INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
333 MARKET STREET
14TH FLOOR
HARRISBURG, PA 17101

(717) 783-5417
Fax (717) 783-2664

March 6, 1998

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

Re: IRRC Regulation #7-328 (#1905)
Environmental Quality Board
Hazardous Waste Management

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-328. These comments outline areas of concern raised by Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact James M. Smith at 783-5439 or John Nanorta at 787-8491. They have been assigned to review this regulation.

Sincerely,

Robert E. Nyce
Executive Director

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

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-328

HAZARDOUS WASTE MANAGEMENT

March 6, 1998

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

1. Status of "coproduct" determinations - Clarity and Implementation Procedures

The proposed amendments would delete the concept of "coproducts" in Pennsylvania regulations. Several commentators are concerned about the lack of a transition mechanism for existing and proposed coproduct determinations to ensure that they continue not to be a "waste" under federal requirements. One commentator recommended maintaining coproduct determinations in Pennsylvania. We recommend that the EQB explain the status of existing and proposed coproduct determinations. We also recommend that the EQB develop a transition plan for existing and proposed coproduct determinations which would minimize the impact on the regulated community.

2. Section 260a.10 Definitions - Clarity and Need

a) Clarity of the proposed format

Proposed Section 260a.10 is broken into three separate categories related to definitions. Subsection (a)(1) lists definitions not incorporated by reference, Subsection (a)(2) contains definitions whose dates are modified, and Subsection (b) provides definitions for terms that do not appear in the Code of Federal Regulations (CFR). The proposed format requires a reader to review all three subsections to determine how a term is defined, or whether it differs from the CFR. It may be clearer to consolidate these provisions into one list of definitions. The individual definitions can provide all of the important details regarding a particular term. Using a consolidated format, the reader could determine whether and how a term varies from the CFR by reviewing one subsection. We recommend that the EQB consider consolidating the definitions into one subsection.

b) Clarity of the terms "management," "storage," and "transportation"

Proposed Subsection (a)(1) provides that the terms "management," "storage," and "transportation" are not incorporated by reference from the CFR. However, as commentators noted, since these terms are not later defined in Subsection (b), the regulation is silent on the definition of these key terms. We recommend that the EQB define the terms "management," "storage," and "transportation" to improve clarity.

c) Clarity of the definition of "disposal"

Subsection (b)(2) defines the term "disposal" differently than that provided in the CFR. The proposed definition is word-for-word from the Pennsylvania statutory definition, except that the last sentence expands the definition further to include abandoned solid waste in the Solid Waste Management Act (SWMA). The EQB did not provide a sufficient explanation for including abandonment in the definition. Also, it is not clear how the EQB would be able to enforce this additional language since it does not appear in the SWMA. We recommend that the EQB explain the basis for expanding the definition or delete the last sentence from the definition for consistency with the SWMA.

d) Need for a definition of the term "hazardous waste management unit"

The definition of the term "hazardous waste management unit" in Subsection (b)(6) has no discernible difference in meaning from the CFR definition of the same term. Any variance from the CFR may create confusion, which is the opposite of the intent stated in the Preamble. Therefore, we question what useful purpose the definition serves. We recommend that the EQB explain the need for this definition in the regulation or delete it and incorporate by reference the federal definition of the same term.

e) Clarity of the term "processing"

Section 261a.7(1) states "...and which is being transported to a facility for processing (as defined in § 260a.10 and 40 CFR 260.10 (relating to definitions))." Presumably, the regulation refers to a definition of the term "processing." However, the term "processing" does not appear in the definitions of Section 260a.10 or in 40 CFR 260.10. We recommend, for improved clarity, that the EQB add a definition of the term "processing."

3. Section 261a.3 Definition of "hazardous waste" - Clarity, Need, and Economic Impact

The EQB has proposed two exceptions to the federal definition of "hazardous waste." The EQB would continue to regulate, as hazardous waste, the waste streams exempted as hazardous wastes by 40 CFR Sections 261.3(c)(2)(ii)(C) and (D). The EQB states in the Preamble that these wastes should not be exempted from hazardous waste regulation at this time because the Department of Environmental Protection (DEP) has no experience with these waste streams.

Seven commentators expressed concern about regulating these materials as hazardous wastes. They question why the EQB is more restrictive than the Environmental Protection Agency (EPA) in classifying these wastes. The commentators state that beneficial uses of High Temperature Metal Reclamation (HTMR) slag, which is currently allowed under both Pennsylvania and federal rules, would be prohibited if the proposed regulation does not include

the federal exemption. One commentator observed that the proposed regulation may require a transporter of HTMR slags to be licensed under Section 263a.13 and pay a fee under Section 263a.23. The commentators are of the opinion the EQB has not established a compelling state interest which justifies a deviation from federal rules.

