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**PENDING REVISIONS TO PENNSYLVANIA HAZARDOUS
WASTE MANAGEMENT REGULATIONS (PK-4)**

March 1992

SUMMARY PAGE

PENDING REVISIONS TO PENNSYLVANIA HAZARDOUS WASTE MANAGEMENT REGULATIONS (PK-4)

This White Paper discusses the proposed final revisions to the Pennsylvania hazardous waste management regulations (PK-4) which will dramatically alter the regulation of recyclable materials currently exempt from federal and state hazardous waste regulations. The final regulations would eliminate existing exemptions and variances from the hazardous waste classification, require permits-by-rule for certain materials, and regulate other exempted materials as hazardous waste. Off-site recycling or reclamation activities will be regulated unless the material is considered a co-product or is directly reused on-site in an ongoing industrial process.

**DRAFT FINAL REVISIONS TO PENNSYLVANIA HAZARDOUS
WASTE MANAGEMENT REGULATIONS (PK-4)**

I. Introduction

On January 6, 1992, the Pennsylvania Department of Environmental Resources ("DER") released to the public recommended final regulations extensively amending the existing state hazardous waste regulations.^{1/} These final regulations:

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- regulate materials reclaimed, recycled, reused or burned for energy recovery;
- eliminate variances from hazardous waste classification;
- establish a limited permit-by-rule for certain recycling and reclamation activities;
- adopt new standards for treatment and storage tanks;
- increase fees for permit applications and administration;
- enlarge financial assurance requirements; and
- adopt the TCLP test and list of toxic contaminants.

The proposed final regulations are expected to be considered for approval by the Environmental Quality Board ("EQB") at the March 17, 1992 meeting. Due to widespread industry objection to the proposed final regulations, DER will hold a public hearing on March 5, 1992 to discuss the proposal. DER has proposed certain amendments to the regulations, however, as these amendments have not been approved by the EQB, this paper addresses only the recommended final regulations released by DER on January 6, 1992.

^{1/} The regulations were originally proposed by the Department of Environmental Resources and published on January 27, 1990 in the Pennsylvania Bulletin. 20 Pa. Bulletin 431-480. The proposed regulations were primarily designed to make Pennsylvania regulations consistent with Federal rules adopted pursuant to the 1984 amendments to RCRA. The final regulations differ substantially from the proposed regulations.

Following EQB approval, the regulations will be reviewed by the Governor's General Counsel and the Attorney General for legality and form. The regulations are also subject to review by the standing environmental committees of the General Assembly and the Independent Regulatory Review Commission. It is likely that industry comments will be submitted to the Independent Regulatory Review Commission and the standing committees following action by the EQB on March 17, 1992.

II. Key Issues

A. Recycled Materials

Under Pennsylvania's current hazardous waste regulations, certain recyclable materials are exempt from regulation, specifically, any "materials produced by a generator which are destined to be recycled and which have a commercial value, have historically had a commercial value, have a history of routine commercial trade and have been so verified in writing by the Department." 25 Pa. Code § 261.6(a). Other materials which can be beneficially used or reused or recycled are subject to notification, manifest and quarterly reporting requirements, but are exempt from other permitting and licensing requirements.

The proposed final regulations would delete the recycling exemption in the current regulations. In addition, the final rule deletes the exemptions provided for, inter alia, used batteries returned to a manufacturer for regeneration. 25 Pa. Code § 261.6(a)(3). However, the exemptions are replaced by a permit-by-rule provision applicable to a battery manufacturing facility regenerating used batteries, facilities recycling or reclaiming scrap metal, and petroleum refining facilities refining hazardous waste along with normal process streams.

The proposed final regulations also eliminate the variances previously provided in the regulations, as well as those in the proposed rulemaking, for: 1) materials that are accumulated speculatively; 2) materials that are reclaimed and then reused within the original primary production process in which they were generated; and 3) materials that have been reclaimed but must be further reclaimed before the materials are completely recovered. 25 Pa. Code §§ 260.30-260.33. These variances appear to be partially replaced by the permit-by-rule provisions for on-site reclamation.

The proposed final regulations contain special provisions applicable to discarded materials used in a manner constituting disposal, hazardous waste burned for energy recovery, spent lead-acid batteries and on-site reclamation similar to the proposed regulations. The proposed final regulations also eliminate the special provision contained in the proposed regulations for materials classified as hazardous waste solely because they are transferred off-site. Off-site beneficial use, reuse, recycling and reclamation are governed by the requirements of Section 261.6 or by the applicable special provisions or permit-by-rule permits as provided by Chapter 266.

B. Permit-By-Rule Provision

As indicated above, the proposed final regulations contain a special permit-by-rule provision applicable to battery manufacturing facilities regenerating used batteries, facilities recycling and reclaiming scrap metal, and petroleum refining facilities refining hazardous waste to produce petroleum products. To qualify for the permit-by-rule, the owner or operator must comply with notification requirements and all applicable requirements of Chapter 264, except for the provisions governing closure/post-closure (subchapter G), groundwater monitoring (subchapter F), and financial requirements (subchapter H).

In addition, owners and operators of facilities that store spent batteries before reclaiming are deemed to have a hazardous waste storage permit subject to notification requirements and compliance with Chapter 264, subchapters A-L, Chapter 267 (financial requirements), Chapter 269 (siting requirements), and Chapter 270 (permit program). The waste analysis and manifest requirements are excluded.

