



Pennsylvania Department of Environmental Protection

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August 31, 2007

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Kim Kaufman, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

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INDEPENDENT REGULATORY
REVIEW COMMISSION

RE: Regulation #7-395, Administration of the Storage Tank and Spill Prevention Act

Dear Mr. ^{Kim}Kaufman:

This letter provides you with the Environmental Quality Board's ("Board") position regarding a written comment submitted last summer to the Department's Meadville Regional Office in response to proposed rulemaking #7-395, Administration of the Storage Tank and Spill Prevention Act ("proposed rulemaking"). As we spoke Wednesday, it became clear to me that you and the Commission staff were not fully aware of our investigation into this matter and our final position. I now understand that there was some confusion as to the Board's position regarding this comment based on discussion with Department of Environmental Protection ("Department" or "DEP") staff and I am pleased to be able to provide the Commission with this written clarification. Also, I appreciate the opportunity to again work in the spirit of cooperation with you and your staff to ensure that issues are identified and discussed in an open and productive manner. As discussed below, the Board's position is that the written comment was not submitted to the Board in a timely matter and therefore is not considered an "official" written comment under the Regulatory Review Act and was appropriately excluded from the official Comment and Response Document.

We believe that the facts underlying the issue are clear. The proposed rulemaking was published in the *Pennsylvania Bulletin* on April 22, 2006 (36 Pa.B. 1651; minor correction published on April 29, 2006, 36 Pa.B. 2016). The Board set June 29, 2006 as the deadline for submission of comments, and explicitly established two options for submission of comments: a) commentators could submit written comments to the Board at a P.O. Box address in Harrisburg (or via express mail to a specific address in the Rachel Carson State Office Building), or b) submit electronic comments to a specific Board email address. If commentators chose the latter method, they were cautioned that if they did not receive a response email within two business days, the comment was not received by the Board and should be resubmitted. Finally, the *Bulletin* notice stated that comments had to be received by the Board by June 29 and that



submissions by facsimile were not allowed. The appropriate pages from the *Bulletin* notice are attached for your review.

The late comment in question was prepared by United Refining ("United letter"). United Refining has its headquarters in Warren, PA, and conducts a fair amount of business with the Department through its Northwest Regional Office located in Meadville, PA ("DEP NWRO"). Although the United letter does bear the correct address for the Board's written comments, it was actually delivered to the DEP NWRO on June 28, 2006, one day before the end of the public comment period. Whether this was hand-delivered to DEP NWRO or sent by U.S. mail, I cannot say, but the United letter was clearly delivered to the DEP NWRO and not to the Board by any of the specified means. The United letter did eventually end up in the proper place, with the Board, a month later on July 25, well outside of the public comment period for the proposed rulemaking. Because the United letter was not received by the Board within the public comment period, the United letter was not included in the official Comment and Response Document prepared by the Board to accompany the final-form rulemaking to demonstrate compliance with the requirements of the Commonwealth Documents Law and the Regulatory Review Act. As you know, public comments received by the Board before the close of the public comment period have a specific legal status triggering various procedures and imposing obligations on the Board.

As indicated in the notice of proposed rulemaking, the Board believes that the burden of properly submitting a written or electronic public comment on a proposed rulemaking is with the commentator. Although the Department and the Board are closely related entities and the Department provides administrative and technical assistance to the Board, for purposes of promulgating regulations they are separate entities, each established by separate statutory enactment. The Department has six Regional Offices, seven District Mining Offices, nearly a dozen district offices and numerous Central Office programs located primarily in the Rachel Carson State Office Building. The Board has not designated any of the Department offices as appropriate places to deliver public comments on Board regulations because the Board needs to maintain tight control over public comments that are submitted. The Board has legal obligations and deadlines that attach to the proper submission of a written comment under the Regulatory Review Act and the Commonwealth Documents Law.¹ Therefore, it must maintain fairly strict controls over how, when and where public comments on proposed rulemakings are submitted. Because the submission of the United letter did not meet the requirements established by the Board for proposed rulemaking #7-395, it was properly excluded from the official Comment and Response Document.

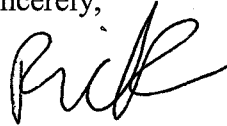
Finally, it is worth noting that, although not required to, the Department and the Board did consider the substance of the comments submitted in the United letter, including a telephone discussion between Regulatory Counsel and counsel for United Refining. The two substantive concerns stated by United Refining were stated more broadly by other commentators, and changes were made in the final-form rulemaking that addressed the substance of the United letter. It should be noted that the Department and the Board do receive a great deal of input

¹ As an example, the Board must forward properly submitted comments on proposed rulemakings to the Commission and the Standing Committees "within five business days of receipt." 71 P.S. § 745.5(c). If comments submitted to any Department office or staff person were accepted, then the Board would need to canvass the entire staff of the Department every business day in order to ensure that this obligation was properly met.

during the rulemaking process that never rises to the level of official "written comments submitted within the statutorily prescribed public comment period." Because of our commitment to operate the agency in an open fashion, encouraging input from the public and other interested parties, we do not reject such input out of hand, and this case is an excellent example of that commitment to review all meaningful comments from the public even those received after the close of the public comment period.

