

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
**ENVIRONMENTAL QUALITY BOARD**

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**MINUTES**

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

**SEPTEMBER 11, 2003**

**I. General**

On September 11, 2003, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the **ABoard@**) met at 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  
Bob Jenkins, Vice Chair  
Edward C. Armbrecht, Jr.  
Scott Simonton

Board members participating by telephone were as follows:

\*Cameron Hackney participated during a portion of the meeting

Staff members present were as follows:

Libby Chatfield  
Becky Charles  
Melissa Carte

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

## **II. Remining Variances**

### **1.) Little Boyd Coal Co. Remining Variance Application:**

In 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. After reviewing the initial application 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.

During the September 11, 2003, Board meeting Lantz Rankin, consultant for Little Boyd Coal Company, provided the Board with additional information. The changes to the original application include a revision to the method for demonstrating improvement below Outlet 001 by basing the degree of improvement on the “best case” sample from site SW-3 and SW-3a; the combined data from two streams below Outlet 004 were separated and will no longer be combined to establish the limits for Outlet 004; the company added an additional outlet to the application, now referred to as Outlet 005; and the company now proposes the addition of a twelve month rolling average for the criteria. The company also included the US Environmental Protection Agency’s (USEPA) Best Management Practices (BMPs) with a discussion of which of the USEPA’s BMPs will be incorporated in the project. A new drainage map and a new site map were also provided to the Board.

After further review of the additional information and a discussion with Ken Politan of the WV Department of Environmental Protection Agency’s (DEP) Division of Mining and Reclamation, Mr. Armbrecht moved and Dr. Jenkins seconded that the Board make a preliminary determination that a variance from water quality standards for remining activities as proposed and revised by the applicant is warranted, with the caveat that Ms. Chatfield further review the newest data regarding the existing water quality, the percentage of proposed improvement and the alternate criteria requested, and the motion carried unanimously 4 to 0. The Board will establish a thirty-day public comment period and will conduct a public hearing on Wednesday, October

29, 2003, at 7:00 p.m., in the second floor conference room located at the Board's office.

\*Whereupon, Dr. Hackney joined by the meeting by teleconference.

2.) Upper Kanawha Valley Development Corp.:

During the September 11, 2003, Board meeting, Mr. Rankin provided the Board members and staff with a new application for a variance from water quality standards for remining activities for Upper Kanawha Valley Development Corp. – Phase Two. The application was not on the meeting agenda and was not discussed in detail by the Board. The variance application may be discussed during the October, 2003, Board meeting.

3.) Catenary Coal Remining Variance:

On August 12, 2003, the Board received an initial letter on behalf of Catenary Coal Company regarding their intent to submit a variance application. During the September 11, 2003, Board meeting Linda Torre, of Decota Consulting, presented the Board with the application for a variance from water quality standards for remining activities on behalf of Catenary Coal Company.

The company is seeking a variance for the Left Fork of White Oak Creek and for Moccasin Hollow of White Oak Creek (near Leewood in the Cabin Creek and Sherman Districts of Kanawha and Boone Counties respectively). The alternate criteria requested in the Left Fork of White Oak Creek are: Iron – 2.46 mg/l Maximum Daily and 1.42 mg/l monthly average; Manganese – 19.62 mg/l Maximum Daily and 5.48 mg/l monthly average; and pH – 4.55 SU Minimum and 5.17 SU monthly average. The alternate criteria requested in Moccasin Hollow of White Oak Creek are: Iron – 2.46 mg/l Maximum Daily and 1.42 mg/l monthly average; Manganese – 16.2 mg/l Daily Maximum and 8.17 mg/l monthly average; and pH – 4.35 SU Minimum and 4.54 SU monthly average. The proposed alternate criteria are based on a ten percent (10%) improvement over existing water quality.

Ms. Torre stated that the company's Article 3 permit application has gone through the first technical phase of the review process and that the NPDES draft permit has not been completed by the DEP's Division of Mining and Reclamation. Dr. Snyder suggested that certain staff members and perhaps a

Board member schedule a site visit. In addition, the Board requested that Ms. Torre add the BMPs that the company will be implementing to the application and a specific site map. The Board will continue to review the application and any new information provided. The Board will include the Catenary Coal Company variance application on the October Board meeting agenda.

