EQB
Environmental Quality Board

p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

February 3, 1998

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking - Comprehensive Hazardous Waste Amendments (#7-328)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Mr. William P. Gotschall, World Resources Company

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

AMERICAN®
METER COMPANY
Measurement Engineers Since 1836

920 PAYNE AVENUE ■ P.O. BOX 1251 ■ GRISWOLD PLAZA BRANCH
ERIE, PENNSYLVANIA 16512-1251
814/451-8206 ■ FAX 814/451-8251

January 27, 1998

Rachel Carson State Office Building
P. O. Box 8471
Harrisburg, PA 17105-8471

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Attn: Mr. D. Richard Shipman

Dear Sir,

The amendments to the Pennsylvania Hazardous Waste Management Regulations as proposed by the Environmental Quality Board can only help those of us who have to interpret and implement environmental regulations. Your efforts to achieve uniformity with the federal regulations are appreciated. The changes of January 11, 1997 have saved time without sacrificing the integrity of the environmental requirements. Anytime you can simplify without sacrificing reduces the burden of regulatory compliance.

Sincerely,

Gaylord H. Magoon
Environmental/Safety Specialist

PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL

25 N. FRONT STREET • SUITE 100
HARRISBURG, PENNSYLVANIA 17101
717-232-6681
FAX 717-232-4684
HTTP://WWW.PCIC.ORG

ORIGINAL: 1905
COPIES: Smith
Nanorta

Sandusky
Legal (2)

Pennsylvania Hazardous Waste Proposed Rule
Environmental Quality Board Hearing
January 12, 1998
Conshohocken, Pennsylvania

Thank you for the opportunity to be here with you today. My name is David Patti. I am the President of the Pennsylvania Chemical Industry Council (PCIC). In my remarks today, I will outline formal comments being prepared by PCIC and a group allied manufacturing firms. PCIC is the Commonwealth's premier trade association for chemical manufacturers, chemical distributors and professional service firms that are associated with the chemical industry.

The chemical industry in Pennsylvania employs about 64,000 residents – about 6.5 percent of the manufacturing workforce – at more than 570 sites. These Pennsylvanians earn more than $3.2 billion annually – or more than 10 percent of the manufacturing wages. We are committed to environmental excellence and stewardship. Most of our member firms voluntarily participate in the Chemical Manufacturers Association's Responsible Care® initiative, or a similar national initiative.

PCIC and the group congratulate the Environmental Quality Board and Department of Environmental Protection staff for their attention to this important policy initiative. Since the early 1990s, and especially since the promulgation of the so-called Pk-4, PCIC and its members have called on EQB to adopt the Federal hazardous waste rule by reference.

PCIC supports a hazardous waste strategy that encourages voluntary efforts at source reduction with a commitment to reuse and recycle hazardous materials, and to treat and dispose of all waste material properly and lawfully. Having a separate and free standing regulation actually hinders compliance and good environmental practices by focusing attention on the differences, nuances and paperwork exceptions of the two programs, rather than on the more important tasks and reducing and managing properly hazardous waste generated in our plants. Corporate and third-party environmental professionals cycle between plants and offices in many states. Differences in laws are obstacles and hindrances to their compliance efforts.

Regulatory Basics Initiative and "Compelling State Interests"

When the Department of Environmental Protection announced its Regulatory Basics Initiative, it underscored a recognition of this problem and set as a goal conformity with Federal regulatory programs and national policies. The RBI program naturally will make exceptions to the conformity principle when Pennsylvania statute calls for a deviation from Federal policy, and RBI provides for other deviations in response to "compelling state interests." PCIC supports RBI and these principles, but believes the burden of proof that a "compelling state interest" exists lies with EQB and the department. In my opinion, a compelling state interest must be demonstrated by different facts and circumstances within the Commonwealth and/or a higher level of risk to Commonwealth citizens. Any proposed demonstration should meet the test of increased risk management or mitigation over the Federal policy with a significant benefit-to-cost ratio. I will apply this test in my remarks today and in PCIC's formal comments to be submitted later.

Editorial Recognition that Absence Indicates Deletion

Incorporating the Federal program by reference while applying the RBI standards means that EQB in its proposal would be expected to delete incompatible and unnecessary sections of the current Pennsylvania hazardous waste program. Our reading of the PA Bulletin of December 6 – in conjunction with the current state regulation and the Federal program – is that if a Pennsylvania-specific regulatory requirement does not exist within in the Federal program and is not carried over specifically in the EQB proposal, it will be null and void as of the effective date of the final rulemaking. I would look to the EQB members present to say, "Is this interpretation correct?" It is the hope of the regulated community that these sections were not simply "forgotten" so that they may re-appear in the final rulemaking. A specific comment that a section was being dropped would have given us more confidence that a cognitive policy decision had been made.

Loss of Coproduct Status

DEP proposes to adopt the Federal definition of solid waste, and in doing so, remove from Pennsylvania regulations the definition and concept of coproduct. PCIC commends EQB for its efforts to simplify Pennsylvania hazardous waste regulations and supports this effort. However, there is a potential for creating unintended confusion and/or imposing additional burden on the regulated community by deleting the definition and concept of coproduct without accounting for the numerous coproduct determinations issued under current Pennsylvania regulation.

PCIC recommends adding a provision to make it clear that materials for which DEP has issued coproduct determination under current Pennsylvania hazardous waste regulations will retain that status (or its Federal equivalent) under the new regulations – effectively "grandfathering" the determination. We suggest the Department consider finishing its work on the requests for coproduct determinations that are in the decision making pipeline at DEP, and that they be afforded the same "grandfathering" consideration if they are approved.

Section 261a.3

The draft appears to apply the definition of hazardous waste to materials that are excluded under 40 CFR 261.3(c)(2)(ii)(C). The text is confusing in that one might read it to reach only those described materials which exhibit characteristics of hazardous waste. PCIC would support that interpretation because of its consistency with Federal regulations. However, the introductory text indicates that the Board wants to regulate the Federally exempted materials. The Board's stated rationale for regulation is that it has no experience with these waste streams. First, PCIC disagrees that a lack of experience can be equated with a "compelling state interest." Moreover, we know of no state in the nation with more experience with some of these waste streams. Pennsylvania probably leads the nation – if not the world – in recovered metals technology. The regulation of these materials hinders their beneficial reuse by forcing interested parties to invoke the rulemaking process under 260a.20. We must keep our eyes on the over-arching goal of good waste management and not allow our own regulations to hinder the achievement of that objective.

261a.6 Retaining the Requirement to Obtain a Recycling Permit

EQB proposes to retain the state requirement to obtain a recycling permit based on its interpretation of the Solid Waste Management Act ("SWMA"). EQB interprets the SWMA to define recycling as treatment, thereby requiring that a "recycling" permit be obtained in order to conduct such operations.

Federal law (i.e., RCRA) exempts recycling facilities from the requirement to obtain a treatment permit. There is no compelling state interest justifying full regulation of true recycling operations. During the PK-4 debates we heard much about "sham recyclers." I told EQB and Department of Environmental Resources personnel then – and I repeat it to you today – propose a regulatory program or statute that attacks the problem of "sham recycling" and PCIC will support it. The additional burden of having to obtain a permit for such environmentally beneficial activities does not encourage recycling. And, since the permit comes under the hazardous waste program creates unnecessary fear and concern within the

communities in which facilities are located. EQB should delete the recycling permit requirement and conform this provision to the Federal program.

261a.7: Container Management
Sub-paragraph (1) twice uses the term "processing" and references a definition at Section 260a.10 and 40 CFR 260.10. Neither of the cited references contain a definition of the term "processing." The EQB should propose a definition for "processing" in this rulemaking.

260a.10: Definitions
In sub-paragraph (a)(1), five definitions are specifically excluded from incorporation by reference: disposal, processing, storage, transportation, and treatment. Each of these terms are repeatedly used throughout the hazardous waste regulation. The EQB therefore must have taken issue with the definitions of these terms as found in 40 CFR 260.10; however, only "disposal" has been otherwise defined in sub-paragraph (b)(1). The regulated community is therefore in the position of not knowing the meaning of these other key terms. PCIC believes all five Federal definitions should be incorporated by reference. Otherwise, it is incumbent for EQB to promulgate definitions of processing, storage, transportation, and treatment, and to submit these definitions for public comment.

262a.22: Manifests
PCIC recognizes EQB is proposing to reduce the required number of copies of the manifest from 8 copies to 6 copies. The Federal program, however, requires only 4 copies. PCIC believes EQB failed to show a "compelling state interest" for the Commonwealth to be more costly in the operation of its program than the Federal equivalent. PCIC notes that there are regulatory requirements on the part of both the generator and the TSD facility operator to report discrepancies to the Department. Further, the Department has, and exercises, its broad inspection authority to review manifest records during facility and generator inspections. The EQB should adopt the Federal 4 part manifest requirement at this time.

264a.13(1)(vii) and (viii) Source Reduction
Responsible firms are dedicated to finding create strategies and technologies for source reduction, reuse, recycling and waste reduction. Process changes, inputs and control technologies, however are sensitive competitive issues. Recent failures by the USEPA to keep track – even possession – of confidential business information and increasing wariness of national law enforcement and security agencies to the threat of industrial espionage further points to the need to minimize collection of sensitive process information. PCIC opposes the open-ended empowerment the proposed rulemaking would grant DEP to require "other information which the Department may prescribe for the Department to determine whether the waste will be treated, stored, or disposed of in accordance" with this chapter.

264a.13 & 265a.13: General and Generic Waste Analyses
PCIC is still developing a proposal to EQB on this section. I can tell you today that PCIC believes the EQB can establish an equally protective, but more efficient process to manage approvals for storage, treatment or disposal. We believe an applicable model would be the management of acceptance of materials at Class I landfills. We believe the goal of this section should be reducing the number of case-by-case approvals sought from and approved by DEP. Our formal comments will have a more specific recommendation.

264a.15 General inspection and construction inspection
EQB proposes retaining prior approval and a step-by-step inspection/approval process of construction without any justification. PCIC believes that general inspection authority is well provided for elsewhere in law and regulation. There is no compelling need to micro-manage the construction schedule.

264a.145 Financial assurance for post-closure

Pennsylvania's requirements for financial assurance have been out of alignment with all other states who have adopted the Federal requirements. A significant component of this mis-alignment is the omission of the "financial test and corporate guarantee" mechanism. Under Section 264a.143, the EQB adopted this mechanism for closures (40 CFR 264.143 (f)). However, 40 CFR 264.145 (f) was not similarly adopted for post-closure in this section and there is no clear explanation in the preamble to this proposed rulemaking. PCIC emphasizes that the use of Corporate tests is an important item to put the Commonwealth's businesses on an equal competitive footing with the rest of the U.S. It is requested that a provision parallel to the provision made in section 264a.143 be added to this section.

264a.147: Liability requirements

See the comment for 264a.145 as a parallel argument is appropriate.

264a.175 Containment

This section was obviously drafted by someone whose model was 55 gallon drums. PCIC can understand a reasonable public policy interest in limitations on the stacking of 55 gallon drums, however the drafter ignores the prevalent use in industry of so-called "totes." These containers are generally cubes or rectangular solids specifically designed with interlocking skids to be lifted by fork lifts and stacked. Even with the use of drums, the management of aisleways and spacing of containers is micromanagement and deviation from the Federal program that goes beyond a "compelling state interest."

264a.56 Emergency procedures

Section 254a.56(1) adds a requirement to report to the National Response Center (NRC). EQB has no authority to add a reporting requirement to a Federal agency. There exists in Federal law and rules ample guidance regarding reports to appropriate Federal agencies. This proposal could result in the NRC being inundated with numerous unwanted and inappropriate calls from Pennsylvania facility operators, jeopardizing appropriate response actions. In fact, 40CFR.56 specifically makes NRC notice optional. CERCLA substances are reportable to the NRC. Moreover, this proposal is at once duplicative of existing Federal and state rules and laws (e.g., CERCLA, SARA Title III, 40CFR.264, Act 165), and falls short of the more complete report required by them. Federal Section 264.56 is not adopted by reference in its entirety. By repeating some but not all of the Federal requirements, this section creates the potential for confusion and compliance difficulties. Federal law specifically prohibits states from adopting less stringent standards. Finally PCIC believes the proposed rule should be amended to permit operators to comply with notification requirement by telephoning the state's Emergency Operations Center at 800-424-7362. Procedures exist now to notify DEP when the EOC receives such a report.

266a.20(b) Recycled Materials used in a Manner Constituting Disposal

EQB proposes to adopt the Federal waste-derived product exemption at 40 CFR 266.20(b), with one important distinction. The proposed rule requires producers of such products to obtain DEP's written approval that such products have undergone a chemical reaction prior to selling such products. The Federal exclusion is self-implementing. In the preamble, EQB states that prior written approval requirement is consistent with "most" other states' regulatory programs. The experience of our members would indicate that this statement is untrue. The self-implementing process employed in the Federal program has been and continues to be successful. EQB has not identified a compelling state interest to exceed the Federal requirement.

266b Universal Waste

PCIC applauds the state's adoption of the Federal Universal Waste program and concept. We believe that mercury switches should be added to the universal waste program.

270a60(1) Comments on Section 270a.60

Federal regulations at 40 CFR 270.1(c)(2)(v) specifically exclude wastewater treatment units that treat hazardous waste, from RCRA permitting and RCRA permit-by-rule requirements as long as the wastewater treatment unit is already regulated under section 402 or 307(b) of the Clean Water Act. The exclusion from permitting and permit-by rule requirements for units regulated under the Clean Water Act eliminates duplication of effort by different departments of the Federal agency and allows the regulated community to focus its compliance efforts on the regulations that are most appropriate to the operating unit. By making wastewater treatment units subject to the permit-by-rule regulations, the agency triggers additional recordkeeping requirements by the operator as well as additional inspection requirements by state hazardous waste inspectors. PCIC does not believe EQB has demonstrated a compelling state interest to do so. We believe the regulations associated with sections 402 and 307(b) of the Clean Water Act are sufficient to protect the interests of the citizens and environment of the Commonwealth. PCIC recommends that all references to regulating wastewater treatment units under section 270a.60 be removed from the proposed rulemaking.

Conclusion

This concludes my remarks. If you have any questions, I will be happy to answer them at this time. Thank you for the opportunity to present these opinions. Formal comments will be submitted in the future.

CHEMCENTRAL

CHEMCENTRAL Corporation

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

January 27, 1998

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

RE: Proposed Rulemaking -- Hazardous Waste Management

Dear Madam or Sir:

Thank you for the opportunity to comment on the proposed changes to Pennsylvania's Hazardous Waste Management regulations.

CHEMCENTRAL Corporation is a national chemical distributor that operates thirty-two facilities in twenty states. CHEMCENTRAL fully supports the Pennsylvania Department of Environmental Protection's efforts to obtain consistency with Federal Hazardous Waste Regulations. While we are disappointed the proposed changes will not result in total consistency with the federal regulations, we understand the need to address specific state concerns.

We welcome the adoption of the federal regulations by reference. This approach simplifies the preparation of corporate guidance for our facilities, and minimizes the need for site specific changes. We are particularly excited that 40 CFR 262.34 is proposed to be incorporated with no changes, thereby allowing satellite accumulation near the point of generation. This will substantially lower disposal costs, especially for activities that generate small quantities waste at regular intervals.

Please feel free to contact me at (708) 594-7000 should there be any questions regarding these comments.

Very truly yours,

Robert J. Garner
Vice President, Environmental Affairs

CC: D. W. Courtney
H. D. Wenstrup

rjg.phly01

7050 W. 71st Street P.O. Box 730 Bedford Park, Illinois 60499-0730 Phone:(708) 594-7000 FAX: (708) 594-6328

REED SMITH SHAW & MCCLAY LLP
Formed in the Commonwealth of Pennsylvania

Writer's Direct Numbers:
Phone 412-288-6586
Fax 412-288-3063
lanaugle@rssm.com

435 Sixth Avenue
Pittsburgh, Pennsylvania 15219-1886
Phone: 412-288-3131
Fax: 412-288-3063

February 3, 1998
ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

James M. Seif, Chairperson
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: EAST PENN MANUFACTURING CO., INC.
COMMENTS ON DECEMBER 1997 PROPOSED
REVISIONS TO HAZARDOUS WASTE
REGULATIONS

Dear Chairperson Seif:

We represent East Penn Manufacturing Co., Inc. ("East Penn"). On December 6, 1997, the Environmental Quality Board ("EQB") published proposed revisions to Pennsylvania's hazardous waste management program which would completely restructure the way hazardous waste is regulated in the Commonwealth. East Penn is very concerned that the proposed regulations, without comment or specific explanation, would alter the manner in which the storage of spent lead-acid batteries ("SLABs") prior to reclamation has been regulated in the Commonwealth.

Presently, the storage of SLABs at battery manufacturing facilities prior to reclamation is subject to the permit-by-rule provisions of 25 Pa. Code § 266.80(b).[1] The

---

[1] Section 266.80(b) reads as follows:

(b) Owners or operations of facilities that store spent batteries before reclaiming them shall be deemed to have a hazardous waste storage permit and are subject to the following requirements:

(1) Notification requirements under § 261.41.

(2) Chapter 264, Subchapters A-L and Chapters 267, 269 and 270, except the waste analysis requirements of § 264.13(a)-(c) (relating to general requirements for hazardous waste management approvals and analysis) and the manifest and manifest discrepancy requirements of §§ 264.70-264.72 (relating to applicability; use of the manifest

Continued on following page

reclamation of SLABs is subject to a permit-by-rule in accordance with 25 Pa. Code § 266.70(a)(1).[2] The December 1997 proposal would retain the permit-by-rule provisions of § 266.70(a)(1) for battery manufacturing facilities reclaiming spent lead-acid batteries in proposed § 270a.60(3). However, the draft regulations do not contain any permit-by-rule provision for the storage of SLABs prior to reclamation. Unless the proposed regulations are modified - either by clarifying that the permit-by-rule provision for "reclaiming" SLABs includes storage prior to reclamation or by including a separate permit-by-rule provision for the storage of SLABs prior to reclamation - East Penn will be required to undergo the substantial burdens and expense of obtaining a full Resource Conservation and Recovery Act Part B permit for the storage of SLABs at its battery manufacturing facility. Based upon discussions with its consultants, East Penn believes that the aggregate cost - including permit application fees, consultants' and attorneys' fees - to prepare and submit a Part B application could well be in the neighborhood of **$100,000**.

Neither the EQB nor the Department have provided any explanation for the precipitous decision to delete this permit-by-rule provision, which has been the law of the Commonwealth the past four years. No mention of this provision appears in any of the Regulatory Basics Initiative ("RBI") documents which East Penn has reviewed - including the October 1996 and December 1997 RBI reports; the hazardous waste program comparison portion of Report No. 1; and the Regulatory Analysis Form which was prepared for this proposed rulemaking.

Continued from previous page

system; and manifest discrepancies) unless a variance is obtained under § 264.1(d) relating to scope).

2 Section 266.70(a)(1) provides:

(a) The following hazardous waste recycling activities managing hazardous waste shall be deemed to have a hazardous waste recycling permit for the purpose of this article:

(1) Battery manufacturing facilities reclaiming spent, lead-acid batteries.

East Penn submits that this significant change in the regulation of storage of SLABs provides no additional environmental protection benefits, directly contradicts the EQB's expressed rationale in adopting the permit-by-rule provisions for specific recycling and reclamation activities - including the storage of SLABs prior to reclamation - and is not required to maintain consistency with the federal hazardous waste regulations. East Penn urges the EQB to revise the December, 1997 proposed regulations to include, under the permit-by-rule provisions of Chapter 270a, a specific permit-by-rule provision for the storage of SLABs prior to reclamation. This can be simply and easily accomplished by including the language of the present permit-by-rule in 25 Pa. Code § 266.80(b) as an additional permit-by-rule provision in Chapter 270a of the proposed regulations.

I. Deletion of permit-by-rule provisions for the storage of SLABs prior to reclamation does not provide any additional environmental protection benefit.

Currently, East Penn's storage of SLABs prior to reclamation is regulated under the permit-by-rule provisions of 25 Pa. Code § 266.80(b). Under this section, in order to qualify for and maintain permit-by-rule status for storage of SLABs, East Penn must comply with the hazardous waste notification requirements of § 261.41, virtually the entire substantive requirements of Chapter 264 and with Chapters 267, 269 and 270. In addition, under § 266.80(c) if the Department were to determine that East Penn's storage of SLABs is "...an activity that harms or presents a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth ...", the Department has the authority to require East Penn to apply for an individual permit.[3]

Both the EQB and the Department have recognized the fact that certain recycling or reclamation activities - including the storage of SLABs prior to reclamation - were activities which presented less risk to the environment than other hazardous waste management activities which were subject to full permitting requirements. In the December 2, 1991 Preamble discussion of the

---

3 See 25 Pa. Code § 266.80(c).

final rulemaking (PK-4) which included the permit-by-rule provisions of existing § 266.80(b) the EQB stated:

> Many of the commentors objected to the regulation of recycling and reclamation, because they believe the RCRA requirements were too extensive and cumbersome in relation to the risks some of these activities pose. *In response to these comments, the Department has provided for permit-by-rule for activities it believes pose less risk.* This should greatly simplify the regulatory burden for these facilities. (December 2, 1991 Preamble, page 18. Emphasis added).

The underscored comment was asserted again by the EQB in its Summary of Public Comments section of the January 16, 1993 rulemaking announcement in the Pennsylvania Bulletin (See 23 Pa.B. 372).

After the adoption of the PK-4 amendments to Pennsylvania's hazardous waste regulations, the Department expanded on its view of the environmental risks presented by the recycling activities - including the storage of SLABs - that had been accorded permit-by-rule status. In an undated "Fact Sheet - Hazardous Waste Permit-By-Rule" the Department stated:

> ...In promulgating these amendments, the Environmental Quality Board recognized the need to encourage safe and sound recycling and reclamation of hazardous waste. *Provisions have been incorporated in the regulations to allow certain hazardous waste recycling and reclamation facilities which pose little or no threat to public health or the environment to obtain permit-by-rule status.* ... The following types of hazardous waste and recycling and reclamation facilities are eligible for permit-by-rule status:
> (1) battery manufacturing facilities reclaiming spent, lead-acid batteries (§ 266.70);
> (2) facilities that store spent, lead-acid batteries before reclaiming them (§ 266.80) ...
> (Emphasis added)[4]

---

4 A copy of the Fact Sheet is attached as Exhibit A.

Clearly, then, both the EQB and the Department determined that, as of 1993, the storage of SLABs prior to reclamation was an activity which, in the Department's own words, posed "little or no threat to public health or the environment." The Department has not cited any information which it has received subsequent to the January, 1993 adoption of the permit-by-rule provisions which would alter this determination, and East Penn knows of none. Deletion of the permit-by-rule provision for storage of SLABs, therefore, does not improve or add any required level of protection for the environment or public health.

II. Deletion of the permit-by-rule provision for the storage of SLABs is not required under the Federal Hazardous Waste Management Regulations.

In the absence of an express explanation from the EQB as to the rationale for the deletion of the permit-by-rule provision for the storage of SLABs, East Penn can only speculate as to the basis behind this ill-considered deletion. As discussed in the previous section, deletion of this provision is not justified as effecting a greater degree of environmental protection. In the EQB minutes of its September 16, 1997 meeting at which the proposed revisions to the hazardous waste regulations were presented, it appears that the impetus behind the regulatory proposal was a desire "...to align Pennsylvania's regulations so they are no more stringent than corresponding Federal Rules except when mandated by state law or when there is a compelling interest to further protect human health or the environment." To the extent that deletion of the permit-by-rule provision for the storage of SLABs is based on the desire to mirror federal hazardous waste regulations, such deletion is neither required nor appropriate.

East Penn concedes that the federal regulations at 40 C.F.R. § 266.80(b) require a RCRA permit for the storage of SLABs prior to reclamation.[5] Deletion of the Commonwealth's permit-by-rule provision for the storage of SLABs would result in

---

5 40 C.F.R. § 266.80(b) was not promulgated pursuant to the 1984 Hazardous and Solid Waste Amendments and, therefore, was not automatically enforceable as a matter of law in an authorized state such as Pennsylvania. [See 40 C.F.R. § 271.1(j)].

an exact reflection of the federal program in this regard. However, neither the provisions of the Reserve Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA") nor the criteria for federal approval of a state's hazardous waste program require an exact duplication of the federal program. Pursuant to § 3006(a) of RCRA and 40 C.F.R. § 271.4:

> [t]o obtain approval, a State Program must be consistent with the federal program... (40 C.F.R. § 271.4(a))

East Penn submits that the Commonwealth's existing hazardous waste regulations, which include the permit-by-rule provision for the storage of SLABs, are consistent with the federal program - a fact which has previously been recognized by both the EQB and the Department.[6]

To qualify for permit-by-rule status under existing § 266.80(b), East Penn must comply with the same substantive requirements of the state's hazardous waste regulations as are recited in 40 C.F.R. § 266.80(b).[7] Doing so confers "permit"

---

6 East Penn believes, based upon conversations with Department personnel, that the January 16, 1993 hazardous waste regulatory package was submitted to EPA for approval in accordance with 40 C.F.R. § 271.4. Department personnel were unable to locate a copy of the submission in response to East Penn's request. East Penn was unable to find any record of any EPA action on the submission, assuming one was made.

