

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
August 30, 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
Gary Fawver, 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
Richard Manfredi, Citizens Advisory Council
Tim Schaeffer, alternate for John Arway, Executive Director, Pennsylvania Fish and Boat Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
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
Randal (Duke) Adams, Policy Office, Acting Director
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Chairman Hanger called the meeting to order at 9:08 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business—the July 13, 2010, EQB meeting minutes.

Michael Pechart moved to approve the July 13, 2010, EQB meeting minutes.
Bill Capouillez seconded the motion, which was approved by a majority of Board members. Richard Manfredi abstained from voting on the motion.

CONSIDERATION OF FINAL RULEMAKING: ADMINISTRATION OF THE LAND RECYCLING PROGRAM (25 Pa Code, Chapter 250)

Denise Brinley, Deputy Secretary for the Office of Community Revitalization and Local Government Support, provided an overview of the final rulemaking. Troy Conrad, Director, Bureau of Land Recycling; Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel; and Michael Buchwach, Assistant Counsel, Office of Chief Counsel, assisted with the presentation.

Following the presentation, Richard Fox asked for clarification whether the standards included in the final rulemaking apply only to groundwater and soil. Deputy Secretary Brinley replied, yes, and elaborated that the standards apply only to those instances where a property is being voluntarily remediated or is being cleaned up in response to a spill or release of a regulated substance. Deputy Secretary Brinley emphasized that the standards in the final rulemaking are not specifically related to regulatory parameters that may be included in a permit.

Patrick Henderson noted to the Board the importance of considering the comments issued by the Cleanup Standards Scientific Advisory Board (CSSAB) and the Storage Tank Advisory Committee (STAC) on the final-form rulemaking. He particularly noted the concerns raised by the CSSAB regarding the Department's proposed medium specific concentrations (MSCs) for methyl tert-butyl ether (MTBE) in the final-form regulations and the fact that the MSCs do not reflect specific health-based criteria as required in Act 2. Mr. Henderson asked for clarification from the Department whether the MTBE standard included in the final-form rulemaking is based on the most recent health advisory level (HAL) or if it is derived from a drinking water advisory level. Deputy Secretary Brinley responded that the MTBE remediation standard used in the rulemaking is based on a drinking water advisory level and not a HAL and also noted to the Board that a final HAL for MTBE has not been issued to date by the federal Environmental Protection Agency. Mr. Henderson asked for further clarification by inquiring whether the drinking water advisory level used by the Department for MTBE is based on health standards and if the Department would concede that a higher MTBE level may be acceptable but that the Department chose to retain the 20 µg/L standard for MTBE for aesthetic reasons only. Chairman Hanger responded that given the fact that the EPA has not finalized a HAL for MTBE, DEP, as well as others, are uncertain what the final standard will be. Due to this uncertainty, Chairman Hanger noted that it was the Department's best judgment to recommend that the existing regulatory MTBE standard of 20 µg/L remain unchanged by the final-form rulemaking, as that is the standard that the EPA continues to advise, to date.

Walter Heine moved to adopt the final rulemaking. Edward Yim seconded the motion, which was approved by a majority of Board members. Mr. Henderson, Mr. Fox, Mr. Manfredi and Joseph Deklinski voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: ADMINISTRATION OF THE UNIFORM ENVIRONMENTAL COVENANTS ACT (25 Pa Code, Chapter 253)

Denise Brinley, Deputy Secretary for Community Revitalization and Local Government Support, provided an overview of the final rulemaking. Troy Conrad, Director, Bureau of Land Recycling; Michael Buchwach, Assistant Counsel, Office of Chief Counsel; and Kurt Klappkowski, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, Mr. Manfredi asked for clarification whether the authority provided in the rulemaking to terminate an environmental covenant on property assumed by eminent domain for highway right-of way proceedings is strictly for use by the Commonwealth and doesn't extend to political subdivisions in the state, such as townships, cities or boroughs. Deputy Secretary Brinley replied yes, and elaborated that the provision is expressly included in the rulemaking because of the highway right-of-way issues specifically relevant to the Commonwealth. Bill Capouillez noted that the Pennsylvania Game Commission has condemnation powers as well and asked for clarification if the regulations afford the Pennsylvania Game Commission with the same authority to terminate environmental covenants. Deputy Secretary Brinley responded that it was the Department's intention to only provide discrete authority to the Commonwealth to terminate an environmental covenant only when the covenant applies to property that would be used for highway right of way proceedings. She emphasized that the Department would

