



**INDEPENDENT REGULATORY REVIEW COMMISSION
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November 16, 1998

Honorable James M. Seif, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17105

Re: IRRC Regulation #7-336 (#1972)
Environmental Quality Board
Residual Waste

Dear Chairman Seif:

Enclosed are our Comments on your proposed regulation #7-336. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact Chuck Tyrrell at 772-3455 or James M. Smith at 783-5439.

Sincerely,

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

Robert E. Nyce
Executive Director

REN:cae

Enclosure

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

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7 - 336

RESIDUAL WASTE REGULATIONS

November 16, 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 (71 P.S. § 745.5a(h) and (i)) 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 economic impact, protection of the public health and safety, need, reasonableness, and clarity of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Consistency with Chapter 250. – Economic Impact, Reasonableness and Clarity

The EQB is proposing revisions for residual waste facilities to blend the remediation requirements of Chapter 250 (relating to the administration of the land recycling program) with the abatement standards in the solid waste program. There are four areas of confusion concerning how Chapter 250 standards will apply to the residual waste regulation.

First, the proposed regulation defines the terms “statewide health standards,” “background standard” and “site-specific standard.” The proposed definitions represent only numeric values. In contrast, these same terms in Act 2 and Chapter 250 regulations encompass more than numeric values. They also include the remediation process and compliance points. The EQB needs to clarify the meaning of these terms for this rulemaking.

Second, the definition of statewide health standard excludes the values used in Sections 250.304(d), 250.305, and 250.308. Why is the EQB excluding these values for residual waste landfills?

Third, a commentator noted that deregulation of the electric industry and the resulting sale of electric generation facilities has affected property lines. The commentator is concerned that there is inconsistency between Sections 289.267 and 250.302 which may affect compliance points beyond property lines. How will compliance points for remediation in Chapter 250 affect this rulemaking?

Finally, the Land Recycling Program will be impacted by this rulemaking because the remediation process creates waste. The classification of this waste will impact the successful remediation of a brownfield. This rulemaking is not clear on whether Chapter 250's standards

and concepts for contamination will be applied to the waste generated by remediation at land recycling sites. The EQB should explain how the Chapter 250 standards will be applied to residual waste generated as part of remediation of brownfields.

2. Section 287.1. Definitions. – Protection of the Public Health and Safety, Economic Impact, Reasonableness and Clarity

Accumulated Speculatively

This definition will allow a generator to accumulate a specific material only if it recycles 75% of that material within a calendar year. Commentators noted that the accumulation of recyclable material is subject to variations in the demand for the recyclable material. Commentators believe the proposed definition does not recognize market conditions and may result in recyclable materials being disposed in landfills.

The EQB should explain the need for this standard and why the 75% annual recycling limit is reasonable. If the EQB maintains the concept of “accumulated speculatively,” it should allow accumulation of recyclable materials for longer time periods when warranted by the recycling market's economic conditions.

Clean Fill

We object and have several concerns with the proposed amendments to the definition of clean fill. First, we object to the reliance on the clean fill guidance document to determine what will be clean fill and what will be waste. The Preamble indicates: “The Department is developing a guidance document that identifies de minimis levels of contamination and criteria for the management of clean fill.” Commentators claim that the current version of the Clean Fill document is unnecessarily restrictive and results in materials being classified as waste when they can be used safely as clean fill.

The specific standards that will be used to determine what will be clean fill and what will be a residual waste should be promulgated as regulations. A guidance document is not subject to the same level of legislative oversight or public notice and input as a regulation. The EQB should include the criteria for clean fill determinations in the regulation, with justification for their reasonableness. The Scientific Advisory Board and other affected groups may be helpful in developing these standards.

Second, the definition uses two undefined terms: “uncontaminated” and “de minimis contamination.” Because these terms are used to define clean fill, it creates confusion as to whether clean fill can contain any contaminants. The EQB needs to define these two terms in the regulation to resolve this inconsistency.

