

~~DEPARTMENT OF ENVIRONMENTAL QUALITY BOARD~~  
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## **MINUTES**

### **WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

**May 6, 2004**

#### **I. General**

On May 6, 2004, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ~~A~~Board) 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  
Scott Simonton  
Edward C. Armbrrecht, Jr. (arrived at the meeting at 9:20 a.m.)

Absent Board members were as follows:

Cameron Hackney

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.) Fiscal Year 2004 Budget Report:

As of April 30, 2004, which represents a ten month period or 83% of the 2004 fiscal year, the Boards have spent 82.93% of the combined budgets. During the April 29, 2004, Board meeting 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. During that meeting the Board members discussed funding options, including canceling Board meetings or requesting additional funding from the WV Department of Environmental Protection.

The Board members were informed that in response to the Boards' continuing budget concerns for fiscal year 2004, Randy Huffman, Administrative Secretary of the WVDEP, has stated that the WVDEP will provide \$8,000 to be used by the Boards to meet operating and meeting expenses for the remainder of fiscal year 2004.

### 2.) Fiscal Year 2005 Budget Report:

Ms. Coleman provided the Board members with a brief budget update for fiscal year 2005. The WV Department of Environmental Protection has agreed to supplement the Boards' budgets for fiscal year 2005 by \$30,000. The WVDEP has also submitted a request to the State Budget Office for additional funding for the Boards. This request could be taken up by the legislature during the June interim meetings.

The WVDEP will be paying the Boards' rent and utility expenses during the first year in the new building. However, a preliminary projection of the operating costs for the Boards in the new building indicates an increase in expense in the amount of \$8,609 per year.

Whereupon, Mr. Armbrecht arrived at the meeting.

### III. Remining Variance Requests

#### 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 May 6, 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.

Ken Politan, of the WV Department of Environmental Protection's Division of Mining and Reclamation, also addressed the Board. He stated that 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 the NPDES permit (WV0093751) which is not a remining permit. The current effluent limits in the NPDES permit (WV0093751) which are not in the remining area were calculated to protect the manganese criterion of 1ug/l in Moccasin Hollow. Mr. Politan questioned whether the alternate criteria in the remining variance would allow the agency to recalculate the limits in the

NPDES permit (WV0093751) and allow the company to use those alternate limits elsewhere in the stream.

Because of the current NPDES limits (WV0093751), the company does not allow the sediment pond to discharge. Instead the water that would normally discharge through the impoundment and into the sediment pond is pumped back within the impoundment pool. However, if the company is allowed to use the alternate criteria established in the remaining variance the water would be discharged as the system was designed. The discharge would be in the range of 8 ug/l – 10 ug/l or 12 ug/l for manganese, 6 SU – 6.5 SU pH.

The current in-stream pH level is in the 4 to 4 ½ range and the manganese is at 8 to above 20 parts per million. If the company is allowed to use the alternate limits granted in the remaining variance for the in-stream criterion as well, the in-stream impact from discharge of the water from the pond may result in an improvement to the quality of the water downstream.

The alternate technology-based limit for iron requested for both streams is 2.46 mg/l maximum daily and 1.42 mg/l rolling 12 month average. An alternate limit for manganese is requested based upon a 10% improvement over the worst case (highest recorded) water quality reading; for Outlets 001, 002 and 003 (unnamed tributary to Left Fork of White Oak Creek), the limits requested would be 19.62 mg/l maximum daily and 5.48 mg/l rolling twelve month average. The limits proposed for Outlets 004, 005, and 006 (Moccasin Hollow) would be 16.20 mg/l maximum daily and 8.17 mg/l rolling twelve month average.

The Company is also seeking alternate limits for pH. The requested limits are based upon a 10% improvement over the worst case (lowest recorded) water quality reading; for Outlets 001, 002 and 003 (unnamed tributary to Left Fork of White Oak Creek), the limits requested are 4.55 SU minimum daily and 5.17 SU rolling twelve month average. The limits proposed for Outlets 004, 005, and 006 (Moccasin Hollow) are 4.35 SU minimum daily and 4.55 SU rolling twelve month average.

Ms. Torre stated that the WV Department of Environmental Protection's (WVDEP) Division of Mining and Reclamation is still reviewing the

company's NPDES application for the remining project but that the Article 3 mining permit has been approved. The Board decided to place the remining variance application on the June Board meeting agenda in order to allow for a final response from the WVDEP regarding the applications.

