

ARTHUR COCCODRILLI, CHAIRMAN
GEORGE D. BEDWICK, VICE CHAIRMAN
S. DAVID FINEMAN, ESQ.
SILVAN B. LUTKEWITTE III
JOHN F. MIZNER, ESQ.
KIM KAUFMAN, EXECUTIVE DIRECTOR
LESLIE A. LEWIS JOHNSON, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION

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

March 15, 2010

Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-444 (IRRC #2802)
Environmental Quality Board
Outdoor Wood-Fired Boilers

Dear Chairman Hanger:

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
wbg
Enclosure

cc: Honorable Mary Jo White, Majority 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
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-444 (IRRC #2802)

Outdoor Wood-Fired Boilers

March 15, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the October 17, 2009 *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. Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

Legislators and members of the public have provided a great deal of comment on this proposed rulemaking. The comments are both in favor of and in opposition to the rulemaking. Both sides raise many valid points about the pros and cons of promulgating a statewide rulemaking that regulates outdoor wood-fired boilers (OWBs).

Those that support the rulemaking have legitimate concerns about air quality in this Commonwealth. We especially understand the concerns of those that have been negatively affected by the operation of a nearby OWB. At the same time many commentators, especially those in the rural parts of the Commonwealth, fail to see the need for imposing statewide regulations on OWBs. They are concerned that if these regulations are promulgated, they will no longer be able to use their existing OWBs.

Given the number of legitimate points raised by opponents and proponents of the rulemaking, the different effects it will have on rural citizens of the Commonwealth compared to urban citizens of the Commonwealth, and the amount of interest expressed by members of the General Assembly, we suggest the regulation of OWBs on a statewide scale is a policy decision of such a substantial nature that it requires legislative review. Striking an appropriate balance between regulation and non-regulation on a statewide scale is an issue that should be addressed by the General Assembly. Since regulations have the

full force and effect of law, we believe that any decision pertaining to the use of OWBs should be made by the elected officials of the legislative branch of government that represent all geographic regions of the Commonwealth.

2. Need for the regulation.

We acknowledge that the Pennsylvania Department of Environmental Protection (DEP) has an obligation to protect the public health and that OWBs can be a nuisance under certain circumstances. However, the Board has not provided adequate justification for the statewide regulation of OWBs. We have five concerns related to the need for the regulation. First, DEP has produced a model ordinance to assist municipalities in enacting local ordinances to regulate OBWs. The model ordinance states that, where home heating decisions are concerned, “the Department believes that local municipalities can respond to and resolve these issues more effectively and swiftly than a state agency.” Many commentators, including members of the General Assembly, also believe the regulation of OWBs should be left to local governments. Why does the Board believe that it is now more appropriate for a state agency to set the standards for the regulation of OWBs?

Second, in the Regulatory Analysis Form (RAF), the Board has stated that there are “many” citizen complaints regarding the operation of OWBs. Based on the number of comments received from citizens in support of this rulemaking, we recognize that OWBs can be problematic to many citizens of the Commonwealth. However, we ask the Board to quantify the number of complaints it has received and the number of complaints received by local governments. A breakdown of complaints by county would assist this Commission in determining if the regulation is in the public interest for all citizens of the Commonwealth.

Third, the Board has stated all or portions of 22 counties in the Commonwealth were designated by the Environmental Protection Agency (EPA) as nonattainment for certain air quality standards. We ask the Board to quantify how many OWBs are operating in the 22 nonattainment counties and compare that to the number of OWBs operating in the Commonwealth’s remaining 47 counties. Is there a correlation between the number of OWBs in a particular county and its attainment or nonattainment status as determined by the EPA?

Fourth, given the list of applicable Commonwealth regulations and statutes already in place and specifically cited in § 123.14(h) of this proposed rulemaking, what is the need for this rulemaking? Why can’t enforcement of the existing regulatory and statutory requirements provide adequate protection of the public health, safety and welfare?

Fifth, how many local governments have ordinances pertaining to the use of OWBs? Are the ordinances less stringent than this proposed rulemaking?

3. Implementation procedures.

Enforcement

Eight members of the Democratic Caucus of the House of Representatives submitted a comment in support of the rulemaking. In that comment, they state, “Most importantly, the Department of Environmental Protection must enforce these rules, and must assist local authorities in responding to wood boiler complaints.” The proposed regulation is silent on enforcement of this regulation. How will it be enforced? As suggested by the commentators, will the DEP be assisting local authorities in responding to complaints?

