

**BUREAU OF THE ENVIRONMENT  
ENVIRONMENTAL QUALITY BOARD**

1615 Washington Street, East, Suite 301  
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**MINUTES  
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
NOVEMBER 29, 1999**

**I. General**

On November 29, 1999, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the "Board") met at its offices at 1615 Washington St., E., Charleston, West Virginia. Don Tarter, Co-Chair, called the Environmental Quality Board meeting to order at 9:00 a.m.

The Board members also present were as follows:

Ed Snyder, Co-Chair  
David Samuel  
Bob Jenkins  
Betsy Dulin

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

**I. Rulemaking**

1. 46 CSR 1 - Requirements Governing Water Quality Standards

a. USEPA recommendations from June 1999 letters to Board:

**Section 7.2.c.4.** "natural background" exception to application of numeric criteria. The exception allows the use of the natural background concentration of a parameter as the numeric criterion if the natural background concentration exceeds the established numeric criterion for the parameter. This provision has been disapproved by EPA because it automatically establishes site specific criteria

equivalent to background without 1) demonstrating that designated and existing uses are protected, 2) providing a procedure to ensure that natural background concentrations are determined accurately and reproducibly, 3) providing an opportunity for public review and comment on the criteria adjustments and 4) limiting the natural background policy to aquatic life.

Mary Kuo, a representative from the Environmental Protection Agency informed the Board that the State of Alaska has developed language or a provision which may be of assistance to the Board. Ms. Kuo stated that she would send the Board a copy of Alaska's Natural Background policy within the next few weeks.

After discussion, the Board elected to delay action on the Natural Background issue until it has the opportunity to review Alaska's policy.

**Section 7.2.d.8.1.** Site -specific criterion for selenium for Fly Ash Run. This disapproves one of several site-specific criteria approved by the Board for Allegheny Power Company's discharge into Fly Ash Run from the Albright Power Station. EPA's concern is that bio-accumulation of selenium may be occurring in aquatic life in the stream.

The company is working with the EPA in an attempt to reach an agreeable selenium value protocol. EPA is currently reviewing this proposal and all indications are that the EPA will approve this protocol. Upon that approval the Board will adopt the values that are a result of this testing.

**Appendix E. Section 8.1.** Lack of chronic aluminum criterion. EPA has disapproved the removal of the chronic aluminum value from the rule. OWR has submitted the data collected over the past year which demonstrates violations of the chronic and acute criteria in streams throughout the state. Benthic data has also been collected. Efforts to correlate the benthic data and aluminum data to determine the impact of the high aluminum values on aquatic life have been unsuccessful.

After reviewing the handout received from Century Aluminum during the September 30, 1999 Board meeting, Mary Kuo indicated that EPA would like additional information regarding the 87 ug dissolved chronic value proposed by Century Aluminum. Specifically, Ms. Kuo requested that they provide the

scientific rational, calculations, the data to support those calculations, and an example of the implementation.

**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.

Ms. Chatfield informed the Board that the manganese portion of the Emergency Rule has been disapproved by the Secretary of State. Consequently, the Board must revisit the issue.

The Board requested that Ms. Kuo provide information on how surrounding states such as Pennsylvania, Virginia and Ohio, deal with the manganese issue. Ms. Kuo noted that the language proposed by the Board in the Emergency Rule is not acceptable to the EPA because an exemption to the human health criteria in light of a statewide application of Category A does not reflect the intentions of the Clean Water Act. Criteria for the protection of human health are needed for waterbodies designated for public water supply, in order to support the designated use. Thus, if Public A is to be applied to all waters in the State, then human health criteria for pollutants, including manganese, need to be applied to all waters as well. The Board then asked Ms. Kuo work with Ms. Chatfield to create acceptable manganese language.

Ms. Chatfield also informed the Board that the Bureau for Public Health will be addressing manganese in their written comments submitted on the Public A issue which is scheduled for public hearing this evening at 7:00 p.m. In addition she will attempt to have a representative from the Bureau attend the December 16<sup>th</sup> and 17<sup>th</sup> Environmental Quality Board meeting.

The Board was also provided with a written comment regarding manganese standards from Jim Sconyers, which is made a part of and attached to these minutes as Exhibit "A".

**Appendix E, Section 8.22** Aquatic life criteria for chloroform and 1,1,2,2-tetrachloroethane. EPA is disapproving the revision of acute and chronic criteria for these criteria because the values adopted represent the lowest observed effect levels (LOEL) rather than EPA criteria. Because EPA has not developed aquatic life criteria for chloroform, removal of the disapproved values is appropriate.

