INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER

Commissioners Voting:

George D. Bedwick, Chairman
John F. Mizner, Esq., Vice Chairman
John J. Soroko, Esq.
Murray Ufberg, Esq.
Dennis A. Watson, Esq., Dissenting

Public Meeting Held September 15, 2022

Order Issued October 11, 2022
Regulation No. 7-553 (#3260)
Environmental Quality Board
Water Quality Standard for Manganese and Implementation

On June 30, 2020, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Environmental Quality Board (EQB). The proposed regulation was published in the July 25, 2020 *Pennsylvania Bulletin* with a public comment period ending on September 25, 2020. The final-form regulation was submitted to the Commission on August 10, 2022.

The proposed version of this rulemaking deleted manganese and the existing criterion of 1.0 mg/L from Table 3 of Section 93.7 (relating to specific water quality criteria) and added manganese and the criterion of 0.3 mg/L to Table 5 of Section 93.8c (relating to human health and aquatic life criteria for toxic substances). Table 3 identifies a specific water use and was established for the protection of potable water supply use. Table 5 identifies organisms to be protected by the criterion, such as human health and aquatic life.

The proposed rulemaking also proposed two alternatives for point of compliance for the manganese water quality standard. The first alternative, as required by Act 40 of 2017 (Act 40), moved the point of compliance to the point of all existing or planned surface potable water supply withdrawals. The specific language of Act 40 that formed the basis for part of this rulemaking reads as follows:

> *The board shall promulgate regulations under the act of June 22, 1937 (P.L. 1987, No. 394) known as the "Clean Streams Law (CSL)," or other laws of this Commonwealth that require that the water quality criteria for manganese established under 25 Pa. Code Chapter 93 (relating to water quality standards) shall be met, consistent with the exception in 25 Pa. Code Section 96.3 (d) (relating to water quality protection requirements). Within ninety days of the effective date of this subsection, the board shall promulgate proposed regulations.* (See Section 1920-A (j) of the Administrative Code of 1929 (71 P.S. Section 510-20(j)).

Section 1920-A (j) of the Administrative Code of 1929 (71 P.S. § 510-20(j)).

The second alternative was to maintain the existing point of compliance in all surface waters, which is the point of discharge. The EQB sought comment on both alternatives. The

final-form version of this rulemaking eliminated the first alternative for compliance, maintained the existing point of compliance, and amended the numeric standard for manganese as described above.

In addition to Act 40, the EQB cites other environmental laws as part of its statutory authority for this final-form rulemaking. These laws include the Clean Streams Law (CSL) (35 P.S. § 691.1et seq.), the Administrative Code of 1921 (71 P.S. § 510-20 (b) and (j) and the Federal Clean Water Act (CWA) (33 U.S.C.A. § 1251 et seq.). The Board states that these statutes, and the regulations promulgated under those statutes, require the Department to protect the waterways of the Commonwealth.

After a review of the final regulatory package, disapproval letters submitted by the House and Senate Environmental Resources and Energy Committees (Committees), a letter from 61 legislators, written public comments and hearing statements from the EQB and others at our public meeting on September 15, 2022, we find that the rulemaking is not in the public interest for the following reasons.

***Statutory Authority and Legislative Intent* 71 P.S. § 745.5b(a).**

First, we find that the regulation does not comply with Act 40 and does not conform to the intentions of the General Assembly. Act 40 directs the EQB to promulgate regulations under the CSL or other state statutes that require the water quality criteria for manganese to be consistent with 25 Pa. Code § 96.3(d). This section provides as follows:

> § 96.3. Water quality protection requirements.
> ...
> (d) As an exception to subsection (c), the water quality criteria for total dissolved solids, nitrite-nitrate nitrogen, phenolics, chloride, sulfate and fluoride established for the protection of potable water supply shall be met at least 99% of the time ***at the point of all existing or planned surface potable water supply withdrawals*** unless otherwise specified in this title. [Emphasis added.]

This provision means that the point of compliance must be moved from where a discharge enters a stream to the point of surface potable water supply withdrawals.

The EQB explains that the CSL gives it the authority to more broadly regulate manganese by classifying it as a pollutant and adding a more stringent criterion (from 1.0 mg/L to 0.3 mg/L). Further, the criterion in this rulemaking is based on federal standards and that of the Pennsylvania Safe Drinking Water Act, which would fall under the "other laws of this Commonwealth" referenced in Act 40. These laws and standards do not classify manganese as a pollutant or toxic substance, nor does either require the EQB to classify it as such. However, in Act 40, the Pennsylvania General Assembly provided specific instruction for regulating the point of compliance for manganese.

The EQB further contends that Act 40 merely requires it to propose a regulation that would include an option for moving the point of compliance to the point of surface potable water

supply withdrawals, which is what they did. It argues that neither Act 40 nor any other law precluded it from including in the proposed regulation a second alternative to maintain the existing point of compliance (*i.e.*, the point of discharge) or to include only this alternative in the final-form regulation. The EQB relies on the following phrase in Act 40 to support this position:

> Within ninety days of the effective date of this subsection, the board shall ***promulgate proposed regulations.***

The EQB states that so long as it provided notice and an opportunity for comment to the public on the Act 40 alternative under the Commonwealth Documents Law (45 P.S. 1102, et al) (CDL) and the Regulatory Review Act (71 P.S. § 745.1, *et al.*) (RRA), then it was not obligated to proceed with that option despite the language of Act 40.

