

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
April 16, 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
Tim Collins, alternate for Senator John Yudichak
Nick Troutman, alternate for Senator Gene Yaw
Michael DiMatteo, alternate for Bryan Burhans, Executive Director, Pennsylvania Game Commission
John St. Clair, Citizens Advisory Council
Heather Smiles, alternate for Tim Schaeffer, Executive Director, Pennsylvania Fish and Boat Commission
Andrea Lowery, Executive Director, Pennsylvania Historical and Museum Commission
Erin Smith, alternate for Meg Snead, Secretary, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
John Walliser, Citizens Advisory Council
Mark Caskey, Citizens Advisory Council
Jim Welty, Citizens Advisory Council
Paul Opiyo, 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 December 18, 2018, EQB meeting minutes.

Jim Welty made a motion to adopt the December 18, 2018, EQB meeting minutes.
Erin Smith seconded the motion, which was unanimously approved by the Board. (18-0)

Chairperson McDonnell welcomed Dr. Sharon Watkins, who arrived after the vote.

CONSIDERATION OF PROPOSED RULEMAKING: REVISION OF THE MAXIMUM ALLOWABLE SULFUR CONTENT LIMIT FOR NO. 2 AND LIGHTER COMMERCIAL FUEL OIL (25 Pa. Code Chapter 123)

This rulemaking proposes to reduce the maximum allowable sulfur content limit for No. 2 and lighter commercial fuel oil in the Commonwealth, generally sold for and used in residential and commercial furnaces and oil heat burners and furnaces for home or space heating, water heating, or both. The sulfur content limit would be reduced from the current 500 parts per million (ppm) to 15 ppm, beginning 60 days after publication of this rulemaking in its final form.

This proposed rulemaking would allow the Department of Environmental Protection (DEP) to address regional haze and visibility impairment. The sulfur dioxide (SO₂) emissions released by combustion of sulfur-containing No. 2 or lighter commercial fuel oil contribute to the formation of regional haze and fine particulate matter (fine particles or PM_{2.5}), both of which are serious public health and welfare threats and affect visibility. Regional haze is visibility impairment produced by a multitude of sources and activities emitting SO₂, nitrogen oxides (NO_x), PM_{2.5}, and PM_{2.5} precursors, which are located across a broad geographic area. Visibility impairment is a humanly perceptible change in visibility (such as light extinction, visual range, contrast, and coloration) from the visibility that would have existed under natural conditions. Regional haze and visibility impairment affect urban and rural areas as well as Federal Class I areas (which include national parks, forests, and wilderness areas).

Krishnan Ramamurthy (Director for Bureau of Air Quality) provided an overview of the proposed rulemaking. Jesse Walker (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

Following the presentation, Mr. Place inquired regarding the link between fine particulate matter (PM_{2.5}) precursors and reducing regional haze. Specifically, he inquired if this is one of the essential arguments for this rule. Mr. Ramamurthy responded that multiple pollutants are affected and this rule includes one of the strategies to bring nonattainment areas into attainment.

Andrew Place made a motion to adopt the proposed rulemaking.

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

CONSIDERATION OF RULEMAKING PETITION: PROGRAM TO LIMIT GREENHOUSE GAS EMISSIONS

On November 27, 2018, DEP received a rulemaking petition submitted by the Clean Air Council, Widener University Commonwealth Law School Environmental Law and Sustainability Center, and other Petitioners. This petition requests the Board promulgate a rulemaking to establish a program to limit greenhouse gas (GHG) emissions. On February 28, 2019, the petition was resubmitted to make minor amendments and to add petitioners to the original petition. DEP reviewed this petition and determined that it meets the requirements for acceptability as defined in §23.2 of the Board's petition policy.

Krishnan Ramamurthy (Director for Bureau of Air Quality) provided an overview of the rulemaking petition. David Althoff (Director for Energy Programs Office), Alex Chiaruttini (Chief Counsel), and Jennie Demjanick (Assistant Counsel for Bureau of Regulatory Counsel) assisted with the presentation.

