

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
November 19, 2019

VOTING MEMBERS OR ALTERNATES PRESENT

Patrick McDonnell, Chair, Secretary, Department of Environmental Protection
Joe Lee, alternate for Gerald Oleksiak, Secretary, Department of Labor and Industry
Natasha Fackler, alternate for Leslie Richards, Secretary, Department of Transportation
Andrew Place, alternate for Gladys Brown Dutrieuille, Chairman, Public Utility Commission
Representative Greg Vitali, Pennsylvania House of Representatives
Representative Daryl Metcalfe, Pennsylvania House of Representatives
Mark Grochocki, alternate for Senator John Yudichak
Rita Zielonis, alternate for Senator Gene Yaw
Michael DiMatteo, alternate for Bryan Burhans, Executive Director, Pennsylvania Game Commission
John Walliser, Citizens Advisory Council
Tim Schaeffer, Executive Director, Pennsylvania Fish and Boat Commission
Andrea Lowery, Executive Director, Pennsylvania Historical and Museum Commission
Erin Wachter, alternate for Meg Snead, Secretary, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Duane Mowery, Citizens Advisory Council
Mark Caskey, Citizens Advisory Council
Jim Welty, Citizens Advisory Council
Denise Brinley, alternate for Dennis Davin, Secretary, Department of Community and
Economic Development
Michael Hanna, alternate for Russell Redding, Secretary, Department of Agriculture
Dr. Sharon Watkins, alternate for Dr. Rachel Levine, Secretary, Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Laura Edinger, Regulatory Coordinator
Jessica Shirley, Policy Director
Robert "Bo" Reiley, 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 Environmental Quality Board (EQB or Board) considered its first item of business – the approval of the August 20, 2019, EQB meeting minutes.

Michael Hanna made a motion to adopt the August 20, 2019, EQB meeting minutes.
Andrea Lowery seconded the motion, which was unanimously approved by the Board. (18-0)
(Mark Caskey was not present during voting on minutes.)

CONSIDERATION OF PROPOSED RULEMAKING: ADMINISTRATION OF THE LAND RECYCLING PROGRAM (25 Pa. Code Chapter 250)

This proposed rulemaking amends 25 Pa. Code Chapter 250 (relating to administration of the land recycling program) to update Statewide health standard medium-specific concentrations (MSC) pertaining to cleanup of soil and groundwater contamination for many contaminants. DEP is also proposing to add MSCs for three new contaminants, including Perfluorooctanoic Acid (PFOA), Perfluorooctance Sulfonate (PFOS), and Perfluorobutane Sulfonate (PFBS). These contaminants are within the Per- and Poly-fluoroalkyl Acid (PFAS) family of compounds for which the U.S. Environmental Protection Agency (EPA) has published toxicological data. The proposal would also clarify administrative elements of Chapter 250.

This proposed rulemaking is authorized under sections 104(a) and 303(a) of the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. §§ 6026.104(a) and 6026.303(a), which direct the Board to adopt and amend periodically by regulation Statewide health standards for regulated substances for each environmental medium, including any health-based standards adopted by the Federal government by regulation or statute, and health advisory levels (HAL), and which direct the Board to promulgate appropriate mathematically valid statistical tests to define compliance with Act 2, and other regulations as necessary to implement the provisions of Act 2.

Krishnan Ramamurthy (Deputy Secretary for Waste, Air, Radiation and Remediation) provided an overview of the proposed rulemaking. Troy Conrad (Director for Bureau of Environmental Cleanup and Brownfields) and Bobby Schena (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

Following the Department's presentation, Dr. Watkins requested clarification that the values included in the proposed aligned with non-use and use aquifers for groundwater. Mr. Conrad confirmed that to be correct. Dr. Watkins asked to which category dairy cows would be placed. Mr. Conrad responded that dairy cows would be categorized in used aquifers.

Dr. Watkins requested clarification regarding the EPA values for the PFAS compounds included in the proposed rulemaking. Mr. Conrad explained that, when reviewing all toxicity information, DEP employs the use of a hierarchy of sources. For this proposed rulemaking, the HAL document was the top tier source from which data was drawn. This is also the document DEP uses to establish groundwater cleanup standards due to its proven reliability and consistency over time. Mr. Schena further clarified that the statute requires that DEP adopt the HAL from EPA.

