

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code, Chapters 271, 279, 287 and 293)

Notification of Proximity to Airports

Order

The Environmental Quality Board (Board) by this order amends 25 Pa. Code, Chapters 271, 279, 287 and 293 (relating to municipal waste and residual waste management). The amendments are based on a petition submitted by the Department of Defense (DOD), requesting that the Department address the potential hazards posed to military aircraft from bird strikes near waste landfill and transfer facilities. The amendments would broaden the definition of airport to include military airports, extend existing airport notification requirements for waste landfills to military airports and impose an airport notification requirement on waste transfer facilities.

This order was adopted by the Board at its meeting of _____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Stephen Socash, Chief, Division of Municipal and Residual Waste, P.O. Box 8472, Rachel Carson State Office Building, Harrisburg, PA 17105-8472, (717) 787-7381, or Susan Seighman, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This final-form rulemaking is available electronically through the DEP Web site (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The final-form rulemaking is being made under the authority of the following:

The Solid Waste Management Act (SWMA) (35 P.S. §§6018.101 - 6018.1003), as amended, which in Section 105(a) (35 P.S. §6018.105 (a)) grants the Board the power and the duty to adopt the rules and regulations of the Department to accomplish the purposes and carry out the provisions of the SWMA. Sections 102(4) and 104(6) of SWMA (35 P.S. §§ 6018.102 and 104) provide the Department with the power and duty to regulate the storage, collection, transportation, processing, treatment and disposal of solid waste to protect the public health, safety and welfare.

The Municipal Waste Planning, Recycling and Waste Reduction Act (53 P.S. §§4000.101 - 4000.1904), which in Section 302 (53 P.S. §4000.302) gives the Board the power and duty to adopt the regulations of the Department to accomplish the purposes and carry out the provisions of this act. Sections 102(b)(3) and 301(6) of Act 101 (53 P.S. §§ 102 and 301) state the intent of protecting the public health,

safety and welfare from the dangers associated with transportation, processing, treatment, storage and disposal of municipal waste and provide the Department with the power and duty to abate public nuisances.

The Administrative Code of 1929 (71 P.S. §§510-1 - 510-27), which in Section 1917 A (71 P.S. §510-17) authorizes and requires the Department to protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition that is declared to be a nuisance by any law administered by the Department, and, which in Section 1920 A (71 P.S. §510-20) grants the Board the power and the duty to formulate, adopt and promulgate such rules and regulations as may be determined by the Board for the proper performance of the work of the Department.

D. Background of the Amendments

Current municipal and residual waste regulations require applicants for municipal and residual waste landfills, construction and demolition waste landfills and residual waste disposal impoundments to notify public airports if a new or expanded facility is proposed within six (6) miles of an airport runway. There is no similar notification requirement for municipal or residual waste transfer facilities because these operations are primarily conducted in enclosed structures. The DOD maintains and the Department concurs that there is a concern that waste transfer activities, such as waste loading, unloading and storage, may still occur outside of an enclosed building and pose a risk to aircraft approaching or departing from nearby airports. This is a risk to public health and safety, and includes military personnel and people living in the area. The risk of bird strikes to aircraft becomes negligible when the airport runway is greater than six (6) miles from the waste transfer facility. Accordingly, DOD petitioned the Department on July 28, 2004, to require an airport notification from waste transfer facilities. Furthermore, since the current definition of “airport” in §271.1 and §287.1 did not include the term “military airports,” the petition also requested that the Department include this term in the definition.

The Board accepted the petition for further study on October 19, 2004. The Department agreed with the petition and submitted a Petition Report to the Board on April 19, 2005, recommending that the municipal and residual waste regulations be amended as requested by the DOD.

Adding the term “military airport” to the definition of “airport” in §§271.1 and 287.1 broadens the definition to address DOD airfields as well as public airports. With the exception of two strictly military airports in Pennsylvania, many public airports also serve as military airports. The addition of new §§279.112 and 293.112 will require a new or expanding waste transfer facility to provide notification to airports, including military airports, if the facility is within six (6) miles of the airport runway. By including military airports in the definition of “airport,” the notification requirements are also being extended to military airports for new or expanded landfills.

