

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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MINUTES

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

JUNE 11, 2004

I. General

On June 11, 2004, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) conducted a teleconference from its offices located at 1615 Washington St. E., Charleston, West Virginia. Dr. Snyder, Chair, called the meeting to order at 2:00 p.m.

Board members present were as follows:

Edward C. Armbrecht, Jr.

Board members participating telephonically were as follows:

Ed Snyder, Chair

Bob Jenkins, Vice Chair

Scott Simonton

Cameron Hackney

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. Water Quality Standards

1.) Update on the Nutrient Criteria Committee:

The Board received an update from Evan Hansen, a member of the Nutrient Criteria Committee, regarding the revised protocol for collecting data in West Virginia lakes to assist in the development of numeric nutrient criteria, and the proposed revised budget of \$46,616 for such data collection.

The Committee proposed collecting 2 types of data, the first is the actual monitoring data in the lakes. The second type of data collection would entail user surveys to determine when the individuals who are using the lakes for recreation feel that the lake is clean enough to offer a good recreational experience.

The NCC has selected 12 lakes for study, including Bear Lake, Beech Fork Lake, Charles Fork, Cheat Lake, Coopers Rock, Curtisville, Elk Fork, Moncove, Rock Cliff, Spruce Knob, Summit and Tomlinson Run. These lakes cover the range of surface areas, residence times, and depths of West Virginia lakes. They also represent all three of the level 3 ecoregions that occur in the state. Each lake will be monitored once each month for a four month period and the data will be analyzed to provide more information concerning the position of West Virginia lakes on the trophic spectrum. The data will be used to construct cause-and-effect relationships in order to derive lake nutrient criteria using West Virginia data. The protocol includes monitor the lakes for such criteria as temperature, sulfide, dissolved oxygen, iron, nitrogen, BOD, total suspended solids, pH, conductivity, chlorophyll, and phosphorus.

The user survey is comprised of a one to two page survey and would be conducted during the same days that the team collects the water samples. During each visit the team will solicit lake users to complete the survey. They will find users that are boating, swimming, fishing or on shore. Consultation with survey experts will help the NCC properly analyze the results.

The NCC provided the Board members with a detailed proposed budget for this project. The budget summary indicates that the project will cost \$46,616.00. After a review and discussion of the expenses involved, Dr. Jenkins moved and Dr. Simonton seconded that the available funds which currently are \$50,000, be made available to the Committee for the field work as outlined in the NCC June 10, 2004, Field Sampling Proposal. The motion carried unanimously 5 to 0. A copy of this proposal is attached to and made a part of these minutes as Exhibit A.

Ms. Chatfield stated that the US Environmental Protection Agency (USEPA) has published a "Request for Assistance" (RFA) relating to funding which may be available for development of nutrient criteria for the upcoming fiscal year. For Region III there is \$80,000 in funding available and the NCC members have been considering various options for the submission of a proposal, including supporting joint efforts of the US Geological Survey (USGS) and Pennsylvania - a multi-state proposal, and a proposal from the USGS and the Cacapon Institute. The deadline for submission of the application in response to the USEPA's RFA is June 24, 2004. After discussion, Mr. Armbrecht moved and Dr. Hackney seconded that Dr. Snyder, as the Board Chair, be given the authority to review and approve the NCC's final decision regarding a response to the USEPA's RFA. The motion carried unanimously 5 to 0.

2.) Tier 2.5 Nomination Application

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.

The Board has continued to discuss the nomination and review additional information during various Board meetings. During the April 29, 2004, Board meeting Dr. Hackney moved and Dr. Simonton seconded that the Board deny the petitions. However that motion was tabled by the Board. During the June 11, 2004, Board meeting, Dr. Snyder informed the Board

members that since the motion to deny the Tier 2.5 nomination was not taken off the table for discussion during the meeting immediately following the April 29, 2004, Board meeting, that motion is considered dead.