Whereupon, Dr. Snyder moved and Ms. Dulin seconded that the Board remove the LOEL values, and the motion passed unanimously 5 to 0.

**Section 8.22.2.** Body Burden provisions. EPA is following up on their disapproval of the body burden provisions in November 1995. They reiterate in this letter that the existing body burden values for the 6 parameters are not consistent with the in-stream criteria.

In response to EPA's disapproval, the Environmental Quality Board filed a rule removing the body burden provision from the water quality standards rule. However, due to public response to this action the Board reconsidered that decision and in 1997, the Board appointed a study group to provide recommendations to the Board regarding the Body Burden issue. The EPA supported the findings of the study group and the Board filed an Emergency Rule regarding the Body Burden standards. However, the Legislature disapproved this proposed Legislative rule, thus leaving in place the rule previously disapproved by EPA.

Whereupon, Dr. Samuel moved and Ms. Dulin seconded that the Board remove the Body Burden provisions, and the motion passed 4 to 1, with Dr. Jenkins voting against the motion.

The Board then instructed Ms. Chatfield to provide them with another copy of the language prepared by a Body Burden study group for their review. Also the Board was informed that Jim Hanlon, of the EPA, is heading a study group which is attempting to establish MDL recommendations by February, 2000. This may provide future guidance to the Board on this issue.

b. USEPA Nutrient Criteria:

Ms. Chatfield provided the Board with an update on the regional effort, which is part of a national effort, to develop nutrient criteria. Ms. Chatfield also distributed a brief summary of the EPA guidance that has been issued. This summary is made part of and attached to these minutes as Exhibit "B".

c. USEPA Management Agreement:

Ms. Chatfield also distributed a USEPA Management Agreement which outlines EPA's effort to get States to consider adopting or replacing the fecal coliform limits with the E. coli and enterococci indicators that EPA posed in 1986. This issue will be discussed in the upcoming triennial review. This Management Agreement is made a part of and is attached to these minutes as Exhibit "C". Ms. Chatfield also provided the Board members with EPA's ambient water quality standards for bacteria for 1986. This document is made a part of and is attached to these minutes as Exhibit "D".

d. Blackwater River Use Removal:

The Blackwater Association is seeking relief from the TMDL which is based on cold water criteria. Mindy Yeager, representing the Blackwater River Watershed Association, appeared before the Board during the October 15<sup>th</sup>, 1999 Board meeting. After that presentation the Board requested additional data on the comparison of the fish surveys from 1950s and 1960s with current surveys. Ms. Yeager attended the Board meeting to present that information and to distribute an addendum to the Use Attainability Analysis given to the Board members during the October meeting.

Also, the Board members were presented with a letter from the West Virginia Rivers Coalition requesting the opportunity to appear before the Board during the January meeting to present opposing arguments to the Blackwater River Use Removal. A copy of that request is made a part of and is attached to these minutes as Exhibit "E".

The Board then directed Ms. Chatfield to contact the Elkins office of the DEP and to request their input into the Blackwater Use Removal request. In addition, Mary Kuo stated that the EPA is also reviewing the request.

The Board was also provided with a written comment on the Upper Blackwater River Use Removal from Jim Sconyers which is made a part of and attached to these minutes as Exhibit ("Exhibit A")

e. Update on antidegradation stakeholder group meetings:

Originally the stakeholder group intended to produce a document for the Board's consideration by the end of November. However, since there is a great deal of work which remains to be done on the document, the members decided to request an extension from the Board to allow them to continue the stakeholder process until April 2000. April 1, 2000 is the current deadline imposed by the EPA to address the outstanding disapprovals in the water quality standards rule.

Ms. Chatfield informed the Board that a draft letter had been prepared by the stakeholder group requesting that the Board extend the stakeholder process and to withdraw the current rule from consideration during the upcoming Legislative session. The group is making progress and is working together successfully. Additional time would allow them to address all of the issues identified at the beginning of the Stakeholder group process. The letter stated that the environmental community agreed not to follow through with their intent to sue until the conclusion of the stakeholder group process and that all parties agreed not to pursue legislation in the 2000 Legislative session.

Kathy Beckett spoke on behalf of Mike Brown who represents the point source community members on the stakeholder group. Although Ms. Beckett encouraged the Board to extend the stakeholder group process, the point source community members: the Coal Association, the Mining Reclamation Association, the Chamber and the Manufacturer's Association, have now decided not to support any agreement which precludes them from dealing with the antidegradation issue outside the stakeholder process. They are considering litigation and may also attempt to introduce an alternative document during the 2000 Legislative session.

