HAZARDOUS WASTE PROGRAM
FINAL RULEMAKING AMENDMENTS

COMMENT AND RESPONSE DOCUMENT

INTRODUCTION

In assembling this document, the Department of Environmental Protection (DEP) has addressed all pertinent and relative comments associated with this package. For the purposes of this document, comments of similar subject material have been grouped together and responded to accordingly.

During the public comment period, the Board received approximately 23 comments from 11 industry organizations, the standing Committee of the House and Senate, and the Independent Regulatory Review Commission. The following table lists these organizations. The Commentator ID number is found in parentheses following the comments in the comment/response document.

Table of Commentators

Commentator ID #	Name	Address	Requested Final Rule	Submitted One-Page Summary
1.	Bill Ries Director, Government Affairs	PPG Industries, Inc. Pittsburgh, PA 15272		
2.	John S. Troutman Buchart-Horn, Inc.	York, PA 17405		
3.	Pamela A. Witmer President Pennsylvania Chemical Industry Council	Harrisburg, PA 17101		X
4.	Chuck Barksdale Manager, Environmental Services Sunoco, Inc.	Philadelphia, PA 19103		
5.	Rolf Hanson Executive Director Associated Petroleum Industries of PA	Harrisburg, PA 17101		X
6.	RCRA Corrective Action Project (RCAP) Kevin P. McCulloch	Morgan, Lewis & Bockius LLP Washington, DC 20004		X

7.	Edward G. Gallagher General Counsel The Surety & Fidelity Association of America	Washington, DC 20036		
8.	Representative Scottt E. Hutchinson Republican Chairman House Environmental Resources and Energy Committee	Harrisburg, PA 17120		
9.	Senator Raphael Musto Democratic Chairman Senate Environmental Resources and Energy Committee	Harrisburg, PA 17120		
10.	Senator Mary Jo White Chairperson Senate Environmental Resources and Energy Committee	Harrisburg, PA 17120		
11.	Independent Regulatory Review Commission	Harrisburg, PA 17101		

§264a.115 and 265a.115. Certification of closure.

1) **Comment:** These two sections provide the process for closure certification of hazardous waste facilities. We question why the terms are different in each. For example, the period of 180 days is used for closure procedures for solid waste management units in Section 264a.115(b). The same period of 180 days is also in Section 265a.115(c) while a period of 90 days is found in Section 265a.115(b). In addition, why are the reasons or conditions different in either section for extending the closure period? What are the bases (*sec*) for these differences? (11)

2) **Comment:** In section 264a.115(b)(1)(ii) and (iii) how would the Board determine or measure "reasonable likelihood" and if closure of the facility would be "incompatible…?" (11)

3) **Comment:** Finally, why does Section 264a.115(b)(2) discuss taking "all steps to prevent threats to human health and environment," but Sections 265a.115(b)(1) and (2) refer to "all measures necessary to ensure safety to human health and the environment?" The Board should use consistent standards in the final-form regulation or explain the need for the different phrasing used to describe these standards of protection. (11)

Response to comments 1, 2 and 3: While preparing a response to these comments, the Department discovered that the text of Subsections 264a.115(b) and 265a.115(b)−(d) of the proposed rulemaking, which was being moved from its respective locations at 264a.83(a) and 265a.83(a)−(c), should not have been in the regulations when final amendments were published on May 1, 1999. Those final amendments originally incorporated many of the federal Title 40 hazardous waste regulations by reference. The proposed rule to those amendments, which was published in the *Pennsylvania Bulletin* on December 6, 1997 (27 Pa.B. 6407), noted that Sections 264a.83 and 265a.83 were to include only the respective text from the previous Sections 264.113 and 265.113 that regarded administrative fees during closure. Inadvertently, the text from the entire Sections 264.113 and 265.113 was published in the final May 1, 1999 rulemaking. Since Pennsylvania incorporates federal regulation by reference regarding closure; time allowed for closure (40 CFR 264.113 and 265.113), this language is duplicative. Therefore, the final-form rulemaking does not amend Sections 264a.115 and 265a.115 to include text moved from Subsections 264a.83(a) and 265a.83(a)−(c) respectively. The text regarding closure and time allowed for closure in 264a. 83(a) and 265a.83(a)−(c) has been deleted as shown in the proposed rule since it duplicates provisions already incorporated from federal regulation.

264a, 265a and 267a. Subchapter H. Financial Requirements.