Finally, the last part of the definition provides that “A person using the material as clean fill has the burden of proof to demonstrate that the material is clean fill.” The proposed shift in the burden of proof is inconsistent with rules and regulations of the Environmental Hearing Board found at 25 Pa Code Section 1021.101(b). The EQB should explain the basis for shifting the burden of proof in this instance.

Co-Product

The proposed definition of co-product is "A co-product determination only applies to materials that will be applied to the land or used to produce products that are applied to the land, including the placement of roadway aggregate, pipe bedding or construction materials, or that will be used for energy recovery with a minimum Btu value of 8,000." There are several concerns with the revised definition.

First, why is the Department limiting co-products to materials that will only be applied to the land or used for energy recovery? The EQB should provide a description of what materials may no longer receive a co-product determination and the need for this limitation.

Second, commentators question the establishment of an 8,000 Btu minimum value for energy recovery. Koppers Industry observes that wood fuel typically averages 6,000 Btu per pound. Other commentators observe that the Federal regulation for hazardous waste uses a 5,000 Btu value. The EQB should explain why the proposed Btu minimum is reasonable, or establish a lower Btu requirement similar to Federal regulations.

Finally, the EQB should clarify if the minimum Btu is on a per pound basis and if it is meant to be based on dry weight only.

Municipal-Like Residual Waste

The EQB is defining a new term, "municipal-like residual waste," because some residual waste does not need to go through the detailed chemical analysis process required in Section 287.132. Commentators expressed concern with the creation of this term. They believe it may allow waste containing hazardous material to be classified as residual waste.

There are four concerns with this definition. First, the term itself lacks clarity because it uses two distinct statutory classifications of waste. Introducing the term "municipal" into the term is confusing because the waste is still residual. Therefore, the EQB should avoid naming this type of waste by referencing "municipal" waste.

Second, the EQB should explain how municipal-like residual waste will be handled and disposed in a manner that will protect the public health and safety. Furthermore, the EQB should explain how the handling and disposal of the materials in this category differs from other residual waste.

Third, the regulation should contain the standards and process to determine that the waste "has the same physical and chemical characteristics as municipal waste."

Finally, the EQB should provide examples of materials that will meet this category of residual waste.

Waste

The definition of waste has been amended to include contaminated soil, contaminated water, and contaminated dredge material. There is no indication as to what is meant by

“contaminated.” Since most materials will have some level of contamination, the regulation should define contaminated and the process used to determine if a material is contaminated.

Commentators recommended that the EQB include specific materials that should be excluded from the waste definition as is done in the hazardous waste program. There may be merit to specifically excluding certain materials or classes of materials from being classified as waste. The EQB should determine what materials merit a specific exemption from the waste definition as has been done for the hazardous waste program.

3. Section 287.2. Scope. – Clarity

Subsection (b)(3) has been amended to allow “*a small quantity of residual waste*” to be mixed with sewage sludge in order to be managed under the municipal waste regulations. There is no definition of what is considered to be a small quantity. Therefore, the EQB should define what it considers to be a small quantity.

4. Section 287.8. Co-Product determination. – Reasonableness and Clarity

This section explains the process that must be followed for a generator to determine if a material can be classified as a co-product. The section does not indicate what will occur if the DEP reviews the generator’s co-product determination and disagrees with the generator’s findings. This section should be amended to provide what will occur when the DEP disagrees with a generator’s co-product determination.

Subsection 287.8(a)(1) refers to hazardous or toxic constituents, but does not indicate what is hazardous or toxic. The EQB should either define these two terms, or reference other state or federal regulations that determine what constituents are considered to be toxic or hazardous.

Subsection (b)(3) as drafted is confusing and difficult to understand. We suggest the EQB reorganize the subsection into several sentences to improve the understanding and intent of the provision.