John Johnston who is a deputy director for DEP, Randy Sovic who is a member of the stakeholder group, and Wayne Appleton who represents the Manufacturer's Association, also encouraged the continuation of the stakeholder group process and requested that the Board withdraw the current proposed legislation regarding anti-degradation.

Mary Kuo of the Environmental Protection Agency informed the Board that the April 1<sup>st</sup>, 2000, deadline imposed by the EPA requires only that the Board identify implementation procedures and that the rule does not have to be adopted or promulgated by that date.

An additional issue which has been raised by the stakeholder group is whether the Environmental Quality Board actually has the authority to promulgate the rule or whether it falls within the jurisdiction of DEP.

After discussion, the Board directed Ms. Chatfield to meet with Barbara Taylor and John Johnston to develop a position regarding which agency has the authority to promulgate the document. The Board requested Ms. Chatfield to present that information to the Board during the December 16<sup>th</sup> and 17<sup>th</sup> Board meeting.

Whereupon, Dr. Samuel moved and Dr. Snyder seconded that the Board withdraw the current proposed rule regarding anti-degradation from consideration during the 2000 Legislative session and continue with the stakeholder group process until April 2000, and the motion passed unanimously 5 to 0.

The Board directed Ms. Chatfield to contact the Legislative Auditor's office to inform them of the continuation of the Stakeholder group process and explain the Board's rationale for the extension.

## 2. Update on Emergency Rule:

Ms. Chatfield informed the Board that the Secretary of State did adopt the Public A emergency provisions but did not approve the proposed manganese language on an emergency basis. Ms. Chatfield then provided the Board members with a copy of the Emergency Rule Decision provided by the Secretary of State's office. A copy of this decision is made a part of and is attached to these minutes as Exhibit "F".

This evening at 7:00 p.m. the Board will conduct a public hearing on the Public A emergency rule. The deadline for written comments has been extended through Monday, December 6, 1999. Copies of these comments will be provided to the Board members prior to the December 16<sup>th</sup> Board meeting.

## II. Administrative Matters

### 1. Review and approval of meeting minutes:

#### a. October 15, 1999:

The minutes of the October 15, 1999 Environmental Quality Board meeting were presented to the Board for consideration. To provide clarification, the minutes were revised to provide that the Board members "also" attending the meeting were Don Tarter, Co-Chair, David Samuel and Bob Jenkins. Whereupon, Dr. Samuel moved and Dr. Jenkins seconded that the minutes of the October 15, 1999, Board meeting, as revised, be adopted and the motion passed unanimously 5 to 0.

#### b. November 3, 1999:

The minutes of the November 3, 1999, Environmental Quality Board teleconference were presented to the Board for consideration. To provide clarification, the minutes were revised to provide that the Board members "also" attending the meeting were Don Tarter, Co-Chair, and Bob Jenkins. Whereupon, Dr. Jenkins moved and Dr. Samuel seconded that the minutes of the November 3, 1999, Board meeting, as revised, be adopted and the motion passed unanimously 5 to 0.

### 2. Computer Update:

The Board was informed that a networking system is being installed in the office and that the e-mail system is being updated with the groupwise program. This work is being performed by DEP and will only cost the Board approximately one hundred dollars for a printer connection.

### 3. Personnel matters:

#### a. 360 Evaluations for Libby Chatfield and Becky Charles:

The Board Co-Chairs were provided with the 360 evaluations for Libby Chatfield and Becky Charles. The evaluations will be reviewed with the staff on December 16<sup>th</sup>, 1999.

b. 90 day Evaluation for Melissa Carte:

The Board Co-Chairs, in conjunction with the Chairman of the Air Quality Board, will complete the 90 day evaluation for Melissa Carte on December 16<sup>th</sup>, 1999.

4. Budget Report:

Ms. Chatfield informed the Board that she had originally scheduled Randy Taylor, of DEP to review the budget report with the Board members. However, Mr. Taylor was unable to attend the meeting and will be rescheduled for the next Board meeting.

5. Audit Report:

The Board was informed that the fiscal post audit is still being conducted and that there is no projected completion date for this project.

6. Meeting Dates:

The Board changed the February meeting date from February 11, 2000 to February 17, 2000.

