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2619

September 10, 2007

Honorable Kathleen McGinty
Chairperson
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

RE. Proposed Hazardous Waste Regulations
Published July 14, 2007

Dear Chairperson McGinty:

The members of the Pennsylvania Chemical Industry Council (PCIC) have reviewed the proposed changes to the Hazardous Waste Regulations and on behalf of the over sixty-five members of PCIC, the enclosed comments are offered.

PCIC is generally supportive of the Department's efforts in the proposed regulations to streamline and provide consistency between the state and federal hazardous waste programs. There are three areas of the proposal however, that raise great concern and which we oppose.

Those three elements of the proposed regulations are:

1. The elimination of Subchapter H. Financial Requirements. PCIC has met with Department personnel to discuss the reasons for the proposed elimination of a program that has had only one example of a problem during the entire history of the program. The ability to provide a corporate guarantee for closure and post-closure is used safely in other states as well as on the national level.
2. The elimination of Section 264a.195. This proposal will cause unnecessary cost increases for certain manufacturers without any increased environmental protection.
3. The addition of paragraph (vi) to Section 270a.60(b)(2). This prohibition is inconsistent with federal regulations and is counter to current PADEP practice.

PCIC and its members stand ready to assist the Department in crafting a regulation that will meet the needs of the department, but which also reflects appropriate financial instruments available to the regulated community on the federal level as well as in many other states, provides federal consistency, and which provides for necessary operational flexibility.

Sincerely,

Pamela A. Witmer
President

Enclosure

cc: Representative Camille George
Representative Scott Hutchinson
Senator Mary Jo White
Senator Raphael Musto

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PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL

COMMENTS ON DEPARTMENT OF ENVIRONMENTAL PROTECTION PROPOSED HAZARDOUS WASTE REGULATIONS

Submitted
September 10, 2007

Introduction

PADEP has proposed to make a number of changes to the hazardous waste management program regulations at Pa. Code 260a – 270a. The Pennsylvania Chemical Industry Council (PCIC) supports many of these changes because they will either eliminate outdated requirements or provide consistency with the federal regulations in other areas of the existing regulations. There are, however, three changes that the PCIC members oppose.

The first proposed change in the regulations which PCIC strongly opposes is the proposed elimination of Section 264a.Subchapter H, its counter-part in Section 265a.Subchapter H, and proposed new Section 267a Subchapter H, the financial test and corporate guarantee option for closure and post-closure of permitted hazardous waste facilities. If this section of the proposed regulation is adopted, then those companies utilizing the existing financial test and corporate guarantee would instead be required to obtain commercial insurance or use one of the other instruments. Rather than eliminating the financial test and corporate guarantee and replacing it with closure insurance, DEP should create an environmentally protective program by adopting by rule the full federal requirements for financial assurance at 40 CFR 264 , 265 and 267 Subpart H which includes the corporate guarantee and financial test. Currently and in the past there are some significant differences in the way DEP applies the rule and the federal requirement.

The second area of the proposed regulations which PCIC opposes is the proposed change to Section 270a.60(b)(2)(vi). Under the proposal thermal treatment activities are not are eligible to operate under the generator treatment in accumulation containers, tanks and containment buildings permit-by-rule.

Lastly, PCIC is concerned by the proposed rescission of Section 265a.195 Inspections. By eliminating this section there will be new requirements placed on manufacturers without any appreciable environmental gain and possibly a negative environmental impact.

1. CORPORATE GUARANTEE AND FINANCIAL ASSURANCE TEST

Background

The corporate guarantee and financial test are used to provide funds for accidental occurrences and/or closure and post-closure costs.

Financial strong corporations utilize the corporate guarantee and financial test as a cost effective alternative to bonding for securing potential hazardous waste liabilities. Hazardous waste permitees may not only be those who manage hazardous waste for other companies (commercial TSDF), but also manufacturing companies that generate their own hazardous waste (captive TSDF).

