

**MINUTES**  
**ENVIRONMENTAL QUALITY BOARD MEETING**  
**August 18, 2009**

**VOTING MEMBERS OR ALTERNATES PRESENT**

Barbara Sexton, Chairperson, alternate for John Hanger, 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

Yasmin Snowberger, 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

Mark Brown, alternate for Senator Mary Jo White

Bill Capouillez, alternate for Carl Roe, Executive Director, PA Game Commission

Richard Manfredi, Citizens Advisory Council

John Arway, alternate for Dr. Douglas Austen, Executive Director, Pennsylvania Fish and Boat Commission

Dr. Walter Meshaka, alternate for Barbara Franco, PA Historical and Museum Commission

Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning

Jolene Chinchilli, Citizens Advisory Council

Bernie Hoffnar, 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

Jared Grissinger, alternate for Secretary Dennis C. Wolff, Department of Agriculture

Dr. James Logue, alternate for Secretary 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**

Chairperson Sexton 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 July 21, 2009, EQB meeting minutes.

With no corrections or amendments, Chairperson Sexton called for a motion to adopt the minutes of the July 21, 2009, EQB meeting.

**Walter Heine moved to approve the July 21, 2009, EQB meeting minutes.**

**Edward Yim seconded the motion, which was unanimously approved by the Board.**

**CONSIDERATION OF RULEMAKING PETITION: REDESIGNATION OF LYCOMING CREEK AND ROARING BRANCH (TIOGA AND LYCOMING COUNTIES) 25 Pa Code, Chapter 93.9L**

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

Following the presentation, Chairperson Sexton noted that the petitioner—the Lycoming Creek Watershed Association – was invited but was unable to attend the meeting.

Joseph Deklinski inquired whether the petitioner contacted the local municipalities within the petition area to advise them of their stream redesignation request. Deputy Secretary Hines responded that the petitioner had contacted a majority of the local municipalities impacted and advised them of their petition request; however, to date, none of the municipalities have expressed either support or opposition to the petition. In addition, Deputy Secretary Hines noted that the petitioner has held three public meetings to inform local citizens and municipal officials about the petition and to address any questions or concerns of the local community. According to the petitioner, the presentations were well received and it appeared a majority of attendees were supportive of the petition.

Following Mr. Deklinski’s question, Bernie Hoffnar asked whether the Department could update the Board in the future concerning the position of local municipalities on the petition. Deputy Secretary Hines responded that the Department would apprise the Board of any future developments with the petition.

**John Arway moved to accept the petition for further study by the Department. Mr. Yim seconded the motion, which was passed by a majority of the Board members. Mr. Deklinski voted in opposition to the motion.**

**CONSIDERATION OF PROPOSED RULEMAKING: WASTEWATER TREATMENT REQUIREMENTS (25 Pa Code, Chapter 95)**

John Hines, Deputy Secretary for Water Management, presented an overview of the proposed rulemaking. Assisting with the presentation were Dana Aunkst, Ron Furlan and Kevin McCleary, Bureau of Water Standards and Facility Regulation; and Bill Cumings, Bureau of Regulatory Counsel.

Prior to his presentation, Deputy Secretary Hines brought to the Board’s attention an administrative error in the Annex that was mailed to the Board. In that version of the Annex, section 95.5 (c) was included as a proposed amendment. The Department doesn’t intend to include that amendment; therefore, a revised Annex was provided at each Board member’s chair prior to the meeting.

Following the presentation, Chairperson Sexton called for a motion to approve the proposed rulemaking with a 60-day public comment period with four public hearings.

Following Deputy Secretary Hines’ presentation, Richard Fox asked whether the wastewater discharges affected by the proposed regulation would be mostly industrial. Dana Aunkst responded yes. Mr. Fox asked whether the affected industries were informed of the development of this rulemaking. Mr. Aunkst responded that they are part of the stakeholder workgroup that Deputy Secretary Hines described and that a myriad of industrial sectors are represented in that group. Mr. Fox asked whether some of

Pennsylvania's neighboring states have a similar standard. Mr. Aunkst responded yes and noted that New York has a 500 milligram per liter TDS standard that, unlike Pennsylvania, is applied everywhere and not just at a water supply intake; therefore, New York is more stringent than Pennsylvania's proposed rulemaking. Mr. Aunkst also noted that West Virginia regulates the chloride component of TDS.

