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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 #7-454 (IRRC #2824)
Environmental Quality Board
Administration of the Uniform Environmental Covenants Act

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 #7-454 (IRRC #2824)

Administration of the Uniform Environmental Covenants Act

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. Economic Impact.

In the Preamble, the EQB states it does not anticipate increased costs except for the \$350 filing fee. In the Regulatory Analysis Form, the EQB estimates \$105,000 of costs imposed on the regulated community due to the filing fee. The EQB states that the use of environmental covenants is established by the Uniform Environmental Covenants Act (UECA), and therefore any costs are imposed by the UECA, not the proposed regulation.

Commentators disagree and ask that the EQB also include the costs of development of environmental covenants, internal review of environmental covenants and the administrative and legal costs to demonstrate an environmental covenant on a property can be removed. Commentators noted the filing of draft environmental covenants and then later filing final versions would also be costly. We ask the Board to quantify these costs, or in the alternative, to explain why these costs should not be included in the economic impact analysis of this regulation.

2. Section 253.1. Definitions. – Clarity.

Department and EQB

The term “Department” is used throughout the regulation, including within the definition of “agency.” Subsection 253.2(e) uses both the terms Department and agency. Additionally the term “EQB” is used in Subsection 253.7(c). For clarity, we recommend defining both of the terms “Department” and “EQB” in the regulation.

Final Report and Remedial Action Completion Report

Commentators requested an amendment to these definitions to recognize that a combination of cleanup standards may be used under the Land Recycling Act. We recommend adding this clarification or, alternatively, that the EQB provide an explanation of why this amendment is not appropriate.

Regulated substances

This term is used in the definitions of “engineering controls” and “institutional controls.” For clarity, we recommend adding a definition of “regulated substances.”

3. Section 253.2. Contents and form of environmental covenant. – Consistency with statute; Need; Reasonableness; Clarity.

Detailed narrative

In addition to the required information an environmental covenant must include that is listed in Subsection (a), Paragraph (b)(6) permits optional information to include:

A **detailed** narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure and the location and extent of the contamination. (Emphasis added.)

Both the regulatory and statutory provisions list the information to be included in the narrative. However, the regulatory provision differs from the parallel language in 27 P.S. § 6504(b)(6) by adding the word “detailed” to the narrative. We have two concerns. First, why is the word “detailed” needed in addition to the statutory language? Second, what guidance does the word “detailed” provide? The EQB should explain why the regulation varies from the statute, how the requirement for a “detailed” narrative differs from the statutory language and how the word “detailed” provides better direction than what is found in the statute.

Date of receipt

Paragraph (c)(5) states:

The date the Department receives the necessary copies of the signed final covenant, and the information reasonably required by the Department to make a determination concerning the approval or disapproval of the covenant, shall be designated as the "date of receipt" under section 6504(c)(4) of the UECA (relating to contents of environmental covenant).

We note that this provision was added to the statutory provisions found in 27 P.S. § 6504(c).

There are two concerns. First, it is not clear how to determine when the criterion is met regarding “information reasonably required by the Department to make a determination.” This criterion is also contained in Paragraph (4). We recommend that within a certain time period after the covenant is filed, the Department send written notice to the remediator indicating the start of the 90-day time period or that additional information is required for the filing to be considered complete.

Second, commentators believe it is unnecessary and premature to require a “signed final covenant” at this point in the process. The commentators assert that the expense of providing a final covenant would be wasted if that covenant is required to be changed. They also point out that if the draft covenant is approved, it could be signed afterward but prior to recording the environmental covenant. The EQB should explain why it is reasonable and cost effective to require a “signed final covenant” in Paragraph (c)(5).

Appeals

27 P.S. § 6504(c)(5) was omitted from the regulation. It states, “[T]he Department’s decision to approve or not approve an environmental covenant is appealable to the board.” The regulation should include this provision. In addition, a definition of “board” would be needed in section 253.1.

Need for Subsection (d)

Commentators believe Subsection (d) is repetitive of provisions already contained in Subsections (a), (b) and (c). Some do not believe Subsection (d) is needed, while others believe it imposes mandatory requirements not found in the UECA relating to Subsection (b). The EQB should explain why Subsection (d) is needed and reasonable.

Model covenant

Subsection (e) provides that the covenant “will be in the form of the Model Covenant posted on the Department’s web site or any other form acceptable to the agency.” Commentators believe that, based on their experience, the model will be enforced as the *defacto* regulation outside the regulatory review process. For example, commentators state that the model covenant contains reporting obligations that they believe have been carried into actual covenants unnecessarily.

While we believe examples can provide needed guidance toward regulatory compliance, we agree that the example must be understood to be an example and should not be raised to the level of enforcement as if it were a regulation. Therefore, we recommend adding clarification to Subsection (e) that states

other covenants will be accepted by the Department that meet the requirements of the UECA and that the model covenant is only one example of how to comply.

