

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
August 21, 2018

VOTING MEMBERS OR ALTERNATES PRESENT

Patrick McDonnell, Chairperson, Secretary, Department of Environmental Protection
Andrew Sharp, alternate for Gerald Oleksiak, Secretary, Department of Labor and Industry
Emma Lowe, alternate for Leslie Richards, Secretary, Department of Transportation
Andrew Place, alternate for Gladys Brown, Chairperson, Public Utility Commission
Richard Fox, alternate for Representative Mike Carroll
Leda Lacomba, alternate for Representative John Maher
Tim Collins, alternate for Senator John Yudichak
Nick Troutman, alternate for Senator Gene Yaw
Don Wandling, alternate for Bryan Burhans, Executive Director, Pennsylvania Game Commission
James Schmid, Citizens Advisory Council
Heather Smiles, alternate for John Arway, Executive Director, Pennsylvania Fish and Boat Commission
Douglas McLearn, alternate for Andrea Lowery, Executive Director, Pennsylvania Historical and
Museum Commission
Erin Smith, alternate for Sarah Galbally, Secretary, Governor's Office of Policy and Planning
Cynthia Carrow, Citizens Advisory Council
Bill Fink, Citizens Advisory Council
Don Welsh, Citizens Advisory Council
John St. Clair, Citizens Advisory Council
Denise Brinley, alternate for Dennis Davin, Secretary, Department of Community and
Economic Development
Kelly O'Donnell, alternate for Russell Redding, Secretary, Department of Agriculture
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 June 19, 2018, EQB meeting minutes.

**Nick Troutman made a motion to adopt the June 19, 2018, EQB meeting minutes.
James Schmid seconded the motion, which was unanimously approved by the Board.**

CONSIDERATION OF FINAL-OMITTED RULEMAKING: ELECTRONIC SUBMISSION OF AIR QUALITY GENERAL PLAN APPROVAL AND GENERAL OPERATING PERMIT APPLICATIONS (25 Pa. Code Chapter 127)

This final-omitted rulemaking amends 25 Pa. Code § 127.621(b) (relating to application for use of general plan approvals and general operating permits) to add the option of electronic means for delivery of applications to the Department of Environmental Protection (Department) for air quality general plan approvals and general operating permits.

George Hartenstein, Deputy Secretary for Waste, Air, Radiation and Remediation, provided an overview of the final-omitted rulemaking. Elizabeth Davis, Assistant Counsel for Bureau of Regulatory Counsel, assisted with the presentation.

There was no discussion following the presentation.

**Sharon Watkins made a motion to adopt the final-omitted rulemaking.
Don Welsh seconded the motion, which was unanimously approved by the Board.**

CONSIDERATION OF FINAL RULEMAKING: ADMINISTRATION OF THE STORAGE TANK AND SPILL PREVENTION PROGRAM (25 Pa. Code Chapter 245)

The U.S. Environmental Protection Agency (EPA) codified comprehensive Federal regulations for underground storage tanks (USTs) at 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of USTs). EPA initially promulgated these regulations in 1988 and published final revisions to 40 CFR Part 280 at 80 FR 41566 (July 15, 2015). These revisions, among other things, added secondary containment requirements for new and replaced tanks and piping, added operator training requirements, added periodic operation and maintenance requirements for UST systems, removed certain deferrals, added new release prevention and detection technologies, updated codes of practice, and made editorial and technical corrections. Secondary containment (November 10, 2007) and operator training (December 26, 2009) requirements that meet the Federal requirements into Chapter 245 were incorporated through prior rulemakings.

In its July 15, 2015, Final Rule, the EPA also updated the State Program Approval requirements in 40 CFR Part 281 (relating to approval of state underground storage tank programs). The EPA is requiring that states amend their UST regulations and apply for initial or revised State Program Approval within 3 years of the effective date of the final EPA rule published at 80 FR 41566.

Currently, the Commonwealth has State Program Approval. The Commonwealth receives approximately \$2.3 million annually in Federal grant funding from the EPA under section 9014 of the Solid Waste Disposal Act (42 U.S.C.A. § 6991m) to aid in administering the UST program. This final-form rulemaking is necessary to ensure continued receipt of Federal grant funds. To comply, Chapter 245 must be updated to be no less stringent than the Federal requirements so the Department can apply for revised State Program Approval. The EPA has not codified companion aboveground storage tank (AST) regulations.

This rulemaking strengthens Pennsylvania's UST regulations by increasing the emphasis on properly operating and maintaining equipment. Lack of proper operation and maintenance of UST systems is the

main cause of new releases. Further, the Department is updating Chapter 245 in the final-form regulations to address a number of issues, especially those pertaining to ASTs, based on observations and experience in implementing and enforcing the regulations since the last comprehensive update.