7 The current text of 40 C.F.R. § 266.80(b) omits the recitation of the sections of the federal hazardous waste program applicable to persons who store SLABs prior to reclamation. The inadvertently omitted text reads:

(b) Owners or operators of facilities that store spent batteries before reclaiming them are subject to the following requirements.

(1) Notification requirements under Section 3010 of RCRA;

(2) All applicable provisions in Subparts A, B (but not § 264.13 (waste analysis)), C, D, E (but not § 264.71 or

Continued on following page

status in the form of the permit-by-rule. Thus, both on the federal level and in Pennsylvania, the storage of SLABs prior to reclamation is subject to the same substantive requirements and to "permit" status. Moreover, under the current provisions of 25 Pa. Code § 266.80(c), the department has the discretion to require an individual permit if circumstances warrant.

To eliminate the current permit-by-rule provisions for the storage of SLABs because there is no exception to full Part B permitting in the federal regulations truly elevates form over substance and perversely turns the spirit and intent of Executive Order 1996-1 and the Regulatory Basics Initiative ("RBI") on their heads by penalizing Pennsylvania businesses with exactly the sort of unnecessary overregulation which the RBI sought to avoid. Moreover, requiring a permit for the storage of SLABs prior to reclamation would reverse years of Commonwealth policy and regulation regarding the storage of SLABs.[8] It would also

---

Continued from previous page

§ 264.72 (dealing with the use of the manifest and manifest discrepancies)), and F through L of Part 264 of this chapter;

(3) All applicable provisions in Subparts A, B (but not § 265.13 (waste analysis)), C, D, E (but not § 265.71 and § 265.72 (dealing with use of the manifest and manifest discrepancies)), and F through L of Part 265 of this chapter;

(4) All applicable provisions in Parts 270 and 124 of this chapter.

Pennsylvania's permit-by-rule provision similarly requires owners or operators who store SLABs prior to reclamation to meet the notification requirements, the analogous State substantive requirements in 25 Pa. Code, Chapter 264, Subchapters A-L - with the same exclusions for waste analysis and use of the manifest as in the federal regulations, as well as the applicable requirements of Chapters 267, 269 and 270.

8 Prior to the promulgation of the existing permit-by-rule provisions, owners or operators of recycling facilities which recycled or reclaimed characteristically hazardous

Continued on following page

directly contradict the views of the EQB on the matter of the consistency of the Commonwealth's regulation of recycling and reclamation activities with the federal program which the Board expressed in approving the 1993 revisions to the Commonwealth's hazardous waste management program which included the permit-by-rule provisions of 25 Pa. Code § 266.80(b) for the storage of SLABs prior to reclamation.

In announcing the adoption of the 1993 amendments, the EQB observed that:

> In summary, these amendments are being adopted so that Pennsylvania's hazardous waste program will retain the required consistency with the federal hazardous waste program, to implement the Act, to encourage safe, alternate uses of hazardous waste while assuring proper management of these wastes...and to ensure that all hazardous wastes are managed in a manner that protects human health and the environment.[9]

The issue of consistency was discussed numerous times as follows:

> The Department and EQB believe and intend these amendments to be broader in scope than the current

---

Continued from previous page

waste, or stored such waste prior to legitimate recycling or reclamation, were not subject to the hazardous waste permitting requirements of Chapters 264 or 265, but were only required to comply with the applicable notification, manifest and quarterly report requirements of Article VII. (See 25 Pa. Code §§ 261.6(a), 264.1(b)(1) and 265.1(c)(3) as renumbered in 20 Pa.B. 909 (February 17, 1990). This exemption from permitting requirements for storage prior to recycling or reclamation was initially prompulgated as 25 Pa. Code § 75.261(e)(1) at 12 Pa.B. 2990 (September 4, 1982) and amended at 15 Pa.B. 3297 (September 14, 1985).

9 23 Pa.B. 363.

> federal regulations *while being no less stringent*.[10]
>
> * * *
>
> The adoption of these amendments will help to ensure the Commonwealth remains consistent with the federal program and allow the Commonwealth to maintain primacy in program enforcement and implementation.[11]

While indicating that the proposed amendments - including the permit-by-rule provisions for the storage of SLABs prior to reclamation - would be no less stringent than, and consistent with, federal law, the EQB also explained that the permit-by-rule provisions were intended to avoid the full hazardous waste permitting burdens:

> The EQB and the Department do, however, want to encourage safe recycling and reclamation of waste. For this reason, the final amendments have allowed for permit-by-rule for assorted recycling and reclamation activities that need a permit. This means that a facility need not go through the entire hazardous waste permitting process for an individual permit, but can instead merely notify the department of their activities and comply with the applicable provisions set forth in the permit-by-rule regulation.[12]

If the 1993 amendments - which included a controversial definition of "waste" which was far different from the federal program (and which has been rejected in the December, 1997 proposal) - were determined to establish a Commonwealth hazardous waste program which was "consistent" with the federal regulations and which would allow Pennsylvania to maintain RCRA primacy, there is no basis for a conclusion that the permit-by-rule

---

10 23 Pa.B. 371 "Summary of Public Comment" (Emphasis added).

11 23 Pa.B. 372 "Benefits and Costs".

12 23 Pa.B. 363 "Modified Exclusions".

provisions of 25 Pa. Code § 266.80(b) must now be deleted to ensure consistency with the federal program.

On two separate occasions subsequent to January 16, 1993, both the Department and the EQB considered revisions to the provisions of the permit-by-rule for the storage of SLABs prior to reclamation in Section 266.80. Both of these revisions were part of the Department's Regulatory Basics Initiative. In the final rulemaking of January 11, 1997, the EQB added new Section 270.60 which expressly recognized that "hazardous waste recycling activities in compliance with §§ 266.70, 266.80, 266.90 and 266.100" would be deemed to have a hazardous waste management permit.[13] As recently as the final rulemaking of June 14, 1997, which adopted the universal waste regulations, Section 266.80(b) was modified to exclude batteries that were to be regenerated. The core permit-by-rule provisions for storage of SLABs prior to reclamation remained unchanged. (See 27 Pa.B. 2898).

Neither the Department nor the EQB has pointed to any change in law, regulation or circumstances which would require the deletion of the existing permit-by-rule provisions for the storage of SLABs prior to reclamation. The proposed deletion of this provision is arbitrary, ill conceived and will unnecessarily impose a greater burden upon East Penn's storage of SLABs prior to reclamation. Moreover, it is fundamentally unfair for the Department to sub silentio remove the permit-by-rule provisions of § 266.80(b) without providing the public with a detailed explanation of its rationale, so that affected parties such as East Penn can fully respond to an express position, rather than speculate on the Department's reasons for the deletion.

III. Deletion of the permit-by-rule provision for the storage of SLABs prior to reclamation will impose additional burdens and expense upon East Penn.

In his August 4, 1995 memorandum announcing the Regulatory Basics Initiative, Secretary Seif noted that:

> The Department's existing regulations and technical guidance documents are the foundation of our effort to provide for a safe and clean

---

13 27 Pa.B. 280.

> environment consistent with the mandates of the General Assembly. The way in which we go about developing and implementing our regulations and guidance will substantially determine the costs of compliance, ease of compliance and our overall ability to achieve the desired result.

Department staff were instructed that one of the criteria they were to use in reviewing the Commonwealth's regulations was the identification of regulations which imposed highly disproportionate costs in comparison to the intended environmental results.

In the December 1997 "Two Year Report", the Department specifically noted the significant cost savings to Pennsylvania businesses which it calculated based on reductions in unnecessary paperwork. On page 21 of the "Two Year Report", the Department stated:

> One of the changes that will mean big savings to the regulated community are streamlined application and reporting requirements. Clarifying the regulations and eliminating redundancies and unnecessary plans and paperwork will mean that companies will spend less money on transaction costs such as consulting and legal expenses.

Despite these laudable objectives, the December 6, 1997 proposed regulations WILL impose additional burdens and expense on East Penn by requiring them to prepare and submit a full hazardous waste permit application for their storage of SLABs prior to reclamation. The permit application fee alone will be $36,000. [See proposed Section 270a.3(1)(vi)(A)]. The cost of preparing such an application, which consultants for East Penn have generally estimated could be $50,000 and upward will have no beneficial environmental impact. It will, rather, be paperwork for paperwork's sake. In addition to the time and money spent on the preparation of a permit application, Department staff will now be required to expend their time in reviewing the application. Changes in business circumstances or conditions which could impact permit conditions could not be implemented until a permit modification or amendment was obtained.

The ultimate paradox if the proposed deletion of Section 266.80(b) is approved by the EQB is that the very same

batteries for which East Penn will be required to obtain full Part B permit status will be subject to less stringent, permit-by-rule status under §§ 266b.10 and 266b.30 of the proposed regulations for those persons who store these batteries, but do not reclaim them. It is illogical to adopt a regulatory scheme in which small and large quantity handlers of universal wastes are subject to minimal performance requirements during their storage of these materials and yet, when these same batteries are delivered to East Penn's battery manufacturing facility conclude that they have suddenly metamorphosed into objects that require a full Part B permit in order to adequately protect the environment.[14] This distinction makes no sense, legally or environmentally and should be corrected by the Board by including the permit-by-rule provision currently contained in Section 266.80(b) of the hazardous waste regulations as part of the permit-by-rule provisions of the proposed regulations.

IV. Conclusion.

East Penn requests that the EQB add an additional section to the proposed permit-by-rule provisions in Section 270a.60 which includes the language of existing Section 266.80(b) and (c) for the storage of SLABs prior to reclamation.

Respectfully submitted,

Louis A. Naugle
Reed Smith Shaw & McClay LLP
Attorneys for East Penn Manufacturing Co., Inc.

LAN:eac

Attachment

---

14 SLABs received by East Penn for reclamation have greater protection against releases to the environment than is required of universal waste handlers. SLABs shipped to East Penn from its distribution warehouses are first palletized and then shrink-wrapped to further protect the batteries - most of which are intact. All of the reclamation process is conducted indoors - no batteries are broken or drained in a manner which would present a threat to the environment.

cc: Independent Regulatory Review Commission
The Honorable D. Michael Fisher
The Honorable David J. Brightbill

EXHIBIT A

Fact Sheet

COMMONWEALTH OF PENNSYLVANIA ♦ DEPARTMENT OF ENVIRONMENTAL RESOURCES

HAZARDOUS WASTE PERMIT-BY-RULE

INTRODUCTION

Revisions to the Pennsylvania hazardous waste regulations were published in the Pa. Bulletin and became effective on January 16, 1993. The revisions amend 25 Pa. Code Chapters 260 through 270. This fact sheet is a brief summary of the permit-by-rule provisions and requirements of the regulations. The term "permit-by-rule" refers to the procedures whereby the owners or operators of certain hazardous waste management facilities are deemed to have a permit without proceeding through the entire permitting process. This fact sheet provides a summary of both past permit-by-rule provisions, which remain in the regulations, and new permit-by-rule provisions. It has been developed to assist in the understanding of the regulations.

Certain hazardous waste management facilities pose little or no threat to the environment and/or are already regulated by permits issued under other environmental laws such as the Pennsylvania Clean Streams Law. Provisions are included in the hazardous waste regulations whereby the owners or operators of eligible facilities do not need to go through the entire hazardous waste permitting process for an individual permit. These facilities are deemed to have permit-by-rule status upon notification to the department and compliance with the applicable provisions of the regulations.

BACKGROUND

Hazardous waste permit-by-rule provisions originally were promulgated in Pennsylvania in 1982. These provisions, which remain in effect, provide the opportunity for the following types of hazardous waste management facilities to operate without obtaining an individual permit:

1) Publicly Owned Treatment Works (municipal wastewater treatment facilities) which accept hazardous waste for treatment;

2) elementary neutralization units (as defined in §260.2) where the only waste treated is generated onsite; and

3) wastewater treatment units (as defined in §260.2) where the only waste treated is generated onsite.

Eligibility for obtaining and retaining permit-by-rule status is also dependent upon compliance with certain specific portions of the hazardous waste regulations as stated in §265.432 (Publicly Owned Treatment Works) or §265.433 (elementary neutralization units or wastewater treatment units). Facilities which are eligible for permit-by-rule status must notify the appropriate regional DER waste management office of their intent to operate under permit-by-rule provisions. Facilities currently operating under the permit-by-rule provisions of §265.432 or §265.433 do not have to re-notify the department in order to maintain permit-by-rule status. Non-compliance with any of the eligibility requirements may result in loss of permit-by-rule status.

REGULATORY CHANGES

The January 16, 1993, amendments to the hazardous waste regulations require many hazardous waste recycling and reclamation activities in Pennsylvania that were exempt from permitting requirements under the previous regulations to now obtain a permit. In promulgating these amendments, the Environmental Quality Board recognized the need to encourage safe and sound recycling and reclamation of hazardous waste. Provisions have been incorporated in the regulations to allow certain hazardous waste recycling and reclamation facilities which pose little or no threat to public health or the environment to obtain permit-by-rule status. Specific requirements and performance standards which must be met in order to qualify for and retain permit-by-rule status are contained in the regulations. As discussed in the next section of this fact sheet, the department may authorize a variance from one or more of the hazardous waste recycling or reclamation permit-by-rule requirements.

The following types of hazardous waste recycling and reclamation facilities are eligible for permit-by-rule status:

1) battery manufacturing facilities reclaiming spent, lead-acid batteries (§266.70);

2) facilities that store spent, lead-acid batteries before reclaiming them (§266.80);

3) petroleum refin facilities refining hazardous waste along with normal process streams to produce petroleum products (§266.70);

4) facilities that reclaim hazardous waste onsite, at the site where it is generated. This includes materials generated at other facilities owned and operated by the same generator (§266.90);

5) other hazardous waste recycling facilities that the department has determined qualify for permit-by-rule status under Chapter 266, Subchapter I and §261.6(a)(4).

Even though a hazardous waste facility appears to qualify for permit-by-rule, the department may require the owner or operator to obtain an individual permit based on compliance history or the potential for harm or threat of harm to public health or the environment.

VARIANCES

Under appropriate circumstances, a hazardous waste recycling or reclamation permit-by-rule facility may request the department to grant a variance from one or more of the applicable regulatory requirements. Section 264.1(d) specifies the criteria for submitting and obtaining a variance. In general, a variance will only be granted where the applicant can demonstrate that suspension of the identified provisions will, on the basis of conditions unique and peculiar to the applicant's particular situation, result in a level of protection of public health and the environment equivalent to that which would have resulted from compliance with the suspended provisions.

FEES

Hazardous waste management facilities which have been granted a permit-by-rule under §§265.432 or 265.433 must submit a nonrefundable annual permit administration fee of $100 along with the quarterly facility report due to be submitted to the department on or before January 20 of each year (see §§264.75(c) or 265.75(c)). The permit administration fee is not applicable to hazardous waste recycling facilities operating under permit-by-rule in accordance with Chapter 266, Subchapters F-I.

FOR MORE INFORMATION

A guidance document which provides more details concerning hazardous waste recycling and reclamation facility permit-by-rule is available from the Bureau of Waste Management, Division of Hazardous Waste Management. Additional information may also be obtained by contacting one of DER's six regional offices.

BUREAU OF WASTE MANAGEMENT
DIVISION OF HAZARDOUS WASTE MANAGEMENT
P.O. Box 8471
Harrisburg, PA 17105-8471
(717) 787-6239

SOUTHEAST REGION, CONSHOHOCKEN . . . .(215) 832-6212
Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties

NORTHEAST REGION, WILKES-BARRE . . . .(717) 826-2516
Carbon, Lackawanna, Lehigh, Luzerne, Monroe, Northampton, Pike, Schuylkill, Susquehanna, Wayne, and Wyoming Counties

SOUTHCENTRAL REGION, HARRISBURG . . . (717) 657-4588
Adams, Bedford, Berks, Blair, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Mifflin, Perry, and York Counties

NORTHCENTRAL REGION, WILLIAMSPORT . . (717) 327-3653
Bradford, Cameron, Centre, Clearfield, Clinton, Columbia, Lycoming, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, and Union Counties

SOUTHWEST REGION, PITTSBURGH . . . . .(412) 442-4120
Allegheny, Armstrong, Beaver, Cambria, Fayette, Greene, Indiana, Somerset, Washington, and Westmoreland Counties

NORTHWEST REGION, MEADVILLE . . . . . (814) 332-6848
Butler, Clarion, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, McKean, Mercer, Venango, and Warren Counties

SUMMARY OF COMMENTS OF **EAST PENN MANUFACTURING COMPANY, INC.** ON THE PROPOSED DELETION OF THE PERMIT-BY-RULE PROVISIONS OF 25 PA. CODE § 266.80(b) IN THE DECEMBER 6, 1997 NOTICE OF PROPOSED RULEMAKING

The December 6, 1997 proposed revisions to Pennsylvania's hazardous waste program delete the existing provisions of 25 Pa. Code § 266.80(b) which allow the storage of spent lead acid batteries (SLABs) prior to reclamation under a permit-by-rule (PBR).

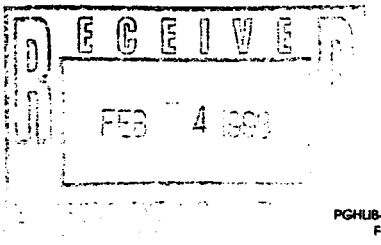
- The effect of this change is that East Penn will be required to obtain a full RCRA hazardous waste storage permit for its storage of SLABs, resulting in increased costs to East Penn estimated to be in the neighborhood of $100,000, including the permit application fee of $36,000. Requiring the storage of SLABs to be covered by full permit rather than permit-by-rule will also increase paperwork and Department staff time in reviewing the application.

- Since 1982, the storage of SLABs prior to reclamation has been regulated under the Commonwealth's hazardous waste regulations, but full Part B permitting has not been required. The 1993 amendments to the hazardous waste regulations specifically authorized the storage of SLABs prior to reclamation under PBR.

- The PBR provisions of existing § 266.80(b) of the Commonwealth's hazardous waste regulations require East Penn to comply with the same substantive hazardous waste requirements as do the federal regulations at 40 C.F.R. § 266.80(b), except that Pennsylvania's regulations provide that compliance with these standards gives a permit-by-rule to the owner or operator of a facility that stores SLABs prior to reclaiming them, while the federal regulations do not.

- Deletion of the PBR provision of 25 Pa. Code § 266.80(b) is inconsistent with the spirit and intent of the Regulatory Basics Initiative and Executive Order 1996-1; will not result in any added environmental protection benefit; directly contradicts the EQB's expressed rationale in adopting the PBR provisions of § 266.80(b) in 1993; and is not required in order for Pennsylvania to receive authorization for its regulations under the federal program.

- Neither the EQB nor the Department has provided any explanation of the rationale for the deletion of § 266.80(b). Before any final action by the EQB which would delete the PBR provisions of § 266.80(b), the EQB and the Department should provide an express statement of the rationale behind this deletion so that East Penn may respond specifically rather than speculate as to reason for this ill-considered deletion.



REED SMITH SHAW & McCLAY LLP

Formed in the Commonwealth of Pennsylvania

Writer's Direct Numbers:
Phone 412-288-8586
Fax 412-288-3063
lanaugle@rssm.com

435 Sixth Avenue
Pittsburgh, Pennsylvania 15219-1886
Phone: 412-288-3131
Fax: 412-288-3063

February 3, 1998

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

James M. Seif, Chairperson
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: EAST PENN MANUFACTURING CO., INC.
COMMENTS ON DECEMBER 1997 PROPOSED
REVISIONS TO HAZARDOUS WASTE
REGULATIONS

Dear Chairperson Seif:

We represent East Penn Manufacturing Co., Inc. ("East Penn"). On December 6, 1997, the Environmental Quality Board ("EQB") published proposed revisions to Pennsylvania's hazardous waste management program which would completely restructure the way hazardous waste is regulated in the Commonwealth. East Penn is very concerned that the proposed regulations, without comment or specific explanation, would alter the manner in which the storage of spent lead-acid batteries ("SLABs") prior to reclamation has been regulated in the Commonwealth.

Presently, the storage of SLABs at battery manufacturing facilities prior to reclamation is subject to the permit-by-rule provisions of 25 Pa. Code § 266.80(b).[1] The

---

1 Section 266.80(b) reads as follows:

(b) Owners or operations of facilities that store spent batteries before reclaiming them shall be deemed to have a hazardous waste storage permit and are subject to the following requirements:

(1) Notification requirements under § 261.41.

(2) Chapter 264, Subchapters A-L and Chapters 267, 269 and 270, except the waste analysis requirements of § 264.13(a)-(c) (relating to general requirements for hazardous waste management approvals and analysis) and the manifest and manifest discrepancy requirements of §§ 264.70-264.72 (relating to applicability; use of the manifest

Continued on following page

reclamation of SLABs is subject to a permit-by-rule in accordance with 25 Pa. Code § 266.70(a)(1).[2] The December 1997 proposal would retain the permit-by-rule provisions of § 266.70(a)(1) for battery manufacturing facilities reclaiming spent lead-acid batteries in proposed § 270a.60(3). However, the draft regulations do not contain any permit-by-rule provision for the storage of SLABs prior to reclamation. Unless the proposed regulations are modified - either by clarifying that the permit-by-rule provision for "reclaiming" SLABs includes storage prior to reclamation or by including a separate permit-by-rule provision for the storage of SLABs prior to reclamation - East Penn will be required to undergo the substantial burdens and expense of obtaining a full Resource Conservation and Recovery Act Part B permit for the storage of SLABs at its battery manufacturing facility. Based upon discussions with its consultants, East Penn believes that the aggregate cost - including permit application fees, consultants' and attorneys' fees - to prepare and submit a Part B application could well be in the neighborhood of **$100,000**.

Neither the EQB nor the Department have provided any explanation for the precipitous decision to delete this permit-by-rule provision, which has been the law of the Commonwealth the past four years. No mention of this provision appears in any of the Regulatory Basics Initiative ("RBI") documents which East Penn has reviewed - including the October 1996 and December 1997 RBI reports; the hazardous waste program comparison portion of Report No. 1; and the Regulatory Analysis Form which was prepared for this proposed rulemaking.

Continued from previous page

system; and manifest discrepancies) unless a variance is obtained under § 264.1(d) relating to scope).

2 Section 266.70(a)(1) provides:

(a) The following hazardous waste recycling activities managing hazardous waste shall be deemed to have a hazardous waste recycling permit for the purpose of this article:

(1) Battery manufacturing facilities reclaiming spent, lead-acid batteries.

East Penn submits that this significant change in the regulation of storage of SLABs provides no additional environmental protection benefits, directly contradicts the EQB's expressed rationale in adopting the permit-by-rule provisions for specific recycling and reclamation activities - including the storage of SLABs prior to reclamation - and is not required to maintain consistency with the federal hazardous waste regulations. East Penn urges the EQB to revise the December, 1997 proposed regulations to include, under the permit-by-rule provisions of Chapter 270a, a specific permit-by-rule provision for the storage of SLABs prior to reclamation. This can be simply and easily accomplished by including the language of the present permit-by-rule in 25 Pa. Code § 266.80(b) as an additional permit-by-rule provision in Chapter 270a of the proposed regulations.

I. Deletion of permit-by-rule provisions for the storage of SLABs prior to reclamation does not provide any additional environmental protection benefit.

Currently, East Penn's storage of SLABs prior to reclamation is regulated under the permit-by-rule provisions of 25 Pa. Code § 266.80(b). Under this section, in order to qualify for and maintain permit-by-rule status for storage of SLABs, East Penn must comply with the hazardous waste notification requirements of § 261.41, virtually the entire substantive requirements of Chapter 264 and with Chapters 267, 269 and 270. In addition, under § 266.80(c) if the Department were to determine that East Penn's storage of SLABs is "...an activity that harms or presents a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth ...", the Department has the authority to require East Penn to apply for an individual permit.[3]

Both the EQB and the Department have recognized the fact that certain recycling or reclamation activities - including the storage of SLABs prior to reclamation - were activities which presented less risk to the environment than other hazardous waste management activities which were subject to full permitting requirements. In the December 2, 1991 Preamble discussion of the

---

3 See 25 Pa. Code § 266.80(c).

final rulemaking (PK-4) which included the permit-by-rule provisions of existing § 266.80(b) the EQB stated:

> Many of the commentors objected to the regulation of recycling and reclamation, because they believe the RCRA requirements were too extensive and cumbersome in relation to the risks some of these activities pose. *In response to these comments, the Department has provided for permit-by-rule for activities it believes pose less risk.* This should greatly simplify the regulatory burden for these facilities. (December 2, 1991 Preamble, page 18. Emphasis added).