Note: This was the most commented upon subject in the proposal. Some commentators cited simply "Subchapter H. Financial Requirements," while others cited only Chapter 264a. Subchapter H, or 265a. Subchapter H. A few commentators cited both 264a and 265a Subchapter H. Still others cited all three Chapters that contain financial assurance requirements in the respective Subchapter H of Chapters 264a., 265a. and 267a. Some commentators included a substantial amount of discussion and attachments. For this reason those comments that raised the same concern have been summarized and paraphrased rather than being reproduced verbatim in this document.

4) **Comment:** The proposed change in the regulations which most commentators opposed, some strongly opposed, is the proposed elimination of Section 264a, Subchapter H, its counterpart 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. Commentators went on to point out: "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 include 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." (1, 3, 4, 5, 6, 8, 9, 10, 11)

5) **Comment:** These sections remove the use of the financial test and the corporate guarantee as a means of financial assurance, and replace them with closure insurance. According to the Preamble, this change is based on "[t]he Department's [Department of Environmental Protection (DEP)]experience with companies suddenly losing the ability to meet the requirements of the financial test with no means of replacing collateral available or entering bankruptcy." Commentators claim that the changes in these provisions will financially penalize the regulated community. What are the compelling interests that justify reducing the flexibility that is available under federal law and regulations? What will be the fiscal impact of the new system on the regulated community? In its response, the Board should also consider and explain what methods of financial assurance are used in neighboring states. (11)

Response to comments 4 and 5: Based on the information provided by the commentators and national research on the financial test and corporate guarantee, the final-form regulation retains the use of the financial test and corporate guarantee as an option to satisfy the closure and post-closure financial assurance requirements. The affected regulatory provisions include §264a.143, 145, 154(a)(3), 156(e); §265a.143, 145, 156(e) and Chapter 267a, Subchapter H. The retention of the proposal to eliminate those provisions fully incorporates the federal provisions for the financial test and corporate guarantee as incorporated by reference. As pointed out by some of the commentators, the Department has implemented some of the provisions somewhat differently than as implemented by the federal requirement. Most significantly, the Department has assumed that the authority to require a company to disclose its liabilities in other states covered by the financial test and corporate guarantee was beyond the Department's authority. Although some companies did provide this information, the Department did not require it. It is now apparent that by fully incorporating the federal requirement, all liabilities covered by this provision are required to be included in the financial test. The Department intends to implement this procedure in the review of these instruments immediately. Finally, as pointed out by some of the commentators, there is a national comprehensive USEPA study underway to review financial assurance requirements, which could result in changes to the federal requirements including the financial test and corporate guarantee. It makes sense to suspend changes to Pennsylvania's financial test requirements at this time, as suggested.

6) **Comment:** SFAA (*The Surety & Fidelity Association of America*) supports the deletion of corporation guaranties as an acceptable form of security. A surety bond is a guaranty from a regulated insurer independent of the bond principal. If the bond principal fails, the surety company will perform its obligations under the bond. The surety company also evaluates the principal before writing the bond, and the surety's prequalification of the principal is one of the reasons bonds are required. (7)

Response: The original intent of the proposal for this rulemaking was motivated by some of the issues raised by this commentator. The proposal addressed one of the principles outlined for the regulatory revision initiative that is to change the bonding requirements to improve the reliability of money available to properly close a hazardous waste facility. However, as outlined in the response to the information and recommendations made by the commentators of comment 4, the Department will implement a higher standard of review of the financial test and corporate guarantee and suspend changes to those requirements pending the outcome of the USEPA study of the review of the financial assurance requirements.

§ 264a.168 and 265a.168. Bond forfeiture.

7) **Comment:** These two sections establish the process necessary if DEP determines that bond forfeiture is appropriate. We have four questions. First, why does the first sentence remain in Section 264a.168 (b)(4), but the same sentence was deleted from Section 265a.l68(b)(4)? Second, in both sections, should each new sentence added to Subsection (b)(4) be separated out as its own number? Third, what are "environmental effects" as mentioned in (b)(4)? Finally, how will DEP calculate what are "excess moneys" as listed in Subsection (b)(4)? (11)

Response: The first sentence in Section 265a.168(b)(4) will be retained in the final-form rulemaking. The new sentences in subsection (b)(4) should not be numbered separately as they all address the same issue of deposit and use of forfeited bond amounts.

The "environmental effects" mentioned in subsection (b)(4) mean any impacts caused by failure to properly close and monitor the hazardous waste facility. Generally speaking, this means compliance with the closure and post-closure requirements (see 40 CFR Part 264, Subpart G, relating to closure and post-closure).

Any funds remaining after completion of the necessary closure and post-closure tasks by the Department in a bond forfeiture situation are considered "excess moneys."

