

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
May 17, 2017

VOTING MEMBERS OR ALTERNATES PRESENT

Patrick McDonnell, Chairman, Acting Secretary, Department of Environmental Protection (DEP)
Nsungwe Shamatutu, alternate for Kathy Manderino, Secretary, Department of Labor and Industry
Roger Cohen, alternate for Leslie Richards, Secretary, Department of Transportation
Gladys Brown, Chairman, Public Utility Commission
Richard Fox, alternate for Representative Mike Carroll
Jonathan Lutz, alternate for Representative John Maher
Joanne Manganello, alternate for Senator John Yudichak
Adam Pankake, alternate for Senator Gene Yaw
Jeff Painter, alternate for Bryan Burhans, Executive Director, Pennsylvania Game Commission
Walter Heine, Citizens Advisory Council
Mark Hartle, alternate for John Arway, Executive Director, Pennsylvania Fish and Boat Commission
Doug McLearn, alternate for James Vaughan, Executive Director, Pennsylvania Historical and
Museum Commission
Sam Robinson, alternate for Sarah Galbally, Secretary, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Jim Sandoe, Citizens Advisory Council
Don Welsh, Citizens Advisory Council
John Walliser, Citizens Advisory Council
Paul Opiyo, alternate for Dennis Davin, Secretary, Department of Community and
Economic Development
Michael Smith, alternate for Russell Redding, Secretary, Department of Agriculture
Anil Nair, alternate for Karen Murphy, Secretary, Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Laura Edinger, DEP Regulatory Coordinator
Jessica Shirley, DEP Policy Director
Kim Childe, Director, DEP Bureau of Regulatory Counsel

CALL TO ORDER AND APPROVAL OF MINUTES

The meeting was called 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 approval of the April 18, 2017, EQB meeting minutes.

Acting Secretary McDonnell noted that at the April meeting, Mark Hartle with the Fish and Boat Commission stated during the discussion of the proposed Triennial Review of Water Quality Standards rulemaking that DEP will be soliciting information on fish reproduction propagation in the Delaware River. The Delaware River Basin Commission (DRBC) held a hearing on April 6, and the Fish and Boat Commission provided testimony that DEP agreed to make available to the Board. Hard copies are

provided today and the testimony will be added to the EQB's 2017 Meetings page under the April 18, 2017 meeting minutes.

Mark Hartle made a motion to adopt the April 18, 2017, EQB meeting minutes.

Jim Sandoe seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF PROPOSED RULEMAKING: SAFE DRINKING WATER – GENERAL UPDATE AND FEES (25 Pa. Code Chapter 109)

Dana Aunkst, Deputy Secretary for Water Programs, provided an overview of the proposed rulemaking. Lisa Daniels, Director of the Bureau of Safe Drinking Water, and Bill Cumings, Assistant Counsel, assisted with the presentation.

This rulemaking proposes to: (1) incorporate the remaining general update provisions that were separated from the Revised Total Coliform Rule (RTCR) as directed by the Board on April 21, 2015, including revisions to treatment technique requirements for pathogens, clarifications to permitting requirements, and new requirements for alarms, shutdown capabilities, and auxiliary power; (2) amend existing permit fees and add new annual fees to supplement state costs and fill the funding gap (\$7.5 million); and (3) establish the regulatory basis for issuing general permits, clarify that noncommunity water systems (NCWS) require a permit or approval from the Department of Environmental Protection (DEP) prior to construction and operation, and address concerns related to gaps in the monitoring, reporting and tracking of back-up sources of supply.

Mr. Fox inquired regarding Pennsylvania's Water/Wastewater Agency Response Network (PA WARN) with regard to auxiliary power. Specifically, he inquired as to how PA WARN functions and who runs PA WARN. Ms. Daniels explained that PA WARN is an excellent program that serves as a mutual aid agreement and process for sharing emergency resources among water and wastewater utilities statewide. However, PA WARN only has about 100 members and Pennsylvania has 2,000 community water systems. Should a regional crisis occur with multiple water systems needing emergency back-up generators, PA WARN is not equipped to handle the large volume at one time. PA WARN is excellent for isolated issues but regional issues would render the organization overwhelmed and unable to assist to that level of need. Ms. Daniels continued that PA WARN is currently run by the PA Section of the American Water Works Association.