C. Definition of Waste

The federal rules define a "solid waste" as any "discarded material that is not excluded from regulation as a hazardous waste". 40 C.F.R. § 261.2. A "discarded material" is any material that is abandoned, is used in a manner constituting disposal, is burned for energy recovery, is accumulated speculatively or is inherently wastelike. Under 40 C.F.R. § 261.2(e), materials are not solid waste when they can be shown to be: 1) recycled by used or reused as ingredients in any industrial process to make a product without reclamation; 2) used or reused as an effective substitute for commercial products; or 3) returned to the original process from which they are generated as a substitute for raw material feedstock without first being reclaimed. Certain materials are deemed solid waste even if they are recycled when the material is: 1) used in a manner which constitutes disposal; 2) burned for energy or used to produce a fuel; 3) accumulated speculatively; or 4) certain listed "F" waste. 40 C.F.R. § 261.2(e)(2).

DER views the federal approach to recycling and exemptions for certain hazardous wastes as encouraging sham recycling. As a result, the proposed final regulations incorporate a waste hierarchy based on definitions of waste, by-product, expended material and co-product. The proposed final regulations delete entirely the definition of discarded material. The term "waste" will include any by-product, expended material, material that is abandoned or disposed, or any contaminated soil, water or other residue. Co-products are not considered a waste, and a material is not a waste if it is directly recycled or reused on-site in an ongoing industrial manufacturing process.

Co-product is defined as any material that is "consistently equivalent to or exceeds, the physical character and chemical composition of an intentionally manufactured

product or produced raw material" provided that the use of the material presents no greater threat of harm to human health or the environment than the use of the product. Based on this definition, off-specification products may be classified as co-products. Materials may be classified as co-products only if they are transferred in good faith as a commodity in trade for use in lieu of a raw material or used as a substitute by a manufacturing or producer in lieu of a product or raw material on a routine basis. The manufacturer, processor or user of the material as a co-product has the burden of proof, based on a clear and convincing evidence standard that the material is a co-product and not a waste.

Under the final regulations, any material that is not a product or co-product which is used off-site in a manufacturing or production process to produce a new product, is considered a waste. As a result, the manufacturing or production process which uses the materials as feedstock is engaged in the "treatment" of a hazardous waste and must obtain the appropriate storage and treatment permits.^{2/} It should be noted that the permit-by-rule provisions are not provided to facilitate off-site recycling or reclamation of any such materials. Rather, off-site recycling or reclamation activities must comply with all applicable hazardous waste management requirements.

D. Closure, Post-closure and Financial Responsibility

The proposed final regulations generally adopt the federal requirements relating to closure and post-closure. However, several important changes are made to the financial responsibility requirements. Currently, the Pennsylvania rules require all storage, treatment and disposal facilities to provide general liability coverage for sudden accidental release of \$2 million per occurrence and \$4 million aggregate annually. Under the proposed final rules, surface impoundments, land treatment facilities and land disposal facilities must provide additional coverage for non-sudden pollution discharges of \$4 million per occurrence and \$8 million aggregate annually.

^{2/} Treatment is defined in new §260.2 as follows: "A method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or to render such waste nonhazardous or less hazardous safer for transport, suitable for recovery, suitable for storage, or reduced in volume. The term includes any activity or processing designed to change the physical form or chemical composition of waste so as to render it neutral or nonhazardous." (emphasis added) This definition is inconsistent with definition of treatment contained to Section 103 of the Solid Waste Management Act, as amended, 35 P.S. § 6018.101 et seq. The revised definition of treatment authorizes DER to regulate beneficial resource recovery activities.

The proposed final regulations increase the general liability insurance requirement to \$2.25 million per occurrence and \$4.5 million aggregate annually and require land treatment and disposal facilities to provide \$6 million per occurrence and \$12 million aggregate coverage annually.

E. Fees

The proposed final regulations include fees for permit modifications, closure plan reviews and request for determination of applicability. Permit application fees for hazardous waste storage, treatment and disposal facilities will increase. For example, storage facility permit fees will increase from \$5,750 to \$36,000 for commercial facilities and will be \$14,000 for captive facilities. Permit fees for on-site treatment facilities increase from \$6,500 to \$14,000. Annual hazardous waste permit administration fees are imposed on land disposal facilities (\$2,500), surface impoundments (\$2,500), commercial treatment facilities (\$2,000), captive treatment facilities (\$700), storage facilities (\$550), incineration facilities (\$1,300) and permit-by-rule facilities (\$100).

F. Conclusion

The proposed final regulations will impose hazardous waste management requirements on recycling and reclamation activities at Pennsylvania industrial and manufacturing sites. Unless the recycled material, otherwise classified as a hazardous waste (characteristic or listed), is a co-product or excluded under the new waste definition, the material will be subject to the hazardous waste management requirements. It is extremely important that all Pennsylvania operations analyze their current reclamation and recycling activities in light of these pending regulations.

Kenneth R. Myers
Brian J. Clark

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Stacy E. West, Esq.
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- "Practical Analysis of EPA's New Model Consent Decree for Superfund Cleanups" (Chemical Waste Litigation Reporter, Vol. 22, No. 4, Computer Law Reporter, Inc., September 1991) Alex S. Karlin [MLB91-00775]
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