Dr. Watkins inquired regarding the reason for the use of 70 for groundwater. Mr. Conrad explained that the Department is statutorily required to use a maximum contaminant level (MCL) that is promulgated by the Federal government of use a lifetime HAL that is published by the EPA as the groundwater standard. The Department uses toxicity information from HAL documents to calculate soil MSCs as well.

Dr. Watkins further inquired how quickly a new MCL could be implemented if either the EPA or the Department were to establish a new MCL for these compounds. Specifically, could changes be incorporated and implemented immediately or would they only be able to be implemented after having moved through the full regulatory review process. Mr. Conrad responded that the Chapter 250 regulations allow remediators to use a groundwater MCL immediately from the time of publication. There are no MCLs for soil. Mr. Schena further clarified that if new toxicity information is published in the Federal

register, that toxicity information is then plugged into the equation included in the existing regulations. Dr. Watkins asked for confirmation that if EPA or Pennsylvania set an MCL based on newly released data in scientific literature, that would trigger the revision of the groundwater as well as the soil standard. Mr. Conrad confirmed that a newly established MCL and newly released toxicity information would assist in the promulgation of new standards.

Representative Metcalfe noted that, in the letter issued by the Cleanup Standards Scientific Advisory Board (CSSAB), the CSSAB addresses changes to vanadium. He requested further explanation. Mr. Conrad responded that there is not a change to vanadium proposed in this rulemaking. In the 2016 update to Chapter 250, a change to vanadium was promulgated with the support of the CSSAB. In the intervening time, concern has arisen that the vanadium value is too low. In Pennsylvania, there are three remediation standards from which businesses can choose: statewide health, background, and site specific. Facilities can choose which option makes the most sense for them to employ. Many of the concerns included in the CSSAB letter more closely align with the Management of Fill Policy and the Department is working with the regulated community to resolve these concerns.

Representative Metcalfe further inquired if the Department had consulted with trade associations regarding the impact of this proposed rulemaking. Mr. Conrad responded affirmatively, noting that the CSSAB members include scientists, attorneys, and consultants affiliated with trade organizations and other stakeholders included in the regulated community. Further, the Department shared the proposed regulatory amendments with the Citizens Advisory Council and the proposed regulatory amendments were posted on the Department's website and distributed to the Bureau's stakeholder distribution list.

Ms. Brinley requested additional clarification if this is an Act 2 issue or a clean fill policy issue. Mr. Conrad noted that the Department perceives this as more of a management of fill issue. The Department continues to work with the CSSAB to find solutions.

Representative Metcalfe quoted the CSSAB letter noting that, while they endorsed the change to the vanadium value in the 2016 rulemaking, after implementation of the 2016 value, it appears that they no longer endorse it. Mr. Conrad confirmed that they no longer endorse the current value. Representative Metcalfe asked for additional explanation as to the reason for not pursuing a regulatory amendment to the value at this time. Mr. Conrad explained that the vanadium MSCs are based on human health toxicity values that are published and peer-reviewed. This is the risk-based level that is deemed protective of human health under the Land Recycling Act. The act provides that if Statewide health standard numeric values are lower than the background standard, persons do not have to remediate beyond the background standard established for the site. Stakeholders in the regulated community asserted concern that the levels are too low and are creating implementation problems. As described previously, however, these implementation issues are more coincidental with the Management of Fill Policy. Nevertheless, the Department had extensive discussion regarding potential alternative values, but there were none that worked within the confines of our regulatory requirements.

Mr. Place inquired about the impact of updating the health compound. Specifically, he asked if there will be more or fewer volatile organic compounds (VOCs). Mike Maddigan, with the Bureau of Environmental Cleanup and Brownfields, noted that the proposal includes a few more compounds than are currently included in the regulation.

Mr. Place asked for further explanation related to the cost to implement the proposed rulemaking. Mr. Schena responded that Act 2 is unique from other statutes in that it does not create a permitting or corrective action obligation. When something is added to the tables, it is not creating a new obligation, but rather it provides the remediator an option to determine how to remediate the site. A person's liability for contamination results from another statute such as, for instance, the Clean Streams Law or the Storage Tanks Act. Act 2 provides the technical and administrative process for someone to address that liability. Therefore, changes to Act 2 do not create new obligations, they are just providing options for a remediator. For these reasons, this is a different perspective from which to view costs associated with this proposed rulemaking.

Andrew Place made a motion to adopt the proposed rulemaking.

Denise Brinley seconded the motion, which was approved by a majority of Board members with a vote of 18-1. Dr. Watkins voted in opposition of the motion.

