

DEPARTMENT OF ENVIRONMENTAL PROTECTION
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 14, 2003

I. General

On August 14, 2003, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) conducted a teleconference from its offices located at 1615 Washington St. E., 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

Board members participating by telephone were as follows:

Bob Jenkins, Vice Chair
Edward C. Armbrrecht, Jr.
Cameron Hackney
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. Administrative Matters

1. Review and Approval of the June 19, 2003, Board meeting minutes as amended:

During the initial review of the June 19, 2003, Board meeting minutes (which occurred during the July 18, 2003, Board meeting), Dr. Hackney requested that the minutes be revised to reflect the discussion conducted by the Board regarding the Category A Procedural Rule and the Legislative process. During the August 14, 2003, Board meeting, the amended minutes of the June 19, 2003, Board meeting were presented to the Board members for consideration. Whereupon, Dr. Hackney moved and Mr. Armbrrecht seconded that the minutes of the June 19, 2003, Board meeting be approved as revised, and the motion carried unanimously 5 to 0.

2. Review and Approval of the July 18, 2003, Board meeting:

The Board members were informed that the minutes of the July 18, 2003, Board meeting have not been completed. They will be provided to the Board members for review prior to the September Board meeting.

3. Budget Report:

Beginning in fiscal year 2002, the Boards received a budget increase resulting from an improvement package request, in the amount of \$63,691.00. However, effective with the fiscal year 2004 budget, the Boards' combined budget was reduced by \$32,033 (AQB - \$12,291 and EQB - \$19,742). Ms. Coleman informed the Board members that an additional 9% cut will be effective for fiscal year 2005. This will further reduce the Boards' combined budget by \$25,319. Therefore, the Boards' cumulative budget reductions will total \$57,352, thus depleting most of the additional funding received in 2002. A copy of the budget report dated August 7, 2003, is attached to and made a part of these minutes as Exhibit "A".

Based on a preliminary analysis of fiscal year 2005 expenses and the 9% reduction, Ms. Coleman is projecting a budget shortfall in the amount of \$53,319. Randy Huffman, a Department of Environmental Protection (DEP) Assistant Cabinet Secretary, was present at the Board meeting and informed the Board members that the 9% budget reduction is actually the best-case scenario and that it is possible that the budget cut may increase as much as 15%. Mr. Huffman further stated that improvement package funding requests would not be appropriate under these circumstances.

The Board then discussed the new DEP building. Mr. Huffman stated that it is anticipated that the new DEP office building will be completed and occupied in the fall of 2004. Once the Boards move into the new space, the Surface Mine Board will be consolidated with the Air Quality Board and the Environmental Quality Board. He anticipates that the annual rent for the three Boards (AQB, EQB and the Surface Mine Board) will total \$32,000. Ms. Coleman said that her figures showed that the rent for the AQB and EQB's would be \$23,000. Mr. Huffman noted the disparity between the two numbers (\$32,000 and \$23,000) and said that Cap Smith, who is the building project coordinator, may be able to determine which numbers are correct. Currently, the EQB and AQB pay \$13,000 in rent annually. The Surface Mine Board does not have a budget independent of the DEP.

Mr. Huffman said that the agency could look at absorbing the Boards' rent and overhead expenses in order to help offset the budget cut. The DEP will use the cost savings realized during the building phase of the project to aid various departments and agencies in paying rent for the first year in the new building. Also, Mr. Huffman noted that once the Boards are in the new DEP building there will be other cost savings opportunities. For example, computer and other equipment sharing may be easier and such sharing could benefit the Boards.

The new DEP building will house a hearing room for use by the Boards for regular Board meetings and some public hearings. Although the Boards have use of the hearing room, it will be considered to be a "common" room or area and as such the expense will be shared on a pro rata basis between the other departments and agencies in the building.