7. Board Member Appointments:

Ms. Chatfield informed the Board that, to date, there is no new information regarding Board member appointments.

8. Pending Case Sheet:

The Board was provided with a pending case sheet which outlines the pending cases and the actions required on each.

### **III. Appeals**

1. Appeal #99-07-EQB (Lignetics):

Becky Charles presented the Board with a Proposed Agreed Order for this Appeal.

After review, Dr. Jenkins moved and Dr. Samuel seconded that the Board approve the proposed Agreed Order in Appeal #99-07-EQB (Lignetics) and the motion passed unanimously 5 to 0.

2. Appeal #99-08-EQB (Quala Systems):

Becky Charles presented the Board with a Motion to Withdraw Appeal #99-08-EQB (Quala Systems). After review, Dr. Samuel moved and Dr. Jenkins seconded that the Board approve the Motion to Withdraw Appeal #99-08-EQB (Lignetics), and the motion passed unanimously 5 to 0.

3. Appeal #99-09-EQB (McClung), #99-10-EQB (Mason) & #99-11-EQB (Knouse Foods) as combined:

Becky Charles presented the Board with a Motion for Continuance in Appeal #99-09-EQB (McClung), #99-10-EQB (Mason) and #99-11-EQB (Knouse) as combined. After review, Dr. Samuel moved and Dr. Snyder seconded that the hearing be continued until February 17<sup>th</sup>, 2000.

Ms. Charles also presented the Board with a Motion to Relocate Hearing (change of venue) in this combined appeal. However, to date, DEP's Office of Legal Services has not responded to this motion. The Board will provide the Office of Legal Services with the opportunity to do so before taking action on this motion.

4. Appeal #98-09-EQB (Wright):

During the October 15<sup>th</sup>, 1999 the Board directed Ms. Charles to communicate with the parties of this Appeal to determine whether the parties feel that the issues of the appeal have been resolved. Ms. Charles provided the Board members with the responses. After reviewing the responses and discussing the issues, the Board directed Becky Charles to draft a Dismissal Order for their review at the next Board meeting.

5. Appeal #99-06-EQB (Monongahela Power):

Ms. Charles informed the Board that the parties in Appeal #99-06-EQB (Monongahela Power) were submitting a Proposed Agreed Order to the Board

prior to the conclusion of the Board meeting.

#### **IV. Executive Session**

Whereupon, Dr. Samuel moved and Dr. Snyder seconded that the Board go into Executive Session to discuss the selection of twelve (12) candidates for telephone interviews and to update the hiring schedule. Upon return, the Board announced that no votes were taken during Executive Session.

#### **V. Other Business**

Whereupon, Dr. Samuel moved and Dr. Jenkins seconded that the November 29, 1999, Environmental Quality Board meeting be adjourned and the motion passed unanimously 5 to 0.

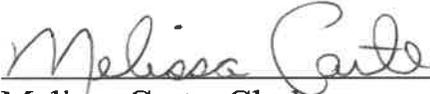
Board members Don Tarter, Ed Snyder and Bob Jenkins were present for the public hearing which was held that evening at 7:00 p.m. The purpose of the public hearing was to receive oral comments on the Emergency Rule regarding 46CSR1 - Requirements Governing Water Quality Standards which was filed with the Secretary of State's office on October 18, 1999. The proposed amendment clarifies that all water of the State are protected by the public drinking water designated use category. The Board was directed to review and revise the rule to clarify the application of category A by October 30, 1999. Passage of the emergency rule is necessary to extend the authority of the Water Quality Standards rule beyond the October 30, 1999 deadline.

A transcript of the public hearing is available at the Board office.

At the conclusion of the public hearing, Board members Tarter, Snyder and Jenkins reconvened to discuss the proposed Agreed Order in Appeal #99-06-EQB (Monongahela Power). After review, Dr. Tarter moved and Dr. Snyder seconded that the Board approve the Agreed Order, and the motion passed unanimously 3 to 0.

Whereupon, the November 29, 1999 meeting of the Environmental Quality Board was adjourned.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meeting held on November 29, 1999, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on December 16<sup>th</sup>, 1999.

  
\_\_\_\_\_  
Melissa Carte, Clerk

**Subject:** water standards  
**Date:** Wed, 20 Oct 1999 14:30:21 +0100  
**From:** Jim Sconyers <jims@wvsierra.org>  
**To:** chatfe@mail.wvnet.edu

Libby Chatfield, EQB  
email: chatfe@mail.wvnet.edu

Dear Ms. Chatfield:

I am concerned about proposals to weaken standards protecting water quality in West Virginia rivers and streams. In particular I am referring to two issues.

