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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE



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April 5, 2010

Via Electronic Mail

Environmental Quality Board
Rachel Carson State Office Building
16th Floor
400 Market Street
Harrisburg, PA 17101-2301

Re: Proposed Amendments to Land Recycling Program
Regulations, 25 Pa. Code Chapter 250

Dear Members of the Board:

We are pleased to submit the following comments regarding the Environmental Quality Board's (the "Board's") proposed amendments to the Chapter 250 regulations administering the Land Recycling Program pursuant to the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 -.909. The proposed amendments appeared in the *Pennsylvania Bulletin* on March 6, 2010, at 40 Pa. Bull. 1297.

These comments are being submitted by Manko, Gold, Katcher & Fox LLP on behalf of Beazer East, Inc. (the "Commenter"). Commenter is the owner of and/or responsible party at numerous facilities and remedial projects throughout Pennsylvania who stands to be significantly and directly affected by the proposed amendments to the Act 2 regulations.

Commenter generally supports the proposed Chapter 250 amendments, with one significant exception. The proposed amendments would add Subsections 250.304(h) and 250.305(h), which seek to require remediators using the Act 2 statewide health standard ("SHS") for groundwater and soil, respectively, to address the vapor intrusion exposure pathway in one of two ways. These include (1) calculating vapor-intrusion-based groundwater and soil cleanup standards unique to the property at issue under the site-specific standard ("SSS") through a evaluation of air inhalation pathways pursuant to Section 304(f)(4) of Act 2 (which requires evaluation of "the potential for human inhalation of regulated substances from the outdoor air and other site-specific air



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exposure pathways, if applicable”); or (2) by following technical guidance issued by the Pennsylvania Department of Environmental Protection (“PADEP” or the “Department”) entitled “Vapor Intrusion into Buildings from Groundwater and Soil under the Act 2 Statewide Health Standard” (the “Vapor Intrusion Guidance”).

Commenter’s concern with these proposed amendments are two-fold. First, as the Department recognized in the introduction to the Vapor Intrusion Guidance, potential indoor air quality impacts from vapor intrusion into buildings from regulated substances in groundwater and soil are not assessed as part of the SHS regulations. Similarly, in its Land Recycling Program Q&A Database published on the PADEP website, the Department acknowledges the existing “loophole” that exists in which the vapor intrusion pathway was not considered in developing the SHS medium specific concentrations (“MSCs”). This gap resulted from a lack of authority in the Act 2 statute to require evaluation of the vapor intrusion pathway through the MSC formulas, or otherwise, under the SHS. While Commenter recognizes this inconsistency in the statute between mandating evaluation of the vapor intrusion pathway under the SSS, on the one hand, and not doing so under the SHS, on the other, Commenter believes that this inconsistency must be resolved by the legislature rather than through amending the Chapter 250 regulations.

Second, aside from the statutory authority concern, Commenter believes that it is inappropriate merely to incorporate the Vapor Intrusion Guidance into the Act 2 regulations by reference. This approach would give a guidance document the authority of duly promulgated regulations without being subjected to the safeguards of formal notice and comment rulemaking. In addition, incorporation-by-reference would effectively allow the Department to change the Act 2 regulations by revising the Vapor Intrusion Guidance document. Therefore, Commenter recommends that the Board either delete proposed Subsections 250.304(h) and 250.305(h), or propose including the full language of the Vapor Intrusion Guidance directly into the Chapter 250 regulations. If the Board were to pursue the latter approach, Commenter believes that an additional comment period would be required because the regulated community would not previously have been notified of the Board’s intent to codify this guidance within the regulations, and therefore should have an adequate opportunity to consider and provide input to the Board on such a proposal.

We appreciate the opportunity to comment on the proposed rulemaking and would welcome the opportunity to discuss the attached comments with the Board and the Department.

Sincerely,



Rodd W. Bender

For MANKO, GOLD, KATCHER & FOX, LLP

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Tate, Michele

From: Rodd Bender [RBender@mgkflaw.com]
Sent: Monday, April 05, 2010 10:21 PM
To: EP, RegComments
Cc: Klapkowski, Kurt E
Subject: Comments on Proposed Amendments to Land Recycling Program Regulations, Chapter 250

Environmental Quality Board:

We are pleased to submit to the Environmental Quality Board the attached comments (in electronic format) regarding the proposed amendments to the Land Recycling Program regulations, which appeared in the Pennsylvania Bulletin on March 6, 2010. These comments are being submitted by Manko, Gold, Katcher & Fox LLP on behalf of Beazer East, Inc. I have included both a transmittal cover letter and the comments themselves in the attached pdf document. My name, address, and additional contact information is set forth below. Please confirm receipt of these comments by reply message to me at rbender@mgkflaw.com. Thank you in advance for your consideration of these comments.

Regards,

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