CONSIDERATION OF FINAL RULEMAKING: FEDERAL OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSM) PROGRAM CONSISTENCY (25 Pa. Code Chapters 86–90)

This final-form rulemaking addresses inconsistencies between the Commonwealth's surface mining regulatory program and the Federal Office of Surface Mining Reclamation and Enforcement (OSM) regulations, so that the Commonwealth may maintain primary regulatory authority over coal mining activities in Pennsylvania. This final-form rulemaking also includes updates for general program maintenance, which will provide clarity for the Commonwealth's mining operators and improve the implementation of these requirements.

This rulemaking is authorized under the Surface Mining Conservation and Reclamation Act, the Clean Streams Law, the Coal Refuse Disposal Control Act, the Bituminous Mine Subsidence and Land Conservation Act and the Administrative Code of 1929.

The Federal Surface Mining Control and Reclamation Act of 1977 (Federal SMCRA) authorized OSM under the U.S. Department of the Interior to administer programs for controlling surface coal mining operations across the United States. A state can assume primacy over the regulation of its coal mining regulatory programs if a state's regulations are consistent with (*i.e.*, no less protective than) the Federal requirements. Pennsylvania achieved primacy over its surface coal mining program in 1982.

Bill Allen (Director for Bureau of Mining Programs) provided an overview of the final rulemaking. Joe Iole (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

Following the Department's presentation, Andrew Place identified typographical errors and items that were not consistent throughout the regulation. Mr. Reiley responded, due to these being minor errors not requiring substantive amendment, all errors will be corrected prior to publication in the *Pennsylvania Bulletin*.

Jim Welty made a motion to adopt the final rulemaking.

Mark Caskey seconded the motion, which was unanimously approved by the Board. (19-0)

CONSIDERATION OF FINAL RULEMAKING: TRIENNIAL REVIEW OF WATER QUALITY STANDARDS (25 Pa. Code Chapter 93)

Section 303(c)(1) of the Federal Clean Water Act (CWA, 33 U.S.C.A. § 1313) requires that states periodically, but at least once every three years, review and revise as necessary, their water quality standards. This rulemaking constitutes Pennsylvania's current triennial review of its water quality standards.

Pennsylvania's water quality standards, which are codified in Chapters 93 and 16, are designed to implement the requirements of Sections 5 and 402 of The Clean Streams Law (CSL) and CWA Section 303. The water quality standards consist of the designated uses of the surface waters of this Commonwealth, along with the specific numerical and narrative criteria necessary to achieve and maintain those uses and an antidegradation policy. Thus, water quality standards are instream water quality goals that are implemented by imposing specific regulatory requirements, such as treatment requirements and effluent limitations, on individual sources of pollution.

The final rulemaking includes amendments to 25 Pa. Code Chapter 93 in order to, among other things: add a definition for 7-day average in § 93.1; update the water quality criteria in § 93.7 Table 3 for ammonia and bacteria and in § 93.8c Table 5 for many human health criteria using the latest scientific information and policies developed by the United States Environmental Protection Agency (EPA) under the CWA, Section 304(a); clarify in § 93.8c(a) how values are determined for local water quality conditions (hardness, pH, etc.) for use in formula-based criteria calculations as is used for some heavy metals criteria; clarify in § 93.8d(c) that the Biotic Ligand Model (BLM) will be required for the development of new or updated site-specific water quality criteria for copper in freshwater systems; and add reference in § 93.8d(f)(2) that identifies a new on-line table is available for a list of site-specific criteria that have been developed and are being used by DEP in permitting and other pollution control measures.

In addition, corrections are made to the water quality standards to use designations and stream entries found in Drainage Lists at §§ 93.9a-93.9z, which are not being addressed by separate stream redesignation rulemakings, including consolidating and reformatting of several Drainage Lists to address the continual changes and updates occurring to the United States Geological Survey (USGS) National Hydrography Dataset (NHD) flowline. The NHD flowline forms the basis of DEP's Designated and Existing Use Geographic Information System (GIS) layers. The final corrections do not change the current stream use designations and only serve as clarifications and corrections.

Aneca Atkinson (Deputy Secretary for Water Programs) provided an overview of the final rulemaking. Gary Walters (Chief for Water Quality Division, Bureau of Clean Water) and Michelle Moses (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

Following the Department's presentation, Ms. Lowery inquired about the development of a criterion for chloride and if there is a timeline. Mr. Walters responded that the development of a chloride criterion is ongoing. There is no set timeline at this time as discussions are ongoing at the Federal level regarding developing chloride criteria and the Department bases the Commonwealth's criteria on data provided by the EPA.

