

**BUREAU OF THE ENVIRONMENT
ENVIRONMENTAL QUALITY BOARD**

1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126
(304) 558-4002
Fax: (304) 558-4116

**MINUTES
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
AUGUST 18, 2000**

I. General

On August 18, 2000, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the "Board") met at its offices located at 1615 Washington St. E., Charleston, West Virginia. Chairman Ed Snyder called the Environmental Quality Board meeting to order at 8:30 a.m.

Other Board members present were as follows:

David Samuel
Charles Jenkins
Cameron Hackney

Absent was Board member:

Betsy Dulin

Whereupon, the Board addressed the issues set forth in the agenda as follows:

I. RULEMAKING

1. Little Boyd Coal Company Remining Variance Request

Previously the Little Boyd Coal Company submitted a formal remining variance application to the Environmental Quality Board. During the April 21, 2000, Board meeting, the Board members decided to delay a decision on the Little Boyd remining variance application until the draft permit was completed. The draft

permit has now been completed and a copy provided to the Board members.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that the Board proceed with the remaining variance request by publishing a public notice, holding a public hearing and accepting written comments on the matter, and the motion passed unanimously 4 to 0.

The Board directed Ms. Chatfield to include in the public notice the fact that WV Code §22B-3-4 provides that the Board may not grant a variance request where the Board determines that degradation of the instream water quality will result from the remaining operation and the fact that this remaining variance request includes valley fills.

2. 46 CSR 1 - Requirements Governing Water Quality Standards

The Board continued its review of the written comments received during the public comment period regarding the proposed amendments to 46CSR1, Requirements Governing Water Quality Standards. The proposed rule must be finalized, approved and filed with the WV Secretary of State's office by September 1, 2000.

These minutes reflect **only** the sections of the proposed Legislative rule which were amended by the Board during the August 18, 2000, Board meeting. The sections which are underlined indicate new language as it appears in the rule.

The Board continued its discussion of section 46-1-4C (Tier 2) of the rule.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that section 4C.2.a.1.A. of the rule read as follows, and the motion passed unanimously 4 to 0:

4C.2.a.1.A. Any proposed activity that would degrade the ambient concentration of any parameter of concern by more than 10% at critical flow conditions or reduce the assimilative capacity by more than 10%, which ever is most protective, will be presumed to pose significant degradation (See also section 4C.3). Critical flow conditions are further defined as follows:

Whereupon, Dr. Jenkins moved and Dr. Snyder seconded that the Board implement a cap of 20% on the potential water quality degradation outlined in

section 4C.2.a.1.A of the rule. In order to accomplish this objective, Dr. Jenkins moved and Dr. Snyder seconded that section 4C.3 of the rule read as follows, and the motion passed unanimously 4 to 0:

4C.3. If the proposed activity is determined not to result in significant degradation to the water, that finding will be documented and no further antidegradation review is necessary. Provided that in no case shall the change in ambient concentration from an established baseline water quality exceed 20% of the baseline level without fulfilling the further requirements of sections 4C.4 through 4C.8 below.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.2.a.2.A of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.A. Temperature: any new or expanded activity resulting in a thermal discharge where the temperature of the discharge will not cause a violation of the applicable temperature criteria in sections 8.28 through 8.28.4 in Appendix E, Table 1 herein, or where the discharge is otherwise consistent with section 316(a) of the Federal Act.

After discussion, Dr. Samuel moved and Dr. Jenkins seconded that section 4C.2.a.2.B. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.B. Fecal coliform - any new or expanded activity resulting in a discharge provided that necessary and appropriate treatment (disinfection) or control is required and the fecal coliform concentrations are established as 200/100 ml monthly average and 400/100 ml daily maximum.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that section 4C.2.a.2.C. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.C. pH - Any new or expanded activity resulting in a discharge where the pH of the discharge is in the range of 6.0 to 9.0 standard units. In addition, any pH permitted at greater than 9.0 standard units will not be considered significant degradation if the sole purpose of the discharge is to improve the quality of the receiving stream, and the discharger demonstrates and the Director finds that such improvement would occur.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that section 4C.2.a.2.D. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.D. Dissolved Oxygen (DO) - any new or expanded activity resulting in a discharge where any reduction of water quality of less than 0.4 ppm at maximum DO sag based upon an appropriate wasteload allocation model, unless the reduction is projected to cause a violation of sections 8.12 through 8.12.3 in Appendix E, Table 1 herein.

