

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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MINUTES

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

APRIL 29, 2004

I. General

On April 29, 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

Bob Jenkins, Vice Chair

Cameron Hackney

Scott Simonton (arrived at the meeting at 9:00 a.m.)

Board members participating telephonically:

Edward C. Armbrecht, Jr. (from 12:00 p.m. until 1:30 p.m.)

Staff members present were as follows:

Libby Chatfield

Becky Charles

Melissa Carte

Kathy Coleman

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

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

II. Administrative Matters

1.) Review and Approval of the March 25, 2004, Board meeting minutes:

Whereupon, the Board members reviewed the draft minutes of the March 25, 2004, Board meeting. After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the minutes of the March 25, 2004, Board meeting be adopted as written, and the motion carried unanimously 3 to 0.

2.) Monthly Budget Report:

Ms. Coleman provided the Board members with a monthly budget report. A copy of this report is attached to and made a part of these minutes as Exhibit "A". As of March 31, 2004, which represents a nine-month period or 75% of the 2004 fiscal year, the Boards have spent 74.34% of the combined budget. The Board members were informed that based on the projected expenses for the remainder of the 2004 fiscal year, the Boards will experience a projected funding shortfall of approximately \$7,000.00 for the combined budgets.

The Board members discussed funding options, including canceling Board meetings or requesting additional funding from the WV Department of Environmental Protection. Dr. Jenkins moved and Dr. Hackney seconded that all future Environmental Quality Board meetings scheduled to be conducted during the 2004 fiscal year be cancelled unless the WVDEP commits to providing the needed funding to the Board by the end of the work day on Monday, May 3, 2004, and the motion carried unanimously 3 to 0.

3.) Fiscal Year 2005 Budget:

The Board members were informed that the legislature has passed the budget for the 2005 fiscal year. The Air Quality Board received a total of \$82,514.00 (after the mandated 9% cut) which includes a slight increase of

\$448.00 over the 2004 fiscal year budget. However, although the Environmental Quality Board submitted a budget request of \$178,766 (after the mandated 9% cut) the legislature approved only \$155,368.00 which reduces the EQB's funding by \$23,398.00.

The Boards' Chairs will be meeting with Randy Huffman, Assistant Secretary of the Department of Environmental Protection (WVDEP), on April 28, 2004, to discuss the budget reduction and the immediate need for supplemental funding from the WVDEP.

Ms. Coleman included a general budget history which shows that from fiscal year 2002 through fiscal year 2005, the Boards' budget, due to various mandated budget cuts, has been decreased by a total of \$79,744.

4.) Purchasing Card Report:

The Board members were provided with the quarterly Purchase Card report which details the purchases made by authorized staff members for the months of January 2004 through March 2004. A copy of this report is attached to and made a part of these minutes as Exhibit "B". After a review of the report, Dr. Hackney moved and Dr. Jenkins seconded that the Board approve the Purchase Card report, and the motion carried unanimously 3 to 0.

III. Appeals

1.) Appeal No. 03-17-EQB(Consol of Kentucky), Appeal No. 03-18-EQB (Consol of Kentucky), and Appeal No. 03-21-EQB (Consol of Kentucky):

Appeal No. 03-17-EQB (Consol of Kentucky) and Appeal No. 03-18-EQB (Consol of Kentucky) were filed with the Board on October 29, 2003, and Appeal No. 03-21-EQB (Consol of Kentucky) was filed with the Board on December 1, 2003. These appeals were scheduled for hearing during the April 29, 2004, Board meeting, however the parties have now filed a proposed "Agreed Order Withdrawing Appeals" for the Board's review and approval. After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the Board approve the proposed Agreed Order and remove the appeals from the Board's docket, and the motion carried unanimously 3 to 0.

2.) Appeal No. 03-20-EQB (Lusk):

Appeal No. 03-20-EQB (Lusk) was filed with the Board on November 20, 2003, and an evidentiary hearing regarding the matters set forth in the appeal was conducted during the April 29, 2004, Board meeting. A copy of the transcript of the hearing is available in the Board office for review.

IV. Rulemaking

1.) Legislative Rule 46CSR1, “Requirements Governing Water Quality Standards”:

Once a legislative rule is passed by the Legislature and signed by the Governor, the governmental agency is responsible, within 30 days of its passage, to proceed with the final promulgation of the rule.

The Board discussed the final promulgation of the Water Quality Standards rule as amended by the Legislature during the 2004 legislative session, in accordance with the State Administrative Procedures Act. The Board members were provided with a copy of the House Bill 4193 which contains all of the mandated changes to be made to the Board’s rule and also a copy of the final version of the rule which incorporates those changes.

After discussion, Dr. Jenkins moved and Dr. Hackney seconded that the Board set an effective date for the rule of July 1, 2004, and that the staff file the rule with the WV Secretary of State’s office as soon as possible, and the motion carried unanimously 3 to 0. Dr. Hackney moved and Dr. Jenkins seconded that the staff file the final version of the water quality standards rule as it was adopted by the legislature and the motion carried unanimously 4 to 0.