We agree that the EQB needs to better justify the need to classify wastes as hazardous which the federal government exempts from its definition of "hazardous waste." The EPA has reviewed these wastes and established classifications for what should and should not be a "hazardous waste." The DEP is reviewing or has approved many of these materials as coproducts in Pennsylvania, thereby exempting them from being classified as hazardous wastes. However, some previously approved coproduct materials would, under this rulemaking, be reclassified as hazardous wastes. We do not understand how the DEP can claim it has no experience with these waste streams when DEP has determined that they meet the current definition of coproducts.

We request an explanation of why this rulemaking should not be amended to adopt the federal government definition of "hazardous waste," including the exemptions. If the EQB decides not to adopt the federal rule, we request that the EQB identify and explain the compelling reason(s) why Pennsylvania should have different hazardous waste rules. We also request the EQB explain the economic impact on the private sector resulting from what would be essentially a reregulation of currently exempted waste substances.

There is also a concern with the format of proposed Section 261a.3. The commentators are concerned about the clarity of exemptions because the proposed regulation classifies wastes as hazardous if they are described in the 40 CFR Sections 261.3(c)(2)(ii)(C) or (D). Thus, if the federal government adds an exemption to 40 CFR Sections 261.3(c)(2)(ii)(C) or (D), the proposed format of Pennsylvania's regulations, as written, would counter the federal addition, and would specifically classify the waste as hazardous. We recognize that this is a generic problem encountered when there is a variance from incorporation by reference. However, it is an important consideration. If the EQB can justify the variance from the CFR as described above, we recommend that the EQB consider modifying the language so that any additions to 40 CFR Sections 261.3(c)(2)(ii)(C) or (D) are not automatically reversed in Pennsylvania.

4. Section 261a.4 Exclusions - Need and Economic Impact

Proposed Section 261a.4 provides a caveat that materials excluded as "solid waste" under 40 CFR Section 261.4 are only excluded from regulation in Pennsylvania as "hazardous wastes." Three commentators questioned the need to regulate, as waste, materials that are being recycled or that are not classified as wastes by the federal government. An example is spent sulfuric acid used to produce virgin sulfuric acid or "closed loop" recycling processes. We question the EQB's authority to regulate recycling activities under the SWMA. The SWMA regulates materials that will be disposed of, not materials to be reused or recycled. We recommend that the EQB explain the need to regulate as "waste" those materials entering a recycling process. We also recommend that the EQB explain the benefits that will be achieved from regulation of materials entering recycling processes and how the benefits outweigh the economic impact on the private sector of treating these substances as hazardous waste.

5. Section 261a.6 Requirements for recyclable materials - Statutory Authority, Need, and Economic Impact

Section 261a.6 provides a broad requirement for owners and operators of facilities that manage recyclable materials to obtain a treatment permit. Federal regulations do not require a permit for hazardous wastes that are recycled; they only require a storage permit for storage of recyclable materials before the materials are recycled. However, the EQB believes that recycling hazardous wastes falls within the definition of "treatment" under the SWMA and therefore, Pennsylvania must impose more stringent standards than those in federal requirements.

Commentators disagree with the EQB's interpretation that recycling hazardous wastes falls within the definition of "treatment" under the SWMA. They believe the SWMA does not directly include recycling in the definition of "treatment." They also believe the additional burden of obtaining a permit discourages recycling in Pennsylvania. We agree and believe the EQB is without authority to require permitting of recycling or reclamation activities. The SWMA only requires permits for treatment, storage and disposal (TSD) facilities of hazardous waste. By defining recycling as treatment, the EQB has exceeded its authority.

Case law is clear as to the regulatory authority of agencies. The Commonwealth Court has stated that agencies are vested only with those powers conferred by the statute or such as are necessarily implied from a grant of such powers. The legislative grant of power must be clear; a doubtful power does not exist. *DeMarco v. Department of Health*, 397 A.2d 61 (1979); *see also, PA Liquor Control Bd. v. Office of Atty. General*, 534 A.2d 1146 (1987).

Here, the SWMA confers no specific authority upon the EQB to require permits for recycling or reclamation activities. Likewise, the authority to impose permitting cannot be implied from a definition of treatment contained in the SWMA. The definition of treatment does nothing more than define that term; it does not establish any substantive right on the EQB to require recycling or reclamation permits. *See Schoepple v. Lower Saucon Township*, 624 A.2d 699 (1993). Furthermore, the definition of treatment requires a change in the physical, chemical, or biological character of the waste. Where a process simply recovers or reuses a material without any changes to the physical, chemical, or biological character, no treatment occurs. Therefore, we recommend that the EQB delete permitting of recycling and reclamation facilities from its final-form regulation.