Dr. Hackney suggested that the budget cuts might require that the Boards cut a staff member or combine Board staff duties with other jobs within DEP. Mr. Huffman agreed that the Agency may consider Board staff combining

duties with other jobs within the DEP but emphasized the need to avoid any conflicts between the Boards' appeal hearing duties and potential staff duties within the DEP. Mr. Armbrecht noted that it is important to have a staff that is able to keep pace with the Boards' work – otherwise the Boards' work will suffer. Dr. Snyder asked Ms. Coleman to plan some of the budget cuts in the areas of office equipment/computer equipment replacement and reducing the number of Board meetings. Upon further discussion, the Board expressed concern in reducing the number of Board meetings. The Board would like Ms. Coleman to explore other ways of conducting meetings that can save costs yet allow the Board to continue to meet – such as video conferencing. Mr. Huffman noted the DEP's video conferencing facilities and capabilities that are now in place.

4. Purchasing Card Report

Ms. Coleman reviewed the Purchasing Card Report with the Board. The report details all transactions on the Boards' Purchasing Card for the months of April 2003 through June 2003. After a brief discussion, Mr. Armbrecht moved and Dr. Simonton seconded that the Board approve the Purchasing Card Report as presented, and the motion carried unanimously 5 to 0.

5. Website Update

The staff informed the Board members that the web site is continuously updated to reflect current Board activity. Dr. Hackney asked that the staff begin to include the web site address on all correspondence and the signature file for e-mails. Also, the Board's web site will soon have a new address: www.wveqb.org but the site at the new address is not completely working at this time. However, the current web address will (for a short time) forward people to the new site once it is complete. The Air Quality Board will also have the following new address: www.wvaqb.org. The Boards have registered all three of the extensions - .org, .net and .com for these two web sites.

6. Calendar of Events for August and September:

The Board members reviewed the calendar of upcoming events for the months of August and September. In addition, the Board scheduled meetings for September 11, 2003, October 30, 2003, and November 20, 2003.

II. Rulemaking

1.) Nutrient Criteria Committee:

Ms. Chatfield provided the Board with an update on the Nutrient Criteria Committee (NCC). She said that the Committee has developed a working definition for the term “impairment”. Also, the Committee has now prioritized their efforts and has decided to begin their work by addressing lake criteria, with efforts being made to collect and compile the data that is available. In addition, some of the NCC members are compiling information on nutrients from other states. The next NCC meeting is scheduled for September 10, 2003, at the West Virginia Farm Bureau in Buckhannon.

2.) Legislative Rule:

a. Update on the filing of the Agency Approved legislative rule (46 CSR 1) with the Secretary of State’s Office and the Legislative Rulemaking Review Committee.

Ms. Chatfield announced that the Board filed the Agency Approved version of the proposed Legislative rule (46 CSR 1) with the Legislative Rulemaking Review Committee and Secretary of State’s Office on August 1, 2003, for consideration during the upcoming 2004 Legislative session. In addition, the staff posted the complete rule package, which includes the rule and corresponding documents, (such as the rule summary, questionnaire, fiscal note, statement of circumstances, rationale and comparison chart) on the Board’s web site.

b. Identify and establish a schedule for discussion of additional items for review by the Board.

As the Board undertook the Triennial Review, several items were identified as important issues but because of time constraints were left for future discussion and consideration outside of the Triennial Review process. Two such issues mentioned were design flows and the recreational use designation category. Ms. Carte developed a list of all issues that the Board decided to address outside the Triennial Review.

3.) Little Boyd Coal C. Remining Variance Application:

During October 2002, the Board received an application from Little Boyd Coal Company for a remining variance from water quality standards for several streams in Mingo County. This variance request is for the company's second phase of the remining project. After reviewing the initial application the Board members expressed some concerns and requested that the company recalculate the data and revise the requested alternate criterion in the remining variance application in order to address those concerns.