Following the Department of Environmental Protection's (Department or DEP) presentation, Representative Metcalfe commenced discussion commenting on the volume of the petition and asking whether DEP staff had read the petition in its entirety. Mr. Althoff responded that the petition is approximately 400 pages in length. Mr. Ramamurthy affirmed that DEP staff read through the petition but reviewed only to ensure that the petition met the criteria to be accepted by the Board for further study. No technical evaluation has been done at this stage.

Representative Metcalfe further inquired if the petition was in conflict with state or federal law. Ms. Chiaruttini responded that the EQB Petition Policy requires review to ensure that it does not conflict with federal law and DEP does not believe that this petition is in conflict with state law. If accepted for further study, this will be thoroughly evaluated.

Mr. Welty inquired why DEP recommends accepting this petition when a previous, similar petition (Ashley Funk petition) was not accepted. Ms. Shirley explained that the Ashley Funk petition was accepted by this Board for further study. Mr. Welty further inquired how DEP will conduct the analysis of this petition; specifically, the impact the recommended regulatory program would have on GHG emission reductions. Mr. Althoff responded that DEP will conduct a comprehensive analysis that will include the economic and fiscal impact; whether it would put Pennsylvania businesses at a competitive disadvantage, whether there are alternatives, or more cost-effective or productive efforts that can be undertaken that differ from this proposal. Ultimately, DEP would be evaluating the program recommended in the petition in comparison to efforts included in the climate action plan, impacts assessment, and GHG emissions inventory.

Mr. Welty asked if there will be an economic analysis that includes all agencies and programs impacted by this program and also the overall economic impact on the Commonwealth. Further, he asked if DEP will be doing this analysis alone or with assistance from a consultant. Mr. Althoff affirmed that an economic and fiscal analysis will be part of the overall evaluation of the petition. A plan for how to evaluate the petition will be developed, if the Board accepts the petition for study.

Mr. Welty asked if DEP has the resources to fully evaluate the petition and conduct the discussed analysis and if outside resources will be needed. Mr. Ramamurthy and Mr. Althoff both noted that, if the petition is accepted for further study, the next step will be to determine how best to conduct the comprehensive technical evaluation of the petition. Ms. Chiaruttini noted that DEP will conduct this analysis as other analyses have been and are conducted. DEP will consult with others as needed and whether DEP hires consultants to assist in the evaluation will be determined by the Secretary.

Chairperson McDonnell noted that the EQB Petition Policy allows for petitions for rulemaking to be brought to the Board for consideration. The Board has an obligation to hear petitions brought before it that have been determined to be complete and vetted for consideration. Acceptance by the Board for further study is the first step in this process. A similar discussion regarding resources was had with other petitions that have been brought before the Board. Assuming it is the desire of the Board to accept the petition for study, DEP must then work to pull together the resources to do the evaluation.

Representative Metcalfe inquired regarding the Ashley Funk petition and the statutory authority of the EQB to accept the petition. Mr. Reiley explained that the petition was reviewed and deemed appropriate for consideration by the Board. The Board then accepted it for further study and after completion of the study, DEP recommended to the Board that the petition not move forward in the rulemaking process. This recommendation was based on a host of varying factors, including activity already underway at both the state and federal level. DEP has the statutory authority to reduce GHG emissions. Commonwealth Court

case *Funk vs. Wolf* and Environmental Hearing Board opinions show that the Department not only has the authority but also has the duty to look at GHG emissions when they are permitting air pollution sources.

Representative Metcalfe requested further clarification regarding statutory authority and what the Ashley Funk petition requested. Mr. Reiley explained that the petitioners in that case claimed that DEP is required to develop and implement a GHG emission reduction regulation purely under Article 1 Section 27 of the Pennsylvania Constitution. DEP's position at the time was, while DEP has the authority to regulate GHG emissions, this was not required as the petitioner claimed.

