

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
**ENVIRONMENTAL QUALITY BOARD**

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**MINUTES**

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

**February 26, 2004**

**I. General**

On February 26, 2004, 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 8:30 a.m.

Board members present were as follows:

Ed Snyder, Chair  
Edward C. Armbrecht, Jr.  
Cameron Hackney  
Scott Simonton

Board members absent from the meeting were as follows:

Bob Jenkins

Staff members present were as follows:

Libby Chatfield  
Becky Charles  
Melissa Carte

\*Cheryl Atkinson of the US Environmental Protection Agency, Region III participated in the meeting by teleconference.

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

## **I. Appeals**

Appeal #03-24-EQB (Terry Eagle) was filed with the Board on December 31, 2003. The Board began the evidentiary hearing during the January 29, 2004, Board meeting and continued to hear testimony during the February 25, 2004, Board meeting. Copies of the evidentiary hearing transcripts are available in the Board's office for review.

The evidentiary hearing was scheduled to resume during the February 26, 2004, Board meeting from 8:30 a.m. until 12:00 p.m. However, the parties appeared before the Board prior to the start of the hearing on the 26<sup>th</sup> and informed the Board members that matters of the appeal had been resolved through settlement negotiations and that the Board will not need to complete the evidentiary hearing. The Appellants withdrew Appeal 03-24-EQB (Terry Eagle).

At 1:00 p.m. the Board members reconvened the Board meeting to discuss the following matters:

### **I. Rulemaking**

#### **1.) Tier 2.5 Application:**

The Board received a nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5) on November 12, 2002, and a supplement to the application on December 16, 2002. During the May Board meeting, the Board members evaluated the nomination application to determine whether all of the information as required by the antidegradation implementation procedures rule (60 CSR 5 Antidegradation Implementation Procedures) had been included in the application and deemed the application to be complete.

After determining that the nomination application was in fact complete the Board provided a Notice of the Board's consideration of the nomination to the property owners located adjacent to those streams. Individual notice was mailed to known landowners, the Notice was published in the area newspapers and the State Register, and the notice and application were

posted on the Board's website. In addition, the Board members conducted a site visit and held a public hearing regarding the nomination application in Rowlesburg in Preston County, and also accepted written comments through November 20, 2003.

Mr. Armbecht commented that the majority of the landowners supported the nomination to classify these two waters in Preston County as Waters of Special Concern (Tier 2.5), although three landowners did express concerns that the Tier 2.5 classification could inhibit timber and mineral extraction, as well as future development in the area. The Board members were informed that the Tier 2.5 stream classification would not affect nonpoint source activities such as timbering provided that they continue to implement Best Management Practices (BMPs). In addition, the Tier 2.5 classification would not prohibit future point source discharges into the stream but would require an NPDES permit application to be evaluated by the Department of Environmental Protection (WVDEP) to determine the level of pollutants that would be allowed to be discharged into the stream. Generally, the protection requirements for Tier 2.5 waters are more stringent than those for a Tier 2.0 water.

Dr. Hackney stated that the timber companies which are opposed to the Tier 2.5 classification are the largest landholders in the affected watershed. Johnson Edmunds of the Friends of Laurel Mountain, clarified that the timber companies are the majority landholder on only one of the nominated streams (Fill Hollow). Private citizens (Dean and Hill) are the primary landholders on the other nominated stream (Watkins Run) and they support the Tier 2.5 nomination. He requested that if the Board decides to deny the Tier 2.5 nomination based on the timbering companies opposition that the Board review the stream nominations separately.

The Board will now seek additional information from the WVDEP regarding the various potential impacts that the Tier 2.5 stream classification could have on nonpoint source or point source dischargers (including package treatment plants); the differences in the BMPs required for each classification; and the differences in the review requirements for Tier 2.0 and Tier 2.5 waters including the limitations on the levels of pollutants allowed to be discharged into each stream classification. The Board will request that this information be provided by the WVDEP to the Board prior to its April 2004 meeting.

## 2.) Design Flow Regimes:

The Board continued its discussion of various design flow regimes. The Board previously requested factual data regarding the specific 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, they requested information regarding the potential impact that a different design flow would have on various state agencies charged with the implementation and regulatory responsibilities. The deadline for the written comments has passed and the Board members were provided with copies of the comments submitted.

