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## ENERGY AND ENVIRONMENTAL LAW

### Environmental Quality Board: Is It Time to Make It Truly Independent?

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*Special to the Legal*

When Dr. Maurice Goddard and others set about designing the commonwealth of Pennsylvania's first environmental agency in 1970, it probably seemed innovative to create an "independent" body to promulgate regulations for the Department of Environmental Resources (DER). Thus came into being the Environmental Quality Board (EQB), a 20-member body made up of 11 government agency representatives, four legislative representatives and five citizens designated by the Citizens' Advisory Council. Unlike almost all other executive agencies, DER (now the Department of Environmental Protection, or DEP), would not promulgate its own regulations. That



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job would fall to the EQB, which was assigned the power and duty "to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the

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proper performance of the work of the department,” 71 PA. STAT. ANN. Section 510-20(b) (West 2017) (emphasis added).

Now, nearly 50 years later, one may question whether the EQB is discharging its duties in the manner envisioned by its creators, or ever has. While the EQB has several other duties, the promulgation of regulations has been its

primary role. However, the board has had little or no staff throughout its history, usually limited to one “regulatory coordinator.” DEP staff drafts (i.e., formulates) proposed regulations. DEP staff then drafts the comment/response document, prepared in response to public comments, without conferring with the EQB. Ultimately, it is even DEP staff that appears before the Independent Regulatory Review Commission (IRRC) to explain or defend the proposed regulations. Moreover, at EQB meetings, the attorney acting as legal counsel to the EQB is an attorney from the Bureau of Regulatory Counsel—an office within the DEP Office of Chief Counsel. EQB members usually receive regulations and related materials, which are sometimes voluminous, about two weeks before a scheduled meeting, where the agenda is controlled by DEP, and DEP staff explains the content and purpose of the proposed regulations. One can legitimately question how much independent analysis EQB members, who have other duties in their “day jobs,” can perform. Suffice to say, it is clear that the EQB does not actually “formulate” regulations.

Over the years there have been suggestions that the EQB is just window dressing, creating an illusion of independence where none exists, and that DEP should formally promulgate its own regulations. Examining the events leading to the recent promulgation of certain regulatory amendments suggests that there may be some merit to these suggestions.

At its Aug. 27, 2013, meeting, the EQB approved proposed amendments to regulations relating to oil and gas regulations, codified at 25 PA Code, Chapter 78, to address both conventional and unconventional operations. In July 2014, the General Assembly passed Act 126-2014, Act of July 10, 2014, P. L. 1053, No. 126, requiring that regulations for conventional oil and gas operations be separated from those for so-called unconventional operations. In response, on April 4, 2015, DEP (not the EQB) published an advanced notice of rulemaking (ANFR) in the Pennsylvania Bulletin announcing the availability of a new draft of the regulation, available on the DEP website. This new draft split the regulatory package into two chapters and added several new provisions. There was no EQB

meeting or vote to approve this revised text.

Following more public comment, DEP made changes to the ANFR text and presented the two-chapter text to the EQB at its Feb. 3, 2016, meeting. After rejecting several amendments offered by the legislative representatives on the Board, the EQB approved the package as presented by DEP. That two-chapter package was duly presented to the Independent Regulatory Review Commission (IRRC) as one rule-making package numbered #7-484 and was approved on April 21, 2016.

The two-chapter package, as approved by the EQB and IRRC, was presented to the Office of Attorney General (OAG) for its statutorily mandated review on June 27, 2016. However, in the interim, Act 52-2016, Act of June 23, 2016, P.L. 375, No. 52, had become effective, essentially abrogating the Chapter 78 regulations. Accordingly, OAG directed the DEP to alter the text approved by IRRC eliminating most of Chapter 78 and making some minor changes to Chapter 78a. The DEP made those changes. The preamble published on Oct. 8, 2016, 46 Pa. Bull. 6431, clearly outlines the

interaction between the OAG and DEP to arrive at the final text; an interaction that was entirely appropriate between the OAG and a promulgating agency. However, the DEP is not supposed to be the promulgating agency.

The agency authorized to promulgate regulations, the EQB, did not vote to approve changes to the two-chapter package it had approved on Feb. 3, 2016. The new text as published in the *Pennsylvania Bulletin* on Oct. 8, 2016, was thus not approved by the EQB; in fact, there were no EQB meetings in July, August or September 2016, to even discuss approving the changes made as a result of Act 52. As has probably occurred numerous times over the years, the EQB merely played a ceremonial role in the promulgation of the regulations, while, DEP actually promulgated the final version of its own regulations.

Whether the above process makes the regulations invalid is a question for another day. However, it is clear that the EQB is not playing the independent role to formulate and promulgate regulations that its creators envisioned. Rather than continue the “independence” fiction, perhaps it is

time to give the EQB the resources necessary to truly function as an independent body.

There may be another reason to consider giving the EQB sufficient resources to function as an independent entity. In 1970, the legislature assigned the EQB another long-forgotten role—developing a master environmental plan for the commonwealth. 71 PA. STAT. ANN. § 510-20(a) (West 2017) Largely promulgated in 1977, see generally 25 PA Code Chapter 9, and soon forgotten, the concept of an updated master environmental plan may be of greater relevance in light of the Pennsylvania Supreme Court’s pronouncements regarding the trusteeship duties that the commonwealth has under the Environmental Rights Amendment. See Pa. Const. Art. I, Section 27; *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (2017). The court has indicated that the trusteeship obligations rest with all agencies of the Commonwealth government. However, if each agency must, and is free to, divine its own view of the commonwealth’s trusteeship obligations, the potential for inconsistencies, duplication, and conflict is high.

Perhaps it would be appropriate for some entity to assume the task of developing an overall environmental strategy and proposing guidelines to help define the respective trustee roles of various governmental entities consistent with the powers assigned to them by the General Assembly and the obligations imposed by Article I, Section 27. Given the broad and diverse agency membership, legislative representation on the EQB, and the fact that nearly fifty years ago the Legislature saw the need for a master environmental plan, the EQB would seem a logical choice, if properly staffed, to carry out this role.

Perhaps now is the time to finally realize Goddard’s vision by creating an independent, appropriately funded EQB, with sufficient staff to independently carry out all the tasks assigned by the General Assembly. •