

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
October 17, 2006

VOTING MEMBERS OR ALTERNATES PRESENT

Kathleen A. McGinty, Chairperson, Secretary, Department of Environmental Protection
Kenneth Graham, alternate for Secretary Stephen M. Schmerin, Department of Labor and Industry
Eric Madden, alternate for Secretary Allen D. Biehler, Department of Transportation
William Hall, alternate for Wendell F. Holland, Chairman, Public Utility Commission
Elizabeth Dunn, alternate for Representative Camille George
Joseph Deklinski, alternate for Representative William Adolph, Jr.
Richard Fox, alternate for Senator Raphael J. Musto
Patrick Henderson, alternate for Senator Mary Jo White
John Byerly, alternate for Executive Director Carl Roe, Pennsylvania Game Commission
Richard Manfredi, Citizens Advisory Council
John Arway, alternate for Dr. Douglas J. Austen, Executive Director, Pennsylvania Fish and Boat Commission
Dr. Walter Meshaka, alternate for Executive Director Barbara Franco, Historical and Museum Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
Pat Lupo, alternate for Jolene Chinchilli, Citizens Advisory Council
Bruce Tetkoskie, Citizens Advisory Council
Walter Heine, Citizens Advisory Council
David Strong, Citizens Advisory Council
Paul Opiyo, alternate for Secretary Dennis Yablonsky, Department of Community and Economic Development
Michael Pechart, alternate for Secretary Dennis C. Wolff, Department of Agriculture
Dr. James Logue, alternate for Secretary Calvin B. Johnson, Department of Health

DEPARTMENT STAFF PRESENT

Richard P. Mather, Sr., Deputy Chief Counsel
Patrick McDonnell, Policy Office Director
Marjorie Hughes, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Chairperson McGinty called the meeting to order at 9:07 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg. The members introduced themselves and the Board considered its first item of business - the September 19, 2006 EQB meeting minutes.

Chairperson McGinty noted that there is one addition that will be included in the Clean Vehicles Proposed Rule discussion at the request of Patrick Henderson. It is added on page 3 following the paragraph that begins "Following action on Amendments 1-3....". "Patrick Henderson stated for the record that the reason Sen. White would be opposing this specific rulemaking is because it is not a two year postponement of the effective date of the California vehicle standards, as DEP has argued, but

rather a conscious decision by DEP to formally adopt and implement the California standards for Pennsylvania and switch away from the federal Tier II standards.” Chairperson McGinty called for a motion to adopt the revised minutes of the September 19, 2006, EQB meeting.

Michael Pechart moved to adopt the September 19, 2006, EQB meeting minutes as revised. Richard Manfredi seconded the motion, which was unanimously approved by the Board.

PETITION TO REDESIGNATE SHERMANS CREEK (PERRY COUNTY)

John Hines, Executive Director, Water Planning Office presented a summary of the petition. Rick Shertzer, Division of Water Quality Standards, Rod McAllister, Water Pollution Biologist, and Michele Moses, Assistant Counsel, assisted.

Executive Director Hines reported that on July 6, 2006, the Department received a request from the Shermans Creek Conservation Association to redesignate the lower main stem of Shermans Creek from Warm Water Fishes (WWF) to Exceptional Value (EV). The petitioner asserts that Sherman Creek has exceptional ecological significance and that a portion contains rare and pollution sensitive species such as the hellbender salamander and the Eastern lamp mussel.

Following DEP’s overview and recommendation, Linda Sieber of the Shermans Creek Conservation Association, made a brief statement regarding the scientific studies done by Dickinson College as well as the area recreational activities.

Richard Fox asked if the Department has a process to review a petition to redesignate a stream from warm water fishery to EV status. Mr. Shertzer responded that we have reviewed such redesignations before, however this will be the first using a regionalized benchmark approach that is being peer reviewed and will be sent to EPA. Richard Fox asked if the municipalities in the watershed have any comprehensive plans or zoning ordinances and, if not, won’t the petition manage or control growth through the designation of the stream. Linda Sieber noted that she is not aware of any comprehensive plan and that the petition would not change any zoning requirements. She offered that possibly the petition might encourage the municipalities to develop a comprehensive plan. Rick Shertzer reminded the Board that the DEP evaluation is based upon, and restricted to, the merits of the aquatic system (physical, chemical and biological).

Following the discussion, David Strong moved to accept this petition for further study. Walter Heine seconded the motion, which was approved by the Board. Richard Fox and Patrick Henderson registered negative votes.

PETITION TO REDESIGNATE GRINNAGE RUN (GREENE COUNTY)

Executive Director John Hines presented a summary of the petition. Rick Shertzer, Division of Water Quality Standards, Rod McAllister, Water Pollution Biologist, and Michele Moses, Assistant Counsel, assisted.

Executive Director Hines reported that on August 28, 2006, the Department received a petition from Civil & Environmental Consultants, Inc., on behalf of Consol Pennsylvania Coal Company (CPCC), to redesignate Grinnage Run from its headwaters to its confluence with Grays Fork in Gray and Richhill

Townships, Greene County from High Quality-Warm Water Fishes (HQ-WWF) to Warm Water Fishes (WWF).

