

**MINUTES  
ENVIRONMENTAL QUALITY BOARD MEETING  
March 18, 2014**

**VOTING MEMBERS OR ALTERNATES PRESENT**

E. Christopher Abruzzo, Chairman, Secretary, Department of Environmental Protection  
Bryan Kendro, alternate for Barry Schoch, Secretary, Department of Transportation  
Patrick McDonnell, alternate for Robert Powelson, Chairman, PA Public Utility Commission  
Representative Greg Vitali, Pennsylvania House of Representatives  
Jonathan Lutz, alternate for Representative Ron Miller  
Richard Fox, alternate for Senator John Yudichak  
Adam Pankake, alternate for Senator Gene Yaw  
Kerry Speelman, alternate for Matthew Hough, Executive Director, PA Game Commission  
Seth Mendelsohn, alternate for Burt Waite, Citizens Advisory Council  
David Spotts, alternate for John Arway, Executive Director, PA Fish and Boat Commission  
Matthew O'Donnell, alternate for Jennifer Branstetter, Director, Governor's Office of Policy & Planning  
William Fink, Citizens Advisory Council  
Walter Heine, Citizens Advisory Council  
John Walliser, Citizens Advisory Council  
Paul Opiyo, alternate for C. Alan Walker, Secretary, Department of Community and Economic Development  
Ben Junkin, alternate for George Greig, Secretary, Department of Agriculture  
Dr. James Logue, alternate for Michael Wolf, Secretary, Department of Health

**DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT**

Hayley L. Book, Director, Policy Office  
Doug Brennan, Director, Bureau of Regulatory Counsel  
Laura Edinger, Regulatory Coordinator

**CALL TO ORDER AND APPROVAL OF MINUTES**

The meeting was called to order at 9:01 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business – the February 18, 2014, EQB meeting minutes.

**Adam Pankake moved to adopt the February 18, 2014, EQB meeting minutes.  
Ben Junkin seconded the motion, which was unanimously approved by the Board.**

**PRESENTATION OF FINDINGS: PERKIOMEN CREEK PETITION**

Kelly J. Heffner, Deputy Secretary for Water Management, provided an overview of the rulemaking petition. Tony Shaw, Chief, Monitoring Section, Bureau of Point and Non-Point Source Management, and Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, Representative Vitali started the discussion inquiring as to the timeframe of the data collected for the Perkiomen Watershed study, asking in what time period data was collected and if newer data is available. Mr. Shaw responded that the data collected is from May of 2007 and that the Department does not have a comprehensive set of current data for the Perkiomen Watershed. Mr. Shaw, in response to a follow-up question from Mr. Walliser regarding data for chemical analysis, confirmed that we do not have a long-term dataset available.

Mr. Fox inquired as to how many petitions the Department has in the queue at this time and if it is unusual to have a seven-year gap between data collection and the petition response consideration by the Board. Mr. Shaw responded that the Department has at least 10 active petitions at this time and that the report and dataset for the Perkiomen Watershed were available soon after the analysis was complete. However, while the Department did have criteria and qualifications for EV in place, other than biological qualifiers, most of these EV criteria and qualifications had rarely been applied to a stream redesignation review before. Coinciding with this petition, another active petition at that time eventually set the precedent for the criteria that would be used for assessments going forward. Perkiomen and other active petitions during that time were held until the process for assessment and evaluation was clarified and the process could be used to evaluate all active petitions. Deputy Secretary Heffner added that the time was also used to analyze additional information that was provided by the petitioner corresponding to EV criteria.

Deputy Secretary Heffner stated that given the significant body of work completed by the Department and the stakeholder outreach involved with this petition, the Department recommends the acceptance of the Perkiomen Watershed report. The report recommends no change in the Perkiomen Watershed designation. Deputy Secretary Heffner added that, given the interest in this petition, the Department also would be supportive of the EQB waiving the Petition Policy statement that does not allow for a petitioner to resubmit a petition until two years have passed. In this way, the conversation could continue, but this petition would close.

