comment letter focuses on areas that should be amended or reviewed, the proposed requirements include several features that we support as a general matter. Empower DC would welcome additional time or opportunity to discuss those provisions.

However, the residents represented by Empower DC express four main concerns with the proposed requirements, which are more fully set forth below: (1) the list of facilities required to automatically adopt an Odor Control Plan ("OCP") is not inclusive enough to address multiple known odorous facilities that adversely affect vulnerable communities; (2) the proposed enforcement structure of the nuisance odor requirements places a significant burden on communities to monitor facilities and file complaints; and (3) the proposed requirements should mandate facilities to comply with their approved OCP until they cease odor emissions, not simply until they cease operations.

I. Nuisance Odor Control Is Critical to Protect Community Health and Wellbeing

Empower DC identifies nuisance odors as a major concern for residents of Brentwood, a historically Black community in Ward 5. Brentwood is concentrated with high-polluting industrial facilities, including a trash transfer station, a construction plant, a paving company, a chemical manufacturing facility, an Amtrak maintenance facility, and multiple auto repair shops. Indeed, “[w]hile only a fraction of the District’s overall land is zoned for industrial, Ward 5 is home to nearly half of all the industrially zoned land in the city.”¹

Many of these industrial activities generate nuisance odors, posing risks to residents’ health, particularly for children, pregnant women, the elderly, and residents with underlying respiratory problems.² More broadly, studies across the U.S. establish that communities of color and communities with low income are disproportionately affected by multiple sources of air pollution.³ Residents in communities overburdened by pollution suffer elevated rates of respiratory conditions that render them more vulnerable to harm from nuisance odors.⁴ Beyond health effects, nuisance odors also interfere with quality of life, limiting residents’ use and enjoyment of their homes, schools, parks, and community spaces.⁵

The emission of these harmful odors from industrial uses in DC is not only a nuisance, but a form of environmental injustice. It is symptomatic of a broader land use problem Empower DC raises consistently in its advocacy—the disproportionate concentration of high-polluting facilities in communities of color and under-resourced communities. For these reasons, we urge

¹ GOV’T OF THE DIST. OF COLUMBIA, WARD 5 INDUSTRIAL LAND TRANSFORMATION STUDY OVERVIEW (Aug. 2014), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/IndustrialLandOnePage_0.pdf.

² See, e.g., Susan S. Schiffman & C. M. Williams, *Science of odor as a potential health issue*, 34 J. OF ENVTL. QUALITY 129 (2005) (collecting sources which establish that odor “exacerbate[s] chronic respiratory problems such as asthma” and providing evidence that “odors may not simply serve as a warning of potential health risks, but that odor sensations themselves may cause health symptoms.”); AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, ENVIRONMENTAL ODORS (updated 2015), <https://www.atsdr.cdc.gov/odors/faqs.html> (describing symptoms of exposure to malodors and noting elevated risk of symptoms for children, pregnant women, the elderly, and people with preexisting respiratory conditions).

³ See, e.g., Jonathan Colmer et al., *Disparities in PM_{2.5} air pollution in the United States*, 369 SCIENCE 575 (2020); Jayajit Chakraborty & Paul A. Zandbergen, *Children at risk: measuring racial/ethnic disparities in potential exposure to air pollution at school and home*, 61 J. EPIDEMIOLOGY & CMTY. HEALTH 1074 (2017); Eric B. Brandt et al., *Air pollution, racial disparities, and COVID-19 mortality*, 146 J. ALLERGY & CLINICAL IMMUNOLOGY 61, 62 (2020) (“Lower income communities of color are more likely to have historical exposures to higher levels of air pollution.”).

⁴ See, e.g., Eric B. Brandt et al., *Air pollution, racial disparities, and COVID-19 mortality*, 146 J. ALLERGY & CLINICAL IMMUNOLOGY 61 (2020).

⁵ See Jacob Fenston, *Brentwood Neighbors File Suit To Stop School Bus Depot*, DCIST (Oct. 26, 2021), <https://dcist.com/story/21/10/26/brentwood-neighbors-file-suit-to-stop-school-bus-depot/>; Darryl Fears, *A Black community in Northeast D.C. is surrounded by industrial pollution. The city plans to add more*, THE WASHINGTON POST (Aug. 4, 2021), <https://www.washingtonpost.com/climate-environment/2021/08/04/brentwood-pollution-racism-dc/>.

DOEE to prioritize the needs of overburdened communities in its efforts to strengthen DC's nuisance odor requirements. We submit the following comments in service of this goal.

II. The Amendments to the Nuisance Odor Requirements Should Be Strengthened in Three Ways.

A. The categories of facilities required to automatically generate OCPs are under-inclusive.

The categories of facilities required to adopt an OCP are not broad enough to cover many odorous facilities that negatively impact DC residents, especially residents of Brentwood and Ivy City. The proposed amendments categorically require six types of facilities to adopt a Department-approved OCP per Section 903.3(c). But the proposed list fails to include certain facilities known to produce nuisance odors. To reduce malodors in DC communities and to reduce burdens on residents to generate complaints about them, the stationary sources categorically required to adopt an OCP should be expanded to include: chemical manufacturing facilities, construction and paving companies, and stationary sources that attract or house high concentrations of vehicles that produce motor exhaust. If the list is not expanded, a host of implementation and enforcement issues will follow, as discussed below (Section II(B)).

Further, we understand that the requirements as currently proposed apply only to stationary sources, yet DOEE's Rulemaking Q&A session on January 28th demonstrated that multiple residents are concerned about *mobile* sources of nuisance odors and other pollution such as idling buses and heavy work vehicle traffic. We look forward to a continued dialogue on this critical topic, including the efficacy of current idling regulations.