#### 4.) Freeport Mining variance:

In 1997, the Board granted a remining variance to Uphold Trucking Company for iron, manganese and pH in an unnamed tributary of Big Sandy Creek of the Cheat River in Preston County. The permit was later transferred to Freeport Mining Company. After Freeport began mining operations in 2001, non-compliance with the in-stream criteria prompted a review of the variance. The remining variance was revised and reissued by the Board in 2002. During the September Board meeting the Board members were advised by the DEP's Division of Mining and Reclamation that continued violations of the permit conditions by the company has resulted in the revocation of the mining permit issued to Freeport Mining Company and the forfeiture of the company's bond.

Mr. Politan stated that the area now needs to be backfilled in order to cover the open pit located on the site and that effort may allow, after a period of time, the water quality to improve to the level it was prior to the start of the remining project. However, the bond is not sufficient to cover the expense of the necessary work and there will be a cost to the state.

#### 5.) Mepco Mining:

In 1998, the Board granted a remining variance to Mepco Mining for manganese and pH in Booths Creek and Mays Run (a tributary of Booths Creek). The permit was later transferred to Coresco Company. The Board members were informed that on August 18, 2003, the WV DEP's Division of Mining and Reclamations issued Order of Compliance to Coresco requiring the company to bring the streams back into compliance with baseline loading levels, the alternate in-stream criteria, and the numeric criteria within 45 days. Violation of this Order may result in enforcement actions against the company.

## 6.) Compliance Reporting:

Also, the staff is continuing to work with the WVDEP's Division of Mining and Reclamation to develop a protocol for reporting the status of the various remaining operations and their compliance with the alternate water quality criteria established through the variance granted by the Board.

### **III. Rulemaking**

#### 1.) Tier 2.5 Application:

The antidegradation policy is an overall policy of stream protection that has been included in the water quality standards for many years. It establishes four different tiers of protection for the waters of the state (with Tier One being the baseline which protects all existing uses) and three other different types or tiers of streams. The three other types of streams that are protected are High Quality Waters (Tier 2), Waters of Special Concern (Tier 2.5), and Outstanding National Resource Waters (Tier 3).

The Board received a nomination to classify two tributaries of the Cheat River 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 promulgated by the DEP), provided a Notice of the Board's consideration of the nomination to the property owners located adjacent to those streams. During the September meeting the Board began an analysis and review of the substance of the application.

The qualification criteria for Tier 2.5 waters are outlined in the Antidegradation Implementation Procedures. Section 8.1.a.2 of that rule establishes the factors that should be considered when determining whether to assign a Water of Special Concern designation to a water. These factors include: the impact on private property owners; whether the interests of all affected parties have been adequately represented during the nomination and designation process; the location of the water; any previous designations; existing water quality; unique or exceptional ecological, recreational or aesthetic resource value; impact on economic development, including the development of demonstrated natural resources; and any other factors determined by the Board. Ms. Chatfield provided the Board members with a memo dated August 25, 2003, which includes a review and discussion of

the qualification criteria, information provided by the applicant regarding each of these criteria, and recommended Board actions. A copy of this memo is attached to and made a part of these minutes as Exhibit "A".

A.) The Board first discussed the potential impacts of the Tier 2.5 designation on property owners: Point Source Discharges - If a landowner proposes an activity which would result in a point source discharge into one of the streams, an application must be filed with the WV DEP for an NPDES permit and the agency would then conduct an antidegradation review of the requirements and limitations on the levels of pollutants allowed to be discharged into the stream. Generally, the protection requirements for Tier 2.5 waters are more stringent than those established for Tier 2 waters. Nonpoint Source Discharges – Landowners adjacent to the streams who conduct activities such as logging or farming which could result in nonpoint runoff into the stream would be in compliance if they employ best management practices (BMPs) to protect the streams. Redesignation of the streams to Tier 2.5 would generally not affect the nonpoint source activities.

Dr. Hackney questioned the need to redesignate these streams as Tier 2.5 waters since the effects to nonpoint discharges would be minimal. Ms. Chatfield stated that while the restrictions regarding nonpoint discharges may not be affected, the requirements regarding point source discharges would be more protective. The Tier 2.5 designation provides an intermediate level of antidegradation protection between High Quality Waters and Outstanding National Resource Waters. Those waters afforded the Tier 2.5 designation include trout streams and those waters with unique ecological value. The streams which are the subject of this application have been identified by the WV Division of Natural Resources (DNR) as trout waters. Classifying these streams correctly would ensure that the appropriate level of protection is available.