After discussion, Dr. Hackney moved and Dr. Jenkins seconded that section 4C.2.a.2.F. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.F. Addition of chemicals used for the treatment of drinking water or sanitary wastewater that do not otherwise violate water quality standards. This exemption shall be limited to public drinking water and municipal waste water systems. This exemption shall not apply to parameters of concern.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.2.a.2.G. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.G. A new or increased discharge of a substance used to treat zebra mussels or asiatic clams in an intake water pipe or structure if the new or increased discharge will not cause adverse effects on human health and aquatic life outside any applicable mixing zone except in areas where federally threatened and endangered species are known to occur.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that section 4C.2.a.2.H which is the exemption for ammonia be removed from the proposed rule, and the motion passed unanimously 4 to 0. The section numbers in this section were then adjusted.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.2.a.2.H.(formerly section 4C.2.a.2.I) of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.H. Those activities that qualify for coverage under a Nationwide Corps of Engineers Permit, or any subsequent reissuance of the same Nationwide Permit (or subsequent Nationwide Permit that regulates those activities) for which state water quality certification has been granted or conditionally approved.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.2.a.2.I. (formerly section 4C.2.a.2.J.) of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.I. Any application approved for coverage under an applicable WV/NPDES General Permit or any subsequent coverage under those permits.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.2.a.J. (formerly section 4C.2.a.K.) of the rule read as follows and the motion

passed 3 to 1, with Dr. Snyder voting against the motion:

4C.2.a.2.J. Waiver granted by the Director allowing the permitting authority to approve activities that lower water quality whenever the Director determines that an emergency exists requiring immediate action to protect public health and welfare. When the Director determines that the emergency is over, this exemption shall no longer apply.

After discussion, Dr. Hackney moved and Dr. Jenkins seconded that section 4C.2.a.2.K (formerly section 4C.2.a.2.L.) of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.K. A proposed new or expanded discharge from a sanitary wastewater treatment plant constructed or operated to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage. This exemption would include Combined Sewer Overflow elimination or reduction projects affecting one or more waterbodies and shall apply only where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters.

After discussion, Dr. Hackney moved and Dr. Jenkins seconded that section 4C.2.a.2.L. (formerly section 4C.2.a.2.M.) of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.L. Groundwater remediation efforts proposed for existing contaminated sites which do not constitute a new point source where there are or may be ongoing surface water impacts from contaminated groundwater not associated with point sources. Provided that the tier 2 review process will be required for groundwater remediation efforts where there is a potential for new or increased surface water or groundwater impacts from activities associated with the treatment of contaminated groundwater.

After discussion, Dr. Jenkins moved and Dr. Samuels seconded that section 4C.2.a.2.M. (formerly section 4C.2.a.2.N.) of the rule read as follows and the motion passed unanimously 4 to 0:

4C.2.a.2.M. Trading. The Director may determine that an activity proposed in a Tier 2 water will not pose significant degradation where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters. The basis for the trade shall be documented through a Trading Assessment Procedure. Such documentation shall include an appropriate margin of safety, which, after taking into account the uncertainties associated with any proposed nonpoint source controls, as well as variability in effluent quality for point sources shall ensure that

improvement in water quality occurs as a result of the trade. A trade may be made between more than one stream segment within an 8-digit Hydrologic Unit Code watershed, where removing a discharge in one stream segment directly results in improved water quality in another stream segment, provided that no degradation results to any stream segment within an 8-digit Hydrologic Unit Code watershed. In addition, (1) The effluent trade must be for the same form of the parameter; (2) Dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (3) Offsets must be enforceable.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.4. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.4. If a determination is made that significant degradation will occur, or if any baseline water quality is to exceed that specified in section 4C.3., the applicant must determine whether reasonable less-degrading or non-degrading alternatives to the proposed activity exist.

