

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
October 16, 2012

VOTING MEMBERS OR ALTERNATES PRESENT

Alisa Harris, Acting Chairperson for Michael Krancer, Secretary, Department of Environmental Protection
Gwenn Dando, alternate for Julia Hearthway, Secretary, Department of Labor and Industry
Neal Brofee, alternate for Barry Schoch, Secretary, Department of Transportation
Patrick McDonnell, alternate for Robert Powelson, Chairman, PA Utility Commission
Jamie Serra, alternate for Representative Camille George
Jonathan Lutz, alternate for Representative Scott Hutchinson
Richard Fox, alternate for Senator John Yudichak
Adam Pankake, alternate for Senator Mary Jo White
Tracey Librandi-Mumma, alternate for Carl Roe, Executive Director, PA Game Commission
Burt Waite, Citizens Advisory Council
David Spotts, alternate for John Arway, Executive Director, PA Fish and Boat Commission
Patrick Henderson, alternate for Jennifer Branstetter, Secretary, Governor's Office of Policy & Planning
Cynthia Carrow, Citizens Advisory Council
Terry Dayton, Citizens Advisory Council
Walter Heine, Citizens Advisory Council
Gail M. Conner, 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, Acting Secretary, PA Department of Health

DEPARTMENT OF ENVIRONMENTAL PROTECTION STAFF PRESENT

Doug Brennan, Director, Bureau of Regulatory Counsel
Patricia Allan, Director, Policy Office
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Acting Chairperson Harris called the meeting to order at 9:08 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business – the July 17, 2012, EQB meeting minutes.

Walter Heine moved to approve the July 17, 2012, EQB meeting minutes.
Burt Waite seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF FINAL RULEMAKING: DAM SAFETY AND WATERWAY MANAGEMENT FEES (25 Pa. Code Chapter 105)

Kelly Heffner, Deputy Secretary for Water Management, provided an overview of the final rulemaking. Jeffrey Means, Director of the Bureau of Waterways Engineering and Wetlands, and Jason Oyler, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, Terry Dayton inquired what size or category of dams would be affected by the final rulemaking. Deputy Secretary Heffner replied that the dam permit application fees would apply to the construction of new dams or the modification of existing dams and that the fees vary in amounts based upon the size and hazard potential of the dam. She clarified that the rulemaking also establishes annual dam registration fees that are applicable only to those category of dams that would create significant economic or public safety concerns if they were to breach. Deputy Secretary Heffner noted that annual fees will not be imposed on hazard potential category 4 dams, which represent a category of dams that present minimal economic impact and no public safety hazards if breached. She noted that the annual fees, assessed in the amounts of either \$1,500 or \$800, depending upon the category of dam in question, may impact individual land owners; however, she stressed that it is the Commonwealth's position that property owners that maintain a dam must realize the seriousness of their responsibility and that the Department must have the resources necessary to inspect and monitor dams to ensure their structural integrity.

Richard Fox noted that the Department estimated that the fees included in the rulemaking would cover approximately 35% of the Department's costs of administering the dam safety program and approximately 31% of the costs associated with the administration of the water obstruction and encroachments program. In response, Mr. Fox asked if the remaining costs to administer both programs would be supported by the General Fund. Deputy Secretary Heffner replied yes. Mr. Fox asked if that funding scenario is comparable to other programs administered by the Department. Deputy Secretary Heffner replied that she could only speak to those programs under the Water Management Deputate.

Richard Fox moved to adopt the final rulemaking. Jamie Serra seconded the motion, which was approved by a majority of Board members. Jonathan Lutz voted in opposition to the motion.

CONSIDERATION OF FINAL RULEMAKING: COMMERCIAL FUEL OIL SULFUR LIMITS FOR COMBUSTION UNITS (25 Pa. Code Chapters 121, 123 and 139)

Dean Van Orden, Assistant Director, Bureau of Air Quality, provided an overview of the final rulemaking. Arleen Shulman, Air Resources Management Division Chief, and Kristen Furlan, Assistant Counsel, Bureau of Regulatory Counsel, assisted with the presentation.

Following the Department's presentation, Richard Fox inquired if a federal commercial fuel oil sulfur limit currently exists. Mr. Van Orden replied no. Mr. Fox asked the Department to comment on the variation that appears to occur in comparing Pennsylvania's proposed commercial fuel oil sulfur limit with the limits imposed by other states, which are predominantly 15 ppm. Arleen Shulman acknowledged that surrounding states have more stringent sulfur limits in place but also noted that other states, unlike Pennsylvania, are not home to a number of refineries and that the Commonwealth crafted its regulation to ensure that all refineries operating in Pennsylvania could meet the new limit. Ms. Shulman noted that the vision of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) is regional consistency, but noted that not all states in the region have implemented consistent commercial fuel oil sulfur limits. In response,

Mr. Fox asked if New York and New Jersey have already implemented a 15 ppm commercial fuel oil sulfur limit in their respective states. Ms. Shulman responded that New Jersey has not implemented a 15 ppm limit yet, but New York has in response to a recently enacted state law.

Burt Waite inquired about the costs to consumers as a result of the promulgation of the rulemaking, including whether there would be an increase in the cost per gallon of compliant fuel. Ms. Shulman responded that according to recent studies, it is estimated that the cost per gallon of compliant fuel may increase in the range of 6 to 8 cents; however she noted that the cost increase will be offset by the decrease in maintenance costs, as the use of low sulfur content commercial fuel oil improves the efficiency and operation of units.