Representative Vitali inquired if the designations remained as they are currently, who might be impacted by this decision; including persons, businesses, or landowners. Deputy Secretary Heffner responded that the decision not to redesignate the watershed was based purely on science. She cannot therefore answer what businesses may be affected one way or another by this decision.

Mr. Spotts inquired about the streams used as reference streams to the Perkiomen Watershed. Mr. Shaw responded that the reasons certain streams were chosen over others is detailed in the comment/response document.

Secretary Abruzzo inquired as to the Department's confidence level that the data analyzed through the course and review of this petition would not be different if the same water and data were to be tested and analyzed within the last six months. Deputy Secretary Heffner responded that the confidence level is very high. She continued that there is always an opportunity to evaluate waters as time goes by and water quality can be impacted by a number of things; including land use and substantial modification in the watershed.

Secretary Abruzzo invited the petitioners to make their presentation to the Board.

## **CO-PETITIONER PRESENTATION TO THE BOARD**

Co-Petitioners Faith Zerbe (Delaware RiverKeeper), Donna Wright (Lower Milford Township), Charles McDonald (Trout Unlimited) and Paul Cooper (Co-Petitioner) presented.

Following the presentation by the co-petitioners, Secretary Abruzzo began the discussion by asking a procedural question. He inquired as to how the Department would respond if, six months from now, additional data comes in to support that the stream qualifies for redesignation to EV and this petition is closed and a new petition has yet to be filed. Deputy Secretary Heffner responded that the Department would review and assess the information. If the determination is that the stream qualifies for EV or HQ redesignation, the streams would be placed on an existing use list. Department staff would be instructed that the existing use of that water course would need to be evaluated based on the HQ or EV criteria. The Department gathers as many existing use designations as possible and puts them through the rulemaking process in order for the designations to formally change. If, in six or eight months, information is received that the stream meets the HQ or EV criteria, Department staff would evaluate that information and make existing use changes as necessary.

Mr. McDonald asked if, given the presence of trout in parts of the watershed, if those parts should be upgraded. Deputy Secretary Heffner responded that the Department has not been presented with trout or fish data that allows for Class A wild trout and that there are very specific components that are examined with any classification. Additionally, Fish and Boat has an evaluation procedure and they will provide information to the Department that a stream could be reclassified. That information has not been received for the Perkiomen Watershed.

Technical discussion concluded and Secretary Abruzzo opened the floor for a motion.

Mr. Fox inquired as to how a motion should be crafted given that the Department is not recommending stream redesignation. Discussion ensued regarding precedent, specifically if this is the first time the Board has voted to accept a report that recommends no change. Mr. McDonnell stated that the item up for consideration is the petition itself; whether or not the petition should be closed by accepting the recommendation of the Department that the stream should not be redesignated. Mr. Brennan confirmed that the question for consideration by the Board is whether to agree or disagree with the Department's recommendation.

Ms. Zerbe stated that the petitioners would like the petition to stay open for another twelve months in order for the petitioners to confidently invest time and money into collecting the new data and continuing the partnership with DEP. She expressed concern that closing the petition would shut down this process. Deputy Secretary Heffner suggested that the petitioners could utilize the permit application process. The Department, through the evaluations of permit applications, can make the determination that the criteria for HQ or EV are met. She reinforced that the Department is recommending that this petition be closed but that the opportunity be afforded to the petitioner to come back to the table within the next one or two years. She also confirmed that re-petitioning would trigger further study of the watershed by the Department.

More conversation ensued pertaining to the role of the Board in consideration of this recommendation.

Mr. Spotts asked if the Department would reconsider if, in twelve months, the Fish and Boat Commission or the petitioner provided evidence of better water quality in the watershed if the petition was to remain

open. Deputy Secretary Heffner responded that if presented with data that indicates the water course meets the criteria, then the Department would be open to modification upon review of the data. Ms. Moses added that having a process to review and evaluate the data is most beneficial. She reinforced that the Department supports waiving the two-year time constraint included in the Board's petition policy that would preclude the petitioner from resubmitting the petition before 2016.