It seems that PADEP is proposing the elimination of the corporate guarantee and financial assurance test out of concern that the Commonwealth may face unfunded obligations to cleanup a hazardous waste site if the company goes bankrupt. The department has produced very little data demonstrating significant failures the financial test did not identify when properly applied. Yet, there continues to be a misperception that the current system, which has been in place nationally for over twenty years, is fraught with weaknesses and vulnerabilities. Before changes to any financial assurance mechanisms are made, it is prudent that a thorough investigation and analysis take place to ensure that these changes are addressing real existing problems and that examines the impacts these changes may have on the regulated community. Altering and/or removing the use of the corporate guarantee and financial test could have unintended and significant consequences to both the regulated industries and the public.

The corporate guarantee although used with the financial test is also used for all the other instruments available for financial assurance. If a company is a subsidiary or sister of a company and because of its legal structure is unable to obtain credit or insurance on its own, then it will turn to a parent or sister company for financial assurance. If the parent company secures, e.g., a surety bond, then the parent company must make a corporate guarantee to the Commonwealth. Without a corporate guarantee, many subsidiaries would be unable to provide financial assurance of any kind since their financial results are rolled up into the parent's financial results. Removing the corporate guarantee would serious harm the complete financial assurance program.

There are currently 16 companies utilizing the corporate guarantee and financial test option at 23 treatment, storage, and disposal facilities (TSDFs) in the Commonwealth. These 16 companies are primarily manufacturing companies. Waste management is not their primary business and the ability to utilize the financial test provides needed flexibility to support manufacturing. Requiring these 16 companies to secure commercial insurance would be a transfer of capital out of the respective companies to financial institutions rather than remaining in the manufacturing sector.

Since the current Pennsylvania financial assurance program was adopted in 1999 there has been only one company, utilizing a department approved financial test, which filed for bankruptcy without providing adequate financial resources to address their environmental liabilities. This company, Bethlehem Steel, operating under current PADEP regulations, provided information according to the Commonwealth form available at the time. Unfortunately, the Commonwealth form was not identical in many aspects discussed below to the federal form as published at 40 CFR 264.151(f) and thereby resulted in insufficient information available to evaluate the financial test. Attachments A and B are the forms that were in use at the time of Bethlehem Steel's filings. Attachment C shows the federal form. Note that there are differences in the two Alternative tests I and II. Additionally, it is very important to note that PADEP did not follow state regulations for reviewing and acting upon a request for use of the financial test in two different years. If the department had requested the information which is stipulated by the regulations, Bethlehem Steel would likely not have met the requirements of the financial test and would have therefore been denied the request for using the financial test and thereby avoiding the potential risk to the Commonwealth.

In the years prior to the issuance of the revision of 2006 question #5 on page 5 of form 2510-FM-BWM0079A (Attachments A and B) did not request the applicant to submit sufficient information as required by the PADEP rule to determine if it could meet the ratio tests of: liabilities to net worth, net income to total liabilities, and current assets to current liabilities. The regulations require that an applicant must be able to pass two of the three financial tests. Had that information been requested, Bethlehem Steel would not have qualified for a corporate guarantee in 1999 or in 2000. This evaluation is based upon the SEC 10K filings for Bethlehem Steel for the years 2000 and 2001 which preceded their filing for bankruptcy in 2002.

The second problem with the PADEP financial test is that Bethlehem Steel (and all other filers) was not required to show environmental liabilities such as UIC and RCRA liabilities in other states for which coverage is demonstrated using the financial test. It is very clear for the federal instructions and forms that environmental liabilities must be disclosed on line 1 of both the Alternative I and II financial tests. This condition stills exists today, even though some members have advised PADEP that their application of the financial test is unique.

Department staff has indicated that there have been other problems with the program, but have not been able to identify any other companies which either were utilizing or are currently utilizing the corporate guarantee and financial test which have gone into bankruptcy and are unable to provide adequate funding to meet liabilities. In fact, Boeing, Inc. is an example of the success of the financial test program. Boeing has utilized a financial test and corporate guarantee for its closure and post-closure activities and will meet all of its obligations under the program in approximately one year.

There have been examples of companies which have not provided adequate bonding (Industrial Solvents), companies which have not met the requirements for a phased deposit (Berkley Industries), or bonding companies which have gone into bankruptcy thereby impacting their clients (Safety Kleen), but these examples should not be confused with the financial test and corporate guarantee.