I hope that this letter makes the Board's position on this matter clear and addresses the issues concerning the United letter raised by the Commission's staff. I am hopeful that the final-form rulemaking will be approved by the Commission as it represents a significant step forward in the regulation of underground and aboveground storage tanks located in the Commonwealth. Finally, I appreciate the willingness of your staff to work with the Department and the Board to discuss this matter in a helpful and constructive manner and I look forward to continued cooperation in the future. If I can be of further assistance, please let me know.

Sincerely,



Richard P. Mather, Sr.
Deputy Chief Counsel

cc: Kathleen A. McGinty
Barbara A. Sexton
Kelly J. Heffner
Thomas K. Fidler
Kurt E. Klapkowski

enclosure

als. By taking this approach, the Department hopes to reduce pollution, lower the number of corrective actions that must eventually be performed, decrease the amounts of contaminated soil and groundwater that must be dealt with, and do so in a manner that is flexible, reasonable and cost effective.

H. *Sunset Review*

The regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 7, 2006, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

J. *Public Comments*

Written Comments—Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by June 29, 2006. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by June 29, 2006. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final-form rulemaking will be considered.

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by (within 60 days following publication in the *Pennsylvania Bulletin*). A subject heading of the proposed rulemaking and a return name and address must be included in each transmission. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

KATHLEEN A. MCGINTY,
Chairperson

Fiscal Note: 7-395. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE VI. GENERAL HEALTH AND SAFETY

CHAPTER 245. ADMINISTRATION OF THE STORAGE TANK AND SPILL PREVENTION PROGRAM

Subchapter A. GENERAL PROVISIONS

GENERAL

§ 245.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Aboveground storage tank—One or a combination of stationary tanks with a capacity in excess of 250 gallons, including the underground pipes and dispensing systems connected thereto within the emergency containment area, which is **used, will be used** or was used to contain an accumulation of regulated substances, and the volume of which, including the volume of piping within the storage tank facility, is greater than 90% above the surface of the ground. The term includes tanks which can be visually inspected, from the exterior, in an underground area. The term does not include the following, or pipes connected thereto:

* * * * *

Air Pollution Control Act—The Air Pollution Control Act (35 P. S. §§ 4101—4106)

* * * * *

Certification categories—Individual certification categories issued to certified installers or certified inspectors to perform tank handling, tightness testing or inspection activities on aboveground or underground storage tank systems and facilities. The term includes category specific certifications in one or more of the following:

(i) Storage tank inspector certification categories:

(A) IAF—Inspection of aboveground field constructed and aboveground manufactured storage tank systems and facilities.

(B) IAM—Inspection of aboveground manufactured storage tank systems and facilities.

(C) IUM—Inspection of underground storage tank systems and facilities.

(ii) Storage tank installer certification categories:

(A) ACVI—Aboveground storage tank civil installation and modification.

(B) AFMX—Aboveground field constructed metallic storage tank installation, modification and removal, and aboveground manufactured metallic storage tank modification.

(C) AFR—Aboveground field constructed storage tank removal.

(D) AMEX—Aboveground storage tank mechanical installation, modification and removal.

(E) AMMX—Aboveground manufactured metallic storage tank installation and modification.

after reasonable inquiry, the statements and information in the document are true, accurate and complete.

(4) The owner or operator of a major facility shall submit to the Department the results of any revalidation test or method within 3 months after completion of the test or method.

(p) The Department may modify or supersede any PAL which was established prior to the date of approval of the PAL provisions by the EPA as a revision to the SIP.

[Pa.B. Doc. No. 06-701. Filed for public inspection April 28, 2006, 9:00 a.m.]

[25 PA. CODE CH. 245]

[Correction]

Administration of the Storage Tank and Spill Prevention Act

An error occurred in the preamble to the proposed rulemaking which appeared at 36 Pa.B. 1851, 1862 (April 22, 2006). A date was inadvertently omitted from the paragraph regarding the submission of electronic comments.

The correct version of the paragraph is as follows:

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by June 29, 2006. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission. If an acknowledgment of electronic com-

ments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

[Pa.B. Doc. No. 06-06-656. Filed for public inspection April 21, 2006, 9:00 a.m.]

MILK MARKETING BOARD

[7 PA. CODE CH. 145]

Transactions Between Dealers and Customers

The Milk Marketing Board (Board) will conduct a public hearing on May 16, 2006, at 10 a.m. in Room 202 of the Agriculture Building, 2301 North Cameron Street, Harrisburg, PA.

The purpose of the hearing is to receive testimony and comments regarding proposed amendments to 7 Pa. Code Chapter 145 (relating to transactions between dealers and customers). See 35 Pa.B. 1772 (March 19, 2005). The proposed amendments deal with the sale and leasing of refrigeration equipment, milk dispensers and cream dispensers.

There is no requirement for prior notification or entry of appearance to be able to provide testimony or comments at the hearing. A draft of the proposed amendments may be obtained at the Board's website or by contacting the Board office.

KEITH BIERLY,
Secretary

[Pa.B. Doc. No. 06-702. Filed for public inspection April 28, 2006, 9:00 a.m.]