Mr. Armbrecht moved that the Board approve the nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5), Dr. Jenkins seconded the motion. Dr. Snyder stated that he would like to address a concern which was raised by Dr. Simonton during the April 29th Board meeting. At that time Dr. Simonton expressed concern regarding the approval of the nomination application stating that the reclassification is premature since the WV Department of Environmental Protection (WVDEP) has not completed the initial presumptive list of Tier 2.5 waters (Waters of Special Concern). However, Ms. Chatfield explained 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. The Board has been reviewing the nomination application based on those criteria since November 2002.

Dr. Simonton stated that portions 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. Consequently the Board cannot say with certainty what the affects of a Tier 2.5 stream designation could have on the landowners.

Dr. Snyder stated that the WVDEP has indicated that the agency is prepared to address the reclassification of the streams even though they have not completed their presumptive list of Tier 2.5 streams. Further, he feels that the Board should be deciding whether the streams which are the subject of the nomination application meet the criteria to qualify as waters of special concern and deserve a greater level of protection than they currently have. 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. Hackney stated that 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. Reclassifying these waters as Tier 2.5 streams could affect the future use of the streams. Further, the current landowners, including the timber companies, have done an adequate job of protecting the quality of the streams thus far and there is no need to add the additional layer of protection that Tier 2.5 classification would provide.

Mr. Armbrecht noted that none of the landowners, including the timbering companies have suggested to the Board that they have a plan to further develop the area or even alter the current use of the land. Approving the Tier 2.5 nomination application should not be precluded by the possibility that sometime in the future an individual or company may want to establish a different use for the land. However, should circumstances change, the landowners would have a right to come back before the Board regarding the stream classification. Further, since the timbering companies and other landowners have been such good stewards of the land and streams, reclassifying the streams as Tier 2.5 should not pose a significant impact.

Dr. Jenkins stated that he had never seen a stream respond so well to heavy rainfall the way that these streams did. The Board members viewed the streams the day after a very heavy rainfall but the streams remained clear, with a normal flow. Both the information contained in the application and the site visit demonstrated that the water is of very good quality. The impacts that the reclassification of the streams as Waters of Special Concern may have on the landowners is a criterion which the Board seriously reviews. However, the streams are actually waters of the state and belong to the citizens of this state – not individual landowners. If the streams meet the criteria for being classified as Tier 2.5 streams then the Board should recognize that fact and classify them as such.

Whereupon, Mr. Armbrecht called for the question on his motion to approve the nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5). The motion passed 3 to 1, with Dr. Hackney voting against the motion and Dr. Simonton abstaining from the vote. The reclassification will now begin to proceed through the legislative process. The Board directed staff to file the proposed rule change with a Notice of

Public Comment Period with the Secretary of State's office and also scheduled a public hearing on July 22, 2004, beginning at 6:00 p.m.

Whereupon, Dr. Simonton left the meeting.

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

a.) State Filing:

During the May 6, 2004, Board meeting, the Board members completed a review of the water quality standards rule in order to verify that the revisions made by staff were consistent with House Bill 4193 as passed by the legislature during the 2004 session. The Board approved the rule and directed staff to file the final version of the rule in accordance with the State Administrative Procedures Act. The Board members were informed that final version of Legislative Rule 46CSR1, "Requirements Governing Water Quality Standards" was filed with the WV Secretary of State's office on May 7, 2004, with an effective date of July 1, 2004.

b.) Federal Filing:

The Board is required by federal law to submit revisions to the Water Quality Standards rule to the US Environmental Protection Agency (USEPA) after such revisions have become effective under state law. The Board members were informed that Legislative Rule 46CSR1, "Requirements Governing Water Quality Standards" was filed with the USEPA on June 7, 2004.