Written comments were received from the WV Rivers Coalition, Affiliated Construction Trades Foundation, the US Environmental Protection Agency – Region III, and WVDEP. Industry representatives did not provide the Board with written comments or factual data regarding the specific economic impacts of the flow regimes on the regulated community. Also the US Geological Survey (USGS) and the WV DEP previously appeared before the Board to discuss various design flow issues and also to report on their preliminary discussions regarding conducting a new low-flow study. The USGS is proposing a study which includes the various design flow methodologies which the Board is considering implementing in the water quality standards rule. If this study is done the Board and other interested parties would have accurate data on which to base the selection of a particular design flow. The USGS concluded that the Board should not change the flow methodology in the water quality standards rule until the study is complete.

Cliff Whyte, of the WVDEP's Division of Water and Waste Management informed the Board that the agency is currently seeking funding for the new low-flow study in conjunction with the USGS. This will be a two-phase process, during phase one the WVDEP will be provided with information regarding all of the gauges in the state including discussions of trend analysis, land use changes and all of the different factors that need to be taken into consideration in the study. The second phase will involve applying the information and factors gathered during phase one of the study across the state and the challenges associated with that. It would involve a five-year permit cycle to implement the new information. Further, there would be clarifications and changes to permitting procedures needed if the design flows are changed. There would also be major impacts to other

programs within the WVDEP such as the Watershed Assessment Program, and the Total Maximum Daily Load (TMDLs) calculations – both new and existing.

After discussion, the Board determined that there is not sufficient data available to support implementing changes to the current design flow established in the water quality standards rule at this time. Further, it is apparent that changing the design flow regime would result in major impacts to various WVDEP programs and the agency is not prepared for these changes at the present time. Whereupon, Mr. Armbrecht moved and Dr. Simonton seconded that the Board remove the design flow issue from the regular Board meeting agendas until such time as new data and information becomes available, and the motion carried unanimously 4 to 0. The Board further requested that the WVDEP update the Board on a regular basis regarding the status of the proposed study and the compilation of data and information.

### 3.) Nutrient Criteria Committee:

Evan Hansen, a member of the Nutrient Criteria Committee (NCC) was present at the Board meeting and informed the Board members that the NCC is conducting its regular meeting today in Elkins. Mr. Hansen participated in the morning portion of the NCC meeting by telephone and reported that the committee is currently reviewing new information including a literature review which discusses treating lakes with short residence times (the water flushes out of the lake before algae has time to grow) as rivers in terms of creating nutrient criteria standards and for regulatory purposes. The Committee is also continuing to discuss the methodology for establishing phosphorus criteria for lakes.

### 4.) Legislative Rule (46CSR1, “Requirements Governing Water Quality Standards”):

The Board completed the proposed revisions to the Water Quality Standards rule developed pursuant to its federally mandated triennial review. The Agency Approved version of that rule was filed with the WV Secretary of State’s Office and the WV Legislative Rulemaking Review Committee on August 1, 2003, for consideration during the 2004 Legislative session.

The Water Quality Standards rule went through both the House and Senate Judiciary Committees. Both of the Committees agreed to change the Board's proposed rule by removing all of the Board's proposed changes including the 69 new parameters and the additions to the Trout Stream list. The Committees passed out a bill which utilized the Board's currently effective 2003 water quality standards rule with several additions such as the variances granted to Weirton Steel and Dow Chemical, a revised manganese five-mile rule, and also a provision which requires the Board in consultation with the regulated community and the WVDEP to revise the aluminum criterion by emergency rule.

In addition to making those changes to the rule, the Committees issued a study resolution which establishes a joint committee to study the Board's proposed changes as well as the current application of Category A drinking water designation. The joint committee will also review the legislative role in amending water quality standards.

Also the House Governmental Organization Committee passed out House Bill 2717 which transfers the Environmental Quality Board's the rulemaking authority to a newly established water quality board. That board would be comprised of seven ex officio members including the secretary of the department of environmental protection, the commissioner of agriculture, the secretary of the department of transportation, the director of the department of forestry, the director of the department of natural resources, the director of the department of tourism, and the director of the office of economic and community development. The bill will now proceed to the House Judiciary Committee.

At the conclusion of this portion of the meeting Cheryl Atkinson of the USEPA, Region III, informed the Board that while she had comments, suggestions, and questions regarding several issues discussed by the Board during this meeting, in light of the current pending legislation regarding the Board and its rulemaking authority, she would reserve her comments until the Board's future becomes more certain.

## II. Remining Variances

### 1.) Catenary Coal Remining Variance:

The Board received an application for a variance from water quality standards for remining activities on behalf of Catenary Coal Company on September 11, 2003. 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 Board continued to review the application during the February 26, 2004, Board meeting.

