

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
April 17, 2012

VOTING MEMBERS OR ALTERNATES PRESENT

Alisa Harris, Acting Chairperson for Michael Krancer, Secretary, Department of Environmental Protection
Gwenn Dando, alternate for Julia Hearthway, Secretary, Department of Labor and Industry
Bryan Kendro, alternate for Barry Schoch, Secretary, Department of Transportation
Pamela Witmer, alternate for Robert Powelson, Chairman, PA Utility Commission
Jamie Serra, alternate for Representative Camille George
Jonathan Lutz, alternate for Representative Scott Hutchinson
Richard Fox, alternate for Senator John Yudichak
Adam Pankake, alternate for Senator Mary Jo White
Tracy Librandi-Mumma, alternate for Carl Roe, Executive Director, PA Game Commission
David Spotts, alternate for John Arway, Executive Director, PA Fish and Boat Commission
Dr. Walter Meshaka, alternate for James Vaughan, Executive Director, PA Historical and Museum Commission
Patrick Henderson, alternate for Jennifer Branstetter, Secretary, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Terry Dayton, Citizens Advisory Council
Walter Heine, Citizens Advisory Council
Burt Waite, Citizens Advisory Council
Paul Opiyo, alternate for C. Alan Walker, Secretary, Department of Community and Economic Development
Heidi Crager, alternate for George Greig, Secretary, Department of Agriculture
Dr. James Logue, alternate for Eli Avila, Secretary, PA Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Doug Brennan, Director, Bureau of Regulatory Counsel
Patricia Allan, Director, Policy Office
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Acting Chairperson Harris called the meeting to order at 9:00 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business – the March 20, 2012, EQB meeting minutes.

**Heidi Crager moved to approve the March 20, 2012, EQB meeting minutes.
Richard Fox seconded the motion, which was unanimously approved by the Board.**

CONSIDERATION OF PROPOSED RULEMAKING: TRIENNIAL REVIEW OF WATER QUALITY STANDARDS (25 Pa. Code Chapter 93)

Kelly Heffner, Deputy Secretary for Water Management, provided an overview of the proposed rulemaking. Lee McDonnell, Director, Bureau of Point and Nonpoint Source Management; Rodney Kime, Chief, Water Quality Standards Division; and Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, Terry Dayton inquired what data was used by the Department to establish the proposed water quality standards for sulfates and chlorides, including whether sampling was conducted in Pennsylvania and if so, when that sampling took place. Rodney Kime replied that extensive sampling was conducted by the Department in the Monongahela watershed and Dunkard Creek over the last two to three years.

Richard Fox asked the Department how many businesses in the Commonwealth would be affected by the proposed criteria for molybdenum. Deputy Secretary Heffner responded that the Department has not calculated that specific number at this time as this rulemaking is focused on the establishment of numeric water quality criteria, as required by the Federal Clean Water Act. She further explained that compliance-related issues associated with the implementation of the rulemaking are factors that are examined when the Department issues a permit. Mr. Fox asked if Pennsylvania's neighboring states have adopted a standard for molybdenum. Deputy Secretary Heffner responded that at least seven other states have adopted water quality criteria for molybdenum. Mr. Kime further noted that Ohio has initiated a proposed rulemaking to establish molybdenum criteria and that the U.S. Environmental Protection Agency (EPA) recommended Pennsylvania's criteria to Ohio. Mr. Fox asked whether the establishment of a molybdenum standard is necessary in order for Pennsylvania to comply with any federal water quality standard. Deputy Secretary Heffner replied that Pennsylvania has not been directed by EPA to include molybdenum criteria in the proposed rulemaking; however, she noted that the purpose of the rulemaking is not to be "reactionary" or responsive to water quality problems after they occur. The purpose of the rulemaking is to stay ahead of any problems and be "proactive" in order to avoid the degradation of water quality. She further noted that DEP has seen increases in the prevalence of molybdenum in waters across the entire Commonwealth.

Burt Waite questioned, with respect to the proposed criteria for chloride, if the Department had conducted an evaluation of conventional oil and gas operations. Deputy Secretary Heffner responded no, but emphasized that the development of standards included in the proposed rulemaking are the result of water quality analyses conducted statewide. She continued by elaborating that as the Department proceeds with the implementation of the rulemaking, a part of DEP's compliance strategy will include an analysis of those entities that are contributing to certain water quality problems in the state, what their contributions are to the problem, and how DEP can work with them to meet water quality standards.

Walter Heine asked about the impact of the proposed rulemaking on active mining operations that utilize conventional treatment operations. More specifically, he asked if these plants can be easily changed or modified in order to meet the standards proposed in the rulemaking. He also asked if the proposed rulemaking would impose a tremendous cost to the coal mining industry. Deputy Secretary Heffner replied that based on anecdotal evidence there would be costs associated with modifying a treatment system but noted that many of Pennsylvania's coal companies are already working with DEP in addressing sulfates.

