

MINUTES
ENVIRONMENTAL QUALITY BOARD MEETING
December 16, 2008

VOTING MEMBERS OR ALTERNATES PRESENT

Barbara Sexton, Acting Chairperson, Special Deputy Secretary, Department of Environmental Protection
Kenneth Graham, alternate for Acting Secretary Sandi Vito, Department of Labor and Industry
Danielle Spila, alternate for Secretary Allen D. Biehler, Department of Transportation
William Hall, alternate for Chairman James H. Cawley, Public Utility Commission
Lee Ann Murray, alternate for Representative Camille George
Mark Brown, alternate for Representative Scott E. Hutchinson
Richard Fox, alternate for Senator Raphael J. Musto
Patrick Henderson, alternate for Senator Mary Jo White
Richard Manfredi, Citizens Advisory Council
John Arway, alternate for Dr. Douglas J. Austen, Executive Director, Pennsylvania Fish and Boat Commission
Bill Capouillez, alternate for Carl Roe, Executive Director, PA Game Commission
William Sisson, alternate for Barbara Franco, Executive Director, Pennsylvania Historical and Museum Commission
Joanne Denworth, alternate for Secretary Donna Cooper, Governor's Office of Policy and Planning
Jolene Chinchilli, Citizens Advisory Council
Walter Heine, Citizens Advisory Council
David Strong, Citizens Advisory Council
Cynthia Carrow, Citizens Advisory Council
Paul Opiyo, alternate for Acting Secretary John Blake, Department of Community and Economic Development
Michael Pechart, alternate for Secretary Dennis C. Wolff, Department of Agriculture
Dr. James Logue, alternate for Acting Secretary Everette James, Department of Health

DEPARTMENT STAFF PRESENT

Richard P. Mather, Sr., Deputy Chief Counsel
Kelly J. Heffner, Policy Office Director
Michele Tate, Regulatory Coordinator

CALL TO ORDER AND APPROVAL OF MINUTES

Acting Chairperson Sexton called the meeting to order at 9:00 a.m. in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. The Board considered its first item of business - the September 16, 2008, EQB meeting minutes.

With no corrections or amendments, Acting Chairperson Sexton called for a motion to adopt the minutes of the September 16, 2008, EQB meeting.

Richard Manfredi moved to adopt the September 16, 2008, EQB meeting minutes. David Strong seconded the motion, which was unanimously approved by the Board.

FINAL RULEMAKING - DRINKING WATER PUBLIC NOTIFICATION REVISIONS
(25 Pa Code, Chapter 109)

Cathy Curran Myers, Deputy Secretary for Water Management, provided an overview of the final rulemaking to the Board. Dana Aunkst, Director of the Bureau of Water Standards and Facility Regulation, assisted with the presentation.

Following the Department's presentation, Richard Fox inquired if guidelines would be issued by the Department, prior to the finalization of the rulemaking, to assist the regulated community in complying with 25 Pa Code, Chapter 109.702 dealing with operation and maintenance plan provisions for the repair and replacement of water mains, as these provisions are to take effect immediately upon publication of the final rulemaking. In response to Mr. Fox, Deputy Secretary Myers stated that the Department will issue draft technical guidance for public comment concerning the loss of positive pressure situations in the distribution system and will finalize the guidance promptly. She further elaborated that it is not the Department's intention to interpret the regulatory provisions broadly. She emphasized that only those water main breaks which have the potential for real contamination of the water supply should be applicable to the provisions in 25 Pa Code, Chapter 109.702 and that the Department's interpretation will be clearly stated in the technical guidance.

Mr. Strong moved to approve the final rulemaking. Cynthia Carrow seconded the motion, which was unanimously approved by the Board.

FINAL RULEMAKING (with Notice of Proposed Rulemaking Omitted) – MARCELLUS SHALE WELL PERMIT FEES (25 Pa Code, Chapter 78)

J. Scott Roberts, Deputy Secretary for Mineral Resources Management, provided an overview of the final rulemaking to the Board. Ron Gilius, Director of the Bureau of Oil and Gas Management, and Scott Perry, Counsel to the Oil and Gas Program, assisted with the presentation.

Following the Department's presentation, Acting Chairperson Sexton invited Dr. Robert Watson, Chairman of the Oil and Gas Technical Advisory Board (TAB), to provide remarks to the Board on behalf of TAB. Dr. Watson stated that the rulemaking was presented to TAB on October 30, 2008, and members were supportive of the fee increases in the rulemaking if they would result in a more streamlined permitting process.

