

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
March 16, 2010

VOTING MEMBERS OR ALTERNATES PRESENT

John Hanger, Chairman, Secretary, Department of Environmental Protection
Kenneth Graham, alternate for Secretary Sandi Vito, Department of Labor and Industry
Danielle Spila, alternate for Secretary Allen D. Biehler, Department of Transportation
Wayne Gardner, alternate for Chairman James H. Cawley, Public Utility Commission
Edward Yim, alternate for Representative Camille George
Joseph Deklinski, alternate for Representative Scott E. Hutchinson
Richard Fox, alternate for Senator Raphael J. Musto
Patrick Henderson, alternate for Senator Mary Jo White
Bill Capouillez, alternate for Carl Roe, Executive Director, PA Game Commission
John Arway, Executive Director, Pennsylvania Fish and Boat Commission
William Sisson, alternate for Barbara Franco, PA Historical and Museum Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Jolene Chinchilli, Citizens Advisory Council
Peter Wilshusen, Ph.D., Citizens Advisory Council
Walter Heine, Citizens Advisory Council
David Strong, Citizens Advisory Council
Paul Opiyo, alternate for Secretary George Cornelius, Department of Community and Economic Development
Michael Pechart, alternate for Secretary Russell Redding, Department of Agriculture
Dr. James Logue, alternate for Secretary Everette James, Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Doug Brennan, Director, Bureau of Regulatory Counsel
Kelly J. Heffner, Policy Office Director
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Chairman Hanger called the meeting to order at 9:05 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business - the February 16, 2010, EQB meeting minutes.

**Michael Pechart moved to approve the February 16, 2010, EQB meeting minutes.
Walter Heine seconded the motion, which was unanimously approved by the Board.**

**CONSIDERATION OF PROPOSED RULEMAKING: AMBIENT WATER QUALITY
CRITERION – CHLORIDE (25 Pa Code, Chapter 93)**

John Hines, Deputy Secretary for the Office of Water Management presented a summary of the proposed rulemaking. Dana Aunkst, Director, Bureau of Water Standards and Facility Regulation, and Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the conclusion of Deputy Secretary Hines' presentation, Joe Deklinski asked for clarification whether the Department currently has a standard in place for chloride. Mr. Aunkst replied there is a standard in place for chloride which is applied at the point of intake for the protection of potable water supply use; however, he noted that since the standard is only applied at the point of intake, there can be long stretches of a stream where chloride may exceed values that are necessary to protect aquatic life as long as there is adequate dilution from the point of discharge to the point of compliance. For this reason, Mr. Aunkst noted that the Department is pursuing this rulemaking in order to establish chloride criterion that would be applicable statewide and would therefore provide additional protection for aquatic life. In response, Mr. Deklinski inquired if the Department currently has a chloride criterion for the protection of fish and aquatic life. Mr. Aunkst responded no and elaborated that the current chloride criterion is only applicable at the point of water withdrawal.

Walter Heine inquired whether the U.S. EPA requires states to adopt aquatic life criterion, such as the criterion for chloride included in the proposed rulemaking. Mr. Aunkst clarified that EPA does not mandate states to incorporate specific aquatic life criterion and noted that EPA develops aquatic life criterion frequently and that states have the option of including that criterion within their approved water quality standards program. Mr. Aunkst further noted that in 2002, the Department chose not to incorporate specific chloride criterion into its regulations because it was believed at that time that osmotic pressure was a better criterion for the protection of fish and other aquatic life. Since that time, the Department has learned that there are difficulties associated with osmotic pressure as an aquatic life criterion and are therefore now seeking to incorporate specific aquatic life criterion for chlorides in the proposed rulemaking. In closing, John Arway commended the Department for moving forward with the rulemaking and stated that the regulations are necessary for the protection of aquatic life. He further noted that as science continues to evolve to enhance aquatic life protection, he hopes the Department stays abreast of those advancements and continues to apprise the Board of any such developments.

Mr. Arway moved to adopt the proposed rulemaking, with a 45-day public comment period. David Strong seconded the motion, which was approved by a majority of the Board members. Mr. Deklinski voted in opposition to the motion.