Commentators have recommended that all co-product determinations made under the existing regulations be grandfathered. With the changes to the definition of waste, some current co-products will no longer be considered to be a waste. However, there may still be some current co-products that will be classified as waste. The EQB should publish a notice listing the co-products that the Department has issued a concurrence letter and will remain co-products under this regulation. This notice could be completed as part of the notice published under Section 287.9.

5. Section 287.54. Chemical analysis of waste. – Need, Reasonableness and Clarity

The EQB is amending this section to require a generator to “Evaluate the potential for the waste to leach into the environment.” We have two concerns with this provision. First, commentators claim that this provision duplicates the requirements of Form 26R. Is this an additional requirement or just a restatement of the requirements of Form 26R?

Second, it is not clear what process or standard will be used to determine if the waste has the potential to leach. The regulation should provide the types of tests necessary to determine if a waste has the potential to leach. Also, what standard or threshold will be used to determine that a waste has the potential to leach into the environment?

Subsection (g) provides that the DEP may modify the requirements of this section for special handling waste and municipal-like residual waste. What types of modifications will the DEP will be allowed to make and under what circumstances?

6. Section 287.115. Filing by permitted facilities. - Reasonableness and Clarity

The EQB has added Subsection (c)(4) to provide that the leachate treatment system requirements may not be waived for a new permit or a permit modification submitted after July 4, 1997. This amendment may require some facilities seeking permit modifications to install new leachate treatment systems because the facility had a waiver. We question if in all cases a facility with a previous waiver should be required to install a new treatment system and request the EQB to provide justification for this change.

7. Section 287.141. Permit application fees. – Reasonableness

The EQB provided fee report forms as justification for the new fees in this section. The date on the fee report form is December 23, 1996. Since this report form is almost two years old, the EQB should re-evaluate the fees to assure that the proposed fees still reflect the current costs to review new or modified permit applications.

8. Section 288.127. Mineral deposits information. – Reasonableness

Current regulations require that if a new or expanded landfill overlies recoverable or mineable coal deposits, the applicant shall demonstrate that it owns the coal deposits and that they will not be mined as long as residual waste is on the site. The EQB is proposing two changes. First, the requirement will apply to all mineral deposits, not only coal. Second, the requirement will not apply to the expansion of captive facilities permitted prior to July 4, 1992. Similar amendments appear in Sections 288.422(a), 288.622(4), 289.127(b), 289.422(a)(4), and 289.522(a)(4). The EQB's reason for the amendments is to allow the expansion of captive facilities on adjacent areas rather than locating new disposal sites.

The Pennsylvania Coal Association commented that the captive site owner should not be authorized to construct or expand facilities above another's mineral rights, without written consent of the owner of the mineral rights. This would insure that the expansion does not interfere with planned or proposed mineral extraction activities.

We are concerned that this provision may be the source of conflict between surface and mineral owners. Therefore, to resolve this conflict the EQB should adopt the Pennsylvania Coal Association's recommendation.

9. Section 288.134. Plan for access roads. – Clarity.

This section provides that “Access roads shall be designed and constructed to adequately handle the truck traffic expected at the disposal facility.” The phrase “adequately handle” is vague. It is not clear what standards the design is expected to meet or what would constitute a violation of this provision. The EQB should amend this language to describe a standard the design is expected to meet.

10. Section 288.136. Nuisance minimization and control plan. – Reasonableness and Need

Subsection (b)(3) will require an operator to seek DEP’s approval for the protocol for equipment installation and data collection. The EQB should explain the need for this approval.

11. Section 288.211. Signs and markers. – Reasonableness

The EQB is deleting prescriptive requirements for the posting of a facility sign to make the requirement more performance based. There is merit in making the sign requirements less prescriptive, but the EQB may be deleting information that is of importance to the general public. Specifically, we question the deletion of the name, address, and phone number of the organization operating the facility. The EQB should consider if the public interest would be better served by maintaining this information on the sign.

