

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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MINUTES

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

AUGUST 11, 2004

I. General

On August 11, 2004, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) conducted a public meeting, via teleconference from its offices located at 1615 Washington St. E., Charleston, West Virginia. Dr. Snyder, Chair, called the meeting to order at 10:00 a.m.

Board members present were as follows:

Edward C. Armbrecht, Jr.

Board members participating telephonically were as follows:

Ed Snyder, Chair

Scott Simonton, Vice Chair

Cameron Hackney

Staff members present were as follows:

Libby Chatfield

Melissa Carte

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

II. Rulemaking

1.) 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 published a public notice seeking written comments from all interested parties, and heard oral comments on revisions to the aluminum criteria. During the July 23, 2004, meeting the Board directed staff to revise Section 8.1 in Table 1 in the Water Quality Standards rule by adding a footnote ^(e) in three places: once, after the words “Not to exceed” in the text of section 8.1 under the “PARAMETER” column and once after each of the values “87xCF⁵” which occur in section 8.1 in both of the columns labeled “CHRON” under the headings “B1, B4” and “B2” which are under the “AQUATIC LIFE” Use Designation columns. The text of the footnote, placed at the end list of footnotes at the end of Table 1, reads “e The current chronic aluminum standard of 87 ug/liter will be suspended in all but trout waters until July 4, 2007.”

In order to amend the current legislative rule the Board must file a Notice of Public Comment Period and Notice of Hearing with the WV Secretary of State’s office and the Legislative Rulemaking Review Committee on August 11, 2004. Prior to the meeting the Board members were provided with the Proposed Rule, the Rule Summary, the Statement of Circumstances, and the Fiscal Note which will be included in the rule filing for their review.

Before reviewing these documents Ms. Chatfield provided the Board members with a memo regarding some suggestions for additional language to be included in the public notice to encourage the most thorough review during the public comment period. The first suggestion was to clarify how the 750 ug/liter aluminum value is to be implemented in warmwater fisheries (Category B1). After discussion, Dr. Hackney moved and Dr. Simonton seconded that a sentence should be added to the end of footnote in Appendix E Table One which provides that “During the period of the suspension, the acute and chronic aquatic life values for aluminum are 750 ug/liter.”, and the motion carried unanimously 4 to 0.

The second suggestion was to solicit comments on how the use of an instream concentration of 750 ug/liter, based on dissolved concentrations, rather than total, ensures the protection of warmwater fishery streams. Dr. Hackney stated that the purpose of a public comment period is to allow the Board to collect as much information and data as possible. Mr. Armbrecht moved and Dr. Hackney seconded that the Board include this request for information in the Notice of Public Comment period, and the motion carried unanimously 4 to 0.

Ms. Chatfield also suggested soliciting comments on retaining the 87 ug/liter in stream based on pH and hardness concentrations, rather than limiting it to the trout water designated use. During the July 23, 2004, Board meeting, Dr. Snyder and several individuals mentioned this approach (as used in Wyoming) and others agreed that the characteristics of a stream such as pH and hardness, drive toxicity. Potentially, if the Board does not solicit comments on this issue during the public comment period, the Board would then be unable to incorporate this provision into the rule, since at the end of the public comment period, the Board may only make revisions to the proposed rule which flow naturally or logically from the original notice.

Dr. Hackney stated that the Board does not currently have the data needed to make a decision on this approach and that the warm water streams are adequately protected with the Board's current proposal. Dr. Simonton agreed, stating that this issue could be reviewed during the Board's next triennial review in 2006 and that he would be reluctant to go beyond the approach that the Board has already decided on.

Dr. Snyder stated that including this in the Public Notice would not necessarily mean that the Board would adopt this approach in the upcoming emergency rule but rather that this would at the least afford the Board with the opportunity to collect and review the data earlier in the process. Mr. Armbrecht questioned whether the basing the aluminum standard on a stream's pH and hardness levels would make enforcement more difficult. Ms. Chatfield stated that the current proposed approach would suspend the aluminum criterion value of 87 ug/liter in all but streams designated as trout waters. The pH and hardness language would require that the pH and hardness data be the factors on which the in-stream aluminum limits would be established in a permit and would include streams designated as warm water.

Randy Sovic of the WV Department of Environmental Protection's Division of Water and Waste Management urged that the Board not accept the Wyoming aluminum value automatically without having delved into the basis of that information. He also noted that the Board will be working on a very tight time frame and encouraged the Board to begin the collection of all data as soon as possible in order to allow ample opportunity for review. Mr. Sovic then suggested that the Board to move forward with the aluminum language that was approved during the previous Board meeting.