George Hartenstein, Deputy Secretary for Waste, Air, Radiation and Remediation, provided an overview of the final rulemaking. Kris Shiffer, Program Manager for the Division of Storage Tanks, and Robert Schena, Assistant Counsel for Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, James Schmid requested clarification if the provisions included in the rulemaking apply to existing underground storage tanks as well as proposed new ones. Deputy Secretary Hartenstein affirmed that the provisions do apply to both new and existing tanks.

Mr. Place inquired as to the definition of size of a small AST. Mr. Shiffer responded that a small AST has 21,000 gallons or less in capacity.

Mr. Place additionally inquired if there a difference in enforcement if there is a release in or out of containment. Deputy Secretary Hartenstein responded that the most important issue is how much substance can go into a containment structure and not pose an immediate threat to the environment and public health and safety. To provide clarity to the regulated community and to firmly address this issue, amendments included in the final-form rulemaking include a definition of *Immediate Threat of Contamination*. Further, clarification is added to the rule to note that if less than 25 gallons of petroleum is released and it is contained and completely recovered within 24 hours, it does not need to be reported. Any amount more than that must be reported. The rationale supporting that is that if it is 25 gallons or more, perhaps a more serious malfunction is occurring. The Department needs assurance that all systems are in good working order. The amendments in this final-form rulemaking support that effort.

Dr. Watkins requested clarification that if a spill of 24 gallons is cleaned up within a 24-hour period, this is not a reportable spill. Deputy Secretary Hartenstein confirmed that is accurate. He noted that the Department is actively inspecting facilities and if something looks unusual or if there is a history of releases, that facility would be evaluated with additional scrutiny.

Andrew Place made a motion to adopt the final rulemaking.

Denise Brinley seconded the motion, which was unanimously approved by the Board.

CONSIDERATION OF FINAL RULEMAKING: NONCOAL MINING PROGRAM FEES **(25 Pa. Code Chapter 77)**

The Department is the agency responsible for implementing the Noncoal Surface Mining Conservation and Reclamation Act (the act). Section 7(a) of the act authorizes the Department to charge and collect a reasonable filing fee from noncoal permit applicants, provided the fees do not exceed the cost of reviewing, administering and enforcing the permit. These fees are used to administer the noncoal mining regulatory program. The Department implements the noncoal mining program through the review of permit applications for the various types of noncoal mining operations and the inspection of these operations to ensure operators' compliance with their permits. There are approximately 1,200 noncoal mining operators in Pennsylvania. These operations range from small quarries that produce less than 2,000 tons of material per year to large quarries that produce millions of tons of aggregate per year. The Department issues permits for the term of the expected mining activity, which also varies from a few years to decades. Operators can request modifications of their permits if their plans change, which require

further staff review. The Department inspects permitted noncoal mines for compliance with permits, which require compliance with environmental and safety requirements included in the act, the Clean Streams Law (CSL), and Chapters 77 (Noncoal Mining) and 209a (Occupational Health and Safety: Surface Mining).

The final-form rulemaking includes amendments to 25 Pa. Code § 77.106 (fees) to provide additional funding to sustain the program. The current rate of revenues and expenditures will likely exhaust the reserves by 2020 in the Noncoal Surface Mining Fund, resulting in inadequate funding and potential curtailment of the program. Without the stable funding realized through the imposition of the increased fees, the Department will not be capable of timely issuance, administration, and enforcement of permits to 1,200 operators as required by the Noncoal Act and the CSL. As a result, applicants will not be able to conduct lawful mining activities, which will have a negative impact on the economy. Additionally, inadequate enforcement of existing permits will have a deleterious effect on public health and safety, and the environment.

John Stefanko, Deputy Secretary for Active and Abandoned Mine Operations, provided an overview of the final rulemaking. Bill Allen, Acting Director for Bureau of Mining Programs, and Joe Iole, Assistant Counsel for Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, Bill Fink and Richard Fox applauded the Department's collaborative effort undertaken with the Aggregate Advisory Board to develop this rulemaking. Mr. Fox asked for verification if, after the year 2026, adjustments to fees will then be in increments of \$25. Deputy Secretary Stefanko confirmed that, after the year 2026, the Employment Cost Index for State and Local Government Compensation will be applied and fees will be adjusted in \$25 increments.

Mr. Fox inquired further if there is a limit on the \$25. Chairperson McDonnell responded that the purpose of the \$25 increments is to ensure that fee increases are kept to reasonable whole dollar amounts. Mr. Fox inquired if the Department would still need to come back to the Board with fee reports. Deputy Secretary Stefanko responded affirmatively. The Department would still come back every three years with a fee report to present to the Board even if the fees are effectively meeting the cost needs to implement the program. Don Welsh further inquired if a workload analysis will be included as part of the three-year fee report to the Board. Deputy Secretary Stefanko responded that it would and that workload analyses are completed quarterly for the Noncoal Mining Program.