Mr. Lutz inquired regarding the back-up sources provision included in the proposal. He referenced the section of the regulation that reads "at a minimum all entry points shall provide water to the public on an annual basis to ensure all sources and entry points are included in routine compliance monitoring." Mr. Lutz asked what the compliance monitoring requirements entail. Ms. Daniels explained that this provision addresses an issue related to permitting. Specifically, these permits do not expire. Once a water system gets a water permit for a source, they have it for life unless they choose to give it up. No ongoing mechanism exists to require retesting of the finished water quality. The proposed regulatory amendments allow DEP to track monitoring compliance in back-up sources, to ensure that those sources are safe. The existing regulations do not include a monitoring provision which allows DEP to determine the quality of back-up – also known as emergency – sources. If these sources should need to be used, DEP cannot currently verify if they are safe. The proposed regulatory amendments require monitoring of these back-up sources at least on an annual basis. All sources will need to be included in routine compliance monitoring that is already occurring for regular sources. This will also ensure that everything is in good working order should it be needed in case of an emergency. When developing these proposed regulatory

amendments, DEP noted that some emergency sources have not been monitored in more than five years. DEP therefore has no way of verifying the water quality of those sources or how the water chemistry would interact once it was released into the distribution system. One related concern is lead solubility. Further, equipment that has not been used in five or more years may not be in good working order. DEP has experienced situations where a system never used an interconnection and when the water was needed, when the valves were accessed, they were frozen shut. Ultimately, this is an issue on which DEP would like to receive public comment. If others have suggestions for an alternative provision to the one included in the proposed rulemaking, DEP would be glad to entertain other proposals that are equally protective of public health.

Mr. Lutz noted concern regarding the proposed fee schedule. He stated that fees must be viewed as reasonable in relation to the cost of administering services. He stated that, in some cases in this proposal before the EQB, fees appear to exceed the cost of services by 800 percent. He further noted that he understands the necessity for the urgency of implementing fees but assurance is needed that DEP is open to exploring different options for increasing program revenue. Ms. Daniels responded by noting that this proposed regulation aims to solicit public comment on different potential options. DEP endeavors to ensure that fees are assessed fairly and equitably. For this reason, in the preamble for the regulation, several options are described and varying fee structures are compared, primarily based on the minimum level of service provided. Different water systems need different levels of time and effort from DEP. In addition, there are compliance and enforcement issues, boil water advisories, other water supply emergencies, and the need for technical assistance all which go beyond the most basic level of service by which DEP structured the proposed fee schedule. For further explanation, Ms. Daniels discussed how DEP assessed the impact to small water systems and learned that while the charge to small water systems is \$250, the cost to DEP to service these systems is more than \$2,000. DEP is working to counterbalance that. Another option discussed in the preamble is a fee for service option which looks strictly at the number of service connections. While this option may appear more fair to have the same per-household cost, the small water systems would pay less than one percent for a fee for service and the large systems would see their fees increase by up to 21,000 percent. This option is noted in the preamble for comparison and to highlight that DEP evaluated other options and picked the one that looked to be the most fair to all who will be impacted.

Mr. Lutz asked if DEP considered an assessment fee akin to what the Public Utility Commission (PUC) would use. Ms. Daniels responded that this was not considered as the PUC has access to financial information that DEP is not privy to for the regulated utilities in order for the PUC to evaluate proposed rate increases. DEP would be open to considering a similar method of fee assessment if DEP had access to that data. PUC Chairman Gladys Brown noted that the PUC has a responsibility as regulators to keep some of the information confidential. The PUC could provide general information but it would be broad in scope and not serve the needs of DEP for structuring a fee schedule. Further, Ms. Brown explained that the PUC assesses rate increases in a different manner – not necessarily based on the amount of service that individual customers receive. Ms. Daniels added that DEP serves 2,000 community water systems of which approximately 200 are regulated by the PUC.

