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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

July 9, 1999

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

Re: IRRC Regulation #7-342 (#2022)
Environmental Quality Board
Waste Oil

Dear Chairman Seif:

Enclosed are our Comments on your proposed regulation #7-342. 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.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Sharon Freeman
Barbara Sexton
William Pound
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-342

WASTE OIL

JULY 9, 1999

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 consistency with existing regulations, need, economic impact, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Incorporation by Reference. – Clarity.

The majority of the proposed regulation mirrors the code of Federal Regulations (40 CFR Part 279). The rulemaking could have incorporated the CFR by reference and then added regulatory provisions where Pennsylvania's requirements differ. This would allow the reader to easily identify provisions which differ from the CFR. As published, Pennsylvania's regulations would have to be read side by side with the CFR to find any differences. This is a tedious process. We recognize that the CFR uses the term "used oil" where the proposed regulation uses "waste oil." However, the regulation could include language addressing the difference in terminology. The EQB should consider incorporating the CFR by reference, rather than duplicating the bulk of the federal regulations in Pennsylvania's regulations. This would also be consistent with Executive Order 1996-1.

2. Section 298.1. Definitions. – Reasonableness.

Inconsistent definitions.

This section begins by stating that the terms defined in Section 245.1 (relating to storage tanks) and 260.2 (relating to hazardous waste) have the same meaning when used in this chapter. We have several concerns with this provision because some terms are defined differently in this rulemaking than they are in Sections 245.1 and 260.2.

First, the terms "existing tank" and "new tank" are defined in this regulation, as well as in Sections 245.1 and 260.2. Each definition contains a different effective date. Therefore, the EQB should clarify the appropriate effective date for this regulation.

Second, Section 245.1 contains the definition of "aboveground storage tank." This rulemaking contains a definition of "aboveground tank." Are these two terms meant to be the

same? If the terms are the same, the inconsistencies between the definitions in this rulemaking and Section 245.1 must be resolved.

Third, the regulation defines "tanks" by providing that they are constructed *primarily* of nonearthen or *nonwooden* materials. In contrast, Section 245.1 provides that they are constructed of nonearthen material. Clarification is necessary as to which definition will be used for this regulation.

Definition of used oil and waste oil.

The proposed regulation defines both "waste oil" and "used oil." The EQB has previously defined both terms in the residual waste regulations (Section 287.1). There are minor differences in definitions between this regulation and the residual waste regulation. To avoid confusion, there needs to be consistent definitions and use of terms.

Waste oil transfer facility.

"Waste oil transfer facility" is defined as follows:

> A transportation related facility including loading docks, parking areas, storage areas and other areas where shipments of waste oil are received or held, or both, during the normal course of transportation.

The definition of this term is largely consistent with the federal definition of "used oil transfer facility." However, the federal definition specifies that shipments of oil at a transfer facility are held for more than 24 hours and not longer than 35 days. The definition in the proposed regulation does not include minimum and maximum time frames.

In the Preamble, the EQB asserts that it is precluded by the Solid Waste Management Act (Act) from adopting the federally specified time frames. According to the EQB, the definition of "transfer facility" in the Act does not include time frames; therefore, they cannot be included in the definition of "waste oil transfer facility."

We disagree with this analysis. The Act defines "transfer facility" in part as follows:

> A facility which receives and processes or **temporarily** stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. (Emphasis added.)

The Act does not contain parameters for what period of time will be considered "temporarily." Consequently, the EQB has the discretion and authority to include minimum and maximum time frames for waste oil storage in the definition of "waste oil transfer facility." Commentators are concerned that without adopting the federal time frames, sites where transporters stop for very short periods of time could be considered transfer facilities and would be subject to the requirements of Subchapter E. The EQB should include the time frames contained in the CFR in the definition of "waste oil transfer facility." Furthermore, the EQB

should consider amending the definition to more closely match the definition in the Act by replacing "received or held, or both," with "received and processed or temporarily stored."

3. Section 298.10. Applicability. – Reasonableness and Economic Impact.

Characteristic hazardous waste.

Subsection (b)(2) provides that mixtures of waste oil and hazardous waste are subject to regulation as a hazardous waste. The exception to this requirement occurs if a mixture contains waste that is hazardous solely due to ignitability and the resultant mixture does not exhibit the characteristic of ignitability. This provision is more stringent than the corresponding federal mixture rule. Under the federal regulations, if the mixture does not qualify as a characteristically hazardous waste, it is only subject to the used oil regulations.

In the Preamble, the EQB asserts that allowing mixtures of waste oil and hazardous substances contradicts its pollution prevention efforts. The EQB is concerned that allowing generators to mix hazardous waste with waste oil will reduce generators' incentive to use source reduction strategies to minimize the amount of hazardous waste they generate. The EQB is also concerned that the federal mixture rule will not protect the environment or the public health, safety or welfare.