Following Dr. Watson's comments, Patrick Henderson inquired if the Department has ever used the final-omitted rulemaking process to raise fees in the past. Richard Mather responded that he wasn't aware of any situation in the past that the Department used the final-omitted rulemaking process to increase fees, however, he also noted that he is unaware of any situations similar to the recent development of the Marcellus Shale formation that precipitated the Department to this point. Mr. Henderson also stated that there is a provision in the rulemaking which states that fees are nonrefundable. He inquired about the Department's intent with this provision and if it would invalidate the Department's Money Back Guarantee Policy. Deputy Secretary Roberts responded that the intent of the Department with this specific provision was not to invalidate the money back guarantee, but to make it clear to permit applicants that if they apply for a permit application and choose not to drill a well, or if they apply for a permit that ultimately cannot be issued, there is no obligation by the Department to refund the permit application fee. Mr. Mather also responded that the proposed fees are based upon the linear feet of the well. If an operator drills less than what their permit authorizes, the Department will not be responsible for issuing a refund for the amount of the linear feet of the well that was not drilled.

Mr. Henderson inquired about the Department's expected effective date of the rulemaking. Deputy Secretary Roberts responded that the EQB is being asked to approve the rulemaking as final. Mr. Mather also responded that because of certain requirements contained in the Regulatory Review Act, if the Board approves the final rulemaking, the Department cannot deliver the final rulemaking to the Independent Regulatory Review Commission (IRRC) and the Standing Environmental Resources and Energy Committees until at least the fourth Monday in January of 2009. With those restrictions, Mr. Mather noted that he expected the final rulemaking could be promulgated by late March or early April 2009.

Mr. Fox inquired how the fees could support hiring additional personnel in light of Governor Rendell's hiring freeze. Deputy Secretary Roberts responded that the Governor's Office has approved the hiring of 37 new staff in the Oil and Gas Program, however, given the current economic situation of the state, those positions will be added in phases to ensure the Department is not moving ahead of economic activity.

Mr. Heine inquired about the number of oil and gas well permit applications the Department projected it would receive and the costs associated with those permits. Deputy Secretary Roberts responded that the Department anticipates receiving 40,000 applications in the next three years, and that the estimate includes applications for all types of oil and gas wells, not just Marcellus Shale wells. In terms of costs, Deputy Secretary Roberts explained to the Board that there are different fee schedules included in the proposed rulemaking and they differentiate based on the type of well to be drilled. Mr. Heine also inquired if there are funds currently available for the Department to hire inspectors now. Deputy Secretary Roberts responded that the Department has been working with the Budget Office to identify funding sources and that the Department is hopeful it can begin hiring inspectors in February 2009.

Mr. Manfredi stated that he likes that the fees in the rulemaking are projected to meet the costs of program administration and that the fees are structured based upon the time it takes to review an application, which appears to increase as the bore length and feet of the well increase. He inquired if the state of New York conducted any analysis that showed the correlation between the time it took staff to review an application and the bore feet of the proposed well. Deputy Secretary Roberts responded that the Department didn't base its proposal on New York's program but rather analyzed how to establish the most equitable fee possible that would generate funds necessary to administer the program. Mr. Manfredi also inquired if the Department is establishing any guarantees on the length of time it will take to review a permit application and if it is examining ways it can simplify the permitting process. Deputy Secretary Roberts responded that the Department is working through those issues and is meeting regularly with industry to discuss proposals that would reduce the overall length of the permitting process from over 150 days to less than 90 days. Mr. Manfredi inquired if the Department considered the use of a set permit fee and holding some amount in escrow for an expedited review of an application if the administrative costs became too great for the program. Deputy Secretary Roberts responded that the Department did not consider a set fee for expedited permitting of complex applications. Acting Chairperson Sexton responded that there are certain environmental agencies that don't establish a set permit fee but rather charge all of their costs back to the permit applicant. Acting Chairperson Sexton noted that she envisions this approach would cause the Department and the regulated community problems as industry generally prefers predictability concerning the permit fees they are expected to pay.

William Capouillez inquired if the Department considered the staff and overhead costs associated with a PNNDI review when it established the fees in the rulemaking. Deputy Secretary Roberts responded that PNNDI reviews are not completed by the Department and that the fee package for the Board's consideration addresses the staffing and administrative needs of the Department. Mr. Capouillez stated for the record that the PA Game Commission handles the birds and mammals aspect of PNNDI review with

one person with a 30-day review time and noted that the PNDI review process may be limited by the resource agency conducting the review due to limited staff, one of which will be the PA Game Commission. Acting Chairperson Sexton acknowledged Mr. Capouillez's comment and responded that the concerns associated with PNDI reviews are not just limited to gas well permit applications.