Mr. Lutz stated that he would like to see a fee structured in response to actual service that water companies require of DEP. Ms. Daniels responded that this would entail a refinement of the minimum elements for what constitutes the level of service provided as opposed to a financial assessment of the ability to pay the increased fee. Ms. Brown added that this could result in uneven fees for some companies. Ms. Daniels affirmed that DEP is willing to entertain all ideas for the fee structure and specifically solicits public comment on the fee schedule in the preamble for the regulation. Determining the best way to adjust the fee schedule is a challenge and all input will be welcome. Ms. Brown added that

the PUC understands this challenge well. Further, the PUC understands that this proposed fee increase will impact some of the PUC's regulated water companies. However, the PUC also is fully aware of the necessity of these fees to ensure the provision of safe drinking water to the consumers served by the water companies. Ms. Brown noted that the PUC will continue to work with DEP on this process.

Mr. Heine commented that previously in his career he inspected water supplies and filters for the health department. He specifically addressed the filter to waste provision of the proposed rulemaking. He commended the inclusion of this provision but noted pathogens and other materials that are not filtered in the initial flush should also go to waste. He inquired if this could be added to regulation. Ms. Daniels responded that this proposed regulation incorporates the federal filter backwash law into Pennsylvania regulation. While the federal regulation has been in place for a few years, Pennsylvania was not able to incorporate it as not all systems had the capability to upgrade in response. Since that time, DEP has worked with water systems that are contemplating major modification to treatment plans to see if they have the capability to apply filter to waste technology along with this modification to the plant. Further, DEP can now track through online turbidimeters when systems are having these issues and can address it through an enforcement action to ensure the protection of public health. If DEP observes an issue after a filter is put back online, corrective action will need to be taken.

Mr. Fox noted that, should the rulemaking move forward as planned, the fee schedule would take effect in April of 2018. He inquired how long after that it would take to hire and train staff. Deputy Secretary Aunkst responded that DEP would need to collect fees for approximately six months before hiring new staff. Ms. Daniels added that there are timelines in place for officially requesting a complement increase and then, once approved, beginning the hiring process. First, DEP must prove that the new costs can be managed. For this reason, as Deputy Secretary Aunkst stated, it typically takes six months to prove that the revenue is sustainable and that the funding is available to hire new staff. With that process, hiring and training could begin in January of 2019. It is also important to note that a sanitarian is not considered fully trained for approximately two years from the date of hire due to the complexities of the drinking water program. Mr. Fox inquired if that timeline is acceptable to the EPA. Ms. Daniels responded that the EPA is aware of this timeline and, while they appreciate the work we are doing to fill the funding gap, they have encouraged us to keep looking for and pursuing temporary funding sources. However, currently no temporary funding sources appear to be available.

Deputy Secretary for the Governor's Policy Office, Sam Robinson, noted the implementation challenges due to the complexity and length of the regulatory review process. He stated that the Administration recognizes the protection of safe drinking water as a significant issue of serious consequence and importance. He noted that numerous members of the General Assembly had expressed interest during Acting Secretary McDonnell's budget testimony that this issue be addressed as quickly as possible. Options are being explored to address this issue expeditiously and with flexibility wherever possible.

Acting Secretary McDonnell added that it is important to note that DEP has seen the percentage of systems in compliance with drinking water standards decrease over time. This proposed rulemaking is therefore not only in response to the demands of the EPA. It also addresses that this program is tasked with protecting public drinking water and DEP needs to ensure that the program is adequately funded to ensure that protection.

Mr. Welsh asked if sanctions could be applied to DEP and the Safe Drinking Water program other than program withdrawal. Ms. Daniels responded that, in some cases, if DEP is not performing, the EPA can choose to take 20 percent off the top of our federal funds. It has happened in the past. Prior to Pennsylvania having a lead ban program in place, funds were taken until that legislation was passed.