Mr. Strong asked whether the proposed TDS limits would apply to mine drainage reclamation projects. Mr. Aunkst responded that a majority of those projects would not be subject to this rulemaking as they involve treatment of existing discharges. In response, Mr. Strong also inquired whether the proposal could inadvertently impact the treatment of acid mine drainage, as some treatment techniques may cause TDS to rise. Mr. Aunkst acknowledged that this would be an issue the Department will closely examine.

John Arway remarked that approximately 10-15 years ago the Board acted on the Department's advice to regulate TDS such as chloride and sulfates at the point of discharge. With the proposed rulemaking, he cautioned the Department to re-examine how it regulates these constituents because if treatment responsibilities are passed on to the water supplier, the public will bear the true cost of treating TDS. Chairperson Sexton acknowledged Mr. Arway's comment and said it would be an issue that would be closely examined at future stakeholder meetings.

Mr. Hoffnar asked for clarification on whether this rulemaking applies only to new or increased discharges. Mr. Aunkst replied that yes, the proposal applies to only new or increased discharges.

Walter Meshaka asked when the public comment period for the proposal would begin. Deputy Secretary Hines responded that it would begin when the proposed rule is published in the *PA Bulletin*. Chairperson Sexton added that the comment period would open generally two to three months after the Board adopts the proposal. Deputy Secretary Hines clarified to the Board that the Water Resources Advisory Committee (WRAC) urged the Department to delay the proposal until a stakeholder group could be convened to discuss and deliberate issues pertinent to the rulemaking. In lieu of slowing the process down, Deputy Secretary Hines noted that the Department would work on a parallel track with the stakeholder group as the rulemaking proceeded. The workgroup, which will be a subgroup of WRAC, will consist of impacted stakeholders who will discuss both the economic and technologic issues associated with the regulation.

As a part of the stakeholder discussions, Richard Manfredi inquired whether the Department would examine process control, output and cost issues. Mr. Aunkst responded that it would but also noted that for the most part the rulemaking will affect industrial discharges, not necessarily municipal or publicly owned treatment works (POTW) unless the POTW has a large industrial source. Therefore, the issues related to infiltration and inflow, among others, will be examined by the subgroup, but from the context of treatment facilities that serve large industrial customers. Mr. Manfredi further asked how much of the regulatory proposal would stay intact, given the substantial stakeholder involvement process the Department will undertake. Deputy Secretary Hines responded that he is confident the Board will receive numerous comments on the rulemaking but that the WRAC subgroup will help the Department acutely examine those comments, which will result in a more productive process than if the Department had delayed the rulemaking. Deputy Secretary Hines also noted that TDS assimilative capacity issues are being faced by the Commonwealth now, further justifying the need for regulations in the most expeditious manner possible.

Jolene Chinchilli asked whether POTWs should be encouraged to have pretreatment programs in place, given the fact that most TDS comes from industrial discharges. Deputy Secretary Hines responded that it would be beneficial if POTWs had pretreatment programs in place. Ms. Chinchilli further inquired if the

Department knows how many POTWs have pretreatment programs. Mr. Aunkst responded that he is unaware how many have pretreatment programs. Mr. Aunkst also cautioned that POTWs need to carefully analyze whether to accept industrial waste customers, as their discharges can be detrimental to the sewage treatment process. Ms. Chinchilli further asked whether Pennsylvania has primacy jurisdiction for pre-treatment. Mr. Aunkst responded that EPA has primacy over pre-treatment. In conclusion, Ms. Chinchilli asked whether the Department is vulnerable to legal action concerning the documented problems and current stream impairment caused by TDS. Rick Mather responded by stating yes.

Edward Yim inquired about the treatment techniques used to establish the 25 cents per gallon cost of treating high TDS waters. Mr. Aunkst responded that evaporation and desalinization were used to treat the water. Mr. Yim further asked whether these types of treatment are appropriate for all different types of businesses. Mr. Aunkst responded that the applicability of treatment techniques across various industries will be an issue that will be addressed by the WRAC subgroup, as well as if different types of wastewater can be effectively treated with these specific treatment techniques.

