

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
June 16, 2009

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
Mark Brown, alternate for Representative Scott E. Hutchinson
Richard Fox, alternate for Senator Raphael J. Musto
Patrick Henderson, alternate for Senator Mary Jo White
William Capouillez, alternate for Carl Roe, Executive Director, PA Game Commission
Richard Manfredi, Citizens Advisory Council
John Arway, alternate for Dr. Douglas J. Austen, Executive Director, Pennsylvania Fish and Boat Commission
William Sisson, alternate for Barbara Franco, Executive Director, PA Museum Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
Thaddeus Stevens, Citizens Advisory Council
David Strong, Citizens Advisory Council
Paul Opiyo, alternate for George Cornelius, Department of Community and Economic Development
Michael Pechart, alternate for Secretary Dennis C. Wolff, Department of Agriculture
Dr. James Logue, alternate for Everette James, Department of Health

DEPARTMENT STAFF PRESENT

Richard P. Mather, Sr., Deputy Chief 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 9:02 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business - the April 21, 2009, EQB meeting minutes.

With no corrections or amendments, Chairman Hanger called for a motion to adopt the minutes of the April 21, 2009, EQB meeting.

**Michael Pechart moved to approve the April 21, 2009, EQB meeting minutes.
Paul Opiyo seconded the motion, which was unanimously approved by the Board.**

CONSIDERATION OF DEPARTMENT REPORT ON RULEMAKING PETITION: DISPOSAL OF WASTEWATER TREATMENT SLUDGE FILTER CAKE, WASTE MANAGEMENT DISPOSAL SERVICES OF PA (25 PA Code, Chapter 261a)

Thomas Fidler, Deputy Secretary for Waste, Air and Radiation Management, presented a report summarizing the evaluation of the rulemaking petition submitted by Waste Management Disposal Services of PA on December 17, 2008. Kenneth Reisinger, Director of the Bureau of Waste Management assisted with the presentation.

Following the Department's presentation, the Board did not present any questions or comments.

Richard Fox moved to adopt the Department's recommendation to proceed with the proposed rulemaking. Joanne Denworth seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF RULEMAKING PETITION: SHOHOLA CREEK REDESIGNATION, BLOOMING GROVE, DINGMANS, AND SHOHOLA TOWNSHIPS (PIKE COUNTY)

John Hines, Deputy Secretary for Water Management presented an overview of the rulemaking petition. Dana Aunkst, Director, Bureau of Water Standards and Facility Regulation, assisted with the presentation.

Following Deputy Secretary Hines' presentation, Chairman Hanger introduced the petitioner, Grace Hatton, from Hawley, PA. Ms. Hatton stated that she would be available to answer questions from the Board.

Mr. Fox asked Ms. Hatton how the potential land swap with the PA Game Commission is anticipated to work. Ms. Hatton responded that according to the PA Game Commission the land swap will not occur.

Mr. Fox inquired about the business park development. Ms. Hatton responded that State Game Land 180 surrounds the business park on three sides, which poses a certain amount of threat to the water. Mr. Fox asked whether the developer is aware of the petition. Mr. Hatton stated that she is not sure.

Thaddeus Stevens asked whether the business park, as currently constructed, is in the wrong place or improperly sited, and why the business park cannot be used for its intended purposes. Ms. Hatton said the developer feels the building site is too far from the interstate and is difficult to access because of the narrow and windy road that leads to it. Chairman Hanger added that if the petition is accepted by the Board for further study, the Department will provide notice of the petition to affected parties.

Patrick Henderson asked Ms. Hatton who prepared the petition. Ms. Hatton responded that she prepared the petition.

In closing, Chairman Hanger expressed his appreciation to Ms. Hatton for the work she devoted in preparing the petition.

On behalf of the PA Game Commission, William Capouillez noted his support of the petition.

Mr. Fox mentioned that he appreciates the Department's commitment to notify those parties affected by the petition.