In response, Mr. Heine questioned why Pennsylvania needs the proposed standards for chlorides and sulfates when DEP has limited information on the effects these standards will have on industry. He compared Pennsylvania with other states including Wyoming, West Virginia and Kentucky and noted that while these states produce more coal than Pennsylvania; these states have not adopted water quality standards similar to what Pennsylvania is proposing. He further questioned the need for the standards when the federal EPA has yet to issue a national water quality standard for chlorides and sulfates and believes it is premature for Pennsylvania to establish these standards without further research or good science to substantiate the standards. Deputy Secretary Heffner responded that she disagrees that the state lacks the science necessary to support the standards proposed in the rulemaking and noted that while the Department considers the impact regulations will have on industry, that consideration occurs at the permitting phase of this rulemaking and not at the regulatory development phase, which must be strictly directed by sound science.

Patrick Henderson noted to the Board that the rulemaking is only at the proposed stage and emphasized that the Board needs to solicit informed input from affected stakeholders, through a formal public comment period process, in order to address the questions being proposed by Board members at the meeting. He further noted that he believes the Department and Board would benefit by retaining the criteria for sulfates, chloride and molybdenum in the proposed rulemaking for the benefit of receiving comments and informed input.

David Spotts complimented Deputy Secretary Heffner and her staff on the development of the proposed rulemaking and stated he believes it is based on sound and good science. He also noted that he believes the Board should move forward with the rulemaking.

Terry Dayton moved to remove the proposed water quality criteria for chlorides and sulfates from the proposed rulemaking. Before seconding the motion, Richard Fox asked Mr. Dayton if he would be amenable to including the removal of molybdenum in his motion. Mr. Dayton agreed to Mr. Fox's suggestion and restated his motion, which included the removal of water quality criteria for chlorides, sulfates and molybdenum from the proposed rulemaking. The motion was seconded by Mr. Fox. The motion was defeated by a majority of board members. Those members voting for the motion included Richard Fox, Adam Pankake, Jamie Serra, Jonathan Lutz, Terry Dayton, Walter Heine and Burt Waite.

Paul Opiyo moved to approve the proposed rulemaking with a 45-day public comment period and one public hearing. Patrick Henderson seconded the motion. The motion was approved by a majority of Board members. Those voting against the motion included Terry Dayton, Walter Heine, Burt Waite and Jonathan Lutz.

CONSIDERATION OF RULEMAKING PETITION: UPPER AND MIDDLE DELAWARE RIVER WATERSHED (25 Pa. Code Chapter 93.9a, 93.9b and 93.9c)

Kelly Heffner, Deputy Secretary for Water Management, provided an overview of the rulemaking petition. Lee McDonnell, Director, Bureau of Point and Nonpoint Source Management; Rodney Kime, Chief, Water Quality Standards Division; and Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel assisted with the presentation.

Following the Department's presentation, Richard Fox asked how many pending petitions the Department is currently studying. Deputy Secretary Heffner replied 17. Mr. Fox asked how many staff would be devoted to studying the Upper and Middle Delaware River Watershed petition given its vast size. Rodney Kime responded by stating approximately five staff would be responsible for studying the petition. Patrick Henderson inquired if the petitioner submitted scientific data with the petition. Deputy Secretary Heffner replied yes and stated that the petitioner provided data that had been collected by various conservation districts, the Delaware RiverKeeper Network and some DRBC studies. Michele Tate noted to the Board that given the volume of data submitted with the petition, the data was not provided to the Board with its meeting materials but is available for review by any Board member upon request. Mr. Henderson asked if the petitioner submitted data to substantiate the exceptional value designation request for the main stem of the Delaware River. The petitioner responded that such data was submitted with the petition.

Acting Chairperson Harris introduced Faith Zerbe, Monitoring Director, with the Delaware RiverKeeper Network. Ms. Zerbe spoke on behalf of the petitioner – the Delaware RiverKeeper Network – and noted to the Board that several co-petitioners, including 28 other organizations, were involved in the development of the petition. Ms. Zerbe stated that many of the streams included in the petition are already designated High Quality and have very good biological diversity. Ms. Zerbe introduced several co-petitioners who expressed their support of the petition and urged the Board to approve the petition for further study. Those individuals included Liz Garland with American Rivers, Cathy Frankenberg with the Appalachian Mountain Club, and Brady Russell with Clean Water Action.