2.) Upper Kanawha Valley Development Corp.:

On September 11, 2003, Upper Kanawha Valley Development Corp. submitted an application for a variance from water quality standards for remining activities for "Phase Two" of their remining project.

The Board members were informed that Mr. Armbrecht, Ms. Carte, Ms. Chatfield and several WV Department of Environmental Protection's Division of Mining staff members completed a site visit. The visit allowed the staff and Board member to view not only the current area which is the subject of this remining variance application but also the area affected by a remining variance previously granted by the Board.

Lantz Rankin of Heritage Technical Associates, and John Wellford appeared before the Board on behalf of the Upper Kanawha Valley Development Corporation. Mr. Rankin provided the Board with additional information and an update for the remining application. The changes to the application included a proposed trend line analysis and company response: "If the water quality at the monitoring sites do not meet the values established by these trend monitoring guidelines, Upper Kanawha Valley Development Corp., in consultation with WVDEP personnel, shall review the abatement plan set forth in this application for variance from applicable water quality standards request to determine if the abatement plan is still appropriate for the site and that sufficient implementation of the abatement plan has occurred that would show improvements proposed by this application for variance from applicable water quality standards. Site specific situations could occur where the trend values may not be met until such time that large portions of the sub-watersheds are affected by remining and implementation of the abatement plan."

The variance application proposes that improvements be demonstrated over both the worst case and average readings:

For the Right Fork of Laurel Fork (unnamed tributary of Laurel Fork of Witcher Creek of Kanawha River) at sampling site URFLF the company proposed a manganese limit of 4.28 ppm which represents a 5% improvement over the worst reading for manganese of 4.51 ppm. The company proposed a pH value of 4.1 SU to 9.0 SU which is a 20% improvement over the lowest recorded water quality reading. In addition, the company is requesting an average pH value of 4.83 SU to 9.0 SU which represents a 20% improvement. Although the water quality sampling has revealed exceedances of the manganese criteria in the stream, Mr. Rankin stated that it is his opinion that an average value for manganese is not needed since the current average value (based on 32 samples) is 1.90 ppm, which is below the technology based limit of 2.00 ppm.

For the Right Fork of Laurel Fork (unnamed tributary of Laurel Fork of Witcher Creek of Kanawha River) at sampling site SW19/RFLF the company proposed a manganese limit of 4.62 ppm which represents a 5% improvement over the worst reading for manganese of 4.86 ppm. The company proposed a pH value of 4.3 SU to 9.0 SU which is a 20% improvement over the lowest recorded water quality reading. In addition, the company is requesting an average pH value of 4.79 SU to 9.0 SU which represents a 20% improvement. Although the water quality sampling has revealed exceedances of the manganese criteria in the stream, Mr. Rankin stated that it is his opinion that an average value for manganese is not needed since the current average value (based on 32 samples) is 0.70 ppm, which is lower than the current technology based limit of 2.0 ppm.

For the Right Fork of Watson's Branch at sampling site SW35/URFWB, the company proposed a manganese limit of 3.45 ppm which represents a 5% improvement over the worst reading for manganese of 3.45 ppm. The company proposed a pH value of 3.27 SU to 9.0 SU which is a 20% improvement over the lowest recorded water quality reading. In addition, the company is requesting an average pH value of 4.09 SU to 9.0 SU which represents a 20% improvement. Although the water quality sampling has revealed exceedances of the manganese criteria in the stream, Mr. Rankin stated that it is his opinion that an average value for manganese is not needed since the current average value (based on 32 samples) is 1.23 ppm, which is lower than the current technology based limit of 2.0 ppm.

For the Left Fork of Watson's Branch at sampling site SW4/ULFWB the company proposed a manganese limit of 4.10 ppm which represents a 5% improvement over the worst reading for manganese of 4.32 ppm. The

company proposed a pH value of 3.2 SU to 9.0 SU which is a 20% improvement over the lowest recorded water quality reading. For this sampling site the company is also seeking a variance from the water quality standard for iron. They are proposing an iron limit of 5.51 ppm which is a 5% improvement over the current the highest recorded water quality reading. In addition, the company is requesting an average pH value of 4.09 SU to 9.0 SU which represents a 20% improvement. Although the water quality sampling has revealed exceedances of the manganese criterion in the stream, Mr. Rankin stated that it is his opinion that an average value for manganese is not needed since the current average value (based on 32 samples) is 1.82 ppm, which is lower than the current technology based limit of 2.0 ppm.