Mr. Armbrecht noted that the Board would not be proposing the adoption of specific Wyoming aluminum criterion, nor utilizing their data but rather would be soliciting public comments regarding the methodology for establishing an aluminum criterion based on pH and hardness concentrations in the streams. There was no motion made to incorporate the solicitation of this data in the Notice of Public Comment Period regarding the Board's proposed change to the aluminum standard.

Finally, Ms. Chatfield suggested that the Board should further clarify the term "suspended" as it is used in the proposed rule. After discussion, Mr. Armbrecht moved and Dr. Simonton seconded that the Board clarify the term "suspension" by including a statement that "it is the Board's intention that if no new criterion is promulgated after the study is completed, the suspension will be lifted, and the currently effective aluminum criterion (87ug/liter for chronic aquatic life protection and 750 ug/liter for acute aquatic life protection, both based on dissolved concentrations) will be reinstated on July 4, 2007.", and the motion carried unanimously 4 to 0. This statement will be included in the Statement of Circumstances document included in the proposed rule packet. In addition the Board will include in the Summary of Proposed Changes document, a statement that provides: "Note, this suspension means that the 87 ug/liter value will not be used for regulatory purposes, including NPDES permits, 303(d) listings and the development of TMDLs for the waters subject to the suspension."

Mr. Sovic asked the Board to clarify how the suspension of the 87 ug/liter aluminum value would affect waters listed as impaired for aluminum on the Clean Water Act Section 303(d) list for West Virginia, which were finalized before the effective date of the suspension. Mr. Armbrecht moved and Dr. Hackney seconded that the Board include this issue on the Notice of Public Comment Period in order to solicit public comment on the matter.

The Board then reviewed the Proposed Rule, the Rule Summary, the Statement of Circumstances, and the Fiscal Note which will be included with the filing of the Notice of Public Comment Period. Dr. Simonton moved and Dr. Hackney seconded that the Board approve those documents, with the incorporation of the previously adopted revisions (suggestions 1, 2, 4 and the 303 (d) list question), and the motion carried unanimously 4 to 0.

2.) Proposed Legislative Rule:

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.

On June 11, 2004, the Board members voted to approve the nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5). The Board filed the proposed rule change in conjunction with a Notice of Public Comment Period with the Secretary of State's office and the Legislative Rulemaking Review Committee on June 22, 2004. In addition the Board conducted a public hearing on July 22, 2004, and accepted written comments on the proposed rule through Friday August 6, 2004, at 5:00 p.m.

During the August 11, 2004, Board meeting, Mr. Armbrecht moved and Dr. Simonton seconded that the Board file the proposed legislative rule which will reclassify these waters in Preston County as Waters of Special Concern (Tier 2.5) as an "Agency Approved" rule in order to continue through the legislative process. The Board members considered the written and oral comments received at the public hearing and during the public comment period. Mr. Armbrecht noted that the Preston County Commission filed a written comment endorsing the reclassification of these waters. In addition, three employees of the WVDEP filed written comments in support of the Tier 2.5 designation. In total the Board received 9 written comments during this public comment period, of which all supported the proposed Tier 2.5 designation for these streams.

While the Board did not receive written comments in opposition to the reclassification, during this public comment period, a timbering company which is a landowner along one of the streams which is the subject of the Tier 2.5 nomination and a private citizen spoke out in opposition to the streams reclassification during the July 22, 2004, public hearing. During that same public hearing the Board heard from two individuals in support of the nomination.

Mr. Armbricht stated that during the June 11, 2004, Board meeting, Board members voted to approve the nomination to classify two waters in Preston County as Waters of Special Concern (Tier 2.5). The vote on the issue was 3 (Dr. Snyder, Dr. Jenkins, Mr. Armbricht) to 1 (Dr. Hackney), with 1 abstention (Dr. Simonton). An abstention from voting on an issue before the Board is treated as vote against the motion. Since there are currently only four members on the Environmental Quality Board, an abstention would now serve to defeat a motion to continue this reclassification process.

Dr. Simonton questioned the consequences of defeating the motion currently on the table and Ms. Chatfield stated that although the Board may have the opportunity to consider the issue at a later date, it could not move forward with the reclassification in time for the upcoming 2005 legislative session.

Dr. Hackney and Dr. Simonton suggested that the WVDEP could add it to their initial presumptive list of Tier 2.5 waters. Randy Sovic stated that the WVDEP is roughly two-thirds of the way through the evaluation of the comments received and additional meetings in August and September have been scheduled to complete the evaluations. Although the agency may delete some streams originally included on the presumptive list of Tier 2.5 waters, streams that were not included on the initial list will not be added by the agency since 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 provides the Board with the authority to designate streams as Tier 2.5 waters based on a list of qualification criteria.