Mr. Caskey asked if DEP has examined how much this proposed program may cost the Commonwealth in relation to the GHG emissions reduced. He asked if data had been examined on the economic impact on other states that have implemented similar programs. Mr. Ramamurthy responded that an economic analysis has not yet been conducted but the concerns raised would be included in the evaluation process if the Board accepts the petition for further study.

On behalf of the petitioners, Bobby McKinstry gave a five-minute presentation regarding the petition.

After the presentation, Mr. St. Clair noted he understands the goal is to reduce GHG emissions. He inquired what the impact may be on global temperatures. Specifically, he asked what measure of global temperature reduction could be expected.

Mr. McKinstry responded, per the Intergovernmental Panel on Climate Change, implementing this program would limit increases of GHG emissions to 1.5 and 2.0 degrees. Ultimately this is not about a decrease but limiting the amount increased. The larger goal is to reach carbon neutrality by 2050. Programs like the one included in the petition are predicted to work over the long term to achieve these goals.

Mr. Welty asked specifically, if Pennsylvania were to achieve net zero carbon emissions by 2050, what kind of impact that would have on global emissions. Mr. McKinstry responded, implementing this program in Pennsylvania alone, the global emissions reduction would be, significantly, approximately 1%. He stated that the reason for this significant impact is Pennsylvania has higher per capita emissions than any other nation in the world.

Mr. Caskey noted the co-petitioners and asked which of the petition signatories are businesses. Mr. McKinstry responded that businesses include renewable energy companies, solar companies, builders, construction companies, and several others. Mr. Caskey asked if the petitioners discussed the costs to businesses, citizens, or the Commonwealth. Mr. McKinstry affirmed that this was discussed at length. He referred to an impacts assessment which evaluates the social cost of carbon and examines economic costs and benefits. The benefits achieved from reducing one ton of GHG emissions exceed the cost of the program to reduce them.

Mr. Caskey inquired if there is a monetary cost number that can be applied to implementing this program. Mr. McKinstry stated that this program would provide net benefits and would create jobs.

Chairperson McDonnell asked if there was a motion to accept the petition for further evaluation.

Mr. Troutman commented that there are several unanswered questions pertaining to this petition. Given that, he preferred to make a motion that the Board take no action on the petition until DEP provides the

Board with an economic analysis on the impact of this petition including job creation and cost to consumers, among other economic evaluation points.

**Nick Troutman made a motion that the Board take no action at this time.
Representative Metcalfe seconded the motion.**

Mr. Reiley noted that the motion contradicts the EQB Petition Policy. The Board must accept the petition for further study before an analysis of the type requested would be conducted. Economic impacts, environmental impacts, jobs lost and created would be included and evaluated as part of the larger study. However, this evaluation will not happen without the Board accepting the petition for further study, essentially triggering DEP to conduct the evaluation. Therefore, this motion is not valid, per the EQB Petition Policy.

The motion that the Board take no action at this time deemed invalid.

Representative Metcalfe put forward a motion to table consideration of this petition until additional information can be presented to the Board. He wished to see additional data before voting to accept for further study.

**Representative Metcalfe made a motion to table the consideration of the petition until additional information can be presented to the Board.
Nick Troutman seconded the motion.**

Chairperson McDonnell noted that a motion to table is valid. However, unless the Board accepts the petition for further study, no further evaluation will be done on the petition. Tabling it will therefore essentially result in a similar discussion of this petition, just at a later date.

Representative Metcalfe noted that he believes a better understanding of the impacts of the petition is needed before voting to accept it for further study. He referred to the DEP policy guiding this process

Chairperson McDonnell noted that the policy that dictates how petitions are accepted and evaluated is a policy of the Board. The Board's Petition Policy provides standards which petitioners must meet before bringing a petition to the Board and explains how the petition for rulemaking process works.

