

**MINUTES OF THE COMBINED MEETING
OF THE CITIZENS ADVISORY COUNCIL AND
THE ENVIRONMENTAL JUSTICE ADVISORY BOARD
December 14, 2016**

CITIZENS ADVISORY COUNCIL (CAC) MEMBERS PRESENT:

Cynthia Carrow, Allegheny County
William Fink, Bedford County
John Over, Fayette County
Jim Sandoe, Lancaster County
Joi Spraggins, Philadelphia County
Thaddeus Stevens, Tioga County
Jim Welty, Cumberland County
Timothy Weston, Cumberland County

CITIZENS ADVISORY COUNCIL STAFF PRESENT:

Katherine Hetherington Cunfer, Acting Executive Director

ENVIRONMENTAL JUSTICE ADVISORY BOARD (EJAB) MEMBERS PRESENT:

Eli Brill
Adam Cutler
Arthur Frank
Kirk Jalbert
Horace Strand
John Waffenschmidt

ENVIRONMENTAL JUSTICE ADVISORY BOARD STAFF PRESENT:

Carl Jones, Director
Nora Alwine, Environmental Advocate

CALL TO ORDER:

Sitting in for Chairman Fink, Cynthia Carrow called the meeting to order at 9:00 a.m. in Room 105 of the Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA, with a quorum. The meeting was also broadcast via WebEx for the public.

Cynthia Carrow, on behalf of CAC, and Eli Brill, on behalf of EJAB, provided brief board histories and objectives.

DEP REPORT

Acting Secretary McDonnell provided a synopsis of his history with the Department and provided the following departmental updates:

Pennsylvania Drought

Despite recent precipitation, four counties remain on drought warning; 30 counties remain on drought watch. No drought emergency has been declared for any county. Pennsylvania is averaging between 3-8 inches below normal precipitation levels. Groundwater levels continue to

decline in the Delaware and Susquehanna River Basins. Pennsylvania's drought report is published weekly and can be found on DEP's Water Division of Planning and Conservation webpage.

Pennsylvania Radon Levels

DEP has detected a new record-high level of radon near the Allentown-Bethlehem area. Radon testing is imperative since Pennsylvania is one of the most radon prone areas in the country.

Methane General Permit/Methane Mapping Event

On January 18, 2016, Governor Wolf announced a methane reduction strategy for oil and gas operations. To meet the goals of this strategy, DEP will develop a general permit (GP-5A) for sources at new or modified unconventional well sites in remote pigging stations and revise the current GP-5 update permitting requirements for sources at natural gas compressing, processing, and transmission facilities.

Amendments to exemption criteria include a revised Air Quality Permit Exemption List for Category No. 38. When revised, Category No. 38 will apply only to unconventional well sites that were constructed between August 2013 and the effective date of the amendment. The owner or operator of new well sites or existing well sites with modified sources may now seek authorization to use the GP-5A or submit an application for a site-specific plan.

Within two years, DEP is required to submit State Implementation Plan regulations for existing sources to minimize emissions. The state plan must require that emission controls be implemented as soon as possible, but no later than January 1, 2021.

Chapter 78(a) Update

On October 13, 2016, the Marcellus Shale Coalition filed a Petition for Review in Commonwealth Court challenging several provisions in the new unconventional well regulations. They sought a Preliminary Injunction of the challenged provisions on October 14. At a hearing on November 8, Commonwealth Court largely upheld the challenged provisions, but enjoined the following requirements: public resource protection provisions; monitoring and remediation requirements for orphaned and abandoned wells that have the potential to be impacted by fracturing; requirements for existing well development impoundments for storage of freshwater; requirements for closure or re-permitting of centralized impoundments; and post-construction stormwater management requirements related to site restoration.

On December 6, the Department appealed the Commonwealth Court decision to the Supreme Court. The appeal resulted in an automatic stay of the enjoined provisions. In order to retain the result of the Commonwealth Court injunction, the stay was quashed. While the Department is temporarily enjoined from implementing or enforcing the enjoined provisions, the Department is continuing to recommend that unconventional operators follow the standards outlined in the enjoined provisions as best practices.

Chesapeake Bay Restoration Initiative

The Chesapeake Bay Restoration Initiative addresses pollutant reduction deficiencies in order to meet the EPA's annual goal of inspecting 10% of farms in the Bay watershed. DEP and

Conservation District staff underwent training for inspections throughout the summer. DEP staff began their inspections in September and, as of November 10, has conducted 115 agricultural inspections. The Conservation Districts began their inspections in October and will submit quarterly reports to DEP. The results from the first round of inspections are due to DEP in January.