Mr. Heine commented that while he respects the work the Department devoted to drafting the proposed rulemaking, he questioned the necessity of moving forward with the rulemaking now in light of the fact that there are many issues that need to be worked out in the WRAC subgroup. Deputy Secretary Hines responded that the necessity of moving forward with the rulemaking now is in direct response to the pressing TDS problems the Commonwealth is currently experiencing in many watersheds. He further noted that prolonging the debate over the appropriate solution to the Commonwealth's TDS problems has the potential to create more costs and more uncertainty. Chairperson Sexton added that the Department currently has several pending permit applications that will impact the state's assimilative capacity for TDS and that the regulated community has asked the Department for regulatory certainty for which the Department has responded through this rulemaking.

Yasmin Snowberger asked how the proposed rulemaking would affect Marcellus Shale operations in the state and whether the wastewater produced as a result of these drilling operations would need to be sent out of state for treatment and discharge. Mr. Aunkst responded that Marcellus Shale operations are of concern to the Department because of their potential to produce flowback and production water that is high in TDS. He further noted that the Department has several pending applications for the discharge of treated wastewater and that the Department is evaluating each on a permit by permit basis to determine whether the applicable watershed has sufficient assimilative capacity to handle the discharge. He further noted that if there is a greater demand above the available assimilative capacity, some drilling companies are transporting their wastewater to West Virginia and Ohio where the water is being injected underground. Ron Furlan also noted that some companies are storing and reusing flowback water, as it is not as contaminated as once thought.

Mr. Fox asked if low flow conditions impact a stream's assimilative capacity. Mr. Aunkst responded that there is a direct correlation between flow and TDS concentrations in areas where there is little precipitation. However, he also noted that the Department also sees spikes in TDS concentration during winter months due to road salt runoff, but these spikes are not necessarily directly linked to stream flow, with all factors being equal. Mr. Aunkst concluded that there is a correlation between flow conditions and assimilative capacity.

**In light of several issues that will need to be addressed during the comment period, Mr. Fox made a motion to amend the rulemaking by extending the public comment period from 60 to 120 days. Mr. Heine seconded the motion.**

In response to the motion, Mr. Hoffnar stated he was against extending the comment period to 120 days because he believes the Department took adequate steps in the development of the regulation and feels confident the Department will address the public's concerns in the final rulemaking. Mr. Arway also questioned the necessity of doubling the duration of the comment period. In response, Mr. Fox asked whether extending the comment period to 120 days would give the Department adequate time to finalize the regulations before the proposed January 1, 2011 compliance deadline. Given the steps in the regulatory review process, Mr. Mather responded that finalizing the regulation before January 1, 2011, would be highly unlikely. Mr. Fox inquired why the Department chose a compliance date of January 1, 2011. Mr. Aunkst responded that the deadline was proposed as an aggressive target to ensure a finalized rulemaking would be in place as expeditiously as possible. Chairperson Sexton again reminded the Board that the regulated community asked for certainty from the Department concerning TDS wastewater discharges and through this rulemaking the Department is responding to that request. In conclusion, Ms. Chinchilli noted that the Department and Board have tackled more complex regulatory issues with less than a 120-day public comment period. As a compromise, Ms. Chinchilli inquired whether a 90-day public comment would be acceptable to the Department. In response, Chairperson Sexton stated that the Department could support a 90-day public comment period, with four public hearings.

**Mr. Fox moved to amend his initial amendment. In response, he moved to increase the duration of the comment period from 60 to 90 days with four public hearings. Mr. Heine seconded the motion, which was passed by a majority of Board members. Mr. Hoffnar voted in opposition to the motion.**

Following the Board's vote on the amendment, Mr. Yim made a statement on behalf of Representative George. He stated that Representative George fully appreciates and commends the DEP for taking action to protect the Commonwealth's water but also encourages that all steps be taken to avoid any unintended consequences of such actions. Representative George believes that the proposed regulation may need more work and he trusts that the final version of the regulation will be fair and carefully fashioned after the DEP considers the public comments and testimony.