1. Downgrading the designated use of the Upper Blackwater River.

It is well known that the upper Blackwater is a functioning native trout stream. Numerous people can attest to that fact, having fished there and caught native trout. The proposal to downgrade the designated use is completely inappropriate, if not downright ludicrous. The Clean Water Act requires that water quality necessary to maintain use of the river as a trout stream must be maintained. I urge you and the EQB to continue to insist that the Clean Water Act be respected and enforced through continued designation of the upper Blackwater as a trout stream.

2. Manganese standards.

There are already communities that must treat their water for manganese pollution to make it potable. Any weakening of manganese standards, or dropping them altogether for drinking water, is unfair and improper. As it is, these communities are paying to restore water quality, rather than requiring that the manganese pollution be eliminated by the coal mines that cause the problem.

/s/ Jim Sconyers  
West Virginia Sierra Club

EXHIBIT "A"

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

November 8, 1999

**SUBJECT:** EPA DRAFT GUIDANCE DOCUMENT FOR  
STREAMS AND RIVERS

**FROM:** IFEYINWA DAVIS, Nutrient Coordinator 

**TO:** MEMBERS OF THE REGION III NUTRIENT TEAM

The attached article was published in the October 27, 1999 edition of "*Inside EPA'S Water Policy Report*" and may be of interest to you.

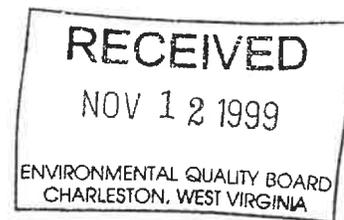


EXHIBIT "B"

### States must develop programs

#### **EPA DRAFT RIVERS AND STREAMS GUIDANCE REQUIRES NUTRIENT STANDARDS**

EPA has released a draft nutrient guidance for states and tribes which would require water quality regulators to establish outlines for the development of regionally-based numeric nutrient criteria for rivers and streams.

The guidance is the second in a series of waterbody specific nutrient guidances which are designed to assist states and tribes in setting nutrient criteria which will protect the designated uses of their water bodies.

States sources could not be reached for comment.

EPA released its *Nutrient Criteria Technical Guidance Manual: Rivers and Streams*, dated Sept. 1999, earlier this month as required under the Clean Water Action Plan and the National Strategy for the Development of Regional Nutrient Criteria. The goal of the guidance is to provide scientifically defensible technical guidance to assist states and tribes in developing regionally based numeric nutrient criteria for rivers and streams.

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***The guidance stresses the importance of ongoing monitoring of stream systems in order to determine the effectiveness of existing measures.***

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The first step under the guidance is for the state or tribe to establish exactly what its water quality needs and goals are for its rivers and streams. Setting well-defined needs and goals, according to the guidance, helps to determine the criteria development process and which water quality goals are feasible. These goals are also used as benchmarks to determine the success of a program throughout the development process.

The guidance also asks states and tribes to classify its rivers and streams into groups with similar properties as a means of assisting in setting appropriate criteria for specific regions and stream system types. These classifications can also aid in developing management and restoration strategies. The classifications can assist states in creating nutrient control strategies by including factors such as land use characteristics, geology and identification of specific point and nonpoint nutrient sources.

This classification approach consists of two parts: an initial classification based largely on a stream's physical parameters, such as climate, geology, and system size; the second phase of the approach further classifies the streams based on trophic characteristics (such as nutrient concentrations and algal biomass), as well as turbidity, land use, and human disturbance parameters.

The guidance outlines the next step towards developing effective nutrient criteria as selecting the variables that can be used to evaluate the degree of eutrophication in a water body. Measuring these variables, such as total nitrogen or phosphorus, can form the basis for regional, waterbody specific nutrient criteria. The guidance then describes methods for developing effective sampling programs to provide data for regions where available data is insufficient to derive criteria.

Once sufficient data is obtained, the guidance details means of developing a database of nutrient and algal information which can then be analyzed in order to determine the scientific defensibility and effectiveness of criteria. The guidance includes means of linking relationships between nutrient loading and algal growth, use of computer models, and statistical analyses which are used to evaluate compiled data.

The guidance document also contains a number of methods which water quality managers may use to select numeric criteria for their ecoregions. These include the use of reference streams, using predictive relationships to select desirable nutrient concentrations, and deriving criteria from thresholds in existing literature.