12. Section 288. 412. Liner system and leachate control plan. - Need

Subsection (d)(19) requires the application to include the percent of recycled material in the description of the liner. The EQB did not provide an explanation of why the percent of recycled material in a liner is relevant and needed. For example, would the Department disapprove a liner on the basis of the percent of recycled material? Unless the EQB can demonstrate the need for this requirement, it should be deleted.

13. Section 289.112. Facility plan. - Clarity

The amendments to Paragraph (2) delete the term “acceptable cover material” and replace it with the term “soil.” One commentator questioned whether alternative cover materials will no longer be acceptable. The EQB should clarify this provision.

14. Section 289.134. Plan for access roads. - Clarity

We have two concerns with the proposed addition to Section 289.134. First, Section 289.134 describes the content of an application concerning access roads. Whereas, Section 289.223 provides the actual specifications an access road must meet. The proposed addition to Section 289.134 describes a specification for access roads. Therefore, the EQB should move this provision to Section 289.223. We suggest the following language for Section 289.134: “The application shall contain designs, cross sections, and specifications for access roads in accordance with Section 289.223 (relating to access roads).”

Second, the phrase "adequately handle" is vague. It is not clear what standards the design is expected to meet or what would constitute a violation of this provision. The EQB should amend this language to describe a standard the design is expected to meet.

15. Section 289.136. Nuisance minimization and control plan. - Clarity

Section 289.136(a) does not include "unsightliness" as required in Section 289.228. These Sections should be consistent. The term "unsightliness" is vague. In order to make the sections consistent, the EQB should either delete the term from Section 289.228, or add it to Section 289.136(a).

16. Section 289.172. Closure plan. - Clarity

In Subsection (a), the phrase "toward and after closure" lacks clarity. It may be clearer to describe the activities that are proposed to occur "prior to closure" and after closure. We have the same concern with Subsection (b)(4). The EQB should replace the word "toward" with clearer language.

17. Section 289.242. Cover. - Cost and Clarity

Subsection (b)(1)(i) requires the cap to limit the migration of precipitation into the landfill "to the greatest degree that is technologically possible." Section (b)(1) specifies the permeability of the cap may be no more than 1.0×10^{-7} cm/sec. It is not clear which requirement the material would be required to meet. Further, a material may be technologically superior, but cost prohibitive. The EQB should delete the vague requirement in Subsection (b)(1)(i).

18. Section 289.412. Liner system and leachate control plan. - Need

Subsection (d)(19) requires the application to include the percent of recycled material in the description of the liner. The EQB did not provide an explanation of why the percent of recycled material in a liner is relevant and needed. For example, would the Department disapprove a liner on the basis of the percent of recycled material? Unless the EQB can demonstrate the need for this requirement, it should be deleted.

19. Section 289.422. Areas where Class I residual waste disposal impoundments are prohibited. - Clarity

We have two concerns with the clarity of Paragraph (a)(12). First, the EQB uses the standard of "if a school, park or playground is *nearby*." It is not clear what distance constitutes "nearby." The EQB should amend this requirement by inserting a specific distance.

Second, Subsection (a) and Paragraph (12) read in conjunction state "...Class I residual waste impoundments may not be operated:...if a school, park or playground is nearby, *the following apply*:...." The EQB should amend Paragraph (a)(12) to improve its clarity by replacing the phrase "the following apply" with the phrase "with the following exceptions."

20. Section 289.512. Liner system and leachate control plan. - Need

Subsection (d)(19) requires an application to include the percent of recycled material in the liner. The EQB did not provide a sufficient explanation of why the percent of recycled material in a liner is relevant and needed. The EQB should delete the requirement for percent of recyclable material unless the EQB can demonstrate this information is relevant and needed.