Executive Order 1996-1 requires that Pennsylvania's regulations "not exceed federal standards unless justified by a compelling and articulable Pennsylvania interest or required by state law." The EQB has not demonstrated the unique circumstances in Pennsylvania that warrant a more restrictive mixture rule than that contained in the federal regulations. If mixing reduces the contaminants to a level that is no longer hazardous, it is unclear how the environment or the public health, safety or welfare will be harmed. The EQB should consider adopting the federal mixture rule or explain the unique and compelling Pennsylvania interests that justify a more stringent mixture rule.

Treatment of wastewater contaminated with waste oil.

Subsection (c)(4) provides two criteria for when wastewater will be managed under this chapter. The first criterion is that the wastewater contains at least one-percent of waste oil. The other criterion is that that the wastewater contains marketable quantities of waste oil. We have several concerns with this provision.

First, the EQB is creating a different standard than the Environmental Protection Agency's (EPA) regulation on used oil. The EPA standard is that the wastewater contains no visible signs of free-flowing oil. The EQB contends the "no visible waste oil test" does not apply to the reclamation of waste oil from wastewater. The EQB should explain why the proposed standard is necessary and how the EPA's standard does not provide adequate protection.

Second, if the EQB demonstrates the need to differ from the EPA, it should explain the reasonableness of the one-percent standard.

Third, the criterion that the wastewater contain marketable quantities of waste oil is vague. We understand that some facilities have the technological capability of extracting very small quantities of waste oil. However, the EQB should define what it will consider "marketable quantities" of waste oil.

Finally, Subsection (c)(4) is inconsistent with Subsection (f). Subsection (f) uses the standard of "de minimis quantities" of waste oil in the wastewater compared to the one-percent and marketable quantity standard in Subsection (c)(4). The EQB should resolve this inconsistency.

4. Section 298.11. Waste oil specifications. – Reasonableness and Need.

Minimum Btu value.

Subsection (a) requires any waste oil or any oil produced by waste oil to have a minimum 8,000 Btu value in order to be burned for energy recovery. This threshold is not contained in the federal used oil regulations. The EQB should justify the need for this provision. If the EQB demonstrates the need for a minimum Btu value, it should explain why 8,000 Btus is a reasonable minimum standard.

Halogen count.

Table 1 in Section 298.11(b) lists the specifications for waste oil burned for energy recovery and fuel produced from waste oil by processing, blending or other treatment. Waste oil that falls within the specification in Table 1 is not regulated as a waste and can be substituted for virgin fuel oil. Waste oil that exceeds the specifications in Table 1 is subject to the requirements of Chapter 298. Except for the limit for total halogens, Table 1 is identical to the corresponding table in the federal regulations (40 CFR § 279.11).

The proposed regulation contains a 1000 parts per million (ppm) limit for halogens, while the federal regulations contain a 4000-ppm limit for halogens. According to the Preamble, the 1000-ppm limit is designed to protect the health and property of individuals using waste oil for home heating fuel. According to the EQB, when the federal regulations were adopted, EPA did not consider home heating applications.

As an alternative, the EQB is seeking comment on the possibility of using two limits for halogens. The two limits would be 1000 ppm for home heating applications and 4000 ppm for all other methods of energy recovery. Since the 1000-ppm limit is a direct result of the Department's concern relating to home heating applications, it is reasonable to apply this limit only to waste oil marketed for home heating fuel. The EQB should retain the federal standard of 4000 ppm for all other methods of energy recovery.

5. Section 298.20. Applicability. – Reasonableness and Need.

Other applicable provisions.

Subsection (b)(3) creates a permit by rule for the processing of waste oil generated onsite and not sent offsite. Commentators questioned what will be considered "onsite" and whether

materials generated by the same generator at several related locations and processed at a central location will be eligible for the permit by rule. The EQB should clarify these issues in the final form regulation.

Recordkeeping.

Subsection (c) requires generators to maintain certain records for five years. It is unclear why it is necessary to retain generator records for five years. The other recordkeeping requirements in the regulation require three-year record retention. For consistency, the EQB should consider amending Subsection (c) to require that generator records be maintained for three years.

6. Section 298.22. Waste oil storage and Section 298.45. Waste oil storage at transfer facility. – Reasonableness and Economic Impact.

Labeling requirements.

Sections 298.22(c) and 298.45(h) require aboveground storage units and pipes to be labeled "waste oil." The federal regulations require this equipment to be labeled "used oil." Commentators have objected to the labeling requirements because they would require thousands of new labels on equipment which is already labeled to comply with the federal requirements. We understand that Pennsylvania's definition of "used oil" differs from the federal definition of "used oil" because the Used Oil Recycling Act was passed prior to the federal regulations. However, it is unclear what benefit would result from requiring double labeling. The EQB should allow either a "waste oil" or "used oil" label to satisfy the labeling requirements.