The Chesapeake Bay Program is in the midst of the midpoint assessment of the TMDL, which is due by December 2018. Key milestones for this assessment include: January 1, 2017 – EPA releases draft expectations for completion of revised Phase 3 Watershed Implementation Plans; January 1, 2017 – EPA releases draft Phase 3 planning targets with revised nutrient and sediment reduction goals; and August 18, 2018 – states must submit draft Phase 3 Watershed Implementation Plans to the EPA for review and approval. These plans require coordination with stakeholders and a public comment process.

Governor's Awards for Environmental Excellence

DEP is accepting applications for the 2017 Governor's Award for Environmental Excellence. The award is open to any Pennsylvania business, farm, government agency, school, non-profit organization, and individual that created or participated in the development of a project that promotes environmental stewardship in the Commonwealth. Projects must have been completed between August 1, 2015 and July 31, 2016. Applications are due by January 3, 2017.

PUBLIC COMMENT

Veronica Coptis, Deputy Director for the Center for Coalfield Justice, presented her concerns regarding DEP's permitting of Consol to again conduct long-wall mining operations in Ryerson Station State Park.

PUBLIC ENGAGEMENT AND PUBLIC OUTREACH

Acting Secretary McDonnell stated that DEP generally supports the definition of public participation as defined by the International Association for Public Participation: to involve those who are affected by a decision in the decision-making process; to promote sustainable decisions by providing participants with information needed to be involved in a meaningful way; and communicating to participants how their input impacts the decision. The practice of public participation may involve public meetings, surveys, open houses, workshops, polling, advisory committees, and other forms of direct involvement with the public.

Acting Secretary McDonnell solicited comments from the room regarding the following:

- Suggested changes to Departmental policies regarding public participation
- What should be included in DEP's goal for public participation
- Examples of best practices in public participation in which members have personally been involved, the type of the practice, and how it improved the outcome
- What DEP is doing right to engage the public
- Whether the Department should improve or expand how it engages the public
- Whether DEP effectively communicates how to participate in the comment process for regulations, permits, and public meetings
- In what specific way should DEP reach past its typical network to engage

- more citizens
- What larger demographics should be engaged, how should those demographics be reached, and how the engagement can be measured to be sure it is effective
- What would help DEP's web-based tools engage people more effectively
- What criteria should DEP use to measure effective and successful public participation

In 2017 and beyond, the Department will provide updates on public participation polices to CAC and EJAB where needed. CAC and EJAB will be updated on technology improvements to enhance public participation. An environmental justice listening tour will be scheduled. CAC and EJAB will conduct an annual joint meeting; the next meeting being November 14, 2017.

DEP BROWNFIELDS PROGRAM UPDATE

George Hartenstein, Acting Deputy Secretary for Waste, Air, Radiation and Remediation, previously Director of Environmental Cleanup and Brownfields, defined brownfields and discussed the challenges of uncertain cleanup costs, concerns related to long-term liability, and the hurdle of public perception of the property. He believes the Department has an important role in helping communities revitalize and redevelop brownfields because of the perceived or real health and environmental threat, because the land may have economic value through access to existing infrastructure, the additional tax revenue, and the availability of existing buildings. The cleanup of brownfields removes the stigma of blight and reduces sprawl. Pennsylvania has a number of statutes, including Act 2, the Land Recycling and Environmental Cleanup Standards Act, which protect the public from liability as long as protective remedies are installed based on the risk levels in the Act.

Almost 5,800 final reports have been approved, with approximately \$600 million dedicated to cleanup and redevelopment projects since 1995. For every \$1 in public assistance, about \$8 of private investment is put into brownfield projects. Financial programs for public assistance, including the EPA Brownfield Grants and PA Industrial Sites Cleanup Program, are available.

UPDATE ON RECYCLING, HSCA, AND CDRA

George Hartenstein advised that the Recycling Fund, under Act 101, will sunset January 1, 2020. The Department will request that the Governor's Office start legislative action to get it funded. The waste community and the recycling coordinators in the counties are very interested in the program.

HSCA funds all of the brownfields, environmental cleanup, hazardous waste, and regulatory programs. DEP lost \$40 million in capital stocks and franchise tax revenue, which was the main source of that fund. Because of trailing collections, the fund is expected to continue until the beginning of the 2018 fiscal year, then additional funds will be needed.

DEP is very interested in approaching the Governor's Office seeking assistance with amendments to the Covered Device Recycling Act. The Department wants to make sure folks have the ability to recycle electronics and ensure manufacturers pay for that recycling.

