

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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MINUTES

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

June 19, 2003

I. General

On June 19, 2003, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) met at its 2nd floor conference room located at 1615 Washington Street, Charleston, West Virginia. Dr. Snyder, Chair, called the meeting to order at 9:00 a.m.

Board members present were as follows:

Ed Snyder, Chair
Bob Jenkins
Edward C. Armbrrecht, Jr.
Cameron Hackney

Board members absent were as follows:

Scott Simonton

Staff members present were as follows:

Libby Chatfield
Becky Charles
Melissa Carte
Kathy Coleman

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

II. Rulemaking

1. Little Boyd Coal C. Remining Variance Application:

Initially, the Board granted a remining variance to Little Boyd Coal Company for the first phase of a remining project in Mingo County in December 2000. The affected stream covered by that remining variance was Lick Fork of Grapevine Creek of Tug Fork. The Board established alternate criteria for manganese (7.78 mg/l – maximum, 4.42 mg/l – average, and 66 mg/l – trend analysis) and pH (3.8 SU – minimum, 4.4 SU – average, and 4.1 SU – trend analysis).

During the June 19, 2003, Board meeting, Mr. Lantz Rankin of Heritage Technical Associates appeared before the Board to review Little Boyd Coal Company's activities during phase one of the remining project, including the implementation of a materials handling plan to control acid mine drainage and also the water quality sampling data from July 2001 through March 2003. Mr. Rankin stated that although the company did not receive a "Notice of Violation" for a noncompliance discharge from the WV Department of Environmental Protection regarding the pH or manganese parameters, the company did report an exceedence of the manganese alternate criteria in May 2003.

Little Boyd Coal Company also previously submitted (in October 2002), a remining variance application for the streams to be affected during the second phase of the ongoing mining project in Mingo County. The Board discussed this remining variance application during the June 19, 2003, Board meeting. The application, in addition to requesting variance limits, includes a copy of a benthic macroinvertebrate survey of Thacker Creek and Grapevine Creek, and also a description of the abatement plan associated with the project.

The remining variance application for phase two covers four (4) streams: two (2) unnamed tributaries of the Tug Fork River and two (2) unnamed tributaries of Thacker Creek, which is a tributary of the Tug Fork River. The alternate criterion requested for the unnamed tributary of Tug Fork at Outlet 001, is 8.06 mg/l for manganese and 3.6 SU to 9.0 SU for pH. The company is requesting alternate criteria of 4.46 mg/l for manganese and 3.7 SU – 9.0 SU for pH at Outlet 002 which is also located on an unnamed tributary of Tug Fork. For Outlet 003 which is located on an unnamed

tributary of Thacker Creek, the company is seeking alternate criteria of 2.87 mg/l for manganese and 4.3 – 9.0 SU for pH. The company is also seeking alternate criteria of 6.04 mg/l for manganese and 3.6 SU – 9.0 SU for another unnamed tributary of Thacker Creek, which receives the discharge from Outlet 004. All of the alternate values were calculated by showing a five percent improvement in the water quality for manganese and a twenty percent improvement for pH.

During the discussion, it was determined that when calculating the alternate criteria and the proposed five percent improvement for two of the streams in the application, Mr. Rankin averaged the data collected from 2 separate sampling points in each of those two streams. For example background data for manganese from the unnamed tributary of Tug Fork (Outlet 001) at one sampling point was 4.30 mg/l to 8.48 mg/l and at another sampling point was 0.88 mg/l to 1.15 mg/l. Mr. Rankin then averaged those values and applied the five percent improvement to that averaged value. This could facilitate an incorrect assumption regarding the amount of improvement of the water quality in a stream and also result in less protective criterion for each of those streams. The Board directed Mr. Rankin to recalculate the data and to revise the requested alternate criterion in the remaining variance application to address the Board's concerns.

In addition the Board members requested that Ms. Chatfield contact the WV Department of Environmental Protection's Division of Mining and Reclamation in order that a representative may attend the July Board meeting to discuss the Little Boyd Coal Company mining permit, the remaining variance application, and the best management practices (BMPs) proposed by the Little Boyd Coal Company.

2. Tier 2.5 Nomination:

The Board received a nomination to classify two waters (Fill Hollow Creek and Watkins Run) in Preston County as Waters of Special Concern (Tier 2.5). During the April Board meeting, the Board members deemed the nomination application to be complete and directed staff, pursuant to 60 CSR 5 (Antidegradation Implementation Procedures), to draft a public Notice of the Board's consideration of such nomination.

During the June 19, 2003, Board meeting the Board members reviewed the draft Notice and amended the draft to include a statement regarding the

impact that the Waters of Special Concern designation would have on the property owners adjacent to these streams. The Board's website address will also be added to the Notice. Dr. Hackney moved and Dr. Jenkins seconded that the Board approve the draft Notice as amended and the motion carried unanimously 4 to 0.