Although the application was placed on the August meeting agenda, the revised application is not yet complete. The company is continuing to work with the DEP on their Article 3 application. Ms. Chatfield stated that she met with Ken Politan, of the DEP's Office of Mining and Reclamation and Lantz Rankin, the company's consultant, about this project and plans to meet with them again prior to the September EQB meeting. Dr. Jenkins requested that prior to the September Board meeting, Ms. Chatfield compile information from Little Boyd Coal Company's first variance and compare it to their most current variance request.

In addition, Ms. Chatfield stated that the staff is also working on a document that tracks all of the remining variances that have been granted by the Board. This should help the Board determine how the remining program is actually working. The staff's report should be available to the Board members by the September meeting.

4. Tier 2.5 Application:

The Board received a nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5). During the May Board meeting, the Board members deemed the nomination application to be complete and pursuant to 60 CSR 5 (Antidegradation Implementation Procedures), provided a Notice of the Board's consideration of such nomination to the property owners located adjacent to those streams. In addition, the Board published a public notice of the application in several area newspapers. The Board received a few comments and responses to the notice, most merely requesting additional information but no written responses have been received.

Ms. Chatfield noted that the classification of waters as Waters of Special Concern (Tier 2.5) requires that the Board proceed through a rulemaking process. After deeming the application complete and notifying adjacent landowners, the Board must then make a determination as to whether a reclassification of the streams should proceed. This will involve conducting a detailed substantive review of the criteria necessary for listing a stream as a Tier 2.5 water and comparing those criteria to the characteristics of the streams included in the application.

Ms. Chatfield stated that the landowners and public must be kept apprised of the Board's progress throughout the process. Ms. Chatfield suggested that all of the Board's meeting notices which include a discussion about this Tier 2.5 application should be sent to the landowners. The Board agreed but directed that the landowners to be told that they were receiving the EQB meeting notice because their property is adjacent to a stream nominated as Water of Special Concern.

The Board then discussed conducting a public meeting in Preston County at some point during the Board's review of the application. Dr. Jenkins requested that the Board solicit written comments from the landowners prior to holding a meeting in Preston County. Ms. Charles noted that the letters that were sent to the landowners as well as the newspaper advertisement included a solicitation for public comments. That letter also included many of the important details regarding the application and the Board's nomination and review process.

Ms. Chatfield suggested that the Board could make a preliminary decision on the Tier 2.5 application and then develop an information sheet regarding the process and the Board's preliminary decision. This information sheet would then be distributed to the area landowners and made available to the general public prior to conducting a public meeting in the area. Further, Ms. Chatfield reminded the Board that since the stream reclassification is a rulemaking process, there will be a public comment period and a public hearing during that process.

Ms. Chatfield stated that she will prepare a memo for the Board members to review during the September Board meeting that outlines the specific criteria that the Board needs to review and that provides more detailed information from the application. This will aid the Board in determining what specific information should be provided to the landowners and also in evaluating the

application. Dr. Jenkins asked that Ms. Charles review the reclassification process to ensure that the Board covers all of the required elements.

5. Harmonic Mean Flow:

The Board discussed how it would address harmonic mean flow and the other design flow regimes. Dr. Hackney asked that the Board receive information from the USEPA (including Region 4) regarding the various flow regimes and the pros and cons of each of the various flow regimes. Dr. Hackney also mentioned that the Board should look at surrounding states flow regimes, and get input from ORSANCO and the Chesapeake Bay program.

Ms. Chatfield reminded the Board that the DEP is in the process of conducting a study to determine what design flows are used by other states and how those design flows are implemented in those states. She suggested that the Board could receive an update from DEP on this project.

Ms. Chatfield also said that the Board had received a number of comments regarding the design flow issue during the most recent Triennial Review. For example, the DEP, in their written comments, provided some comparisons between discharges under 7Q10 and harmonic mean flow regimes. She will provide a summary of those comments to the Board members for review at the next Board meeting. Dr. Jenkins requested that the Board contact an expert on water flow hydrology and physics, and also a toxicologist to review the comments received on this matter during the Triennial Review and provide the Board with a critique.