8) **Comment:** The proposed amendments to the bond forfeiture are a positive step, but they do not go as far as they should. The amended rules would require use of any forfeiture first to pay for costs at the facility for which the bond was provided. We believe that the obligation of each bond should be solely for the facility on which it was provided. The surety should have to pay only the cost of closing that facility, not a forfeiture of the penal sum to the Abatement Fund. (7)

Response: The proposed changes to the bond forfeiture provisions at §264a.168(b)(4) and §265a.168(b)(4) added clarification to the hazardous waste regulations that are consistent with the bond forfeiture provisions in the municipal and residual waste regulations as well as the Solid Waste Management Act (SWMA). The SWMA provisions for closure and post-closure bonds are penal bonds. If a surety enters into a bond obligation on behalf of a permittee, that obligation

is for the full amount of the bond based on cost estimates. If there are excess moneys remaining after all closure and post-closure activities have been conducted upon forfeiture of the bond, those funds are included in the forfeiture amount and deposited in the Solid Waste Abatement Fund as specified by Section 505(d) of the SWMA.

§264a.195 and 265a.195. Inspections.

9) **Comment:** The proposed regulation deletes this section in its entirety. Commentators have indicated that this deletion would result in unnecessary costs imposed on the regulated community. If the tanks are in a facility that is not in operation during the weekend, what is the need for daily inspections? Why is inspection necessary for a storage tank when the facility is not in operation? The Board and DEP need to justify the need for and benefit of this deletion. (3, 11)

Response: This section was proposed to be deleted because it does not have a comparable federal counterpart and may be interpreted as less stringent than federal regulations. Federal provisions at 40 CFR 264.193(c)(3) and 265.193(c)(3), and guidance available regarding those regulations, state that secondary containment systems must, at a minimum, be provided with a leak-detection system that is designed to detect the release of hazardous waste within 24 hours. This mandates daily checking of secondary containment systems, including days in which manufacturing operations are not conducted. Also, in cases where ancillary equipment is not provided with full secondary containment, 40 CFR 264.193(f) and 265.193(f) require visual inspection on a daily basis, whether or not manufacturing operations are being conducted.

10) **Comment:** The Federal Register, April 4, 2006, identifies the Resource Conservation and Recovery Act Burden Reduction Initiative; Final Rule effective May 4, 2006, which includes decreased inspection frequencies for tank systems when leak detection equipment or implemented established workplace practices to ensure leaks are promptly identified, as a minimum weekly inspection frequency. Additional language for further reduced monitoring on a case-by-case basis is included. The changes are referenced on Pages 16878 and 16879 of the April 4, 2006 Federal Register. Table 11 on page 16884 also provides clarity of the reduction in monitoring and associated requirements.

I suggest that the Proposed Rulemaking referencing Chapter 264a.195 (Inspections) incorporate the reduced monitoring frequency associated requirements to be consistent with the April 4, 2006, Federal Register. (2)

Response: 25 Pa. Code 260a.3(e) provides that Pennsylvania's incorporation by reference of the Code of Federal Regulations (CFR) includes any subsequent modifications and additions to the portions of the CFR incorporated. Therefore, the April 4, 2006, final federal rule allowing members of the National Environmental Performance Track Program to apply for an adjustment to the frequency of inspections for certain hazardous waste units and areas (including tank systems) was incorporated by reference on May 4, 2006, the date it became effective as a federal regulation.

§265a.154. Form, terms and conditions of bond.

11) **Comment:** Subsection (b) mentions forms used for bond instruments. The Board should specify the manner in which these forms will be made available to the regulated community. (11)

Response: The financial assurance forms are available on the Department's website ("Bonding and Insurance Forms"), or by directly contacting the Division of Hazardous Waste Management or the Waste Management Program in a Regional Office.

12) **Comment:** This section is listed twice in the proposed regulation between Sections 264a.153 and 264a.156, and Sections 265a.153 and 265a.156. The final-form regulation should be correctly numbered. (11)

Response: The double listing of this section is a typographical error; the first listing has been corrected to read "264a.154."

§265a.163. Failure to maintain adequate bond.

13) **Comment:** In Sections 265a.163 and 270a.41(3), the regulation refers to requests by DEP. However, it is unclear whether requests by DEP will be made in writing. We note that Section 270a.207(l)(iv) requires the public to submit requests in writing to DEP. The final-form regulation should clearly state that DEP will submit its requests in writing to parties who are expected to comply with the requests. (11)

Response: Changes have been made specifying written requests from the Department in these sections of the final-form rulemaking.

§266b.3. Definitions.

