

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

**RECOMMENDATION
TO THE PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD**

**ON THE SIERRA CLUB *et al.* PETITION FOR RULEMAKING
TO RAISE BOND AMOUNTS FOR CONVENTIONAL OIL AND GAS
WELLS**

JUNE 27, 2023

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A. DESCRIPTION OF THE PETITION FOR RULEMAKING PROCEDURE

Any person may petition the Environmental Quality Board (EQB) to initiate a rulemaking proceeding for the issuance, amendment, or repeal of a regulation administered and enforced by the Pennsylvania Department of Environmental Protection (Department). 71 P.S. § 510-20(h). The EQB has developed a policy for processing petitions for rulemaking. See [25 Pa. Code Chapter 23](#) (relating to Policy for Processing Petitions – Statement of Policy). Among other things, a petition for rulemaking must contain the following information: (1) the petitioner’s name, address, and telephone number; (2) a description of the action requested including suggested regulatory language if the petition requests the EQB to adopt or amend regulations; (3) the reason the petitioner is requesting the action from the EQB; and (4) the types of persons, businesses, and organizations likely to be impacted by the proposal. 25 Pa. Code § 23.1 (relating to Petitions).

When a petition for rulemaking is submitted, the Department examines the petition before it is submitted to the EQB to determine if it meets the following conditions: (1) the petition is complete as required by § 23.1; (2) the petition requests an action that can be taken by the EQB; and (3) the requested action does not conflict with Federal law. 25 Pa. Code § 23.2 (relating to Departmental review).

The Department then notifies the EQB and the petitioner of its determination within 30 days of receipt of the petition. 25 Pa. Code § 23.3. If the Department determines that the petition is not appropriate, the Department will state the reasons for its determination in the notification and give the petitioner 30 days to modify the request. 25 Pa. Code § 23.3 (relating to Notification).

Where the Department determines that a petition is appropriate for consideration by the EQB, the Chairperson of the EQB shall inform the EQB of the petition for rulemaking, the nature of the request and the petitioner. The Chairperson shall give the petitioner the opportunity to make

a five-minute presentation to the EQB and the Department will also make a recommendation as to whether the EQB should accept the petition. 25 Pa. Code § 23.4 (relating to Oral presentation).

The EQB may refuse to accept a petition if it determines that one or more of the following exist: (1) the EQB has within the past two years considered the issue addressed in the petition as part of an earlier decision concerning the adoption, amendment or deletion of a regulation; (2) the action requested by the petitioner concerns a matter currently under litigation; (3) the requested action is inappropriate for rulemaking by the EQB due to policy or regulatory considerations; or (4) the petition involves an issue previously considered by the EQB, and it does not contain information that is new or sufficiently different to warrant reconsideration of that issue. If a petition does present new or sufficiently different information, this information must have been either unavailable at the time of the EQB's previous decision or not contained in the record of the proceeding in which the previous decision was made. 25 Pa. Code § 23.5 (relating to Board determination).

If the EQB accepts the petition, a notice of acceptance is published in the *Pennsylvania Bulletin* within 30 days and a report is prepared. 25 Pa. Code § 23.6 (relating to Notice of acceptance and Department report).

Once the report is completed, the Department sends a copy of it to the petitioner who may then submit to the Department a written response to the report within 30 days of the mailing of the report. 25 Pa. Code § 23.7 (relating to Response to report).

The Department prepares a recommendation to the EQB based on the report and comments received from the petitioner. If regulatory amendments are recommended, the Department develops a proposed rulemaking for EQB consideration within 6 months after the Department mailed its report to the petitioner. If regulatory amendments are not recommended, the Department

presents its recommendation and basis to the EQB at the first meeting occurring at least 45 days after the Department mailed its report to the petitioner. 25 Pa. Code § 23.8 (relating to Board consideration).

