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

February 15, 2002

Honorable David E. Hess, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-370 (IRRC #2228)
Environmental Quality Board
Consumer Products

Dear Chairman Hess:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for 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 would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

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Enclosure

cc: Honorable Arthur D. Hershey, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee
Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation No. 7-370

Consumer Products

February 15, 2002

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Environmental Quality Board (EQB) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by January 16, 2004, the regulation will be deemed withdrawn.

1. General. - Consistency with other regulations; Clarity.

We have two general concerns with this regulation.

First, different parts of the proposed regulation are inconsistent with the Ozone Transport Commission (OTC) Model Rule for Consumer Products (OTC Model Rule).

- Numerical errors or omissions in Section 130.211, Table of Standards.
- Current provisions in the proposed regulation are out-of-date with or different from the current OTC Model Rule. Some of these provisions are addressed below in Issues #8-12.

The EQB indicated that its goal is to be consistent with the OTC. Hence, it should use the most recent regulatory language from the OTC Model Rule when the final-form regulation is submitted.

Second, various sections of the proposed regulation contain vague references to “applicable Commonwealth laws and regulations” and “applicable Commonwealth regulations.” The following are examples:

- Section 130.412. Variance orders.
- Section 130.414. Modification of variance.
- Section 130.461(b). Modification of an ACP by the Department.
- Section 130.463. Treatment of information.

Open references to “Commonwealth laws and regulations” should be changed to specific references to the pertinent statutes or regulations in the final-form regulation.

2. Confidentiality procedures. - Consistency with the statute; Clarity.

Section 130.392 states that specific information submitted by a responsible party will be “handled in accordance with the procedures specified in applicable Pennsylvania confidentiality requirements upon request by the responsible party.” Rather than a general reference to these

requirements, this section of the regulation should reference Section 13.2 of the Air Pollution Control Act (35 P.S. § 4013.2) (Act). Section 13.2 of the Act establishes procedures for protecting the confidentiality of certain types of information.

In its comments on Sections 130.458(a)(2) and 130.463, the Consumer Specialty Products Association (CSPA) expresses concerns related to confidentiality. The concerns of CSPA could be resolved by also including a reference to Section 13.2 of the Act in these sections of the proposed regulation.

3. Section 130.202. Definitions. - Clarity.

Device

The last sentence of this definition reads: "The term does not include equipment used for the application of pesticides when sold separately therefrom." The word "therefrom" is unnecessary and should be deleted.

Floor polish or wax

Paragraph (v) of this definition states that this term does not include: "Coatings subject to architectural coatings regulations." Paragraph (v) should be amended to specifically identify references to the applicable "architectural coatings regulations."

4. Section 130.331. Products for shipment and use outside this Commonwealth. - Clarity.

The last sentence of Subsection (b) reads: "This subsection does not apply to consumer products that are sold, supplied or offered for sale by a person to retail outlets in this Commonwealth." The purpose of this sentence is unclear. This subsection should be explained or deleted.

5. Section 130.334. Insecticides, fungicides and rodenticides. - Clarity.

There is an inconsistency between the title and text of this section. The title refers to three consumer products registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) while the text refers to all the products regulated by FIFRA. If it is the intent of the EQB that this section applies to all products regulated by FIFRA, the title should reflect this.

6. Section 130.352. Request for exemption. - Clarity.

Paragraph (2) in this section requires manufacturers to apply in writing for an exemption claimed under Section 130.331(b). It is our understanding that this reference may be unnecessary since the application requirements in this section apply to innovative products and do not pertain to the exemption established by Section 130.331. The EQB needs to either clarify the purpose of the reference to Section 130.331(b) in Paragraph (2) or delete it.

7. Section 130.371. Code-dating. - Clarity.

Subsection (b) states that if a manufacturer uses a code indicating the date of manufacture for a product subject to this regulation, then "an explanation of the code shall be filed with the Department no later than 12 months prior to the effective date of the applicable standard specified in § 130.211."

Section 130.211 establishes January 1, 2005, as the effective date for the applicable standards. Rather than use the words "12 months," Section 130.371(b) should state that explanations of the codes for manufacture dates must be filed with the Department by January 1, 2004.