The underscored comment was asserted again by the EQB in its Summary of Public Comments section of the January 16, 1993 rulemaking announcement in the Pennsylvania Bulletin (See 23 Pa.B. 372).

After the adoption of the PK-4 amendments to Pennsylvania's hazardous waste regulations, the Department expanded on its view of the environmental risks presented by the recycling activities - including the storage of SLABs - that had been accorded permit-by-rule status. In an undated "Fact Sheet - Hazardous Waste Permit-By-Rule" the Department stated:

> ...In promulgating these amendments, the Environmental Quality Board recognized the need to encourage safe and sound recycling and reclamation of hazardous waste. *Provisions have been incorporated in the regulations to allow certain hazardous waste recycling and reclamation facilities which pose little or no threat to public health or the environment to obtain permit-by-rule status.* ... The following types of hazardous waste and recycling and reclamation facilities are eligible for permit-by-rule status:
> (1) battery manufacturing facilities reclaiming spent, lead-acid batteries (§ 266.70);
> (2) facilities that store spent, lead-acid batteries before reclaiming them (§ 266.80) ...
> (Emphasis added)[4]

---

4 A copy of the Fact Sheet is attached as Exhibit A.

Clearly, then, both the EQB and the Department determined that, as of 1993, the storage of SLABs prior to reclamation was an activity which, in the Department's own words, posed "little or no threat to public health or the environment." The Department has not cited any information which it has received subsequent to the January, 1993 adoption of the permit-by-rule provisions which would alter this determination, and East Penn knows of none. Deletion of the permit-by-rule provision for storage of SLABs, therefore, does not improve or add any required level of protection for the environment or public health.

II. Deletion of the permit-by-rule provision for the storage of SLABs is not required under the Federal Hazardous Waste Management Regulations.

In the absence of an express explanation from the EQB as to the rationale for the deletion of the permit-by-rule provision for the storage of SLABs, East Penn can only speculate as to the basis behind this ill-considered deletion. As discussed in the previous section, deletion of this provision is not justified as effecting a greater degree of environmental protection. In the EQB minutes of its September 16, 1997 meeting at which the proposed revisions to the hazardous waste regulations were presented, it appears that the impetus behind the regulatory proposal was a desire "...to align Pennsylvania's regulations so they are no more stringent than corresponding Federal Rules except when mandated by state law or when there is a compelling interest to further protect human health or the environment." To the extent that deletion of the permit-by-rule provision for the storage of SLABs is based on the desire to mirror federal hazardous waste regulations, such deletion is neither required nor appropriate.

East Penn concedes that the federal regulations at 40 C.F.R. § 266.80(b) require a RCRA permit for the storage of SLABs prior to reclamation.[5] Deletion of the Commonwealth's permit-by-rule provision for the storage of SLABs would result in

---

5 40 C.F.R. § 266.80(b) was not promulgated pursuant to the 1984 Hazardous and Solid Waste Amendments and, therefore, was not automatically enforceable as a matter of law in an authorized state such as Pennsylvania. [See 40 C.F.R. § 271.1(j)].

an exact reflection of the federal program in this regard. However, neither the provisions of the Reserve Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA") nor the criteria for federal approval of a state's hazardous waste program require an exact duplication of the federal program. Pursuant to § 3006(a) of RCRA and 40 C.F.R. § 271.4:

> [t]o obtain approval, a State Program must be consistent with the federal program... (40 C.F.R. § 271.4(a))

East Penn submits that the Commonwealth's existing hazardous waste regulations, which include the permit-by-rule provision for the storage of SLABs, are consistent with the federal program - a fact which has previously been recognized by both the EQB and the Department.[6]

To qualify for permit-by-rule status under existing § 266.80(b), East Penn must comply with the same substantive requirements of the state's hazardous waste regulations as are recited in 40 C.F.R. § 266.80(b).[7] Doing so confers "permit"

---

6 East Penn believes, based upon conversations with Department personnel, that the January 16, 1993 hazardous waste regulatory package was submitted to EPA for approval in accordance with 40 C.F.R. § 271.4. Department personnel were unable to locate a copy of the submission in response to East Penn's request. East Penn was unable to find any record of any EPA action on the submission, assuming one was made.

7 The current text of 40 C.F.R. § 266.80(b) omits the recitation of the sections of the federal hazardous waste program applicable to persons who store SLABs prior to reclamation. The inadvertently omitted text reads:

(b) Owners or operators of facilities that store spent batteries before reclaiming them are subject to the following requirements.

(1) Notification requirements under Section 3010 of RCRA;

(2) All applicable provisions in Subparts A, B (but not § 264.13 (waste analysis)), C, D, E (but not § 264.71 or

Continued on following page

status in the form of the permit-by-rule. Thus, both on the federal level and in Pennsylvania, the storage of SLABs prior to reclamation is subject to the same substantive requirements and to "permit" status. Moreover, under the current provisions of 25 Pa. Code § 266.80(c), the department has the discretion to require an individual permit if circumstances warrant.

To eliminate the current permit-by-rule provisions for the storage of SLABs because there is no exception to full Part B permitting in the federal regulations truly elevates form over substance and perversely turns the spirit and intent of Executive Order 1996-1 and the Regulatory Basics Initiative ("RBI") on their heads by penalizing Pennsylvania businesses with exactly the sort of unnecessary overregulation which the RBI sought to avoid. Moreover, requiring a permit for the storage of SLABs prior to reclamation would reverse years of Commonwealth policy and regulation regarding the storage of SLABs.[8] It would also

---

Continued from previous page

§ 264.72 (dealing with the use of the manifest and manifest discrepancies)), and F through L of Part 264 of this chapter;

(3) All applicable provisions in Subparts A, B (but not § 265.13 (waste analysis)), C, D, E (but not § 265.71 and § 265.72 (dealing with use of the manifest and manifest discrepancies)), and F through L of Part 265 of this chapter;

(4) All applicable provisions in Parts 270 and 124 of this chapter.

Pennsylvania's permit-by-rule provision similarly requires owners or operators who store SLABs prior to reclamation to meet the notification requirements, the analogous State substantive requirements in 25 Pa. Code, Chapter 264, Subchapters A-L - with the same exclusions for waste analysis and use of the manifest as in the federal regulations, as well as the applicable requirements of Chapters 267, 269 and 270.

8 Prior to the promulgation of the existing permit-by-rule provisions, owners or operators of recycling facilities which recycled or reclaimed characteristically hazardous

Continued on following page

directly contradict the views of the EQB on the matter of the consistency of the Commonwealth's regulation of recycling and reclamation activities with the federal program which the Board expressed in approving the 1993 revisions to the Commonwealth's hazardous waste management program which included the permit-by-rule provisions of 25 Pa. Code § 266.80(b) for the storage of SLABs prior to reclamation.

In announcing the adoption of the 1993 amendments, the EQB observed that:

> In summary, these amendments are being adopted so that Pennsylvania's hazardous waste program will retain the required consistency with the federal hazardous waste program, to implement the Act, to encourage safe, alternate uses of hazardous waste while assuring proper management of these wastes...and to ensure that all hazardous wastes are managed in a manner that protects human health and the environment.[9]

The issue of consistency was discussed numerous times as follows:

> The Department and EQB believe and intend these amendments to be broader in scope than the current

---

Continued from previous page

waste, or stored such waste prior to legitimate recycling or reclamation, were not subject to the hazardous waste permitting requirements of Chapters 264 or 265, but were only required to comply with the applicable notification, manifest and quarterly report requirements of Article VII. (See 25 Pa. Code §§ 261.6(a), 264.1(b)(1) and 265.1(c)(3) as renumbered in 20 Pa.B. 909 (February 17, 1990). This exemption from permitting requirements for storage prior to recycling or reclamation was initially prompulgated as 25 Pa. Code § 75.261(e)(1) at 12 Pa.B. 2990 (September 4, 1982) and amended at 15 Pa.B. 3297 (September 14, 1985).

9 23 Pa.B. 363.

> federal regulations *while being no less stringent*.[10]
>
> * * *
>
> The adoption of these amendments will help to ensure the Commonwealth remains consistent with the federal program and allow the Commonwealth to maintain primacy in program enforcement and implementation.[11]

While indicating that the proposed amendments - including the permit-by-rule provisions for the storage of SLABs prior to reclamation - would be no less stringent than, and consistent with, federal law, the EQB also explained that the permit-by-rule provisions were intended to avoid the full hazardous waste permitting burdens:

> The EQB and the Department do, however, want to encourage safe recycling and reclamation of waste. For this reason, the final amendments have allowed for permit-by-rule for assorted recycling and reclamation activities that need a permit. This means that a facility need not go through the entire hazardous waste permitting process for an individual permit, but can instead merely notify the department of their activities and comply with the applicable provisions set forth in the permit-by-rule regulation.[12]

If the 1993 amendments - which included a controversial definition of "waste" which was far different from the federal program (and which has been rejected in the December, 1997 proposal) - were determined to establish a Commonwealth hazardous waste program which was "consistent" with the federal regulations and which would allow Pennsylvania to maintain RCRA primacy, there is no basis for a conclusion that the permit-by-rule

---

10 23 Pa.B. 371 "Summary of Public Comment" (Emphasis added).

11 23 Pa.B. 372 "Benefits and Costs".

12 23 Pa.B. 363 "Modified Exclusions".

provisions of 25 Pa. Code § 266.80(b) must now be deleted to ensure consistency with the federal program.

On two separate occasions subsequent to January 16, 1993, both the Department and the EQB considered revisions to the provisions of the permit-by-rule for the storage of SLABs prior to reclamation in Section 266.80. Both of these revisions were part of the Department's Regulatory Basics Initiative. In the final rulemaking of January 11, 1997, the EQB added new Section 270.60 which expressly recognized that "hazardous waste recycling activities in compliance with §§ 266.70, 266.80, 266.90 and 266.100" would be deemed to have a hazardous waste management permit.[13] As recently as the final rulemaking of June 14, 1997, which adopted the universal waste regulations, Section 266.80(b) was modified to exclude batteries that were to be regenerated. The core permit-by-rule provisions for storage of SLABs prior to reclamation remained unchanged. (See 27 Pa.B. 2898).

Neither the Department nor the EQB has pointed to any change in law, regulation or circumstances which would require the deletion of the existing permit-by-rule provisions for the storage of SLABs prior to reclamation. The proposed deletion of this provision is arbitrary, ill conceived and will unnecessarily impose a greater burden upon East Penn's storage of SLABs prior to reclamation. Moreover, it is fundamentally unfair for the Department to sub silentio remove the permit-by-rule provisions of § 266.80(b) without providing the public with a detailed explanation of its rationale, so that affected parties such as East Penn can fully respond to an express position, rather than speculate on the Department's reasons for the deletion.

III. Deletion of the permit-by-rule provision for the storage of SLABs prior to reclamation will impose additional burdens and expense upon East Penn.

In his August 4, 1995 memorandum announcing the Regulatory Basics Initiative, Secretary Seif noted that:

> The Department's existing regulations and technical guidance documents are the foundation of our effort to provide for a safe and clean

---

13 27 Pa.B. 280.

> environment consistent with the mandates of the General Assembly. The way in which we go about developing and implementing our regulations and guidance will substantially determine the costs of compliance, ease of compliance and our overall ability to achieve the desired result.

Department staff were instructed that one of the criteria they were to use in reviewing the Commonwealth's regulations was the identification of regulations which imposed highly disproportionate costs in comparison to the intended environmental results.

In the December 1997 "Two Year Report", the Department specifically noted the significant cost savings to Pennsylvania businesses which it calculated based on reductions in unnecessary paperwork. On page 21 of the "Two Year Report", the Department stated:

> One of the changes that will mean big savings to the regulated community are streamlined application and reporting requirements. Clarifying the regulations and eliminating redundancies and unnecessary plans and paperwork will mean that companies will spend less money on transaction costs such as consulting and legal expenses.

Despite these laudable objectives, the December 6, 1997 proposed regulations WILL impose additional burdens and expense on East Penn by requiring them to prepare and submit a full hazardous waste permit application for their storage of SLABs prior to reclamation. The permit application fee alone will be $36,000. [See proposed Section 270a.3(1)(vi)(A)]. The cost of preparing such an application, which consultants for East Penn have generally estimated could be $50,000 and upward will have no beneficial environmental impact. It will, rather, be paperwork for paperwork's sake. In addition to the time and money spent on the preparation of a permit application, Department staff will now be required to expend their time in reviewing the application. Changes in business circumstances or conditions which could impact permit conditions could not be implemented until a permit modification or amendment was obtained.

The ultimate paradox if the proposed deletion of Section 266.80(b) is approved by the EQB is that the very same

batteries for which East Penn will be required to obtain full Part B permit status will be subject to less stringent, permit-by-rule status under §§ 266b.10 and 266b.30 of the proposed regulations for those persons who store these batteries, but do not reclaim them. It is illogical to adopt a regulatory scheme in which small and large quantity handlers of universal wastes are subject to minimal performance requirements during their storage of these materials and yet, when these same batteries are delivered to East Penn's battery manufacturing facility conclude that they have suddenly metamorphosed into objects that require a full Part B permit in order to adequately protect the environment.[14] This distinction makes no sense, legally or environmentally and should be corrected by the Board by including the permit-by-rule provision currently contained in Section 266.80(b) of the hazardous waste regulations as part of the permit-by-rule provisions of the proposed regulations.

IV. Conclusion.

East Penn requests that the EQB add an additional section to the proposed permit-by-rule provisions in Section 270a.60 which includes the language of existing Section 266.80(b) and (c) for the storage of SLABs prior to reclamation.

Respectfully submitted,

Louis A. Naugle
Reed Smith Shaw & McClay LLP
Attorneys for East Penn Manufacturing Co., Inc.

LAN:eac

Attachment

---

14 SLABs received by East Penn for reclamation have greater protection against releases to the environment than is required of universal waste handlers. SLABs shipped to East Penn from its distribution warehouses are first palletized and then shrink-wrapped to further protect the batteries - most of which are intact. All of the reclamation process is conducted indoors - no batteries are broken or drained in a manner which would present a threat to the environment.

cc: Independent Regulatory Review Commission
The Honorable D. Michael Fisher
The Honorable David J. Brightbill

EXHIBIT A

Fact Sheet

COMMONWEALTH OF PENNSYLVANIA ♦ DEPARTMENT OF ENVIRONMENTAL RESOURCES

HAZARDOUS WASTE PERMIT-BY-RULE

INTRODUCTION

Revisions to the Pennsylvania hazardous waste regulations were published in the Pa. Bulletin and became effective on January 16, 1993. The revisions amend 25 Pa. Code Chapters 260 through 270. This fact sheet is a brief summary of the permit-by-rule provisions and requirements of the regulations. The term "permit-by-rule" refers to the procedures whereby the owners or operators of certain hazardous waste management facilities are deemed to have a permit without proceeding through the entire permitting process. This fact sheet provides a summary of both past permit-by-rule provisions, which remain in the regulations, and new permit-by-rule provisions. It has been developed to assist in the understanding of the regulations.

Certain hazardous waste management facilities pose little or no threat to the environment and/or are already regulated by permits issued under other environmental laws such as the Pennsylvania Clean Streams Law. Provisions are included in the hazardous waste regulations whereby the owners or operators of eligible facilities do not need to go through the entire hazardous waste permitting process for an individual permit. These facilities are deemed to have permit-by-rule status upon notification to the department and compliance with the applicable provisions of the regulations.

BACKGROUND

Hazardous waste permit-by-rule provisions originally were promulgated in Pennsylvania in 1982. These provisions, which remain in effect, provide the opportunity for the following types of hazardous waste management facilities to operate without obtaining an individual permit:

1) Publicly Owned Treatment Works (municipal wastewater treatment facilities) which accept hazardous waste for treatment;

2) elementary neutralization units (as defined in §260.2) where the only waste treated is generated onsite; and

3) wastewater treatment units (as defined in §260.2) where the only waste treated is generated onsite.

Eligibility for obtaining and retaining permit-by-rule status is also dependent upon compliance with certain specific portions of the hazardous waste regulations as stated in §265.432 (Publicly Owned Treatment Works) or §265.433 (elementary neutralization units or wastewater treatment units). Facilities which are eligible for permit-by-rule status must notify the appropriate regional DER waste management office of their intent to operate under permit-by-rule provisions. Facilities currently operating under the permit-by-rule provisions of §265.432 or §265.433 do not have to re-notify the department in order to maintain permit-by-rule status. Non-compliance with any of the eligibility requirements may result in loss of permit-by-rule status.

REGULATORY CHANGES

The January 16, 1993, amendments to the hazardous waste regulations require many hazardous waste recycling and reclamation activities in Pennsylvania that were exempt from permitting requirements under the previous regulations to now obtain a permit. In promulgating these amendments, the Environmental Quality Board recognized the need to encourage safe and sound recycling and reclamation of hazardous waste. Provisions have been incorporated in the regulations to allow certain hazardous waste recycling and reclamation facilities which pose little or no threat to public health or the environment to obtain permit-by-rule status. Specific requirements and performance standards which must be met in order to qualify for and retain permit-by-rule status are contained in the regulations. As discussed in the next section of this fact sheet, the department may authorize a variance from one or more of the hazardous waste recycling or reclamation permit-by-rule requirements.

The following types of hazardous waste recycling and reclamation facilities are eligible for permit-by-rule status:

1) battery manufacturing facilities reclaiming spent, lead-acid batteries (§266.70);

2) facilities that store spent, lead-acid batteries before reclaiming them (§266.80);

3) petroleum refining facilities refining hazardous waste along with normal process streams to produce petroleum products (§266.70);

4) facilities that reclaim hazardous waste onsite, at the site where it is generated. This includes materials generated at other facilities owned and operated by the same generator (§266.90);

5) other hazardous waste recycling facilities that the department has determined qualify for permit-by-rule status under Chapter 266, Subchapter I and §261.6(a)(4).

Even though a hazardous waste facility appears to qualify for permit-by-rule, the department may require the owner or operator to obtain an individual permit based on compliance history or the potential for harm or threat of harm to public health or the environment.

VARIANCES

Under appropriate circumstances, a hazardous waste recycling or reclamation permit-by-rule facility may request the department to grant a variance from one or more of the applicable regulatory requirements. Section 264.1(d) specifies the criteria for submitting and obtaining a variance. In general, a variance will only be granted where the applicant can demonstrate that suspension of the identified provisions will, on the basis of conditions unique and peculiar to the applicant's particular situation, result in a level of protection of public health and the environment equivalent to that which would have resulted from compliance with the suspended provisions.

FEES

Hazardous waste management facilities which have been granted a permit-by-rule under §§265.432 or 265.433 must submit a nonrefundable annual permit administration fee of $100 along with the quarterly facility report due to be submitted to the department on or before January 20 of each year (see §§264.75(c) or 265.75(c)). The permit administration fee is not applicable to hazardous waste recycling facilities operating under permit-by-rule in accordance with Chapter 266, Subchapters F-I.

FOR MORE INFORMATION

A guidance document which provides more details concerning hazardous waste recycling and reclamation facility permit-by-rule is available from the Bureau of Waste Management, Division of Hazardous Waste Management. Additional information may also be obtained by contacting one of DER's six regional offices.

BUREAU OF WASTE MANAGEMENT
DIVISION OF HAZARDOUS WASTE MANAGEMENT
P.O. Box 8471
Harrisburg, PA 17105-8471
(717) 787-6239

SOUTHEAST REGION, CONSHOHOCKEN . . . .(215) 832-6212
Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties

NORTHEAST REGION, WILKES-BARRE . . . .(717) 826-2516
Carbon, Lackawanna, Lehigh, Luzerne, Monroe, Northampton, Pike, Schuylkill, Susquehanna, Wayne, and Wyoming Counties

SOUTHCENTRAL REGION, HARRISBURG . . . (717) 657-4588
Adams, Bedford, Berks, Blair, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Mifflin, Perry, and York Counties

NORTHCENTRAL REGION, WILLIAMSPORT . . (717) 327-3653
Bradford, Cameron, Centre, Clearfield, Clinton, Columbia, Lycoming, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, and Union Counties

SOUTHWEST REGION, PITTSBURGH . . . . .(412) 442-4120
Allegheny, Armstrong, Beaver, Cambria, Fayette, Greene, Indiana, Somerset, Washington, and Westmoreland Counties

NORTHWEST REGION, MEADVILLE . . . . . (814) 332-6848
Butler, Clarion, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, McKean, Mercer, Venango, and Warren Counties

LAW OFFICES
LANGSAM STEVENS & MORRIS LLP
1616 WALNUT STREET
SUITE 812
PHILADELPHIA, PENNSYLVANIA 19103-5308
215-732-3255
FAX 215-732-3260

HENRY I. LANGSAM, PA
MARK A. STEVENS, PA, NJ
JAMES D. MORRIS, PA
DENISE A. KUESTNER*, PA, NJ, AZ
*NEW JERSEY MANAGING ATTORNEY

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

NEW JERSEY OFFICE:
250 WEST MAIN STREET
MOORESTOWN, NJ 08057
609-727-0057
FAX 609-727-0315

February 3, 1998

Sharon Freeman
Environmental Quality Board
400 Market Street
Rachel Carson State Office Building - 15th Floor
P.O. Box 8477
Harrisburg, PA 17101-2301

Re: Comments on Proposed Rulemaking
25 PA. CODE CHS. 260-265, 267, 269-270, 260a-266a, 266b and 268a-270a

Dear Ms. Freeman:

I am writing on behalf of Accurate Recovery Systems, Inc., Pyromet, Inc., and Radiological Imaging Services (the "Commenters") to comment on the above rulemaking which was published in the Pennsylvania Bulletin on December 6, 1997 (Vol. 27, No. 49).

As more fully set forth below, the Commenters strongly recommend including in the rulemaking a permit-by-rule for precious metals recycling that is consistent, to the greatest extent possible, with the federal regulation at 40 C.F.R. §266.70. Without such a permit-by-rule, the Commenters and other recyclers would be required to apply for a full hazardous waste management permit with all of the attendant expense, including but not limited to, the application fee of at least $36,000.00. This onerous fee, and the other costs of regulation under the full permit program could severely limit the viability of the Commenters and other recyclers in Pennsylvania. Ironically, under the proposed rulemaking, an environmental regulation would cause precious metals that are now being recycled to be disposed of in sewers and as solid waste. Instead of recovering a valuable resource, sewage treatment plants may have trouble meeting their effluent discharge permits, and sludge that is now suitable for land disposal may have to be handled as a hazardous waste.

The Commenters provide silver reclamation services for hospitals, medical x-ray laboratories, printers, industrial NDT laboratories, micrographers, photographic laboratories and any photo-imaging operation that uses film or paper with silver emulsions. The Commenters may charge customers a percentage of recovered silver for providing equipment, maintenance, and harvesting. By working with their customers to recycle silver, the Commenters help to prevent silver from being discharged to sewer systems. If the Commenters and other recyclers' costs increase significantly, as would be the case under the proposed rulemaking, the payment back to customers would decrease significantly. At some point, customers would not get any money back,

and would be required to pay to have their silver-bearing wastes removed. In this situation, the incentive to recycle would totally disappear, and silver that is now recycled would be discharged as a waste.

The viability of the Commenters and other silver recyclers depends on the value of silver as compared with the cost of recycling. A vital and liquid market exists for silver that is reclaimed from photographic materials. The value of silver at any point in the process from pickup to the casting of 0.999 fine is the base price of silver in the marketplace, a value that is set daily by the commodity exchanges that trade precious metals world wide. These prices are net of any percentages for impurities, charges imposed in processing to the required 0.999 fine standard and any brokerage or sales fees. With the hundreds of reputable refining companies and metals brokers available in the United States, a consistent and solid long term market exists and will continue to exist for silver recovery, processing and refining operations of all sizes. A guaranteed silver market is evidenced by the trading in silver futures on the world's commodities markets.

Under a permit-by-rule the incentive to recycle will be maintained. The recovery of silver represents a valuable source of revenue for the businesses that generate the waste photographic materials. In addition, these generators typically are subject to effluent discharge limitations that require them to control the concentration of silver in the waste water that is discharged from their operations, whether to a Publicly Owned Treatment Works or to a seepage field. These two factors alone provide a powerful incentive to minimize loss of silver to the environment for any business that handles silver-bearing materials. Moreover, silver, unlike other heavy metals, such as nickel or chromium, is relatively easy to handle and separates readily from the photographic matrix. The technology for the recovery of silver from silver-bearing wastes from photographic processing units is not considered to create a high risk. Drying processes are common and may be operated with little risk with proper housekeeping procedures, containment, and properly maintained air pollution control equipment. The combination of this easy to operate, low technology equipment, combined with the viable world market in silver and pollution control requirements place on generators, means that silver can be reclaimed cost-effectively without the risk of harm to human health or the environment.