B. DESCRIPTION OF THE SIERRA CLUB *et al.* PETITION

1. Procedural Description

On September 14, 2021, the EQB received a petition to amend the Department's regulations to require updated full-cost bond amounts for both new conventional oil and gas wells and existing conventional oil and gas wells drilled after April 17, 1985 (Petition for Rulemaking or Petition). *See* Exhibit 1.

The Petition was submitted by Ankit Jain (Mr. Jain), counsel for the Sierra Club, 50 F Street NW, Eighth Floor, Washington, DC 20001, on behalf of the Sierra Club, Clean Air Council, Earthworks, Mountain Watershed Association, PennFuture, and Protect Penn-Trafford (Petitioners).

On October 8, 2021, the Department sent a letter to Mr. Jain notifying Petitioners that the petition met the established criteria in § 23.2 of the EQB's petition policy. The letter also set November 16, 2021, as the date the EQB would consider the Petition.

At the November 16, 2021 EQB meeting, Mr. Jain, on behalf of the Petitioners, made a brief presentation as to why the EQB should accept the Petition for further study. The Department recommended that the EQB accept the Petition for further study. The EQB voted 16-3 to accept the Petition for further study.

On December 4, 2021, the EQB published a notice of acceptance of the Petition in the *Pennsylvania Bulletin*. *See* [51 Pa.B. 7471](#) (December 4, 2021).

On April 21, 2023, the Department sent the evaluation report of the Petition to the Petitioner, which recommended that the Petition be denied.

On May 19, 2023, the Petitioners submitted their reply to the Department's report, (Petitioners' Reply or Reply), which agreed with the Department that the EQB does not currently have the authority to take the action requested by the Petition to change individual or blanket bond

amounts for conventional wells, due to the enactment of the act of July 19, 2022 (P.L. 1622, No. 96) (Act 96).

2. Petition Description

The Petition asserts the EQB should amend the Department's regulations at 25 Pa. Code § 78.302 to require full-cost bonding for conventional oil and gas wells by increasing bond amounts to \$38,000 for each new or existing unplugged conventional oil and gas well drilled after April 18, 1985, setting blanket bonds to the sum of total per-well bond amounts, and establishing an ongoing obligation for the Department to submit a report to the EQB evaluating whether the EQB should adjust bond amounts further.

In support of this petition, Mr. Jain included an expert report the Sierra Club commissioned from Dr. Jeremy Weber (Dr. Weber), a professor at the University of Pittsburgh and an established expert in the economics of oil and gas production. Dr. Weber's report used historical plugging data within Pennsylvania to estimate the cost of plugging the average conventional well in 2021. As summarized in Mr. Jain's petition, the report found that under the "assumption that the average well will be plugged in a fourteen-well plugging contract, as has been the case over the past decade, the cost of plugging the average conventional well will be \$38,000." *See* Petition, p. i. Mr. Jain's petition requested that the EQB amend the conventional oil and gas wells bond amounts to full-cost bonding because the current bond amount of \$2,500 per conventional well, with the option to post a \$25,000 blanket bond, "does not come close to full-cost bonding."

C. SUMMARY OF THE DEPARTMENT'S REPORT ON THE PETITION

On April 21, 2023, the Department sent its *Evaluation Report on the Sierra Club et al. Petition for Rulemaking to Raise Bond Amounts for Conventional Oil and Gas Wells* (April 21 Report) to the Petitioners. *See* Exhibit 2. The April 21 Report detailed the history of bonding requirements for conventional oil and gas wells in Pennsylvania, beginning in 1984 with the establishment of requirements and the grant of discretionary authority to the EQB to amend bond amounts every two years to reflect the projected costs to the Commonwealth of performing well plugging. The most recent change to conventional well bonding requirements in Pennsylvania occurred on July 19, 2022, with the enactment of Act 96, which set specific individual and blanket bond amounts for conventional wells at \$2,500 and \$25,000 plus \$1,000 per new well drilled six months after the effective date of the law but not to exceed a total of \$100,000, respectively. Act 96 also withdrew the EQB's authority to adjust those amounts for 10 years.