After discussion Dr. Hackney moved and Dr. Samuel seconded that section 4C.5.a. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.5.a. If it is determined that reasonable less-degrading or non-degrading alternatives to the proposed activity do exist, coordination with the project applicant may occur to revise the project design. In general, if reasonable alternative(s) exist, the alternative or combination of alternatives that provide the least amount of degradation shall be implemented up to the reasonable threshold. If the project applicant does not agree to adopt such reasonable alternatives, the alternatives analysis findings will be documented and the activity will not be allowed.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that section 4C.5.b of the rule read as follows and the motion passed unanimously 4 to 0:

4C.5.b. If no reasonable less-degrading or non-degrading alternatives to the proposed activity are determined to exist, the Tier 2 review shall continue and the substance and basis for the preliminary determination shall be documented.

After discussion, Dr. Snyder moved and Dr. Hackney seconded that the Board adopt option 1, (encompasses section 4C.6 through 4C.8) of the proposed rule and the motion passed unanimously 4 to 0. Individual changes made within option 1 are discussed below.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that section 4C.6.c of the rule read as follows and the motion passed unanimously 4 to 0:

4C.6.c. Once the available information pertaining to the socio-economic importance of the proposed activity has been reviewed, a preliminary determination regarding importance shall be made. In evaluating the applicant's demonstration of socio-economic importance, the Director may use EPA's Interim Economic Guidance for Water Quality Standards Workbook (EPA 823-B-95-002, March, 1995). If the proposed activity is determined to have social or economic importance in the area in which the affected waters are located, the substance and basis for that preliminary determination shall be documented and the Tier 2 review shall continue.

After discussion, Dr. Samuel moved and Dr. Hackney seconded that the current second paragraph of section 4C.6.c. of the rule be renumbered as section 4C.6.d. and the motion passed unanimously 4 to 0. That section reads as follows:

4C.6.d Where there is a request for a variance from groundwater standards pursuant to 47 CSR 57 for existing sites where activities on those sites have the potential to impact surface water from contaminated groundwater, the socio-economic justification process required under §47 CSR 57.6.2.i will satisfy the requirements of sections 4C.6.a-c herein.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that 4C.6.e (formerly section 4C.6.d.) Of the rule read as follows and the motion passed unanimously 4 to 0:

4C.6.e. If the preliminary determination that the proposed activity does not have social or economic importance in the area in which the affected waters are located is made, that antidegradation review finding shall be documented. In no case shall the Director deny an activity based solely on its socio-economic importance without first proceeding to the intergovernmental coordination and public participation phase of the antidegradation review process.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that section 4C.7.a. of the rule read as follows and the motion passed unanimously 4 to 0:

4C.7.a. The intergovernmental coordination requirements in section 4.1.b herein, will be accomplished by either providing notice consistent with the state's continuing planning process document or by providing notice to the appropriate agencies as identified by the Director using the list provided in Appendix F1 as guidance. Such coordination will be accomplished by the agency performing the antidegradation review, by notifying the appropriate agencies outlined in Appendix F1 of the results of any antidegradation review, and requesting comments from them regarding that review to be returned by the agency within thirty days.

**Appendix F was renamed as Appendix F1 and the following agencies were listed as intergovernmental coordination agencies:

STATE AGENCIES

Bureau of Commerce

Division of Natural Resources

Division of Forestry

Development Office

Department of Health and Human Resources

Bureau for Public Health

Bureau of the Environment

Division of Environmental Protection - all offices

Department of Agriculture

Soil Conservation Agency

FEDERAL AGENCIES

US Environmental Protection Agency, Region III

US Fish and Wildlife Service

US Army Corps of Engineers

US Forest Service

US Office of Surface Mining

The Board then began reviewing section 46-1-4D (Tier 2.5 waters) of the proposed rule.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that section 4D.3 of the rule be removed and the motion failed 2 to 2, with Dr. Jenkins and Dr. Snyder voting against the motion.

