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

March 16, 2005

Honorable Kathleen A. McGinty, Chairperson  
Environmental Quality Board  
Rachel Carson State Office Building  
400 Market Street, 16th Floor  
Harrisburg, PA 17101

Re: Regulation #7-394 (IRRC #2461)  
Environmental Quality Board  
Storage, Handling and Use of Explosives

Dear Chairperson McGinty:

The Independent Regulatory Review Commission disapproved your regulation on March 10, 2005. Our order is enclosed and will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us).

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff has any questions, please contact Mary S. Wyatte, our Acting Executive Director, at 783-5506.

Sincerely,

John R. McGinley, Jr., Esq.  
Chairman

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Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee  
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee  
Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee  
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee

**INDEPENDENT REGULATORY REVIEW COMMISSION  
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held March 10, 2005

John R. McGinley, Jr., Esq., Chairman

Alvin C. Bush, Vice Chairman

Daniel F. Clark, Esq.

Arthur Coccodrilli - Dissenting

Murray Ufberg, Esq., by Phone - Dissenting

Regulation No. 7-394

Environmental Quality Board

Storage, Handling and Use of Explosives

On February 8, 2005, the Independent Regulatory Review Commission (Commission) received this regulation from the Environmental Quality Board (Board). This rulemaking amends 25 Pa. Code §§ 211.101, 211.111, 211.113 and 211.115. Notice of proposed rulemaking was omitted for this regulation.

This regulation amends the procedures, requirements and standards for explosive storage facilities to deter the theft of explosives. It is being promulgated as a result of the combined efforts of the Department of Environmental Protection (DEP), Pennsylvania State Police and Governor's Office of Homeland Security.

We commend these agencies for recognizing the need to improve security and taking the lead to address this issue. We agree there is a need to augment security to protect the public. Regrettably, this regulation fails to meet several of the criteria set forth in the Regulatory Review Act.

**Direct costs to the private sector (71 P.S. § 745.5b(b)(1)(i))**

This regulation will impose large costs directly on the regulated industries, without allowing them sufficient time to budget for those costs. The Board projects total costs of about \$5.7 million to construct the security measures. It did not estimate recurring costs for requirements such as daily inspections. The regulated industry contends that construction costs will be \$34 million and annual recurring costs will be between \$7 and \$40 million.

It is impossible for us to accurately predict the economic and fiscal impacts of this regulation since the universe of potential "alternatives" is uncharted and unknown. The Board needs to further clarify the criteria that will be used to approve alternatives so that licensees can select cost-effective means of compliance.

**Adverse effects on prices of goods and services and competition  
(71 P.S. § 745.5b(b)(1)(ii))**

The significant costs of this regulation will be passed on to the users of explosives and fireworks, resulting in an adverse effect on the prices of goods and services. The added costs of this regulation are likely to place Pennsylvania businesses at a competitive disadvantage with similar businesses in other states that are not subject to similar requirements. Therefore, the Board should consider revisions to the regulation to mitigate these costs.

### **Desirability and feasibility of setting lesser standards of compliance for small business (71 P.S. § 745.5b(b)(1)(v))**

We believe the Board should consider lower standards for compliance for the fireworks industry. Many manufacturers and distributors of fireworks in Pennsylvania are either small businesses or hobbyists who produce holiday displays for small towns. The costs of the strict security measures may prove to be prohibitive for many of them. The black powder used in their products entails only a minimal security risk when compared to explosives used in the construction or mining industries. Furthermore, black powder is readily available for purchase from retail stores. In contrast, the relatively small quantity of black powder contained in most fireworks can only be retrieved after a great deal of effort. The Board should revisit this issue and adopt lesser standards that will still preserve the balance between the safety of the public and promotion of small business.

### **Protection of the public health, safety and welfare (71 P.S. § 745.5b(b)(2))**

This regulation may have an inadvertent but detrimental impact on the public health, safety and welfare. If the cost of storing explosives or fireworks in Pennsylvania becomes unaffordable, transportation of explosives may increase. Licensees may strive to reduce costs by either reducing the number of storage sites or moving out-of-state. This could necessitate shipment of this material across state lines or for longer distances. In turn, a greater threat to the public safety could result from an increased vulnerability to theft and risk of accidents.

We also find that the required barriers may present a safety hazard to employees. In the event of a fire or other catastrophic event, employees must have several avenues of escape. However, if they could not reach the access point, the concertina razor wire would be impassable. The Board needs to consider both of these safety concerns as it revises the regulation.