Bill Fink made a motion to adopt the final rulemaking.

Richard Fox seconded the motion, which was unanimously approved by the Board.

PRESENTATION OF REGULATORY FEE REPORTS: WATER QUALITY MANAGEMENT AND NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM FEE REPORTS (25 Pa. Code Chapters 91 and 92a)

On September 2, 1971, 25 Pa. Code Chapter 91 was published to implement provisions of Pennsylvania's Clean Streams Law (35 P. S. §§ 691.1 *et seq.*). Chapter 91 establishes, among other things, a water quality management (WQM) permit program for the construction of sewage and industrial waste treatment facilities and for land application of sewage and industrial wastes. Chapter 91 also provides for a permit

program for the use of algicides, herbicides and fish control chemicals (pesticides) in waters of the Commonwealth (generally referred to as joint pesticide permits; see 25 Pa. Code § 91.38).

Based on the current funding structure, the Department's ability to adequately comply with state environmental requirements relating to the WQM program is continually strained due to inadequate funding. Without adequate funding for all required aspects of the WQM program, public health may suffer, and environmental gains previously made may be lost, due to a reduced capacity to conduct compliance and enforcement efforts. Additionally, the Department's ability to efficiently and timely process permit applications, meet its obligations under the Clean Streams Law, and promptly serve the public are all affected by this insufficient funding.

The Department is also responsible for the administration of the National Pollutant Discharge Elimination System (NPDES) permitting and compliance monitoring activities under 25 Pa. Code Chapter 92a. The Department implements this program pursuant to a Memorandum of Agreement with the U.S. Environmental Protection Agency (EPA) for point source discharges from sewage, industrial waste and municipal and industrial stormwater facilities and other activities including the application of pesticides. The NPDES program authority comes from the federal Clean Water Act (Federal Act) (33 U.S.C.A. §§ 1251 – 1387) and the Clean Streams Law (35 P.S. §§ 691.1 – 691.1001). Section 691.6 of the Clean Streams Law allows the Department to charge filing fees for applications by regulation, provided that the fee is reasonable. The Clean Streams Law also allows for charging and collecting fees for permits issued (35 P.S. § 691.6).

Chapter 92a was published as a final rulemaking in the *Pennsylvania Bulletin* (40 Pa.B. 5767) on October 9, 2010, and replaced the prior NPDES regulations, Chapter 92. The fee schedule for NPDES permit applications was last updated through Chapter 92a. This update also introduced annual fees for individual NPDES permits (see 25 Pa. Code § 92a.62). The Department began its Chapter 92a annual invoicing and fee collection program in December 2010. The fee schedule established in Chapter 92a was intended to cover the program costs not covered by federal funding or the state General Fund. NPDES fees are deposited into the Clean Water Fund, a special restricted revenue account in the General Fund administered by the Department, that may use these funds for purposes authorized under the Clean Streams Law.

As is true for the WQM program, based on the current funding structure, the Department's ability to adequately comply with federal and state environmental requirements relating to the NPDES program is continually strained due to inadequate funding. Without adequate funding for all required aspects of the NPDES program, public health may suffer, and environmental gains previously made may be lost due to a reduced capacity to conduct compliance and enforcement efforts. Additionally, the Department's ability to efficiently and timely process permit applications, meet its obligations under the Clean Streams Law, satisfy increasing federal requirements, and promptly serve the public in areas, including but not limited to municipal stormwater (MS4s) and agriculture, are all affected by this funding gap.

Approximately \$8 million in new revenue annually is needed in order for the Department to fully comply with all federal and state environmental and public health requirements relating to the NPDES and WQM programs (collectively "Clean Water Program"). This amount is based on a comprehensive workload

analysis conducted by the Department that considered the tasks necessary to properly implement all aspects of the Clean Water Program.

Tim Schaeffer, Deputy Secretary for the Office of Water Programs, provided an overview of the regulatory fee reports. Lee McDonnell, Director for Bureau of Clean Water, and Keith Salador, Assistant Counsel for Bureau of Regulatory Counsel, assisted with the presentation.

Following the presentation, Mr. Fox inquired if any fines or penalty money is included in the fee reports' calculations. Mr. McDonnell reported that was not included. Chairperson McDonnell noted that, as a general rule, the Department includes a conservative amount for fines. Programs evaluate historical data and use a conservative estimate to ensure that programs are not underfunded should they heavily rely on penalty numbers.

Mr. Fox commented on the process for this upcoming proposed rule, inquiring if a similar stakeholder process will be employed as was used for the Noncoal Mining Program Fees rule. Deputy Secretary Schaeffer responded that the Department is currently engaging in the stakeholder outreach process for this eventual proposed fee increase.