Dr. Simonton stated that the Board should solicit additional comments that include a scientific rationale regarding the potential health impacts that could occur with each of the design flows. Dr. Simonton also said that this comment process should be on-going and not limited to a set time period.

Mr. Armbricht requested factual data regarding the economic impacts of the flow regimes on the regulated community as well as the impacts to human health with a change to the design flow. In addition, he requested information regarding the potential impact that of a different design flow would have on various state agencies charged with the implementation and regulatory responsibilities.

Mr. Armbrecht stated that the Board should be clear about the specific information that the Board needs from the public and regulated community and that the Board undertake a review in as expeditious manner as possible. For the September Board meeting, the Board requested that Ms. Chatfield provide them with a proposal of how to accomplish the objectives established by the Board during this meeting. Also for the September Board meeting, the Board requested a conference call with a representative from EPA Region 3 to discuss these general matters, including identifying the information and data that is available and how to compile such data, and also outlining specific areas of interest to the Board which could be addressed by the USEPA at a future date.

III. Appeals

1.) Appeal #03-09-EQB (Rivers/Burke):

Appeal #03-09-EQB (Rivers/Burke) was filed with the Board on April 8, 2003, and was scheduled for hearing during the August 14, 2003, Board meeting. However, the parties submitted a proposed Agreed Order for the Board's review and approval which resolves the issues of the appeal without the need for an evidentiary hearing. After discussion, Mr. Armbrecht moved and Dr. Simonton seconded that the Board approve the Agreed Order as presented and the motion carried unanimously 5 to 0.

2.) Appeal #03-10-EQB (Weirton Steel):

Appeal #03-10-EQB (Weirton Steel) was filed with the Board on April 9, 2003, and was scheduled for hearing during the August 14, 2003, Board meeting. However, on August 11, 2003, the parties submitted a Joint Motion for Continuance stating that the original counsel for the Appellant had ceased providing legal services and although the parties have continued settlement discussions and believe that they have reached consensus of the issue in principle, due to scheduling conflicts they have not completed the exact details of the settlement agreement. The Board members were informed that after reviewing the motion the Board Chair granted a continuance of the evidentiary hearing until September 11, 2003.

3.) Appeal #03-11-EQB (Aracoma):

Appeal #03-11-EQB (Aracoma) was filed with the Board on May 19, 2003, was scheduled for hearing during the July 18, 2003, Board meeting. However, on July 16, 2003, the parties filed a proposed Order which resolves the issues of the appeal without the need for an evidentiary hearing. The Board reviewed the proposed Order during the August 14, 2003, Board meeting. After discussion, Dr. Simonton moved and Dr. Jenkins seconded that the Board approve the Order as submitted, and the motion carried unanimously 5 to 0.

Whereupon Dr. Simonton and Dr. Hackney left the meeting since they did not participate in the evidentiary hearing conducted in Appeal #02-31-EQB (Burke).

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

Appeal No. 02-31-EQB (Burke) was filed on December 5, 2002. The Board conducted the evidentiary hearing during the February 21st and the March 27th, 2003, Board meetings and the parties filed proposed Findings of Fact and Conclusions of Law, and Response Briefs to such proposed findings. The Board then reached a final decision on this appeal during the June 19, 2003, Board meeting and directed staff to prepare a Final Order to be entered in this appeal. Board members Snyder, Armbrecht and Jenkins reviewed the draft Final Order during the August Board meeting. After a discussion, the Board proposed a modification to the draft Order. Dr. Jenkins then moved and Mr. Armbrecht seconded that the Board approve the Final Order as amended, and the motion carried unanimously 3 to 0.

Whereupon, Mr. Armbrecht moved and Dr. Jenkins seconded that the August 14, 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 August 14, 2003, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on September 11, 2003.



Melissa Carte, Clerk