After discussion, Dr. Samuel moved and Dr. Jenkins seconded that section 4D.4 of the rule read as follows and the motion passed unanimously 4 to 0:

4D.4 Trading. A proposed activity that will result in a new or expanded discharge in a Tier 2.5 water may be allowed where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters. Where such trading occurs on or upstream of a Tier 2.5 segment or water, Tier 2.5 requirements may be considered satisfied where the applicant shows that water quality at all points within the Tier 2.5 waters will be improved. The basis for trade will be documented through a Trading Assessment Procedure. Such documentation shall include an appropriate margin of safety, which, after taking into account the uncertainties associated with any proposed nonpoint source controls, as well as variability in effluent quality for point sources, shall ensure that improvement in water quality occurs as a result of the trade. A trade may be made between more than one stream segment within an 8-digit Hydrologic Unit Code watershed, where removing a discharge in one stream segment directly results in improved water quality in another stream segment, provided that no degradation results to any stream segment within the 8-digit Hydrologic Unit Code watershed. In addition, (1) The effluent trade must be for the same form of the parameter; (2) Dischargers cannot claim offsets for water quality improvements that are required or will occur irrespective of the proposed new or expanded discharge; and (3) Offsets must be enforceable.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that section 4D.5.b. of the rule be removed and the motion passed unanimously 4 to 0. Section 4D.5.c. through Section 4D.5.f. were renumbered and that section now reads as follows:

4D.5. Determine whether the proposed activity is short term in nature and the resulting changes in water quality will be temporary and have limited effects. Activities which result in less than a 5% change may be deemed to have limited effects. Determinations will be made on a case-by-case basis and shall be made after consideration of the following factors:

4D.5.a. the length of time during which the water quality will be lowered,

4D.5.b. the parameters affected;

4D.5.c. the likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediments);

4D.5.d. the degree to which achieving applicable water quality standards during the proposed activity may be at risk; and

4D.5.e. the potential for any residual long-term influences on existing uses.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the Board insert the following language in the rule and number it as 4D.6 and the motion passed unanimously 4 to 0:

4D.6. If after review of the factors in 4D.5.a.- e, the Director determines that the proposed activity will be short term in nature and the changes in water quality will be temporary and limited, the proposed activity may be authorized. In such case the antidegradation review findings shall be documented and public notice activities shall be initiated. If after review of the factors in 4D.1.a.1-5 the Director determines that the proposed activity will not be short term in nature or that changes in water quality will not be temporary and limited, the proposed activity shall be denied.

**The remaining sections were then renumbered.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the Board insert "Economic Justification" into section 4D.7.b.9 (formerly 4D.6.b) to the rule and renumber the remaining factor and the motion passed unanimously 4 to 0. That section now reads:

4D.7.b.9. Economic justification; and

4D.7.b.10. Other factors determined by the Board or the Director, when applicable.

The Board then began reviewing 46-1-4E (Tier 3) of the proposed legislative rule.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the modifications made in section 4D.5 also be made in section 4E.1.a. and the motion passed unanimously 4 to 0. That section now reads as follows:

4E.1.a. Determine whether the proposed activity is short term in nature and the resulting changes in water quality will be temporary. Activities which result in less than a 5% change in ambient concentration may be deemed to have limited effects. Such determination will be made on a case-by-case basis and shall be made after consideration of the following factors:

4E.1.a.1. The length of time during which the water quality will be lowered;

4E.1.a.2. The parameters affected;

4E.1.a.3. The likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediment);

4E.1.a.4. The degree to which achieving applicable water quality standards during the proposed activity may be at risk; and

4E.1.a.5. The potential for any residual long-term influences on existing uses.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that section 4E.4.b.2. of the rule read as follows and the motion passed unanimously 4 to 0:

4E.4.b.2. A determination that the activity will be short-term in nature and the resulting changes in water quality will be temporary. Inclusion of this determination is only necessary as a result of a review under section 4.E.1.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that section 6E.6.a. of the rule read as follows and the motion passed unanimously 4 to 0:

4E.6.a. Upon receiving a nomination of a water or segment of a water for designation as a Tier 3 water pursuant to the Board's antidegradation policy, the Board shall notify each locality in which the water or segment lies and areas upstream and downstream and shall provide individual notice to property owners on the nominated segment. The written notice shall include, at a minimum:

After discussion Dr. Jenkins moved and Dr. Samuel seconded that section 4E.6.b.9 of the rule read as follows and the motion passed unanimously 4 to 0:

4E.6.b.9. Other factors determined by the Board or the Director, when applicable.