David Strong moved to accept the petition. John Arway seconded the motion, which was approved by a majority of the Board members. Mark Brown voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: BLUFF RECESSION AND SETBACK (25 Pa Code, Chapter 85)

John Hines, Deputy Secretary for Water Management, presented an overview of the final rulemaking. Andrew Zemba, Assistant Director, Water Planning Office, Gary Obleski, Coastal Resources Program Manager, Shamus Malone, Assistant Coastal Resources Program Manager, and Bill Cumings, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, Mr. Fox asked why the language concerning deed and plat notices was removed from the rulemaking. Mr. Zemba responded that after conducting further research, it became apparent to the Department that enforcement of the deed and plat notice requirements was going to be difficult; therefore, the Department decided that the intent of the regulations could be better addressed through a voluntary training program that would bring together realtors, municipalities, etc. to assure proper awareness of properties containing bluff recession hazard setbacks. In response, Mr. Fox inquired about the voluntary nature of the Department's plans, given that other regulatory programs mandate such property transfer notifications. Deputy Secretary Hines responded that that unlike other regulatory programs, the bluff recession hazard area program is only applicable to a limited 64-mile geographic area; therefore, as a first step, the Department thought it was more appropriate to establish a voluntary program to assure communication between the Department, affected municipalities, realtors, and property owners. He further noted that if in the future the Department saw a need for a regulatory program, it would consider making such notifications mandatory.

Mr. Henderson inquired about SB3 LLC's comments on the rulemaking, including their expressed concern over a blanket designation for the City of Erie versus designation of a specific bluff recession hazard area. Mr. Zemba responded that the Department received a number of comments asking for clarity on the specific areas considered to be bluff recession hazard areas. To dispel any confusion, Mr. Zemba noted that the Department amended the rulemaking to specifically delineate the geographic areas that contain bluff recession hazard areas, as opposed to identifying only the municipalities that contain a bluff recession hazard area. In response, Mr. Henderson inquired what it means if a site is designated as a bluff recession hazard area. Mr. Zemba responded that it means that the geographic area has a setback, measured in distance starting from the bluff line and moving landward. Chairman Hanger noted that even if you are located in a hazard area that requires a setback, a local government can provide a variance to the setback distance.

Mr. Henderson introduced an amendment to the rulemaking that would exempt the shoreline property owned by Waldameer Park from being designated as a bluff recession hazard area. The specific language of the amendment is as follows:

Section 85.12 (d) - In accordance with Section 4(c) of the Act, 32 P.S 5204 (c), the geographic areas in Millcreek Township running from the line identified as Transect 167M through the line identified as Transect 172M inclusive, as set forth in Section II of the Department's "Study To Tentatively Designate Bluff Recession Hazard Areas", dated November 2004, are protected from Lake Erie by the Presque Isle Peninsula and, therefore, are hereby identified and designated by the EQB as being outside of a bluff recession hazard area under the Act.

In response to the introduction of the amendment, Deputy Secretary Hines stated that he is confident the Department used proper methodologies and relied upon accurate studies to identify specific bluff recession hazard areas; therefore, the Department is not supportive of the amendment introduced by Mr. Henderson. Chairman Hanger also responded by expressing his appreciation to Mr. Henderson for the amendment, but noted that after looking closely at this matter, he is reassured that the science and facts support the Department's determination of the Waldameer property as a bluff recession hazard area. He further noted that any owner of property located within a bluff recession hazard area – including the owners of Waldameer Park – may petition their local government for a variance to the setback distances imposed by this rulemaking.

Mr. Capouillez inquired about the rate of bluff retreat in the areas immediately adjacent to Waldameer Park's property. Mr. Zemba responded that property not in the hazard area has zero to minimal recession, but land within the hazard area faces recession at approximately a half foot per year. Mr. Capouillez noted that the subject area in question appears to have very little development. In response, Mr. Arway asked about the future development interests of the park in the area of question and also inquired if development would be susceptible to erosion if it occurred further inland from the lakefront. Mr. Zemba responded that he believes the park was interested in constructing a storage structure in the subject area, but that the potential for recession exists in the bluff recession hazard area independent of it being adjacent to the lakefront because erosion in the area is also caused by groundwater seepage and other natural processes.

Mr. Henderson acknowledged for the record the professionalism of the Department's staff that worked on this rulemaking, but conceded that the regulations encompass unique circumstances. He asked for the Board's support of his amendment and noted that the bluff in the recession hazard area owned by Waldameer Park sits 500 feet from the shoreline and does not receive direct wave energy from the lake. He noted that the property owners of Waldameer Park, in their judgment, do not believe the property in question is impacted by recession.

Thaddeus Stevens asked whether the jetties constructed along the edge of the lake have been effectual in reducing the recession. Shamus Malone stated that the largest of the jetties is about 200 feet and lies on the property line between Kelso Beach and Waldameer Park's property. Mr. Malone stated that the jetties aid in reducing erosion. Deputy Secretary Hines clarified that the purpose of the jetties is to maintain sand on the beaches and to stabilize the shore. Mr. Stevens asked whether the jetties help to support the bluff or if the bluff recedes because of groundwater issues. Mr. Malone responded that the particular property in question at Waldameer Park recedes because of groundwater and that vegetation could help to keep the bluff in tact by removing moisture out of the bluff. However, he noted, that there are several water-based amusement park rides on the property which can further contribute to recession.