14) **Comment:** Paragraph (i), under the definition of "oil-based finishes," refers to a "hazardous waste characteristic," but the proposed regulation does not define this term. The Board should provide a definition for this term or a reference to the applicable federal regulation. (11)

Response: Changes have been made to the definition in the final-form rulemaking to refer to the federal regulations that define characteristic and listed hazardous waste.

§ 266b.11, 266b.12, 266b.31 and 266b.32. Waste management for universal waste.

15) **Comment:** These sections contain the same language to describe waste management for both universal waste oil-based finishes and photographic solutions. We have three concerns pertaining to these four sections. First, what is "original or otherwise appropriate and labeled packaging?" (Emphasis added.) Second, the phrase "reasonably foreseeable conditions" is vague and needs to be further defined. Finally, how is it determined that a container is "structurally sound, compatible...?" (11)

Response: Because the universal waste program is intended to be less prescriptive than the hazardous waste program and encourage the proper collection and reuse or disposal of these

universal wastes, the standards set out in these sections are necessarily less exact. The original packaging is self explanatory; it is the packaging of the original product when purchased or otherwise obtained, such as a paint can, that contains oil-based paint product. In the event that the original packaging is no longer available, a suitable equivalent container may be used provided that the labeling requirements of §266b.29 or §266b.39 are satisfied. The standards established in these sections mirror the federal universal waste regulations at 40 CFR 273.13(a)(1), (b)(1), (c)(1) and (d)(1) and 40 CFR 273.33 (a)(1), (b)(1), (c)(1) and (d)(1), which are incorporated by reference. These standards apply to Pennsylvania-specific universal wastes added in this rule-making consistent with the federally incorporated standards for universal wastes.

§270a.2. Definitions.

16) **Comment:** Subsection (c) defines the term "standardized permit." This subsection states that a standardized permit may have two parts: "[a] uniform portion issued in all cases and a **supplemental portion issued at the Department's** discretion." (Emphasis added.) When would DEP decide to use its discretion to issue a "supplemental portion?" (11)

Response: In general, the Department does not expect to issue many "supplemental portions" to standardized permits. There may be exceptional cases where permit conditions in addition to those contained in the standardized permit may be necessary to address a specific facility's situation. The two-part standardized permit approach mirrors the federal approach contained at 40 CFR Part 124, Subpart G − Procedures for RCRA Standardized Permit. Any site-specific terms and conditions the Department deems necessary for inclusion in a supplemental portion of a draft standardized permit will be subject to opportunity for public comments and hearings in accordance with §270a.208. Supplemental portions of a draft standardized permit will also be subject to appeal as provided for in §270a.210.

270a.41(3). Procedures for modification, termination or revocation and reissuance of permits.

17) **Comment:** In Sections 265a.163 and 270a.41(3), the regulation refers to requests by DEP. However, it is unclear whether requests by DEP will be made in writing. We note that Section 270a.207(l)(iv) requires the public to submit requests in writing to DEP. The final-form regulation should clearly state that DEP will submit its requests in writing to parties who are expected to comply with the requests. (11)

Response: Changes have been made specifying written requests from the Department in §270a.41(3) of the final-form rulemaking.

§270a.60. Permits-by-Rule.

18) **Comment:** Subsection (b)(2)(vi) states that "treatment activities involving thermal treatment are not eligible to operate under this permit-by-rule." Currently, the DEP allows a generator treating its own hazardous waste in containers, tanks or containment buildings to operate under a permit-by-rule. A commentator expressed concerns over this proposed subsection, indicating that it could "limit options for reclaiming usable material from the waste or contaminated soil via use of thermal desorption or other processes that use elevated temperatures." The Preamble

offers no explanation for the new language making thermal treatment ineligible. What is the need for this change? Please explain the intent of the addition of Subsection (b)(2)(vi) and its impact on thermal treatment. (3, 11)

Response: The intent of adding this subsection to the permit-by-rule provisions for generator treatment in accumulation units was to clarify and implement a long-standing federal policy. Pennsylvania's §270a.60(b)(2) permit-by-rule mirrors the federal interpretation allowing generators to treat in accumulation units without obtaining a treatment permit that was initially published in the March 24, 1986 Federal Register (see 51 FR 10168). The federal interpretation allowing treatment in generator accumulation units is limited to circumstances where the standards that apply to hazardous waste accumulation in those units are also sufficient to protect human health and the environment when treatment is conducted in those units. To avoid singling out any particular treatment method, or to inadvertently prohibit a particular treatment method that does not present a threat to human health or the environment, we have changed the wording of this subsection in the final-form rulemaking. The provision now states that treatment activities subject to requirements in addition to those specified in the generator treatment in accumulation unit permit-by-rule requirements will not be eligible for the permit-by-rule. This will prohibit situations where the standards applicable to the particular accumulation units are not sufficient to protect human health and the environment for the proposed treatment method, and provide the Department with the ability to make case-by-case determinations in those situations.