VOLKSWAGEN SETTLEMENT

Alex Chiaruttini, DEP's Chief Counsel, reported that the United States filed claims against VW and a number of its affiliates and subsidiaries for certain vehicles that were produced between 2009 and 2016 for sale in the U.S. As a purposeful act, devices were placed in the vehicles specifically to register emissions compliance where emissions compliance did not exist. More than 23,000 vehicles sold in Pennsylvania during the 2009-2016 period of time are subject to the case. Under normal driving conditions, these particular cars emitted 9-40 times the amount of NOx that they were supposed to be emitting.

Pennsylvania is currently expected to receive \$110,740,310. The AG's Office will be receiving \$22 million for consumer protection claims. 80% of the \$110 million must be allocated within the first 10 years. If the 80% is not spent, the money actually goes back to the other participating states. There are very specific details about how Pennsylvania can spend the money. The EPA is currently identifying a trustee for the \$2.8 billion that will be allocated to the states. Once identified, the trustee can actually change the terms of the agreement. Significant changes are not expected, but the states are currently laying out ambiguities.

In order to be able to participate in the settlement agreement, Pennsylvania had to consent to the jurisdiction and authority of the northern California court. Pennsylvania also had to waive all claims for injunctive relief to address environmental harm caused by the 2.0 liter engines; however, the state has reserved the right to collect penalties. Pennsylvania also agreed to make information publicly available and agreed not to deny registration to those vehicles that are staying on the road.

Kristen Furlan stated that Volkswagen, as part of the overall settlement, has committed \$2 billion across the country to increase infrastructure for zero emission vehicles. \$800 million of that will go to California; the other \$1.2 billion will be used elsewhere. Suggestions for the design, construction, and maintenance of infrastructure may be submitted to Volkswagen via their website.

ROBINSON TWP. v. COMMONWEALTH UPDATE

Liz Davis, Assistant Counsel with the Bureau of Regulatory Counsel, and program attorney for the Oil & Gas program, provided an update on the Robinson Township II and IV cases.

On March 29, 2012, seven municipalities, township supervisors, the Delaware Riverkeeper Network, the Delaware Riverkeeper, and Dr. Kahn filed a petition for review in the Commonwealth Court's original jurisdiction challenging the constitutionality of Act 13 of 2012. Act 13, for the first time, defined unconventional wells and made a distinction in Pennsylvania's oil and gas laws between conventional wells and unconventional wells and developed a whole new set of regulations that specifically addressed unconventional wells. Act 13 created six new chapters (23, 25, 27, 32, 33, and 35) in Title 58 of Pennsylvania's consolidated statutes.

In Robinson II, the Supreme Court issued its opinion on December 19, 2013. A plurality decision of three judges found these provisions unconstitutional under an analysis of the Environmental Rights Amendment to the Pennsylvania Constitution, Article 1, Section 27. A

fourth justice wrote a concurring opinion that these provisions were unconstitutional, but under a substantive due process analysis. Robinson II is a robust discussion of Article 1, Section 27, but there is no majority test of how to demonstrate compliance with Article 1, Section 27, so the analysis and the discussion are not binding precedent.

After the plurality ended the substantive discussion, general severability was discussed. Should the other sections of Act 13 survive because a couple of provisions were found unconstitutional? The rest of the provisions in 3215 were discussed. The court found that those provisions could not be severed from the waiver, that the intent of the General Assembly was that those provisions be considered together, so all of 3215(b) was tossed out. We were left with no statutory setbacks in the 2012 Oil & Gas Act.

The court also mentioned 3215(c) and (e). 3215(e) requires the Department to consider the impact of public resources when making a decision on a well permit. Subsection (e) was new, and it directed the Environmental Quality Board to promulgate regulations to develop criteria for well permits if population impacts to public resources are identified during the process. The court said, insofar as those provisions implement the 3215(b) setback decisional process, they are also invalid. The Department has taken the position that those provisions have survived Robinson Township and that we have the authority to protect public resources. That particular issue is important because the Department is litigating that issue right now in the Supreme Court in a case titled PIOGA v. DEP. The Department's interpretation prevailed before Commonwealth Court in an opinion that was issued in September 1. PIOGA appealed to the Supreme Court. Robinson II also remanded a lot of issues back down to Commonwealth Court, which leads to Robinson IV.

In September of 2016, the Supreme Court found these provisions to be unconstitutional. The court found that 3218.2 relating to notice of spills was unconstitutional as a special law. That provision required the Department to notify public water supply facilities in the event of a spill. The court's reasoning was that the purpose of Act 13 was to protect all citizens of the Commonwealth. Because this particular provision did not apply to private water supplies and was a special law, the court invalidated the entire notification provision, but stayed its mandate for 180 days to allow the General Assembly to come up with a fix. The stay will run out in four months.