4. Section 253.3. Notice of environmental covenant. – Reasonableness; Need.

Subsection (c)

This subsection limits the opportunity to file waiver information to “no later than the date the draft environmental covenant is submitted to the agency.” Commentators believe this may be too restrictive. They believe after a filing there may be discussions with the agency that results in a change to the notification list. The EQB should explain why the waiver information is needed when the draft environmental covenant is submitted.

5. Section 253.4. Requirements for and waiver of environmental covenants. – Consistency with statute; Need.

Subsection (a)

This subsection is similar to 27 P.S. § 6517(a)(1), but not identical. The regulation uses the phrase “...controls **used** to demonstrate **or maintain** attainment of a remediation standard...” The regulation also states “...shall be **implemented through** an environmental covenant.” (Emphases added.) It is not clear why these phrases were substituted for the statutory language. The EQB should explain why these amendments to the statutory language are needed and what purpose they serve.

Subsection (b)

A commentator observes that the requirements in this subsection do not appear in the UECA and suggests deleting it. The commentator explains that an environmental covenant would essentially be redundant of requirements already in other required agreements. The EQB should explain why Subsection (b) is needed.

Subsections (c) and (d)

Commentators believe the Department will not have sufficient information to make an informed decision on waiver requests at the times they are required under subsections (c) and (d). They believe waivers need to be considered later in the process. The EQB should explain why information on waivers is needed as specified in Subsections (c) and (d) and how the Department can properly review the waiver requests at that time.

6. Section 253.5. Submission of environmental covenants and related information. – Consistency with statute; Economic impact; Need; Reasonableness.

Timing of submission

Extensive public comment was submitted relating to Subsections (a), (b) and (d). Commentators stated:

- The timeframes established in Section 235.5 are unworkable, impractical and not authorized by the UECA or any other statute.
- The timing of the submittal requirements in these provisions is too early to be productive.
- It is premature and a waste of resources to prepare and negotiate the terms of an environmental covenant before the facts underlying the environmental covenant are determined.
- An environmental covenant should be the last step in the remediation process.
- The time and cost of the work will have to be repeated because the environmental covenant will likely need to be revised based on the remedial outcome.

We are concerned that resources may be wasted and question why draft and final environmental covenants are needed at the points specified in Subsections (a), (b) and (d). The EQB should explain how the process in the regulation represents an effective use of time and resources for all parties involved. We will evaluate this response, as well as the response to public comment on these sections as part of our determination of whether the final regulation is in the public interest.

Names and current addresses

Subsection (c) requires a list of the names and current addresses of persons involved with the environmental covenant. That list must be provided when the unsigned draft of the environmental covenant is submitted. A commentator believes Subsection (c) is burdensome and describes it as a useless recordkeeping exercise because the list could be substantially changed by the time the environmental covenant is finalized. Another commentator suggests that the information required by Subsection (c) should not be required if that information is already contained in the environmental covenant. The EQB should explain why the list required by Subsection (c) is needed in addition to the information in the environmental covenant and also why the list is needed and useful when the unsigned draft is submitted.

7. Section 253.6. Requirements for county recorder of deeds. – Statutory authority.

Recorder of deeds

This section directs the actions of a recorder of deeds. Subsection (a) directs that “the recorder of deeds shall provide” a copy of the recorded document. Subsection (b) states the “county recorder of deeds may not require payment of the Realty Transfer Tax....” It is not clear in the regulation or Preamble what authority the EQB is using to regulate the actions of recorder of deeds. The EQB should explain its statutory authority to enforce Section 253.6.

8. Section 253.7. Fees. – Clarity; Economic impact.

Application of the fee

A commentator is concerned that the application of the \$350 fee is not sufficiently clear given the regulation’s requirements for multiple submittals of draft and final environmental covenants. We agree. For example, the regulation does not address amendments the Department may require to an environmental covenant. The regulation should clearly state what filings require payment of a fee.

9. Section 253.8. Subordination. – Consistency with statute; Need; Clarity.

Parallel provisions in 27 P.S. § 6503(d)

A commentator noted that this section includes portions and excludes portions of the parallel provision in 27 P.S. § 6503(d). We agree that, for example, the second sentence of 27 P.S. § 6503(d)(3) is not included in Subsection (c) of the regulation. Also 27 P.S. § 6503(d)(1) is not included in the regulation. We recommend including all of the provisions from 27 P.S. § 6503(d) in the regulation. Alternatively, the EQB should explain why only portions are needed.

10. Section 253.10. Conversion and waiver of conversion. – Consistency with statute; Reasonableness; Clarity.

Activity and use limitations

Subsection (a) closely tracks the language of 27 P.S. 6517(b)(1), but excludes the statutory phrase “which establishes activity and use limitations.” The EQB should explain why this statutory phrase was omitted in the regulation.

Facsimile Cover Sheet



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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: May 5, 2010
Pages: 8

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-454 (IRRC #2824). 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 Yordy

Date:

5-5-10