The Board then began discussing section 46-1-2 (definitions) of the rule.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that section 2.1 of the rule read as follows and the motion passed unanimously 4 to 0:

2.1. “Ambient Concentration” is that measured value or level of water quality upstream of the proposed activity (discharge point for point source, runoff area for nonpoint source) for any parameter of concern determined through EPA-approved or other methods accepted by the Chief, collection and analytical methods in 40 CFR 136. In the absence of a suitable upstream location, the ambient concentration will be measured at a point closest to the discharge or activity during precipitation events and at a point immediately downstream of the discharge or activity during non-precipitation events where adequate stream flow is available.

After discussion, Dr. Samuel moved and Dr. Jenkins seconded that a definition for baseline water quality be added to this section of the rule and the motion passed unanimously 4 to 0. That definition reads as follows:

2.3. “Baseline Water Quality” is that ambient concentration established at the time of an initial antidegradation review under rules effective (date) for a stream or stream segment or any other water(s) of the state.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that section 2.22 (formerly 2.21) of the rule read as follows and the motion passed unanimously 4 to 0:

2.22. “Regulated activity” includes 1) any activity that requires a permit or a water quality certification pursuant to state or federal law (e.g., Clean Water Act §402 NPDES permits, Clean Water Act §404 dredge and fill permits, or any activity requiring a Clean Water Act §401 certification), 2) any activity subject to nonpoint source control requirements or regulations, and 3) any activity which is otherwise subject to state requirements and regulations developed to protect water quality. The term “proposed activity” means a proposed activity that is also a regulated activity.

After discussion, Dr. Samuel moved and Dr. Jenkins seconded that section 2.26 of the rule read as follows and the motion passed unanimously 4 to 0:

2.26. “Trading” means establishing upstream controls for a parameter of concern to compensate for new or increased downstream sources for the same parameter resulting in improved water quality for the parameter traded. More than one parameter of concern may be traded on a given stream. Trading may involve point sources, nonpoint sources or a combination of point and nonpoint sources. Unused permitted capacity cannot be traded.

After discussion, Dr. Hackney moved and Dr. Samuel seconded that a definition for water of special concern be added to this section of the rule and the motion passed unanimously 4 to 0. That definition reads as follows:

~~2-20~~ 2.29. "Water of special concern" are those waters occurring in the categories outlined in sections 4.1.c.1. through 4.1.c.4. of the antidegradation policy. This designation provides an intermediate level of antidegradation protection between high quality waters and outstanding national resource waters.

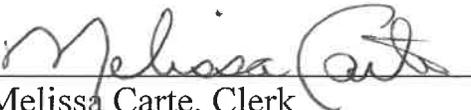
The Board began discussing section 46-1-4 (antidegradation policy) of the rule.

After discussion, Dr. Jenkins moved and Dr. Samuel seconded that the second paragraph of section 4.1.b. of the rule read as follows and the motion passed unanimously 4 to 0:

In addition, the Board and the Director shall assure that all new and existing point sources shall achieve the highest established statutory and regulatory requirements applicable to them and shall assure the achievement of cost-effective and reasonable best management practices (BMPs) for non-point source control. BMPs that have been implemented, applied or installed at a specific site should be evaluated to determine whether the BMPs are sufficient to reduce or minimize impacts to water quality. Where appropriate, the Director may require application or implementation of BMPs sufficient to prevent violations of water quality standards. If BMPs are demonstrated to be inadequate to reduce or minimize water quality impacts, the Director may require that more appropriate BMPs be developed and applied or, alternatively, may require that the activity causing the pollution cease.

Whereupon, Chairman Snyder moved and Dr. Jenkins seconded that the August 18, 2000, Board meeting be adjourned at 5:45 p.m. and the motion passed unanimously 4 to 0. An emergency meeting, by teleconference was then scheduled for August 21, 2000, at 3:00 p.m. The Board must have this meeting in order to finalize the rule in time for it to be filed by the deadline of September 1, 2000.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meetings held on August 18, 2000, by the West Virginia Environmental Quality Board. The minutes were approved by the Environmental Quality Board on Sept. 25, 2000.


Melissa Carte, Clerk