Upon conclusion of the petitioners' comments, Pamela Witmer asked the petitioner to explain why the Delaware RiverKeeper Network is seeking the redesignation of the Upper and Middle Delaware River. Ms. Zerbe replied that additional new and solid data was collected by the petitioner which they felt warranted the redesignation of the Upper and Middle Delaware River to Exceptional Value. Ms. Witmer followed by asking why the petitioner believes that the high quality designation that currently exists in many parts of the watershed is not adequately protective. Ms. Zerbe responded that the Delaware River meets many of the qualifiers for Exceptional Value designation and elaborated on the outstanding water quality of the Upper and Middle Delaware River Watershed, including that the Upper and Middle segments of the Main Stem Delaware River are deemed Special Protection Waters by the Delaware River Basin Commission. In response, Ms. Witmer asked if the redesignation was sought by the petitioner to institute land use controls within the petition area. Ms. Zerbe responded that an Exceptional Value designation to a waterbody does not stop development from occurring and that land use controls were not a motivating factor for the petition. She further noted that an Exceptional Value designation ensures that a process will be followed so that development is conducted and planned for in the right way. Mr. Henderson noted that he respectfully disagreed with the claim that an Exceptional Value designation is necessary to ensure that development is completed in the right way, whatever that development may be. He noted that the Department has the responsibility and commitment to ensure the environment is protected, regardless of the designation of a waterbody.

While noting that he believes the motivation for the petition was associated with the natural gas drilling activity in the petition area, Mr. Henderson asked the petitioner to elaborate on the additional protections or enhancements that may occur with respect to natural gas drilling in the petition area if the waterbody is redesignated to Exceptional Value protection. Ms. Zerbe responded that an Exceptional Value designation does not stop gas drilling. To illustrate her point, she noted the gas drilling activity taking place in the Allegheny Forest which has Exceptional Value streams. She further elaborated on the special permit conditions that may have to be followed with respect to gas drilling activity occurring in an Exceptional Value watershed as opposed to a waterbody with a different designation. Brady Russell

noted that natural gas is very important to the entire community and that stopping that activity from occurring was not what motivated the submission of the petition.

Mr. Fox noted that the petitioner claims that there are 54 municipalities in the proposed petition area. He asked the petitioner if they had contacted all 54 municipalities about the petition. Ms. Zerbe responded that all municipalities were contacted.

David Spotts inquired if the 5 DEP staff members needed to evaluate and study the petition were all central office staff. Rodney Kime responded yes and noted that central office staff would be responsible for completing the survey work associated with the review of the petition.

Mr. Fox noted that he would be voting against accepting the petition for further review, as he believes it is too large. He noted the criteria in *25 Pa Code* Chapter 23 which outline the reasons the Board may refuse to accept a petition for further study and noted that one of the criteria is that the requested action is not appropriate for rulemaking by the EQB due to policy or regulatory considerations. He noted his respect for the amount of work that went into developing the petition, but noted that the petition is the largest ever considered by the Board and therefore would expend valuable Commonwealth resources that are limited. Walter Meshaka noted that the size of the petition area and the resources needed by the Department to study the petition should not be factors in whether the Board accepts or rejects the petition for further study.

Walter Meshaka moved to accept the petition for further study. Walter Heine seconded the motion, which was approved by a majority of the Board members. Richard Fox, Burt Waite, Jonathan Lutz, Adam Pankake and Terry Dayton voted in opposition to the motion.

CONSIDERATION OF PROPOSED RULEMAKING: MEASUREMENT AND REPORTING OF CONDENSABLE PARTICULATE MATTER EMISSIONS (25 Pa. Code Chapters 121 and 139)

Vincent Brisini, Deputy Secretary for Waste, Air, Radiation and Remediation, provided an overview of the proposed 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, there were no questions raised by the Board on the proposed rulemaking.

Richard Fox moved to adopt the proposed rulemaking with a 60-day public comment period and 3 public hearings. Terry Dayton seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF FINAL RULEMAKING: NONCOAL MINING FEES (25 Pa. Code Chapter 77)

John Stefanko, Deputy Secretary for Active and Abandoned Mine Operations, provided an overview of the final rulemaking. Tom Callahan, Director, Bureau of Mining Programs, and Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department’s presentation, Richard Fox inquired about the effective date of the administrative fee proposed in the final rulemaking. Deputy Secretary Stefanko noted that the

administrative fee would begin to be collected starting on January 1, 2013, and would be collected from current permit holders when they renew their mining license.

Terry Dayton moved to adopt the final rulemaking. Richard Fox seconded the motion, which was approved by a majority of the Board members. Jonathan Lutz voted in opposition to the motion.

OTHER BUSINESS:

Michele Tate provided an update to the Board regarding the assemblage of a workgroup to further define the Board Chairperson's authority to withdraw a rulemaking. She noted that six individuals on the Board volunteered to serve on the workgroup.

ADJOURN:

With no further business before the Board, Burt Waite moved to adjourn the meeting. Richard Fox seconded the motion, which was unanimously approved by the Board. The April 17, 2012, meeting of the Board was adjourned at 10:32 a.m.