The guidance also provides means for classifying streams into three separate categories according to their need to be addressed by management solutions to nutrient related problems. These three categories consist of those water bodies which require extensive restoration, those with strong potential to develop nutrient problems, and those which have low potential for problems and do not adversely impact downstream waterbodies. This classification process allows the state or tribe to prioritize the order in which the streams need to be addressed.

Following prioritization it is important for a management plan to be developed to aid in the restoration of impaired streams. The guidance goes into general descriptions of methods which can be used to manage stream flow conditions, such as low flow or flooding, but focuses more on existing regulatory programs designed to address point and nonpoint source pollution problems. This discussion covers such regulatory programs as the National Pollutant Discharge Elimination System permits and total maximum daily loads to clean up impaired waters.

The guidance also stresses the importance of continued monitoring of river and stream systems in order to reassess goals and determine the effectiveness of existing measures.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEV

OCT 18 1999

MEMORANDUM

OFFICE OF  
WATER

SUBJECT: FY 2000-01 Management Agreements

FROM: Geoffrey H. Grubbs, Director  
Office of Science and Technology

TO: Water Management Division Directors  
Regions 1-10

The purpose of this memorandum is to call to your attention a commitment the Agency has made for developing management agreements with the States beginning with FY 2000, and to offer our assistance in achieving it.

In March 1999, the Agency issued the *Action Plan for Beaches and Recreational Waters*. This plan contained a comprehensive set of actions, including the following:

The transition to *E. Coli* and enterococci indicators will be a priority for the triennial reviews of water quality standards that will occur in FY 2000-2002. **Beginning with FY 2000, EPA Headquarters and Regional Offices will develop management agreements with the states and tribes that will include commitments to have states and tribes adopt the *Ambient Water Quality Criteria for Bacteria—1986*.** Where a State does not amend its water quality standards to include the 1986 criteria, EPA will act under Section 303(c) of the Clean Water Act to promulgate the criteria with the goal of assuring that the 1986 criteria apply in all states not later than 2003. (Emphasis added)

As you know, the 1986 criteria recommend the use of *E. coli* and enterococcus indicators, which have been found to have a much stronger scientific basis to protect human health than criteria using fecal coliform bacteria. Implementing the management agreements will complete a process that began thirteen years ago when these risk-based criteria were first issued, and that was reinforced more recently in Robert Perciasepe's January 13, 1997, letter to states and tribes, in the President's 1998 *Clean Water Action Plan*, and in the Office of Science and Technology's (OST's) January 1999 *Guidance to States, Tribes, and Regions on Priorities for the Water Quality Standards Program for FY 2000-2002*. The need for the management agreements was referenced in the Office of Water's April 1999 *National Program Guidance for the Office of Water*, but not explicitly listed as a management measure.

EXHIBIT "C"

Please keep us informed of your progress in completing these management agreements. As part of these management agreements, each region should establish a schedule for State and Tribal adoption of the 1986 criteria. You may provide this information by November 30, 1999 to Jennifer Wigal of the Water Quality Standards Branch at 202-260-5177. This information should include, for each state, the date by which the Region expects the State to adopt the 1986 criteria into their water quality standards.

Later this year we will be issuing policy guidance to assist states and tribes in adopting the 1986 criteria. I would like to offer the assistance of OST staff in any way we can to facilitate the process for states and tribes to adopt these criteria. Please have your water quality standards coordinator work with their headquarters liaison in the Water Quality Standards Branch, or with Jennifer Wigal. If there are any major management or policy barriers that will prevent achievement of the goal in the *Action Plan*, we need to know about them as soon as possible.

Thank you for your assistance. Please feel free to call me or Betsy Southerland, Acting Director of the Standards and Applied Science Division (202-260-3966), if you have any questions or concerns.

cc: Water Quality Standards Coordinators, Regions 1-10



# FAX TRANSMISSION

U.S. EPA, Region III  
1650 Arch Street (3WP12)  
Philadelphia, PA 19103-2029  
Fax: (215)814-2301

To: Libby Chatfield

Date: 11/8/99

Fax #:

Pages: 3 , including this cover sheet.

From: Mary Kuo  
(215) 814-2390

Subject: Fyi: E. coli memo

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## COMMENTS:

Hi Libby -

I hope you enjoyed your wknd!

I'm sending you this memo as a "heads up"  
to a letter I'll probably be putting together in  
the next couple months.

