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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

May 5, 2010

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

Re: Regulation #7-453 (IRRC #2823)  
Environmental Quality Board  
Administration of the Land Recycling Program

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](http://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 #7-453 (IRRC #2823)

### Administration of the Land Recycling Program

May 5, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the March 6, 2010 *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 (EQB) to respond to all comments received from us or any other source.

#### **1. Section 250.11. Periodic review of MSCs. – Implementation procedures.**

Under this new section, the EQB is proposing a plan to keep the medium-specific concentrations (MSCs) current by requiring reviews of the MSCs as new scientific information becomes available, but in no case more than 36 months after the effective date of the most recently promulgated MSCs. A commentator is concerned with how the Department of Environmental Protection (Department) will implement this provision and the effects it might have on remediation projects that are either in the planning stages or have already begun. For example, if an MSC value changes during a remediation project, what standard will be required? It would benefit the regulated community to include language in the final-form regulation that spells out how any changes to MSCs will be administered.

#### **2. Sections 250.304. MSCs for groundwater and 250.305. MSCs for soil. – Statutory authority; Legislative intent; Implementation procedures; Clarity.**

Under Subsection (c), the EQB is amending a reference to an EPA Office of Water Publication. As required by Section 1.6 of the *Pennsylvania Code & Bulletin Style Manual*, the year or edition of the document being incorporated by reference should be included in the final-form regulation.

In addition, the EQB is adding similar language under both sections that would require remediators using the statewide health standards (SHSs) of the Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101 *et. seq.*) (Act 2) to address vapor intrusion exposure pathways in one of two ways. Listed below is the language being added as Subsection (h) under both sections:

The methodology used by the Department for calculating the MSCs for groundwater/soil does not address the vapor intrusion exposure pathway. Therefore, to demonstrate attainment under the act for the vapor intrusion exposure pathway the remediator shall address the vapor intrusion exposure pathway in accordance with section 304(f)(4) of the act (35 P. S. § 6026.304(f)(4)) and Subchapter D (relating to site-specific standard), or in accordance with technical guidance published by the Department addressing vapor intrusion into buildings from groundwater and soil under the Statewide health standard.

We have three concerns with the new language. First, a commentator believes that the Department lacks statutory authority under Act 2 “to require evaluation of the vapor intrusion pathway through the MSC formulas, or otherwise under the SHS.” It is our understanding that the Department can require this type of evaluation when a remediator is using the site-specific standards under Act 2, but cannot require this type of evaluation when a remediator is using the SHSs of Act 2. We ask the EQB to explain what authority it has to require remediators using SHSs to demonstrate attainment as required by these sections.

Second, the reference to technical guidance published by the Department is vague. We recommend that the final-form regulation include a specific name and/or document number for the technical guidance referenced above and also the year or edition of the document.

Third, a commentator believes that it is inappropriate to incorporate technical guidance by reference because it would give the document the authority of a duly promulgated regulation without the benefit of formal notice and a public comment period. As suggested by the commentator, has the EQB considered including the full language of the guidance document in these regulations?

**3. Appendix A, Table 1 – Medium-Specific Concentrations (MSCs) for Organic Regulated Substances in Groundwater. – Statutory authority; Legislative intent.**

*Methyl Tertiary Butyl Ether (MTBE)*

In existing regulation, the MSC for MTBE is 20 ug/l for groundwater used for drinking water. That numeric standard is not being amended under this proposed rulemaking. However, the EQB is deleting the designation of (h), lifetime health advisory level, from the table. According to the EQB, MTBE is no longer included in the EPA “Drinking Water Standards and Health Advisories” table and there is no published concentration number. Therefore, the designation is being deleted.

In its discussion of the treatment of this MSC in the Preamble to the rulemaking, the EQB included the following statement: “The Department has decided that the previously considered revisions for MTBE included in the September 1, 2009 draft, which allowed for higher concentrations of MTBE based on health based calculations, would have resulted in unacceptable taste and odor impacts on groundwater used for drinking water.” Public commentators are concerned with the EQB’s decision to retain the existing numeric value for MTBE. As noted in the Preamble, the Department’s Cleanup Standards Scientific Advisory Board (CSSAB) also has concerns, “because they do not reflect specific health-based criteria from the Land Recycling Act.”

Aside from the debate on the underlying science of the MSC for MTBE, we have concerns with the process used by the EQB. First, as noted by a commentator, “In the absence of an MCL or an HAL, the Department is statutorily required to calculate the MSC using valid scientific methods that are not more stringent than the health-based criteria set forth in Section 303 of the Land Recycling Act.” We agree with the commentator and note that the deletion of the lifetime health advisory level designation would mandate that MSC for MTBE be calculated using valid scientific methods. 35 P.S. 6026.303(c).

Second, what is the EQB’s statutory authority for basing any MSC on unacceptable taste and odor impacts? How does the EQB’s decision to retain the MSC for MTBE at 20 ug/l fit into the General Assembly’s declaration of policy found in the Section 102 of the Act:

Cleanups should be based on the actual risk that contamination on the site may pose to the public health and the environment, taking into account its current and future use and the degree to which contamination can spread offsite and expose the public or the environment to risk, not on cleanup policies requiring every site in this

Commonwealth to be returned to a pristine condition.  
(35 P.S. § 6026.102(6))

We believe this declaration of policy clearly establishes the intent of the General Assembly. We urge the EQB to listen to the advice of the CSSAB and align the MSC for MTBE with actual health risks, not taste or odor.

**4. Appendix A, Table 2 – Medium Specific Concentrations (MSCs) for Inorganic Regulated Substances in Groundwater. – Need.**

*Sulfate*

A commentator has questioned the rationale for adding sulfate to this table. In the Preamble to the final-form rulemaking, the EQB should explain why this substance is being added to Appendix A, Table 2.

**5. Miscellaneous clarity.**

*EQL*

The definition of this term found under § 250.1 is being amended to read as follows:

Estimated quantitation limit. The lowest concentration that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions. The EQL is generally 5 to 10 times the MDL (method detection limit). However, it may be nominally chosen within these guidelines to simplify data reporting. For many analytes the EQL analyte concentration is selected as the lowest non-zero standard in the calibration curve. Sample EQLs are highly matrix dependent. The EQLs in the EPA publication *Test Methods for Evaluating Solid Waste, Physical/Chemical Methods* [SW-846] are provided for guidance and may not always be achievable.

Regulations have the full force and effect of law and establish a binding norm that is applicable to all that fall under its jurisdiction. Therefore, regulations must be clear and unambiguous. The first sentence of this definition, “The lowest concentration that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions.” accomplishes this goal. However, the remaining sentences lack the clarity needed to establish a binding norm. We recommend that they be deleted from the final-form regulation.

### Facsimile Cover Sheet



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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

**To:** Debra L. Failor  
**Agency:** Environmental Quality Board  
**Phone:** 7-2814  
**Fax:** 705-4980  
**Date:** May 5, 2010  
**Pages:** 6

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation # 7-453 (IRRC #2823). 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:** *Karen Brady* **Date:** 5-5-10