Secretary Abruzzo stated that he respects the efforts being made by and on behalf of the petitioners. He further stated that everyone should aspire to see his or her water courses attain the highest possible quality. However, he stated concern that allowing this petition to remain active could set a precedent on the Board that would allow any petition to remain open indefinitely. If petitions are allowed to remain open based on what the future health of the stream may be or what future data may show, the petitions may never close as a final designation would be impossible to reach. Secretary Abruzzo continued that it appears that no one is disputing the data presented by the Department. While seven years is a significant period of time, the Department's confidence is very high that data is still applicable. Although the petitioners presented that the water quality may be better now, it cannot be stated with certainty that new data will qualify the stream to HQ or EV designation. The hope is that it could be redesignated, but the petition process requires that a recommendation is made and that the Board act on the recommendation. Secretary Abruzzo stated that while he is not opposed to eventual redesignation, the Department and the Board have reached a point where a decision must be made in order for the petition process to remain constructive for the Department and for future petitioners.

Mr. Fox asked if a motion could be made to accept the Department's report, closing the petition and coupling it with the waiver of the 2-year requirement. He reasoned that, with this motion, the Department would be directed to report back with any information within the next year, on whether a change in designation is needed, outside of any other petition being filed. Once the determination is made that a stream meets a certain water quality, it would be protected to that use or that designation, regardless of a petition being open.

Secretary Abruzzo stated that he believed such a motion could be made to accept the Department's recommendation and provide a waiver of the two-year requirement if a new petition was to be filed.

Representative Vitali asked the petitioners to comment on Mr. Fox's suggestion. Ms. Zerbe stated that the petitioners are prepared to begin collecting data in April. Additionally, Fish and Boat has agreed to undertake studies in 2014. Resubmitting the petition would be labor intensive whereas keeping the petition open would appear to be the easier option for supplying the Department with information thereby continuing the partnership and moving forward with data collection. Ms. Wright reinforced the petitioners' position that the twelve month extension would be beneficial.

Representative Vitali asked for clarification if the petitioner would need to submit a new petition in order to achieve the desired result of stream redesignation. Secretary Abruzzo stated that a new petition would not necessarily need to be filed in order for a stream to be redesignated. Ms. Moses stated that assessments may be undertaken in response to a petition, on the Department's own initiative (in relation to data collected and work done on a continual basis in the field), or through a permit or approval action. If a permit is under consideration and it affects a particular stream, a third party can submit information regarding its existing use at that time and the Department is obligated to evaluate it.

After further discussion pertaining to how data submitted to the Department by a third party is handled, Ms. Moses clarified that a formal action would need to be taken as previously described in order for the data to be evaluated by the Department. A petition or permit would need to be filed by a third party in

order to trigger action by the Department. The reasoning behind using a formal process is due to the number of people collecting data who would like to have it evaluated by the Department. Without an orderly process to consider all of that data, it risks not getting addressed or not having a timeline for evaluation.

Mr. Brennan suggested that the Board could modify its recommendation. That the Board accept the Department's recommendation to keep the current stream designation and close the petition and to have a commitment from the Department that, within a certain time period, the Department will report back to the Board or make plans to review the existing use data for the purpose of permitting. In this way, it would not be associated with an actual permitting action. Based on the discussion thus far and the interest in this issue, the Department would take action within a certain time period. Mr. Brennan further clarified that his suggestion is that the Department would commit or agree to accept the data that the petitioners wish to provide and the Department will review the data without the use of the petition process. This would be a change to the normal approach where data is accepted as part of the petition or permitting process. Mr. McDonnell clarified that the Department would be altering its recommendation to make that commitment and then the Board would vote on the amended recommendation. Deputy Secretary Heffner stated that the Department's recommendation is to accept the report as final and, as such, accept the recommendation not to redesignate the Perkiomen Watershed. She added that the Water Management Program would be open to Mr. Brennan's suggestion as the Department is committed to being open and transparent and the program would be glad to review data that may be available within the next year. Deputy Secretary Heffner additionally, respectfully requested that, should this suggestion be taken up by the Board, that this is a one-time event.