Representative Metcalfe noted concern regarding whether there are conflicts with State statute or with the State constitution. Ms. Shirley explained that the evaluation that DEP will do, should the Board accept the petition for further study, will evaluate all concerns raised today. After the evaluation is complete, DEP would prepare a report and bring that back to the Board. The report would include a comprehensive economic analysis as well as a legal review. As discussed earlier, with the Ashley Funk petition, DEP conducted an evaluation and, in its report to the Board, recommended that the petition not move forward to rulemaking. The question before the Board today, though, is not whether the petition moves forward to rulemaking but whether the Board will accept the petition for further study, allowing DEP to conduct a comprehensive assessment.

Mr. Reiley reinforced that part of the criteria included in the evaluation is a legal assessment. This assessment includes a review of statutory authority. The preliminary review conducted prior to bringing this petition to the Board includes evaluating whether the petition's request is an action that the Board can take. If it is determined that it is not, the petition is not presented to the Board for any action, including

acceptance for further study. As an example, if DEP received a petition that requested DEP reduce turnpike tolls, this would be clearly outside the EQB's authority and so this petition would request would be rejected for presentation to the Board at all. As was noted earlier in discussion, should the petition be accepted for further study, DEP will conduct a holistic and comprehensive review that evaluates this program in comparison to other, existing programs. Economic, public health and safety, and all manner of other impacts will be evaluated and considered and reported back to the Board. There will be plentiful opportunity to continue the discussion once a report, that includes a recommendation based on data evaluation, is presented back to the Board. Today, the Board needs only to decide whether DEP will be permitted to study the petition further.

Representative Metcalfe registered his surprise that conflict with State law and the State constitution is not included as part of the initial review prior to presentation of any kind to the Board. Mr. Reiley responded that, while not written explicitly in the Policy, DEP does review petitions in accordance with State law. For example, the Ashley Funk petition, upon its initial submission, requested an action that conflicted with the Air Pollution Control Act. The petition requested that Pennsylvania set a National Ambient Air Quality Standard for CO₂, which presented a conflict. DEP sent the petition back and requested modifications before it could move forward to be presented to the Board for consideration for acceptance for further study.

Mr. Welty inquired if DEP could provide a plan for evaluation to the Board prior to the petition's acceptance for study. Dr. Watkins inquired, given the density and complexity of the petition, if it would be possible for DEP to conduct the evaluation in stages and present it to the Board accordingly. Ms. Shirley responded that it would likely make the evaluation process more difficult to break it into stages rather than reviewing it holistically. It will be necessary to review the varying pieces of the petition as a whole to appropriately and accurately determine the entirety of the impact on the program in Pennsylvania. Mr. Reiley concurred offering that the EQB Petition Policy instructs that the petition be evaluated holistically as opposed to piece by piece.

Chairperson McDonnell further concurred, noting that, DEP's evaluation and recommendation will not necessarily be a binary yes or no in favor or against the petition. Recommendations that come from the review may have several components for the Board to consider. Ultimately, though, any recommendation must come from a holistic and comprehensive review of the petition.

Mr. Welty noted that he would like to understand the process that would be employed to evaluate the petition. Understanding how the study will be conducted could help allay some of the concern of accepting the petition. Further, he commented that he is unsure why the legislature is not more engaged in this process. He also noted that, with regard to two of the measures for accepting a petition included in the EQB Petition Policy, one states that a petition under federal litigation should not be accepted and the other states that the EQB can reject a petition of which the content has been decided by the EQB prior. He stated not seeing significant difference between this petition and the Ashley Funk petition. Mr. Reiley responded that, while there is ongoing federal litigation, none of it would impact the requested action of this petition. With regard to the similarity of the two petitions, new studies have been published with updated data since the Ashley Funk petition submittal, providing new information. Further, in 2013 and 2014 when that petition was under consideration, the federal government was developing the Clean Power Plan, which included a nationwide cap and trade program. Pennsylvania was involved in helping to implement that through the National Governor's Association. With this action at the federal level and Pennsylvania's active participation in that endeavor, State-level efforts would have been redundant. In 2019, the federal

government is not taking the same aggressive approach as the prior administration. State-level action is no longer redundant.