only be amenable to terminating an environmental covenant if it is certain no environmental issues would arise as a result of extinguishing the covenant. Kurt Klapkowski noted that the Uniform Environmental Covenants Act provides for the termination of environmental covenants under eminent domain proceedings, but such a determination is made by the judiciary because it involves a real property right. Therefore, he noted that the concerns of the Pennsylvania Game Commission could be addressed through provisions provided under the Act, rather than provisions provided under the regulations. He further noted that termination of an environmental covenant relevant to highway-right-of way proceedings requires an administrative – not a judicial – process for PennDOT, so that is why the Department developed a separate process in the regulations to deal with these particular projects. To clarify, Mr. Capouillez inquired whether the Pennsylvania Game Commission would have to initiate legal proceedings in order to invoke any authority to terminate an environmental covenant on property it would assume through eminent domain. Mr. Klapkowski responded yes, and elaborated that the statute (the Uniform Environmental Covenants Act) – not the regulations – provides the authority that would be applicable to the Pennsylvania Game Commission. In response, Mr. Capouillez stated that he found it difficult to believe that the Pennsylvania Game Commission – unlike PennDOT – would have to initiate legal proceedings to obtain the same right to terminate an environmental covenant. In response to the discussion, Chairman Hanger asked Mr. Capouillez whether he had expressed his concerns with the Department during the public comment period for the proposed rulemaking. Mr. Capouillez responded that he was just made aware of issue and, therefore did not raise it during the public comment period. In response, Chairman Hanger noted that the Department is bounded by the provisions provided by the Uniform Environmental Covenants Act but offered a meeting with Department and Pennsylvania Game Commission staff to discuss the matter in more detail.

Wayne Gardner moved to adopt the final rulemaking. Walter Heine seconded the motion, which was approved by a majority of Board members. Mr. Deklinski, Mr. Manfredi and Mr. Capouillez voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: BENEFICIAL USE OF COAL ASH (25 Pa Code, Chapters 287 and 290)

Ken Reisinger, Acting Deputy Secretary for Waste, Air and Radiation Management, provided an overview of the final rulemaking. Steve Socash, Chief, Division of Municipal and Residual Waste, Bureau of Waste Management, and Susan Seighman, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, the Board did not pose any questions regarding the final rulemaking.

In closing remarks, Chairman Hanger expressed his gratitude to Department staff that worked on the rulemaking package and expressed the importance of the regulations in ensuring the beneficial use of coal ash.

Mr. Henderson moved to adopt the final rulemaking. Mr. Yim seconded the motion, which passed by a majority of Board members. Mr. Deklinski voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: CONTROL OF VOC EMISSIONS FROM PAPER, FILM AND FOIL SURFACE COATING OPERATIONS (25 Pa Code, Chapters 121 and 129)

Ken Reisinger, Acting Deputy Secretary for Waste, Air and Radiation Management, provided an overview of the final rulemaking. Joyce Epps, Director, Bureau of Air Quality, and Kristen Furlan, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, the Board did not pose any questions concerning the final rulemaking.

Mr. Fox moved to accept the final rulemaking. Paul Opiyo seconded the motion, which was approved unanimously by the Board.

CONSIDERATION OF FINAL RULEMAKING (With Notice of Proposed Rulemaking Omitted): MERCURY EMISSIONS: REPEAL (25 Pa Code, Chapter 123)

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

Following the Department's presentation, the Board did not pose any questions concerning the final rulemaking.

Mr. Opiyo moved to accept the final rulemaking. Mr. Henderson seconded the motion, which was approved unanimously by the Board.

Following the Board's vote, Mr. Heine inquired if the standards for mercury that were previously promulgated by the federal Environmental Protection Agency were vacated because the standards were not technology-based. Mr. Reiley clarified that the federal standards were vacated because EPA developed the standards pursuant to Section 111 of the Clean Air Act, and not Section 112. He further explained that under the Clean Air Act, such standards needed to be developed under Section 112, which requires the development of standards attainable through maximum achievable control technology. Ms. Epps further clarified that EPA's initial mercury rulemaking included a market-based trading program whereas the Clean Air Act requires that such a program be based on a maximum achievable control technology standard; therefore the rulemaking adopted by the EPA was not consistent with federal law and was not enforceable. Mr. Heine in closing asked whether the vacatur of the federal regulations was decided on science or legal arguments. Mr. Reiley responded that the decision was based on legal arguments.

OTHER BUSINESS:

Chairman Hanger announced that the next meeting of the Board is scheduled for Tuesday, September 21, 2010. Chairman Hanger also noted that the October 19, 2010, meeting of the Board is rescheduled to Tuesday, October 19, 2010. Notice of the change in meeting date will be advertised in the *Pennsylvania Bulletin* and the *Harrisburg Patriot News*. Both the September and October Board meetings will convene at 9:00 a.m. in Room 105 of the Rachel Carson State Office Building, Harrisburg.

ADJOURN:

With no further business before the Board, Mr. Pechart moved to adjourn the meeting. Mr. Yim seconded the motion, which was unanimously approved by the Board. The August 30, 2010, meeting of the Board was adjourned by Chairman Hanger at 10:10 a.m.