We also believe Pennsylvania is in a better position to evaluate the need to impose additional requirements beyond what is contained in the federal rules. Given the experience that the DEP has had with recycling facilities, the EQB should take this opportunity to reconsider its historic interpretation of permitting recycling and recovery facilities consistent with the Regulatory Basics Initiative and the Governor's Executive Order No. 1. We note that Section 6018.102(2) of the SWMA (35 P.S. § 6018.102(2)) states that one of the purposes of the SWMA is to "encourage the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy." Requiring unnecessary permitting works contrary to that purpose and others designed to curb excessive regulation.

If the EQB does not delete permitting of recycling and reclamation facilities, we request that the EQB:

a) Explain what compelling interest is served by requiring permits for all recycling and reclamation activities in Pennsylvania that is not adequately addressed in the federal requirements;

b) Explain how a permit will be used by the DEP to provide unique protections that are not available elsewhere under other federal or state provisions;

c) Provide a quantification of the costs of permitting all recycling and reclamation facilities to both the DEP and the permittees; and

d) Explain how the benefits of permitting outweigh the costs of additional compliance.

6. Section 262a.22 Number of copies - Statutory Authority, Need, Duplication, and Reporting Requirements

Section 262a.22 would require six part manifests whereas the CFR only requires four part manifests. We recognize that requiring a six part manifest is a reduction from the existing Pennsylvania requirement for an eight part manifest. However, we agree with the commentators that requiring fewer manifests would be less burdensome on the regulated community. The EQB believes two additional copies of manifests are needed to allow states to properly monitor transportation of these wastes. The EQB's proposed regulation would exceed the federal requirements by requiring additional copies to allow the designated facility to send copies to the generator state and the destination state.

We note that there are other extensive reporting requirements in 40 CFR Section 262, Subpart D *Recordkeeping and Reporting*. Subpart D requires the generator to keep manifests for three years (§ 262.40), file biennial reports of shipments (§ 262.41), report exceptions when manifests are not properly executed (§ 262.42), and file any additional reports the administrator deems necessary concerning quantities and disposition of hazardous wastes (§ 262.43). Therefore, we question why the EQB would require additional copies of manifests to be sent to DEP for every shipment.

We have three concerns with the proposed requirements. First, we see no need beyond the federal requirement for a four part manifest in order to provide sufficient monitoring. The federal requirements appear to be extensive and sufficient. Therefore, we recommend that the EQB delete Section 262a.22. If the EQB believes it is necessary to exceed federal requirements, we recommend that the EQB explain how the DEP uses the copies of manifests to monitor the flow of wastes and how this monitoring results in an effective protection of the environment.

Second, the regulation requires the facility to send copies to the generator state *and* the destination state. This requirement goes beyond DEP's statutory authority and is duplicative. If either the generator state or destination state are not Pennsylvania, we question DEP's authority to require a copy of a manifest to be sent to and received by another state and how DEP would enforce this requirement. Other states determine their need to receive copies of manifests for hazardous waste facilities within their borders, not the EQB.

Finally, if Pennsylvania is both the generator state and the destination state, the regulation is duplicative because it requires the facility to have two copies available to send to DEP. While DEP may not actually require two copies in practice, a sixth copy of the manifest would have to

be available according to the proposed regulation. If the EQB believes it is necessary to exceed federal requirements, we recommend that the proposed requirements for additional manifests be amended to only require the facility to send one copy to DEP.

7. Section 263a.12 Transfer facility requirements - Reasonableness

Sections 263a.12(1) and (2) require the DEP to approve prevention plans in writing. However, the regulation does not provide any time frame for the DEP to act on such plans. One commentator questioned what happens if a plan is submitted but the DEP does not act on it. The commentator suggested that the DEP should be required to act on a plan within 30 days, or the plan would be deemed approved. We agree. Specifying a time frame for action on the part of the DEP is reasonable and we recommend that the EQB add such a provision to the rulemaking.

8. Sections 264a.13 and 265a.13 General and generic waste analysis - Need, Economic Impact, Reporting, and Paperwork

In Sections 264a.13 and 265a.13, the EQB proposes to exceed federal requirements by requiring an owner or operator of a TSD facility to submit an application and secure DEP approval to handle the waste prior to receiving a particular waste from each generator for the first time. Four commentators oppose exceeding federal requirements. They cited the cost burdens of an application process for case-by-case approvals, duplication of the permitting process for the facility, delay in being able to handle new wastes and customers, duplication of source reduction strategy requirements, and competitive concerns with non-specific language requiring "other information."

