



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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November 26, 1997

Honorable James M. Seif, Chairman
Environmental Quality Board
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: IRRC Regulation #7-325 (#1877)
Environmental Quality Board
Regulatory Basics Initiative #3 (Malodors)

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-325. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Chuck Tyrrell at 772-3455. He has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg

cc: Sharon Freeman
Barbara Sexton
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-325

REGULATORY BASICS INITIATIVES #3 (MALODORS)

NOVEMBER 26, 1997

We have reviewed this proposed regulation from the Environmental Quality Board (EQB) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to legislative intent, need for the regulation, and the clarity and reasonableness of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Should Malodors be considered at the local level - Need for Regulation

In the Regulatory Analysis Form, the EQB indicated that one of the alternatives considered to the rulemaking was to leave the regulation of malodors to local municipalities. The EQB indicates that it did not choose this alternative because it would be too costly for the municipalities to enforce malodor complaints.

We agree it may be too costly for some municipalities to establish and enforce malodor standards on their own. However, since malodors are many times a local nuisance, we believe the EQB should consider investigating the mutual partnership local municipalities/counties and the DEP can play in the control of malodors. For example, the regulation could contain the option of allowing the local municipalities to set standards for malodors and investigate malodor complaints with the DEP maintaining the enforcement provisions.

2. Section 121.1 Definition of Malodors - Clarity and Reasonableness

The EQB is amending the definition of "malodor" such that the DEP will not need to prove that a malodor is objectionable to the public. Instead, the proposed regulation will require that a member of the public report an objectionable odor and the DEP will make a determination as to whether the odor is objectionable. The EQB explains that this change will make it easier for the DEP to enforce the malodor regulation.

Numerous commentators expressed concern with deleting the requirement that the DEP must determine an odor is objectionable to the public for it to be considered a malodor. These commentators are concerned that this definition is too subjective and may result in a odor being classified as a malodor because it is objectionable to only one person in a community.

We do not necessarily object to the change in the definition of malodor if it will improve the ability of the DEP to correctly identify and enforce malodors. However, this change will give the DEP, especially the DEP field staff, significant discretion in determining what is a malodor. The decision of the DEP could result in sources having to invest significant financial resources on control equipment or altering production processes. We believe the EQB and DEP must provide some level of consistency and fairness in the way the DEP will identify malodors. Although it may not be possible to include specific criteria in the rulemaking, there needs to be established guidelines that the DEP staff will follow in conducting an odor investigation. As part of these guidelines, the DEP staff should investigate how the odor is effecting the local community.

Therefore, we strongly request the EQB and DEP to develop guidelines for the DEP field staff to use during an odor investigation and provide these guidelines with the submittal of the final-form regulation. In doing so, the EQB will provide more certainty in the enforcement of malodors and address the concerns raised by commentators.

3. Section 121.1 Definition of Malodor Investigation - Clarity and Reasonableness

We believe the regulation creates an ambiguity as to what role the frequency of an odor may play in determining if a source needs to implement specific remedies to control an odor. Specifically, the regulation defines odor investigation as the following:

An investigation of the source and frequency of odors which may include, but is not limited to an inspection of a facility, surveillance activities in the area of the facility, affidavits or odor logs.

As written, it is not clear how frequent an odor must be present for action to be taken against the facility. We do not believe it is reasonable to take action when an odor occurs because of a rare or unintentional event. Therefore, we recommend the EQB amend the first part of the definition to read as follows:

An investigation of a source that emits a reoccurring odor which may include, but is not limited to an inspection of a facility, surveillance of activities in the area of the facility, affidavits or odor logs.

A reoccurring odor would be an odor that is a result of an intentional or regular activity of the source.

4. Process for implementing control provisions - Clarity and Reasonableness

The regulation does not indicate the process that will occur when the DEP determines that a facility is emitting an odor that needs to be controlled. It is our understanding that when a source is determined to be emitting a malodor, the source will be required to submit a plan to the DEP on how it can control the odor. The DEP will review this plan and either approve it or require the source to take additional or different steps. We believe this process must be described in the regulation.

As part of the process description, the regulation should include reasonable time frames for the source to submit a plan to the DEP, the time frame for the DEP to act on the source's plan, and the time frames for the source to fully implement the control technology.

We also believe that Section 123.31 should be rewritten to clearly indicate that the DEP will work with the source to determine the most cost effective measure to decrease the malodor. Although Section 123.31(a)(2) appears to provide some flexibility, we believe this section could be written to clearly provide for flexibility in determining the best method to control the odor in a cost effective manner.

5. Section 123.31(c) Process for Best Available Technology - Clarity

Section 123.31(c) provides that if a person controls malodorous air contaminants from a source through the use of the best available technology (BAT), no additional measures will be required to control residual odors for the first five years. Numerous commentators expressed concern with this provision because it seems unreasonable to provide a five-year blanket exemption for the facility to control odors.

It is our understanding that if a facility installs BAT to control a malodor, the five-year exemption only applies to that particular odor being emitted from that specific source within the facility. If the facility begins to emit a different odor or an odor from a source other than the one where the BAT was installed, the five-year rule does not apply. Instead, the facility may have to install additional measures if the new odor is determined to be objectionable. Therefore, we believe the EQB must amend the regulation to more clearly define its intent on the scope of the five-year exemption rule when BAT is installed in a facility.

We also request that the EQB and DEP explain what steps will occur to alleviate the public's concerns with a malodor that continues to occur after the installation of BAT.

6. Section 123.31(d) Agricultural Commodities - Legislative Intent and Clarity

The regulation provides for the exemption of the production of agricultural commodities *in their unmanufactured state*. However, we observe that Act 174 of 1996 amended the Air Pollution Control Act by deleting "*in their unmanufactured state*" with regard to the exemption of the production of agricultural commodities. Therefore, to be consistent with Act 174 of 1996 we strongly encourage the EQB to amend Section 123.31(d)(1) accordingly.

To improve the clarity of the regulation, we also recommend that the EQB include the statutory definition of "production of agricultural commodities" or include a statutory reference to this definition.

7. Section 123.31(d) and (e) Allowing exemptions outside of the rulemaking process - Need for Legislative Review

The regulation grants the DEP the authority to exempt source types from this rulemaking. The exemptions would be published for public comment, which would be reviewed by the DEP prior to any final decision. However, the proposed exemptions would not be reviewed pursuant

to the regulatory review process thereby depriving the standing committees and this Commission of any practical input.

We believe all exemptions should be included in the regulation. A regulation is an agency's statement of general applicability and future effect that implements, interprets or prescribes law. This dual process of granting exemptions will result in some exemptions being established in the Department's duly promulgated regulations and others being established simply by administrative decisions of the DEP. Additionally, although the regulation calls for public review and comment, we do not believe it provides the same level of public scrutiny and legislative review contained in the Regulatory Review Act.

Therefore, we recommend the EQB delete proposed sections 123.31(d)(5) and (e).

INDEPENDENT REGULATORY REVIEW COMMISSION

To: Shirley Hartman
or Patty Johnson
or Denise Henke
or Jocelyn Darrow

Agency: Department of Environmental Protection
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From: Kristine M. Shomper, Executive Assistant
Company: Independent Regulatory Review
Commission
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Date: November 25, 1997
of Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-325 (#1877). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Shirley Hartman Date: 11/26/97