Ms. Denworth commented that on behalf of the Governor's Office she believes it is appropriate that the EQB institute a general rule for the designation of Bluff Recession Hazard Areas, in lieu of making specific designations for individual properties, especially when local governments can exercise their authority to provide variances. Rick Mather noted to the Board that Millcreek Township had previously issued a variance to Waldameer Park. In that particular case, the Department issued an exemption to Waldameer Park to construct a roller coaster near the bluff. Property owners adjacent to Waldameer Park appealed the Department's action to the Environmental Hearing Board, who decided that the Department could not unilaterally provide an exemption to a Bluff Recession Hazard Area designation and that Waldameer Park must follow a formal procedure to obtain a variance. Waldameer Park in turn applied and received a variance from Millcreek Township to construct the roller coaster in the Bluff Recession Hazard Area. Millcreek Township's action was appealed, which advanced to Commonwealth Court, who

affirmed the issuance of the variance. In response to the Commonwealth Court's decision, Waldameer Park constructed the rollercoaster, which is currently still operating.

In closing, Chairman Hanger stated that legal precedent has established what the Department can and cannot do in relation to the identification or exemption thereof of properties located within a Bluff Recession Hazard Area and that the courts have clearly upheld the local variance process. He also mentioned that the best course of action for the Board is to approve the final rulemaking and let the variance process proceed at the local level. He further commented that he believes the citizens of Millcreek Township would make a better decision on this matter than the Board and that he has confidence in the local process.

Mr. Capouillez asked whether Millcreek Township could establish its own variance. Mr. Zemba responded that the Bluff Recession Area Hazard Act and ensuing regulations are administered through local ordinances; therefore Millcreek Township could enact its own variance to the EQB's rulemaking.

Mr. Fox moved to accept Mr. Henderson's amendment. The motion was seconded by Mr. Capouillez. The amendment failed by a vote of 12 – 5, with the following five Board members voting in acceptance of the amendment: Mr. Capouillez, Mr. Henderson, Mr. Fox, Mark Brown and Edward Yim.

Mr. Strong moved to adopt the final rulemaking as presented by the Department. Ms. Denworth seconded the motion. The motion was adopted by a vote of 14 – 3, with the following three Board members voting in opposition to the rulemaking: Mr. Henderson, Mr. Capouillez, and Mr. Brown.

CONSIDERATION OF PROPOSED RULEMAKING: LEAD AND COPPER SHORT TERM REVISIONS (25 Pa Code, Chapter 109)

John Hines, Deputy Secretary for Water Management presented an overview of the proposed rulemaking. Dana Aunkst, Director of the Bureau of Water Standards and Facility Regulation assisted with the presentation.

Following the Department's presentation, the Board did not present any questions or comments.

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

CONSIDERATION OF PROPOSED RULEMAKING: EROSION AND SEDIMENT CONTROL AND STORMWATER MANAGEMENT (25 Pa Code, Chapter 102)

John Hines, Deputy Secretary for Water Management presented an overview of the proposed rulemaking. Diane Wilson, Manager, Watershed Support Section, Ken Murin, Manager, Waterways, Wetlands and Stormwater Management Division, and Meg Murphy, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

At the conclusion of the Department's presentation, Mr. Arway asked why the Department excluded wetlands from the riparian forest buffer definition. Mr. Murin explained the Department did consider applying riparian forest buffers to wetlands, but to do so would require an identification of such waters in advance, which is not easy to accomplish. In fact, a significant amount of wetland resources in

Pennsylvania are not mapped and what mapping does exist is not accurate. Therefore, the Department is proposing that riparian forest buffers be applicable only to those waters that are perennial and intermittent in flow. Mr. Murin noted that there are some wetlands that will be incorporated as they are in close proximity to or in the flood way of some of the perennial streams. Deputy Secretary Hines added that he believes the Department will receive feedback on this issue during the public comment period, which will help the Department further refine this issue.

Mr. Yim inquired whether all low risk and low impact projects are defined as anything that is not high risk and high impact. Deputy Secretary Hines responded that within the regulatory package, the Department has established a very stringent set of criteria that would define projects as low impact. Using this criteria, Department staff as well as staff from the Conservation Districts will assess whether the projects are low impact and therefore eligible for the Permit-By-Rule option.