In the Preamble, the EQB requested comments on the proposal to retain Module 1 applications. The EQB currently requires that the DEP must approve a waste stream before a facility can accept a particular waste in order to ensure that facility is able to manage the waste properly.

We see no need for this requirement because it duplicates approvals previously granted through the permitting process. If a facility is permitted to handle a waste category under its permit, it is unclear what purpose is served by requiring another application and approval for individual wastes of a class which the applicant has been previously approved by permit to accept. For example, one commentator claims to have submitted hundreds of Module 1 applications at a cost of $1,500 per application, with no rejections. Consequently, we recommend the EQB drop the Module 1 application requirement because it is costly, duplicative, and unnecessary.

If it is retained, the EQB needs to explain in more detail why the federal requirements are insufficient. More specifically, the EQB should explain how the existing approval of wastes on a case-by-case basis has resulted in greater protection of Pennsylvania's environment.

9. Sections 264a.52 and 265a.52 Content of contingency plan - Clarity, Need, and Economic Impact

Sections 264a.52 and 265a.52 exceed federal requirements by requiring contingency plans to be in accordance with "DEP guidance for contingency plans." We have four concerns with this requirement. First, it is not clear exactly what "DEP guidance for contingency plans" consist of because it is not included or referenced in the regulation. Second, the EQB needs to explain why the federal requirements are insufficient. Third, the EQB should consider allowing the use of "Integrated Contingency Plans" used by the federal government as suggested by commentators. Finally, Subparagraph (2) of each section is vague in requiring a contingency plan to be submitted "at the time in the application process the Department prescribes."

We recommend that the EQB justify the need to exceed federal requirements and include an estimate of the economic impact of this requirement on the regulated community. If the EQB believes it is necessary to exceed federal requirements in this area, it should include the "DEP guidance for contingency plans" in the regulation and clarify when a contingency plan is required to be submitted.

10. Sections 264a.56 and 265a.56 Emergency procedures - Statutory Authority, Conflict with Existing Regulations, and Protection of the Public Safety

The emergency procedures require the emergency coordinator to immediately notify the DEP and the National Response Center by phone. Commentators expressed two concerns with this requirement. First, they question the DEP's authority to require reporting to a federal agency and how the DEP would enforce such a requirement. We believe it is also important to consider that the parallel federal requirements (at *40 CFR §§ 264.56(a)(2) and (d)(2)*) require immediate notification of *either* a designated government official *or* the National Response Center. The language of the proposed regulation conflicts with federal requirements because it requires notification of both the DEP *and* the National Response Center. We request that the EQB reevaluate this provision and revise it to comport with its statutory authority and the practicality of requiring only one notification.

Second, one commentator questions why the regulation requires notification of the DEP's Harrisburg office rather than a DEP regional office. The commentator stated this requirement differs from other DEP emergency procedures which require notification of regional offices. Another commentator suggested using the Emergency Operations Center number to integrate emergency reporting. We see value in requiring centralized notification because it allows one phone number to be used for notification regardless of the location of the emergency.

Notification of the appropriate regional office should be an internal procedure within the DEP, rather than leaving the judgment of which regional office number to call to the person reporting. It is also more efficient and reliable for the DEP to maintain one 24-hour notification phone number than six. Nevertheless, we recommend that the EQB review the selection of the phone number used to report emergencies to assure that the DEP is not duplicating the services and equipment of the Emergency Operations Center or any other Commonwealth agency.

Finally, one commentator noted that the language of these sections is largely duplicative of federal requirements. We recommend that the EQB eliminate duplicative language.

11. Section 264a.96 Compliance period - Need and Economic Impact

Proposed Section 264a.96 requires several reports which exceed federal requirements. The proposed monitoring and resulting reports impose costs on all of the regulated community and there are no provisions for exemptions. Commentators are concerned that these requirements are not flexible enough to accommodate different conditions at different sites and believe that federal requirements are more flexible.

The commentators have raised a valid point. While these reports may be appropriate in some instances, they may not be needed or useful in all instances. A more flexible approach would direct the resources of both the regulated community and the DEP to the areas which need to be monitored frequently. We recommend that the EQB explain the compelling need for Pennsylvania to exceed federal requirements for all facilities, quantify the economic impact on the regulated community, and explain why the benefits exceed the costs.