CONSIDERATION OF RULEMAKING PETITION: STEPHENSON GROUP NATURAL GAS COMPANY AMENDMENTS TO 25 Pa Code, Chapters 78.51 and 78.52

J. Scott Roberts, Deputy Secretary for the Office of Mineral Resources Management, introduced Scott Perry, Director, Bureau of Oil and Gas Management, who presented an overview of the rulemaking petition to the Board. Pam Bishop, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following Mr. Perry's presentation, Bill Capouillez asked for clarification regarding the regulations that are referenced in the petition. The petition seeks to amend the Commonwealth's regulations to address, in the petitioner's assessment, ambiguities concerning the regulatory requirements that a well permit applicant notify all landowners or water purveyors whose water supplies are within 1,000 feet of the location of the proposed well. Mr. Capouillez inquired, with respect to the 1,000 feet limitation, whether the regulations – and therefore the petition – refer to the well head or the lateral length of the well. Mr. Perry replied that the Department interprets the regulatory provision to be applicable to the well head because it is the vertical portion of the well that penetrates the fresh ground-water zone; therefore making the well head the appropriate place to apply the 1,000 feet presumptive distance area. In response, Mr. Capouillez asked for clarification if the 1,000 foot presumptive distance would apply in those situations where a gas well fracs an aquifer that is above the point of fracture, but is within the 1,000 feet

presumptive distance. Deputy Secretary Roberts responded that in the Commonwealth, gas well operators are typically not fracing aquifers and that fracing is predominantly taking place 6,000 feet below an aquifer. In response, Mr. Capouillez inquired whether the 1,000 feet presumptive limitation is also applicable to coal bed methane wells. Mr. Perry responded that the 1,000 feet presumptive liability provision, relative to coal bed methane wells, applies to the vertical portion of the well, but clarified that if a well operator affects a water supply, regardless if that supply is within a 1,000 feet of the well head, the operator must restore and replace the water. He further stated that the regulatory provision in question does not provide a mechanism that allows for the contamination of groundwater. He emphasized that groundwater contamination is absolutely prohibited and that the regulatory provision being discussed merely identifies that an operator is presumed to have caused groundwater contamination if contamination is found within 1,000 feet of the well and predrilling surveys were not completed. In response, Mr. Capouillez asked for clarification of the substance of the petition. He asked whether the basis of the petition implies that a permit applicant must obtain a sworn statement relative to the condition of a water supply before the Department could act on the petition application. Mr. Perry responded in the affirmative.

Patrick Henderson inquired whether the petition seeks to amend existing presumption provisions provided under Federal law or if the petition seeks to amend the administrative procedures that are used to implement the provision. Mr. Perry clarified that the substance of the petition includes whether a permit applicant has been deemed to have been refused access to a property in order to conduct predrilling surveys.

Wayne Gardner asked for clarification on the Board's action on the petition. Chairman Hanger clarified that the Board would vote to either accept or reject the petition based solely on whether the petition is administratively complete and emphasized that the Board's vote on the petition would not speak to the merits of the actions requested in the petition. Mr. Gardner asked for further clarification concerning the Department's intended review of the petition. Mr. Perry explained that in lieu of submitting a separate report to the Board that would highlight the Department's evaluation of the petition, the Department would include its evaluation of the petition in a comment/response document that will be completed by the Department when it finalizes a rulemaking on amendments to Chapter 78.

In a related note, Mr. Arway asked the Department for its position on the accuracy of the 1,000 feet presumptive liability provision in the regulations, given the changes in technology. Deputy Secretary Roberts responded that the question needs to be addressed from two different aspects – including water quality and quantity. With regard to water quantity, the Department doesn't believe it makes sense to increase the 1,000 feet presumptive liability limitation; however, with respect to water quality, the Department is currently analyzing that question in response to several legislative amendments that are being pursued.

Mr. Henderson moved to accept the rulemaking petition for further review by the Department. Mr. Heine seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF PROPOSED RULEMAKING: COAL MINING PROGRAM AMENDMENTS (25 Pa Code, Chapters 86-90)

J. Scott Roberts, Deputy Secretary for the Office of Mineral Resources Management, presented an overview of the rulemaking. Bill Allen, Acting Director, Bureau of Mining and Reclamation, and Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

At the conclusion of the Department's presentation, Mr. Strong inquired why the Department would permit coal exploration in areas designated as unsuitable for mining. Deputy Secretary Roberts responded that with respect to the Commonwealth that the Department doesn't receive a predominance of requests for coal exploration in unsuitable for mining areas, but clarified that the rulemaking amendments were being pursued in order to ensure consistency with Federal rules.