B.) The next issue discussed was whether the interests of all affected parties have been adequately represented during the nomination and designation process. The applicant made significant efforts during the nomination process to provide notice to local landowners of this nomination. Evidence of those efforts include a letter from the Preston County Commission regarding the nomination, a letter from the Friends of the Cheat supporting the nomination, and a list of signatures from local landowners on both streams who support the nomination. The applicant also informed the Board

that two timber companies and two private citizens did not sign the nomination petition.

The Board is continuing its efforts to include all affected parties in the designation process. A detailed Notice of the Board's consideration of the application was provided to local landowners, the Notice was published in several local newspapers as well as in the Charleston papers, and a press release was issued. The Board intends to notify the landowners of all meetings where the Board discusses the application and has scheduled a public hearing regarding the nomination in the area. Also, the Board will continue to update the list of landowners as necessary.

C.) Another criterion for review when considering the nomination of a stream as a Tier 2.5 water is the location of the water. The applicant included two maps with the application indicating the location of the streams. Both streams are located in Preston County and are tributaries of the Cheat River.

D.) The Board then discussed previous special designations of the waters. Correspondence included with the application indicates that the streams are naturally reproducing trout streams, supporting native brook trout. Additional information from the WV Division of Natural Resources (DNR) indicates that there are reproducing native brook trout in Fill Hollow and that it is likely that Watkins Run is also a naturally reproducing trout stream.

E.) The existing quality of the streams is another factor which should be considered by the Board during its review of the nomination application. The applicant provided data collected from three sampling stations on Watkins Run and one on Fill Hollow which was collected from June 1996 through June 2001, by Friends of Laurel Mountain, through the WV Save Our Streams Program. Water quality, as measured by macroinvertebrate count, indicate good quality in one station and excellent quality in two stations on Watkins Run and similar data from Fill Hollow demonstrates good water quality. The data sheets indicate that trout were found at all sampling stations. Also, ratings were consistently good for water color, stream bed and bank condition, stream buffer zones, and stream shading.

F.) The Board must also consider any factors that indicate a unique or exceptional ecological, recreational, or aesthetic resource value of the streams. In addition to the water quality data outlined above, and the

presence of a native trout population, the application noted the presence of springs in Fill Hollow. Fill Hollow contains two reservoirs which serve as the primary water supply for the Town of Rowlesburg. In addition, the applicant included a narrative description of the plant communities along both drainages and photographs of the streams.

G.) The final qualification criterion is the impact that the redesignation would have on the economic development in the area. While there would be no impact on nonpoint activities such as farming (provided that landowners employ BMPs), point source activities may be affected, since no significant degradation of Tier 2.5 waters will be allowed. For Tier 2.5 waters, degradation will be deemed significant if it exceeds the baseline water quality plus ten percent of the available assimilative capacity (the difference between the baseline water quality and the water quality criteria) whether from a single activity or cumulatively. There is no exception provided for the socio-economic importance of the point source activity.

H.) During the September 11, 2003, Board meeting, the Board did not identify any additional qualification factors to be considered during the review of the application.

At the conclusion of the Board's preliminary review of the application and of the criteria necessary for listing a stream as a Tier 2.5 water and completing a comparison of those criteria to the characteristics of the streams included in the application, the Board accepted comments from the audience. Three persons addressed the Board to voice concerns about or opposition to the redesignation of the streams: Mr. Guy Clark, a landowner (also provided a written statement); Ms. Donna Reckart representing Allegheny Wood Products, a landowner; and Mr. Ed Kraynok representing Coastal Lumber Company, a landowner.

Dr. Simonton expressed some concern regarding the current status of the WV DEP's Antidegradation Implementation Procedures after a recent judicial review and its effect on the reclassification or nomination process. Ms. Chatfield stated that the nomination process has been in the Board's rule since 1994 and it is not under judicial review. The nomination process is independent of the antidegradation implementation procedures.

The Board will continue to review all of the factors as set forth in 60 CSR 5, section 8.1.a.2 that should be considered when determining whether to

assign a Water of Special Concern designation (Tier 2.5) to the nominated streams. Mr. Armbricht moved and Dr. Jenkins seconded that the Board conduct a public hearing on the nomination application, and the motion carried unanimously 4 to 0. The Board then scheduled the public hearing for November 20, 2003, at 6:30 p.m. in Preston County. In addition to the regular distribution and publication of the meeting notice, the notice will also be sent directly to the current list of landowners and interested parties as comprised by the Board.