Finally, any permit-by-rule that is placed in the final rule should not require silver recyclers like the Commenters to obtain hazardous waste transporter licenses. The small volumes of silver-bearing solid waste that the Commenters transport do not pose a high risk of contamination. Any concern is alleviated by the regulatory framework provided under the federal rules which require detailed record keeping and transportation of the waste in vehicles operated by the recycler. Based on all of the above considerations, DEP and EQB should include a permit-by-rule that allows silver recyclers like the Commenters to be regulated consistent with, but no more stringently than the federal rule governing the Management of Recyclable Materials Utilized for Precious Metals Recovery as set forth under Subpart F of 40 C.F.R. Part 266. Thank you for your consideration.

Respectfully submitted,
LANGSAM STEVENS & MORRIS LLP

Mark A. Stevens, Esquire

WORLD RESOURCES COMPANY

1600 Anderson Road
McLean, Virginia 22102

Tel: 703.734.9800
Fax: 703.790.7245

January 27, 1998

BY FEDERAL EXPRESS

Pennsylvania Environmental Quality Board
15th Floor
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105-2301

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Re: Comments by World Resources Company on Proposed Rulemaking on Hazardous Waste Management[1]

Dear Sir or Madam:

World Resources Company ("WRC") operates a hazardous-waste recycling facility in Pottsville, Pennsylvania. The facility recycles metal-bearing sludges, which are classifed as EPA No. F006 listed hazardous wastes (wastewater treatment sludges from electroplating operations). The facility produces, from the sludges, metal concentrates that are sold to smelters for metals recovery. Since 1983, when the facility started operations, its concentrates have never been required to be manifested as hazardous waste, but have been shipped as commercial products.

In the so-called "PK-4" amendments, the Department introduced a definition of "coproduct" into the regulations and suggested that facilities such as WRC's might wish to apply to the Department to confirm "coproduct" status.[2] WRC so applied with respect to

---

1 *See* 27 Pa. Bull. 6,407 (Dec. 6, 1997).

2 The current definition of "coproduct" appears at 25 Pa. Code § 260.2 (March 1997 looseleaf supp.). The definition was originally inserted by the PK-4 amendments, 23 Pa. Bull. 374 (Jan. 16, 1993). The definition was amended by 27 Pa. Bull. 243 (Jan. 11, 1997). In promulgating the definition, the Deparment explained, 23 Pa. Bull. 363 at 365 (Jan. 16, 1993) (preamble):

> [A] waste derived from the treatment of a listed hazardous waste is a hazardous waste until it is delisted. This derived from rule applies only to wastes derived from treatment, storage or disposal of hazardous wastes. It does not apply to products or coproducts derived from hazardous wastes. In the case of facilities treating hazardous wastes to produce newly defined products or coproducts, the Department may make a finding as a permit condition, that the resulting materials are coproducts or products and not wastes. Of course, a material may qualify as a product or coproduct under the definitional provisions of the rule without any special Departmental finding made as a permit condition or otherwise. However, a formal finding will provide greater assurance that the material does in fact qualify as a product or coproduct.

To remedy the problem, we suggest adding a regulatory transition rule, a draft of which we offer below. While in drafting this we necessarily have relied mostly on our experience with our own "coproduct" application, we have also attempted to address the general transition problem common to other holders of "coproduct" determinations and to holders of "product" determinations as well. We respectfully suggest that this transition rule be added as § 260.30a:

§ 260.30a. Transition rule for persons who have obtained product or coproduct determinations under previous regulations and who wish to apply for analogous exemptions under new regulations.

(a) If a person has been issued a written determination by the Department that a material qualifies as a "product" or "coproduct" under the regulations superseded upon adoption of this chapter, which determination was valid and in force on the day prior to adoption of this section, and that person wishes to claim an analogous exemption for the same material under this chapter, the person must notify the Department of such claim within sixty (60) days of the date on which this section becomes effective. The notice must briefly describe the material in question, state the date of issuance of the Department's product or coproduct determination being relied on, and cite the section of this chapter (as well as the specific section of the federal regulations incorporated by reference by this chapter) under which person claims exemption. The notice shall be sent to the Department by registered or certified mail to the following address: [insert address].

(b) As of the day on which this section becomes effective, a person who gives proper notice under (a) above shall be deemed to have the exemption under this chapter as claimed in the notice, until such time as the Department notifies him in writing that his claim for such exemption has been finally denied.

(c) The Department may request such additional information from a claimant under (a) above as the Department deems necessary in order for it to make a final determination whether to allow or disallow the claimed exemption.

Respectfully submitted,

William P. Gotschall
General Counsel

cc (by regular mail):

Mr. William Tomayko
Program Manager
Waste Management Program
Pennsylvania Department of Environmental Protection
2 Public Square
Wilkes-Barre, PA 18711-0790

PAF2.DOC

INMETCO

Summary of Hazardous Waste Management Regulation Comments
of The International Metals Reclamation Company, Inc. (INMETCO)

INMETCO, located in Ellwood City, Pennsylvania, operates the only high temperature metals recovery (HTMR) process in the United States designed to recover nickel, chromium, iron, and cadmium from metal-bearing secondary materials. Because it conserves non-renewable resources and provides a variety of other environmental benefits, INMETCO's HTMR process has been recognized by U.S. EPA as the Best Demonstrated Available Technology for the treatment of metal-bearing hazardous wastes.

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

While INMETCO has accommodated itself to operating under two separate regulatory regimes, we can appreciate the potential advantages of a system in which the State hazardous waste program mirrors the Federal program. To realize these advantages, the Pennsylvania regulations must closely track the Federal rules and go beyond Federal requirements only where more stringent State rules are justified by "an identified compelling State interest." Several provisions of the proposed Amendments do not meet this test. They impose regulatory requirements and paperwork burdens that exceed Federal requirements and are not justified by a compelling State interest. This would discourage desirable recycling and place Pennsylvania businesses at a competitive disadvantage. Our principal concerns are as follows:

- "Coproduct" determinations should continue to be available under the Pennsylvania rules. At a minimum, those materials for which "coproduct" determinations have been made under the current regulations should be "grandfathered" under the new regulations.

- 40 CFR § 261.3(c)(2)(ii)(C)(*1*), which exempts from hazardous waste regulation HTMR slags that meet health-based exclusion levels and are managed in a specified way, should be incorporated into the Pennsylvania regulations. If this is not done (and the Board eliminates "coproduct" determinations), beneficial land-based uses of HTMR slag -- which currently are allowed under both Pennsylvania and Federal rules -- could effectively be banned in the Commonwealth. This would raise the costs of HTMR processing substantially, making it more difficult for this important form of recycling to compete with landfilling of metal-bearing wastes.

- The Board should make clear that HTMR slags being shipped for beneficial use within the Commonwealth do not have to be carried by a licensed hazardous waste transporter and are not subject to hazardous waste transportation fees.

- The Module I pre-approval requirement should be eliminated or narrowed, at least for recycling facilities. Moreover, to the extent it is retained, DEP regional offices should be given the discretion to waive the requirement for individual facilities where the regional office concludes that its approval of Module I forms is not necessary in order to ensure that the facility accepts only wastes it is able to manage properly.

- If the Board retains a requirement for prior DEP approval before a waste-derived product can be used beneficially on the land under 25 Pa. Code § 266a.20(b), the requirement should be waived in the case of HTMR slags for which the Department has concurred in a "coproduct" determination.

and that add unjustifiably to the costs of doing business in the Commonwealth.

We comment on specific provisions of the Comprehensive Amendments below.

I. "Coproduct" Determinations Should Continue To Be Available Under the Pennsylvania Regulations.

In the Comprehensive Amendments, the Board proposes to delete the definition of "coproduct" currently contained in 25 Pa. Code § 260.2 and to eliminate the availability of "coproduct" determinations as a basis for exempting materials from the definition of "solid waste." Instead, the Comprehensive Amendments would rely on the definitional provisions -- and applicable variances and exemptions -- of the Federal regulations as the basis for exempting materials from regulation as hazardous waste.[4] The Board believes that this would avoid the confusion of applying different regulatory definitions of "solid waste" under the Federal and State programs and would do away with situations in which "the Department may be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate."[5]

Avoiding confusion and refraining from regulating as hazardous waste recyclable materials that U.S. EPA does not regulate are laudable objectives. However, the Board does not have to do away with the availability of "coproduct" determinations in order to achieve these objectives. To the contrary, given other modifications of the Federal rules that are proposed in

---

[4] See 27 Pa. Bull. at 6409.

[5] *Id.*

the Comprehensive Amendments (see Parts II, IV and VI below), if "coproduct" determinations are no longer available under the Pennsylvania regulations, one of the Board's stated objectives would be compromised because the Department may very well "be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate." See 27 Pa. Bull. at 6409.

Retaining the definition of "coproduct" would not create confusion. It would simply make available under the Pennsylvania regulations an additional mechanism for determining that a particular material does not fall within the definition of "solid waste." Other aspects of the Federal definition of "solid waste" (along with the Federal exclusions and exemptions) would apply in Pennsylvania -- except to the extent that the Comprehensive Amendments modify EPA's regulations to eliminate a particular exemption or exclusion that is available under the Federal rules. Retaining the definition of "coproduct," therefore, would not be confusing: If a "coproduct" determination has been made for a particular material, it would not be a "solid waste" under the Pennsylvania regulations. If a "coproduct" determination has not been made for the material, its status as a "solid waste" would depend on the provisions of EPA's rules that are incorporated into the Pennsylvania regulations. It's as simple as that.

At the same time, since the Board is proposing not to incorporate all of the Federal exemptions and exclusions into the Pennsylvania regulations -- or will restrict their application -- eliminating "coproduct" determinations could subject various materials to hazardous waste regulation under the Pennsylvania rules even though they are exempt under the Federal rules. As discussed in later sections of these Comments (see Parts II, IV and VI below), this could be a particular problem for HTMR slags, the beneficial use of which might then be

prohibited or placed at a severe competitive disadvantage. That, in turn, would have a negative impact on metals recovery operations like INMETCO's -- operations for which the Department should be creating incentives, not obstacles.

For the foregoing reasons, we urge that the definition of "coproduct" and the availability of "coproduct" determinations be retained under the Comprehensive Amendments. If the Board is reluctant to retain these as a continuing feature of the regulatory program, it should adopt a "grandfathering" provision that excludes from the definition of "solid waste" under the new regulations those materials for which "coproduct" determinations have been made under the current regulations. The specific materials covered by the "grandfathering" provision could be identified in an appendix to 25 Pa. Code Chapter 261a.

II. Proposed Modification of 40 CFR § 261.3 - EPA's "Derived-from" Rule

The Board is proposing to incorporate into the Pennsylvania regulations the provision of EPA's rules, 40 CFR § 261.3, which defines when a solid waste is deemed to be a hazardous waste. A subsection of this provision, 40 CFR § 261.3(c)(2)(i), the so-called "derived-from" rule, states that -- with certain important exceptions -- a solid waste generated from the treatment, storage, or disposal of a hazardous waste is itself a hazardous waste. One of the exceptions that the Board proposes not to incorporate into the Pennsylvania regulations is 40 CFR § 261.3(c)(2)(ii)(C)(*1*), which excludes from the "derived-from" rule slag resulting from the HTMR processing of K061, K062, or F006 waste, provided that the slag meets health-based

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal

PA. CHEMICAL INDUSTRY COUNCIL

...ry Basics Initiative and "Compelling State Interests"

...The Department of Environmental Protection announced its Regulatory Basics Initiative (RBI), it ...erscored a recognition of this problem and set as a goal conformity with Federal regulatory programs ...d national policies. The RBI program naturally will make exceptions to the conformity principle when ...ennsylvania statute calls for a deviation from Federal policy, and RBI provides for other deviations in ...esponse to "compelling state interests." PCIC supports RBI and these principles, but believes the burden of proof that a "compelling state interest" exists lies with EQB and the department. PCIC believes a compelling state interest must be demonstrated by different facts and circumstances within the Commonwealth that result in a higher level of risk to Commonwealth citizens. State regulations should not lower Pennsylvania's competitiveness in the global market place. EQB should be able to demonstrate that any regulatory proposal that exceeds Federal policy provides significantly increased risk management and that the benefits far outweigh the costs. Many of these comments will apply this definition of "compelling state interest."

Editorial Recognition that Absence Indicates Deletion

Incorporating the Federal program by reference while applying the RBI standards means that EQB in its proposal would be expected to delete incompatible and unnecessary sections of the current Pennsylvania hazardous waste program. Reading of the PA Bulletin of December 6 – in conjunction with the current state regulation and the Federal program – indicates that if a Pennsylvania-specific regulatory requirement does not exist within in the Federal program and is not carried over specifically in the EQB proposal, it will be null and void as of the effective date of the final rulemaking. It is the hope of the regulated community that these sections were not simply "forgotten" so that they may re-appear in the final rulemaking. A specific notation inserted in the final rulemaking that a section is being deleted will give the regulated community more confidence that a cognitive policy decision has been made.

Loss of Co-product Status

EQB proposes to adopt the Federal definition of solid waste, and in doing so, removes from Pennsylvania regulations the definition and concept of co-product. PCIC commends EQB for its efforts to simplify Pennsylvania hazardous waste regulations and supports this effort. Agency staff believe that nearly all of materials for which a co-product determination was made will be covered by Federal exemptions. However, there is a potential that some materials will be left out. PCIC recommends adding a provision that effectively "grandfathers" materials for which DEP has issued co-product concurrences.

260a.10: Definitions

In sub-paragraph (a)(1), five definitions are specifically excluded from incorporation by reference: "act," "storage," and "transportation." Each of these terms are repeatedly used throughout the hazardous waste regulation. The EQB therefore must have taken issue with the definitions of these terms as found in 40 CFR 260.10; however, only "disposal" has been otherwise defined in sub-paragraph (b)(1). The regulated community is therefore in the position of not knowing the meaning of these other key terms. PCIC believes all five Federal definitions should be incorporated by reference. Otherwise, it is incumbent for EQB to promulgate definitions of "act," "management," "storage," and "transportation," and to submit these definitions for public comment.

Section 261a.3: Definition of "hazardous waste"

The proposal appears to apply the definition of hazardous waste to materials that are excluded under 40 CFR 261.3(c)(2)(ii)(C). The text is confusing in that one might read it to reach only those described materials that exhibit characteristics of hazardous waste. PCIC would support that interpretation because of its consistency with Federal regulations. However, the introductory text indicates that the EQB wants to regulate the Federally exempted materials – in particular high temperature metal recovery (HTMR) slag. EQB's rationale for the regulation of these materials is that it has no experience with these waste streams.

SAFETY-KLEEN

5. Generic Module I's.

Proposed 25 Pa. Code § 264a.13 retains Pennsylvania's existing hazardous waste provisions which authorize owners and operators of hazardous waste treatment, storage and disposal facilities to comply with the Module I waste acceptance criteria through a Generic Module I application. Safety-Kleen was instrumental in working with the Department to develop the Generic Module I process which streamlines waste acceptance for new waste streams and for customers whose waste is consistently alike. Accordingly, Safety-Kleen recommends that the Generic Module I process, or an equivalent process, be retained in the regulations to expedite an owner and operator's ability to receive new waste streams and to reduce burdens on the owner and operator who receives consistent waste from a generator over time.

6. Transition Scheme.

The proposed hazardous waste regulations do not contain any transition scheme for facilities with existing hazardous waste permits. Accordingly, Safety-Kleen recommends that the Board include transition requirements which provide an orderly approach for complying with any new regulatory requirements. The Department has, in the proposed regulations, simplified the permit modification process by including more items in the category of minor permit modifications. One possible approach is that changes to existing permits resulting from the new regulations be considered, at most, minor permit modifications.

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Bethlehem Resource Recovery Division

890 Front St., P.O. Box Y, Hellertown, PA 18055 • 610/838-7034 • FAX 610/838-6333

January 5, 1998

Environmental Quality Board
PO Box 8477
Harrisburg, PA 17105-8477

COPIES: Smith
Nanorta
Sandusky
Legal (2)

ORIGINAL: 1905

Ref. Proposed rulemaking PA Bulletin, Vol. 27, No. 49, December 6, 1997, page 6407, Hazardous Waste Management

Dear Sir:

Bethlehem Apparatus Company, Inc. would like to comment on one aspect of the Hazardous Waste Management rules that reduce the safety and protection of the public and the environment.

Subchapter I. Use and Management of Containers, Parts 264a.175 Containment and 265a.175 Containment and collection systems.

Both sections regulate the maximum total container height for containers in feet. Dependent upon waste type and location, the maximum height for containers is either 6 feet or 9 feet.

For example, for indoor storage of nonreactive or nonignitable hazardous waste, the total container height may not exceed 9 feet. The typical 55 gallon drum is about 34 inches tall. Stacked three high would equate to 8 1/2 feet. However, if pallets are used between layers of drums, the overall height exceeds 9 feet and could be cited as a violation.

A row of drums stacked three high without pallets takes longer to move. If a drum needs to be removed from a row, each individual drum stacked in front must be moved first, rather than four or eight palletized drums at a time.

Response time to access a leaking drum is greatly increased. If the intent is to restrict container stacking to two or three drums high, an allowance for pallet height would provide an added safety factor.

Sincerely,
BETHLEHEM APPARATUS CO., INC.

John M. Boyle
Admin. and Environ. Manager

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA GAME COMMISSION

Date: January 22, 1998

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Subject: Pennsylvania's Hazardous Waste Management Regulations
December 6, 1997 publication in the Pennsylvania Bulletin

To: D. Richard Shipman, Chief
Division of Hazardous Waste Management
P.O. Box 8471
Rachael Carson State Office Building
Harrisburg, PA 17105-8471

From: Denver A. McDowell, Chief
Division of Environmental Planning
and Habitat Protection
Bureau of Land Management
Pennsylvania Game Commission
2001 Elmerton Avenue
Harrisburg, PA 17110-9797

Dear Mr. Shipman:

Thank you for requesting comments and opinions of the Pennsylvania Game Commission of the Environmental Quality Board's proposed amendments to Pennsylvania's Hazardous Waste Management Regulations as published in the December 6, 1997 Pennsylvania Bulletin.

We have reviewed the proposed amendments and concur with the Departments proposal to include the federal regulations by reference.

The Pennsylvania Game Commission appreciates the opportunity to comment on the proposed amendments.

(1)

ORIGINAL: 1905
COPIES: Smith
Nanorta

Sandusky
Legal (2)

Lisa Graves Marcucci
Jefferson Action Group
c/o 123 Oakwood Drive
Clairton, PA 15025
412/655-0261

I am not here today as someone who has impressive sums of money to donate to a political campaign. Nor am I here as someone who has high-powered lobbyists working the halls of Capital Hill or our State Legislature on her behalf. Instead, I am here as an average citizen who has something to say, not only on behalf of our group, but for all concerned citizens of the Commonwealth. Isn't is just like the DEP and our State Government to hold a public hearing on a Wednesday and 1:00 PM? How many working professionals do you know who can attend an important hearing that will ultimately impact their lives and the health of their families in the middle of the work day and week? With that said, I'd like the record to show that although I am only one person, the information I am about to present is a culmination of shared concerns and information compiled by a growing number of Pennsylvania communities.

Two years ago my family was thrust in the midst of an effort to stop hazardous waste from being dumped in my parents' backyard. What began as one community's fight, has now taken on statewide proportions. Throughout the past six months additional communities have contacted us with similar questions and concerns about various types of dumping. The common denominator among all these communities is the so called Beneficial Use Act. It is very clear to all of us that the Beneficial Use Act is beneficial to only two parties – Big Business looking to enhance their bottom line and many of our elected officials who stand to gain large political contributions. So where do the citizens fit into this? Well, all of us will bear the burden of these relaxed regulations and pay with our health and our very lives if hazardous waste dumping continues in our State.

At issue today is a proposal to amend and relax even more of our once stringent environmental laws. The movement to do so is based on what occurred in the late 1980's when powerful lobbying efforts on Capital Hill were effective in convincing the EPA to reclassify many materials from Hazardous to Residual Waste. Among them, Coal Combustion By-Products. How did the reclassification occur ... and what brings us here today? In 1980, coal generated electric companies across the country were producing an enormous amount of coal combustion wastes. The costs for the disposal of these wastes in regulated landfills were skyrocketing. The electric utilities lobbied Congress to instruct the Environmental Protection Agency to study, with the intent to reclassify, all coal combustion wastes from "C" Hazardous to "D" Residual. As directed by Congress, the EPA initiated a study. The basis of the report was the analysis of research conducted by the following organizations:

- Arthur D. Little, Inc.
- Franklin Associates, Ltd.
- USWAG, Utility Solid Waste Activities Group, an informal consortium of approximately 65 electric utility operating companies
- EEI, Edison Electric Institute
- NRECS, National Rural Electric Cooperative Association

After reviewing the EPA'S Report To Congress (RTC), it is our opinion that the most crucial information supplied for consideration was given by parties with an obvious vested interest. No where in this RTC did the American Medical Association, the Center for Disease Control, Occupational Safety and Health Administration (OSHA), nor the National Institute For Occupational Safety and Health (NIOSH) acknowledge the fact that such reclassification of these waste materials was safe for human exposure or the environment at large.

This RTC and other like it reclassified hazardous wastes to residual and gave all regulatory authority to individual states. The wheels were now set in motion, hence bringing us to today. Our state's dumping laws are about to be change to reflect these Reports To Congress, bringing the State regulations in line with federal requirements; however, we question the objectivity and accuracy of all of the RTC's.

In fact, some of our greatest suspicions and fears were confirmed on December 23 when Ed Bradley of CBS's Sixty Minutes presented a special report called "A Town Under Siege." This in-depth piece featured a small town in Louisiana's Cajun territory, Grand Bois. Bradley tells a frightening story of one town's incredible fight to stop hazardous waste dumping . Eerie parallels can be drawn between this story and what is about to happen in the State of Pennsylvania. The following references are about the Petroleum Industry; however, I believe they clearly illustrate the dangers we will face throughout our state if your agency approves too many relaxed hazardous and residual waste dumping regulations. This information will also confirm that our suspicions regarding the objectivity of the Reports to Congress are, in fact, well founded.

Bradley began his piece, and I quote,

> "Our story tonight is about a small town whose struggle could affect millions of families across the country. In every other industry, federal law would require that waste be tracked, labeled and handled as hazardous material, but not the oil industry. Years ago, their lobbyists got a special deal from Congress which lets them pump toxic waste out of a well, label it 'non-hazardous,' and dump it near cities and towns without warning a soul. That's what the oil industry has done legally ever since. When this law was passed, hardly anyone noticed, not CBS News, not the nation's leading newspapers, and certainly not the residents of a little bayou town 70 miles southwest of New Orleans."**

Ed Bradley told how the citizens of Grande Bois had never been told that Exxon leased land in their community and obtained governmental approval for hazardous waste dumping. Subsequently, residents of this town, including a large number of children were suffering various health conditions all documented by a local physician. The ill health was traced to the Exxon dump site. Not only had this large corporation been given permission to dump dangerous waste products, by none of the citizens had been informed. Even more insulting, "Louisiana's governor, Mike Foster, says the town simply overreacted."**

Bradley's report continued. He interviewed Mark Rubin, from the American Petroleum Institute, an industry lobbying group.

BRADLEY: Shouldn't they have a right to know that? (if they are exposed to poisonous chemicals)

Mr. MARK RUBIN: Sure, I think people have a right to know.

BRADLEY: But they don't have to because it's treated as non-hazardous waste.

RUBIN: The states have extensive information on our waste, and if people want to know more about the waste, they can talk to the facility operator, they can talk to the state regulatory agencies.

BRADLEY: Well, we did talk to the agencies in all 33 oil-producing states. Not one of them knew what toxic chemicals were in all their waste pits or even where all the pits were. What's more, we talked to the head of the Environmental Protection Agency, Carol Browner, and she not only disagreed with Mr. Rubin and with all her predecessors at the EPA about this law, she challenged Congress to change it.

Ms. CAROL BROWNER (Environmental Protection Agency): Congress should revisit this loophole. I mean, this is, there's—there's no other thing like this in federal law. You know, big oil got a sweetheart deal.

Ms. BROWNER: And the effect is that the people that live near these facilities don't even know what is being placed in their community – benzene, toluene, arsenic, lead.

What the scientific health studies tell us about these sorts of wastes is that they can result in reproductive problems, birth defects, cancers, lead poisoning, which can lead to loss in IQ points, serious health problems.