The April 21 Report concluded that with the enactment of Act 96, the EQB no longer had the statutory authority to take the action requested by the Petitioners to amend the Department's regulations to require full-cost bonding for conventional oil and gas wells by increasing bond amounts to \$38,000 for each new or active conventional oil and gas well drilled after April 18, 1985 and setting blanket bonds to the sum of total per-well bond amounts. As a result, it was recommended that the Petition for Rulemaking be denied.

**D. PETITIONERS' REPLY TO THE DEPARTMENT'S APRIL 21, 2023,
EVALUATION REPORT**

The Petitioners' Reply agrees with the Department that the EQB currently lacks the authority to make any changes to individual or blanket bond amounts for conventional wells due to the enactment of Act 96. *See* Exhibit 3. What follows are the Department's responses to the Petitioner's comments.

E. DEPARTMENT'S RESPONSE TO THE PETITIONERS' REPLY

PETITIONER COMMENT

“Petitioners agree with DEP’s statement in its report that ‘the enactment of Act 96 on July 19, 2022, explicitly suspended the EQB’s authority to make any changes to individual or blanket bond amounts for conventional wells for 10 years.’ ...Given EQB’s current apparent lack of authority to act, Petitioners see no reason to leave this petition under consideration at this time.”

Petitioner’s Reply at 1.

DEPARTMENT RESPONSE

The Department agrees with this comment and will no longer consider this petition. As a result, it is recommended that the Petition for Rulemaking be denied.

PETITIONER COMMENT

“...DEP’s recommendation to deny the petition is based solely on EQB’s current lack of statutory authority to act on the petition. DEP has not contested the veracity of any of the factual assertions in the Petition, nor has it taken the position that the actual policy changes the petition asked for are unreasonable.... To the extent DEP engages with the substance of the petition, therefore, it is to indicate support for the overall goal of the petition.” Petitioner’s Reply at 1-2.

DEPARTMENT RESPONSE

At the time the EQB considered accepting the Petition on November 16, 2021, the EQB had the statutory authority under the Oil and Gas Act to adjust bond amounts for conventional oil and gas wells. However, the enactment of Act 96 on July 19, 2022, explicitly suspended the EQB’s authority to make any changes to individual or blanket bond amounts for conventional wells for 10 years. While the Department agrees that the current bonding requirements for conventional oil and gas wells are insufficient, once the General Assembly suspended the EQB’s statutory authority

to establish bond amounts, the Department did not conduct an analysis of all of the factual assertions and financial assessments made in the Petition.

PETITIONER COMMENT

“...[T]he Commonwealth’s obligation under the Environmental Rights Amendment, Article 1, Section 27 of the Constitution (“Section 27” or “ERA”) [is] to act as a trustee of the Commonwealth’s natural resources and to vindicate the peoples’ rights under Section 27 to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I, § 27. The Commonwealth assumes a trustee obligation to ensure remediation when it issues drilling permits that necessarily authorize degradation of the state’s natural resources. That trustee obligation requires Pennsylvania to ensure that every well will be promptly remediated, whether the plugging and clean-up is performed by the operator or by the Commonwealth. Pennsylvania’s low bond amounts for conventional wells do not allow it to meet this obligation currently. Similarly, Pennsylvania is required to ensure the remediation of land harmed by drilling operations in order to protect the peoples’ right to a clean environment; the Commonwealth’s low bond amounts for conventional wells also do not allow it to fulfill this obligation. The passage of Act 96 does not change these obligations.” Petitioner’s Reply at 2-3.