Following DEP's overview and recommendation, Dr. James Mudge of Civil & Environmental Consultants (CEC), representing CPCC, made a brief presentation to the Board. Dr. Mudge reviewed the watershed characteristics and land use as well as the selection and use of the reference stream.

John Arway asked several questions regarding the following: 1) petitioner's intent related to future development in the area, 2) if cold water streams were used as the reference stream and 3) if the Department was involved in the reference stream selection. Dr. Mudge indicated that their interest is to have the stream properly identified and to not limit future development in the watershed. He added that they received advice from the Department's regional or district office regarding the reference stream, since there are no warm water reference streams and utilized methodologies in place in other states. Mr. Arway asked the Department if the methodology under peer review would be applied to this stream. Rick Shertzer replied yes, and noted that regardless of the methodology utilized, unless and until a stream is re-designated, discharge requests are evaluated based on the current regulatory designation. David Strong asked if it was likely that a WWF designation would allow the stream to improve. The Department response was no.

William Hall moved to accept this petition for further study. Bruce Tetkoskie seconded the motion, which was approved by the Board. David Strong registered a negative vote.

FINAL RULEMAKING – NEWTOWN CREEK, *et al.*

Executive Director John Hines presented a summary of the petition. Rick Shertzer, Division of Water Quality Standards, Rod McAllister, Water Pollution Biologist, and Michele Moses, Assistant Counsel, assisted.

Executive Director Hines noted that this final rulemaking includes amendments to 25 Pa. Code, Chapter 93 for designation of six streams and also makes several corrections. These streams were evaluated in response to: a petition - Pine Run (Clearfield County), request from the Pennsylvania Fish and Boat Commission (PFBC)- Messenger Run (Warren County); and requests from the Department: Indian Spring Run, Unnamed Tributary (UNT) to Lizard Creek, Newtown Creek and Indian Creek. These regulatory changes were developed as a result of aquatic studies conducted by the Department and the PFBC.

Richard Manfredi moved to adopt the final rule making. John Arway seconded, and the Board unanimously approved the motion.

PROPOSED RULEMAKING – DOD MILITARY AIRPORTS

Deputy Secretary Thomas K. Fidler, Office of Waste, Air, and Radiation Management, presented a summary of the proposed rulemaking. Ken Reisinger, Director Bureau of Waste Management; Steve Socash, Division of Municipal & Residual Waste, and Susan Seighman, Assistant Counsel, assisted.

Deputy Secretary Fidler explained that the amendments to 25 Pa. Code, §§271.1, 279.112, 287.1, and 293.112 were prepared in response to a petition submitted by the Department of Defense (DOD) to address its concerns about potential hazards to military aircraft from bird strikes caused by birds attracted to transfer stations and landfills. The EQB accepted the petition for study on October 19,

2004, and the Department's Report on April 19, 2005, to adopt DOD's proposal to add "military airport" to the definition of "airport". With the proposed amendments the airport notification requirements would apply to new and expanded municipal and residual waste landfills and transfer facilities, construction and demolition waste landfills and residual waste disposal impoundments.

He reviewed questions raised by the Solid Waste Advisory Committee and their concern regarding including transfer stations in the proposal. The Department relayed the information that it obtained from DOD in response to this concern and noted that neither the current or proposed regulations prohibit an open-air transfer station. The committee voted against the proposed amendments because transfer stations historically have operated within a structure.

Deputy Secretary Fidler added that the Department recommends the EQB adopt this proposed rulemaking with a 30-day public comment period.

Eric Madden moved to approve the proposed rulemaking with a 30-day comment period. Richard Fox seconded the motion, which was unanimously approved by the Board.

FINAL RULEMAKING – MERCURY EMISSION REDUCTION REQUIREMENTS FOR ELECTRIC GENERATING UNITS

Deputy Secretary Thomas K. Fidler, Office of Waste, Air, and Radiation Management, presented a summary of the final rulemaking. Joyce Epps, Director Bureau of Air Quality; Krishnan Ramamurthy, Division of Compliance & Enforcement, John Slade, Bureau of Air Quality and Bo Reiley, Assistant Counsel, assisted.

Deputy Secretary Fidler noted that this final rulemaking amends 25 Pa. Code, Chapter 123 to establish mercury emission standards, annual emission limitations as part of a statewide mercury allowance program with annual non-tradable mercury allowances and other requirements for the purpose of reducing mercury emissions from coal-fired electric generating units or cogeneration units.

The Board approved the proposed rulemaking at its May 17, 2005 meeting. The proposed rulemaking was published June 24, 2006 with three EQB public hearings held July 25th (Pittsburgh), July 26th (Harrisburg) and July 27th (Norristown). The Board received an unprecedented number of comments – 10,936 letters, postcards, testimony and emails. Several revisions have been made to address the comments received.

On August 31, 2006, the Department held a joint meeting of the Mercury Rule Workgroup, Citizens Advisory Council (CAC) and Air Quality Technical Advisory Committee (AQTAC) to discuss concepts for the final rulemaking. Subsequent meetings were held with the AQTAC on September 11 and September 27. The Department also consulted with the CAC on September 19, 2006. The draft final regulation and Decision Document requested by the Board were discussed with the Council.