Walter Heine inquired about the sulfur limits currently imposed in Pennsylvania for commercial fuel oil. Ms. Shulman replied that currently home heating oil in Pennsylvania typically contains 2000 – 2500 ppm sulfur. She also noted that the regulatory limits, which vary across the Commonwealth, are higher; therefore, the regulatory proposal provides a marked decrease in the allowable limit of sulfur in commercial fuel oil. Mr. Heine in response inquired the reasoning behind adopting a 500 ppm standard in lieu of another numeric standard, for example 15 ppm. Ms. Shulman explained that 15 ppm is the sulfur limit standard currently used for most transportation-related fuels, including fuels for off-road and highway trucks and buses, and was the standard initially included at proposed rulemaking. 15 ppm was also the standard advocated by the MANE-VU in part because it would promote consistent sulfur limits among the transportation-related fuels and the home heating fuels. While Ms. Shulman acknowledged that there are advantages to having consistent sulfur standards among the various fuel types, there are disadvantages which were articulated in the comments submitted to the Board on the proposed rulemaking, including the concern that mandating fuel sulfur levels at 15 ppm could carry the risk of higher prices for both heating oil and transportation fuels.

Burt Waite moved to adopt the final rulemaking. David Spotts seconded the motion, which was approved by a majority of Board members. Jonathan Lutz voted in opposition to the motion.

OTHER BUSINESS:

WITHDRAWAL OF PROPOSED RULEMAKING: SAFE DRINKING WATER PROGRAM FEES (25 Pa. Code Chapters 109)

Michele Tate provided the Board with background information concerning the withdrawal of the Safe Drinking Water Program Fees rulemaking, including concerns expressed by some Board members that the withdrawal of the rulemaking should not have occurred at the sole discretion of the Chairman of the EQB. In light of the concerns expressed by some members, Ms. Tate noted that a group of Board members previously volunteered to convene a workgroup that would more substantively define the EQB Chairperson's authority to withdraw a rulemaking. Ms. Tate noted that the Department recognized the validity of the concerns expressed by some Board members and believes that in lieu of convening a workgroup, it would be more expedient for the Board to consider the question of the withdrawal of the rulemaking. Therefore, Ms. Tate on behalf of the Department recommended that the Board adopt a motion to formally withdraw the Safe Drinking Water Program Fees rulemaking from further consideration.

In response to Ms. Tate's comments, Gail Conner expressed that she supports continuing with the rulemaking process for the proposed rulemaking and believes the Board should not withdraw the

proposal. She noted that the Board adopted the Dam Safety and Waterway Management Fees final rulemaking at this meeting which imposed new and increased fees on the regulated community and acknowledged that costs are associated with environmental protection. Ms. Conner further elaborated that if the Board had concerns with the scope of fee increases included in the rulemaking, amendments could have been deliberated by the Board at the time the proposal was acted on by the Board. She further noted that a withdrawal of the rulemaking would render a complete vacatur of the proposal and would be disrespectful to those individuals who worked on the regulation.

Mr. Fox inquired about the status of the rulemaking, including at which step it was in the regulatory review process. Ms. Tate responded that the Board approved the proposal in late 2010 and that the rulemaking was being reviewed for form and legality by the Attorney General's Office, who had issued two tolling memos questioning several issues about the rulemaking. Mr. Fox noted to the Board that the proposal was initiated under a prior administration and was reevaluated by the current administration. He also commented that despite the valid arguments being made about the rulemaking and whether it should be withdrawn, he was concerned only about the manner in which the proposal was withdrawn, which he believed needed full action by the entire Board. Mr. Fox acknowledged that despite the withdrawal of the rulemaking, it would remain the Department's prerogative to present another proposed rulemaking to the Board in the future if the Department determined a need for the rulemaking. It would be at that juncture, he noted, where the Board could debate the scope of the rulemaking, including the fair amount to be appropriated as a user fee.

Mr. Heine questioned the justification for withdrawing the rulemaking and noted that it appears to be contradictory for the Board to withdraw the rulemaking because of the cost it will impose on public drinking water suppliers when the same argument could be made for other fee packages. In response, Patrick Henderson noted each rulemaking fee package is different and must be analyzed on its own merits in order to achieve an appropriate balance, including considering the broader public interest and benefit of the program to which the fees will support.

David Spotts asked for clarification regarding Mr. Fox's comments, including whether the Department would reexamine the need for the rulemaking and report back to the Board by a certain date. Mr. Henderson noted that it would be inappropriate for the Department to commit to a future rulemaking; however, he did note that the Department could provide an update of the financial status of the Safe Drinking Water Program at the next Board meeting. In conclusion, Acting Chairperson Harris stated that ensuring the fiscal sustainability of all programs is a responsibility that the Department undertakes every day and noted that DEP is continuously assessing every program to assure it is appropriately funded.

Richard Fox moved to withdraw the proposed rulemaking. Patrick Henderson seconded the motion, which was approved by a majority of Board members. Walter Heine and Gail Conner voted in opposition to the motion.

NEXT MEETING:

Acting Chairperson Harris announced that the next meeting of the Board is scheduled for Tuesday, November 20, 2012. 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, Richard Fox moved to adjourn the meeting. Patrick McDonnell seconded the motion, which was unanimously approved by the Board. The October 16, 2012, meeting of the Board was adjourned at 10:10 a.m.