Whereupon, Dr. Hackney left the meeting.

## 2.) Design Flow Regimes:

The Board was scheduled to continue its discussion of various design flow regimes. Ms. Chatfield provided the Board with a memo dated September 5, 2003, regarding a schedule for review of the design flows. A copy of this memo is attached to and made a part of these minutes as Exhibit "B".

In addition, Ms. Chatfield provided the Board members with a memo dated September 10, 2003, regarding a suggested approach for the review of design flow regimes. The suggested approach includes: Determining the occurrence and extent of potential changes in in-stream concentrations or loadings of chemical parameters as a result of the implementation of a range of critical design flows, compared to concentrations resulting from the current use of 7Q10; Evaluating the impacts of any changes in concentrations identified by the determination of the occurrence and extent of potential changes in in-stream concentrations or loadings of chemical parameters as a result of the implementation of a range of critical design flows; and Consideration of agency costs (financial and other resources) of implementing a range of design flows. Further the Board should discuss a process for evaluating the risks/costs identified during the review process. A copy of that memo is attached to and made a part of these minutes as Exhibit "C".

Previously the WV DEP began conducting a survey of the design flows implemented in other states. The Board had scheduled an update of that information from the WV DEP during the September Board meeting. However, the Board received a letter dated September 8, 2003, from the Cabinet Secretary in which the Secretary informed the Board that there would not be a DEP employee present and prepared to discuss that issue

during the September Board meeting. Further, Secretary Timmermeyer requested that in the future the Board make requests for information or research assistance to the DEP in writing in advance of the meeting. A copy of the letter is attached to and made a part of these minutes as Exhibit "D".

The Board members directed Ms. Chatfield to draft a letter to Secretary Timmermeyer requesting that a DEP employee be available at the October Board meeting to review and discuss the spreadsheets which were provided to the Board by the DEP in May 2003 and to explain the process used to develop the information contained in those spreadsheets. In addition, the Board is interested in continuing to compile information regarding the design flow information from other states, specifically how states believe the flow regimes are working, any challenges that may have been experienced in the implementation of the flow regime and also their rationale for implementing a particular flow regime.

The Board members were provided with copies of all previously submitted comments regarding the various design flow regimes as well as copies of the pertinent portion of the Board meeting minutes during which public comments were accepted on the issue. Ms. Chatfield will provide a summary and review of those comments to the Board at a later date.

Cheryl Atkinson, of the US Environmental Protection Agency (USEPA) Region 3 participated in this portion of the meeting by teleconference, in order to discuss what information the agency could provide to the Board to assist in its review of the design flow regimes. Dr. Simonton requested that the USEPA provide information regarding the methodology used in the development of the risk numbers for carcinogens, the calculation used to develop the criteria for all of the carcinogens, and also the equations and assumptions used. Dr. Jenkins requested assistance from the USEPA in evaluating and addressing the broad concern which exists in the state regarding toxicological factors versus the economic factors. In addition he requested future input from a USEPA hydrologist to explain the various flow regimes and a toxicologist who could explain the risk assessment methodology for carcinogens.

Ms. Atkinson requested that she be provided with copies of the information regarding design flows that has been provided to the Board members and also an e-mail which accurately articulates the information which the Board

is seeking. In addition, the UPEPA could assist the Board in compiling the information on the various design flows implemented in other states.

Whereupon, Dr. Simonton left the meeting.

### 3.) Nutrient Criteria Committee:

The Board created a Nutrient Criteria Committee (NCC) that is charged with providing recommendations to the Board regarding water quality criteria for nutrients and a plan for developing such criteria. The Board reviewed and revised the NCC's plan, then submitted the plan to the US Environmental Protection Agency (USEPA Region 3) for approval on October 29, 2002. In response the USEPA provided some suggestions and some additional questions regarding several aspects of the plan. The Board responded to those questions in a letter dated May 28, 2003.

The Board received a second set of questions regarding the plan from the USEPA on September 9, 2003. During the September 10, 2003, NCC meeting, the members drafted a response to those questions for the Board's review. After discussion, Mr. Armbrecht moved and Dr. Jenkins seconded that the Board direct Ms. Chatfield to send the proposed responses to the questions to the USEPA and include a statement requesting written acknowledgment from the agency of the completed plan as well as an acknowledgment that the state has suitably addressed all questions and concerns presented by the USEPA, and the motion carried unanimously 3 to 0.