DEPARTMENT RESPONSE

The Department acknowledges that it is one of the Article I, Section 27 Commonwealth trustees, and is one of the executive agencies responsible for protecting and preserving the rights contained in Article I, Section 27 of the Pennsylvania Constitution. The Department and the EQB do not necessarily agree with the characterization of the extent of the Commonwealth’s trustee obligations, but do not dispute that the Commonwealth must comply with the constitution. However, the passage of Act 96 by the General Assembly – also a Commonwealth trustee under

Article I, Section 27 – eliminated the statutory authority of the EQB to establish bond amounts. Article I, Section 27 does not overcome the prerequisite of EQB rulemakings to be authorized by statute. To the extent Act 96 restrains the agencies’ powers to carry out the Commonwealth’s constitutional obligations, the act may be unconstitutional. Neither the Department nor the EQB can resolve this constitutional conflict. Likewise, the EQB may not adopt regulations that are not supported by statute.

F. DEPARTMENT’S RECOMMENDATION ON THE PETITION FOR RULEMAKING

As stated in Section A of this recommendation, when a petition for rulemaking is submitted to the EQB, the Department first examines the petition to determine if it meets certain criteria, which include that the petition requests an action that can be taken by the EQB. 25 Pa. Code § 23.2. The Department performs this initial review to ensure the EQB has the statutory authority to adopt the rule requested by the Petitioners. If the EQB is not permitted by law to take the requested action, the Department will not recommend the EQB accept the petition and the process ends there.

This Petition for Rulemaking asks the EQB to amend the Department’s regulations at 25 Pa. Code § 78.302 to require full-cost bonding for conventional oil and gas wells by increasing bond amounts to \$38,000 for each new or active conventional oil and gas well drilled after April 18, 1985 and setting blanket bonds to the sum of total per-well bond amounts.

At the time the EQB considered accepting the Petition on November 16, 2021, the EQB had the statutory authority under the act of February 14, 2012 (P.L. 87, No. 13) (Oil and Gas Act) to adjust bond amounts for conventional oil and gas wells. However, the enactment of Act 96 on July 19, 2022, explicitly suspended the EQB’s authority to make any changes to individual or blanket bond amounts for conventional wells for 10 years. 58 Pa.C.S. § 3225(a)(1)(iii) and 58 Pa.C.S. § 3225(a)(2)(ii)(E). Act 96 set the individual bond amount at \$2,500 and the blanket bond at \$25,000, plus \$1,000 per new well drilled six months after the effective date of the law but not to exceed a total of \$100,000. 58 Pa.C.S. § 3225(a)(2)(ii)(A)-(C).

The Department acknowledges that it is one of the Article I, Section 27 Commonwealth trustees, and is one of the executive agencies responsible for protecting and preserving the rights contained in Article I, Section 27 of the Pennsylvania Constitution. However, the passage of Act

96 by the General Assembly – also a Commonwealth trustee under Article I, Section 27 – eliminated the statutory authority of the EQB to establish bond amounts. Article I, Section 27 does not overcome the prerequisite of EQB rulemakings to be authorized by statute. To the extent Act 96 restrains the agencies’ powers to carry out the Commonwealth’s constitutional obligations, the act may be unconstitutional. Neither the Department nor the EQB can resolve this constitutional conflict. Likewise, the EQB may not adopt regulations that are not supported by statute.

While the Department agrees the current bonding requirements for conventional oil and gas wells are insufficient, the EQB no longer has the statutory authority to take the action requested by the Petitioners. As a result, the Petition for Rulemaking must be denied.

G. EXHIBITS

1. Petition to Adopt Full-Cost Bonding for Conventional Oil and Gas Wells to Conserve and Maintain Public Resources for which the Commonwealth is a Trustee, Sierra Club *et al.*, September 14, 2021.
2. Evaluation Report on the Sierra Club *et al.* Petition for Rulemaking to Raise Bond Amounts for Conventional Oil and Gas Wells, The Pennsylvania Department of Environmental Protection, April 21, 2023.
3. Petitioners' Reply to the Pennsylvania Department of Environmental Protection's Evaluation Report on the Sierra Club *et al.* Petition for Rulemaking to Raise Bond Amounts for Conventional Oil and Gas Wells, Sierra Club *et al.*, May 19, 2023.