After completing the review Dr. Snyder requested that the company revise their application to demonstrate a 10% improvement in the value derived from the worst reading for manganese. Mr. Wellford agreed to this request for most sampling points but requested that the Board continue to consider a 5% improvement for the Right Fork of Laurel Fork (unnamed tributary of Laurel Fork of Witcher Creek of Kanawha River) at sampling site SW19/RFLF.

Mr. Politan noted that the company may need to amend the variance application to include a variance request for the iron criterion. Mr. Rankin stated that meeting the water quality standard for aluminum is also a problem. He was informed that the Board has the authority to grant variances from water quality standards for pH, iron and manganese only. However, there are other options available to address aluminum which the company could consider such as a socio-economic variance or site specific numeric criteria variances which can be applied for through the water quality standards. These types of variances require legislative approval.

Mr. Rankin stated that he would provide the Board members with additional information regarding a 10% improvement for manganese and also the iron alternate limits, if needed, prior to the June Board meeting. The Board will place the continued discussion of remaining variance application on the June 28, 2004, Board meeting agenda.

#### IV. Rulemaking

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

During the April 29, 2004, Board meeting the staff was directed to complete 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. However, during the May Board meeting the Board staff requested that the Board members review the final version of the water quality standards rule in order to verify that all of the modifications and revisions directed by the Legislature had been completed accurately.

The Board members were previously provided with a copy of the enrolled version of the bill which outlines the Legislative amendments and the final version of the rule which reflects those amendments. The Board members reviewed each section of the rule to verify the amendments had been completed correctly:

As amended by the Legislature, Section 6.2.d. of the water quality standards rule now provides:

6.2.d. All other surface water intakes where the water is used for human consumption. (See Appendix B for partial listing of Category A waters; see section 7.2.a.2, herein for additional requirements for Category A waters.) The manganese human health criterion shall only apply within the five-mile zone immediately upstream above a known public or private water supply used for human consumption.

As amended by the Legislature, Section 7.2.a.2. of the water quality standards rule now provides:

7.2.a.2. Each segment extending upstream from the intake of a water supply public (Water Use Category A), for a distance of one half (1/2) mile or to the headwater, must be protected by prohibiting the discharge of any pollutants in excess of the concentrations designated for this Water Use Category in section 8, herein. In addition, within that one half (1/2) mile zone, the Chief may establish for any discharge, effluent limitations for the protection of human health that require additional removal of pollutants than would otherwise be provided by this rule. (If a watershed is not significantly larger than this zone above the intake, the water supply section may include the entire upstream watershed to its headwaters.) Until September 1,

2010, or until action by the Environmental Quality Board to revise this provision, whichever comes first, the one-half (1/2) mile zone described in this section shall not apply to the Ohio River main channel (between Brown's Island and the left descending bank) between river mile points 61.0 and 63.5 for the Category A criterion for iron as set forth in §8 herein. Weirton Steel Corporation shall conduct monthly monitoring of the treated water at its drinking water plant for iron and submit the results of such monitoring to the West Virginia Bureau for Public Health and the Office of Water Resources of the West Virginia Department of Environmental Protection. In addition, Weirton Steel Corporation shall submit a written report regarding the status of its drinking water plant and the issues pertaining thereto to the Environmental Quality Board on or before March 1, 2007.

As amended by the Legislature, Section 7.2.d.16.2. of the water quality standards rule now provides:

7.2.d.16.2. Except that a socio-economic variance shall apply to that segment of Harmon Creek (0-97) from its confluence with the Ohio River to a point 2.2 miles upstream, which shall not have water use Category A designation, and which shall have the following instream criteria: Lead 14 ug/l, Daily Maximum, Temperature 100 degree F (monitored per Footnote 12 of the permit); Iron 4.0 mg/l, monthly average and 8.0 mg/l Daily Maximum (monitored per Footnote 12 of the permit). Weirton Steel Corporation shall continue to submit to the Office of Water Resources of West Virginia Department of Environmental Protection, on an annual basis summary reports on the water quality of the discharge from Outlet 004 and the efforts made by Weirton Steel Corporation during the previous year to improve the quality of the discharge. These exceptions shall be in effect until action by the Environmental Quality Board to revise the exceptions or until July 1, 2007, whichever comes first.