Dr. Simonton stated that are several uncertainties associated with this rule, including what will happen if the Board moves forward with the proposed rule or the consequences of defeating the rule. Also, aspect of the issue which is uncertain is the fact 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. Further, the WVDEP has not yet completed its initial presumptive list of Tier 2.5 streams. Randy Sovic, WVDEP, urged the Board to move forward with the reclassification of these streams, stating that, if the streams meet the criteria for being classified as Tier 2.5 streams then they should be classified as such through the process that the Board has been undertaking over the past year.

Dr. Hackney stated that Dr. Simonton's vote is very important and that he would be willing to delay the vote on the motion if Dr. Simonton needs more time. Mr. Armbricht stated the Board has been provided with information which concludes that a vote on this issue, at this time is appropriate; the Board has been reviewing this nomination application for an extended period of time; some of the Board members have visited the sites; the Board conducted public hearings; solicited written comments from interested parties; and discussed the issue with both the WVDEP and the USEPA. Further, both the information contained in the application and the site visit demonstrated that the water is of very good quality. Since it is appropriate at this time for the Board to address this application, 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.

Dr. Hackney stated that he did 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.

Dr. Simonton stated that reclassifying the streams as Tier 2.5 waters would restrict the use of property along the stream thus devaluing the stream and punishing the landowners who are responsible for the high quality of the water in the streams. Dr. Snyder stated that the reclassification would not be devaluing the stream but rather would recognize the value of the streams.

Mr. Armbricht 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. Snyder stated that it is time for the Board members to vote on the matter, the Board members have spent a significant amount of time reviewing the information in the application, conducting site visits and public hearings, as well as having detailed discussions during public meetings, and he wants the Board to vote on the issue during this meeting, without any further delays. The Board must determine whether it will look at the stream as the entity of concern or the property owners as the entity of concern. While 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, all streams are actually waters of the state and belong to the citizens of this state – not individual landowners, and the Board’s first responsibility is to protect the waters of this state.

Dr. Simonton stated that the Board also has the responsibility to explain to the landowners what the implications of the Tier 2.5 designation will be. 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. He feels that there may be problems or at least questions regarding implementation. Consequently the Board cannot say with certainty what the effects 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. 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.

Randy Sovic, DEP asked that he be allowed to address Dr. Simonton's concerns. He stated that there were several issues that the judge ruled on the Antidegradation Rule that still are in the negotiation process with USEPA. However, the outstanding Tier 2.5 issues do not include implementation procedures. The agency is prepared to implement Tier 2.5 and does not foresee any problems with the process. Further, current landowners who are using Best Management Practices (BMPs) for nonpoint source activities would not see any impact from the designation change because BMPs are designed to minimize potential water quality impacts and 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. He further stated that should circumstances change such as land uses, landowners would have a right to come back before the Board regarding the stream classification.

Whereupon, Mr. Armbrrecht called the question on the Motion to file the proposed legislative rule which will reclassify these waters in Preston County as Waters of Special Concern (Tier 2.5) as an "Agency Approved" rule in order to continue through the legislative process, and the motion carried 3 to 1, with Dr. Hackney voting against the motion.

The Board then reviewed the Proposed Rule, the Rule Summary, the Statement of Circumstances, and the Fiscal Note. Whereupon, Dr. Simonton moved and Mr. Armbrrecht seconded that the Board approve these documents for filing with the "Agency Approved" version of the rule, and the motion carried 3 to 1, with Dr. Hackney voting against the motion. The Board staff will file the Agency Approved rule on August 20, 2004.

III. Appeals

1.) Appeal No. 04-10-EQB (Weirton):

Appeal 04-10-EQB (Weirton) was filed with the Board on May 13, 2004, and was scheduled for hearing during the July 23, 2004, Board meeting. However, during the July 23, 2004, Board meeting the Board instead heard oral arguments on certain preliminary motions. The Board was scheduled to rule on these preliminary motions during the August 11, 2004, Board meeting. However, on August 9th the parties submitted a letter confirming that the parties have reached an agreement in principle to settle all matters related to the appeal. It is the intent of the parties to submit an agreed

Consent Order to the Board on or about August 13, 2004. The Board will review the Consent Order once it is complete.

Whereupon, Dr. Simonton moved and Dr. Hackney seconded that the August 11, 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 August 11, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on August 26, 2004.



Melissa Carte, Clerk