Further, the Board determined that providing practicable public notice of the Board's consideration of the application would include mailing a copy of such Notice to the individual property owners located adjacent to those streams as identified in the application. Dr. Hackney requested that the staff ensure that a copy of the Notice is provided to John Crites of Allegheny Wood Products. In addition, the Board will also provide constructive notice of the Board's consideration of the Tier 2.5 nomination application by publishing the Notice in the local newspapers, and the Charleston Gazette and Daily Mail. Also, the Board will seek assistance from the Public Information Office of the WV Department of Environmental Protection to compose a press release regarding the matter.

3. Nutrient Criteria Committee:

The Nutrient Criteria Committee (NCC) is continuing to meet. They have now developed working definitions for "Impairment", "Category A", "Category B" and "Category C" and are developing scenarios to help determine and evaluate situations where nutrients cause impairment in the waters.

The Board members were provided with a copy of the May 28, 2003, letter which was sent to the USEPA in response to their comments regarding the Nutrient Criteria Plan.

The Board further discussed the budget and funding issues associated with the NCC. The Board staff is still working with USEPA in an effort to obtain the \$10,000 promised (from the USEPA) during the last fiscal year. Also there is some potential for funding during this fiscal year since the WVDEP submitted a grant application to the USEPA for work unrelated to nutrients but which includes a request for \$10,000 for the Board's Nutrient Criteria Committee.

4. Triennial Review:

The Board has completed the proposed revisions to the Water Quality Standards rule (46 CSR 1, “Requirements Governing Water Quality Standards”) developed pursuant to its federally mandated triennial review. A public hearing to take oral comments regarding the proposed changes was conducted on June 18, 2003, at 7:00 p.m. and the deadline for filing written comments with the Board is Monday, June 23, 2003, at 5:00 p.m.

5. Removal of a Category A Use Designation:

Ms. Chatfield informed the Board that there is the potential for Catenary Coal Company to appear before the Board to request the removal of a Category A use designation from a stream under the Board’s procedural rule 46 CSR 7 “Procedural Rules Governing Reclassification of Waters Designated for Public Water Supply”. Dr. Hackney questioned the Board’s ability to use the procedural rule to remove a use designation since the procedural rule has not been approved by the Legislature.

Ms. Chatfield explained that procedural rules are not presented to the Legislature for approval. The Board followed the guidelines established in the Administrative Procedures Act for adopting procedural rules, held a public hearing and accepted written public comments on the procedural rule prior to its approval. However, because of some of the concerns that were raised, the Board opted to send the procedural rule to the WV Legislative Rule-Making Review Committee (LRMRC) for comment.

The LRMRC expressed some concerns regarding the rule in a letter to the Board. The Board responded to the LRMRC’s concerns in a letter dated April 14, 2003, and sought additional guidance from the Committee. The Board did not withdraw the procedural rule and the rule has been in effect since February 7, 2003. Dr. Jenkins stated that if a designated use removal application is filed, the Board should consider continuing to communicate with the Legislature regarding the procedural rule.

Ms. Charles stated that the Board could continue the dialogue with the LRMRC regarding the procedural rule but if the Board gets an application for the removal of a use designation through the procedural rule process it must be addressed by the Board. If the Board fails to consider the application, then the applicant could file a lawsuit to force the Board to

follow its own procedural rule and to consider the application in a fair and timely manner.

Mr. Armbrecht stated that the Board developed the procedural rule in order to create an expedited process to remove the Public Water Supply Use Designation (Category A) on a site specific basis. It is his opinion that the regulated community raised the issues and/or concerns expressed by the LRMRC. However, in this particular instance using the procedural rule to remove the use designation could save the mining company a lot of time and expense related to variance process so the company may support the Board's use of the procedural rule.

Ms. Chatfield stated that she would keep the Board members apprised of the status of the application and suggested that the Board also keep the Legislature informed. However, Board must make clear that any action taken on the application will not be dependent on any comments or recommendations from the Legislature.

III. Administrative Matters

1. Review and Approval of the Minutes of the May 8, 2003, EQB meeting:

The minutes of the May 8, 2003, EQB meeting were presented to the Board for review and consideration. Dr. Hackney moved and Dr. Jenkins seconded that the minutes of the May 8, 2003, Board meeting, as written, be adopted, and the motion carried unanimously 4 to 0.

2. Future Meeting Dates:

The Board members scheduled Board meetings on August 13th & 14th, 2003, and September 11th and 12th, 2003.

3. Budget Report:

Ms. Coleman provided the Board members with a memo dated June 12, 2003, which provided the Boards financial update through May 31, 2003. As of that date, which represents an eleven month period or 92% of the fiscal year, the Boards have spent 84% of the combined budget. The surplus funds as of June 30th will be carried forward to fiscal year 2004. A copy of

this budget report is attached to and made a part of these minutes as Exhibit "A".

The Board further discussed the Nutrient Criteria Committee funding. At the end of fiscal year 2003, the Board will have spent approximately \$2,500 for Committee member travel. For fiscal year 2004, Ms. Coleman was only able to budget \$2,500 for all NCC expenses. Although the unspent portion of the original \$10,000 budgeted for the Nutrient Criteria Committee will be carried forward to the next fiscal year, that money will not be appropriated to that line item. Instead that money will be used by the Boards to offset the statewide budget reductions and will cover other Board expenses. Staff is continuing to pursue additional funding from the USEPA.

