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

October 12, 2007

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

Re: Regulation #7-409 (IRRC #2619)
Environmental Quality Board
Hazardous Waste Regulations

Dear Chairperson McGinty:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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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 Camille George, Majority Chairman, House Environmental Resources and Energy Committee

Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation #7-409 (IRRC #2619)

Hazardous Waste Regulations

October 12, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the July 14, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (Board) to respond to all comments received from us or any other source.

1. Sections 264a.115 and 265a.115. Certification of closure. - Consistency; Clarity.

Certification of closure

These two sections provide the processes for closure certification of hazardous waste facilities. We question why the terms are different in each. For example, the period of 180 days is used for closure procedures for solid waste management units in Section 264a.115(b). The same period of 180 days is also in Section 265a.115(c) while a period of 90 days is found in Section 265a.115(b). In addition, why are the reasons or conditions different in either section for extending the closure period? What are the bases for these differences?

Finally, why does Section 264a.115(b)(2) discuss taking "all steps to prevent threats to human health and environment," but Sections 265a.115(b)(1) and (2) refer to "all measures necessary to ensure safety to human health and the environment?" The Board should use consistent standards in the final-form regulation or explain the need for the different phrasing used to describe these standards of protection.

Reasonable likelihood and incompatibility

In Section 264a.115(b)(1)(ii) and (iii) how would the Board determine or measure "reasonable likelihood" and if closure of the facility would be "incompatible...?"

2. Sections 264a.143 and 265a.143. Financial assurance for closure. - Fiscal impact; Consistency with other regulations; Need; Implementation procedures.

These sections remove the use of the financial test and the corporate guarantee as a means of financial assurance, and replace them with closure insurance. According to the Preamble, this change is based on "[t]he Department's [Department of Environmental Protection (DEP)] experience with companies suddenly losing the ability to meet the requirements of the financial test with no means of replacing collateral available or entering bankruptcy." Commentators

claim that the changes in these provisions will financially penalize the regulated community. What are the compelling interests that justify reducing the flexibility that is available under federal law and regulations? What will be the fiscal impact of the new system on the regulated community? In its response, the Board should also consider and explain what methods of financial assurance are used in neighboring states.

3. Sections 264a.168 and 265a.168. Bond forfeiture. - Implementation procedures; Clarity.

These two sections establish the process necessary if DEP determines that bond forfeiture is appropriate. We have four questions. First, why does the first sentence remain in Section 264a.168 (b)(4), but the same sentence was deleted from Section 265a.168(b)(4)? Second, in both sections, should each new sentence added to Subsection (b)(4) be separated out as its own number? Third, what are "environmental effects" as mentioned in (b)(4)? Finally, how will DEP calculate what are "excess moneys" as listed in Subsection (b)(4)?

4. Section 264a.195. Inspections. - Fiscal impact; Reasonableness; Implementation procedures; Need.

The proposed regulation deletes this section in its entirety. Commentators have indicated that this deletion would result in unnecessary costs imposed on the regulated community. If the tanks are in a facility that is not in operation during the weekend, what is the need for daily inspections? Why is inspection necessary for a storage tank when the facility is not in operation? The Board and DEP need to justify the need for and benefit of this deletion.

5. Section 265a.154. Form, terms and conditions of bond. - Clarity.

Subsection (b)

Subsection (b) mentions forms used for bond instruments. The Board should specify the manner in which these forms will be made available to the regulated community.

Numerical order

This section is listed twice in the proposed regulation between Sections 264a.153 and 264a.156, and Sections 265a.153 and 265a.156. The final-form regulation should be correctly numbered.

6. Section 266b.3. Definitions. - Clarity.

Paragraph (i), under the definition of "oil-based finishes," refers to a "hazardous waste characteristic," but the proposed regulation does not define this term. The Board should provide a definition for this term or a reference to the applicable federal regulation.

7. Sections 266b.11, 266b.12, 266b.31 and 266b.32. Waste management for universal waste. - Implementation procedures; Clarity.