Section 3222.1(b)(10) and (11) are provisions that allows health professionals to request information on frack chemicals, the trade secret and confidential proprietary information that is not provided on FracFocus, which is the publicly available website for chemical disclosure. The court invalidated that provision also as a special law and determined that it granted the oil and gas industry as a class special protections for its trade secrets and confidential proprietary information that is not afforded to other industries. Operators have to provide all of their chemical information to the Department, including trade secret and confidential proprietary information, so that is information the Department does have even though it is not provided on the FracFocus website.

Section 3241 gave the power of eminent domain to corporations that transport, sell, and store natural gas. This provision was found unconstitutional under the 5th Amendment of the United

States Constitution, but also Article 1, Sections 1 and 10 of the Pennsylvania Constitution related to eminent domain. The court determined that this section was not limited to public utilities and it allows corporations to exercise this power of eminent domain to take private property for private gain.

Sections 3305-3309 are provisions related to the Public Utility Commission reviewing local ordinances. The court conducted a severability analysis. Since 3303 and 3304 were invalidated in *Robinson II*, the court said that these provisions were so connected to those provisions that they were also invalid.

Meg Murphy, Assistant Director in the Bureau of Regulatory Counsel, discussed the Environmental Hearing Board and Commonwealth Court decisions post-*Robinson II* that have addressed Article I, Section 27 where DEP has been a party. DEP has been a party in cases that have resulted in 15 opinions or adjudications.

Meg stated that *Robinson II* does not necessarily create a new obligation. DEP has had an obligation as an executive agency dating back to the 1970s related to the Environmental Rights Amendment. Since July of 2016, there have been eight EHB decisions related to the implementation of Article 1, Section 27. There were decisions in 2015 and one in 2014. Municipalities, but primarily and predominantly citizens groups, environmental groups, are raising Article 1, Section 27 issues. Where there has been a final decision, DEP has been upheld six times and overruled two times under Article 1, Section 27 analysis. The Department is currently filing a brief in the Supreme Court in the *Ashley Funk* case. Two trials are currently ongoing involving DEP where Article 1, Section 27 issues are being litigated: the *Guyer* well permit case that is being litigated in Erie and the *Keystone Landfill* permit renewal, which is a Northeast Region matter. Both appeals involve citizen groups. A decision is expected from the Supreme Court in the *Pennsylvania Environmental Defense Foundation* case where DEP is not a party but in which there are significant Article 1, Section 27.

Does *Robinson II* change anything?" The *Robinson II* decision, while expansive, robust, and lengthy, was not a majority decision. Through subsequent cases that have evaluated Article 1, Section 27, the courts have concluded that they are still bound by the tests set forth in the *Payne v. Kassab* line of cases that preceded *Robinson Township*. What the Department has learned over the course of these 15 opinions over the last three years is that the same test was applied. *Payne v. Kassab* is the standard. *Payne v. Kassab* created a three-part test to evaluate whether or not executive agencies have met their obligations under Article 1, Section 27. The three-part test is: 1) did DEP comply with statutes and regulations; 2) did DEP and the applicant make reasonable effort to reduce environmental incursions to a minimum; and 3) does environmental harm of the activity outweigh its benefits such that proceeding would be an abuse of discretion. A number of parties argued that if a permit satisfied the statute and the regulations, the three-part test and the obligations under Article 1, Section 27 have been met. A number of cases post *Robinson* clarify that it is not enough to simply comply with the statutes and regulations. The second and third prongs must be met. Several cases involve the kind of proof the EHB is looking for related to the second and third prongs. In the October 2016 Environmental Hearing Board decision in the *Pine Creek* case, the EHB provided more detail about the nuts and bolts of demonstrating the reduction of environmental incursions and balancing whether or not the

environmental harms outweigh the benefits. Another significant case, in terms of understanding the boundaries of Article 1, Section 27 implementation by an executive agency is the Ashley Funk petition addressed by the EHB. The challenge asserts that DEP had an obligation to take an action and has not done so.

Is there a limit to an executive agency's authority under Article 1, Section 27? The Funk decision in Commonwealth Court provides boundaries that are informative for the Department relative to its responsibility under Article 1, Section 27. The court has stated that agencies, like DEP, only have the power that they have been given by the General Assembly and the statutes that the courts have enacted and designated the respective agencies to implement. The Funk decision was July 26, 2016. Seven more decisions have been received since then.

Executive Session

The board entered executive session at 1:10pm and exited executive session at 2:00pm.

Adam Cutler made a motion to adjourn, which motion was seconded by Eli Brill.

Meeting adjourned at 2:00 p.m.