Mr. Armbrecht stated that the Nutrient Criteria Committee was originally created by the Board to encompass a broad and well-balanced membership and questioned the NCC members' meeting attendance, since it appears that some members and/or their alternates are not attending the meetings on a regular basis. He expressed concerns that certain groups may decide, at the end of the process, that their interests were not adequately represented and consequently they may then disagree with the findings and recommendations of the Committee. The Board requested that staff obtain and review the NCC meeting attendance sheets. Further, Dr. Jenkins suggested that the Board could establish a protocol that would allow the NCC members to attend an EQB meeting on an annual basis, or more frequently if necessary, to present their progress to the Board and demonstrate to the Board that the Committee is in agreement on the issues as resolved.

4.) 2002/2003 Legislative Rule:

During the 2003 Legislative Session, the Board proposed a revision to the water quality standards which consisted of an addition to a sentence in Section 7.2.a.2. (the “1/2 mile rule”) which served to extend the Weirton Steel exemption from the ½ mile rule (on the Ohio River) until September 2004. This proposed revision was approved by the state legislature and became effective on June 25, 2003. The rule was submitted to the USEPA on May 14, 2003 for their review and approval. The Board members were provided with a letter from the USEPA dated August 12, 2003, which approves this revision.

#### **IV. Administrative Matters**

1.) Review and Approval of the July 18, 2003, Board meeting minutes:

Whereupon, the minutes of the July 18, 2003, Board meeting were presented to the Board members for consideration. After review, Mr. Armbricht moved and Dr. Jenkins seconded that the minutes of the July 18, 2003, Board meeting be approved as written and the motion carried unanimously 3 to 0.

2.) Review and Approval of the August 14, 2003, Board meeting minutes:

Whereupon, the minutes of the August 14, 2003, Board meeting were presented to the Board members for consideration. After review, Dr. Jenkins moved and Mr. Armbricht seconded that the minutes of the August 14, 2003, Board meeting be approved as written, and the motion carried unanimously 3 to 0.

3.) Budget Report:

The Board members reviewed the budget report provided by Ms. Coleman. A copy of the report is attached to and made a part of these minutes as Exhibit “E”. Mr. Armbricht requested that she include an additional column which reflects the previous years’ actual total expenditure for each line item included in the budget report.

4.) Update on the new WV Department of Environmental Protection (DEP) building:

The Board members were updated on the progress of the construction of the new DEP building. In addition, the Board chairs have met regarding the layout of the hearing room and have scheduled a meeting with the Cabinet Secretary to further discuss the issue.

5.) Calendar of Events for September and October:

The Board members reviewed the calendar of events for the months of September and October. Further, the Board scheduled a Board meeting on December 11, 2003, and January 8, 2004.

## **V. Appeals**

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

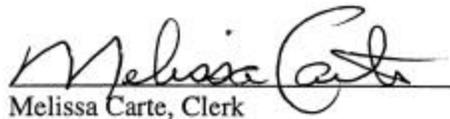
Appeal #03-10-EQB (Weirton Steel) was filed with the Board on April 9, 2003, and was scheduled for hearing during the September 11, 2003, Board meeting. However, on September 9, 2003, the parties submitted a proposed Agreed Dismissal Order for the Board's approval. After a review of the proposed Order the Board members voiced concerns regarding the language and some conditions contained in the Order and directed Ms. Charles to contact the parties for clarification. Mr. Armbricht moved and Dr. Jenkins seconded that in order not to delay action on the appeal until the October Board meeting, that Ms. Charles provide the information to the Board members via e-mail and if the response meets with their satisfaction, the Order will be approved and signed by Ms. Charles, and the motion carried unanimously 3 to 0.

2.) Appeal #03-12-EQB (Sylvan Grove Waste Treatment):

Appeal #03-12-EQB (Sylvan Grove Waste Treatment) was filed with the Board on July 3, 2003, and the evidentiary hearing was scheduled for the September 11, 2003, Board meeting. However, the Board stayed the proceedings to allow sufficient time for the Appellant to complete negotiations which would render the issues of the appeal moot. After discussion, the Board directed the Clerk to set the evidentiary hearing in Appeal #03-12-EQB (Sylvan Grove Waste Treatment) for October 30, 2003.

Whereupon, Mr. Armbrecht moved and Dr. Jenkins seconded that the September 11, 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 September 11, 2003, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on October 30, 2003.



Melissa Carte, Clerk