12. Section 264a.145 Financial assurance for post-closure care - Need and Adverse effects on Competition

Proposed Section 264a.145 provides that *40 CFR 264.145* is not incorporated by reference. Two commentators commented that Pennsylvania's requirements for closure and post closure of RCRA facilities are more burdensome than other states and the federal requirements. The commentators believe the variance from federal requirements puts Pennsylvania facilities at a competitive disadvantage. The EQB did not provide an explanation in the Preamble for not adopting *40 CFR 264.145*. It is not clear what the EQB's compelling reason is that justifies foreclosing all of the options available under *40 CFR 264.145* which include trust funds, surety bonds, letters of credit, insurances, corporate guarantees, and other assurances. We recommend that the EQB either revise the rulemaking to incorporate *40 CFR 264.145* or explain why all of the mechanisms in that section are not appropriate or sufficient, and the economic impact on Pennsylvania facilities of the proposed regulation.

13. Section 264a.147 Liability requirements - Need and Clarity

Section 264a.147 provides Pennsylvania liability requirements which exceed federal requirements. The EQB provided an explanation in the Preamble that liability amounts in Pennsylvania will differ from federal requirements and that there is a unique SWMA requirement for an ordinary public liability policy. The SWMA requires an ordinary public liability insurance policy in an amount prescribed by rules and regulations promulgated under the SWMA. Commentators believe the federal requirements are sufficient and the requirements of proposed Section 264a.147 are misplaced. The Preamble is not clear on how the proposed liability amounts were chosen or how the insurance policies required by the federal regulation differ significantly from the SWMA requirements. Given the EQB's discretion in the SWMA to prescribe the amounts of the insurance, we question the need to vary from the federal requirements. We recommend the EQB either revise the rulemaking to incorporate federal requirements or explain the compelling need for Pennsylvania to vary from federal requirements.

14. Section 264a.151 Wording of instruments - Clarity

Commentators expressed confusion over the scope of proposed Section 264a.151 and its effects on other sections. We agree that the EQB has not provided sufficient explanation of what federal requirements may not be consistent with the laws and regulations of the Commonwealth. The regulation needs to be more specific with regard to which existing federal laws or regulations are not consistent with the laws of this Commonwealth. We recommend that the EQB add the appropriate citations to clarify Section 264a.151.

15. Sections 264a.175 and 265a.175 Containment - Need

Sections 264a.175 and 265a.175 provide extensive storage requirements for containers including maximum heights, depth of a group, and aisle spacing. Commentators stated that there are no parallel federal requirements and these requirements do not accommodate newer storage containers such as "totes." Commentators believe the prescriptive nature of the proposed requirements will reduce the flexibility of storage without a significant benefit. We recommend that the EQB explain the need for these provisions because the prescriptive format may hinder the use of more modern storage containers. We recommend that the EQB consider revisions to direct the requirements toward performance and facilitating access in emergencies rather than imposing prescriptive requirements which may not be compatible with advances in storage technology.

16. Section 265a.75 Biennial report - Need

Section 265a.75(b) requires reports to be maintained for the life of the facility. In contrast, the federal government only requires record retention for three years. Commentators questioned the practical need to retain records for the life of the facility. We recommend that the EQB delete this requirement. If the EQB does not do so, we request that the EQB explain the compelling need to exceed the federal requirement for record retention and how records more than three years old will be used by the DEP.

17. Section 266a.20 Incorporation by reference and applicability - Need

Proposed Section 266a.20(b) requires producers to demonstrate and secure the DEP's written approval that recyclable materials have undergone the chemical reaction described in 40 CFR 260.20(b). In contrast, the federal requirements do not require prior written approval. The EQB believes that a prior written approval provision is necessary to safeguard against abuses. The EQB further states that this requirement is consistent with most other states' regulatory programs. Commentators take issue with the EQB's statement that the requirement is consistent with other states' regulatory programs. Commentators assert that their experience is that most other states do not have a similar requirement. We request that the EQB provide a detailed explanation of the compelling need for the proposed requirement and how the information would be used by the DEP.

18. Section 270a.60 Permits by rule - Need and Economic Impact

Proposed Section 270a.60(b) provides requirements in addition to the federal requirements. Five commentators expressed concerns that these requirements impose restrictions on the ability of wastewater treatment facilities which have NPDES permits to accept off-site wastewater. Such provisions would burden these facilities with paperwork that is not required under federal regulations. We recommend that the EQB review the additional restriction and explain the compelling need to exceed federal requirements. We also request that the EQB explain how the perceived benefits outweigh the increased costs.