

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
February 16, 2010

VOTING MEMBERS OR ALTERNATES PRESENT

John Hanger, Chairman, Secretary, Department of Environmental Protection
Kenneth Graham, alternate for Secretary Sandi Vito, Department of Labor and Industry
Danielle Spila, alternate for Secretary Allen D. Biehler, Department of Transportation
Yasmin Snowberger, alternate for Chairman James H. Cawley, Public Utility Commission
Edward Yim, alternate for Representative Camille George
Joseph Deklinski, alternate for Representative Scott E. Hutchinson
Richard Fox, alternate for Senator Raphael J. Musto
Patrick Henderson, alternate for Senator Mary Jo White
Michael DiMatteo, alternate for Carl Roe, Executive Director, PA Game Commission
Richard Manfredi, Citizens Advisory Council
John Arway, alternate for Brian Barner, Acting Executive Director, PA Fish and Boat
Commission
Dr. Walter Meshaka, alternate for Barbara Franco, Executive Director, PA Historical and Museum
Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Walter Heine, Citizens Advisory Council
David Strong, Citizens Advisory Council
Paul Opiyo, alternate for Secretary George Cornelius, Department of Community and Economic
Development
Michael Pechart, alternate for Secretary Russell Redding, Department of Agriculture
Dr. James Logue, alternate for Secretary Everette James, Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Doug Brennan, Director, Bureau of Regulatory Counsel
Kelly J. Heffner, Policy Office Director
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Chairman Hanger called the meeting to order at 9:05 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business—the December 15, 2009, EQB meeting minutes.

Michael Pechart moved to approve the December 15, 2009, EQB meeting minutes. Patrick Henderson seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF PROPOSED RULEMAKING: CLARKS CREEK, ET AL STREAM REDESIGNATION (25 Pa Code, Chapter 93)

John Hines, Deputy Secretary for Water Management, presented an overview of the proposed rulemaking. Dana Aunkst, Director, Bureau of Water Standards and Facility Regulation, and Michelle Moses, Assistant Counsel, assisted with the presentation.

Following the Department's presentation, Joe Deklinski inquired if the municipalities potentially affected by the stream redesignations in the rulemaking would be notified when the regulations are open for public comment. Mr. Aunkst responded yes and stated that the Department would notify the potentially affected municipalities concerning the public comment period for the rulemaking.

John Arway moved to accept the proposed rulemaking with a 45-day public comment period. Joanne Denworth seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF PROPOSED RULEMAKING: DAM SAFETY AND WATERWAYS MANAGEMENT (25 Pa Code, Chapter 105)

John Hines, Deputy Secretary for Water Management, presented an overview of the proposed rulemaking. Patricia McSparran, Director, Bureau of Waterways Engineering, and Marylou Barton, Assistant Counsel, assisted with the presentation.

Board members did not pose any questions on the proposed rulemaking, following the conclusion of the Department's presentation to the Board.

David Strong moved to approve the proposed rulemaking with a 30-day public comment period. Walter Heine seconded the motion, which was unanimously approved by the Board.

OTHER BUSINESS:

In response to a request from Richard Fox, Bo Reiley, Regulatory Counsel to the Department's Bureau of Air Quality, provided an update to the Board on the Pennsylvania Supreme Court's ruling on the Commonwealth's Mercury Rule. Mr. Reiley explained to the Board that on September 15, 2008, PPL Generation, LLC, PPL Montour, LLC, and PPL Brunner Island, filed a Petition for Review to invalidate the Pennsylvania Mercury Rule. On January 30, 2009, in *PPL Generation et al., v. Department of Environmental Protection*, the Commonwealth Court granted PPL's petition and invalidated the rule. On December 23, 2009, the Pennsylvania Supreme Court affirmed the Commonwealth Court and held that the Pennsylvania Mercury Rule is invalid. The rationale for the Supreme Court's decision focused on the invalidation of the U.S. EPA's Delisting Rule by the U.S. Court of Appeals for the District of Columbia Circuit. Because the Delisting Rule was invalidated, the Pennsylvania Supreme Court ruled that the legal basis for the Pennsylvania Mercury Rule ceased to exist. As background, the federal Delisting Rule removed mercury from the federal list of hazardous air pollutants, which provided Pennsylvania with the legal authority to regulate mercury emissions, according to state law. The federal court's invalidation of the Delisting Rule occurred after the promulgation of the Pennsylvania Mercury Rule in 2007.

Mr. Reiley further noted to the board that the federal EPA is currently working on a Maximum Achievable Control Technology (MACT) rulemaking to regulate mercury emissions and has requested information from affected coal-fired electric generating units (EGUs) concerning the development of February 16, 2010, EQB Meeting Minutes

these regulations. Mr. Reiley also announced that EPA has signed a consent degree with a number of environmental groups in which they have committed to proposing a MACT standard in March 2011, with finalization of the rulemaking expected in November 2011. In the interim, Mr. Reiley noted that DEP is continuing to exercise its existing authority under Section 6.6 of the Air Pollution Control Act to make MACT determinations on a case-by-case basis for any proposed EGUs.

At the conclusion of Mr. Reiley's report, Richard Fox inquired if the Board is required to formally withdraw or invalidate the state-specific mercury rulemaking to ensure it is removed from the *Pennsylvania Code*. Mr. Reiley replied that since the Pennsylvania Supreme Court invalidated the Mercury Rule, he didn't believe the Board would be compelled to take further action on the rulemaking. However, he and Doug Brennan stated that they would further research the issue and report back to the Board at its next meeting whether further action by the Board to invalidate the Mercury Rule is necessary.

Yasmin Snowberger asked Mr. Reiley how the invalidation of Pennsylvania's Mercury Rule may impact existing EGUs. Mr. Reiley responded that the invalidation of Pennsylvania's Mercury Rule does not specifically impact existing EGUs, as these units must continue to comply with regulatory requirements imposed by the federal CAIR rulemaking and are therefore continuing to reduce mercury emissions through use of scrubbers and other technology.

Mr. Arway inquired about the criteria the Department uses to establish individual MACT determinations for proposed EGUs. Mr. Reiley responded that individual determinations by Department staff are made in consultation with permit applicants based upon the control technology the facility identifies it can implement.

Patrick Henderson commented that although EPA has not announced its MACT rule to date, he believes it would be beneficial if the Department provides input to EPA on the baseline technologies that should be incorporated in the proposed rulemaking. While he agreed that industry in Pennsylvania that purchased control technology to comply with Pennsylvania's Mercury Reduction Rule are in essence "ahead of the game", Mr. Henderson noted that industry should not be disadvantaged for the investments they made previously to comply with the now invalidated Pennsylvania law. Mr. Reiley responded that once the EPA announces its proposed rulemaking, Department staff will analyze the proposal and confer whether comments on the proposal should be submitted to the EPA. In closing, Chairman Hanger noted his sympathies to those businesses that made prior investments to comply with the original federal CAMR rulemaking and the Pennsylvania Mercury Reduction rulemaking. He further noted that the invalidation of the rulemakings has placed the Department in a regrettable position, where it must make case-by-case determinations for proposed EGUs, whereas a formal rulemaking would be more beneficial as it would provide uniformity and consistency to the regulated community.

ADJOURN:

With no further business before the Board, Mr. Pechart moved to adjourn the meeting. Mr. Fox seconded the motion, which was unanimously approved by the Board. The February 16, 2010, meeting of the Board was adjourned at 9:45 a.m.