Therefore, the possibility exists that federal funding can be withdrawn. Ms. Daniels noted that the EPA will typically evaluate the circumstances involved in each case before taking drastic action. For example, in the recent past, the EPA put California and Oklahoma on notice that they were underperforming. Oklahoma was likely closest to having action taken because they were struggling to find an alternate funding source within their state. It is important to understand that the EPA does not want to have to take action of this nature – this would be a measure of last resort. The EPA does not want to run state programs. However, if forced to take over, it is also important to understand, all of DEP’s funding that is used to run the safe drinking water program would be withdrawn, as the EPA would need that funding to run its program in the state. DEP would lose all SRF capitalization money and all federal PENNVEST funds.

John Walliser made a motion to adopt the proposed rulemaking.

Walter Heine seconded the motion, which was unanimously approved by the Board.

**CONSIDERATION OF RULEMAKING PETITION: ZONES 3 AND 4; DELAWARE RIVER
(25 Pa. Code § 93.9e)**

Dana Aunkst, Deputy Secretary for Water Programs, provided an overview of the rulemaking petition. Lee McDonnell, Director of the Bureau of Clean Water, and Josh Lookenbill, Division of Water Quality Standards, assisted with the presentation.

The Delaware Riverkeeper Network submitted a petition for rulemaking to the Board requesting an upgrade to the existing and designated uses of Zones 3 and 4 of the Delaware River to include fish propagation for the warm water fishes use and fish maintenance and propagation for the migratory fishes use.

Mr. Lutz noted that DEP is a voting member of the Delaware River Basin Commission (DRBC) and asked if the DRBC has the same authority to designate in the Delaware River. Deputy Secretary Aunkst responded affirmatively that the DRBC has the authority to establish water quality standards and designate uses. Mr. Fox asked if there will be coordination with DEP and the DRBC in order to avoid two competing studies, also to account for the Delaware River being an interstate waterway, to avoid different standards in different states. Deputy Secretary Aunkst replied that DRBC’s study and DEP’s study would be done together as to not duplicate efforts and to have the benefit of the expertise of both DEP and the DRBC. Mr. Cohen inquired if the study will include potential impacts to riverside facilities and their operations. Deputy Secretary Aunkst responded that existing use studies evaluate whether a petitioner’s information supports the redesignation and whether the data collected in the field supports the redesignation of the existing use. These studies evaluate water quality and fish and other aquatic life.

Nicholas Patton, staff attorney for the Delaware Riverkeeper Network, and Dr. Eric Silldorff, Restoration Director for the Delaware Riverkeeper Network provided a brief presentation to the Board.

Mr. Pankake inquired of DEP how long a study of this nature would take to complete. Mr. Lookenbill responded that DEP plans to work closely with DRBC staff in conducting this evaluation in collaboration with their study. As such, it is difficult to determine how long the study will take. DEP is currently in discussion with DRBC technical staff.

Mark Hartle made a motion to accept the rulemaking petition for further study by the Department. Doug McLearen seconded the motion.

Jonathan Lutz commended the milestones reached in the Delaware River but noted concern about DEP establishing water quality standards with which other states that share the river would not be obligated to comply. He stated that this particular issue may best be left for DRBC to manage as it is an interstate issue. Mr. Cohen added that outreach should be conducted to those who may be affected economically by the action requested in this petition in order to not potentially undermine economic growth and vitality near the petitioned area. Mr. Hartle referred to the DRBC testimony provided by the Pennsylvania Fish and Boat Commission and stressed the importance of fish propagation and nursery activities that currently are not adequately protected. He noted his support of this petition.

**The motion was approved by a majority of the Board members.
Jonathan Lutz voted in opposition to the motion.**

OTHER BUSINESS:

The next meeting of the EQB is tentatively planned for Tuesday, June 20, 2017.

ADJOURN:

With no further business before the Board, John Walliser moved to adjourn the meeting. Jim Sandoe seconded the motion, which was unanimously approved by the Board. The May 17, 2017, meeting of the Board was adjourned at 10:03 a.m.