Mr. Heine moved to adopt the proposed rulemaking, with a 30-day public comment period. Joanne Denworth seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF PROPOSED RULEMAKING: DESIGNATION OF AREA AS UNSUITABLE FOR SURFACT MINING (MUDDY RUN) (25 Pa Code, Chapter 86)

J. Scott Roberts, Deputy Secretary for the Office of Mineral Resources Management, presented an overview of the rulemaking. Bill Allen, Acting Bureau Director, Bureau of Mining and Reclamation, and Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

After the Department presentation, Mr. Capouillez asked how reclamation projects would be affected if they were included within an unsuitable for mining area. Deputy Secretary Roberts replied that reclamation projects or treatment of discharges would not be affected. Mr. Capouillez further asked whether an unsuitable for surface mining designation could impact incidental coal removal, when the removal was part of a reclamation project. Deputy Secretary Roberts responded no, if the removal was truly part of a reclamation project. Mr. Arway asked whether there are any other unsuitable for mining requests that the Department has received. Mr. Allen responded that the Department has received three other requests and emphasized that the Department usually focuses on only one request at a time because the requests are very resource intensive.

Ms. Denworth inquired whether there are areas within the unsuitable for mining petition area that have been mined but not reclaimed. Deputy Secretary Roberts said yes and elaborated that out of the 3,200 acres that are in the petition area, only about 275 acres of coal remain in place that are conducive to mining. He further explained that the petitioner's interest in requesting the unsuitable for mining designation is to protect the water supply of the Reade Township Municipal Authority from near surface aquifer pollution. Mr. Henderson asked for clarification whether the water wells within the petition area are still producing high quality water despite the fact that approximately 90% of the petition area has already been mined. Deputy Secretary Roberts responded that the wells are producing high quality water but elaborated on the petitioner's concerns regarding pumping rates and the ability of those wells to start pulling water down into the aquifer during dry months.

Mr. Arway moved to adopt the proposed rulemaking, with a 30-day public comment period. Ms. Chinchilli seconded the motion, which was approved by a majority of the Board members. Mr. Deklinski voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: CONTROL OF NO_x EMISSIONS FROM CEMENT KILNS (25 Pa Code, Chapter 145)

Kenneth Reisinger, Acting Deputy Secretary for Waste, Air and Radiation Management, presented an overview of the proposed rulemaking. Joyce Epps, Director, Bureau of Air Quality, and Robert Reiley, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, Mr. Henderson noted the length of time that had elapsed between the time the Board adopted the proposed rulemaking until the time the Department presenting the final regulations to the Board and asked whether the Board is nearing the two-year statutory limitation to finalize the rulemaking. Ms. Epps responded yes. Mr. Henderson inquired the reasons behind the delay in finalizing the rulemaking. Ms. Epps explained that in light of actions concerning the CAIR rulemaking, including its vacatur in July 2008 and its subsequent remanding back to EPA in 2009, EPA Headquarters voiced concerns about the proposed rulemaking because it included provisions that allowed the surrender of NO_x allowances as a compliance strategy. The delay in finalizing the rulemaking was attributable both to the vacatur and remanding of the CAIR rulemaking as well as the time needed by the Department to resolve issues with EPA concerning the provisions in the rulemaking that referenced the surrender of NO_x allowances. In response, Mr. Henderson inquired if there were any substantive changes included in the final rulemaking that were not reviewed by AQTAC. Ms. Epps responded that the Department shared the draft final rulemaking with AQTAC prior to its submission to the EQB.

Mr. Gardner moved to adopt the final rulemaking. Mr. Yim seconded the motion, which passed unanimously by the Board.

CONSIDERATION OF FINAL RULEMAKING: CONTROL OF NO_x EMISSIONS FROM GLASS MELTING FURNACES (25 Pa Code, Chapters 121 and 129)

Kenneth Reisinger, Acting Deputy Secretary for Waste, Air and Radiation Management, presented an overview of the final rulemaking. Joyce Epps, Director, Bureau of Air Quality, and Robert Reiley, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, Mr. Henderson noted his appreciation of the Department's willingness to consider modifications to the alternate emission limit provisions in the rulemaking, which were included in the final rulemaking presented to the Board.

Ms. Denworth moved to adopt the final rulemaking. Mr. Yim seconded the motion, which was approved by a majority of the Board members. Mr. Deklinski voted in opposition to the rulemaking.

OTHER BUSINESS:

In response to an inquiry at the Board's February 16, 2010, meeting, Doug Brennan presented to the Board the Department's recommendation regarding the Board's appropriate response to the invalidation of the Commonwealth's Mercury Rule by the Pennsylvania Supreme Court. The Department's recourse is to proceed with a final-omitted rulemaking, which will remove the regulations from the *Pennsylvania Code*.

ADJOURN:

With no further business before the Board, Mr. Strong moved to adjourn the meeting. Mr. Yim seconded the motion, which was unanimously approved by the Board. The March 16, 2010, meeting of the Board was adjourned at 10:15 a.m.