Talk to you later,

Mary

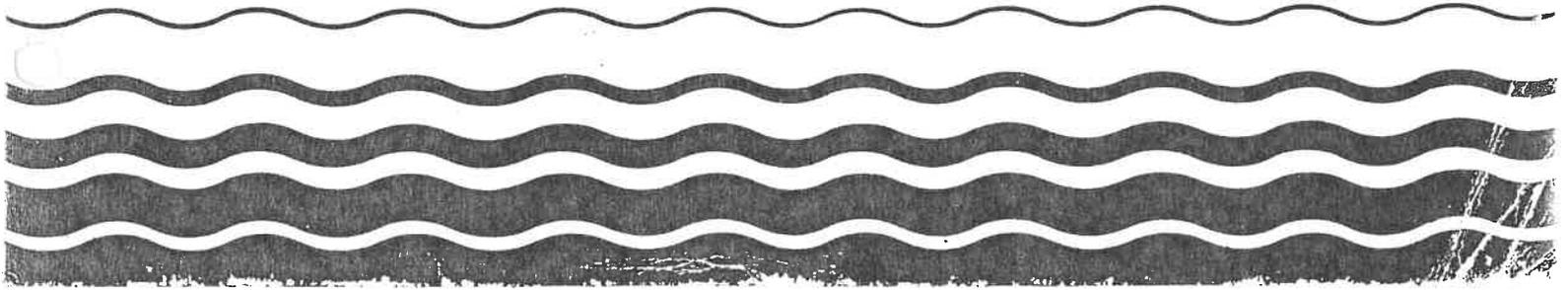
*Celebrating 25 Years of Environmental Progress*

Water



# Ambient Water Quality Criteria for Bacteria - 1986

EXHIBIT 'D'



EPA Criteria for Bathing (Full  
Body Contact) Recreational Waters

Freshwater

Based on a statistically sufficient number of samples (generally not less than 5 samples equally spaced over a 30-day period), the geometric mean of the indicated bacterial densities should not exceed one or the other of the following:(1)

<u>E. coli</u>	126 per 100 ml; or
enterococci	33 per 100 ml;

no sample should exceed a one sided confidence limit (C.L.) calculated using the following as guidance:

designated bathing beach	75% C.L.
moderate use for bathing	82% C.L.
light use for bathing	90% C.L.
infrequent use for bathing	95% C.L.

based on a site-specific log standard deviation, or if site data are insufficient to establish a log standard deviation, then using 0.4 as the log standard deviation for both indicators.

Marine Water

Based on a statistically sufficient number of samples (generally not less than 5 samples equally spaced over a 30-day period), the geometric mean of the enterococci densities should not exceed 35 per 100 ml;

no sample should exceed a one sided confidence limit using the following as guidance:

designated bathing beach	75% C.L.
moderate use for bathing	82% C.L.
light use for bathing	90% C.L.
infrequent use for bathing	95% C.L.

based on a site-specific log standard deviation, or if site data are insufficient to establish a log standard deviation, then using 0.7 as the log standard deviation.

Note (1) - Only one indicator should be used. The Regulatory agency should select the appropriate indicator for its conditions.



## WEST VIRGINIA RIVERS COALITION

November 17, 1999

Dr. Ed Snyder, Chair  
WV Environmental Quality Board  
1615 Washington Street East, Suite 301  
Charleston, WV 25311-2126

**RE: Request to present at January 2000 EQB meeting**

Dear Dr. Snyder:

On behalf of the West Virginia Rivers Coalition and the West Virginians for Clean Water Campaign, I respectfully request the opportunity for our organization and associated campaign members to present to the Board regarding the Blackwater River Use Redesignation at your upcoming January meeting.

If you have any questions about this request, please feel free to call me at (304) 637-7201. We appreciate your consideration of this request.

Sincerely,

Pamela C. Moe-Merritt  
Conservation Director

— EXHIBIT "E"

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

JAN CASTO  
Deputy Secretary of State

Telephone: (304) 558-6000  
Corporations: (304) 558-8000  
FAX: (304) 558-0900  
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

WILLIAM H. HARRINGTON  
Chief of Staff

CATHERINE FREROTTE  
Executive Assistant

JUDY COOPER  
Director, Administrative Law

PENNEY BARKER  
Supervisor, Corporations

(Plus all the volunteer  
help we can get)

facsimile  
TRANSMITTAL

Date: 11/1/99

# of Pages: 6

To: Libby Chatfield

Organization: \_\_\_\_\_

Fax: 558-4116

Phone: \_\_\_\_\_

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help we can get)

October 29, 1999

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

AGENCY: Environmental Quality Board

RULE: Amendment, Series 1, Requirements Governing Water Quality Standards

DATE FILED AS AN EMERGENCY RULE: October 18, 1999

DECISION NO. 17-99

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved in part, disapproved in part**. A copy of the complete decision with required findings is available from this office.