§270a.204. Procedures for preparing a draft standardized permit.

19) **Comment:** This section provides the procedures necessary for preparing a draft standardized permit. How will DEP determine whether a facility has a "demonstrated history of significant noncompliance with applicable requirements," making it ineligible for a standardized permit under Subsection (2)(ii)(IV)? (11)

The intent of the "tentative determination" and "draft permit decision" requirements in Subsection (3) are unclear. Will the permit applicant have an opportunity at this point to submit more information? Please explain. (11)

Response: "Significant noncompliance" has been addressed by the Department on a case-by-case basis when reviewing permit applications since the passage of the Solid Waste Management Act. Section 503 of the Solid Waste Management Act establishes the Department's authority for considering current and past compliance history when making a decision on a permit application. The decision is an "action" of the Department, reviewable by the Environmental Hearing Board with the appropriate scope of review.

Paragraph (3) mirrors federal requirements in 40 CFR 124.204(c). It holds the Department to a decision timeframe and allows for discussion of the Department's draft decision with all interested parties including the applicant prior to final action, hopefully minimizing litigation over the final action.

§270a.206. Requirements to apply for an individual permit.

20) **Comment:** This section provides the requirements necessary to apply for an individual permit, with ineligibility based on various factors. How will DEP determine a "demonstrated history of significant noncompliance" and a "demonstrated history of submitting incomplete or deficient permit applications" as mentioned in Paragraphs (1)(ii) and (iii)? When will DEP inform a facility owner or operator that it needs to apply for an individual permit as mentioned in Paragraph (2)? The final-form regulation should include a reference to the appropriate section that specifies a timeframe. (11)

Response: "Significant noncompliance" has been addressed by the Department on a case-by-case basis when reviewing permit applications since the passage of the Solid Waste Management Act. Section 503 of the Solid Waste Management Act establishes the Department's authority for considering current and past compliance history when making a decision on a permit application. The decision is an "action" of the Department, reviewable by the Environmental Hearing Board with the appropriate scope of review.

The timeframe within which the Department may inform a facility owner or operator that it needs to apply for an individual permit could vary from within the 120-day timeframe outlined in §270a.204(3), to some time after the public notice period, to any time after a facility is operating under a standardized permit. Therefore, a particular timeframe is not specified or referred to in this section.

§270a.207. Requirements for standardized permit public notices.

21) **Comment:** This section describes the process for DEP to provide public notice of draft standardized permits. Paragraph (2)(ii) refers to "a manner constituting legal notice to the public under State statute." This phrase is vague. The final-form rulemaking should set forth the specific manner in which notice is to be legally provided and specify the statute this provision references. (11)

Response: The phrase noted in subsection (2) of the proposed rulemaking is language from the federal regulation and has been removed from the final-form rulemaking. The notice outlined in paragraph (1) is sufficient to give legal notice of the draft standardized permit.

§270a.209. Response to comments.

22) **Comment:** This section describes the process for DEP's response to public comments on draft standardized permits. We have two questions. First, Paragraphs (1) (ii) and (2) refer to "significant comments." How will DEP determine what comments are "significant?" Second, Paragraph (l)(ii) indicates that DEP will describe and respond to all significant comments, and "on any additional conditions necessary to protect human health and the environment." What is meant by this phrase? Is it referring to conditions as a result of the permit or from those identified by the public comment? The final-form regulation needs to clarify this issue. (11)

Response: This language mirrors federal regulations in 40 CFR 124.209. The Department reads this language to refer to two categories of comments: those that raise questions about "the facility's ability to meet the terms and conditions of the standardized permit," and those that suggest or recommend "additional conditions necessary to protect human health and the

environment." The Department would be obliged under this section to respond to both types of comments. This has been clarified in the final-form rulemaking and the word "significant" removed since the Department strives to respond to all comments.

§270.210. Procedures to appeal a final standardized permit.

23) **Comment:** Would there be any circumstances where the uniform portion of the standardized permit would be subject to appeal? (11)

Response: The Department does not believe that these conditions would be subject to appeal. It should be noted, however, that the appeal of actions of the Department is governed by the Environmental Hearing Board Act, and these regulations cannot change the scope of review of the Environmental Hearing Board. The terms and conditions of the uniform portion of a standardized permit are regulatory requirements, rather than strictly permit conditions (similar to the requirements of a permit-by-rule).