Corporate Guarantee and Financial Test Purpose and Background

The financial test was developed to maximize the protection of the public while minimizing the cost to private industry. The goal of the test was to develop a means of determining the financial viability of a company posting financial assurance to pay for its closure, post-closure and corrective action costs through revenue generation. The conservatism built into the test minimizes the likelihood of a qualifying entity going bankrupt within three-years of passing the financial test. Studies by EPA when the financial test was originally implemented in 1982 (April 7,1982, 47FR 15032), as well as more recent studies performed under contract with EPA (ICF, 1996, see http://www.epa.gov/garbage/finance/fame), indicate that the likelihood of a company passing the financial test and then going bankrupt within a year are extremely low. The predictive nature of the test is such that a company that may fail the test still has the financial ability to secure alternative financial assurance.

DEP suggests that use of the financial test exposes taxpayers to a significant risk of default. This view fails to reflect the careful analysis that EPA performed before promulgating the financial test and has since reviewed several times. The financial test mechanism was adopted by EPA only after a careful analysis of competing consideration's supporting evidence. For example, EPA decided to use fairly simple measures to evaluate financial performance for the purpose of determining whether a company would be able to cover its cleanup obligations. These simple measures are also quite conservative: either a bond rating of investment grade plus tangible net worth of six times total closure and post-closure liabilities (Alternative II) or meeting two of three ratio factors plus the same net tangible worth requirement and also net working capital (i.e., liquid assets) of six times total remediation obligations (Alternative I). Putting aside for a moment the other factors included in the Alternative I, these are very conservative measures for evaluating whether a company can pay its debts as they come due.

EPA also concluded that a company meeting the required threshold of $10 million in tangible net worth was extremely unlikely to declare bankruptcy at any time in the next three years. If a company was unable to meet the financial test requirements, then with a two-year "look ahead" remaining, a company would have sufficient resources at that time to secure other instruments to use for their financial assurance obligations. In other words, the financial test is constructed to screen out companies that have a significant risk of declaring bankruptcy at any time in the next three-years. This three-year "look ahead" aspect is a central feature of the financial test, but it has been overlooked in the policy debate on financial assurance.

EPA's original analysis on the financial test has been revisited on several occasions and its validity has been reaffirmed each time. (See Federal Register 17.706, 17.715-18 April 10, 1998)

What happens When A Company Can No Longer Qualify for Financial Assurance?

As previously discussed, the financial test was specifically designed to cover a three year "look-ahead" period. EPA determined that companies qualifying for the financial test are highly unlikely to seek bankruptcy protection or otherwise default over the next three years. Because

the company must re-qualify again every year if it wishes to keep using the financial test, there is always at least a two year "look-ahead" period during which a default is highly unlikely.

Even in a situation where a company can no longer pass the financial test, there will still be sufficient financial wherewithal to purchase a financial assurance mechanism due to the conservative design of the financial test. There is a huge middle ground in which companies are able to afford letters of credit or other, more liquid, instruments, even though they may no longer qualify for the financial test due to changed circumstances. For example, a company that has been using the financial test for a $10 million cleanup liability, but no longer qualifies, would need to pay approximately $100,000 to $300,000 for a letter of credit. It would be surprising indeed if a company that was strong enough to pass the financial test – which requires a net tangible worth of six times total remediation liabilities, or at least $60 million in this example – suddenly found itself with liquid assets insufficient to cover a $300,000 expense.

The financial test was set-up conservatively enough that once a company can no longer qualify under the test; the company will still be financially strong enough to acquire an alternative form of financial assurance.

Cost and Competitiveness

The department needs to seriously consider the potential cost and impact to the competitiveness to industry in the Commonwealth that will result from this proposed rule change. While the department may look at this proposed rule change as impacting only a handful of companies with RCRA closure and post-closure permits, it is logical that these same rules will be applied to CERCLA Superfund cleanups and to RCRA Corrective Action remediations once the state receives authorization for that program. If RCRA Corrective Action facilities were brought under the proposed program, there would be approximately 105 companies impacted. (See attached EPA ECHO database for TSD's in PA only)

It is assumed that each of the other mechanisms for financial assurance will still be allowed by the department. Perhaps the most affordable mechanism outside the financial test would be a letter of credit. While the cost of a letter of credit can range from 0.5% to 6% or greater, it is expected that on average the credit would be around 1% to 3% annual for the amount being assured. When one looks at not just the cost estimates from closure and post-closure, but adds CERCLA and RCRA remediation to the equation, it is easy to see that the costs of a third party mechanism can be very high on companies whose primary business is manufacturing.

