

The Environmental Quality Board Evaluates Petition that Proposes Further Setbacks for Unconventional Oil and Gas Operators

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On October 22, 2024, the Clean Air Council (CAC) and Environmental Integrity Project (EIP) (collectively, “Petitioners”) filed a rulemaking petition with the Pennsylvania Environmental Quality Board (EQB) to increase minimum setback distances from unconventional oil and gas wells. The EQB is a 20-member independent board chaired by the Secretary of the Pennsylvania Department of Environmental Protection (PADEP) and is the body responsible for adoption of all PADEP regulations. Petitioners assert in their submission that alleged health impacts, in addition to alleged groundwater and surface water pollution, associated with unconventional oil and gas wells require the EQB to take action to increase minimum setback distances.

At present, Section 3215 of the 2012 Oil and Gas Act, 58 Pa.C.S.A. § 3215, establishes the setbacks from unconventional oil and gas wells, measured horizontally from the vertical well bore, at 500 feet from buildings and 1,000 feet from water supply extraction points, water wells, surface water intakes, and/or reservoirs. Petitioners seek to expand the current setbacks to require that any unconventional oil or gas well be at least 3,281 feet from any building and/or drinking water well, 5,280 feet from any building serving vulnerable populations, and 750 feet from any surface water of the Commonwealth. While the rulemaking petition does not explicitly define what constitutes “surface water,” it generally contends that the EQB’s authority to protect Pennsylvania’s water extends broadly over waters of the Commonwealth.

More specifically, the Petitioners have requested that the EQB promulgate regulations under Title 25 of the Pennsylvania Code, 25 Pa. Code §§ 78a.1, et seq., to increase the minimum setback distances, arguing that the EQB has broad authority under the Oil and Gas Act to promulgate regulations governing the development of oil and gas resources in Pennsylvania. Indeed, Section 3274 of the Oil and Gas Act is one sentence in length and simply states that, “[t]he Environmental Quality Board shall promulgate regulations to implement this chapter.” 58 Pa.C.S.A. § 3274. Several industry interest groups submitted comments to the EQB on the rulemaking petition on this point, arguing that the EQB lacks statutory authority under the Oil and Gas Act to expand, contract, or alter the statutory setback requirements.

The rulemaking petition submitted by Petitioners heavily relies on the 2020 43rd Statewide Investigating Grand Jury Report (Grand Jury Report), issued following an omnibus investigation overseen by then-Attorney General, now Governor, Josh Shapiro. The Grand Jury Report detailed the investigation into PADEP’s regulatory oversight of the fracking industry over a two-year period and analyzed findings that government agencies failed to exercise proper oversight of the unconventional oil and gas industry. As a result, the Grand Jury Report outlined eight recommendations for legislative, executive, and administrative action by the Commonwealth, the first of which was to “take action to expand the no-drill zone between fracking and homes from 500 to 2,500 feet and to adopt a more protective no-drill zone of 5,000 feet for schools and hospitals.” It is worth noting that in PADEP’s rebuttal to the Grand Jury Report, it highlighted that there were no findings of wrongdoing on PADEP’s part and stated that it failed as a “meaningful tool for improving the regulation of the unconventional gas industry” because the report was not informed by the applicable law or facts.

Before the EQB (or any government regulatory agency) can promulgate rules, there are several significant regulatory review steps petitions must work their way through before an agency can promulgate a rule that amends an existing regulation. Generally, the EQB has the authority to refuse to accept a rulemaking petition for review for a number of reasons, which include (1) whether the EQB has considered the issue within the previous two years; (2) whether the

action requested by the petition is currently in litigation; (3) whether the action requested is inappropriate for EQB review due to policy or regulatory considerations; or (4) whether the petition involves an issue previously considered by the EQB and the petition does not contain new information to warrant reconsideration. 25 Pa. Code § 23.5. As discussed below, the rulemaking petition submitted by Petitioners could potentially implicate one of the enumerated refusal bases, but it has yet to be seen how the EQB will move forward on the petition.

On November 21, 2024, PADEP made the administrative determination that the rulemaking petition itself complied with the EQB petition policy. That policy addresses administrative aspects of petitions including (1) that all rulemaking petitions to be heard by the EQB are complete, (2) that the petition requests an action to be taken that falls within the purview of the EQB, and (3) that the requested action does not conflict with federal law. 25 Pa. Code § 23.2. The determination on the part of PADEP that Petitioners rulemaking petition complied with the petition policy does not mean, however, that the EQB has accepted the rulemaking petition for review.

After PADEP determined that the petition was compliant, it recommended to the EQB that the EQB accept the petition for further study at the April 8, 2025 meeting of the EQB. At that meeting, Petitioners were given the opportunity to present to the EQB their reasons for why the EQB should accept their rulemaking petition. During their presentation, Petitioners heavily focused on the alleged adverse health and environmental consequences of unconventional oil and gas development. Despite the presentation, Public Utility Commission (PUC) Commissioner Kathryn Zerkus, a member of the EQB, moved to table the Petition, reasoning that she wished to give the EQB additional time to consider the petition given the complexity of the issues at stake.

To move the petition forward again, the rules of order prescribe that a member of the EQB will have to move to untable the petition to advance the petition for consideration at the next regularly scheduled EQB meeting. The EQB meeting scheduled for July 8, 2025, has been cancelled, and the next meeting is scheduled to take place on August 12, 2025.

If the EQB ultimately accepts the petition for review at the August EQB meeting, notice of acceptance will be published in the *Pennsylvania Bulletin* within 30 days of that decision. 25 Pa. Code § 23.6. Within 60 days of the EQB decision, PADEP will be required to prepare a formal report evaluating the petition and including a recommendation on whether the EQB should approve the action requested in the petition. *Id.* In the event PADEP needs additional time to prepare its report, it may take that time; however, PADEP would have to report to the EQB at its next regularly scheduled meeting how much additional time it will require to complete the report. *Id.* If the recommendation is to amend the regulation, the report shall specify the anticipated date the EQB would consider a proposed rulemaking. *Id.*

If issued, a copy of the PADEP final report will be sent to Petitioners, and the Petitioners may opt to submit a written response to the report for the EQB's consideration within 30 days. 25 Pa. Code § 23.7. If PADEP's report recommends regulatory amendments, it will prepare a proposed rulemaking within six months of sending the report to the Petitioners. 25 Pa. Code § 23.8. If no regulatory amendments are recommended, PADEP will present its report at the next EQB meeting that occurs at least 45 days after it mailed its report to the Petitioners. *Id.*

Thus, the timeline for complete review and decision making on the rulemaking petition is somewhat uncertain given the EQB's tabling of the issue and subsequent meeting cancellations. EQB action on the rulemaking petition has been largely administrative up to this point, so its substantive position on the rulemaking petition in the context of current setbacks from unconventional oil and gas wells remains to be seen.

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