The proposed amendments were presented to the Solid Waste Advisory Committee (SWAC) on July 14, 2005. Some members of the SWAC, primarily representing the interests of the waste industry, opposed these amendments. These members asserted that, unlike landfills, waste transfer facilities do not attract birds as the activities are primarily conducted in enclosed structures. Another industry concern was the airport not responding in a timely fashion or commenting on non-technical issues, which could delay permit issuance. Other concerns expressed were the intent of the petition; the additional notification burden imposed on the waste industry; and this requirement applying to a large number of facilities.

The Department, in agreement with the petition filed by the DOD, maintained that these amendments, as proposed, would provide for increased safety for both military and non-military personnel operating aircraft from airports located in the vicinity of waste transfer facilities and landfills. On May 11, 2006, the committee continued to discuss its prior concerns and the Department relayed the information that it obtained from DOD

in response to these concerns. The committee voted against the proposed amendments. However, the Department decided to proceed with the amendments in light of the reasoning advanced by DOD.

The proposed rulemaking was adopted by the Board at its meeting of October 17, 2006, and published in the *Pennsylvania Bulletin* on December 23, 2006. During the 30-day public comment period that followed, the agency received comments from three commentators: Tim O'Donnell, President, Pennsylvania Waste Industries Association; Elam M. Herr, Assistant Executive Director, Pennsylvania State Association of Township Supervisors; and the Independent Regulatory Review Commission.

The following major issues were raised: whether transfer operations in an enclosed building present an increased risk of bird strikes; whether inclusion of military airports retroactively imposes setback restrictions on existing, permitted facilities; and whether a lack of response from FAA or the Bureau of Aviation would result in a determination that an application was incomplete. These issues and the Department's responses were incorporated into the Comment and Response Document. No changes were made to the final amendments as a result of the comments.

On April 11, 2007, the Department presented the final amendments and Comment and Response Document to the Solid Waste Advisory Committee for their consideration. Again, the Committee voted to disapprove the rulemaking. For the same reasons discussed above, the Department has chosen to proceed to final rule with the package as originally presented to the EQB as proposed.

E. Summary of Changes to the Proposed Rulemaking

No changes were made to the Final Rulemaking as a result of comments received during the public comment period.

F. Summary of Comments and Responses on the Proposed Rulemaking

Notice of proposed rulemaking was published at 36 Pa.B. 7867 (Saturday, December 23, 2006). The proposal set forth a 30-day comment period. No public meetings or hearings were held.

During the public comment period, the Board and the Department received written comments from three individuals or groups. The Board and the Department considered the comments received and has prepared a comment and response document that addresses each comment on the proposed amendments. The following is a summary of the comments and the Board's responses.

Chapter 271. Municipal Waste Management- General Provisions

Chapter 287. Residual Waste Management- General Provisions

§271.1. and §287.1. Definitions.

The Board amended the term "airport" in these sections to include the term "military airport" in the definition. By including this term, all regulatory requirements that relate to airports, current and proposed, will apply to military airports.

Two commentators objected to the retroactive application of the airport exclusionary criteria that would result from the proposed definitional change. The comments asserted that inclusion of military airports within the definition of airport retroactively imposes setback restrictions on existing, permitted facilities and raises the potential for a confiscatory scenario. The commentators suggested that existing permitted municipal waste landfills be given a grandfathering provision from these requirements. The

Board declined to change the relevant exclusionary criteria, since currently there are no existing military airports either within or outside the borders of the Commonwealth that would trigger the existing setback criteria for municipal waste landfills, residual waste landfills or residual waste disposal impoundments. The regulation does not create any potential for confiscatory scenarios and therefore does not need to be amended to include only prospective provisions or grandfathering provisions for existing facilities.

Chapter 279. Transfer Facilities.

Subchapter B. Application Requirements for Transfer Facilities.

Chapter 293. Transfer Facilities for Residual Waste.

Subchapter B. Application Requirements for Transfer Facilities.

§279.112 and §293.112. Notification of Proximity to Airport.