Role of local municipalities

The Pennsylvania State Association of Township Supervisors submitted comments that state the following: “If the municipality would want to assist and enforce the proposed regulations, that municipality will have to first adopt an ordinance referencing the proposed regulations. Without such an ordinance, the only recourse for the municipality would be to refer the individual to DEP for relief.” Will local municipalities be required to pass their own ordinances referencing this rulemaking before they could require compliance? We ask the Board to respond to this concern in the Preamble to the final-form rulemaking.

Possibility of a “grandfathering” provision

As noted by many commentators, the retroactive nature of the rulemaking is problematic. They believe it is unfair to impose new requirements on people that have already invested in OWBs. Has the Board considered adding a grandfathering provision to the regulation?

Timetables for compliance

Section 15 of the RAF requires a promulgating agency to describe who and how many will be adversely affected by a regulation and how they will be affected. The Board has identified two companies in the Commonwealth that manufacture OWBs. One of the companies identified has submitted comments on the rulemaking. They are concerned that the proposed effective date of the rulemaking will not provide them enough time to develop and properly test the new technology that will be required. They note that if they are prohibited from selling their current units before they have a unit that is in compliance with this rulemaking, they will be forced out of business. As suggested by the commentator, we ask the Board to allow the requirements of the regulation to be phased-in over time so that the two Pennsylvania manufacturers will not be negatively affected by the rulemaking.

4. Fiscal impact of the regulation.

Cost to individuals

The Board's estimate of costs to operators of OWBs is limited to the costs associated with ensuring the stack height of the devices is in compliance with the regulation. Many commentators, including members of the General Assembly, believe there are other costs associated with the rulemaking. For example, Senator Scarnati, President Pro Tempore of the Senate, commented as follows:

The retroactive nature of the proposed regulations will impose significant, unforeseen costs on homeowners who, in view of rising utility costs, have invested in these units to heat their homes. Additionally, the stack height requirements (especially for older boilers: 2 feet higher than rooflines within 500 feet) would require many existing installations in rural areas with hilly terrain to be retrofitted with impractical, expensive and unsafe chimney heights and guy wiring. The estimated cost to achieve compliance under the proposed regulations, will require significant additional expense, denying many rural owners, most of whom are on limited incomes, the ability to heat their home economically.

We ask the Board to provide a more detailed analysis of the costs associated with retrofitting an existing OWB. In addition, if an owner of an OWB is unable to meet the requirements of this regulation, we ask the Board to quantify the cost of obtaining a new source of heat and the cost of paying for that heat source on an annual basis.

Cost to state and local government

If the DEP will be enforcing the regulation and assisting local authorities with complaints, what additional costs will be incurred by the DEP? If enforcement and responding to complaints will be the duty of local governments, what will be the costs for those entities? We ask the Board to quantify these costs in the Preamble and Regulatory Analysis Form of the final-form rulemaking.

5. The legality, desirability and feasibility of exempting or setting lesser standards of compliance for individuals or small businesses.

The setback provisions contained in § 123.14(c) and the stack height provisions contained in § 123.14(d) have been cited by many commentators as problematic for numerous reasons. For situations in which the operation of an

OWB does not impact a neighbor, we ask the Board to consider providing exemptions to Subsections (c) and (d) for owners of OWBs.

6. Section 123.14. Outdoor wood-fired boilers. – Need; Reasonableness; Implementation procedures; Clarity.

Subsection (a) Applicability.

According to Subsections (a)(1)(i),(ii) and (iii), this regulation will apply to a person, manufacturer, supplier or distributor who sells, offers for sale, leases or distributes an OWB in the Commonwealth; a person who installs an OWB in the Commonwealth; and a person who purchases, receives, leases, owns uses or operates an OWB in the Commonwealth.

Section 15 of the RAF requires a promulgating agency to describe who and how many will be adversely affected by a regulation and how they will be affected. The Board's response to this section of the RAF includes the following paragraph:

Real estate agents and brokers may also be affected by this proposed rulemaking. The proposed rulemaking prohibits the sale of non-Phase 2 OWB models in this Commonwealth after the effective date. In the event that an unqualified OWB model is located on a property that is being sold after the effective date, the transfer of ownership and operation of the existing, unqualified OWB may be prohibited. While the regulation as currently drafted does not explicitly address the issue of transferring non-Phase 2 OWBs through a real estate transfer, the Department could interpret the regulation to prohibit that transfer and require that the non-qualifying OWB be dismantled before the real estate transfer takes place.