Mr. RUBIN: I believe that EPAs studied our industry. And they reached the conclusion that the state regulatory bodies that are already in place have the ability, talent and power to regulate this industry. And they're doing a good job.

(Close-up of document) Display of multiple Reports to Congress

BRADLEY: That's exactly what the EPA told Congress nine years ago, after a massive study of oil field waste.

But we tracked down the director of that study, Carla Greathouse, and she told CBS something she had never been allowed to tell Congress: the real recommendation of her report.

Ms. CARLA GREATHOUSE: The conclusions that some of the wastes can pose dangers to human health, even if they're managed in accordance with existing regulations.

BRADLEY: So that you wanted to end these exemptions?

Ms. GREATHOUSE: For certain fractions of the waste, yes.

BRADLEY: And the scientists at the EPA were in agreement with you?

Ms. GREATHOUSE: Yes, they were.

BRADLEY: And what happened when you moved up the ladder at the EPA to the political appointees?

Ms. GREATHOUSE: The decision was overturned.

BRADLEY: How did you feel about that?

Ms. GREATHOUSE: I was appalled. It's – it's a very difficult pill to swallow. It really is, especially when you know that there are damages occurring our there that are going to continue to occur if something isn't changed.**

This same situation is about to repeat itself within the Commonwealth of Pennsylvania. And where are our elected officials? Why aren't they listening to the citizens who elected them? And why are State and Federal, so called environmental officials taking the word of lobbyists and reports completely sponsored by an industry looking to improve their bottom line? We as citizens now question ALL the Reports to Congress. Are they truthful or serving only those industries which stand to save billions of dollars? Why have we as citizens been removed from the approval loop when we are those on the front line of living and breathing the ill effects of all types of hazardous waste dumping? When will the people be back in control? Perhaps today is the first step. Our founding fathers established our democracy on a simple equation : a government of the people, by the people and for the people. It is unfortunate, however, that our democracy has become a government of the politicians, by the money and for big business. It is time that the average citizen rebalance the equation!

Ed Bradley ended his report with the following:

> "When we first talked to Louisiana's Governor Mike Foster about the problems in Grand Bois, he told us, in effect, there was nothing to worry about. But in the glare of publicity surrounding this broadcast, the governor has had second thoughts. Now he says some oil field waste can cause illnesses ranging from severe headaches to cancer. He recently announced new rules for oil waste in Louisiana. And the state has also begun to monitor the air and Campbell Wells to see if it's poisoning Grand Bois. Whatever happens in Louisiana, officials in other states are as oblivious to toxic oil waste as Louisiana has been. We'll never know how many people have gotten sick because of oil field waste. We'll never know how many other Grand Bois there are."**

Well, Ed Bradley has recently been informed of the potential of another Grand Bois, not just in one town, but throughout the entire Commonwealth of Pennsylvania.

** all references to Mr. Bradley's news story , including interview/conversation exchanges were obtained from a written transcript, On Assignment: Town Under Siege, CBS News, December 23, 1997.

INMETCO
THE INTERNATIONAL METALS RECLAMATION COMPANY, INC.
AN INCO COMPANY

P.O. BOX 720 • 245 PORTERSVILLE ROAD
ELLWOOD CITY, PA 16117
(412) 758-5515 • FAX (412) 758-9311

R. H. HANEWALD
PRESIDENT

January 23, 1998

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Environmental Quality Board
15th Floor, RCSOB
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Proposed Amendments to the Hazardous Waste Management Regulations, 27 Pennsylvania Bulletin 6407 (December 6, 1997)

Dear Sir or Madam:

I am enclosing two copies of the Comments of The International Metals Reclamation Company, Inc. (INMETCO) and Inco United States, Inc. on the proposed Comprehensive Amendments to the Hazardous Waste Management Regulations. Also enclosed are two copies of a one-page Summary of the Comments to be provided to each member of the Board prior to the meeting at which the final regulations will be considered.

If you have any questions about the Comments, please let me know.

Sincerely,

INMETCO

Richard H. Hanewald
President

Enclosures

Summary of Hazardous Waste Management Regulation Comments
of The International Metals Reclamation Company, Inc. (INMETCO)

INMETCO, located in Ellwood City, Pennsylvania, operates the only high temperature metals recovery (HTMR) process in the United States designed to recover nickel, chromium, iron, and cadmium from metal-bearing secondary materials. Because it conserves non-renewable resources and provides a variety of other environmental benefits, INMETCO's HTMR process has been recognized by U.S. EPA as the Best Demonstrated Available Technology for the treatment of metal-bearing hazardous wastes.

While INMETCO has accommodated itself to operating under two separate regulatory regimes, we can appreciate the potential advantages of a system in which the State hazardous waste program mirrors the Federal program. To realize these advantages, the Pennsylvania regulations must closely track the Federal rules and go beyond Federal requirements only where more stringent State rules are justified by "an identified compelling State interest." Several provisions of the proposed Amendments do not meet this test. They impose regulatory requirements and paperwork burdens that exceed Federal requirements and are not justified by a compelling State interest. This would discourage desirable recycling and place Pennsylvania businesses at a competitive disadvantage. Our principal concerns are as follows:

- "Coproduct" determinations should continue to be available under the Pennsylvania rules. At a minimum, those materials for which "coproduct" determinations have been made under the current regulations should be "grandfathered" under the new regulations.

- 40 CFR § 261.3(c)(2)(ii)(C)(*1*), which exempts from hazardous waste regulation HTMR slags that meet health-based exclusion levels and are managed in a specified way, should be incorporated into the Pennsylvania regulations. If this is not done (and the Board eliminates "coproduct" determinations), beneficial land-based uses of HTMR slag -- which currently are allowed under both Pennsylvania and Federal rules -- could effectively be banned in the Commonwealth. This would raise the costs of HTMR processing substantially, making it more difficult for this important form of recycling to compete with landfilling of metal-bearing wastes.

- The Board should make clear that HTMR slags being shipped for beneficial use within the Commonwealth do not have to be carried by a licensed hazardous waste transporter and are not subject to hazardous waste transportation fees.

- The Module I pre-approval requirement should be eliminated or narrowed, at least for recycling facilities. Moreover, to the extent it is retained, DEP regional offices should be given the discretion to waive the requirement for individual facilities where the regional office concludes that its approval of Module I forms is not necessary in order to ensure that the facility accepts only wastes it is able to manage properly.

- If the Board retains a requirement for prior DEP approval before a waste-derived product can be used beneficially on the land under 25 Pa. Code § 266a.20(b), the requirement should be waived in the case of HTMR slags for which the Department has concurred in a "coproduct" determination.

BEFORE THE PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

[25 Pa. Code Chapters 260-265,267,	)
269-270, 260a-266a, 266b and	)
268a-270a] Hazardous Waste Management	)
Proposed Rulemaking	)
27 Pennsylvania Bulletin 6407	)
December 6,1997)	)

COMMENTS OF THE

INTERNATIONAL METALS RECLAMATION COMPANY, INC.

AND

INCO UNITED STATES, INC.

Mr. Kenneth L. Money
Executive Vice President
Inco United States, Inc.
1225 I Street, N.W.
Washington, D.C. 20005
(202) 682-4715

Mr. Richard H. Hanewald
President
The International Metals Reclamation Company, Inc.
P.O. Box 720
245 Portersville Road
Ellwood City, PA 16117
(412) 758-2808

Of Counsel:
Neil J. King
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6061

January 23, 1998

Table of Contents

Introduction

These Comments are filed by The International Metals Reclamation Company, Inc. ("INMETCO") and its parent company, Inco United States, Inc. in response to the Environmental Quality Board's proposal to comprehensively revise the Pennsylvania Hazardous Waste Regulations (the "Comprehensive Amendments"). 27 Pa. Bull. 6407 (December 6, 1997). Under the proposal, the Commonwealth's existing Hazardous Waste Regulations would, for the most part, be scrapped. In an effort to reduce confusion, eliminate unnecessarily burdensome and overlapping regulations, and align the Commonwealth's regulatory program with the parallel Federal regime, the existing Pennsylvania regulations would be replaced by a simpler set of rules that basically incorporate the applicable Federal hazardous waste regulations by reference into the Pennsylvania Code. This would make the Pennsylvania regulations consistent with the Federal regulations and would maintain that consistency in the future as the Federal program evolves. The Federal regulations would be modified, however, and made more stringent where the Board determines that the "modification is justified by an identified compelling State interest." See 27 Pa. Bull. at 6408.

INMETCO, located in Ellwood City, Pennsylvania, operates the only pyrometallurgical process in the United States designed to recover nickel, chromium, iron, and cadmium from metal-bearing secondary materials. As pointed out by U.S. EPA in a June 1994 Report to Congress, INMETCO's high temperature metals recovery ("HTMR") process conserves non-renewable resources, reduces the volume of metal-bearing wastes that otherwise would be landfilled, and produces nickel, chromium, iron, and cadmium metal using less energy

and creating less pollution than would be the case if the metals were produced from virgin ore.[1] It also is effective in thermo-chemically stabilizing metal constituents in the coproduct slag that is produced along with the recovered metal ingots.[2] For these reasons, INMETCO's HTMR process has been recognized by EPA as the Best Demonstrated Available Technology for the treatment of metal-bearing hazardous wastes under the Land Disposal Restrictions program.[3] It is precisely the kind of recycling operation that the Department should seek to encourage through the structuring of its Hazardous Waste Regulations.

INMETCO has operated under the dual set of Federal and Commonwealth hazardous waste regulations for many years. At considerable effort and expense, INMETCO has obtained both a Part B Hazardous Waste Storage Permit and a Hazardous Waste Recycling Permit. In addition, the Department has concurred in a "coproduct" determination for a variety of beneficial land-based uses of INMETCO's slag. At the same time, as noted above, the Company has operated in accordance with Federal hazardous waste regulatory requirements, some of which -- notably various of the Land Disposal Restrictions program treatment standards -- are based directly on the performance of INMETCO's HTMR process. In sum, over the years, INMETCO has accommodated itself to life under two separate though overlapping regulatory

---

[1]See U.S. EPA, Metal Recovery, Environmental Regulation & Hazardous Wastes (June 1994) at 90, 131; see also U.S. EPA, Proposed BDAT Background Document for Toxicity Characteristic Metal Wastes D004-D011, July 26, 1995 (hereinafter "BDAT Background Document") at 3-5 & 3-6; 58 Fed. Reg. 48092, 48094 (September 14, 1993) (metals recovery processes "reduce the mass loading of hazardous constituents to the environment").

[2]See 56 Fed. Reg. 41164, 41168 (August 19, 1991).

[3]See BDAT Background Document at 3-5 & 3-6.

regimes.

That said, we recognize there are advantages to simplifying and streamlining the process by eliminating unnecessary requirements and having the State regulatory program track the comparable Federal program as closely as possible -- with consistency automatically built in as the Federal program evolves in the future. To that extent, we agree with the Board's proposal. We also agree that the Pennsylvania regulations should depart from, or go beyond, Federal requirements only in those cases where more stringent State requirements are shown to be justified by "an identified compelling State interest." As discussed below, however, in several respects, the proposed Comprehensive Amendments differ from the Federal rules or impose additional requirements that are not justified by a compelling State interest. We believe the Board should reconsider those provisions and eliminate them from the final rule, so that the Comprehensive Amendments will reflect the following principles:

- Except where departures are justified by "an identified compelling State interest," Pennsylvania's regulations should conform with, and be no more stringent than, the corresponding Federal regulations promulgated under the Resource Conservation and Recovery Act. Whenever possible, exemptions, exclusions, and other provisions of the Federal rules should be incorporated by reference into the Pennsylvania regulations.

- The Pennsylvania regulations should be structured so as to encourage recycling, both on-site and at off-site facilities.

- Pennsylvania should not attempt to project its regulatory authority beyond the borders of the Commonwealth in ways that would place Pennsylvania recycling and waste management companies at a competitive disadvantage with facilities in other states.

- The Pennsylvania regulations should avoid the imposition of unnecessary or unproductive paperwork and reporting requirements, particularly those that are accompanied by "processing" fees that exceed the costs of program administration

and that add unjustifiably to the costs of doing business in the Commonwealth.

We comment on specific provisions of the Comprehensive Amendments below.

I. "Coproduct" Determinations Should Continue To Be Available Under the Pennsylvania Regulations.

In the Comprehensive Amendments, the Board proposes to delete the definition of "coproduct" currently contained in 25 Pa. Code § 260.2 and to eliminate the availability of "coproduct" determinations as a basis for exempting materials from the definition of "solid waste." Instead, the Comprehensive Amendments would rely on the definitional provisions -- and applicable variances and exemptions -- of the Federal regulations as the basis for exempting materials from regulation as hazardous waste.[4] The Board believes that this would avoid the confusion of applying different regulatory definitions of "solid waste" under the Federal and State programs and would do away with situations in which "the Department may be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate."[5]

Avoiding confusion and refraining from regulating as hazardous waste recyclable materials that U.S. EPA does not regulate are laudable objectives. However, the Board does not have to do away with the availability of "coproduct" determinations in order to achieve these objectives. To the contrary, given other modifications of the Federal rules that are proposed in

---

[4]See 27 Pa. Bull. at 6409.

[5]*Id.*

the Comprehensive Amendments (see Parts II, IV and VI below), if "coproduct" determinations are no longer available under the Pennsylvania regulations, one of the Board's stated objectives would be compromised because the Department may very well "be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate." See 27 Pa. Bull. at 6409.

Retaining the definition of "coproduct" would not create confusion. It would simply make available under the Pennsylvania regulations an additional mechanism for determining that a particular material does not fall within the definition of "solid waste." Other aspects of the Federal definition of "solid waste" (along with the Federal exclusions and exemptions) would apply in Pennsylvania -- except to the extent that the Comprehensive Amendments modify EPA's regulations to eliminate a particular exemption or exclusion that is available under the Federal rules. Retaining the definition of "coproduct," therefore, would not be confusing: If a "coproduct" determination has been made for a particular material, it would not be a "solid waste" under the Pennsylvania regulations. If a "coproduct" determination has not been made for the material, its status as a "solid waste" would depend on the provisions of EPA's rules that are incorporated into the Pennsylvania regulations. It's as simple as that.

At the same time, since the Board is proposing not to incorporate all of the Federal exemptions and exclusions into the Pennsylvania regulations -- or will restrict their application -- eliminating "coproduct" determinations could subject various materials to hazardous waste regulation under the Pennsylvania rules even though they are exempt under the Federal rules. As discussed in later sections of these Comments (see Parts II, IV and VI below), this could be a particular problem for HTMR slags, the beneficial use of which might then be

prohibited or placed at a severe competitive disadvantage. That, in turn, would have a negative impact on metals recovery operations like INMETCO's -- operations for which the Department should be creating incentives, not obstacles.

For the foregoing reasons, we urge that the definition of "coproduct" and the availability of "coproduct" determinations be retained under the Comprehensive Amendments. If the Board is reluctant to retain these as a continuing feature of the regulatory program, it should adopt a "grandfathering" provision that excludes from the definition of "solid waste" under the new regulations those materials for which "coproduct" determinations have been made under the current regulations. The specific materials covered by the "grandfathering" provision could be identified in an appendix to 25 Pa. Code Chapter 261a.

II. Proposed Modification of 40 CFR § 261.3 - EPA's "Derived-from" Rule

The Board is proposing to incorporate into the Pennsylvania regulations the provision of EPA's rules, 40 CFR § 261.3, which defines when a solid waste is deemed to be a hazardous waste. A subsection of this provision, 40 CFR § 261.3(c)(2)(i), the so-called "derived-from" rule, states that -- with certain important exceptions -- a solid waste generated from the treatment, storage, or disposal of a hazardous waste is itself a hazardous waste. One of the exceptions that the Board proposes not to incorporate into the Pennsylvania regulations is 40 CFR § 261.3(c)(2)(ii)(C)(*1*), which excludes from the "derived-from" rule slag resulting from the HTMR processing of K061, K062, or F006 waste, provided that the slag meets health-based

generic exclusion levels identified in the rule and is disposed in a RCRA Subtitle D landfill.[6] According to the Board, the reason for not incorporating this Federal exclusion into the Pennsylvania regulations is that "the Department has no experience with these waste streams."[7] We disagree both with the decision not to incorporate this Federal exemption into the Pennsylvania regulations and with the rationale for the decision.

It may be true that the Department has no experience with the disposal in Subtitle D landfills of slags resulting from the HTMR processing of K061, K062, or F006 materials, but the Department does have experience with the beneficial use of such slags in land applications such as building roads, parking lots, and the like. Indeed, as noted above, after considering its chemical and physical characteristics and leachate data, the Department concurred in a "coproduct" determination for precisely such uses of INMETCO's slag. Thus, the Department certainly has experience with one HTMR slag, and there probably is only one other K061 HTMR slag generated or used in the Commonwealth.

In these circumstances, it is not correct to say that "the Department has no experience with these waste streams." And, as far as we are aware, that experience does not establish any "compelling State interest" that would preclude the incorporation into the Pennsylvania regulations of U.S. EPA's exclusion of certain HTMR slags from the "derived-from" rule. In this connection, we would note that the Board has not questioned the protectiveness of the generic exclusion levels adopted by EPA as applied in the circumstances

---

[6]See proposed § 261a.3(a)(1) of the Pennsylvania regulations, 27 Pa. Bull. 6409, 6420.

[7]See 27 Pa. Bull. at 6409.

where the exclusion is available. Nor has the Board suggested why an exclusion that EPA has found to be appropriate for the United States generally is, nevertheless, inappropriate for Pennsylvania. In short, there simply is no "compelling State interest" warranting a deviation from the Federal rules on this point.

INMETCO does not send its slag to Subtitle D landfills and, accordingly, does not currently avail itself of the exclusion set forth in 40 CFR § 261.3(c)(2)(ii)(C)(*1*). Instead, INMETCO's slag is used in beneficial land applications pursuant to its "coproduct" determination under the Pennsylvania regulations and the "use constituting disposal" rule of U.S. EPA's regulations, 40 CFR § 266.20(b). This situation will change if the Comprehensive Amendments are adopted in the form proposed by the Board, because the Amendments would delete the definition of "coproduct" from the Pennsylvania regulations and replace it with the Federal definition of "solid waste," along with most, but not all, of the Federal exemptions and exclusions.[8] Continued beneficial use of INMETCO's slag would then depend upon the extent to which U.S. EPA's rules are incorporated into the Pennsylvania regulations. By declining to adopt the applicable EPA exemptions and exclusions -- even though there has been no showing that these exclusions are inconsistent with the protection of public health -- the Board could be jeopardizing the future beneficial use of INMETCO's slag. That, in turn, could have severe financial consequences for the Company, thereby leading to a reduction in the important recycling activity performed by INMETCO.

The foregoing scenario is not entirely hypothetical. Under a pending rulemaking

---

[8] See 27 Pa. Bull. at 6409.

proposal, EPA would expand the range of permissible uses for HTMR slag under the generic exclusion from the "derived-from" rule in 40 CFR § 261.3(c)(2)(ii)(C)(*1*) -- if the slag meets specified health-based exclusion levels. At the same time, however, EPA would eliminate the "use constituting disposal" exemption of 40 CFR § 266.20(b) for all slags generated by the HTMR processing of K061, K062, and F006.[9] Thus, if the Comprehensive Amendments are adopted as the Board proposes, and if EPA finalizes the pending rulemaking proposal, there apparently would be no basis for using INMETCO's slag beneficially on the land in Pennsylvania -- even if it meets all of the health-based generic exclusion levels established by EPA and thus qualifies for such use under Federal law. This is because:

- "Coproduct" determinations no longer would be recognized under the Pennsylvania regulations;
- The "use constituting disposal" exemption of 40 CFR § 266.20(b) no longer would be available under EPA's rules or under the Pennsylvania regulations, which automatically would incorporate any changes in EPA's rules by reference; and
- The generic exclusion from the "derived-from" rule, while available under 40 CFR § 261.3(c)(2)(ii)(C)(*1*) of EPA's regulations, would not be available under the Pennsylvania regulations because proposed 25 Pa. Code § 261a.3(a)(1) states that K061-derived, K062-derived, and F006-derived HTMR slags continue to be hazardous wastes in Pennsylvania even though they meet EPA's health-based criteria for exclusion.

In sum, the Board has provided no explanation of why the health-based exclusion from the "derived-from" rule that EPA has established for certain HTMR slags in 40 CFR § 261.3(c)(2)(ii)(C)(*1*) is not appropriate in Pennsylvania. We are aware of no "compelling State

---

[9]See 59 Fed. Reg. 67256, 67262, 67264 (December 29, 1994). EPA currently is gathering additional data related to this rulemaking.

interest" that would justify a departure from EPA's regulations on this issue, and the Board has suggested none. Yet, if the Board modifies the EPA regulations as it proposes to do, beneficial land-based uses of HTMR slag -- which currently are allowed under both Pennsylvania and Federal rules -- could become subject to a blanket prohibition in the Commonwealth, even though:

(1) The Department has made a "coproduct" determination for the slag under current law; and

(2) EPA permits such uses under Federal law based on a finding that they are consistent with the protection of human health and the environment.

The Board can and should avoid such an unwarranted result, by incorporating 40 CFR § 261.3(c)(2)(ii)(C)(*1*) into the Pennsylvania regulations without modification. If it is reluctant to incorporate this provision without restriction, the Board, at the very least, should incorporate 40 CFR § 261.3(c)(2)(ii)(C)(*1*) into the new Pennsylvania regulations with respect to HTMR slags for which the Department has concurred in a "coproduct" determination under the current regulations. Otherwise, the costs of environmentally beneficial HTMR processing in Pennsylvania may escalate substantially, making it more difficult for this important form of recycling to compete financially with landfilling of metal-bearing wastes.

III. Proposed Modification of 40 CFR § 261.6 - Requirements for Recyclable Materials

The Board is proposing to incorporate 40 CFR § 261.6 of EPA's rules (dealing with the regulation of recyclable materials) into the Pennsylvania regulations, with one exception that makes the Pennsylvania regulations more stringent. The Federal rule, 40 CFR § 261.6(c)(1),

subjects facilities that store recyclable materials before they are recycled to the full range of hazardous waste storage requirements, including applicable permit requirements. However, the Federal rule explicitly exempts "the recycling process itself" from regulation. See *id.* The Board's proposal would not incorporate this exemption for "the recycling process itself" into the comparable provision of the Pennsylvania rules. Instead, proposed 25 Pa. Code § 261a.6 would require facilities that "reclaim or otherwise treat hazardous waste" to obtain a hazardous waste recycling permit.[10]

According to the Board, this deviation from the Federal rules is necessitated by the facts that (1) the Pennsylvania Solid Waste Management Act (SWMA) requires a permit for the treatment of hazardous waste (as does the statute under which the EPA regulations were promulgated[11]) and (2) "recycling hazardous waste falls within the SWMA definition of 'treatment.'"[12] We believe this second proposition is overly broad. While some forms of recycling may fall within the SWMA definition of "treatment," others -- including HTMR reclamation processes that produce metal ingot products -- do not.

Section 402 of the SWMA, 35 P.S. § 6018.103, defines the term "treatment" as follows:

> Any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any

---

[10]See 27 Pa. Bull. at 6410, 6421.

[11]See Solid Waste Disposal Act § 3005(a), 42 U.S.C. § 6925(a).

[12]See 27 Pa. Bull. at 6410.

> waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, suitable for recovery, suitable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of waste so as to render it neutral or nonhazardous. (Emphasis supplied.)

This definition can reasonably be said to encompass a recycling process that is "designed to change the physical, chemical, or biological character or composition of a[] waste . . . so as to render such waste . . . suitable for recovery." And, indeed, such recycling processes exist -- *e.g.*, a recycling process that dries a sludge so that it becomes "suitable for recovery" in a subsequent operation. But the definition does not fit an operation like INMETCO's HTMR process, which is designed to actually recover or reclaim metals from wastes, not simply to render the wastes "suitable for recovery" in subsequent processing. Since the SWMA definition of "treatment" does not encompass a true reclamation process in which the actual recovery of usable materials occurs, the SWMA does not require that the owner/operator of such a process must obtain a "recycling/treatment" permit.

Accordingly, if the Board feels compelled to modify 40 CFR § 261.6 of the Federal regulations at all, it should narrow the modification so that a "recycling-treatment" permit is required only for those types of recycling operations that do not produce a usable product. As long as hazardous waste storage permit and related requirements continue to apply to recycling facilities, there is no compelling State interest in regulating a recycling process that is not regulated by U.S. EPA and that does not fall within the SWMA definition of "treatment."