As amended by the Legislature, Section 7.2.d.19.3. of the water quality standards rule now provides:

7.2.d.19.3. Except that in Ward Hollow of Davis Creek, the following site-specific numeric criterion for chloride shall apply for Category A and Category B1 (chronic aquatic life protection): 310,000 ug/L.;

Appendix E, Table 1 of the water quality standards rule was also amended by the Legislature. In column one, the words “The concentration of un-ionized ammonia (NH<sub>3</sub>) shall not exceed 50 ug/l” were stricken from the rule. In addition all of the provisions of section 8.2 were stricken and section 8.2.1. was renumbered as section 8.2. Section 8.2. now provides that:

8.2. Acute and chronic aquatic life criteria for ammonia shall be determined using the National Criterion for Ammonia in Fresh Water<sup>d</sup> from USEPA’s 1999 Update of Ambient Water Quality Criteria for Ammonia (EPA-822-R-99-014, December 1999)

After the completion of the Board’s review of the rule, Mr. Armbricht moved and Dr. Jenkins seconded that the Board verify and approve the revisions made by staff to the water quality standards rule in accordance with House Bill 4193, and the motion carried unanimously 4 to 0. The Board then directed staff to file the final version of the rule.

## 2.) Legislative Follow-up of Water Quality Standards Provisions:

After the conclusion of the 2004 legislative session, the Joint Legislative Committee on Government and Finance assigned various study topics to select House-Senate panels for review during the upcoming interim meetings. A study of the state’s water quality standards was assigned to the Legislative Rule-Making Review Committee. Although it is unclear exactly what role the Board will play in the process, the Board members may be invited to attend a meeting of the Legislative Rule-Making Review Committee. Regardless of how the conflicts regarding the provisions of the Board’s proposed 2004 water quality standards rule (including the proposed 69 new parameters and the proposed additions to the trout stream list) are resolved by the Committee, it is the Legislature’s intention that the rule will be promulgated by the Board.

## 3.) Aluminum:

House Bill 4193 provides that “the Environmental Quality Board shall, in cooperation with the regulated community and the department of

environmental protection, propose for promulgation an emergency and legislative rule to revise the aquatic life aluminum criterion in the Water Quality Standards rule by October 1, 2004.” The Board will file any revision to the aluminum standard as both an Emergency rule and as a Legislative rule. This process requires that the Board accept public input and comments from all interested parties, and that all decisions by the Board be carried out in an open forum during a public Board meeting.

The Board directed staff to provide public notice of the Board’s consideration of the aluminum criterion. The Notice will be filed in the State Register, posted on the Board’s website, emailed to the all persons who normally receive Board notices (listing of approximately 125 people), and will also be published in the newspaper. The Board will be accepting written comments on aluminum through June 25, 2004. These comments will be distributed to the Board members during the June 28<sup>th</sup> Board meeting.

In addition the Board intends to contact the US Environmental Protection Agency (USEPA) and also the U.S. Fish and Wildlife Service for input on the aluminum criteria. Jenny Henthorn representing the regulated community, stated that there was no intention on the part of the regulated community to exclude participation by any interested party, including the USEPA. She provided the Board members with a copy of a letter from the USEPA, dated August 2, 2001, regarding their approval of Pennsylvania’s water quality standards rule, and which also contains a reference to Pennsylvania’s failure to adopt a chronic aquatic life value for aluminum. Ms. Henthorn also provided the Board members with a proposed time schedule for promulgating the rule. However, Mr. Don Garvin, of Trout Unlimited, stated that the Federal Clean Water Act establishes open meeting provisions and requires 45-day public comments periods for any revision to a water quality standards rule, and he expressed concerns regarding the amount of time that will be provided by the Board for public comment.

Whereupon, the Board took up the following appeal-related matters:

## V. Appeals

1.) Appeal No. 04-01-EQB (Bennett):

Appeal No. 04-01-EQB (Bennett) was filed with the Environmental Quality Board on January 2, 2004, and was set for hearing during the May 6, 2004, Board meeting. However, prior to the start of the evidentiary hearing the parties met with the Board's attorney and explained that the appellant is currently undertaking steps to bring the facility into compliance and that the Appellee wants to negotiate a settlement of the issues with the Appellant. The Board granted a continuance of the evidentiary hearing until June 28, 2004, but encouraged the parties to finalize their negotiations and complete the resolution of the issues of the appeal as soon as possible.