Chairperson McDonnell also reaffirmed that the option to motion to table the consideration of the petition is an action that the EQB can take. However, no further evaluation will be conducted unless the petition is accepted. If the Board desires to have the evaluation completed, the first step in that process is accepting the petition for further study.

**Representative Metcalfe made a motion to table the consideration of the petition.
Mark Caskey seconded the motion.**

No discussion on the motion.

**The motion to table the consideration of the rulemaking petition failed.
Representative Metcalfe, Mark Caskey, Jim Welty, Nick Troutman and John St. Clair voted
in support of the motion. Motion fails. (5-14)**

Chairperson McDonnell stated that the motion failed. He called for another motion.

**Representative Vitali made a motion to accept the petition for further study.
John Walliser seconded the motion.**

In discussing the motion, Representative Metcalfe noted that Board members had received a letter from the Pennsylvania Chamber of Business and Industry taking issue with this petition moving forward. He reinforced previous points made about needing additional data regarding economic impact. He offered concern that, should this move forward into a proposed rulemaking, it would have a negative impact on the workforce, the energy sector. He stated concern that DEP will not conduct an unbiased review of the petition and that government resources would be wasted in the evaluation of this petition. He offered doubt that the program included in the petition would have the significant impact necessary to offset implementation costs. He further stated concern that using the EQB petition process for this particular endeavor is merely a way to bypass the legislative process. In California, their process to adopt a similar program was legislative. Other similar state programs worked through the legislative process to be implemented. Further, the program in this petition is far more stringent. He commented that, for a program with far-reaching, economy-wide impacts, moving through the legislative process would be the most appropriate avenue to implementation. For all of these reasons and those stated prior, Representative Metcalfe asked that the Board not accept the petition for further study.

Representative Vitali noted that climate change is the most serious long-term problem facing the global citizenry. Study after study indicates that time is short to act. This vote offers the chance to study one potential solution. This simply is a study. State resources would be well-used in this endeavor.

Mr. Caskey noted that the program is economy-wide and that is of concern, without having hard cost numbers to consider. He noted that, cost numbers were included in the proposed rulemaking package that the Board voted unanimously to adopt earlier in the meeting. Having monetary cost data would help inform this decision similarly. Mr. Caskey did not find that specific data included in the petition and offered concern regarding voting to accept the petition without having cost data.

Mr. Welty asked, assuming this petition is accepted, if DEP could provide the EQB with status updates as the study progresses. Specifically, he is interested in how the evaluation will be conducted and who will conduct it. Chairperson McDonnell affirmed that the Board would receive updates.

Mr. Collins stated, on behalf of Senator Yudichak, he will vote to accept the rulemaking petition for consideration based on the petition as it is set forth in the process. However, Senator Yudichak believes, as he stated the last time such a rulemaking petition was brought forward, that state environmental policy should be set under the legislature, not through the EQB petition process.

Chairperson McDonnell called for the vote.

The motion to accept the petition for further evaluation by the Department was approved by a majority of Board members. Representative Metcalfe, Mark Caskey, Jim Welty, Nick Troutman and John St. Clair voted in opposition to the motion. No abstentions. Motion carries. (14-5)

OTHER BUSINESS:

Regulatory Update:

Laura Edinger provided the following updates on regulations adopted by the Board on December 18, 2018:

- On March 16, 2019, the proposed Additional Requirements for Control of Fine Particulate Matter in the Nonattainment New Source Review Program rulemaking was published in the *Pennsylvania Bulletin*, opening a 64-day public comment period that will close on May 20, 2019. Three public hearings are scheduled for today, tomorrow, and Thursday of this week (April 16 at SCRO, April 17 at SWRO, April 18 at SERO). No comments have been received to date and no one is signed up to speak at any of the hearings.
- On March 21, 2019, the Independent Regulatory Review Commission (IRRC) approved the final Noncoal Mining Program Fees rulemaking. Once approved by the Office of Attorney General, it will be submitted to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
- On March 23, 2019, the proposed Water Quality Standards – Class A Stream Redesignations rulemaking was published in the *Pennsylvania Bulletin*, opening a 45-day public comment period that will close on May 7, 2019. One public hearing is scheduled for April 26, 2019 at SCRO. To date, we have received one form letter comment from over 700 commenters, in support of the rulemaking.
- On March 30, 2019, the proposed Water Quality Management/National Pollutant Discharge Elimination System rulemaking was published in the *Pennsylvania Bulletin*, opening a 45-day public comment period that will close on May 14, 2019. One public hearing is scheduled for May 1, 2019. One note on this rule, the publisher made an error and omitted part of a table in Chapter 91. A correction to the table was published in the *Pennsylvania Bulletin* on April 6, noting the publisher's error.
- On April 13, 2019, the proposed Air Quality Fee Schedule Amendments rulemaking was published in the *Pennsylvania Bulletin*, opening a 66-day public comment period that will close on June 17, 2019. Three public hearings are scheduled for May 13 (SWRO), 15 (SERO), and 16 (SCRO). We anticipate more public interest in this rulemaking, so I will be reaching out to EQB members who may be available to volunteer to chair one of these three hearings.

OSM Form 23:

Each board member (or alternate) was given a copy of the *OSM Form 23 – Statement of Employment and Financial Interest* at today's meeting. All board members and alternates are required to complete this form.

Please complete the form and submit to Laura Edinger by June 1, 2019. For your convenience, an email (with the form and other supporting documentation attached) will be sent to all EQB board members and alternates.

Other Questions/Discussion:

Mr. Place inquired about the executive session to follow the public portion of the meeting, asking if an informal discussion could be had prior to the executive session. Mr. Troutman asked if he needed to recuse himself from the discussion. Mr. Reiley responded that he would need to recuse himself from the executive session but could remain during the remainder of the public portion of the meeting.

Mr. Place asked for additional explanation regarding the timing of proposing the water quality standard for manganese rule in relation to the passage of Act 40 of 2017. Mr. Reiley noted that Act 40 required promulgation of a proposed rulemaking within 90 days and that more detailed information would be provided in executive session. Ms. Shirley noted that an Advance Notice of Proposed Rulemaking was issued last year to solicit scientific information related to manganese. DEP received comments through that process and staff are evaluating the science. The next steps in this process will be to take the data, information and science to our advisory committees with a recommendation as to how to proceed.

Mr. Place asked if there is a timeline for this to be accomplished. Ms. Shirley responded that DEP anticipates bringing the topic of a water quality standard for manganese to the Water Resources Advisory Committee this summer. Once advisory committees have had the opportunity to provide feedback, the full rulemaking package can be prepared and will be submitted through the regulatory review process to be provided to the Board. It is anticipated for Board consideration in 2019. Mr. Reiley noted that further detail would be provided to the Board in executive session.

Next Meeting:

Chairperson McDonnell noted that the next meeting of the EQB is tentatively planned for Tuesday, June 18, 2019. The May 22, 2019, meeting will be cancelled.

EXECUTIVE SESSION:

Chairperson McDonnell stated that on Friday, March 29, 2019, a mandamus action was filed against DEP and the EQB seeking to force action under Act 40 of 2017. Chairperson McDonnell asked the Board for a motion to close the public session of the meeting to allow Board members to proceed into executive session for discussion with counsel.

**Dr. Watkins made a motion to close the public session of the Environmental Quality Board.
Andrea Lowery seconded the motion, which was unanimously approved by the Board.**

The public session of the April 16, 2019, EQB meeting was adjourned at 10:37 a.m. Everyone except EQB members and alternates in attendance, and EQB Counsel were asked to leave the room at this time. All members of the public, petitioners and other DEP staff and Counsel not on the Board exited so the executive session could be held.

ADJOURN:

With no further business before the Board, Dr. Watkins moved to adjourn the meeting. John St. Clair seconded the motion, which was unanimously approved by the Board. The April 16, 2019, meeting of the Board was adjourned at 10:55 a.m.