Linda Torre, of the Decota Consulting Company, appeared before the Board on behalf of Catenary Coal Company. Ms. Torre stated that since filing the initial application several intermittent seeps were discovered in the preexisting mine bench and in order to address that issue the diversion sediment ditch was redesigned and additional outlets added. These outlets lie in the Moccasin Hollow watershed above a preexisting permit area and the alternate limits requested for these outlets are the same as those already requested for the Moccasin Hollow watershed.

In addition, Ms. Torre provided water analysis that was collected on the seeps. Although there was no pooled water on the bench, the data indicates that the discharge from the seeps located below the bench is consistent with the quality that was found throughout the Moccasin Hollow watershed.

The current application requests daily maximum and monthly average alternate limits for both iron and pH. However, after discussion, Ms. Torre stated that she would revise the application to remove the daily maximum and monthly average values and replace them with one in-stream minimum value and a rolling twelve monthly average.

Ken Politan, of the WV Department of Environmental Protection's Division of Mining and Reclamation, also addressed the Board. He stated that currently the draft permit has not been completed but that he is not aware of any potential problem with the permit. However, there is an issue which may arise – whether the alternate criteria granted by the Board in the remining variance for Moccasin Hollow would be applicable to all

discharges into that stream or just the remining permit outlets. As previously stated the remining application has been modified to include two outlets to the sediment ditch above Moccasin Hollow. However, adding these outlets will cause water to run from the remining site down and through an existing sediment pond and outlet (Outlet 19) which are not part of the remining project. The water leaving the remining site will be subject to less stringent limits established by the remining variance, however once the water enters the existing sediment pond, it will be subject to the more stringent limits established by NPDES Permit WV0093751 which is not a remining permit. Although it is not part of the proposed remining operation, the Catenary may request, through this remining variance application, a variance from those current manganese limits at Outlet 19.

Also, since NPDES Permit WV0093751 which covers Outlet 19, is currently proceeding through the permit renewal process, another potential option that the company could use to address the manganese issues at Outlet 19, is to appeal the limits set in the NPDES permit to the Board. However, Ms. Charles informed the Board members that a variance from water quality standards cannot be granted through the appeal process.

### **III. Administrative Matters**

1.) Review and Approval of the December 10, 2003, Board meeting minutes:

Whereupon, the minutes of the December 10, 2003, Board meeting were presented to the Board members for consideration. After review, Dr. Simonton moved and Dr. Hackney seconded that the minutes of the December 10, 2003, Board meeting be approved as written, and the motion carried unanimously 4 to 0.

2.) Review and Approval of the December 11, 2003, Board meeting minutes:

Whereupon, the minutes of the December 11, 2003, Board meeting were presented to the Board members for consideration. After review, Dr. Simonton moved and Dr. Hackney seconded that the minutes of the December 11, 2003, Board meeting be approved as written, and the motion carried unanimously 4 to 0.

3.) Review and Approval of the January 29, 2004, Board meeting minutes:

Whereupon, the minutes of the January 29, 2004, Board meeting were presented to the Board members for consideration. After review, Dr. Simonton moved and Dr. Hackney seconded that the minutes of the January 29, 2004, Board meeting be approved as written, and the motion carried unanimously 4 to 0.

4.) Budget Report:

Ms. Coleman reviewed the budget report which provides a financial analysis update through January 31, 2004. As of that date, which represents a seven month period or 58% of the fiscal year, the Boards have spent 57.85% of the combined budget. Also the Board saved \$3,135.00 by reimbursing only for actual expenses incurred. A copy of this report, dated February 9, 2004, is attached to and made a part of these minutes as Exhibit "A".

5.) Purchasing Card Report:

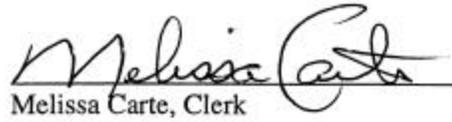
Ms. Coleman reviewed the quarterly Purchase Card report with the Board. This report details the purchases made by authorized staff members during the months of October 2003 through December 2003. The Board members did not have any questions or concerns regarding the transactions contained in the report. A copy of the Purchase Card report is attached to and made a part of these minutes as Exhibit "B".

6.) Board Meeting Dates:

The Board scheduled a Board meeting for Thursday, March 25, 2004. Once the Board establishes a meeting agenda they may consider meeting during the afternoon of March 24, 2004.

WHEREUPON, Mr. Armbrecht moved and Dr. Simonton seconded that the February 26, 2004, Environmental Quality Board meeting be adjourned and the motion passed unanimously 4 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meeting held on February 26, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on March 26, 2004.



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

Melissa Carte, Clerk