PCIC maintains that these costs are unfounded and a drain on the working capital and competitiveness for companies that qualify for an already conservative corporate guarantee through the financial test. Every dollar spent on duplicative and unnecessary financial instruments is a dollar that is no longer available for capital improvements such as new and expanded manufacturing plants, product development, proactive investment in pollution control equipment, and capital expenditures necessary for a Pennsylvania facility to remain competitive with its sister facilities in other states as well as increasing pressure from overseas competition. This is not only a matter of decreased return to shareholders on their investment; it also affects

the amount of money available to run the business. These are costs that competitors are not incurring.

Suggested Alternative

Rather than eliminating a program that provides flexibility and which has not been proven unsafe, PCIC proposes that the Department enhance the existing corporate guarantee and financial test program thereby making it more robust.

When PADEP adopted the corporate guarantee and financial test program, the department did not adopt the complete federal rule and corresponding forms and requirements. PCIC proposes that the Environmental Quality Board (EQB) adopt the federal rule in its entirety as it pertains to the corporate guarantee and financial assurance test.

The existing PADEP corporate guarantee and financial assurance test only requires that companies provide information to the department reflecting their Pennsylvania liabilities. This financial test does not provide enough information to allow the department to make an informed decision on the viability of the company in relationship to its obligations. Had the complete federal corporate guarantee and financial assurance program been in place in Pennsylvania, Bethlehem Steel would not have qualified for the financial test.

If the complete federal corporate guarantee and financial assurance test,were adopted by the EQB, companies seeking to use the corporate guarantee and financial test would only be eligible if they had a net worth of $10 million and could meet the tangible net worth to liability ratio of six times for the requisite environmental liabilities in the United States, not just those in Pennsylvania. These include liabilities incurred under the Nuclear Regulatory Commission, EPA CERCLA and RCRA programs for corrective actions, Underground Storage Tanks, TSCA, state required programs such as NJ's ISRA site clean-up program, and consent decrees and other orders.

While PADEP may not believe they have the financial expertise to make a determination on a company's financial status it is important to note that the department is already making that determination, but without the most complete information available. Likewise, the federal Environmental Protection Agency offers training sessions for states on how to run the financial assurance program.

If PADEP eliminates the corporate guarantee and financial assurance program, Pennsylvania will be the **only** state without a corporate guarantee and financial assurance test.

Underscoring the efficacy of the federal corporate guarantee and financial assurance test program, it is important to understand that there have been two recent comprehensive reviews of the federal EPA program. The first review was completed in 2006 by an advisory board to EPA, Environmental Financial Assurance Board (EFAB). The second was undertaken by the state of California because they were considering dropping their corporate guarantee and financial assurance test. **Both reviews resulted in recommendations for the continued use of the EPA corporate guarantee and financial assurance test.**

2. PERMITS-BY-RULE

Background

Currently the department allows a generator treating its own hazardous waste in containers, tanks or containment buildings to operate under a permit-by-rule.

Under the draft regulations in Section 270a.60(b)(2)(vi), the department would no longer allow those generators utilizing processes that may meet the definition of thermal treatment of hazardous waste to operate under the permit-by-rule option.

Concern

Thermal treatment is broadly defined in 40 CFR 260.10 and could potentially include any form of treatment that uses "...a device which uses elevated temperatures..." to treat a hazardous waste.

By singling out thermal treatment, which is broadly defined, it could limit options for reclaiming usable material from the waste and/or contaminated soil via use of thermal desorption or other processes that use elevated temperatures.