Mr. Fox inquired that if the final-omitted rulemaking moves forward, as well as the proposed rulemaking, if the regulated community would be faced with two sets of fees. Deputy Secretary Roberts responded that the fee schedule included in the final-omitted rulemaking is included in the proposed rulemaking. Acting Chairperson Sexton also responded that the final rulemaking as presented would be promulgated in the Pennsylvania Code and would stand as a regulation until changed by a proposed rulemaking. Mr. Mather responded that the fees established through the final-omitted rulemaking may undergo adjustments and modifications based upon the comments the Department receives during the public comment period for the proposed rulemaking. He further noted that the final-omitted rulemaking will be amended or modified, but not repealed, and that there will only be one set of fees after the proposed rulemaking is finalized. Acting Chairperson Sexton noted Mr. Henderson's concern with the use of the final-omitted process to establish fees for Marcellus Shale wells and stated that the circumstances the Department is currently facing are unique as it needs to add staff immediately to its complement to keep up with permit reviews and, most importantly, inspections. Acting Chairperson Sexton also stated that she does not envision the Department will routinely use the final-omitted process to establish or amend fees, but noted that the fees included in the final-omitted package were reviewed by the Oil and Gas TAB and would be subsequently reviewed during the public comment period of the proposed rulemaking.

Mr. Henderson stated for the record Senator Mary Jo White's concerns with establishing fees through a final-omitted rulemaking process. While he acknowledged that the current fees are antiquated as they have not been increased in 24 years, he maintained Senator White's concern whether the matrix of fees the Department has proposed is equitable and the best way to cover program costs. He further noted that the public and industry deserve an opportunity to comment on the fee increases. He also noted that in spring 2008, Governor Rendell supported a fee increase of \$1500 across the board for the oil and gas industry and noted that there are different approaches to cover program costs and various opinions on how much money is necessary to sustain the oil and gas program. Mr. Henderson also stated concern about the timing and effective date of the final-omitted rulemaking. He explained to the Board that if the final-omitted rulemaking is adopted at today's meeting, under the Regulatory Review Act, the Department must wait until at least the fourth week of January to submit the rulemaking to the Senate Environmental Resources and Energy Committee, which then has a minimum of 20 days to review the rulemaking. With that schedule in mind, Mr. Henderson noted that the Board would be looking to at least early Spring 2009 before the final-omitted rulemaking could be finalized and adopted; however, if the Board were to adopt the Marcellus Shale fee rulemaking as a proposed rulemaking, the Department could use the interim five or six weeks as a comment period from industry and the public on whether the fee proposal is appropriate. In conclusion, Mr. Henderson noted Senator White's concern about the precedent that the Department may be creating by establishing fees through a final-omitted rulemaking process.

Mr. Manfredi inquired about Mr. Henderson's comments. Mr. Mather responded that Mr. Henderson's change would amend the motion before the Board which would convert the final-omitted rulemaking into a proposed rulemaking. Mr. Mather noted that because of procedures mandated by the Regulatory Review Act, the Department could not finalize the Marcellus Shale fee increases through a proposed rulemaking as expeditiously as Mr. Henderson alluded. If the final-omitted rulemaking were converted into a proposed rulemaking, the Department would be required to provide a public comment review period for the rulemaking, and finalize the rulemaking by presenting it for consideration to the EQB. These steps would add considerable time to the processing and finalization of the regulation. In

comparison, Mr. Mather noted that if the final-omitted rulemaking is approved today, it is feasible the Department could begin collecting the fees at the end of March or April 2009; however, if the rulemaking is processed as a proposed rulemaking, the Department may not be able to collect fees until late summer or early fall 2009. In conclusion, Mr. Mather noted the Department's need to begin assessing the new fees in the first quarter of 2009 in order to cover program administration costs. In turn, Mr. Henderson responded that if the final-omitted rulemaking were to be converted to a proposed rulemaking, the rulemaking could be delivered in a matter of days to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin, which would start a 30-day public comment period on the proposal. Mr. Henderson further noted that the Department could use the balance of December and early January 2009 for the comment period of the proposal. He also commented that he doesn't believe converting the regulation into a proposed rulemaking adds additional steps for the Department and believes the Department could still finalize the regulation expeditiously, in line with the same time frame it would take to finalize the final-omitted rulemaking. .

In conclusion, Dr. Watson commented on the need to move ahead with a fee package now to support a streamlined regulatory process for industry before they decide to move outside of the state.

Mr. Henderson moved to convert the final-omitted rulemaking into a proposed rulemaking with a 30-day public comment period. Mark Brown seconded the motion. The motion was defeated by a majority of the Board members. The following Board members voted to adopt the amendment: Mr. Henderson, Mr. Manfredi, Mr. Brown, and Mr. Fox.