Curtis Kratz inquired about the fees imposed in the rulemaking, in particular if all fees collected would be retained by Conservation Districts or if a portion of the fees would be collected and reallocated to the federal government. Deputy Secretary Hines replied that the Conservation Districts implement the program on DEP's behalf and therefore would retain a portion of the fees for the reviews it would conduct. The Department would also receive a percentage of the fees, as there are elements of the permit review process that are conducted by the Department. Mr. Kratz also voiced his personal concerns regarding the riparian forest buffer requirements, stating that he is primarily concerned with the infringement the requirement may have on personal property rights. He further stated that the responsibilities of the Department and property owners must be more fully examined in relation to the buffer requirements.

Mr. Stevens also expressed concern about the mandatory setback distances for riparian forest buffers and stated that he could support approving the proposed rulemaking for public comment but questioned whether a 60-day public comment period was adequate. He suggested in turn that a 90-day public comment period may be more advisable to the Department in order to attain better feedback and broader participation.

Mr. Yim questioned the implications that may arise if a licensed professional approves a project that should not have been approved. Deputy Secretary Hines responded that with respect to the improper conduct of a licensed professional, the Department would seek action from the appropriate Licensing Board, as well as impose fines against the individual.

Mr. Henderson inquired about the revenue and cost projections associated with the rulemaking and asked whether the figure of \$7.1 million included costs for both the Department and the Conservation Districts. Mr. Murin responded that yes, \$7.1 million includes program costs for both the Department and the Conservation Districts. Mr. Henderson further asked about the \$7.3 million in projected revenue and whether the Department had a rough estimate of how much money would be apportioned between the Conservation Districts and the Department. Chairman Hanger responded that the figures provided by the Department were "ballpark figures" but indicated that roughly 70% of the anticipated revenue collected would be retained by the Conservation Districts and 30% would be allocated to the Department.

Mr. Henderson further asked whether the Department intends to only allow the Permit-By-Rule option in non-EV watersheds. Mr. Murin responded yes that the Permit-By-Rule option would only be afforded in non-EV watersheds. Mr. Henderson asked whether the Department and the Board have the legal authority to authorize the Permit-By-Rule option in EV watersheds. Meg Murphy responded that currently 25 *Pa Code* Chapter 92 limits NPDES authorizations that are provided through a General Permit

to waters that are not designated as special protection. She further noted that if the Department would choose to provide the Permit-By-Rule option in EV watersheds, it may do so by stating its explicit authority, derived from the Clean Streams Law and the Clean Water Act, in this rulemaking. She further noted that if the Department would pursue this option, the regulations at hand would supersede the limitations imposed in Chapter 92.

Mr. Yim inquired about the impact that would be encountered if the Department would decide to exclude the Permit-By-Rule option in High Quality waters. In response, Mr. Murin stated that it would be hard to determine the impact of that decision, but that he believes, based on past permitting data, that a majority of Department-issued permits would still qualify for the Permit-By-Rule option. He specifically noted that the Department processes approximately 2,500 to 3,000 NPDES permits per year and that roughly 2,000 – 2,500 of those authorizations are General Permits. The remaining 500 are individual permits, as they require individual coverage because they impact special protection waters, such as HQ or EV designated waters.

Wayne Gardner asked when the Board could expect the 60-day public comment period to commence for the proposed rulemaking. Mr. Mather responded that if the Board were to approve the proposed rulemaking, it must be submitted to the Office of General Counsel for approval as well as to the Attorney General's Office. After approval is obtained from both offices, the proposed rulemaking may be published in the PA Bulletin for public comment. Mr. Mather noted that generally this approval process takes between 6 – 8 weeks; therefore he would anticipate publication of the proposed rulemaking to occur in late July or early August. Mr. Hines emphasized that the Department will continue to work with the Water Resources Advisory Committee on deliberating a number of issues associated with the rulemaking.

Chairman Hanger recognized the extensive outreach Department staff undertook on the rulemaking, including 76 meetings with stakeholders.

Mr. Stevens moved to extend the public comment period from 60 to 90 days. Mr. Gardner seconded the motion, which passed unanimously by the Board.

Ms. Denworth moved to approve the proposed rulemaking with a 90-day public comment period. Mr. Arway seconded the motion, which was approved by a majority of Board members. Mr. Brown voted in opposition to the motion.

OTHER BUSINESS:

Chairman Hanger announced that the next scheduled meeting of the EQB would occur on Tuesday, July 21, 2009, at 9:00 a.m. in Room 105 of the Rachel Carson State Office Building, Harrisburg, PA.

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 June 16, 2009, meeting of the Board was adjourned at 10:38 a.m.