If the EQB objects to allowing the use of either term, it should consider seeking a legislative amendment to the Used Oil Recycling Act to make Pennsylvania's definition of "used oil" consistent with the federal definition.

Spill prevention program.

Subsection (e) provides that waste oil generators are subject to Chapter 265, which requires all generators to implement a spill prevention control and countermeasure program. Several commentators express concern that the EQB will require every waste oil generator to submit a spill prevention control and countermeasure plan. Commentators assert that requiring small generators to comply with these planning requirements will be financially burdensome. The EQB should consider whether it is necessary for a small generator to develop and implement a full contingency plan or if another alternative is appropriate.

7. Section 298.25. Source reduction strategy. – Reasonableness and Conflict with existing regulations.

This section requires all waste oil generators subject to this regulation to submit and prepare a source reduction strategy. However, Section 287.51 of the residual waste regulations has an exemption from the source reduction strategy requirements for persons or municipalities who "generate residual waste as a result of collecting the waste, including the collecting of parts, machinery, vehicles, appliances and used oil from the repair or replacement of the parts,

machinery, vehicles, appliances and used oil." Since "used oil" in the residual waste regulation would be included as waste oil in this rulemaking, there is an inconsistency between the proposed regulation and the residual waste regulation. This inconsistency should be resolved.

8. Section 298.26 Biennial report. - Reasonableness and Conflict with existing regulations.

This section requires all waste oil generators subject to this regulation to file a biennial report. However, Section 287.51 of the residual waste regulations does not require a report for persons or municipalities who "generate residual waste as a result of collecting the waste, including the collecting of parts, machinery, vehicles, appliances and used oil from the repair or replacement of the parts, machinery, vehicles, appliances and used oil." Since "used oil" in the residual waste regulation would be included as waste oil in this rulemaking, there is an inconsistency between the proposed regulation and the residual waste regulation. This inconsistency should be resolved.

9. Section 298.31. Waste oil aggregation points owned by the generator. – Reasonableness and Clarity.

Subsection (b)(4) creates a permit-by-rule for waste oil aggregation points. The permit by rule will not be applicable if the operator accepts water, antifreeze or other residual or hazardous waste. If the operator accepts this other waste in accordance with the applicable regulations, why is the permit-by-rule not available?

10. Section 298.45. Waste oil storage at transfer facility. – Reasonableness and Need.

Permits.

Paragraph (b)(4) lists the conditions a waste oil transfer facility must meet to qualify for a general permit. Condition (iv) states the following:

> (iv) The waste oil collected at a transfer facility is destined for a waste oil transfer or waste oil processing/refining facility located in this Commonwealth which is permitted by the same person who owns/operates the waste oil transfer facility.

Why must the oil must be sent to a transfer or processing/refining facility within Pennsylvania? If the oil is sent to a facility outside of Pennsylvania, that facility would be regulated by the appropriate state jurisdiction. Furthermore, the waste oil would no longer be in Pennsylvania. The risks associated with transportation would apply to both an in-state and out-of-state transfer. Therefore, it is unclear how Pennsylvania would be harmed by sending the waste oil to an out-of-state facility. We request the EQB explain the reasonableness of and need for general permit condition (b)(4)(iv).

Additional requirements.

Subsection (j) (which is incorrectly labeled (c) in the *Pennsylvania Bulletin*) requires a waste oil transporter to comply with the preparedness, prevention and contingency plan and emergency procedures in Subchapters C and D of Chapter 264. A transporter is also required to comply with the underground storage tank and spill prevention program in Chapter 245. These

requirements apply regardless of whether the waste oil exhibits any characteristics of hazardous waste.

These provisions are incorrectly cited. Chapter 264 was repealed and replaced with Chapter 264a, and Subchapter C no longer exists. The contingency plan and emergency procedures are now contained in Chapter 264a, Subchapter D.

Furthermore, it is unclear why transporters should be subject to these chapters. The underground storage tank requirements in Chapter 245 do not appear to be relevant to transporters since transportation would not occur in underground tanks. It is also unclear why waste oil that does not exhibit any characteristics of hazardous waste should be subject to hazardous waste planning requirements in Chapter 264a, rather than the residual waste requirements. The EQB should address these issues in the final regulation.

11. References to other Chapters of Regulations. – Clarity.

The proposed regulation contains several references to other chapters of regulations that have recently changed. Specifically, incorrect citations are made to the recently revised hazardous waste regulations. The EQB should review the proposed regulation to correct outdated cross-references. In addition, the regulation is amending portions of Sections 261.3, 261.5 and 261.6. These sections have recently been changed and need to be corrected to reflect the new sections.