Joanne Denworth moved to approve the final rulemaking with proposed rulemaking omitted. The motion was seconded by Mr. Strong. The motion was approved by a majority of the Board members. The following Board members voted in opposition to the motion: Mr. Henderson and Mr. Brown.

PROPOSED RULEMAKING– OIL AND GAS WELL PERMIT FEES (25 Pa Code, Chapter 78)

J. Scott Roberts, Deputy Secretary for Mineral Resources Management, provided an overview of the proposed rulemaking to the Board. Ron Gilius, Director of the Bureau of Oil and Gas Management, and Scott Perry, Counsel to Oil and Gas Program, assisted with the presentation.

Acting Chairperson Sexton invited Dr. Robert Watson, Chairman of the Oil and Gas Technical Advisory Board, to address the Board. Dr. Watson stated that he had no additional comments for the Board's consideration.

Ms. Chinchilli inquired if the Department received comments from the Oil and Gas Technical Advisory Board concerning the adequacy of the 30-day comment period and if the Board thought a 60-day public comment period would be more useful. Deputy Secretary Roberts responded that the Department didn't specifically discuss the length of the comment period with the Advisory Board. In response, Ms. Chinchilli inquired if any of the Advisory Board members raised concerns about the duration of the comment period. Deputy Secretary Roberts responded that he wasn't aware of any concerns with the duration of the comment period.

John Arway referenced the earlier conversation about costs associated with PNDI work and noted the importance of integrating other agency costs into the fee structure. Mr. Arway also noted that he hopes the Department stays open to considering fees that reflect the total costs of the permitting process, rather

than just the costs of the Department. Deputy Secretary Roberts responded that the Department would be open to those comments as well as any others. Ms. Denworth commented that the Governor's Office has been working closely with all of the resource agencies associated with PNDI reviews and is very aware of the need for staff within these agencies to conduct the reviews.

Mr. Henderson inquired about what other fees a Marcellus Shale permit applicant is required to pay in addition to the Department's fees. Deputy Secretary Roberts responded that there are other fees, such as those assessed by relevant River Basin Commissions, fees for erosion/sediment control plans through County Conservation Districts, and possibly township fees. Ms. Denworth responded that the Governor's Office has collected a summary of all of the applicable fees associated with Marcellus Shale development and would provide a copy to Mr. Henderson.

Mr. Capouillez inquired if there were any special considerations given to coal bed methane wells with regard to the fee structure. Mr. Gilius responded that coal bed methane wells are considered to be non-vertical wells with relation to the fee structure in the proposed rulemaking.

Ms. Denworth moved to approve the proposed rulemaking with a 30-day public comment period. Ms. Chinchilli seconded the motion. The motion was approved by a majority of the Board members. Mr. Brown voted in opposition to the motion.

PROPOSED RULEMAKING – UNDERGROUND STORAGE TANK OPERATORS TRAINING REQUIREMENTS (25 Pa Code, Chapter 245)

Thomas Fidler, Deputy Secretary for Waste, Air and Radiation Management, provided the Board with an overview of the proposed rulemaking. Ken Reisinger, Director of the Bureau of Waste Management, Charlie Swokel, Manager of the Storage Tank Division, and Kurt Klapkowski, Counsel for the Storage Tank Program, assisted with the presentation.

Mr. Heine moved to adopt the proposed rulemaking with a 30-day public comment period. Lee Ann Murray seconded the motion, which was approved unanimously by the Board.

PROPOSED RULEMAKING – ADHESIVES, SEALANTS, PRIMERS AND SOLVENTS (25 Pa Code, Chapters 121, 129 and 130)

Thomas Fidler, Deputy Secretary for Waste, Air and Radiation Protection, provided an overview of the proposed rulemaking. Joyce Epps, Director of the Bureau of Air Quality, and Kristen Furlan, Assistant Counsel for the Air Quality Program, assisted with the presentation.

Mr. Arway moved to adopt the proposed rulemaking with a 60-day public comment period and three public hearings. Ms. Carrow seconded the motion, which was unanimously approved by the Board.