IV. Licensing and Fee Requirements for the Transportation of Hazardous Waste

Under the proposed Comprehensive Amendments, 25 Pa. Code § 263a.13 would preclude anyone from transporting hazardous waste in Pennsylvania unless the person has first obtained from the Department a license to transport hazardous waste in the Commonwealth. We are concerned about the possibility that this provision may be read to apply to the transportation of HTMR slag to sites where the slag is to be used in land applications like roadbuilding. Such a requirement would complicate -- and add to the costs of -- using HTMR slags beneficially, as they have been used for many years in Pennsylvania. The situation would be made even worse if the hazardous waste transportation fees specified in proposed 25 Pa. Code § 263a.23 are deemed to apply to shipments of such slag. The added costs would severely depress the market for HTMR slags and negatively impact the metals recovery processes in which the slags are generated. There is no reason to apply 25 Pa. Code §§ 263a.13 and 263a.23 to the transportation of HTMR slags, and the Board should make clear that they do not apply.

Assuming that an HTMR slag meets the conditions specified in EPA's "use constituting disposal" rule, 40 CFR § 266.20(b), the hazardous waste transportation fee provision of proposed 25 Pa. Code § 263a.23 presumably would not apply, because a waste-derived product that qualifies under 40 CFR § 266.20(b) is "not presently subject to regulation" according to the text of that provision. Among other things, that means the slag can be transported without a hazardous waste manifest. Since hazardous waste transportation fees under proposed 25 Pa. Code § 263a.23 apply only to transportation "which requires a [hazardous waste] manifest," there would be no basis for assessing the transportation fee on shipments of an HTMR slag that meets the "use constituting disposal" conditions of 40 CFR § 266.20(b).

The same result should obtain as far as proposed 25 Pa. Code § 263a.13 is concerned. That is, since an HTMR slag that qualifies under 40 CFR § 266.20(b) is "not presently subject to regulation," the slag should not have to be transported by a person holding a hazardous waste transportation license. This also makes sense as a matter of policy, since HTMR slags that are to be "used in a manner constituting disposal" will not present a hazard in the event of a spill during transport. Indeed, by definition, their intended use involves land placement.

For these reasons, the Board should make clear that HTMR slags (and other waste-derived products that are used in a manner constituting disposal) do not have to be transported by a licensed hazardous waste transporter under 25 Pa. Code § 263a.13 and are not subject to the hazardous waste transportation fee of 25 Pa. Code § 263a.23.[13]

V. Waste Analysis and Module I Approval Requirements

A. The Module I Approval Requirement Should Be Eliminated or Narrowed.

Under the Comprehensive Amendments, the Board proposes to go beyond the Federal rules relating to waste analysis, by requiring that the operator of a hazardous waste treatment, storage, or disposal (TSD) facility submit for DEP approval a Module I waste analysis

[13]If the "coproduct" determination for INMETCO's slag is preserved under the new rules (see Part I above), these points presumably would be moot because the slag would not be a solid waste under the Pennsylvania regulations.

form before the facility accepts a specific waste from a specific generator for the first time.[14] The Board suggests that this pre-approval requirement is necessary "in order to ensure that the facility is able to manage the hazardous waste properly."[15] But that simply is not the case. In the permitting process, the DEP will have identified the specific types of waste that can be safely and properly stored, treated, processed, and/or disposed of at the TSD facility. Once those specific waste types have been identified in the facility's permit, the owner/operator should not have to secure case-by-case approval for each specific waste that is accepted for the first time from a specific generator. As long as the new waste is one that the facility has been authorized to handle in its permit, there is no reason to expect that the facility will not be able to manage the waste properly, and there is no need or justification for the additional paperwork and delay associated with securing the DEP's prior approval.

The Module I pre-approval requirement -- along with the associated application fee -- imposes unnecessary costs and burdens on recyclers and other TSD facilities, reduces operating flexibility, and makes it more difficult to establish relationships with potential new customers who may be unwilling to postpone a decision on where to send their waste until the Module I submission and approval process has run its course. It is like requiring the TSD facility to go through a mini-permitting process every time it wishes to accept a new waste from an existing customer or any waste from a new customer -- even though the facility has already been authorized to manage that type of waste in its treatment, storage, or disposal permit. Such a

---

[14]See proposed 25 Pa. Code § 264a.13. Proposed § 265a.13 contains comparable provisions for Interim Status facilities.

[15]See 27 Pa. Bull. at 6411.

redundant requirement is unwarranted and certainly serves no compelling State interest.

For example, over the years, INMETCO has submitted more than 800 Module I forms to the DEP, and the total continues to climb. This has involved significant costs and delays. Yet the DEP has never found that INMETCO was unable to properly manage a waste for which a Module I form was submitted.[16] The Module I process thus creates unjustified paperwork burdens, costs, and obstacles to the conduct of our business by requiring repeated submissions to DEP for approval to handle wastes that INMETCO already has been authorized to manage in its Hazardous Waste Storage and Recycling permits. The Board may believe this process is justified in the case of a hazardous waste landfill. We cannot say. But it clearly makes no sense for an HTMR facility like INMETCO, where Module I requirements simply create an unnecessary and unproductive obstacle to environmentally sound recycling. It is doubtful that the Board could justify the Module I requirement for HTMR recycling operations using a cost-benefit analysis.

The problem can be solved either by eliminating the Module I approval requirement altogether -- at least for recycling facilities -- or by adding a provision to proposed 25 Pa. Code § 264a.13 stating that the requirements of § 264a.13(1) are waived for any waste that complies with the facility's approved Waste Analysis Plan, falls within a waste category that is specifically identified in the facility's permit, and is handled in accordance with the permit conditions. We urge the Board to adopt one or the other of those approaches. Furthermore, to

---

[16]Occasionally, a Module I form has been returned for technical reasons -- *e.g.*, incorrect signature -- but INMETCO has never been told that it is not qualified or authorized to handle a waste identified on a Module I.

the extent that the Module I approval requirement is retained, DEP regional offices should be given the discretion to waive the Module I submission requirement for individual TSD facilities where the regional office concludes that its approval of Module I forms is not necessary in order to ensure that the facility accepts only wastes it is able to manage properly.[17]

B. Source Reduction Strategy Submission Requirements Are Unnecessary.

Proposed 25 Pa. Code § 264a.13 also is objectionable because it requires that each Module I report include a copy of the generator's source reduction strategy or documentation that an out-of-state generator has complied with section 3005(h) of the Solid Waste Disposal Act. This provision is unnecessary as far as in-state generators are concerned because proposed 25 Pa. Code § 262a.100 already requires hazardous waste generators in Pennsylvania to prepare source reduction strategies and to make them available for inspection by the DEP. As far as generators located outside Pennsylvania are concerned, the provision is both unnecessary (since out-of-state generators have to satisfy source reduction strategy requirements under Federal regulations or the hazardous waste regulations of the states in which they are located) and inappropriate (since it effectively projects the DEP's jurisdiction beyond the borders of the Commonwealth and places Pennsylvania recyclers and other operators of TSD facilities in the role of policemen who must

---

[17]The Comprehensive Amendments would allow operators to use the Generic Module I process to expedite their ability to receive wastes from new generators. As discussed in text, however, the Module I process is unnecessary to begin with, so the additional flexibility afforded by the Generic Module I process does not solve the problem -- particularly since there would still be at least a 15-day delay before waste could be accepted from a new customer. Furthermore, the fee for submission of a Generic Module I -- $1,500 -- is inexplicably high. We do not understand why it should be five times as costly for the DEP to review a Generic Module I application as an individual Module I application.

ensure that the source reduction strategy requirements of EPA or other states are being complied with).

Pennsylvania has no compelling State interest in ensuring that out-of-state generators are implementing source reduction and waste minimization strategies. That is the province of U.S. EPA or the state in which the generator is located. The DEP should not duplicate requirements of U.S. EPA and other states and should not place Pennsylvania recyclers and TSD facilities at a competitive disadvantage by forcing them to oversee source reduction strategies of out-of-state generators. This is particularly true since most companies have found it necessary to implement source reduction and waste minimization programs for competitive reasons, without regard to regulatory requirements.

VI. Proposed Modification of 40 CFR § 266.20(b) - EPA's "Use Constituting Disposal" Rule

In 25 Pa. Code § 266a.20, the Board proposes to incorporate U.S. EPA's "use constituting disposal" rule into the Pennsylvania regulations. However, the Board would add to the EPA rules a requirement that before a waste-derived product may be used in a manner constituting disposal, the producer of the product must obtain the DEP's written approval by demonstrating that the recyclable materials contained in the product have undergone a chemical reaction so as to become inseparable by physical means.[18] The Board asserts that such "prior

[18]See 27 Pa. Bull. at 6446. There is a typographical error in the last line of proposed 25 Pa. Code § 266a.20(b) as printed in the Pennsylvania Bulletin. The provision mistakenly refers to "the chemical reaction described in 40 CFR 260.20(b) (relating to general)."

(continued...)

written approval is required to ensure that this provision is not abused."[19]

The recyclable materials used as inputs to INMETCO's high temperature metals recovery process clearly have undergone a chemical reaction so as to become inseparable by physical means in the slag produced by the HTMR smelting furnace. As U.S. EPA has observed, the metal constituents of the recyclable materials that are inputs to an HTMR process are either recovered or

> "thermo-chemically stabilized in HTMR residues such as slags. This thermo-chemical stabilization of the non-volatile metals occurs due to the high temperatures present, the relatively efficient mixing conditions, the oxidation-reduction conditions in the primary furnace, and the presence of other inorganic constituents that act, in effect, as stabilization reagents." 56 Fed. Reg. 41164, 41168 (August 19, 1991).

Clearly, there can be no question that an HTMR slag like INMETCO's meets the "chemical reaction-inseparable by physical means" test of 40 CFR § 266.20(b), and no one could seriously suggest that INMETCO has "abused" this provision. Furthermore, the Department has reviewed extensive physical and chemical information relating to INMETCO's slag and, on the basis of that review, has concurred in INMETCO's "coproduct" determination for the slag. In these circumstances, there is no reason to require further approval by the Department as a precondition to the continued use of INMETCO's slag in a manner that constitutes disposal.

Accordingly, if a requirement for prior DEP approval is retained in 25 Pa. Code

---

[18](...continued)
The correct reference is to "the chemical reaction described in 40 CFR 266.20(b) (relating to products containing recyclable materials that are used in a manner that constitutes disposal)."

[19]See 27 Pa. Bull. at 6415.

§ 266a.20(b), the requirement should be waived in the case of HTMR slags for which the Department has concurred in a "coproduct" determination.

Conclusion

As discussed above, we support the concept of simplifying and streamlining the Pennsylvania Hazardous Waste Regulations so that they directly track the parallel Federal rules except where a modification is necessary to serve an "identified compelling State interest." We believe, however, that a number of the Board's proposed modifications of the Federal regulations add unnecessary complexity and costs to the regulatory program and are not justified by a compelling State interest. Such modifications should not be made.

In addition, the definition of "coproduct" and the availability of "coproduct" determinations should be retained. Otherwise, the Department may wind up regulating "as hazardous wastes materials that industries could reuse and that the Federal government does not regulate"[20] -- thereby creating a strong disincentive to desirable recycling activity. At the very least, the Board should adopt a "grandfathering" provision that excludes from the definition of "solid waste" under the Comprehensive Amendments those materials for which "coproduct" determinations have been made under the current regulations.

---

[20]See 27 Pa. Bull. at 6409.

EQB
Environmental Quality Board
p.o. box 8477 • harrisburg, pa. 17105-8477 • (717) 787-4526

January 29, 1998

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Re: Proposed Rulemaking - Comprehensive Hazardous Waste Amendments (#7-328)

Dear Mr. Nyce:

The Environmental Quality Board has received comments regarding the above referenced proposed rulemaking from the following:

1. Richard H. Hanewald, INMETCO

These comments are enclosed for your review. Copies have also been forwarded to the Senate and House Environmental Resources and Energy Committees. Please contact me if you have any questions.

Sincerely,

S. K. Freeman

Sharon K. Freeman
Regulatory Coordinator

Enclosure

(1)

ORIGINAL: 1905
COPIES: Smith
Nanorta

Sandusky
Legal (2)

Lisa Graves Marcucci
Jefferson Action Group
c/o 123 Oakwood Drive
Clairton, PA 15025
412/655-0261

I am not here today as someone who has impressive sums of money to donate to a political campaign. Nor am I here as someone who has high-powered lobbyists working the halls of Capital Hill or our State Legislature on her behalf. Instead, I am here as an average citizen who has something to say, not only on behalf of our group, but for all concerned citizens of the Commonwealth. Isn't is just like the DEP and our State Government to hold a public hearing on a Wednesday and 1:00 PM? How many working professionals do you know who can attend an important hearing that will ultimately impact their lives and the health of their families in the middle of the work day and week? With that said, I'd like the record to show that although I am only one person, the information I am about to present is a culmination of shared concerns and information compiled by a growing number of Pennsylvania communities.

Two years ago my family was thrust in the midst of an effort to stop hazardous waste from being dumped in my parents' backyard. What began as one community's fight, has now taken on statewide proportions. Throughout the past six months additional communities have contacted us with similar questions and concerns about various types of dumping. The common denominator among all these communities is the so called Beneficial Use Act. It is very clear to all of us that the Beneficial Use Act is beneficial to only two parties – Big Business looking to enhance their bottom line and many of our elected officials who stand to gain large political contributions. So where do the citizens fit into this? Well, all of us will bear the burden of these relaxed regulations and pay with our health and our very lives if hazardous waste dumping continues in our State.

At issue today is a proposal to amend and relax even more of our once stringent environmental laws. The movement to do so is based on what occurred in the late 1980's when powerful lobbying efforts on Capital Hill were effective in convincing the EPA to reclassify many materials from Hazardous to Residual Waste. Among them, Coal Combustion By-Products. How did the reclassification occur ... and what brings us here today? In 1980, coal generated electric companies across the country were producing an enormous amount of coal combustion wastes. The costs for the disposal of these wastes in regulated landfills were skyrocketing. The electric utilities lobbied Congress to instruct the Environmental Protection Agency to study, with the intent to reclassify, all coal combustion wastes from "C" Hazardous to "D" Residual. As directed by Congress, the EPA initiated a study. The basis of the report was the analysis of research conducted by the following organizations:

- Arthur D. Little, Inc.
- Franklin Associates, Ltd.
- USWAG, Utility Solid Waste Activities Group, an informal consortium of approximately 65 electric utility operating companies
- EEI, Edison Electric Institute
- NRECS, National Rural Electric Cooperative Association

After reviewing the EPA'S Report To Congress (RTC), it is our opinion that the most crucial information supplied for consideration was given by parties with an obvious vested interest. No where in this RTC did the American Medical Association, the Center for Disease Control, Occupational Safety and Health Administration (OSHA), nor the National Institute For Occupational Safety and Health (NIOSH) acknowledge the fact that such reclassification of these waste materials was safe for human exposure or the environment at large.

This RTC and other like it reclassified hazardous wastes to residual and gave all regulatory authority to individual states. The wheels were now set in motion, hence bringing us to today. Our state's dumping laws are about to be change to reflect these Reports To Congress, bringing the State regulations in line with federal requirements; however, we question the objectivity and accuracy of all of the RTC's.

In fact, some of our greatest suspicions and fears were confirmed on December 23 when Ed Bradley of CBS's Sixty Minutes presented a special report called "A Town Under Siege." This in-depth piece featured a small town in Louisiana's Cajun territory, Grand Bois. Bradley tells a frightening story of one town's incredible fight to stop hazardous waste dumping . Eerie parallels can be drawn between this story and what is about to happen in the State of Pennsylvania. The following references are about the Petroleum Industry; however, I believe they clearly illustrate the dangers we will face throughout our state if your agency approves too many relaxed hazardous and residual waste dumping regulations. This information will also confirm that our suspicions regarding the objectivity of the Reports to Congress are, in fact, well founded.

Bradley began his piece, and I quote,

> "Our story tonight is about a small town whose struggle could affect millions of families across the country. In every other industry, federal law would require that waste be tracked, labeled and handled as hazardous material, but not the oil industry. Years ago, their lobbyists got a special deal from Congress which lets them pump toxic waste out of a well, label it 'non-hazardous,' and dump it near cities and towns without warning a soul. That's what the oil industry has done legally ever since. When this law was passed, hardly anyone noticed, not CBS News, not the nation's leading newspapers, and certainly not the residents of a little bayou town 70 miles southwest of New Orleans."**

Ed Bradley told how the citizens of Grande Bois had never been told that Exxon leased land in their community and obtained governmental approval for hazardous waste dumping. Subsequently, residents of this town, including a large number of children were suffering various health conditions all documented by a local physician. The ill health was traced to the Exxon dump site. Not only had this large corporation been given permission to dump dangerous waste products, by none of the citizens had been informed. Even more insulting, "Louisiana's governor, Mike Foster, says the town simply overreacted."**

Bradley's report continued. He interviewed Mark Rubin, from the American Petroleum Institute, an industry lobbying group.

BRADLEY: Shouldn't they have a right to know that? (if they are exposed to poisonous chemicals)

Mr. MARK RUBIN: Sure, I think people have a right to know.

BRADLEY: But they don't have to because it's treated as non-hazardous waste.

RUBIN: The states have extensive information on our waste, and if people want to know more about the waste, they can talk to the facility operator, they can talk to the state regulatory agencies.

BRADLEY: Well, we did talk to the agencies in all 33 oil-producing states. Not one of them knew what toxic chemicals were in all their waste pits or even where all the pits were. What's more, we talked to the head of the Environmental Protection Agency, Carol Browner, and she not only disagreed with Mr. Rubin and with all her predecessors at the EPA about this law, she challenged Congress to change it.

Ms. CAROL BROWNER (Environmental Protection Agency): Congress should revisit this loophole. I mean, this is, there's—there's no other thing like this in federal law. You know, big oil got a sweetheart deal.

Ms. BROWNER: And the effect is that the people that live near these facilities don't even know what is being placed in their community – benzene, toluene, arsenic, lead.

What the scientific health studies tell us about these sorts of wastes is that they can result in reproductive problems, birth defects, cancers, lead poisoning, which can lead to loss in IQ points, serious health problems.

Mr. RUBIN: I believe that EPAs studied our industry. And they reached the conclusion that the state regulatory bodies that are already in place have the ability, talent and power to regulate this industry. And they're doing a good job.

(Close-up of document) Display of multiple Reports to Congress

BRADLEY: That's exactly what the EPA told Congress nine years ago, after a massive study of oil field waste.

But we tracked down the director of that study, Carla Greathouse, and she told CBS something she had never been allowed to tell Congress: the real recommendation of her report.

Ms. CARLA GREATHOUSE: The conclusions that some of the wastes can pose dangers to human health, even if they're managed in accordance with existing regulations.

BRADLEY: So that you wanted to end these exemptions?

Ms. GREATHOUSE: For certain fractions of the waste, yes.

BRADLEY: And the scientists at the EPA were in agreement with you?

Ms. GREATHOUSE: Yes, they were.

BRADLEY: And what happened when you moved up the ladder at the EPA to the political appointees?

Ms. GREATHOUSE: The decision was overturned.

BRADLEY: How did you feel about that?

Ms. GREATHOUSE: I was appalled. It's – it's a very difficult pill to swallow. It really is, especially when you know that there are damages occurring our there that are going to continue to occur if something isn't changed.**

This same situation is about to repeat itself within the Commonwealth of Pennsylvania. And where are our elected officials? Why aren't they listening to the citizens who elected them? And why are State and Federal, so called environmental officials taking the word of lobbyists and reports completely sponsored by an industry looking to improve their bottom line? We as citizens now question ALL the Reports to Congress. Are they truthful or serving only those industries which stand to save billions of dollars? Why have we as citizens been removed from the approval loop when we are those on the front line of living and breathing the ill effects of all types of hazardous waste dumping? When will the people be back in control? Perhaps today is the first step. Our founding fathers established our democracy on a simple equation : a government of the people, by the people and for the people. It is unfortunate, however, that our democracy has become a government of the politicians, by the money and for big business. It is time that the average citizen rebalance the equation!

Ed Bradley ended his report with the following:

> "When we first talked to Louisiana's Governor Mike Foster about the problems in Grand Bois, he told us, in effect, there was nothing to worry about. But in the glare of publicity surrounding this broadcast, the governor has had second thoughts. Now he says some oil field waste can cause illnesses ranging from severe headaches to cancer. He recently announced new rules for oil waste in Louisiana. And the state has also begun to monitor the air and Campbell Wells to see if it's poisoning Grand Bois. Whatever happens in Louisiana, officials in other states are as oblivious to toxic oil waste as Louisiana has been. We'll never know how many people have gotten sick because of oil field waste. We'll never know how many other Grand Bois there are."**

Well, Ed Bradley has recently been informed of the potential of another Grand Bois, not just in one town, but throughout the entire Commonwealth of Pennsylvania.

** all references to Mr. Bradley's news story , including interview/conversation exchanges were obtained from a written transcript, On Assignment: Town Under Siege, CBS News, December 23, 1997.

Pennsylvania Chamber of Business and Industry

Testimony on the Proposed Comprehensive Hazardous Waste Management Amendments Before the Environmental Quality Board

January 16, 1998
Harrisburg, Pennsylvania

Good afternoon. I want to thank the Environmental Quality Board and the Department of Environmental Protection for the opportunity to provide testimony on Pennsylvania's comprehensive amendments to the *Hazardous Waste Management* regulations. My name is Brian Clark of the law firm of Buchanan Ingersoll and I am here today on behalf of the Pennsylvania Chamber of Business and Industry in my capacity as co-chair of the Solid Waste Work Group.

The Pennsylvania Chamber of Business and Industry (the Chamber) is the largest, broad based business association in Pennsylvania. Our more than 5,600 members employ about 50% of Pennsylvania's private workforce or approximately 1.5 million employees. 80% of our members have less than 100 employees. The Chamber is dedicated to helping our members understand and comply with both state and federal regulations.

At the outset, we would like to take this opportunity to recognize the Department's hard work and acknowledge the Chamber's support for the positive changes to the hazardous waste regulations. The package before you addresses many of our long-standing issues including our core concern that our state regulations more closely parallel and incorporate

by reference the federal regulations. The Chamber has been a long and constant proponent of removing unnecessary or overlapping regulations on Pennsylvania Industry.

We are pleased to have had the opportunity to work with the Department to help improve this program. During the Regulatory Basics Initiative, our members expressed more concerns over this program than any other area in the Department. There has been much progress made since then. I represented the Chamber on the Department's PK4 work group that was formed as a result of the override veto that allowed publication of the controversial PK4 regulations. The PK4 work group, made up of affected industry, recommended many of the changes found in PK5 and advocated the incorporation by reference of the federal language that is being considered in this regulatory package now.

Some of the positive changes that have been made to the hazardous waste regulations include eliminating some duplicate reporting requirements by doing away with Quarterly reports for generators, eliminating the confusing PA01 code, modifying the used oil requirements, modifying administrative requirements for manifesting to be consistent with EPA and many others. These changes not only bring more consistency with the federal program but more importantly, eliminate duplicate or unnecessary requirements that increase the regulatory burden while doing no more to protect the environment.

We do, however, have several remaining issues that we wish to bring to the attention of the EQB. We will be addressing these issues in more detail in our written comments. These issues include the following:

Definitions:

- DEP refers to terms such as "storage" ,"transportation" and "processing" that have not been defined in 260a.10;
- DEP should accept EPA's exemption for non-characteristic HTMR slag in whole without exceptions;

Federal Recyclable Materials Provision:

- In Section 261a.6 regarding requirements for recyclable materials, DEP should incorporate all federal provisions without imposing the limitations that appear in this package. We remain concerned that the federal exemptions in Section 261.6(a) and the recycling requirements in Section 261.6 (c) of the federal rules are not included. The Chamber believes the federal requirements for recycling should be adopted to encourage, rather than hinder, recycling in Pennsylvania;

RCRA Empty Containers:

- In Section 261a.7, DEP is vague in describing the requirements for the management of residues in or from empty containers;

Manifests:

- DEP should adopt the federal 4-part manifest requirement rather than a 6-part manifest as proposed in this package;

Generic Module 1:

- We recommend eliminating the Generic Mod I process in favor of a model similar to the way the Department manages acceptance at Class I landfills. This would reduce the number of case by case approvals that have to be obtained from the Department and create a more efficient program;

Financial Assurance Requirements:

- Pennsylvania's requirements for financial assurance in 264a.145 are out of alignment with all other states who have adopted the federal program;

Labeling Requirements:

- We question the need for additional labeling requirements in Sections 264a.173 and 265a.173 when federal regulations already exist that require containers to be labeled; and

Wastewater Permit by Rule:

- Section 270a.60(b) of the proposed regulations should be broadened to include company owned (captive) wastewaters which would allow a facility to accept wastewaters from other company owned locations which are too small to have their own facilities.