4. Calendar of Events for June and July:

The Board members reviewed the calendar of upcoming events for the months of June and July.

5. Court Reporting Services:

Each year the Board must solicit price quotes and bids from companies for court reporting services. The Board members were informed that KRM Court Reporting, which provides the Boards' current court reporting services, has submitted the low bid for the next fiscal year. Staff is pleased with the services that they provide.

6. Janitorial Services:

Ms. Coleman informed the Board members that the latest janitorial contract has been signed. The new agreement reduces the number of janitorial services requested in order to cut costs. The savings to the Boards under the new contract is approximately \$572 dollars per year.

IV. Appeals

1. Appeal No. 02-29-EQB (IOGA & WVOANGA):

Appeal No. 02-29-EQB (IOGA & WVONGA) was filed with the Board on November 27, 2002, and was scheduled for evidentiary hearing. The parties conducted settlement negotiations regarding the various issues under appeal

and reached an agreement in principal pending the issuance of the US Environmental Protection Agency's (USEPA) final rule regarding application of storm water permitting requirements to oil and gas operations. On March 10, 2003, the USEPA announced that it was postponing the requirement to relating to permits for oil and gas construction activity that disturbs one to five acres of land until March 10, 2005.

After reviewing the USEPA announcement the parties advised the Board that they have resolved the issues of the appeal and submitted a Final Order to the Board for review and approval. After a review of such proposed Final Order, Dr. Hackney moved and Mr. Armbrrecht seconded that the Board approve the Final Order and the motion carried unanimously 4 to 0. Appeal No. 02-29-EQB (IOGA & WVOANGA) was removed from the Board's docket.

2. Appeal #03-07-EQB (Morgan County Potting Soil):

Appeal #03-07-EQB (Morgan County Potting Soil) was scheduled for hearing on June 18, 2003. However, the parties informed the Board that they had resolved the issues of the appeal without the need for an evidentiary hearing. On June 19, 2003, the parties presented the Board with a proposed Agreed Order for their review. Dr. Hackney moved and Dr. Jenkins seconded that the Board accept the settlement agreement and approve the proposed Agreed Order, and the motion carried unanimously 4 to 0. Appeal #03-07-EQB (Morgan County Potting Soil) was removed from the Board's docket.

3. Appeal 03-08-EQB (Reese):

Appeal #03-08-EQB (Reese) was scheduled for hearing on June 18, 2003. The parties were notified of the exact date and time of the evidentiary hearing through a formal Notice of Hearing which was mailed on April 18, 2003, via Certified United States Mail, postage prepaid. The certified mail receipt documents indicate that both parties received this Notice of Hearing on April 21, 2003. In addition, there were oral communications between the Board's attorney and both parties regarding the evidentiary hearing. On June 18, 2003, at 1:00 p.m. Counsel for the Appellee and his witnesses appeared for the evidentiary hearing. However, the Appellant did not appear for the evidentiary hearing nor file a Motion for a Continuance of the

hearing. Counsel for the Appellee then moved that Appeal 03-08-EQB be dismissed since the Appellant failed to appear for the hearing.

Dr. Hackney moved and Dr. Jenkins seconded that the Board GRANT the Appellee's Motion to Dismiss the Appeal based on the Appellant's failure to appear for the evidentiary hearing, and the motion carried unanimously 4 to 0. Appeal #03-08-EQB was removed from the Board's docket.

Whereupon, Dr. Hackney left the meeting.

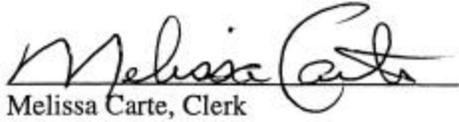
4. Appeal No. 02-31-EQB (Burke):

Appeal No. 02-31-EQB (Burke) was filed on December 5, 2002, and the Board conducted the evidentiary hearing during the February 21st and the March 27th, 2003, Board meetings. The parties have now had the opportunity to file proposed Findings of Fact and Conclusions of Law, and Response Briefs to such proposed findings.

Dr. Snyder, Dr. Jenkins and Mr. Armbrecht reviewed the pleadings filed in this appeal. Dr. Simonton and Dr. Hackney did not participate in the decision making process since they had been unable to attend the entire evidentiary hearing conducted in the appeal. After discussions, the Board directed Ms. Charles to draft a Final Order that reflects their decision in the matter. The Final Order will be reviewed by the Board during the July 10, 2003, EQB meeting before it is entered and issued to the parties of the appeal.

Whereupon, Mr. Armbrecht moved and Dr. Jenkins seconded that the June 19, 2003, Environmental Quality Board meeting be adjourned and the motion carried unanimously 3 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meeting held on June 19, 2003, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on August 14, 2003.



Handwritten signature of Melissa Carte in cursive script, written over a horizontal line.

Melissa Carte, Clerk