The Board added new subsections that require applicants to notify the Bureau of Aviation of the Pennsylvania Department of Transportation (PennDOT), the Federal Aviation Agency (FAA) and the applicable airport if the proposed new or expanding municipal or residual waste transfer facility will be located within six (6) miles of the airport runway. These amendments would also require the applicant to include copies of these notifications in the permit application. The amendments would not affect most existing transfer facilities; it would apply only to new facilities and expansions of existing facilities.

Two commentators objected to requiring transfer facilities to provide the applicable notice, stating that transfer operations occur within an enclosed building and do not present a realistic increase in the risk of bird strikes. The Board disagreed, stating that although municipal and residual waste transfer operations are primarily conducted in enclosed structures, some waste transfer activities may occur outside of an enclosed building and attract birds, which potentially pose a risk to aircraft approaching or departing from nearby airports.

One commentator questioned whether municipal recycling centers are transfer facilities that need to comply with the regulations. The Board took no action regarding this comment, since the definition of a municipal waste transfer facility specifically excludes a collecting or processing center that is only for source-separated recyclable materials.

One commentator suggested that the Board refrain from enacting any regulatory changes until the results on an FAA-sponsored study on birds associated with waste transfer stations is complete. The Board declined to act on this suggestion to delay the regulation and believes it is appropriate to move forward with the rulemaking, since no new information has been provided at the time of the rulemaking to substantiate the claim that transfer stations do not pose an increased risk to aircraft from nearby airports. This action, however, does not preclude the Board from making further regulatory changes in the future as a result of the FAA study.

One commentator stated that this new subsection does not adequately guide new waste transfer facilities since it does not provide a timeframe under which the notification must be delivered or how long the notified parties have to respond. The Board declined to modify this subsection, since there are similar existing notification and contact provisions in the Department's Form D, Environmental Assessment for Municipal and Residual Waste Management Facilities. Applicants typically send notice to affected agencies with a response request of 30 to 60 days. If no response is received, the applicant may solicit the assistance of the Department to verify that the agency and/or airport receiving notification has no comment.

One commentator suggested that an exemption be granted to transfer facilities that do not accept putrescible waste. The Board declined to grant such an exemption, since there is no certainty that the waste will not attract birds or that putrescible waste will not be accepted sometime during the operational life of the transfer facility.

G. Benefits, Costs and Compliance

Benefits

The final-form amendments will benefit both military and non-military personnel operating and traveling in aircraft near waste landfill and transfer facilities, as they either approach or depart the airport runway, by reducing the potential risk of bird strikes to their aircraft, which can cause hazards to surrounding communities, as well.

Compliance Costs

The final-form amendments will minimally increase the application cost, via the notification requirement, only for a new or expanding waste landfill or transfer facility and in these cases, only for those facilities that are proposed within six (6) miles of an airport runway. As applications for new or expanding landfills are estimated at less than ten, and new and expanding transfer facilities at a frequency of two or three per year, this minimal application cost increase will not affect the several hundred municipal and residual waste transfer facilities that are currently permitted in Pennsylvania. The applicant will be required to notify the relevant airport, the Bureau of Aviation of PennDOT and the FAA. The cost of each notice, sent by certified mail including a request for a return receipt, is estimated to be no more than \$50 current value, with the total cost of notification for each applicant estimated at \$150. The total cost per year, therefore, for up to 12 applicants sending notification to the two agencies and the airport is estimated at \$1,800.

There are no additional permit fees associated with these amendments and no indirect cost to the regulated community or the Department.

Compliance Assistance Plan

Since the amendments would impose notification requirements only, a compliance assistance plan is not required.

Paperwork Requirements

As part of its permit application, an applicant for a new or expanding waste landfill or transfer facility will be required to send copies of responses received from the two agencies and airport in response to the notices, to the Department. This is not expected to increase compliance costs.

H. Pollution Prevention

Not applicable.

I. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on ___ (date) ___, the Department submitted a copy of the notice of proposed rulemaking, published at 36 Pa.B.7867, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on ___ (blank) ___, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on ___ (blank) ___ and approved the final-form regulations.

K. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at *1 Pennsylvania Code* §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 36 *Pennsylvania Bulletin* 7867 (Saturday, December 23, 2006).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapters 271, 279, 287 and 293, are amended to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

BY:

KATHLEEN A. MCGINTY
Chairperson
Environmental Quality Board