Suggested Alternative

PCIC suggests that the department eliminate paragraph 270a.60(b)(2)(vi) and maintain the same requirements for thermal treatment that the EPA has put in place and which the department currently regulates. Hence, if a generator is allowed to thermally treat a particular hazardous waste under the federal regulations, it should be allowed under PA regulations. Conversely, if the thermal treatment is a form of treatment that EPA would regulate under 40 CFR Part 265 Subpart O (incineration), or Subpart P (thermal treatment) or Part 266 Subpart H for hazardous waste derived fuels, then it will still be subject to those provisions as incorporated by reference in the PADEP sections of RCRA (Title 25, sections 260 through 270a of the PA Code)

3. INSPECTIONS

Background

Section 265a.195 was originally added and interpreted by PADEP and EPA Region III as only requiring inspection of a tank holding waste material once every 72 hours when the *facility* was not operating. Some facilities, which do not operate on a 24/7 basis and which also do not accumulate a large volume of waste material on a frequent basis, utilize tanks to safely store material until such time as is appropriate to move off site for disposal. PADEP has consistently interpreted "in operation" to mean **when the plant is in operation, when processes are running that may contribute to accumulation of material in a tank.**

Concern

With the elimination of Section 265a.195 and re-interpretation of 'In operation" those facilities not operating seven days a week and which do not accumulate waste material on a frequent basis would be required to perform an inspection on a daily basis whenever any material is in a tank. This will mean that in order to comply with the 24hour regulation, tanks will require inspection on overtime every weekend and every day during holidays unless tanks are completely emptied every week regardless of volume accumulated. Companies in this situation make every effort to keep accumulated volume down prior to and during these holidays, but they were never been required to have them completely empty. PCIC is concerned that rescission of Section 265a.195, will result in one of two negative effects. Either significant overtime would be required to provide for an inspector Every Saturday, Sunday and holiday, or tanks would have to be completely emptied every Friday and before every holiday.

The later result is counter to waste minimization efforts. Waste material would be taken out of safe and secure secondary treatment and transported over the highway, burning excessive fuel and producing additional air emissions. Transporting these unnecessarily small partial loads will drive disposal costs up considerably by eliminating economies of scale for full loads. In addition, transportation cost would increase three to four fold. One company's waste minimization efforts to date have resulted in reductions from once-a-week bulk liquid loads to once a month. Nearly all the cost savings from those efforts would be completely negated by the requirement to ship partial loads every week to keep tanks empty on weekends while reducing safety and increasing air pollution.

Conclusion

While PCIC supports many of the proposed changes to the PADEP Hazardous Waste Regulations as published in the PA Bulletin on July 14, 2007, we strongly oppose the proposed elimination of Section 264a, Subchapter H, and its counter-part in Section 265a. Subchapter H, and in the proposed new Section 267a Subchapter H the corporate guarantee and financial assurance test with the proposed replacement of commercial insurance, the proposed addition of paragraph (vi) to Section 270a.60(b)(2)(vi), and the rescission of Section 265a.195

PCIC strongly urges that the Environmental Quality Board instead adopt complete federal rule for corporate guarantee and financial assurance. By adopting the federal rule, the EQB will be providing a stronger set of tools for PADEP to make appropriate decisions regarding an applicant's ability to meet the financial criteria as well as continuing to provide important flexibility for those companies which can meet the standard.

Likewise, PCIC strongly advocates the elimination of paragraph Section 270a.60(b)(2)(vi) regarding the ability to obtain a permits-by-rule for thermal treatment of hazardous waste in certain containment as is currently permitted under federal regulation.

By eliminating Section 265a.195, PADEP will create a negative impact on the environment through increased transportation with resulting air pollution.

PCIC is concerned that each of these three subject areas will result in the additional loss of competitiveness for Pennsylvania manufacturing by driving up costs without any positive environmental impact and without sufficient justification for the proposals by the department.

2619

Tate, Michele

From: Pam Witmer [pam@pcic.org]
Sent: Monday, September 10, 2007 8:50 AM
To: RegComments@state.pa.us
Subject: PA Chemical Industry Council-Proposed Hazardous Waste Regulation Amendment Comments

Dear Chairperson McGinty. Attached are comments to DEP's proposed amendments to the Hazardous Waste Regulations being submitted by the Pennsylvania Chemical Industry Council.

On behalf of the over 60 member companies, I am more than happy to answer any questions you or the member of the Environmental Quality Board may have.

Best regards
Pam Witmer

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