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Oct. 29, 1999 *jl*  
ADMINISTRATIVE LAW DIVISION

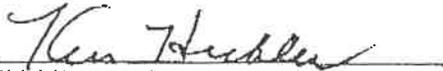
  
KEN HECHLER  
Secretary of State

EXHIBIT "F"

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**EMERGENCY RULE DECISION**  
**(ERD 17-99)**

**AGENCY:** Environmental Quality Board  
**RULE:** Amendment, Series 1, Requirements Governing Water Quality Standards

**FILED AS AN EMERGENCY RULE:** October 18, 1999

- par. 1 The Environmental Quality Board (EQB) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The EQB filed this emergency rule with supporting documents with the Secretary of State October 18, 1999 and with the LRMRC October 18, 1999.

- par. 7 It is the determination of the Secretary of State that the EQB has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §22B-3-4(a) reads:  
*In order to carry out the purpose of this chapter and §22-1-1 et seq. of this code, the board shall promulgate legislative rules setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall be such as to protect the public health and welfare, wildlife, fish and aquatic life, and the present and prospective future uses of such water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.*
- par. 9 W. Va. Code §64-3-2 further states:  
*The legislative rule filed in the state register on August 3, 1998, authorized under the authority of §22B-3-4 of this code, relating to the environmental quality board (requirements governing water quality standards, 46 CSR 1) is authorized until October 30, 1999: Provided, That the environmental quality board shall review, revise and propose, within this statutory deadline, and in accordance with the provisions of §29A-1-1 et seq. of this code, emergency and legislative rules to address the interpretive differences regarding the designation of category A waters and analyze the need for distance prohibitors for the policies of public drinking water intake.*
- par. 10 It is the determination of the Secretary of State that the EQB has not exceeded its statutory authority in promulgating this emergency rule.
- par. 11 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:  
*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*
- par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13

The facts and circumstances as presented by the EQB are as follows:

In 1999, the WV Legislature passed HB 2533, which, among other things, approved amendments to the Water Quality Standards rule. §64-3-2 authorized the rule until October 30, 1999 with a proviso that the Board review, revise and propose emergency and legislative rules to address the current designation of category A waters.

The proposed language clarifies that the use category applies to all waters of the state, except where that use has been removed through legislative rulemaking and is listed in section 7.2.d of the rule. This clarified language is consistent with the current application category A by the Office of Water Resources of the Division of Environmental Protection in the National Pollutant Discharge Elimination System (NPDES) permitting program. Additional language is proposed which provides an exemption from the manganese human health criterion above five miles of a known drinking water source. This change has been included to address concerns raised by the coal industry regarding the difficulty of meeting the manganese limit.

In considering the clarification of how Category A is to apply to the state's waters, the Board looked at a number of alternatives to the current implementation protocol. After reviewing a number of options, the Board believes that applying the watershed approach is a valuable way of implementing the public drinking water category. The Board will review the Zones of Critical Concern to be delineated around drinking water intakes as outlined in the Source Water Assessment and Protection Plan prepared by the WV Bureau for Public Health which applies the watershed approach to the waters of the State. The Board will then implement the reassessment of the Public A use category based on those Zones of Critical Concern. The projected completion of the delineations of the ZCC's is July of 1999. Until that time, the Board has determined that the current application of the use category to all streams of the state is appropriate in that it ensures full protection of those waters until a review of the protection zones in the SWAPP can be completed.

par. 14

It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . mandated by the 1999 Legislature with the exception of 6.2.a.

par. 15

It is the determination of the Secretary of State that the proposed 6.2.a. does not qualify under the definition of an emergency as defined in §29A-3-15(f) because the agency exceeded the scope of the mandate found in §64-3-2 and also failed to show that an emergency exists for this section.

par. 16

This decision shall be cited as Emergency Rule Decision 17-99 or ERD 17-99 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Environmental Quality Board, the Attorney General and the Legislative Rule Making Review Committee.

*Ken Hechler*

KEN HECHLER  
Secretary of State

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE

THIS DATE Oct 29, 1999 *JC*

Entered

ADMINISTRATIVE LAW DIVISION