These sections contain the same language to describe waste management for both universal waste oil-based finishes and photographic solutions. We have three concerns pertaining to these

four sections. First, what is “original or **otherwise appropriate** and labeled packaging?” (Emphasis added.) Second, the phrase “reasonably foreseeable conditions” is vague and needs to be further defined. Finally, how is it determined that a container is “structurally sound, compatible ...?”

8. Section 270a.2. Definitions. - Implementation procedures.

Subsection (c) defines the term “standardized permit.” This subsection states that a standardized permit may have two parts: “[a] uniform portion issued in all cases and a **supplemental portion issued at the Department’s discretion.**” (Emphasis added.) When would DEP decide to use its discretion to issue a “supplemental portion?”

9. Section 270a.60. Permits-by-rule. - Fiscal impact; Reasonableness; Need.

Subsection (b)(2)(vi) states that “[t]reatment activities involving thermal treatment are not eligible to operate under this permit-by-rule.” Currently, the DEP allows a generator treating its own hazardous waste in containers, tanks or containment buildings to operate under a permit-by-rule. A commentator expressed concerns over this proposed subsection, indicating that it could: “[I]mit options for reclaiming usable material from the waste or contaminated soil via use of thermal desorption or other processes that use elevated temperatures.” The Preamble offers no explanation for the new language making thermal treatment ineligible. What is the need for this change? Please explain the intent of the addition of Subsection (b)(2)(vi) and its impact on thermal treatment.

10. Section 270a.204. Procedures for preparing a draft standardized permit. - Reasonableness; Implementation procedures; Clarity.

This section provides the procedures necessary for preparing a draft standardized permit. How will DEP determine whether a facility has a “demonstrated history of significant noncompliance with applicable requirements,” making it ineligible for a standardized permit under Subsection (2)(ii)(D)?

The intent of the “tentative determination” and “draft permit decision” requirements in Subsection (3) are unclear. Will the permit applicant have an opportunity at this point to submit more information? Please explain.

11. Section 270a.206. Requirement to apply for an individual permit. - Clarity.

This section provides the requirements necessary to apply for an individual standardized permit, with ineligibility based on various factors. How will DEP determine a “demonstrated history of significant noncompliance” and a “demonstrated history of submitting incomplete or deficient permit applications” as mentioned in Paragraphs 1 (ii) and (iii)? When will DEP inform a facility owner or operator that it needs to apply for an individual permit as mentioned in Paragraph (2)? The final-form regulation should include a reference to the appropriate section that specifies a timeframe.

12. Section 270a.207. Requirements for standardized permit public notices. - Clarity.

This section describes the process for DEP to provide public notice of draft standardized permits. Paragraph (2)(ii) refers to “[a] manner constituting legal notice to the public under State statute.” This phrase is vague. The final-form rulemaking should set forth the specific manner in which notice is to be legally provided and specify the statute this provision references.

13. Section 270a.209. Response to comments. - Clarity.

This section describes the process for DEP’s response to public comments on draft standardized permits. We have two questions. First, Paragraphs (1) (ii) and (2) refer to “significant comments.” How will DEP determine what comments are “significant?” Second, Paragraph (1)(ii) indicates that DEP will describe and respond to all significant comments, and “[o]n any additional conditions necessary to protect human health and the environment.” What is meant by this phrase? Is it referring to conditions as a result of the permit or from those identified by the public comment? The final-form regulation needs to clarify this issue.

14. Section 270a.210. Procedures to appeal a final standardized permit. - Reasonableness; Clarity.

Would there be any circumstances where the uniform portion of the standardized permit would be subject to appeal?

15. Requests. - Reasonableness; Consistency; Implementation procedure; Clarity.

In Sections 265a.163 and 270a.41(3), the regulation refers to requests by DEP. However, it is unclear whether requests by DEP will be made in writing. We note that Section 270a.207(1)(iv) requires the public to submit requests in writing to DEP. The final-form regulation should clearly state that DEP will submit its requests in writing to parties who are expected to comply with the requests.

ENVIRONMENT QUALITY BOARD #7-409 (#2619)
HAZARDOUS WASTE REGULATIONS

HONORABLE KATHLEEN A. MCGINTY, CHAIRPERSON

Kathy Fordy

DATE:

10-12-07