2.) Submission of Rule Package to the USEPA:

Once the final version of the rule is filed with the Secretary of State’s office, the Board is required to submit the complete rule package to the USEPA. Ms. Chatfield noted that regardless of the effective date of the rule set by the Board, for the purposes of the Federal Clean Water Act, the rule is not effective until it is approved by the USEPA.

The USEPA rule package must include the final version of the rule as promulgated by the Board, a summary of the changes made to the rule, and the rationale or basis for making those changes. During this legislative session, the section 6.2.d. of the Water Quality Standards rule was amended by the Legislature to provide that “the manganese human health criteria shall only apply within the five-mile zone immediately above a known public or private water supply for human consumption”. The Board did not propose this change to the rule and consequently consideration of a change to the manganese requirements was not included in the public notice published for the triennial review, no comments were solicited or received during the public comment period, and no data regarding manganese was reviewed or considered by the Board. The Board discussed a letter submitted by the WV Coal Association dated April 27, 2004, regarding preparing a basis to support the legislative amendment to the state’s manganese water quality criteria.

After discussion, the Board directed staff to contact the Chairman of the Senate Judiciary Committee and the Chairman of the House Judiciary Committee to explain that the Board is required by federal law to submit all revisions to the State’s Water Quality Standards rule and include supporting documentation for such revisions to the USEPA and to seek copies of any written submissions or other information that was considered in the Committee’s deliberations for the revisions to section 6.2.d. which the Board that could then include in the rule package submitted to the USEPA. If the legislature does not have such information available, the Board directed staff to submit the rule package to the USEPA as required and include with the submission a statement that the revision to section 6.2.d. of the water quality standards rule was generated by the state legislature.

IV. Tier 2.5

The Board received a nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5). During the May 2003 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 the nomination to the property owners located adjacent to those streams. The Board conducted a site visit and a public hearing in Rowlesburg in Preston County regarding the application and accepted written comments through November 20, 2003.

During the course of the Board's consideration of the application, several questions arose regarding how the classification of these streams as Tier 2.5 waters may affect activities that would result in point source or nonpoint source discharges into those streams. The Board sent a letter to the WV Department of Environmental Protection (WVDEP) requesting additional information which would be helpful.

On April 28, 2004, Allyn Turner, Director of the WVDEP's Division of Water and Waste Management submitted a letter in response to the Board's questions. Cliff Whyte, WVDEP, provided the Board with an overview of the response as it relates to point source activities:

1. "What is the current antidegradation classification tier for these two streams?" Both of the streams which are the subject of the Tier 2.5 nomination application are currently classified as Tier 2 streams, which is the default designation.

2 & 3. "What steps would the WVDEP follow in addressing an NPDES permit application for a package treatment plant on the streams as currently classified and what requirements would govern the allowable discharges in such permit into streams as classified?" and "How would a Tier 2.5 classification change those requirements?" For permitting purposes, the permitting requirements for a Tier 2 stream and a Tier 2.5 stream are very similar, for example baseline water quality would be established. Both classification levels require that no more than 10% of the remaining assimilative capacity could be exceeded with any new discharge allocation. The assimilative capacity is evaluated on a parameter by parameter basis. Under a Tier 2 classification, if a discharge would exceed the 10% assimilative capacity level the discharger has the option of providing information to the agency in support of a socio-economic benefit which would then allow the agency to approve the discharge. That option is not available on a stream classified as a Tier 2.5 stream. Mr. Whyte noted that for either stream classification, the effluent limit for the criteria cannot exceed the water quality standard for that pollutant.

4. & 5. "What Best Management Practices (BMPs) would be required to be employed for activities resulting in nonpoint source discharges into the streams as currently classified?" and "Would those requirements change if the streams were reclassified as Tier 2.5 streams?" Because BMPs are

designed to minimize potential water quality impacts there would be no distinction when applying them to land use activities along the streams, regardless of whether they are classified as Tier 2 streams or Tier 2.5 streams.

A copy of the Board's letter and the WVDEP response are attached to and made a part of these minutes as Exhibit "C".

Dr. Simonton stated that 13 points of the Antidegradation Implementation Procedures rule including a portion of the Tier 2.5 regulations are still pending because of a court decision issued as a result of a lawsuit and that the WVDEP does not have a complete antidegradation implementation rule at this time. Cheryl Atkinson of the USEPA Region 3, stated that there are actually only four remaining issues on which the USEPA has deferred action as a result of that lawsuit and that of those items, the only one which would affect a stream classified as a Tier 2.5 water is the proposed exemption from the de minimus provisions for dissolved oxygen, pH, temperature, and fecal coliform.