8. Section 130.411. Application for variance.

Section 130.412. Variance orders. - Consistency with other regulations; Reasonableness; Clarity.

These two sections and Sections 130.413 and 130.414 set forth the requirements and procedures for applying for and granting variances. There are two concerns.

First, Section 130.411 closely mirrors a provision of the OTC Model Rule but other portions of the OTC Model Rule are not included. One commentator questioned the intent of the following sentence in Section 130.411: "A person who cannot comply with §§ 130.211-130.216 (relating to standards), because of extraordinary reasons beyond the person's control, may apply in writing to the Department for a variance." Clarity would be improved if the regulation included guidance as to what the Department may consider "extraordinary." The final-form regulation should also include the required findings for variances established in the OTC Model Rule.

Section 8(c) of the OTC Model Rule establishes three specific findings that a state agency needs to make before it grants a variance. For example, the first finding is that due to "reasons beyond the reasonable control of the applicant, requiring compliance with section 3 (VOC standards) would result in extraordinary economic hardship." Neither this finding nor the other two appear in this proposed regulation.

The second area of difference with the OTC Model Rule is that the proposed regulation does not contain standards for public review of a variance application. The OTC Model Rule contains specific time frames for public notification and public inspection of the variance application. In addition, it establishes a time frame for holding a hearing. The proposed Section 130.412 refers to a hearing but does not set forth any time frames or procedures concerning proper notice or inspection of the application by the public.

9. Section 130.453. Request for exemption. - Consistency with other regulations; Reasonableness; Clarity.

Subsection (a) states that manufacturers "may seek an ACP [Alternative Control Plan] Agreement with the Department." However, neither this subsection nor other parts of the proposed regulation establish the procedures or application content requirements for "seeking" this type of agreement. Section 11(c) of the OTC Model Rule establishes procedures and requirements for an ACP application. Will the ACP application requirements and procedures of the OTC Model Rule be incorporated into the proposed regulation?

10. Section 130.454. Recordkeeping and availability of requested information. - Consistency with other regulations; Reasonableness; Clarity.

Subsection (a) requires that "information specified in the ACP agreement approving an ACP shall be maintained by the responsible ACP party for at least 3 years after the records are generated." However, there is nothing in the regulation that indicates the contents of the ACP agreement. Section 11(c)(1) of the OTC Model Rule sets forth the content requirement for an application for a proposed ACP. In addition, Section 11(d) establishes time frames for the

review of an ACP application by the state agency. The proposed regulation should contain similar language.

11. Section 130.460. Other modifications. - Consistency with other regulations; Clarity.

There are two concerns.

This section begins with the phrase: "Except as otherwise provided in this section," The purpose of this phrase is unclear since the section contains only one provision. In the OTC Model Rule, the comparable language is found in Subsection (3) of a larger section, Section 11(i). This subsection in the OTC Model Rule uses the same phrase but specifically references the pertinent subsections. The phrase should be deleted or it should use the example provided by the OTC Model Rule and specifically reference the appropriate provisions.

Second, Section 130.460 states: "... the responsible ACP party shall notify the Department in writing, of information that the responsible ACP party may have which may alter the information submitted." This requirement is vague. Section 11(i)(3) of the OTC Model Rule requires the responsible ACP party to notify the state agency of any information "...which may alter any of the information submitted pursuant to the requirements of section 11(c) [related to requirements and process for approval of an ACP including application content requirements]." The final-form regulation should specifically identify the types of information covered by this requirement.

12. Section 130.461. Modification of an ACP by the Department. - Consistency with other regulations; Clarity.

Subsection (a) is one long sentence. In the OTC Model Rule, similar language is found in Section 11(j)(1). The OTC Model Rules enumerate separate clauses of the sentence. This enumeration could be used (see Chapter 7 of the *Pennsylvania Code & Bulletin Style Manual*) to clarify Section 130.461(a) and make it easier to read.

Revised 12/10/01

INDEPENDENT REGULATORY REVIEW COMMISSION

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Date: February 15, 2002
of Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-370 (#2228). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Shirley Wright Date: 2/15/02