Mr. Fink inquired if any of the fees for existing general permits were included in the analysis. Mr. McDonnell responded affirmatively.

Mr. Welsh noted that the Department mentioned neighboring states generating revenue to support 50 percent of program costs through permit fees. He asked if the actual dollar cost is comparable for NPDES permits in other states. Mr. McDonnell responded that Pennsylvania's permitting fees are lower than that of other states relative to the cost of permitting.

Mr. Place inquired that if there is less impairment, if less assessment would be needed. Mr. McDonnell responded that the Department's objective is to conduct a complete assessment of surface water across the Commonwealth over the course of the next ten years. However, with the staff currently available to do this work, the timeline to meet this objective would be twenty to thirty years. The Department is working to change survey methods and is consequently finding more stream impairment than had been discovered in the past. Mr. Place asked if the Department is finding more impaired surface waters because of the modified survey methods or if more impairments are being discovered because more impairments exist. Mr. McDonnell responded that the impairments existed before but the Department is now employing much more detailed biological survey protocols to evaluate surface waters.

Ms. Brinley commented that one of the Commonwealth's most important assets is water quality. She noted that the Clean Water Program is chronically underfunded and that it is incumbent upon the Board to assist in finding a solution to this underfunding. It is important to the overall environmental and economic vitality of the Commonwealth that water quality is protected.

Ms. Smiles inquired if the Department will take into consideration a possible fee for the Chapter 91.38 aquatic algicide, herbicide, and fish control chemical permit that is jointly approved by the Department and the Fish and Boat Commission. Mr. McDonnell affirmed that the Department would consider said fee.

Chairperson McDonnell noted that the Department has testified to the legislature about the state of the general fund, the decreases the Department has experienced over time, and the impact that has had on the

Department's ability to provide necessary services to the citizens of the Commonwealth, including those in the regulated community. He further noted his appreciation for the discussion and commentary provided at this meeting.

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

OTHER BUSINESS:

Regulatory Update:

Laura Edinger provided the following updates:

- On Thursday, June 28, 2018, IRRC approved two final rulemakings: Control of VOC Emissions from Industrial Cleaning Solvents and Safe Drinking Water General Update and Fees. Both rulemakings were adopted by this Board on April 17, 2018.
- On Saturday, July 14, 2018, the proposed Unconventional Well Permit Application Fee rulemaking was published in the *Pennsylvania Bulletin*, opening a 30-day public comment period. The comment period closed August 14. Thirteen comments were received. Comments from IRRC are due on September 12, 2018.
- On Saturday, August 11, 2018, the Control of VOC Emissions from Industrial Cleaning Solvents was published in the *Pennsylvania Bulletin*. On August 18, 2018, the Safe Drinking Water General Update and Fees rule was published in the *Pennsylvania Bulletin*. Both rulemakings were effective upon publication. However, several deferred implementation dates were included in the Safe Drinking Water rule. For more information, visit www.pabulletin.com. The first couple pages of the preamble for the rule states which provisions have deferred implementation.
- On Thursday, August 16, 2018, IRRC approved two rulemakings: U.S. Nuclear Regulatory Commission Consistency (final-omitted) and Radiological Health (final). Both rulemakings were adopted by this Board on June 19, 2018.

After the regulatory update, Chairperson McDonnell invited discussion or questions. Mr. Place asked if there is an update on hiring toxicologists (related to the PFOA petition discussed at the June 19, 2018 EQB meeting). Chairperson McDonnell responded that the hiring is still in progress and has proven to be challenging. Dr. Sharon Watkins noted that the Department of Health (DOH) has interviewed candidates for a contract position, but has not had success in hiring. Recently, DOH posted a full-time toxicologist position and started advertising and sharing that announcement with partners within and external to Pennsylvania in order to recruit more potential qualified candidates. Leda Lacomba asked if more detail could be provided as to what the challenges are to hiring. Dr. Watkins explained that a couple of potential candidates indicated intimidation at the prospect of being the only State toxicologist on staff. Candidates had expected perhaps more infrastructure across agencies. DOH and the Department are working to address and develop that infrastructure. Another prominent issue raised by candidates is that Pennsylvania has a number of issues that a toxicologist would be expected to work on and evaluate in addition to PFAS, which is a great deal of work for a single individual to reasonably manage.

Next Meeting:

The next meeting of the EQB is tentatively planned for Tuesday, September 18, 2018.

ADJOURN:

With no further business before the Board, Dr. Watkins moved to adjourn the meeting. Bill Fink seconded the motion, which was unanimously approved by the Board. The August 21, 2018, meeting of the Board was adjourned at 10:05 a.m.