



**BUREAU OF THE ENVIRONMENT
ENVIRONMENTAL QUALITY BOARD**

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**MINUTES
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
NOVEMBER 3, 1999**

I. General

On November 3, 1999, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the "Board") met by telephone. Members of the public participated at the Board's offices at 1615 Washington St., E., Charleston, West Virginia. Ed Snyder, Co-Chair, called the Environmental Quality Board meeting to order at 2:00 p.m.

The Board members also present were as follows:

Don Tarter, Co-Chair
Bob Jenkins

The absent members were as follows:

Betsy Dulin
David Samuel

Whereupon the Board addressed the issues set forth in the Agenda as follows:

I. Rulemaking

1. **Appendix E, Section 8.17.1.** Effluent limitation language for manganese. This language was proposed by the Legislature in 1998 in an effort to address the coal industry's concerns about the application of the human health manganese criterion in NPDES permits. EPA's concerns are that it allows relief from effluent limits for manganese, which is inappropriate for the water quality standards rule. It also allows the DEP, upon a showing by an applicant, to remove the Category Public A use from a stream. EPA's position is that only the Board, through the rulemaking process, can remove a designated use from a stream.

During the October 15, 1999 Environmental Quality Board meeting, when addressing the manganese issue, the Board directed Ms. Chatfield to include an exemption from the manganese criterion in the Proposed Emergency Rule which was then filed with the West Virginia Secretary of State's office on October 18, 1999. Leonard Knee, of Bowles, Rice, McDavid, Graff & Love, PLLC, presented the Board with the proposed exemption language. This exemption would have appeared in 6.2. Category A -- Water Supply, Public at 6.2.a. The manganese exemption read as follows: "The manganese human health criteria shall not apply where the discharge point of the manganese is located more than five mile upstream from a known drinking water source." The Secretary of State did not approve the manganese exemption portion of the Emergency Rule.

The purpose of this meeting was to allow the Board members to discuss with representatives of EPA, Bob Koroncai and Mary Kuo, the manganese issue and the proposed manganese exemption adopted by the Board.

EPA representatives reiterated their concerns regarding the 8.17.1 manganese language. Mr. Koroncai stated that there are two basic problems with this language. First, it essentially amounts to a removal of a water quality criterion for a body of water and that the language appears to allow the applicants to certify that the stream or stream segment is not Category "A" water. This is not consistent with the methods by which regulations are established by states with the authority to promulgate water quality standards. Only the Environmental Quality Board should have the authority to grant a removal of a water quality criterion for a body of water and that responsibility should not be delegated to the applicant as this language implies.

The other problem with the language is that it speaks to effluent limitation and appears to be an attempt to supercede the Clean Water Act and the National Effluent Guidelines for Manganese. EPA has the Effluent Guidelines which apply to every coal mine in the country and the verbiage of 8.17.1 seems to suggest that even those effluent limitations for manganese would not be applied.

EPA confirmed that there are economic variances for water quality standards available. If the applicant provides an economic review of how this water quality standard affects a certain facility in such a way that it creates a widespread social and economic impact, there would be justification for removing a particular water quality criterion from a particular stream site. This would be reviewed by both the Environmental Quality Board and the EPA, similar to a regular variance procedure. Such economic variances are available if the economic impact affects the citizens or community, not the company/applicant.

Next, Mr. Koroncai discussed the proposed language adopted by the Environmental Quality Board during the October 15, 1999 Board meeting. The manganese exemption read as follows: "The manganese human health criteria shall not apply where the discharge point of the manganese is located more than five mile upstream from a known drinking water source." .

Mr. Koroncai stated that simply removing a criterion or limiting the application of a criterion to a certain zone involving drinking water intakes but still applying a drinking water use category throughout the entire state, is not acceptable to the EPA. The Board must operate under the premise that there are designated water uses and implement water quality standards to protect those existing uses and the potential uses which may achievable .

The entire State has a use designation of Public Water Supply, yet it appeared to the EPA that the Board was looking to remove a manganese water quality standard that was intended to protect public water supply for all streams, except within five miles of a drinking water intake. The EPA questions how the Board protected that designated use which applies to all other parts of the State. The Board needs to have criteria which protects all the designated uses throughout the entire State.

As previously discussed, the EPA suggested that a temporary solution to the problem, until the Board implements the watershed approach based on the Zones of Critical Concern established by Bureau for Public Health, is the economic variance. If the applicant can provide documentation that the existing universally applied manganese criterion is causing an economic hardship, both the Board and the EPA could approve a variance. A problem exists with this approach because currently all variances must be acted upon by the Legislature.

