Comments of the Independent Regulatory Review Commission

Environmental Quality Board Regulation #7-575 (IRRC #3409)

Administration of the Land Recycling Program

October 11, 2024

The Independent Regulatory Review Commission (Commission) submits for your consideration the following comments on the proposed rulemaking published in the July 13, 2024 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (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. **Determining whether the regulation is in the public interest; Protection of the public health, safety, and welfare; Clarity; Implementation.**

This regulation from the Board is proposed under 25 Pa. Code § 250.11 (relating to periodic review of [medium-specific concentrations (MSCs)]) which requires that the Department of Environmental Protection (Department) review new scientific information that relates to the basis of the statewide health standard MSCs no more than 36 months after the effective date of the most recently promulgated MSCs and propose to the Board any changes to the MSCs as necessary. The Department's proposed Chapter 250 amendments were adopted by the Board at its meeting on March 12, 2024. In April, the United States Environmental Protection Agency (EPA) established a National Primary Drinking Water Regulation (NPDWR) final rulemaking, establishing maximum contaminant levels (MCLs) and health-based Maximum Contaminant Level Goals (MCLGs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water. The EPA final rulemaking standards, which went into effect on June 25, 2024, differ from the standards approved by the Board in March and contained in this proposed regulation.

This issue of timing and discrepancy between the EPA rulemaking and the Board's proposed regulation is a significant concern for all of the public commenters and this Commission. For clarity of implementation and protection of the public health, safety, and welfare, we ask the Board to amend the final regulation to align with federal standards. If the standards in the final regulation differ from the EPA final rulemaking, we ask the Board to explain how implementation of the final regulation is clear and protects the public health, safety, and welfare.

Commenters also raise a variety of other issues which we summarize below.

- The Department's review of and proposed changes related to PFAS MSCs are incomplete and out of sync with the rapidly evolving landscape of PFAS regulation at the federal level. A possible solution for this inconsistency is for the Department to amend the

currently proposed MSC tables for certain PFAS to incorporate the new federal NPDWR MCLs as groundwater MSCs and to re-publish these changes in the *Pennsylvania Bulletin* for further public comment. If finalized in their current form, the regulated community will be left with an outdated and incomplete set of MSC tables for PFAS that do not otherwise incorporate the latest relevant and applicable standards for groundwater. The Department should at the same time provide compliance and enforcement clarifications. [Pennsylvania Chamber (PA Chamber), Pennsylvania Chemical Industry Council (PCIC)]

- The Department should add perfluorohexanesulfonic acid (PFHxS) and perfluorononanoic acid (PFNA) to the regulated substances, and add soil to groundwater and direct contact soil MSCs for PFHxS and PFNA. [Joint comment from the Clean Air Council, Mountain Watershed Association, CREATE Lab, PennFuture, and The Breathe Project (CAC et al.), Form letter from 19 individuals (Form letter A)]

- The Department should clarify how it will implement EPA's novel and unprecedented Hazard Index (HI) approach for PFAS groundwater MSCs and in the future for PFAS soil MSCs. [PA Chamber, PCIC]

- There is concern that overly stringent PFAS limits could lead to the unnecessary reopening of previously closed [Land Recycling and Environmental Remediation Standards Act (Act 2)] or [Comprehensive Environmental Response, Compensation, and Liability Act] sites. [PCIC]

- Other programs, such as the fill management program, rely on the MSCs pursuant to Act 2. Under the *Management of Fill Policy*, the numeric values on which cleanup standards for soils are based in Chapter 250 are incorporated by reference for purposes of determining the clean fill concentration limits and the regulated fill concentration limits. These concentration limits in turn affect virtually every project in Pennsylvania where fill materials are being imported or exported. The Department's regulatory analysis of the benefits, costs, and compliance associated with the proposed regulation did not account for significant impacts on the regulated community and the confusion created through the incorporation of the PFAS MCLs as MSCs, as well as the use of the HI approach for a combination of PFAS. [PA Chamber, PCIC]

- The Department has not established generic soil-to-groundwater MSCs due to incomplete technical information. This is an important component of the MSC tables for soil-to-groundwater values and has significant ramifications for other Department programs, such as the *Management of Fill Policy* under the Solid Waste Management Act. [PA Chamber, PCIC]

- The Department should strengthen its due diligence component of the clean fill determination process to clarify that contaminants, including PFAS, do not need to be included in the suite of analytical parameters where they are not known or suspected to be present and to limit clean fill sampling analytes to parameters of potential concern identified during the due diligence process. Additionally, establishing a statewide background value would provide a more consistent baseline for assessing PFAS contamination in clean-fill materials, making it easier to determine whether they meet the

necessary standards without conducting extensive and expensive background determinations at both the donor and receiving sites. [PA Chamber, PCIC]

- The Department's proposed contamination standards for six carcinogenic polycyclic aromatic hydrocarbons create a cumulative cancer risk of 3 in 10,000. This is greater than the maximum cancer risk allowable for statewide health standards: 1 in 10,000. [CAC et al., Form letter A].

- The Department is still behind the most recent science regarding lead pollution. The Department is proposing to adopt a target blood lead level (TBLL) of 5 micrograms per deciliter (µg/dL), but in 2021 the Center for Disease Control updated its blood lead reference value to 3.5 µg/dL. There is no safe level of lead consumption and the Department should begin work to adopt a TBLL of 3.5 µg/dL. [Form letter A]

We ask the Board to address the concerns of commenters noted above and to explain how the final regulation protects the public health, safety, and welfare and how its implementation is clear for the regulated community. We will take into consideration the Board's responses in determining whether the final regulation is in the public interest.

2. Section 250.707. Statistical tests. – Protection of the public health, safety, and welfare.

The Department proposes to add subparagraph (b)(1)(iv), which states:

> For sites with a release of lead or lead compounds that has been remediated to attain an MSC for lead based on an ingestion numeric value calculated in accordance with the requirements of § 250.306(e) (relating to ingestion numeric values) and Appendix A, Table 7, the arithmetic average of all attainment samples, which shall be randomly collected in a single event from the site, shall be equal to or less than the applicable MSC.

Commenters assert that the Department should not add this subparagraph because all soil samples at a given site should be required to meet the Department's standards for lead contamination in soil. The commenters explain that this new language, which provides for samples to be "randomly collected in a single event from the site" contradicts Section 250.703 which provides specific soil sampling procedures and allows the Department to require additional characterization if certain soil contamination conditions are met. Further, the commenters question whether a remediator could increase the number of samples at a site for the purpose of skewing the average of all attainment samples to make it appear that the samples show lead in an amount equal to or less than the applicable MSC. We ask the Board to explain how the statistical testing for lead or lead compounds in the final regulation protects the public health, safety, and welfare.