OTHER BUSINESS:

Under Other Business, Acting Chairperson Sexton updated the Board on the status of several proposed rulemakings, including the Safe Drinking Water Groundwater Rule, the Stage II Disinfection and Disinfectants Byproducts Rule and the Long Term Enhanced Surface Water Treatment Rule. In addition,

she noted that Board members received copies of correspondence which were sent to IRRC and the Standing Environmental Resources and Energy Committees withdrawing the Diesel Vehicle Idling final rulemaking and the Clean Air Interstate Rule (CAIR) – Repeal final-omitted rulemaking from consideration. In response to the Board’s withdrawal of the rulemakings, Mr. Heine inquired who authorized the decision to withdraw the rulemakings. Mr. Mather responded that the Chairperson of the Board has the ability on behalf of the Board to make intervening decisions on regulations under review under the Regulatory Review Act and to inform the Board of such decisions and what was accomplished at the next EQB meeting.

Concerning the withdrawal of the Diesel Vehicle Idling rulemaking, Mr. Mather noted that there is no written policy that provides direction on the steps to take if the Board adopts a regulation and the General Assembly in the interim passes legislation which closely mirrors the state regulation. However, he noted that the Department worked very closely with the legislature to develop the legislation to accomplish everything that the regulation did. There are some differences between the regulations and the statute; however, rather than invoking confusion in the regulated community, it was decided to withdraw the rulemaking. Mr. Heine inquired if the regulation was not withdrawn, if it would be in effect now. Mr. Mather responded that the Standing Committees were closely monitoring the rulemaking and the legislation and on October 8, 2008, the Senate Standing Committee provided notice to IRRC and the EQB Chairperson that it intended to further review the rulemaking so the committee would have an opportunity to see how the statute and regulations worked together. The committee also wanted to see if the regulations were necessary in light of the statute which contained the same level of detail as the regulations.

Mr. Heine inquired why the Department could not allow the regulations to stand as is, and then possibly amend the regulations in the future based upon the differences provided in the new state law. Mr. Mather responded that statutes authorize the Board to adopt new regulations if necessary. The General Assembly has the superior right to enact legislation that can supplant regulatory requirements and in this specific case, the General Assembly enacted a relatively detailed statute. Deputy Secretary Fidler responded that without the rulemaking process, the Department would not have seen the specificity and detail in the statute that eventually was passed and enacted. He further noted that Department staff worked very closely with the Legislative Committees that drafted the legislation and felt it was acceptable.

Mr. Henderson indicated that he agreed with Mr. Heine that there needs to be timely communication with and between the Board Chairperson and the Board when the Chairperson acts on behalf of the Board. Acting Chairperson Sexton responded to Mr. Henderson’s comments by reminding the Board of a policy that was previously adopted by the Board that gives the Chairperson certain abilities to take intervening actions when there is not a Board meeting. Mr. Mather responded that while notification to Board members could be accommodated, official business could not be deliberated on, absence of a formal meeting, due to the requirements of the Sunshine Law. Nevertheless, Mr. Heine expressed his concern over how and when the Board was notified of the Chairperson’s decision to withdraw the rulemakings. In light of Mr. Heine’s concerns, Mr. Fox suggested that in the future it be made clear in correspondence and otherwise that any intervening acts by the Chairperson are made “on behalf of the EQB”. Acting Chairperson Sexton recognized Mr. Fox’s comment for the record and noted that a copy of the policy she referenced would be distributed to the Board for its review.

Mr. Henderson requested an update on the Triennial Review of Water Quality Standards final rulemaking. Mr. Mather responded that the rulemaking was disapproved by IRRC on November 20, 2008. In response to the disapproval, Mr. Mather clarified that the Department must decide whether to withdraw the regulation, modify it, or move forward with the regulation unchanged. If the Department decides to

modify the regulation or proceed with the regulation unchanged, the Department must respond to IRRC and the Standing Committees with a written report and the rulemaking no sooner than the fourth Monday in January 2009. Mr. Mather noted that to date a decision has not been made by the Department concerning the rulemaking.

Concerning the withdrawal of the CAIR-Repeal final-omitted rulemaking on November 19, 2008, Acting Chairperson Sexton noted to the Board that the rulemaking was withdrawn due to recent indications by the U.S. Court of Appeals for the District of Columbia that it may delay the effectiveness of its CAIR vacatur decision. Mr. Mather noted that if such a delay occurs, states may be able to implement their CAIR rules for at least some period of time. If the vacatur is stayed, Mr. Mather noted that the Department must be in a position to respond to the court's ruling. In conclusion, Mr. Mather noted to the Board that the Department is closely monitoring further developments associated with the CAIR rulemaking.

ADJOURN:

Acting Chairperson Sexton announced that the next meeting of the EQB would occur on Tuesday, January 20, 2009, at 9:00 a.m. in Room 105 of the Rachel Carson State Office Building, Harrisburg, PA.

With no other business before the Board, Acting Chairperson Sexton adjourned the meeting at 10:50 a.m.