Mr. Walliser inquired as to the number of petitions currently open. Specifically, he asked if the Board would find itself in a similar situation next year and be forced to offer this same solution to any petitioner that may come forward with a petition similar to the Perkiomen petition. Deputy Secretary Heffner responded that she is not certain of the number of petitions currently open but that this particular petition is unique. The Board is not likely to see another petition similar to this petition.

Representative Vitali asked the petitioners' preference. Ms. Zerbe reinforced that the petitioners would like to have the petition stay open for twelve additional months in order for the petitioners to provide updated data to the Department. Further discussion ensued pertaining to the level of rigor conducted by the Department when assessing the water quality of the Perkiomen Watershed. The Department reinforced to the petitioners that all possible testing was undertaken to examine whether the watershed met HQ or EV standards. The ultimate determination by the Department after extensive study and evaluation was that the watershed does not meet the established HQ or EV water quality standards.

Secretary Abruzzo confirmed with the Program that all information had been reviewed in order to make a designation decision. Deputy Secretary Heffner responded affirmatively.

**Representative Vitali made a motion to extend the period of time to consider the petition by 12 months. John Walliser seconded the motion.**

Secretary Abruzzo called for comments or questions on Representative Vitali's motion.

Representative Vitali listed supporters of his motion to extend the petition for twelve months. He further noted that he heard no opposition to the extension and that the petitioners' presentation provided compelling testimony as to the possible current water quality of the stream. He additionally stated that filing another petition would place an unnecessary burden on the petitioners.

Mr. Fox clarified that the motion essentially tables the report as the Department has reported already. The motion would table the decision pertaining to the Department's recommendation.

**Representative Vitali withdrew his first motion and made an amended motion to table consideration of the report for twelve months for the purpose of gathering additional data for the report.**

Mr. Mendelsohn inquired as to the Department's position on the motion. Specifically, he asked if gathering additional data and testing could be completed in twelve months. Deputy Secretary Heffner responded that the petitioner would have a year to submit additional information but the Department would require additional time to evaluate the information provided.

Mr. Fink asked about the permit application process. He asked how quickly the existing use list would be updated if someone submitted data for a permit application that supported an EV qualification. Deputy Secretary Heffner responded that the stream would be placed on the existing use list at the higher designation upon review and approval of the permit application. Mr. Spotts added that a stream's placement on the existing use list is not automatic. Deputy Secretary Heffner affirmed placement on the existing use list also follows a review and approval process but the Department works as quickly as possible to evaluate all requests.

Secretary Abruzzo called for any additional comments or questions on the motion. Hearing none, a vote was taken.

**Representative Vitali made a motion to table the consideration of the report for 12 months for the purpose of gathering additional data for the report. John Walliser seconded the motion which was approved by six Board members. Ten members voted no. Motion did not pass.**

**Patrick McDonnell made a motion to accept the Department's recommendation and to waive the 2-year requirement for filing an additional petition on this particular matter. Adam Pankake seconded the motion, which was approved by a majority of the Board members. Walter Heine voted in opposition to the motion.**

### **OTHER BUSINESS:**

Hayley Book provided an update on proposed oil & gas surface regulations. The ninety day public comment period closed on March 14, 2014. To date, the Department received well over 22,000 comments on the proposed regulation, a majority of which have come in as form letters. At this point the Department has delivered all of the individual comments and form letters that were received to the standing committees and also to IRRC for their review and evaluation. Ms. Book thanked Board members who submitted comments. She reinforced that now that the deadline for submitting comments has passed, while the Department will read and consider other additional comments that are submitted, those comments will not be included as part of the public comment/response document. The Department will keep the Board updated regarding this regulation. Mr. Walliser commended the Department on the work that has been done. Ms. Book affirmed that a great deal of staff time and interest went into holding those hearings and staff found it extremely helpful as well.

There will be no April meeting for EQB. The next meeting of the Board is scheduled for Wednesday, May 21, 2014. The meeting 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, David Spotts moved to adjourn the meeting. Richard Fox seconded the motion, which was unanimously approved by the Board. The March 18, 2014, meeting of the Board was adjourned at 10:52 a.m.