As you can see, the majority of our comments identify areas that fail to incorporate the federal provisions. The Chamber believes the rationale for more stringent state regulations in these areas is not supported by findings of a unique or compelling Pennsylvania interest or state law requirement. We recommend that the EQB reevaluates its position to ensure that the ~~federal~~ Pa. regulations are consistent with the objectives of the Governor Ridge's Executive Order (1996-1).

Overall, the Chamber is very pleased with the changes made to this package. Thank you for the opportunity to testify today.

Duquesne Light
411 Seventh Avenue
P.O. Box 1930
Pittsburgh, PA 15230-1930

(412) 393-6000

January 28, 1998
EAU(0):861-98

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

Environmental Quality Board
15th Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105-8477

Proposed Changes to Hazardous Waste Regulations
(25 PA Code Chapters 260-270)
25 PA Bulletin - Volume 27 (December 6, 1997)

Dear Sir/Madam:

I am pleased to submit the attached comments in behalf of Duquesne Light Company ("Duquesne Light") with respect to the Pennsylvania Environmental Quality board's ("EQB") proposal to amend the Pennsylvania Hazardous Waste regulations. The proposed changes were published in the Pennsylvania Bulletin on December 6, 1997 (25 PA Bulletin Volume 27. Duquesne Light is the principal electrical power generator and provider in the Pittsburgh area. Duquesne Light serves approximately 565,000 customers in Allegheny and Beaver Counties in Western Pennsylvania.

Duquesne Light operates seven facilities that generate hazardous waste and all but one are currently "Small Quantity Generators." The Company does not operate any hazardous waste TSD facilities requiring a permit. As such, our comments address those changes affecting the generation and transportation of hazardous waste in Pennsylvania.

Duquesne Light Company agrees that an alignment of the Department's hazardous waste program with the federal program is necessary. Alignment with the federal program on PCB waste and the definition of solid waste are provisions that Duquesne Light Company strongly agrees with the Department.

Duquesne Light does not agree with certain provisions of the proposed rule that are different from the federal program. The Department asserts, in the preamble to the proposed rule, that the differences from the federal program are justified "by an identified compelling state interest (that) will protect human health and the environment". In this highly competitive business climate, we are very sensitive to environmental regulations that would place Pennsylvania business at an economic disadvantage with neighboring states, at no real benefit to the environmental health and safety of the Commonwealth. Thus, we must take exception to the following items in the proposed regulations:

1. Proposed 25 PA Code §262a.22 - Number of Manifest Copies

The proposal requires the use of a six part manifest, rather than the four part manifest required by the federal regulations. The Board has determined that Pennsylvania should require two more copies than the federal regulation requires, because the two additional copies are sent from the TSD facility to the generator state and from the TSD to the disposal state.

Currently, EPA has been holding public meetings on the Agency's hazardous waste manifest initiative. EPA is looking into revising the manifest to streamline reporting efforts, including the possibility of electronic preparation tracking and submission. The proposed Pennsylvania regulations do not follow the Federal requirements because of administration/notification reasons, rather than any valid health and safety concerns. Thus, if Pennsylvania adopts §262a.22 as proposed, hazardous waste generators in Pennsylvania would not be able to realize any real-world benefits from EPA's initiative (such as the future use of commercial software for manifest preparation and/or submittal). DEP should adopt the Federal regulations verbatim, and consider another mechanism rather than extra manifest pages to achieve their recordkeeping and/or notification objectives.

2. Proposed 25 PA Code §265a.52 - Content of Contingency Plan

The proposal incorporates by reference 40 CFR 264.52 and 265.52, the federal provisions for contents of contingency plans. In addition, the proposal will relocate to 25 PA Code §264a.52 and 265a.52 the existing Pennsylvania requirement that hazardous waste generators prepare contingency plans in accordance with DEP guidelines rather than in accordance with EPA guidelines.

In 1996, EPA issued an "Integrated Contingency Plan" (ICP) that was intended to be used as guidance by industrial facilities in the preparation of integrated facility-wide emergency response plans. The ICP was proposed to provide a mechanism for consolidating the numerous overlapping requirements for facility emergency response plans. The ICP attempted to alleviate this burden by allowing separate regulatory response plans, such as to meet RCRA requirements, to be integrated into a single plan.

DEP should allow the use of the ICP format for the contingency plans required under §264a.52 and 265a.52. Any additional state requirements not provided in the federal ICP format could be included in a supplement or appendix to the ICP. The DEP PPC guidelines used to provide guidance to generators could be revised to follow the ICP format, with additions found necessary by DEP.

3. Proposed 25 PA Code 265a.175 - Container Spacing in Containment

The proposal retains the current requirements for height, width and depth of containers used to store waste, as well as aisle distances between groups of storage containers. These requirements are currently found in 25 PA Code §264.179 and 265.178. There is no comparable Federal requirement.

In the preamble to the regulation, the reason given for maintaining this requirement is to "ensure uniformity in storage practices." There is no valid basis for requiring by regulation all containers be stored in this specified manner to ensure safety (i.e., if you don't store waste in the specified aisle distances and heights, it is automatically by regulation an unsafe storage condition). Due to the various designs, complexities and floor arrangements of industrial establishments, it would be a huge benefit to Pennsylvania industries to have the same flexibility of hazardous waste container storage arrangements allowed outside of Pennsylvania. There is no universal safety benefit from providing arbitrary, rigid, regulatory container storage heights, spacing, etc.

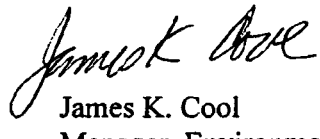
If Pennsylvania is concerned with the container storage safety issues, they should reference a national established code as a regulatory storage requirement (if it exists). As an alternative to meeting its objective, the regulation should only require container storage that would allow unobstructed movement of emergency equipment and personnel into all areas where waste is accumulated or stored.

4. Proposed 25 PA Code §265a.56(1) - Emergency Reporting

Proposed §265a.56 requires a facility where a fire, explosion, emission or discharge of hazardous waste which could threaten human health or the environment to notify DEP's Harrisburg office. To be consistent with the emergency notification requirements under other Pennsylvania regulations (such as water quality), the notification should be to the appropriate DEP regional office. This will prevent confusion of a facility's emergency coordinator when reporting emergency problems under different DEP regulations to different DEP locations.

Duquesne Light appreciates the opportunity to review the proposed amendments to the regulations, and requests that the EQB give full consideration to the comments developed. If there are any questions, please call me at 412/393-6097.

Very truly yours,



James K. Cool
Manager, Environmental Affairs

Proposed Changes to Hazardous Waste Regulations
(25 PA Code Chapters 260-270)
25 PA Bulletin - Volume 27 (December 6, 1997)
Duquesne Light Company
Comments to the PA Environmental Quality Board
January 28, 1998

Duquesne Light Company is an electric utility serving approximately 565,000 customers in the Pittsburgh area and has six (6) small quantity and one (1) large quantity generator of hazardous waste and no treatment storage and disposal facilities. The Company agrees that alignment of Pennsylvania's hazardous waste program with the federal program is a necessary and positive development. However, we cannot agree with certain provisions that place Pennsylvania at an economic disadvantage with other states and have no real benefit to environmental health and safety. The following comments are provided with respect to the proposed regulation;

1. Proposed 25 PA Code §262a.22 - Number of Manifest Copies

   The Department should adopt the federal four part manifest rather than the proposed six part manifest in order to realize benefits from EPA's manifest streamlining initiatives (i.e. commercial software preparation and/or submittal).

2. Proposed 25 PA Code §265a.52 - Content of Contingency Plan

   The Department should revise the DEP PPC guidelines to follow the EPA Integrated Contingency Plan (40 CFR 264.52 & 265.52) with additional state requirements as a supplement or appendix.

3. Proposed 25 PA Code §265a.175 - Container Spacing in Containment

   The proposal should reference a national code on storage requirement or as an alternative only require container storage that would allow unobstructed movement of emergency equipment and personnel into all storage areas where waste is accumulated or stored.

4. Proposed 25 PA Code §265a.56910 - Emergency Reporting

   Emergency notification should be to the appropriate DEP regional office instead of the Harrisburg office. This would be consistent with other emergency notification requirements.

233 Ridge Avenue
Pittsburgh, PA 15202
February 1, 1998

ORIGINAL: 1905
COPIES: Smith
Manorta
Sandusky
Legal (2)

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Comments on Notice of Proposed Rulemaking – Hazardous Waste Management
(25 Pa. Code, Chapters 260a-266a, 266b, 268a-270a)

In response to the notice of proposed rulemaking, I am submitting the enclosed comments as an individual citizen. I have no affiliation with any of the industries that would be subject to these proposed regulations. The comments on specific provisions are arranged so that they correspond to the order of those provisions in the published preamble. At the end of this document are some general comments.

25 Pa. Code §§264a.78-264a.83 and 25 Pa. Code §265a.78-265a.83 Hazardous Waste Management Fees and Administrative Fees

As proposed, these management fees and administrative fees should be retained.

40 CFR 264.94 Concentration Limits

This is a questionable step, because of the potential for abuse. The preamble states that a background standard for groundwater remediation has often been "unattainable." In dealing with operators, DEP should make a far greater effort to distinguish between the inability to attain the remediation standard, and the unwillingness to attain the standard.

25 Pa. Code §§264a.194 and 265a.194 and 40 CFR 264.194 and 265.194 Tanks: General Operating Requirements

As proposed, the tank labeling requirements should be retained.

25 Pa. Code §§264a.195 and 265a.195 and 40 CFR 264.195 and 265.195 Tanks: Inspections

As proposed, the requirement to inspect tanks every 72 hours when the facility is not operating should be retained. As the Board stated, regardless of whether the facility is operating, any tank can leak.

25 Pa. Code §264a.251 and 40 CFR 264.251 Waste Piles: Design and Operating Requirements

As proposed, there should be no exemption from groundwater monitoring requirements for waste piles from which the waste is periodically removed and for which the liner is inspected for cracks.

As proposed, the requirement that run-on control measures be designed to handle a 25-year storm would be an improvement over the current regulation. A "25-year storm" is not strictly a product of weather conditions. As we strip away vegetation and pave over the landscape, we increase the likelihood of "25-year storms." A precautionary approach is well-justified.

25 Pa. Code §264a.276 and 40 CFR 264.276 Land Treatment: Food Chain Crops

There can be no argument against the proposed prohibition on growing food crops intended for direct human consumption on "hazardous waste land treatment facilities." It is, if anything, a minimal restriction. In this context, it is worth noting that DEP is currently promoting – without any corresponding restrictions – the land application of sewage sludge, despite the fact that sewage sludge can contain many of the constituents of hazardous waste.

25 Pa. Code §266a.20 and 40 CFR 266.20 Applicability

As proposed, prior written approval should be required before products containing or derived from hazardous waste are applied to the land. This is a minimal and obvious precaution.

25 Pa. Code §266a.103 and 40 CFR 266.103 Interim Status Standards for Burners

The proposed 8000 BTU/lb. minimum heating value is certainly better than the weak federal standard. The Board is correct in identifying the need for assurance that the hazardous wastes are being burned for energy recovery, rather than disposal. Throughout the country, there is substantial abuse of this practice by BIFs. Products of incomplete combustion from the burning of hazardous wastes are a public health hazard. In addition to stack emissions and fugitive emissions, the ash from the process can present a disposal problem. To the extent that BIFs offer an "easy way out" for generators of hazardous waste, those generators will have less incentive to reduce the volume of hazardous waste that they generate.

Appendix I for 40 CFR 270.42 Classification of Permit Modification

This provision of the preamble (obtained through the DEP web site) refers to "an appendix that classifies permit modifications as Class 1, Class 2, or Class 3 modifications." That appendix could not be found in the accompanying document containing the actual language of the proposed regulations (obtained through the DEP web site). The appendix was also missing from the corresponding issue of the Pennsylvania Bulletin (12/06/97 – Vol. 27, No. 49, Part II).

This provision would increase the scope of permit changes that could be instituted by DEP and the permittee, with no effective public participation. Based on the general trend of DEP's conduct in recent years, there is ample reason for concern that this provision would be abused.

25 Pa. Code §270a.60 and 40 CFR 270.60 Permits by Rule

The Board proposes to retain the state's current permit-by-rule program for facilities that are exempt from federal permitting requirements. Presumably, the Board believes that retaining the current permit-by-rule program serves the public interest. That is debatable.

In practice, permit-by-rule serves the permitted industries by providing the illusion of regulation, instead of serving the public by providing effective regulation. It might be better to abolish permit-by-rule. At least that would destroy the illusion.

General Comments

The practice of making the text of proposed regulations available through the DEP web site is commendable. However, as noted above, the appendix pertinent to one of the provisions was apparently not included.

Other procedural aspects of the proposed rulemaking have had the effect – perhaps intentional – of discouraging public comment on this subject. The three public hearings were held at 1 p.m. on weekdays – a time most convenient for the professional representatives of the regulated community, but certainly not for members of the general public. The comment period of 60 days – 90 days would have been appropriate – straddled the Christmas holidays. To the professional representatives of the regulated community, the holiday season poses no significant problem. That is not the case for members of the general public.

I appreciate the opportunity to submit these comments.

Sincerely,

John F. Warren

John F. Warren

Summary of Comments on Notice of Proposed Rulemaking
Hazardous Waste Management
(25 Pa. Code, Chapters 260a-266a, 266b, 268a-270a)

In response to the notice of proposed rulemaking, I am submitting three pages of comments. I submit these comments as an individual citizen. I have no affiliation with any of the industries that would be subject to these proposed regulations. The first section of this document summarizes my comments on specific provisions of the proposed regulations. That section is followed by some general comments.

Comments on Specific Provisions

Support for provisions of proposed regulations:

- Hazardous Waste Management and Administrative Fees – retention of fees
- Tanks -- retaining labeling requirements
- Tanks -- inspecting even if facility is not operating
- Waste Piles – no exemption for periodic removal
- Waste Piles – "25-year storm" design standard
- Land Treatment – restrictions on food crops
- Land Treatment – prior written approval for land application
- BIF Waste Burning – 8000 BTU/lb. minimum heating value

Concern about provisions of proposed regulations:

- Groundwater – ACL creates enforcement loophole
- Permit Modification – effect is to curtail public scrutiny and participation
- Permit-by-Rule – existing DEP program is a fig leaf for permitted industries

General Comments

The practice of making the text of proposed regulations available through the DEP web site is commendable. However, the appendix containing the changes to the permit modification regulations was apparently not included.

Other procedural aspects of the proposed rulemaking have had the effect – perhaps intentional – of discouraging public comment on this subject. The three public hearings were held at 1 p.m. on weekdays – a time most convenient for the professional representatives of the regulated community, but certainly not for members of the general public. The comment period of 60 days – **90 days would have been appropriate** – straddled the Christmas holidays. To professional representatives of the regulated community, the holiday season poses no significant problem. That is not the case for members of the general public.

John F. Warren
233 Ridge Avenue
Pittsburgh, PA 15202
February 1, 1998

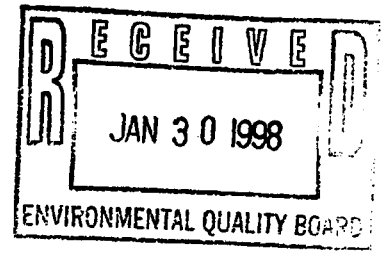
PENNSYLVANIA ELECTRIC ASSOCIATION

GENERAL OFFICES • 301 APC BUILDING • 800 NORTH THIRD STREET • HARRISBURG, PA 17102

ADDRESS REPLY TO

ORIGINAL: 1905
COPIES: Smith
Nanorta
Sandusky
Legal (2)

January 29, 1998
EAU(8):871-98



Environmental Quality Board
15th Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105-8477

Proposed Changes to Hazardous Waste Regulations
(25 PA Code Chapters 260-270)
25 PA Bulletin - Volume 27 (December 6, 1997)

Dear Sir/Madam:

Pennsylvania Electric Association (PEA) is pleased to submit the following comments with respect to the Pennsylvania Environmental Quality Board's ("EQB") proposal to amend the Pennsylvania Hazardous Waste regulations. The proposed changes were published in the Pennsylvania Bulletin on December 6, 1997. PEA is the trade association of the 11 investor-owned electric utilities in the Commonwealth. Together, these utilities provide electric service to approximately 92% of the Commonwealth's population and supply approximately 95% of the electrical energy consumed in Pennsylvania.

PEA strongly supports the alignment of the Department's hazardous waste program with the federal program. Alignment with the federal program on PCB waste and the definition of solid waste are provisions that PEA strongly agrees with the Department. However, PEA disagrees with certain provisions of the proposed rule that are different from the federal program.

Additional comments are as follows:

1. Number of Manifest Copies

As proposed, Section 262a.22 requires the use of a six part manifest, rather than the four part manifest required by the federal regulations. The Board has determined that Pennsylvania should require two more copies than the federal regulation requires, because the two additional copies are sent from the TSD facility to the generator state and from the TSD to the disposal state.

EPA is currently considering revising the manifest to streamline reporting efforts, including the possibility of electronic preparation tracking and submission. If Pennsylvania adopts §262a.22 as proposed, hazardous waste generators in Pennsylvania would not realize any benefits from EPA's initiative (such as the future use of commercial software for manifest preparation and/or submittal). In addition, the preamble to the proposed rule states that the differences from the federal program are justified "by an identified compelling state interest

(that) will protect human health and the environment". The proposed six part manifest addresses an administrative concern and doesn't serve any health, safety or environmental protection related purpose. Accordingly, PEA urges DEP to adopt the Federal regulations verbatim, and consider another mechanism rather than extra manifest pages to achieve their recordkeeping and/or notification objectives.

2. Content of Contingency Plan

The proposal incorporates by reference 40 CFR 264.52 and 265.52, the federal provisions for contents of contingency plans. In addition, the proposal will relocate to 25 PA Code §264a.52 and 265a.52 the existing Pennsylvania requirement that hazardous waste generators prepare contingency plans in accordance with DEP guidelines rather than in accordance with EPA guidelines.

In 1996, EPA issued an "Integrated Contingency Plan" (ICP) that was intended to be used as guidance by industrial facilities in the preparation of integrated facility-wide emergency response plans. The ICP was proposed to provide a mechanism for consolidating the numerous overlapping requirements for facility emergency response plans. The ICP attempted to alleviate this burden by allowing separate regulatory response plans, such as to meet RCRA requirements, to be integrated into a single plan.

DEP should allow the use of the ICP format for the contingency plans required under §264a.52 and 265a.52. Any additional state requirements not provided in the federal ICP format could be included in a supplement or appendix to the ICP. The DEP PPC guidelines used to provide guidance to generators could be revised to follow the ICP format, with additions found necessary by DEP.

3. Container Spacing in Containment

The proposal retains the current requirements for height, width and depth of containers used to store waste, as well as aisle distances between groups of storage containers. These requirements are currently found in 25 PA Code §264.179 and 265.178. There is no comparable Federal counterpart.

In the preamble to the regulation, the reason given for maintaining this requirement is to "ensure uniformity in storage practices." There is no valid basis for requiring by regulation all containers be stored in this specified manner to ensure safety (i.e., if you don't store waste in the specified aisle distances and heights, it is automatically by regulation an unsafe storage condition). Due to the various designs, complexities and floor arrangements of industrial establishments, it would be a huge benefit to Pennsylvania industries to have the same flexibility of hazardous waste container storage arrangements allowed outside of Pennsylvania. There is no universal safety benefit from providing arbitrary, rigid, regulatory container storage heights, spacing, etc.

4. Emergency Reporting

Proposed §265a.56 requires a facility to notify DEP's Harrisburg office in the event of a fire, explosion, emission or discharge of hazardous waste which could threaten human health or the environment. To be consistent with the emergency notification requirements under other Pennsylvania regulations (such as water quality), the notification should be to the appropriate DEP regional office. This will prevent confusion of a facility's emergency coordinator when reporting emergency problems under different DEP regulations to different DEP locations.

PEA appreciates the opportunity to review the proposed amendments to the regulations, and requests that the EQB give full consideration to the comments developed. If there are any questions, please call me at 412/393-6288.

Very truly yours,

Scott K. Rodgers
PEA Solid Waste Subcommittee

BEFORE THE PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

[25 Pa. Code Chapters 260-265,267,	)
269-270, 260a-266a, 266b and	)
268a-270a] Hazardous Waste Management	)
Proposed Rulemaking	)
27 Pennsylvania Bulletin 6407	)
December 6,1997)	)

COMMENTS OF THE

INTERNATIONAL METALS RECLAMATION COMPANY, INC.

AND

INCO UNITED STATES, INC.

Mr. Kenneth L. Money
Executive Vice President
Inco United States, Inc.
1225 I Street, N.W.
Washington, D.C. 20005
(202) 682-4715

Mr. Richard H. Hanewald
President
The International Metals Reclamation
Company, Inc.
P.O. Box 720
245 Portersville Road
Ellwood City, PA 16117
(412) 758-2808

Of Counsel:
Neil J. King
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6061

January 23, 1998

Table of Contents

Introduction

These Comments are filed by The International Metals Reclamation Company, Inc. ("INMETCO") and its parent company, Inco United States, Inc. in response to the Environmental Quality Board's proposal to comprehensively revise the Pennsylvania Hazardous Waste Regulations (the "Comprehensive Amendments"). 27 Pa. Bull. 6407 (December 6, 1997). Under the proposal, the Commonwealth's existing Hazardous Waste Regulations would, for the most part, be scrapped. In an effort to reduce confusion, eliminate unnecessarily burdensome and overlapping regulations, and align the Commonwealth's regulatory program with the parallel Federal regime, the existing Pennsylvania regulations would be replaced by a simpler set of rules that basically incorporate the applicable Federal hazardous waste regulations by reference into the Pennsylvania Code. This would make the Pennsylvania regulations consistent with the Federal regulations and would maintain that consistency in the future as the Federal program evolves. The Federal regulations would be modified, however, and made more stringent where the Board determines that the "modification is justified by an identified compelling State interest." See 27 Pa. Bull. at 6408.

INMETCO, located in Ellwood City, Pennsylvania, operates the only pyrometallurgical process in the United States designed to recover nickel, chromium, iron, and cadmium from metal-bearing secondary materials. As pointed out by U.S. EPA in a June 1994 Report to Congress, INMETCO's high temperature metals recovery ("HTMR") process conserves non-renewable resources, reduces the volume of metal-bearing wastes that otherwise would be landfilled, and produces nickel, chromium, iron, and cadmium metal using less energy

and creating less pollution than would be the case if the metals were produced from virgin ore.[1] It also is effective in thermo-chemically stabilizing metal constituents in the coproduct slag that is produced along with the recovered metal ingots.[2] For these reasons, INMETCO's HTMR process has been recognized by EPA as the Best Demonstrated Available Technology for the treatment of metal-bearing hazardous wastes under the Land Disposal Restrictions program.[3] It is precisely the kind of recycling operation that the Department should seek to encourage through the structuring of its Hazardous Waste Regulations.

INMETCO has operated under the dual set of Federal and Commonwealth hazardous waste regulations for many years. At considerable effort and expense, INMETCO has obtained both a Part B Hazardous Waste Storage Permit and a Hazardous Waste Recycling Permit. In addition, the Department has concurred in a "coproduct" determination for a variety of beneficial land-based uses of INMETCO's slag. At the same time, as noted above, the Company has operated in accordance with Federal hazardous waste regulatory requirements, some of which -- notably various of the Land Disposal Restrictions program treatment standards -- are based directly on the performance of INMETCO's HTMR process. In sum, over the years, INMETCO has accommodated itself to life under two separate though overlapping regulatory

---

[1]See U.S. EPA, Metal Recovery, Environmental Regulation & Hazardous Wastes (June 1994) at 90, 131; see also U.S. EPA, Proposed BDAT Background Document for Toxicity Characteristic Metal Wastes D004-D011, July 26, 1995 (hereinafter "BDAT Background Document") at 3-5 & 3-6; 58 Fed. Reg. 48092, 48094 (September 14, 1993) (metals recovery processes "reduce the mass loading of hazardous constituents to the environment").

[2]See 56 Fed. Reg. 41164, 41168 (August 19, 1991).

[3]See BDAT Background Document at 3-5 & 3-6.

regimes.

That said, we recognize there are advantages to simplifying and streamlining the process by eliminating unnecessary requirements and having the State regulatory program track the comparable Federal program as closely as possible -- with consistency automatically built in as the Federal program evolves in the future. To that extent, we agree with the Board's proposal. We also agree that the Pennsylvania regulations should depart from, or go beyond, Federal requirements only in those cases where more stringent State requirements are shown to be justified by "an identified compelling State interest." As discussed below, however, in several respects, the proposed Comprehensive Amendments differ from the Federal rules or impose additional requirements that are not justified by a compelling State interest. We believe the Board should reconsider those provisions and eliminate them from the final rule, so that the Comprehensive Amendments will reflect the following principles:

- Except where departures are justified by "an identified compelling State interest," Pennsylvania's regulations should conform with, and be no more stringent than, the corresponding Federal regulations promulgated under the Resource Conservation and Recovery Act. Whenever possible, exemptions, exclusions, and other provisions of the Federal rules should be incorporated by reference into the Pennsylvania regulations.