Further, federal law requires supporting documentation for all revisions to the State's water quality standards be submitted to the USEPA with the complete rule package. One of the amendments to the Water Quality Standards rule (46 CSR 1 – "Requirements Governing Water Quality Standards") passed by the West Virginia Legislature in the 2004 session revised the last sentence of section 6.2.d, which outlines the application of the numeric water quality standard for manganese. The new language provides: "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."

Since the Board did not propose the revision to section 6.2.d of the rule, and did not receive any comments or recommendations on this section during its public comment period on the rule, the Board could not provide any supporting documentation for the revision. However, on April 27, 2004, the WV Coal Association filed a letter with the Board, regarding preparing a basis to support the legislative amendment to the state's manganese water quality criteria. In addition, on June 8, 2004, the Coal Association filed several documents which included a rationale for the revision to section 6.2.d. of the rule and requested that the Board file such documents with the USEPA as the scientific and regulatory basis for the manganese revision in the rule.

Also, on May 10, 2004, the Board sent a letter to the Chairman of the House Judiciary Committee and the Chairman of the Senate Judiciary Committee requesting copies of any written submissions or other information that was considered by the Committees during deliberations on the State's water quality standards rule that would serve as supporting documentation for the revisions made to the manganese criteria.

The Board received a response from Senator Kessler, Senate Judiciary Committee on May 18, 2004, encouraging the Board to accept the Coal Association's offer to provide the documentation to support the Legislature's amendment to the manganese criterion. In addition, on May 26, 2004, the Board received a response from the Legislative Rule-Making Review Committee encouraging the Board to develop an adequate record to facilitate USEPA approval of the revisions to the rule including receiving recommendations from the WVDEP, the coal industry, and other interested parties.

After further discussion, Mr. Armbricht moved that in order to accomplish the legislative goal as set forth in the response letters from Senator Kessler and the Legislative Rule-Making Review Committee, that the Board forward the materials that have been developed by the Coal Association in support the revision to the water quality standards rule. In addition, the Board will publish a notice to advise all interested parties that the Board is accepting additional information regarding the revision to section 6.2.d of the water quality standards rule through 5:00 PM, Friday, July 2, 2004. All information received by that deadline will be forwarded to USEPA, Region

3, with a request that it be considered with the Water Quality Standards rule which was submitted to the agency on June 7th. All comments will be submitted to the USPEA with a cover letter clearly stating that the Board has not reviewed or discussed the contents of the comments included in the submission, and does not make a recommendation regarding the information included. Dr. Snyder seconded the motion, which passed 3 to 0, with Dr. Hackney abstaining from the vote.

4.) 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. The Legislative Rule-Making Review Committee interim meetings will be held on July 25th, 26th & 27th, during which water quality standards issues will be considered.

5.) 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." On May 14, 2004, the Board published a public notice requesting information from all interested parties regarding appropriate aquatic life protection limits for aluminum. The deadline for the submission of written comments is June 25, 2004. Also, the Board will set aside time during the June 28, 2004, Board meeting for oral comments. The Board will then establish a schedule for the review of the public comments received regarding the aluminum criteria.

III. Administrative Matters

1.) Review and Approval of the April 29, 2004, Board meeting minutes:

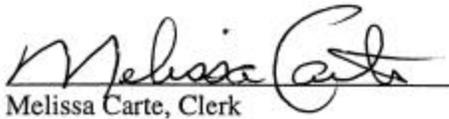
Whereupon, the minutes of the April 29, 2004, Board meeting were presented to the Board for consideration. After review, Dr. Jenkins moved and Dr. Hackney seconded that the minutes of the April 29, 2004, Board meeting, as written, be approved, and the motion carried unanimously 3 to 0.

2.) Establish dates for future Environmental Quality Board meetings:

The Board scheduled Board meetings for August 26, 2004, September 9, 2004, and October 29, 2004.

Whereupon, Mr. Ambrecht moved and Dr. Jenkins seconded that the June 11, 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 June 11, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on July 22, 2004.


Melissa Carte, Clerk