B. The enforcement structure of the proposed requirements risks burdening communities and remedying violations too slowly.

a. The enforcement structure places a significant burden on communities to document and file complaints.

Enforcement of the proposed requirements relies on affected communities to identify, document, and report nuisance odor emitted from sources not captured within Section 903.3(a)-(f). Under the proposed requirements, odorous facilities that are not listed under that Section may be required to adopt and implement an OCP only if a trained inspector happens to detect the odor (Section 903.2(a)) or DOEE receives and verifies three or more complaints from distinct addresses within a 30-day period (Section 903.2(b)). Under the current proposal, communities affected by odor from facilities that are not listed under Section 903.3 bear the burden of generating and filing complaints to bring non-listed facilities within the purview of OCP requirements.

Furthermore, Empower DC is concerned that Section 903.2(b) may be ineffective to impose OCP requirements on odorous facilities even when DOEE receives complaints regarding their emissions. DOEE acknowledges that it continues to face challenges when conducting field investigations to verify complaints. For example, the Notice of Comment Period for this proposed rulemaking notes that “[t]hough DOEE receives regular citizen complaints regarding nuisance odors from various types of sources, the complaints have, at times, been difficult to investigate due to the potential for odors to dissipate by the time the inspector arrives at the scene.”⁶ Similarly, sparse field inspections and responses to community complaints days after they are made are likely to prove ineffective at controlling odors.

In the interests of controlling the broadest number of nuisance odor-generating facilities and of administrative efficiency, the Section 903.3 list should be expanded. Moreover, DOEE should commit to taking proactive enforcement steps, such as more frequent routine field inspections. DOEE should also consider steps to improve the speed of its complaint response process to address investigation timeliness issues.

b. Enforcement must be designed to facilitate transparent and simple complaint processes, as well as swift and effective enforcement.

Effective enforcement of the proposed requirements will be facilitated by a transparent and robust regulatory design.⁷ Empower DC acknowledges the resource constraints under which DOEE may operate. In consequence, however, the burden of reporting nuisance odors and OCP violations will likely remain on affected communities as described above. This reality necessitates that residents be well-informed in order to report potential OCP violations to DOEE.

To inform residents and foster transparency for communities affected by nuisance odors, the final requirements should commit that OCPs and complaints generated under this regulation will be publicly available online, and in multiple languages. Making this information easily accessible will support residents in identifying nuisance odor generators in their area and alerting DOEE of potential violations. It will also create further incentives for facilities to comply with OCPs.

Finally, to further support community members in filing complaints, DOEE should conduct significant public education and outreach programs to inform DC residents of where and how to submit nuisance odor complaints. Empower DC looks forward to additional discussions

⁶ DC DEP’T OF ENERGY AND ENV’T, *Notice of Comment Period for Proposed Rulemaking - Amendments to Nuisance Odor Requirements* (Jan. 4, 2022), <https://doee.dc.gov/node/1574721>.

⁷ See, e.g., Robert L. Glicksman, et al., *Technological Innovation, Data Analytics, and Environmental Enforcement*, 44 ECOLOGY L. Q. 41, 83-86 (2017) (discussing the importance of transparency and easily accessible information to inform and empower citizens to “better participate in governance efforts”).

with DOEE regarding public education and outreach programs to inform DC residents of the mechanics of filing complaints.

c. The penalty structure must be robust enough to achieve compliance and deterrence goals.

Prior to finalizing its requirements, we encourage DOEE to review its relevant enforcement policies to ensure the penalty amounts and penalty structure are robust enough to achieve compliance and deterrence goals.⁸ Given the \$500 starting point for Class 3 infractions, the existing penalty structure may be insufficient to incentivize facilities to prevent odor violations or remedy them in a timely manner. Without strong penalties, Empower DC is concerned facilities could simply pay the fines of emitting noxious odors as a routine cost of doing business.

C. Facilities should be required to comply with their approved OCP until they cease odor emissions, not only until they cease operation.

The final set of odor regulations should require owners and operators of facilities with approved OCPs to comply with the OCP until the facility ceases emitting odors to prevent uncontrolled odors during a decommissioning process. Under the proposed requirements, compliance with an approved OCP is required only “until the source *ceases operation*” under Section 903.8(b) (emphasis added). However, this may not be adequate to address odors that persist after a source ceases operation—for example, during the decommissioning of a trash transfer facility, which could take significant time to complete. To cover facilities that cease operation but continue to emit odors, the final requirements should mandate owners and operators of such facilities to comply with the OCP “until a source ceases operation and ceases emitting odors.”

III. Conclusion

Revising the District’s Nuisance Odor Requirements provides DOEE the opportunity to address the disproportionate impact of nuisance odors and air pollution on communities of color and communities of low income in DC. We urge DOEE to consider amending the proposed requirements to: expand the list of odorous facilities required to adopt an OCP; reduce the burden on residents to submit complaints by proactively investigating odorous facilities; ensure transparent and robust enforcement of nuisance odor violations; and control malodor emissions from sources that may be decommissioned or demolished. With these adjustments to the

⁸ See, e.g., Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1187 (1998) (“The task for enforcement agencies is to make penalties high enough and the probability of detection great enough that it becomes economically irrational for facilities to violate environmental requirements.”).

proposed requirements, DOEE's regulation of nuisance odors can take strides toward environmental justice for DC communities.

Sincerely,

/s/ Sara A. Colangelo

Clirae Bourke
Lillian Zhou
Thomas Gooding
Student Clinicians

Sara A. Colangelo
Director
Georgetown Environmental Law & Justice Clinic
Georgetown University Law Center

/s/ Parisa Norouzi

Parisa Norouzi
Executive Director
Empower DC