21. Section 293.104. Plan for access roads. - Clarity

We have two concerns with the proposed addition to Section 293.104. First, Section 293.104 describes the content of an application concerning access roads. Whereas, Section 293.213 provides the actual specifications an access road must meet. The proposed addition to Section 293.104 describes a specification for access roads. Therefore, the EQB should move this provision to Section 293.213. We suggest the following language for Section 293.104: "The application shall contain designs, cross sections, and specifications for access roads in accordance with Section 293.213 (relating to access roads)."

Second, the phrase "adequately handle" is vague. It is not clear what standards the design is expected to meet or what would constitute a violation of this provision. The EQB should amend this language to describe a standard the design is expected to meet.

22. Section 293.202. Areas where transfer facilities are prohibited. - Clarity

The amendments to Paragraph (a)(5) would modify the exception for storage and disposal facilities located within 100 feet of a perennial stream. The amended paragraph will require an enclosed facility for any aspect of storage and processing, even if the storage and processing do not occur within 100 feet of the stream. The EQB should explain why the existing provision is no longer adequate and why an enclosed facility is needed.

In Paragraph (a)(12), the EQB uses the standard of "if a school, park or playground is *nearby*." It is not clear what distance constitutes "nearby." The EQB should amend this requirement by inserting a specific distance.

23. Section 295.115. Plan for access roads. - Clarity

We have two concerns with the proposed addition to Section 295.115. First, Section 295.115 describes the content of an application concerning access roads. Whereas, Section 295.212 provides the actual specifications an access road must meet. The proposed addition to Section 295.115 describes a specification for access roads. Therefore, the EQB should move this provision to Section 295.212. We suggest the following language for Section 295.115: "The application shall contain designs, cross sections, and specifications for access roads in accordance with Section 295.212 (relating to access roads)."

Second, the phrase "adequately handle" is vague. It is not clear what standards the design is expected to meet or what would constitute a violation of this provision. The EQB should amend this language to describe a standard the design is expected to meet.

24. Section 295.202. Areas where composting facilities are prohibited. - Clarity

We have two concerns with the clarity of Paragraph (a)(9). First, the EQB uses the standard of "if a school, park or playground is *nearby*." It is not clear what distance constitutes "nearby." The EQB should amend this requirement by inserting a specific distance.

Second, Subsection (a) and Paragraph (9) read in conjunction state "...a composting facility may not be operated:...if a school, park or playground is nearby, *the following apply*....." The EQB should amend Paragraph (a)(9) to improve its clarity by replacing the phrase "the following apply" with the phrase "with the following exceptions."

25. Section 297.105. Plan for access roads. - Clarity

We have two concerns with the proposed addition to Section 297.105. First, Section 297.105 describes the content of an application concerning access roads. Whereas, Section 297.212 provides the actual specifications an access road must meet. The proposed addition to Section 297.105 describes a specification for access roads. Therefore, the EQB should move this provision to Section 297.212. We suggest the following language for Section 297.105: "The application shall contain designs, cross sections, and specifications for access roads in accordance with Section 297.212 (relating to access roads)."

Second, the phrase "adequately handle" is vague. It is not clear what standards the design is expected to meet or what would constitute a violation of this provision. The EQB should amend this language to describe a standard the design is expected to meet.

26. Chapter 299. Storage and transportation of residual waste. - Clarity

It is not clear if the provisions in this chapter apply to generators who only accumulate waste prior to transportation and disposal. The EQB should explain the scope of this chapter and whether accumulation of waste prior to transportation and disposal is exempt from the requirements of this chapter.

27. Section 299.121. Containers. - Need, Reasonableness, and Clarity

The amendment to Subsection (a) requires the person or municipality storing residual waste in containers to "prevent leaks." Commentators expressed concern that this standard cannot be met with existing containers. In the Preamble, the EQB simply states a new performance standard has been added. This explanation is not sufficient to justify an amendment that may require the regulated community to incur the costs of replacing their existing containers. The EQB should delete this new performance standard unless the EQB can justify the need and reasonableness of this amendment.