2.) Appeal No. 04-09-EQB (PKC):

Appeal No. 04-09-EQB (PKC) was filed with the Board on May 4, 2004, and is set for hearing during the July 23, 2004, Board meeting. When filing the Notice of Appeal, the Appellant also filed a Motion for Stay. The Board conducted a hearing on the Appellant's Motion for Stay during the May 5, 2004, Board meeting.

Whereupon, Dr. Simonton left the meeting and did not participate in the hearing or decision by the Board regarding the stay request. The Board found that unjust hardship existed to justify a stay of the Order which is the subject of the appeal and granted a conditional thirty (30) day stay.

3.) Appeal No. 04-08-EQB (Welding, Inc.):

Appeal No. 04-08-EQB (Welding, Inc.) was filed with the Board on April 30, 2004, and scheduled for hearing during the July 2004, Board meeting. When filing the Notice of Appeal, the Appellant also filed a Motion for Stay. However, the parties have reached an agreement regarding the Stay request. After reviewing the proposed Order for Stay, and determining that no environmental harm would result from granting the Stay request, Dr. Jenkins moved and Mr. Armbrecht seconded that the Board approve the proposed Stay Order, and the motion carried unanimously 3 to 0.

**Whereupon the Board then continued the discussion of water quality standards issues.**

4.) Update on the Nutrient Criteria Committee:

The Board members were reminded that on November 20, 2003, the Board submitted a revised Nutrient Criteria Development Plan for West Virginia to the USEPA based on recommendations from the Board's Nutrient Criteria Committee (NCC). After receiving the proposed plan the USEPA offered additional recommendations for items that should be included. The NCC members reviewed those recommendations and agreed to the following revisions: Section III (Criteria Development) Item 5 (Inventory of Existing Data – Accumulate and evaluate data from the following sources) was amended to include the USEPA National Database and the USEPA Regional Database (Region 3); Section IV (Specific Near-Term Objectives 1-2 years) Item 5 (Secure Funding) was amended to provide that the Board and the NCC acknowledge that the USEPA will not necessarily be providing all of the necessary funding for the development of the criteria; Section V (Intermediate-Term Objectives 2-5 years) Item 1 (the NCC will) was revised to provide an explanation of the extended timeframe needed for the completion of the project; Section VI (Long-Term Objectives 5-7 years) Item 2 (the EQB will) was revised to provide an explanation of the State's rather lengthy Legislative rulemaking process.

After completing a review of the revised plan Mr. Armbrrecht moved and Dr. Jenkins seconded that the Board approve the Nutrient Criteria Development Plan as revised, and the motion carried unanimously 3 to 0.

The Board members were also provided with a copy of the NCC Field Sampling Proposal 2004. The draft proposal was prepared by a subcommittee of the NCC and will be addressed by the entire NCC at the June meeting. The proposal establishes the final cost of the research projects for establishing lake criteria in West Virginia totals \$118,358.28. Available resources from various state agencies and the Nutrient Criteria Committee should provide \$52,965 in matching resources. The cost of the NCC recommended sampling in 2004 is \$65,393.28.

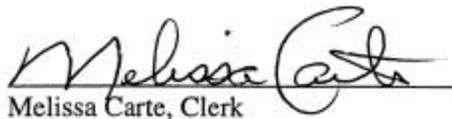
Ms. Chatfield stated that there is currently a \$50,000 grant from the WVDEP to assist in the development of the nutrient criteria. However, the Committee should not spend the entire \$50,000 grant on the development of lake criteria since nutrient criteria must also be developed for streams, rivers, and wetlands. In addition, the grant was originally awarded by the WVDEP for the development of nutrient criteria as well as other criteria. After discussion, Mr. Armbrrecht moved and Dr. Jenkins seconded that the

Nutrient Criteria Committee be allowed to spend up to \$31,000 of the grant in the development of lake criteria and that the EQB Chair review and authorize those expenditures, and the motion carried unanimously 3 to 0.

The Board scheduled a teleconference on June 18, 2004, beginning at 2:00 p.m. to discuss Nutrient Criteria Committee matters in a timely manner. The Board also determined that during that meeting, the Tier 2.5 nomination application should be discussed and a decision on the matter be issued by the Board.

Whereupon, Mr. Armbricht moved and Dr. Jenkins seconded that the May 6, 2004, meeting of the WV Environmental Quality Board 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 May 6, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on June 28, 2004.



Melissa Carte, Clerk