As noted by the Pennsylvania Association of Realtors (PAR), the terms "seller" and "lessor" are not defined in the regulation. PAR would like these terms defined to ensure that the regulation does not apply to real estate professionals or their clients. We agree that any potential interpretation of this regulation that would prohibit the sale of real property that has an non-Phase 2 OWB is unreasonable. We urge the Board to include specific language in the final-form regulation that would exempt individuals involved with real estate transactions from these regulations.

In addition, the phrase "reasonably prudent precautions" is used in Subsection (a)(2)(ii). This phrase is vague and does not establish a binding standard that can be evenly applied to all members of the regulated community. We

recommend a more precise standard that would allow the regulated community and those that will be enforcing the regulation to know what is expected of them be included in this subsection.

Subsection (b) Phase 2 outdoor wood-fired boiler.

This subsection states that only Phase 2 OWBs may be sold or purchased in this Commonwealth. How will this provision be administered if real estate is sold that includes a non-Phase 2 OWB?

Subsection (c) Setback requirements for Phase 2 outdoor wood-fired boilers.

Under this subsection, a Phase 2 OWB must be installed a minimum of 150 feet from the nearest property line. We have two concerns. First, since Phase 2 OWBs are cleaner burning devices than existing OWBs, what is the need for such a significant setback requirement? Second, why does this provision use the phrase “nearest property line”? We note that the stack height requirements in Subsection (d)(2) are imposed on Phase 2 OWBs within 150 feet of a *residence*, not a property line. As recommended by several commentators, we suggest that the setback be a function of distance to the nearest residence, not property line.

Subsection (d) Stack height requirements for Phase 2 outdoor wood-fired boilers.

This subsection mandates certain stack height requirements for Phase 2 OWBs. Similar to our concern above, since these devices are cleaner burning, what is the need for these requirements?

In addition, how can the Board ensure that the effectiveness of the Phase 2 OWBs will not be affected by the stack height requirements? What evidence does the Board have to show that this requirement is reasonable? We have a similar concern with Subsection (e), pertaining to stack height requirements for existing OWBs.

Finally, Subsection (d)(2) requires a Phase 2 OWB stack to extend two feet above the highest peak of the highest residence located within 150 feet of that device. If a person currently owns or installs a Phase 2 OWB that is in compliance with this provision and a neighbor builds a residence within that 150 foot radius that makes the Phase 2 OWB non-compliant, how will this be resolved? We have a similar concern with Subsection (e)(1)(ii).

Subsection (f) Allowed fuels.

How would a person obtain approval from the DEP to use a fuel other than the fuels listed in this subsection? The process for obtaining this approval should be included in the final-form regulation.

Subsection (i) Written notice.

This subsection requires a distributor, seller or lessor of an OWB to provide the prospective buyer or lessee with a copy of the regulation and a written notice that includes six pieces of information. We have five concerns. First, similar to a concern noted above, does this subsection apply to the sale or lease of real estate on which an OWB is located?

Second, does this subsection apply to isolated sales between two private individuals?

Third, Subsection (1)(i) requires “acknowledgement” that the buyer was provided a copy of regulation. Would a verbal acknowledgement satisfy the requirement of this subsection? If a written acknowledgement is required, it should be included in the final-form regulation.

Fourth, what is the need for Subsection (1)(ii)? Since the buyer will be receiving a copy of the regulation which specifically lists allowed fuels, providing that list again via the written notice is redundant. We have similar concerns with Subsections (1)(iii) and (1)(iv).

Fifth, Subsection (1)(vi) states the following:

A written statement that the stack height and setback requirements provided under this section may not be adequate in some areas of this Commonwealth due to terrain that could render the operation of the outdoor wood-fired boiler a nuisance or public health hazard.

We question what this provision means and how it will be applied to the regulated community. Is the Board implying that compliance with this regulation could still lead to some sort of fine, penalty or corrective action? The Board needs to explain its intent for including this provision in the written notice.

Subsection (j) Recordkeeping requirements.

If real estate transfers and isolated sales between individuals require the written notices referenced in Subsection (i), will the requirements of this subsection be applicable to those that sell real estate with an OWB or a private party that sells an OWB?

Facsimile Cover Sheet

RECEIVED
2010 MAR 15 AM 11:13
INDEPENDENT REGULATORY REVIEW COMMISSION



Phone: (717) 783-5417
Fax #: (717) 783-2664
E-mail: irrc@irrc.state.pa.us
Website: www.irrc.state.pa.us

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

To: Debra L. Failor
Agency: Environmental Quality Board
Phone: 7-2814
Fax: 705-4980
Date: March 15, 2010
Pages: 9

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-444 (IRRC #802). 2802
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:

Kanya Gordy

Date:

3-15-10