Subsection (d) requires all containers to be labeled as residual waste or as the specific type of residual waste. One commentator stated the labeling requirements of Subsection (d) may be burdensome because they have so many types of wastes. The EQB's intent is not clear in this provision. The Preamble states that this requirement will provide clear identification of the material being handled. However, contrary to the concerns of the commentator and the intent of the EQB, the proposed language gives the person an option. This provision can be met by opting

to simply label the material as residual waste. This provision can also be met with more burdensome specific labeling. The EQB should review Subsection (d) to determine whether more specific labeling is needed and why. If more specific labeling is needed, the EQB should provide guidance on what reasonable level of specificity is required.

28. Section 299.122. Storage tanks. - Need, Economic Impact, Implementation Procedures, and Reasonableness

The existing language of Section 299.122 has two provisions. First, a tank must be designed in accordance with the Storage Tank and Spill Prevention Act. Second, DEP may waive or modify those requirements for tanks not subject to the Storage Tank and Spill Prevention Act.

The proposed amendments delete the waiver provision for tanks not subject to the Storage Tank and Spill Prevention Act. The proposed amendments also require all tanks to meet performance standards in addition to the existing design standards of the Storage Tank and Spill Prevention Act. As a result, all tanks would be required to meet higher standards, and DEP could not waive or modify the requirements.

The amendments to Section 299.122 raised concerns with several commentators. The commentators are concerned that the proposed amendments to Section 299.122 could extend tank design and performance standards to all tanks used to hold residual waste. The commentators state this would add significant burdens and costs to residual waste management without benefit. The commentators also see a need for an implementation schedule of three to four years to make necessary changes to existing tanks. We agree.

The proposed amendments conflict with four criteria of the Regulatory Review Act. First, the EQB has not demonstrated a compelling need to modify Section 299.122. Second, the EQB has not sufficiently explained the economic impact on tank owners. Third, the EQB has not provided a reasonable implementation schedule for tank owners to comply. Finally, the EQB should reconsider the reasonableness of deleting DEP's discretion to waive or modify requirements for tanks which are not subject to the Storage Tank and Spill Prevention Act to allow flexibility where appropriate.

The EQB has also added labeling requirements to Section 299.122. The EQB should review the labeling requirements to determine whether more specific labeling is needed and explain why. If more specific labeling is needed, the EQB needs to provide guidance on what reasonable level of specificity is required.

29. Section 299.131. General requirements. - Clarity

Subsection (e) does not provide the criteria DEP will use to determine if groundwater monitoring may be required. The EQB should add the criteria DEP will use to determine if water quality monitoring will be required.

30. Section 299.155. Storage of waste tires and tire derived materials. - Clarity

One commentator was concerned that Sections 299.155 to 299.163 may put unnecessary regulations on tires used as fuel and classified as a co-product. The EQB should clarify whether tires used as fuel and classified as a co-product are subject to the requirements of Sections 299.155 to 299.163.

In Section 299.155(b) the EQB uses the phrase "small piles." This phrase is vague. The EQB should identify what will be considered a "small pile."

31. Section 299.160. Hazard prevention. - Protection of the Public Health and Safety

Subsection (c) provides requirements for fire prevention equipment. Paragraphs (3), (4), and (5) provide vague requirements that could only be applied in hindsight. These paragraphs do not prescribe minimum safety equipment requirements. For example, these paragraphs require "suitable fire control equipment," suitable water volume and equipment "to temporarily contain a fire," and "equipment sufficient ...to provide timely movement of tires...in case of emergency." The EQB should explain how these provisions will provide sufficient protection of the public health and safety.

32. Section 299.162. Annual report for waste tire storage sites. - Need

Subsection (b) requires certain annual reports to be maintained for a minimum of five years. The EQB needs to justify the need to retain annual reports for at least five years and why a shorter time period such as three years would not be sufficient.