The EPA reiterated that even when the Board imposes the public A designation which includes a buffer zone above existing water supplies, if a mine is discharging outside that public water supply zone, the State agency that issues the NPDES permits still has the obligation to ensure that any mine discharge meets the water quality standards of the stream it is discharging into but also any downstream waters.

Mr. Koroncai also reminded the Board that all streams are designated for aquatic life. At this time the EPA does not have a manganese aquatic life criterion, however, it should be completed within the next two years and at that time the EPA will insist that the Board adopt their numeric aquatic life standard for manganese.

At the conclusion of the dialogue between the Board members and the EPA representatives, the members of the audience were allowed to provide input. Mr. Bruce Levitt of Consol stated that the treatment for manganese removal is deleterious to aquatic life in the streams and is in fact more deleterious to the streams than the manganese itself. In order to remove the manganese from the stream the company must raise the pH level to a level that becomes a problem for the aquatic life in the stream.

Pavanne Pettigrew, of DEP, informed the Board and the EPA, that when these situations arise the DEP gives variances as high as 10 and 10.5 for pH levels. Mr. Koroncai informed Ms. Pettigrew that all regulators have an obligation to protect the streams. The numeric water quality criteria is one method used to do this. Any NPDES permit that is written needs to assure compliance with the numeric water quality criterion and if it does not the EPA will object to the permit. Mr. Koroncai assured Ms Pettigrew that in the future, the EPA will be closely monitoring these permits.

Further, Mr. Koroncai stated that even if there is not a numeric water quality standard, the regulators still have an obligation to meet other parts of the State water quality standards regulations. The DEP should not be issuing permits which they know are causing impairments to aquatic life down stream and the EPA will look into how these permits are being issued to ensure that the down stream aquatic uses are not being impaired.

II. Administrative Matters

1. Personnel matters

A. Staff performance evaluations:

The Board granted the staff members an additional two weeks to prepare their 360 performance evaluations.

2. Freedom of Information request in Appeal #99-03-EQB:

The Board was informed that a Freedom of Information Request has been filed by Mr. Paul G. Taylor who is an attorney located in Martinsburg, WV. He is requesting a complete copy of the information contained in the appeal book and the certified file in Appeal No. 99-03-EQB. The total number of copies would be approximately 4500 pages, and he has asked the Board to waive the fee based on the fact that his clients are living on a fixed income. Whereupon, Dr. Tarter moved and Dr. Jenkins seconded that the Board lower the fee to .12 cents per page, and the motion passed unanimously 3 to 0.

III. Appeals

1. Appeal #99-09-EQB (McClung)
2. Appeal #99-10-EQB (Mason)
3. Appeal #99-11-EQB (Knouse) - Pro Hac Vice Motion

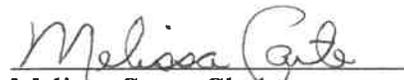
Becky Charles informed the Board that 3 appeals, #99-09-EQB, #99-10-EQB and #99-11-EQB, have been filed with the Board. These appeals are all regarding the permit which was issued to Knouse Foods. Whereupon, Dr. Tarter moved and Dr. Jenkins seconded that Ms. Charles send an Order to all parties, informing them that these appeals will be consolidated unless they file a written response by November 19th, 1999, which demonstrates good cause as to why the appeals should not be consolidated, and the motion passed unanimously 3 to 0.

Ms. Charles also informed the Board that in Appeal #99-11-EQB, a Pro Hac Vice Motion has been filed. This motion requests the admission of attorneys Scott A. Gould, Helen L. Gemmill and Curtis N. Stambaugh so that they assist in the above styled action now scheduled before the Board.

Whereupon, Dr. Tarter moved and Dr. Jenkins seconded that the Pro Hac Motion be granted to allow the attorneys to practice before the Board on behalf of Knouse Foods Cooperative, Inc. and the motion passed unanimously 3 to 0.

Whereupon, Dr. Tarter moved and Dr. Jenkins seconded that the November 3, 1999, telephone conference of the Environmental Quality Board be adjourned and the motion passed unanimously 3 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meeting held on November 3rd, 1999, by the West Virginia Environmental Board. These minutes were approved by the Environmental Board on November 29th, 1999.


Melissa Carte, Clerk