- The Pennsylvania regulations should be structured so as to encourage recycling, both on-site and at off-site facilities.

- Pennsylvania should not attempt to project its regulatory authority beyond the borders of the Commonwealth in ways that would place Pennsylvania recycling and waste management companies at a competitive disadvantage with facilities in other states.

- The Pennsylvania regulations should avoid the imposition of unnecessary or unproductive paperwork and reporting requirements, particularly those that are accompanied by "processing" fees that exceed the costs of program administration

and that add unjustifiably to the costs of doing business in the Commonwealth.

We comment on specific provisions of the Comprehensive Amendments below.

I. "Coproduct" Determinations Should Continue To Be Available Under the Pennsylvania Regulations.

In the Comprehensive Amendments, the Board proposes to delete the definition of "coproduct" currently contained in 25 Pa. Code § 260.2 and to eliminate the availability of "coproduct" determinations as a basis for exempting materials from the definition of "solid waste." Instead, the Comprehensive Amendments would rely on the definitional provisions -- and applicable variances and exemptions -- of the Federal regulations as the basis for exempting materials from regulation as hazardous waste.[4] The Board believes that this would avoid the confusion of applying different regulatory definitions of "solid waste" under the Federal and State programs and would do away with situations in which "the Department may be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate."[5]

Avoiding confusion and refraining from regulating as hazardous waste recyclable materials that U.S. EPA does not regulate are laudable objectives. However, the Board does not have to do away with the availability of "coproduct" determinations in order to achieve these objectives. To the contrary, given other modifications of the Federal rules that are proposed in

---

[4]See 27 Pa. Bull. at 6409.

[5]*Id.*

the Comprehensive Amendments (see Parts II, IV and VI below), if "coproduct" determinations are no longer available under the Pennsylvania regulations, one of the Board's stated objectives would be compromised because the Department may very well "be required to regulate as hazardous wastes materials that industries could reuse and that the Federal government does not regulate." See 27 Pa. Bull. at 6409.

Retaining the definition of "coproduct" would not create confusion. It would simply make available under the Pennsylvania regulations an additional mechanism for determining that a particular material does not fall within the definition of "solid waste." Other aspects of the Federal definition of "solid waste" (along with the Federal exclusions and exemptions) would apply in Pennsylvania -- except to the extent that the Comprehensive Amendments modify EPA's regulations to eliminate a particular exemption or exclusion that is available under the Federal rules. Retaining the definition of "coproduct," therefore, would not be confusing: If a "coproduct" determination has been made for a particular material, it would not be a "solid waste" under the Pennsylvania regulations. If a "coproduct" determination has not been made for the material, its status as a "solid waste" would depend on the provisions of EPA's rules that are incorporated into the Pennsylvania regulations. It's as simple as that.

At the same time, since the Board is proposing not to incorporate all of the Federal exemptions and exclusions into the Pennsylvania regulations -- or will restrict their application -- eliminating "coproduct" determinations could subject various materials to hazardous waste regulation under the Pennsylvania rules even though they are exempt under the Federal rules. As discussed in later sections of these Comments (see Parts II, IV and VI below), this could be a particular problem for HTMR slags, the beneficial use of which might then be

prohibited or placed at a severe competitive disadvantage. That, in turn, would have a negative impact on metals recovery operations like INMETCO's -- operations for which the Department should be creating incentives, not obstacles.

For the foregoing reasons, we urge that the definition of "coproduct" and the availability of "coproduct" determinations be retained under the Comprehensive Amendments. If the Board is reluctant to retain these as a continuing feature of the regulatory program, it should adopt a "grandfathering" provision that excludes from the definition of "solid waste" under the new regulations those materials for which "coproduct" determinations have been made under the current regulations. The specific materials covered by the "grandfathering" provision could be identified in an appendix to 25 Pa. Code Chapter 261a.

II. Proposed Modification of 40 CFR § 261.3 - EPA's "Derived-from" Rule

The Board is proposing to incorporate into the Pennsylvania regulations the provision of EPA's rules, 40 CFR § 261.3, which defines when a solid waste is deemed to be a hazardous waste. A subsection of this provision, 40 CFR § 261.3(c)(2)(i), the so-called "derived-from" rule, states that -- with certain important exceptions -- a solid waste generated from the treatment, storage, or disposal of a hazardous waste is itself a hazardous waste. One of the exceptions that the Board proposes not to incorporate into the Pennsylvania regulations is 40 CFR § 261.3(c)(2)(ii)(C)(*1*), which excludes from the "derived-from" rule slag resulting from the HTMR processing of K061, K062, or F006 waste, provided that the slag meets health-based

generic exclusion levels identified in the rule and is disposed in a RCRA Subtitle D landfill.[6] According to the Board, the reason for not incorporating this Federal exclusion into the Pennsylvania regulations is that "the Department has no experience with these waste streams."[7] We disagree both with the decision not to incorporate this Federal exemption into the Pennsylvania regulations and with the rationale for the decision.

It may be true that the Department has no experience with the disposal in Subtitle D landfills of slags resulting from the HTMR processing of K061, K062, or F006 materials, but the Department does have experience with the beneficial use of such slags in land applications such as building roads, parking lots, and the like. Indeed, as noted above, after considering its chemical and physical characteristics and leachate data, the Department concurred in a "coproduct" determination for precisely such uses of INMETCO's slag. Thus, the Department certainly has experience with one HTMR slag, and there probably is only one other K061 HTMR slag generated or used in the Commonwealth.

In these circumstances, it is not correct to say that "the Department has no experience with these waste streams." And, as far as we are aware, that experience does not establish any "compelling State interest" that would preclude the incorporation into the Pennsylvania regulations of U.S. EPA's exclusion of certain HTMR slags from the "derived-from" rule. In this connection, we would note that the Board has not questioned the protectiveness of the generic exclusion levels adopted by EPA as applied in the circumstances

---

[6]See proposed § 261a.3(a)(1) of the Pennsylvania regulations, 27 Pa. Bull. 6409, 6420.

[7]See 27 Pa. Bull. at 6409.

where the exclusion is available. Nor has the Board suggested why an exclusion that EPA has found to be appropriate for the United States generally is, nevertheless, inappropriate for Pennsylvania. In short, there simply is no "compelling State interest" warranting a deviation from the Federal rules on this point.

INMETCO does not send its slag to Subtitle D landfills and, accordingly, does not currently avail itself of the exclusion set forth in 40 CFR § 261.3(c)(2)(ii)(C)(*1*). Instead, INMETCO's slag is used in beneficial land applications pursuant to its "coproduct" determination under the Pennsylvania regulations and the "use constituting disposal" rule of U.S. EPA's regulations, 40 CFR § 266.20(b). This situation will change if the Comprehensive Amendments are adopted in the form proposed by the Board, because the Amendments would delete the definition of "coproduct" from the Pennsylvania regulations and replace it with the Federal definition of "solid waste," along with most, but not all, of the Federal exemptions and exclusions.[8] Continued beneficial use of INMETCO's slag would then depend upon the extent to which U.S. EPA's rules are incorporated into the Pennsylvania regulations. By declining to adopt the applicable EPA exemptions and exclusions -- even though there has been no showing that these exclusions are inconsistent with the protection of public health -- the Board could be jeopardizing the future beneficial use of INMETCO's slag. That, in turn, could have severe financial consequences for the Company, thereby leading to a reduction in the important recycling activity performed by INMETCO.

The foregoing scenario is not entirely hypothetical. Under a pending rulemaking

---

[8]See 27 Pa. Bull. at 6409.

proposal, EPA would expand the range of permissible uses for HTMR slag under the generic exclusion from the "derived-from" rule in 40 CFR § 261.3(c)(2)(ii)(C)(*1*) -- if the slag meets specified health-based exclusion levels. At the same time, however, EPA would eliminate the "use constituting disposal" exemption of 40 CFR § 266.20(b) for all slags generated by the HTMR processing of K061, K062, and F006.[9] Thus, if the Comprehensive Amendments are adopted as the Board proposes, and if EPA finalizes the pending rulemaking proposal, there apparently would be no basis for using INMETCO's slag beneficially on the land in Pennsylvania -- even if it meets all of the health-based generic exclusion levels established by EPA and thus qualifies for such use under Federal law. This is because:

- "Coproduct" determinations no longer would be recognized under the Pennsylvania regulations;

- The "use constituting disposal" exemption of 40 CFR § 266.20(b) no longer would be available under EPA's rules or under the Pennsylvania regulations, which automatically would incorporate any changes in EPA's rules by reference; and

- The generic exclusion from the "derived-from" rule, while available under 40 CFR § 261.3(c)(2)(ii)(C)(*1*) of EPA's regulations, would not be available under the Pennsylvania regulations because proposed 25 Pa. Code § 261a.3(a)(1) states that K061-derived, K062-derived, and F006-derived HTMR slags continue to be hazardous wastes in Pennsylvania even though they meet EPA's health-based criteria for exclusion.

In sum, the Board has provided no explanation of why the health-based exclusion from the "derived-from" rule that EPA has established for certain HTMR slags in 40 CFR § 261.3(c)(2)(ii)(C)(*1*) is not appropriate in Pennsylvania. We are aware of no "compelling State

---

[9]See 59 Fed. Reg. 67256, 67262, 67264 (December 29, 1994). EPA currently is gathering additional data related to this rulemaking.

interest" that would justify a departure from EPA's regulations on this issue, and the Board has suggested none. Yet, if the Board modifies the EPA regulations as it proposes to do, beneficial land-based uses of HTMR slag -- which currently are allowed under both Pennsylvania and Federal rules -- could become subject to a blanket prohibition in the Commonwealth, even though:

(1) The Department has made a "coproduct" determination for the slag under current law; and

(2) EPA permits such uses under Federal law based on a finding that they are consistent with the protection of human health and the environment.

The Board can and should avoid such an unwarranted result, by incorporating 40 CFR § 261.3(c)(2)(ii)(C)(*1*) into the Pennsylvania regulations without modification. If it is reluctant to incorporate this provision without restriction, the Board, at the very least, should incorporate 40 CFR § 261.3(c)(2)(ii)(C)(*1*) into the new Pennsylvania regulations with respect to HTMR slags for which the Department has concurred in a "coproduct" determination under the current regulations. Otherwise, the costs of environmentally beneficial HTMR processing in Pennsylvania may escalate substantially, making it more difficult for this important form of recycling to compete financially with landfilling of metal-bearing wastes.

III. Proposed Modification of 40 CFR § 261.6 - Requirements for Recyclable Materials

The Board is proposing to incorporate 40 CFR § 261.6 of EPA's rules (dealing with the regulation of recyclable materials) into the Pennsylvania regulations, with one exception that makes the Pennsylvania regulations more stringent. The Federal rule, 40 CFR § 261.6(c)(1),

subjects facilities that store recyclable materials before they are recycled to the full range of hazardous waste storage requirements, including applicable permit requirements. However, the Federal rule explicitly exempts "the recycling process itself" from regulation. See *id.* The Board's proposal would not incorporate this exemption for "the recycling process itself" into the comparable provision of the Pennsylvania rules. Instead, proposed 25 Pa. Code § 261a.6 would require facilities that "reclaim or otherwise treat hazardous waste" to obtain a hazardous waste recycling permit.[10]

According to the Board, this deviation from the Federal rules is necessitated by the facts that (1) the Pennsylvania Solid Waste Management Act (SWMA) requires a permit for the treatment of hazardous waste (as does the statute under which the EPA regulations were promulgated[11]) and (2) "recycling hazardous waste falls within the SWMA definition of 'treatment.'"[12] We believe this second proposition is overly broad. While some forms of recycling may fall within the SWMA definition of "treatment," others -- including HTMR reclamation processes that produce metal ingot products -- do not.

Section 402 of the SWMA, 35 P.S. § 6018.103, defines the term "treatment" as follows:

> Any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any

---

[10]See 27 Pa. Bull. at 6410, 6421.

[11]See Solid Waste Disposal Act § 3005(a), 42 U.S.C. § 6925(a).

[12]See 27 Pa. Bull. at 6410.

> waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, suitable for recovery, suitable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of waste so as to render it neutral or nonhazardous. (Emphasis supplied.)

This definition can reasonably be said to encompass a recycling process that is "designed to change the physical, chemical, or biological character or composition of a[] waste . . . so as to render such waste . . . suitable for recovery." And, indeed, such recycling processes exist -- *e.g.*, a recycling process that dries a sludge so that it becomes "suitable for recovery" in a subsequent operation. But the definition does not fit an operation like INMETCO's HTMR process, which is designed to actually recover or reclaim metals from wastes, not simply to render the wastes "suitable for recovery" in subsequent processing. Since the SWMA definition of "treatment" does not encompass a true reclamation process in which the actual recovery of usable materials occurs, the SWMA does not require that the owner/operator of such a process must obtain a "recycling/treatment" permit.

Accordingly, if the Board feels compelled to modify 40 CFR § 261.6 of the Federal regulations at all, it should narrow the modification so that a "recycling-treatment" permit is required only for those types of recycling operations that do not produce a usable product. As long as hazardous waste storage permit and related requirements continue to apply to recycling facilities, there is no compelling State interest in regulating a recycling process that is not regulated by U.S. EPA and that does not fall within the SWMA definition of "treatment."

IV. Licensing and Fee Requirements for the Transportation of Hazardous Waste

Under the proposed Comprehensive Amendments, 25 Pa. Code § 263a.13 would preclude anyone from transporting hazardous waste in Pennsylvania unless the person has first obtained from the Department a license to transport hazardous waste in the Commonwealth. We are concerned about the possibility that this provision may be read to apply to the transportation of HTMR slag to sites where the slag is to be used in land applications like roadbuilding. Such a requirement would complicate -- and add to the costs of -- using HTMR slags beneficially, as they have been used for many years in Pennsylvania. The situation would be made even worse if the hazardous waste transportation fees specified in proposed 25 Pa. Code § 263a.23 are deemed to apply to shipments of such slag. The added costs would severely depress the market for HTMR slags and negatively impact the metals recovery processes in which the slags are generated. There is no reason to apply 25 Pa. Code §§ 263a.13 and 263a.23 to the transportation of HTMR slags, and the Board should make clear that they do not apply.

Assuming that an HTMR slag meets the conditions specified in EPA's "use constituting disposal" rule, 40 CFR § 266.20(b), the hazardous waste transportation fee provision of proposed 25 Pa. Code § 263a.23 presumably would not apply, because a waste-derived product that qualifies under 40 CFR § 266.20(b) is "not presently subject to regulation" according to the text of that provision. Among other things, that means the slag can be transported without a hazardous waste manifest. Since hazardous waste transportation fees under proposed 25 Pa. Code § 263a.23 apply only to transportation "which requires a [hazardous waste] manifest," there would be no basis for assessing the transportation fee on shipments of an HTMR slag that meets the "use constituting disposal" conditions of 40 CFR § 266.20(b).

The same result should obtain as far as proposed 25 Pa. Code § 263a.13 is concerned. That is, since an HTMR slag that qualifies under 40 CFR § 266.20(b) is "not presently subject to regulation," the slag should not have to be transported by a person holding a hazardous waste transportation license. This also makes sense as a matter of policy, since HTMR slags that are to be "used in a manner constituting disposal" will not present a hazard in the event of a spill during transport. Indeed, by definition, their intended use involves land placement.

For these reasons, the Board should make clear that HTMR slags (and other waste-derived products that are used in a manner constituting disposal) do not have to be transported by a licensed hazardous waste transporter under 25 Pa. Code § 263a.13 and are not subject to the hazardous waste transportation fee of 25 Pa. Code § 263a.23.[13]

V. Waste Analysis and Module I Approval Requirements

A. The Module I Approval Requirement Should Be Eliminated or Narrowed.

Under the Comprehensive Amendments, the Board proposes to go beyond the Federal rules relating to waste analysis, by requiring that the operator of a hazardous waste treatment, storage, or disposal (TSD) facility submit for DEP approval a Module I waste analysis

[13]If the "coproduct" determination for INMETCO's slag is preserved under the new rules (see Part I above), these points presumably would be moot because the slag would not be a solid waste under the Pennsylvania regulations.

form before the facility accepts a specific waste from a specific generator for the first time.[14] The Board suggests that this pre-approval requirement is necessary "in order to ensure that the facility is able to manage the hazardous waste properly."[15] But that simply is not the case. In the permitting process, the DEP will have identified the specific types of waste that can be safely and properly stored, treated, processed, and/or disposed of at the TSD facility. Once those specific waste types have been identified in the facility's permit, the owner/operator should not have to secure case-by-case approval for each specific waste that is accepted for the first time from a specific generator. As long as the new waste is one that the facility has been authorized to handle in its permit, there is no reason to expect that the facility will not be able to manage the waste properly, and there is no need or justification for the additional paperwork and delay associated with securing the DEP's prior approval.

The Module I pre-approval requirement -- along with the associated application fee -- imposes unnecessary costs and burdens on recyclers and other TSD facilities, reduces operating flexibility, and makes it more difficult to establish relationships with potential new customers who may be unwilling to postpone a decision on where to send their waste until the Module I submission and approval process has run its course. It is like requiring the TSD facility to go through a mini-permitting process every time it wishes to accept a new waste from an existing customer or any waste from a new customer -- even though the facility has already been authorized to manage that type of waste in its treatment, storage, or disposal permit. Such a

---

[14]See proposed 25 Pa. Code § 264a.13. Proposed § 265a.13 contains comparable provisions for Interim Status facilities.

[15]See 27 Pa. Bull. at 6411.

redundant requirement is unwarranted and certainly serves no compelling State interest.

For example, over the years, INMETCO has submitted more than 800 Module I forms to the DEP, and the total continues to climb. This has involved significant costs and delays. Yet the DEP has never found that INMETCO was unable to properly manage a waste for which a Module I form was submitted.[16] The Module I process thus creates unjustified paperwork burdens, costs, and obstacles to the conduct of our business by requiring repeated submissions to DEP for approval to handle wastes that INMETCO already has been authorized to manage in its Hazardous Waste Storage and Recycling permits. The Board may believe this process is justified in the case of a hazardous waste landfill. We cannot say. But it clearly makes no sense for an HTMR facility like INMETCO, where Module I requirements simply create an unnecessary and unproductive obstacle to environmentally sound recycling. It is doubtful that the Board could justify the Module I requirement for HTMR recycling operations using a cost-benefit analysis.

The problem can be solved either by eliminating the Module I approval requirement altogether -- at least for recycling facilities -- or by adding a provision to proposed 25 Pa. Code § 264a.13 stating that the requirements of § 264a.13(1) are waived for any waste that complies with the facility's approved Waste Analysis Plan, falls within a waste category that is specifically identified in the facility's permit, and is handled in accordance with the permit conditions. We urge the Board to adopt one or the other of those approaches. Furthermore, to

---

[16]Occasionally, a Module I form has been returned for technical reasons -- *e.g.*, incorrect signature -- but INMETCO has never been told that it is not qualified or authorized to handle a waste identified on a Module I.

the extent that the Module I approval requirement is retained, DEP regional offices should be given the discretion to waive the Module I submission requirement for individual TSD facilities where the regional office concludes that its approval of Module I forms is not necessary in order to ensure that the facility accepts only wastes it is able to manage properly.[17]

B. Source Reduction Strategy Submission Requirements Are Unnecessary.

Proposed 25 Pa. Code § 264a.13 also is objectionable because it requires that each Module I report include a copy of the generator's source reduction strategy or documentation that an out-of-state generator has complied with section 3005(h) of the Solid Waste Disposal Act. This provision is unnecessary as far as in-state generators are concerned because proposed 25 Pa. Code § 262a.100 already requires hazardous waste generators in Pennsylvania to prepare source reduction strategies and to make them available for inspection by the DEP. As far as generators located outside Pennsylvania are concerned, the provision is both unnecessary (since out-of-state generators have to satisfy source reduction strategy requirements under Federal regulations or the hazardous waste regulations of the states in which they are located) and inappropriate (since it effectively projects the DEP's jurisdiction beyond the borders of the Commonwealth and places Pennsylvania recyclers and other operators of TSD facilities in the role of policemen who must

---

[17]The Comprehensive Amendments would allow operators to use the Generic Module I process to expedite their ability to receive wastes from new generators. As discussed in text, however, the Module I process is unnecessary to begin with, so the additional flexibility afforded by the Generic Module I process does not solve the problem -- particularly since there would still be at least a 15-day delay before waste could be accepted from a new customer. Furthermore, the fee for submission of a Generic Module I -- $1,500 -- is inexplicably high. We do not understand why it should be five times as costly for the DEP to review a Generic Module I application as an individual Module I application.

ensure that the source reduction strategy requirements of EPA or other states are being complied with).

Pennsylvania has no compelling State interest in ensuring that out-of-state generators are implementing source reduction and waste minimization strategies. That is the province of U.S. EPA or the state in which the generator is located. The DEP should not duplicate requirements of U.S. EPA and other states and should not place Pennsylvania recyclers and TSD facilities at a competitive disadvantage by forcing them to oversee source reduction strategies of out-of-state generators. This is particularly true since most companies have found it necessary to implement source reduction and waste minimization programs for competitive reasons, without regard to regulatory requirements.

VI. Proposed Modification of 40 CFR § 266.20(b) - EPA's "Use Constituting Disposal" Rule

In 25 Pa. Code § 266a.20, the Board proposes to incorporate U.S. EPA's "use constituting disposal" rule into the Pennsylvania regulations. However, the Board would add to the EPA rules a requirement that before a waste-derived product may be used in a manner constituting disposal, the producer of the product must obtain the DEP's written approval by demonstrating that the recyclable materials contained in the product have undergone a chemical reaction so as to become inseparable by physical means.[18] The Board asserts that such "prior

[18]See 27 Pa. Bull. at 6446. There is a typographical error in the last line of proposed 25 Pa. Code § 266a.20(b) as printed in the Pennsylvania Bulletin. The provision mistakenly refers to "the chemical reaction described in 40 CFR 260.20(b) (relating to general)." (continued...)

written approval is required to ensure that this provision is not abused."[19]

The recyclable materials used as inputs to INMETCO's high temperature metals recovery process clearly have undergone a chemical reaction so as to become inseparable by physical means in the slag produced by the HTMR smelting furnace. As U.S. EPA has observed, the metal constituents of the recyclable materials that are inputs to an HTMR process are either recovered or

> "thermo-chemically stabilized in HTMR residues such as slags. This thermo-chemical stabilization of the non-volatile metals occurs due to the high temperatures present, the relatively efficient mixing conditions, the oxidation-reduction conditions in the primary furnace, and the presence of other inorganic constituents that act, in effect, as stabilization reagents." 56 Fed. Reg. 41164, 41168 (August 19, 1991).

Clearly, there can be no question that an HTMR slag like INMETCO's meets the "chemical reaction-inseparable by physical means" test of 40 CFR § 266.20(b), and no one could seriously suggest that INMETCO has "abused" this provision. Furthermore, the Department has reviewed extensive physical and chemical information relating to INMETCO's slag and, on the basis of that review, has concurred in INMETCO's "coproduct" determination for the slag. In these circumstances, there is no reason to require further approval by the Department as a precondition to the continued use of INMETCO's slag in a manner that constitutes disposal.

Accordingly, if a requirement for prior DEP approval is retained in 25 Pa. Code

---

[18](...continued)
The correct reference is to "the chemical reaction described in 40 CFR 266.20(b) (relating to products containing recyclable materials that are used in a manner that constitutes disposal)."

[19]See 27 Pa. Bull. at 6415.

§ 266a.20(b), the requirement should be waived in the case of HTMR slags for which the Department has concurred in a "coproduct" determination.

Conclusion

As discussed above, we support the concept of simplifying and streamlining the Pennsylvania Hazardous Waste Regulations so that they directly track the parallel Federal rules except where a modification is necessary to serve an "identified compelling State interest." We believe, however, that a number of the Board's proposed modifications of the Federal regulations add unnecessary complexity and costs to the regulatory program and are not justified by a compelling State interest. Such modifications should not be made.

In addition, the definition of "coproduct" and the availability of "coproduct" determinations should be retained. Otherwise, the Department may wind up regulating "as hazardous wastes materials that industries could reuse and that the Federal government does not regulate"[20] -- thereby creating a strong disincentive to desirable recycling activity. At the very least, the Board should adopt a "grandfathering" provision that excludes from the definition of "solid waste" under the Comprehensive Amendments those materials for which "coproduct" determinations have been made under the current regulations.

---

[20]See 27 Pa. Bull. at 6409.