The EQB's position is misguided. The language of Act 40 is arguably ambiguous and a literal reading of it appears to direct the EQB to promulgate a proposed regulation without going through all of the procedural requirements of the RRA and the CDL. Therefore, it is appropriate to apply the Pennsylvania rules of statutory construction. The plain language of a statute prevails when it is "clear and free from all ambiguity." 1 Pa.C.S.A § 1921(b). Its interpretation cannot lead to an absurd result or one that is impossible to execute. *See* 2303 Bainbridge, LLC v. Steel River Building Systems, Inc., 239 A.3d 1107 (Pa Super. 2020).

Act 40 states that the EQB must "promulgate proposed regulations." Under the RRA, a "proposed regulation" is defined as:

> A document intended for promulgation as a regulation which an agency submits to the commission and the committees and for which the agency gives notice of proposed rulemaking and holds a public comment period pursuant to … the [CDL].

71 P.S. 745.3. Once the statutory process for reviewing a proposed regulation has completed, an agency can deliver a final regulation for action and ultimately, publication. "Promulgate" is defined as:

> To publish an order adopting a final-form or final-omitted regulation in accordance with…the CDL.

Id.

In reviewing both the RRA and the CDL in their entirety, it is clear that a proposed regulation can be published and made available for public comment, but it cannot be promulgated in Pennsylvania. Only a final regulation can be promulgated and published in the *Pennsylvania Code.* Accordingly, Act 40 cannot be reasonably interpreted to mean that so long as the EQB included in the proposed rulemaking one of two alternatives that contained language from Act 40, it could disregard the requirements of the statute in the final-form rulemaking. Act 40 can and should be read as "…the board shall promulgate regulations."

Moreover, since the language of Act 40 is not clear, the intention of the General Assembly is relevant. *See* 1 Pa.C.S.A. § 1921(c). By letters dated September 7, 2022, September 12, 2022, and September 13, 2022, the Committees and members of the General Assembly, respectively, made clear that their intent was for the EQB to promulgate a final-form regulation that incorporated the requirements of Act 40.

***Comments, Objections or Recommendations of a Committee* 71 P.S. § 745.5b(b)(5)**

Second, in its disapproval letter of September 13, 2022, the House Committee expressed concern that the EQB included two alternative and inconsistent points of compliance in the proposed rulemaking in violation of the RRA. This method was exacerbated by the fact the EQB disregarded the first alternative mandated by Act and proceeded with the second alternative in the final-form regulation. The House Committee determined that the process used at both the proposed and final stages of the regulatory review process violated both the letter and intent of the RRA and Act 40, and is not in the public interest.

***Compliance with the provisions of the Regulatory Review Act and IRRC regulations in promulgating the regulation*. 71 P.S. § 745.5b(b)(6)**

Third, in its proposed regulation, the EQB proposed two, completely different compliance alternatives within the same rulemaking. The House and Senate Committees contend that it was inappropriate for the proposed regulation to two offer such divergent alternatives for the regulation of manganese, including one which was directly contrary to the mandate of Act 40. We agree. Such an approach is neither envisioned nor authorized by the Regulatory Review Act. It fails to provide interested parties with a clear picture of what the final regulation will require of the regulated community, and therefore, deprives interested parties of a meaningful opportunity to prepare and provide appropriate comments.

***Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector* 71 P.S. § 745.5b(b)(1)(i)**

Fourth, our comments on the proposed rulemaking stated that the Regulatory Analysis Form (RAF) and the Preamble submitted with the proposal did not provide specific estimates of the costs or savings that may be experienced by the regulated community, local governments and state government. Our comments also recognized comments submitted by the Senate Committee on the proposed rulemaking that asked how the lower standard will affect the remediation of legacy acid mine drainage sites, bond forfeiture sites and the potential increased costs for state and local agencies related to public highway construction.

Based on our review of the final rulemaking, formal comments and objections submitted by the Committees, and comments from members of the General Assembly and the regulated community, it is unclear what the total economic or fiscal impact of the rulemaking will be to the Commonwealth, its political subdivisions, and to the private sector. We base this conclusion on the following points. First, despite the fact that the rulemaking will have a substantial fiscal impact on the regulated community, principally the coal industry, there is a discrepancy between costs as quantified by the EQB and separately by the coal industry. Second, the EQB has not

quantified potential costs associated with compliance for other dischargers of water such as such as non-coal mining operators, water and wastewater facilities, other industries and small businesses. Third, as noted by the Senate Committee in its objections to the final rulemaking, the EQB has "not done an assessment of the cost to DEP, the Commonwealth, and taxpayers should DEP treat to the proposed 0.3 mg/L toxicity standard." Fourth, it is not clear if it is technically feasible for some dischargers to meet the lower standard for manganese, which could force the closure of some of those businesses. The economic impact of this possibility has not been considered.

***Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.* 71 P.S. § 745.5b(b)(4)**

Fifth, compliance with the new standard by the regulated community, in particular, the coal industry could lead to higher costs of their product and increased costs for energy producers in the Commonwealth. We believe this rulemaking, and the potential it has for increasing energy costs in the Commonwealth, is a policy decision of such a substantial nature that it requires legislative review.

If the EQB amends and resubmits the rulemaking by moving the point of compliance as contemplated by Act 40, the EQB must quantify the fiscal impact this will have on the regulated community. First, this requires information on the savings that will be realized by dischargers of water. Second, it must provide information on the costs that will be shifted to those that withdraw water under the existing standard of 1.0 mg/L. Finally, information is required on the costs that will be shifted to those that withdraw water under the proposed standard of .3 mg/L. This information should be included with the report required to be filed with the resubmitted rulemaking.

We have determined this regulation is not consistent with the statutory authority of the EQB and the intention of the General Assembly. Additionally, after considering all of the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.

THE INDEPENDENT REGULATORY REVIEW COMMISSION

George D. Bedwick

George D. Bedwick, Chairman