Joanne Denworth moved and Paul Opiyo seconded to approve this final rulemaking. A detailed discussion followed.

Patrick Henderson asked who commented on the issue of PA coal being disadvantaged. Deputy Fidler noted that it was the PA Coal Association (PCA) that submitted that comment and they believed there was no disadvantage under the federal rule. Mr. Henderson noted PCA's position before the Senate Energy and Environment Committee indicated they believed the proposed state regulation would

worsen their competitive position. There was a quick review of the comment/response document and Mr. Henderson indicated he was satisfied that the PCA comments were accurately reflected.

Richard Fox noted the change between proposed and final deleting reference to 100% bituminous coal and supplemental allowances. He recalled Department remarks that the proposed language was included to support the State coal industry. He asked if they are now removed, is the rule now similar to the federal requirement and therefore unnecessary. Deputy Fidler explained that these revisions were made because on interstate commerce and constitutionality concerns. Krishnan Ramamurthy explained that because the bituminous coal found in Pennsylvania has a higher chloride content the required control measures have a fortuitous additional benefit of also reducing mercury emissions. Deputy Fidler noted that the Department has already received applications for facilities with the new controls.

John Arway asked if the comments submitted by the federal Environmental Protection Agency (EPA) had been addressed and would they approve the new regulations. Deputy Fidler replied that EPA has agreed that states can adopt requirements that are more that the federal standards, and the Department believes all their comments were adequately addressed.

Richard Manfredi asked for an expansion on the benefits and cost comparisons included in the decision document. John Slade reviewed the data from other states (Florida and Massachusetts) studies that shows a direct benefit to ecosystems with a reduction in mercury emissions, supports the observation that the majority of mercury is deposited locally and that any increase in cost to utility customers would be insignificant. Bruce Tetkoskie asked if there were any PA-specific contamination studies. Krishnan Ramamurthy referenced the PA fish tissue studies, which show elevated mercury levels, as well as the EPA studies on infants and women. No PA epidemiological studies were available.

Mr. Henderson asked for the status of the Department's allocation litigation, and an explanation if the Department's position is upheld, will this result in the Commonwealth actually receiving more mercury emission allowances than currently authorized under CAMR. Bo Reiley explained that the case has not yet been briefed and there is no schedule as yet. He added that Mr. Henderson's understanding was correct, and because our air regulations incorporate the federal regulations by reference, no additional regulatory action is needed by PA unless we want to set different requirements. Secretary McGinty noted that because the state mercury rule is based on authority from multiple statutes, if one authority is struck down, this rule would still stand.

Patrick Henderson distributed a handout that included amendatory language to include new definitions for inter-company compliance demonstration and inter-company compliance plan and to add a new §123.207(p)(4) and §123.207(s) to allow inter-company compliance demonstration.

There was discussion regarding the amendment, with Mr. Henderson noting that the intent of the amendment is to mirror the language added at final rulemaking regarding intra-company compliance option to allow inter-company compliance. Secretary McGinty confirmed that on request from Mr. Henderson Department counsel provided guidance on the structure of this amendment. Mr. Henderson explained that the amendment would not relieve any applicant of their environmental compliance obligations. John Slade offered that industry representatives supported intra-company compliance

demonstration because they did not want their over-compliance efforts to go into a pool that could be utilized by their competitors.

Deputy Fidler cautioned that expanding the intra-company compliance demonstrations to inter-company compliance demonstrations would be a significant departure from the state plan, and would probably require additional public comment prior to submission to EPA. He noted that if the Commonwealth does not take action, the federal EPA is moving ahead and regardless of our debate the federal plan could become the state plan. There was discussion regarding regulatory timing and the state plan. Rick Mather clarified that the state plan will be submitted with the final form regulation with a statement that we are pursuing publication in the *Pennsylvania Bulletin* as final rulemaking. Mr. Henderson urged additional discussion and disagreed that it is too late to revise the final rule without impacting the status of the state plan.

Patrick Henderson moved that the amendatory language be added to Annex A, and Richard Fox seconded. The motion to accept the amendment failed with four affirmative votes (Henderson, Fox, Heine and Tetkoskie).

William Hall, alternate for Chairman Wendell F. Holland read the following statement “ I am voting yes on this rulemaking so we can move forward on this clean air issue. I am still unsure that the costs of going beyond the federal rule will provide commensurate health benefits, but I hope so. I also realize that differing opinions will always be involved in complex policy issues.”

Secretary McGinty called for a vote on the motion to approve the final rulemaking. The motion passed with three members (Patrick Henderson, Richard Fox and Bruce Tetkoskie) voting in opposition.

OTHER BUSINESS:

Chairperson McGinty stated that due to lack of agenda items, the November 21st EQB meeting has been cancelled. The next meeting is scheduled for December 19, 2006.

ADJOURNMENT:

With no further business before the Board, David Strong moved to adjourn the meeting. Paul Opiyo seconded the motion. The October 17, 2006, meeting of the EQB was adjourned at 11:23 a.m.