Mr. Place asked if the Department could elaborate on why water contact is excluded from portions of Lake Erie and the Delaware Estuary. Tom Barron, with the Bureau of Clean Water, explained that the

exclusion for recreational use in Lake Erie and the Outer Harbor and shipping channel was conducted back in the late 1980s. Part of this evaluation included impacts from combined sewer overflows as well as the hazards associated with ship and boat navigation. The hazards, especially the navigation hazards, continue to exist today for Lake Erie. Mr. Place asked if these locations are catastrophically challenged or if they could be improved in the future. Mr. Barron responded that there are long term control plans for remediation and discharges in place, and the Department will continue to review the exclusion for water contact sports in these waters.

Mr. Place additionally inquired if dissolved oxygen had been evaluated for aquatic life in the Delaware Estuary. Ms. Moses responded that the Department has been working with all members of the Delaware River Basin Commission (DRBC) concerning this issue, evaluating the water uses issue and also the criteria necessary to protect the uses. The questions of which standards to apply and when to apply them are complex questions. DRBC is evaluating this holistically to determine the appropriate time to put forward a change in designated use relative to the criteria development necessary to protect the uses. The Department also has the ability to protect the existing uses in the interim, on a case-by-case basis, when permits are issued or up for renewal. The Department will evaluate and consider any new data available at that time, per what the regulations allow.

Mr. Place noted that some of these changes appeared as though they would impact NPDES permits. He asked if the regulatory amendments would be implemented immediately upon publication of this rulemaking as final or if that happens upon permit renewal. Ms. Moses confirmed that new standards would be applied at the time of issuance or renewal.

Representative Metcalfe referenced a letter that Board members received from the American Forest and Paper Association that raised concerns pertaining to amendments included in this final rulemaking. He noted the concern addressed in the letter regarding the response to question 19 of the regulatory analysis form (RAF). The letter alleges that the RAF does not provide appropriate cost data to comply with requirements of the Regulatory Review Act because the RAF response states that cost data cannot be determined as it has to be evaluated on a site-specific basis.

Mr. Walters responded that each permit is unique and not all conditions will apply to each permit. Changing a standard may or may not change a permittee's discharge limit, which may or may not necessitate a cost increase. The cost determination is made on a permit-by-permit basis.

Representative Metcalfe inquired if an estimate could be given to comply with the requirement to provide a cost evaluation. He referenced the letter noting studies related to obtaining cost information were done in Washington State. He stated that he would like to see additional cost information before moving forward with consideration of this rulemaking. Ms. Moses responded that the standards included in the rulemaking are goals for the streams in Pennsylvania and they do not go into effect unless there is a discharge which creates the potential for pollution to the streams. Only at this time are the standards in the regulation applied. When a discharge is proposed, the specific location is evaluated, and a number of factors are considered that will eventually dictate what technology is used to establish effluent limits. This is a very site-specific process and cannot be generalized to the population of regulated entities. The statewide water quality criteria are developed to provide some relief to the regulated community, so that each permitted entity is not required to develop site-specific standards for each permit, where no statewide criteria are available. Developing site-specific standards puts the burden on the permittee to develop studies upon which a standard can be determined. All standards, including site-specific criteria, further require EPA approval. Additionally, with having statewide criteria, one of the benefits is that when a

facility is conducting an Act 2 cleanup, Act 2 refers to the surface water quality standards as the cleanup standards in Pennsylvania. Many consultants that are involved in developing pump and treat systems for groundwater cleanups will need surface water standards to rely on for their discharges. By having these standards codified in our surface water quality standards, they can then be used as statewide standards for cleanup. Otherwise, they too would have to develop a site-specific standard, using EPA's methodologies, for approval by EPA. In sum, given the foregoing factors described, it is not possible to provide estimated cost data for Pennsylvania. However, there are a number of benefits that apply to having statewide standards.

Mr. Welty noted that he understands the need for standards and clean water. He inquired if outreach was conducted to those in the regulated community to determine the fiscal impact of the rulemaking. Ms. Moses responded that these final regulatory amendments were presented to and discussed, on several occasions, with the Water Resources Advisory Committee (WRAC). WRAC includes representation of multiple stakeholders, including the potentially impacted regulated community. The Department solicited their input during the development of the standards included in this final rulemaking.