At the conclusion of the discussion on the rulemaking, Ms. Snowberger asked the Department for additional cost estimates on treatment technology besides reverse osmosis. Mr. Aunkst responded that compliance cost issues as well as treatment technologies would be thoroughly examined by the WRAC subgroup; however, he noted that the Department has observed some limitations with reverse osmosis, as it is a technology that appears to not work when TDS concentrations are high. In response, Mr. Snowberger inquired whether there are more environmentally protective means to discharge treated TDS wastewater besides injection wells and ocean discharge. Mr. Aunkst responded that as Mr. Furlan elaborated, there are onsite treatment technologies being used by some companies to treat the flowback water to a point where it can be reused. However, this means of treatment produces a concentrated brine solution that will also need to be treated and disposed. Mr. Aunkst reiterated that these issues would be closely examined by the WRAC subgroup.

**David Strong moved to approve the rulemaking with an amended 90-day public comment period and four public hearings. JoAnne Denworth seconded the motion. A majority of Board members approved the motion. Mr. Hoffnar, Mr. Heine and Mr. Deklinski voted in opposition to the motion.**

**CONSIDERATION OF PROPOSED RULEMAKING: HAZARDOUS WASTE MANAGEMENT SYSTEM; PROPOSED EXCLUSION FOR IDENTIFICATION AND LISTING OF HAZARDOUS WASTE (25 Pa Code, Chapter 261a)**

Kenneth Reisinger, Acting Deputy Secretary for Waste, Air and Radiation Management, presented an overview of the proposed rulemaking. Kurt Klapkowski, Bureau of Regulatory Counsel, assisted Deputy Secretary Reisinger with the presentation.

The Board did not pose any questions following the presentation.

**Mr. Hoffnar moved to approve the proposed rulemaking with a 30-day public comment period. Mr. Yim seconded the motion, which was passed unanimously by the Board.**

### **PRESENTATION OF PROPOSED AMENDMENTS: PROTOCOL FOR THE PRESENTATION OF REGULATIONS UNDER THE REGULATORY REVIEW ACT**

Rick Mather, Counsel to the Board, provided an overview of the Department's recommended amendments to the Board's "Protocol for the Presentation of Regulations under the Regulatory Review Act". The amendments were proposed to address concerns expressed by Board members regarding the Department's authority to act on the Board's behalf to make decisions on rulemakings that are processed pursuant to requirements of the Regulatory Review Act. During his presentation, Mr. Mather emphasized that the Department was presenting the amendments so that Board members would have ample time to review them prior to the Board's September 15, 2009, meeting, where adoption of the amendments would be an agenda item.

Following Mr. Mather's presentation, Dr. Meshaka asked whether Mr. Mather believes the proposed amendments minimize the confusion that resulted from the previous protocol. Mr. Mather responded by stating that the previous protocol only addressed developments associated with the review of regulations pursuant to the Regulatory Review Act and did not cover intervening situations, such as the passage of a new or amended federal or state law that could also impact the need for and promulgation of the Department's regulations. Mr. Mather further elaborated that the amendments to the protocol, as suggested by the Department, reflect the Department's recent experience with situations that arise that are not directly pursuant to Regulatory Review Act procedures and therefore clarifies the procedures in the protocol that direct the actions the Department may take on the Board's behalf. Mr. Mather also acknowledged that the amendments will ensure Board members are more promptly informed of developments on regulations as they are subsequently reviewed and processed under the Regulatory Review Act. Mr. Capouillez inquired whether further clarification needed to be made to section 3(c), with regard to the words "will" and "shall" in the second sentence. Mr. Capouillez elaborated by explaining that the provision, as currently amended, appears to not give the Board the option of reviewing proposed revisions to regulations prior to Board adoption. Mr. Mather responded that it was not the Department's intent to omit the Board's review of revised regulations and emphasized that any changes made to a rulemaking are at the discretion of the Board. He further noted that if the revised policy was unclear about this point, the Department would make further changes to the protocol to clarify its intent. Jared Grissinger asked whether the Department would entertain removing the term "promptly" in section 3 and replacing it with a more definitive date or timeframe in order to be more precise. Mr. Mather said it is at the Board's discretion to amend the protocol; therefore if Board members suggest a specific timeframe be included in the protocol, the suggestion will be entertained.

**OTHER BUSINESS:**

Chairperson Sexton announced that the next scheduled meeting of the EQB would occur on Tuesday, September 15, 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. Strong moved to adjourn the meeting. Mr. Manfredi seconded the motion, which was unanimously approved by the Board. The August 18, 2009, meeting of the Board was adjourned at 10:08 a.m.