### **Clarity and lack of ambiguity (71 P.S. § 745.5b(b)(3)(ii))**

Sections 211.115(d)(3) and (d)(4) state that the security system “shall obstruct, to the greatest extent possible” unauthorized access by wheeled vehicles or by unauthorized persons (relating to inner barriers for high explosives and detonators). To meet this standard, the regulation prescribes specific physical requirements for two barriers including concertina razor wire for the inner barrier. The regulation also gives DEP the discretion to approve alternatives that are equivalent to these specific requirements.

The regulation does not establish criteria for acceptable alternatives. Hence, regulated parties have no notice of what other security measures DEP will approve in lieu of the prescriptive measures. Without clear and unambiguous standards, licensees are left without guidance or direction in developing equivalent site protection.

For instance, the regulation relies almost exclusively on physical measures. Electronic surveillance or intrusion detection systems provide a different type of security. Unlike physical barriers, such as boulders and concertina wire, electronic systems do not “obstruct” unauthorized entry. However, they can be designed to immediately alert the appropriate parties of an attempted theft. There is no indication in the regulation of how DEP will evaluate electronic

systems and determine whether they provide an equivalent or greater level of security compared to physical barriers designed to “obstruct” entry.

Also, the determination of what constitutes “the greatest extent possible” is subjective and, therefore, completely within the discretion of DEP. Regulated parties have no advance notice of what is financially or technically possible in order for their plans to pass muster. DEP touts this language as “flexible.” We find it vague, since it could be applied inconsistently.

If electronic surveillance or intrusion detection systems would be acceptable alternatives, then the basic terms, standards and prerequisites for them should be included in the regulation. This would not only provide the regulated community with clear direction but, more importantly, would enable it to comply with the new requirements in both an expeditious and cost-effective manner.

#### **Reasonableness of requirements, implementation procedures and timetables for compliance (71 P.S. § 745.5b(b)(3)(iv))**

Although there is a definite need for security in the storage of explosives and black powder, we question the reasonableness of this regulation. The Board claims that this regulation is necessary to prevent thefts of explosives. To support this claim, the Board cites nine explosive thefts between March and December of 2003, based on statistics from the Bureau of Alcohol, Tobacco and Firearms, U.S. Department of Justice (ATF). According to these figures, Pennsylvania had the highest number of thefts of any of the 50 states during this period. However, the regulation would not have prevented five of those thefts, which resulted from employee theft and poor inventory control. Only four of the nine thefts involved forced entry (breaking of locks or doors).

Currently no perimeter barriers are mandated for high explosive storage facilities. This regulation will require two perimeter barriers. We note that neither the ATF nor other states have any similar requirements for one or two physical barriers on the perimeters of explosives storage sites. Also, DEP is not aware of any draft regulations proposed by ATF or neighboring states with similar requirements for physical barriers. We believe a one-perimeter barrier would be sufficient to impede intrusion by both vehicles and humans.

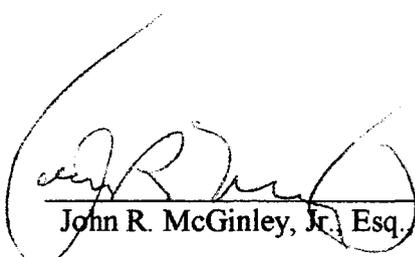
We also question why the implementation schedule in this regulation is based on the date a plan is submitted. The date a plan is submitted starts the time periods for implementation specified in Section 211.115(e) which include 180 days to implement either outer or inner perimeter security requirements. However, there is no time limit placed on DEP to approve the plan during this 180-day period. Furthermore, if a licensee requests an alternative, even more lead time for implementation could be lost. We recognize that there is a provision for a time extension, but that request must to be filed with the initial plan. To insure that licensees have a reasonable amount of time to comply, the time period for implementation should begin with DEP approval of the plan, not the date the plan is submitted.

We have determined this regulation is consistent with the statutory authority of the Board (73 P.S. § 161 and 71 P.S. § 751-35) and the intention of the General Assembly. However, after considering all of the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

**BY ORDER OF THE COMMISSION:**

This regulation is disapproved.



  
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John R. McGinley, Jr. Esq. Chairman

Environmental Quality Board  
#7-394 (IRRC #2461)  
Storage, Handling and Use of Explosives

Honorable Kathleen A. McGinty, Chairperson

*D. McCarley*  
Date: 3/16/05