**Representative Vitali made a motion to adopt the final rulemaking.
Andrew Place seconded the motion.**

Representative Metcalfe noted that he appreciated the responses from Department staff. Further, everyone is in favor of ensuring water quality standards are the highest quality. However, he indicated without the statutorily required cost analysis, he does not believe the Board should adopt this rulemaking today, advancing it forward in the regulatory review process. He noted concern and recommended that the regulation not be adopted until additional cost analysis information is issued.

The motion was approved by a majority of Board members with a vote of 16-3. Representative Metcalfe, Rita Zielonis, and Jim Welty voted in opposition to the motion.

PRESENTATION OF STATEMENT OF POLICY: WATER QUALITY TOXICS MANAGEMENT STRATEGY (25 Pa. Code Chapter 16)

Amendments to this Statement of Policy were provided as a supplement to the Triennial Review of Water Quality Standards final-form rulemaking.

Aneca Atkinson (Deputy Secretary for Water Programs) provided an overview of the Policy. Gary Walters (Chief for Water Quality Division, Bureau of Clean Water) and Michelle Moses (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

There were no questions following the Department's presentation.

As this was a presentation to the Board, no formal Board action was required.

OTHER BUSINESS:

Laura Edinger provided the following regulatory updates:

- On November 2, 2019, the Water Supply Replacement for Surface Coal Mining proposed rulemaking was published in the *Pennsylvania Bulletin*, opening a 30-day comment period. This Board adopted the proposed rulemaking on June 18, 2019. No comments have been received to date. The comment period will close Monday, December 2, 2019.
- On October 16, 2019, the Independent Regulatory Review Commission (IRRC) approved the Additional Requirements for Control of Fine Particulate Matter in the Nonattainment New Source Review Program final rulemaking. The Office of Attorney General has approved the rulemaking. It will be published as final in the *Pennsylvania Bulletin* in a few weeks.
- An update was requested for the Control of VOC Emissions from Oil and Natural Gas Sources. The Department is currently working on having it in front of this Board for consideration next month.

Bo Reiley provided the following update:

- The Commonwealth Court ruled last week on the suit brought forth by Senators Yaw and Scarnati relative to the development of a proposed rulemaking to establish a water quality standard for manganese as directed under Act 40 of 2017. The Court said the Senators did not have standing and the dismissed the case.

Mr. Welty asked for an update on the Cap and Trade Petition. Ms. Shirley responded that the Department has executed a contract with ICF and is currently working through modeling and evaluation with them. Results will hopefully be available early next year.

Representative Metcalfe asked if the Department has background information explaining the process for how ICF was chosen as the contractor. Ms. Shirley explained that an invitation to quote (ITQ) was sent out through the Department of General Services (DGS). ICF was the only respondent to the ITQ. She noted that the ITQ process is different than the request for proposal (RFP) process.

Representative Metcalfe asked if there is any additional information that could be shared with the Board and with the Legislature speaking to the process to choose the contractor and the qualifications of the contractor. Given the breadth of depth of the study, he noted it would be helpful to better understand the universe of contractors available and how ICF was selected.

Chairperson McDonnell responded that, using the ITQ process, the Department is limited to evaluate only those contractors who responded to the ITQ issued by DGS.

Representative Metcalfe noted concern that the Department had limited knowledge of which contractors may respond and thus their respective qualifications. Ms. Shirley responded that the Department has a full understanding of the list of all contractors who were eligible to bid on the project. As with all bids of a similar nature, the Department follows the procurement and bid evaluation process as required by the Department of General Services and the Office of Administration.

Representative Metcalfe asked if the Department is aware of who ICF's competitors are. Ms. Lowery commented that it may be helpful if the Department could provide a list of all qualified vendors. Chairperson McDonnell and Ms. Shirley responded that the Department did already share the ITQ

proposal, but the Department could also provide the list of contractors that were eligible to bid at that time.

Dr. Watkins inquired if there was an update on the PFAS contractor for the Department. Chairperson McDonnell responded that negotiations are ongoing and the Department does not yet have a signed contract.

Next Meeting:

The next meeting of the EQB is tentatively planned for Tuesday, December 17, 2019.

ADJOURN:

With no further business before the Board, Representative Vitali moved to adjourn the meeting. Dr. Watkins seconded the motion, which was unanimously approved by the Board. The November 19, 2019, meeting of the Board was adjourned at 10:38 a.m.