In addition, Dr. Simonton stated that the WVDEP is currently proposing an initial presumptive list of approximately 444 streams to be classified as Tier 2.5 waters. He stated that because this list must go through the entire legislative process, it will be, at minimum, one year before that list of streams is approved and that if the Board designates these two streams which are the subject of the nomination application as Tier 2.5 waters, they will be added to a list that does not yet exist. Ms. Chatfield stated that the antidegradation implementation regulation filed by the WVDEP is filed as a "Legislative Rule Exempt From Legislative Review" and does not require legislative review and approval for final promulgation. Dr. Simonton stated that he feels that the Board is being asked to add these two streams to a program that is not yet in place, to a list that does not exist at this time, and because the program has not been administered, the implications of changing the stream classification are unknown. Ms. Charles stated the fact that the WVDEP has not yet implemented the antidegradation procedures or adopted a presumptive list of Tier 2.5 waters does not preclude the Board from designating these streams as Tier 2.5 waters.

Ms. Chatfield stated that the rule provides for two separate avenues for designating a Tier 2.5 water, one is the initial presumptive listing being created by the WVDEP and the other method, which is actually located in a

separate section of the rule, provides the Board with the authority to designate streams as Tier 2.5 waters based on a list of qualification criteria. The basis for classifying a stream as a Tier 2.5 water is addressed by the qualification criteria outlined in the antidegradation rule. Qualification criteria are the factors to be considered in determining whether to assign a Water of Special Concern designation to a stream. These criteria include 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 special designations, existing water quality, factors that indicate unique or exceptional ecological, recreational, aesthetic resource value, impact on economic development in the area including development of demonstrated natural resources, and other factors determined by the Board when applicable. The Board has been reviewing the nomination application based on those criteria since November 2002.

Dr. Snyder stated that based on the review of the information contained in the nomination application, the qualification criteria, and the site visit to the streams by some of the Board members it is clear that the streams are high quality waters. Dr. Hackney stated he does not see the benefit to changing the designation of the streams from Tier 2 to Tier 2.5 since the criteria are not that much different, except that retaining the Tier 2 designation would allow for more future development of the area. Dr. Snyder stated that changing the designation of the streams to Tier 2.5 would ensure that the high quality of the streams is maintained in the future. Dr. Jenkins noted that the high quality of the water is not in question, but that because the rule has not been implemented, the possible future impacts of the Tier 2.5 designation are not clear.

Ms. Charles reminded the Board that an area landowner had requested that the Board consider addressing each stream separately and noted that all of the landowners along one of the two streams nominated for the Tier 2.5 classification voiced strong support for the nomination. Ms. Charles noted that those landowners did not appear to be concerned about any possible future impacts of the designation. Dr. Simonton stated that if the landowners were in support of retaining the high quality of the waters, then the streams probably won't be degraded.

Dr. Hackney moved and Dr. Simonton seconded that the Board deny the petitions at this time with the caveat that after the rule is completely

implemented and the presumptive list of streams has been approved, the applicants can come back before the Board. Ms. Charles clarified that if the Board denies the application and the applicants decide to come back before the Board, they would have to re-file the application and proceed through the entire nomination process again.

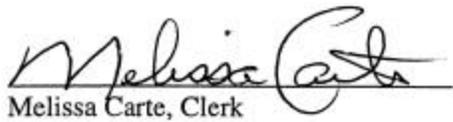
Mr. Armbrecht stated that the Board has been reviewing this nomination application for an extended period of time, some of the Board members have visited the sites, conducted a public hearing, listened to the pros and cons from interested parties where a number of the property owners expressed overwhelming support for the designation and if the Board passes Dr. Hackney's motion, it will negate all of the work of the Board and the citizens. Mr. Armbrecht asked whether the Board could request that these streams be added by the WVDEP to their initial presumptive list of Tier 2.5 waters. Ms. Chatfield stated that would be a decision that would have to be made by the WVDEP. Mr. Armbrecht suggested that the Board needs to discuss the issued with the WVDEP and then moved to table Dr. Hackney's motion, and Dr. Snyder seconded the motion to table. The motion to table passed 3 to 2, with Dr. Hackney and Dr. Simonton voting against the motion.

Mr. Armbrecht stated that the point of his motion is to continue a review process that has been ongoing for an extended period of time by allowing the matter to continue to be considered by the Board and which will provide additional opportunity to address Board member concerns once the Board receives further clarification.

Cheryl Atkinson of the US Environmental Protection Agency, Region III, informed the Board that the USEPA is available to discuss the four remaining items of the antidegradation implementation procedures that were deferred and to offer additional clarification. She stated that the USEPA is planning to complete action on the WVDEP's antidegradation rule by the end of summer and suggested that the Board members review a letter which was sent to the WVDEP regarding approval of the antidegradation implementation procedures. Cliff Whyte stated that he could provide a copy of that letter to the Board.

Whereupon, Dr. Hackney moved and Dr. Simonton seconded that the April 29, 2004, Board meeting be adjourned and the motion carried unanimously 4 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the meeting held on April 29, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on June 11, 2004.



Melissa Carte, Clerk