

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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MINUTES

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

AUGUST 26, 2004

I. General

On August 26, 2004, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) conducted a public meeting from the Gaston Caperton State Training Center (STC) in Conference Room "B". The STC conference room is located on the second floor in Building 7 of the State Capitol Complex, Charleston, Kanawha County, West Virginia. Dr. Snyder, Chair, called the meeting to order at 9:00 a.m.

Board members present were as follows:

Ed Snyder, Chair

Scott Simonton, Vice Chair

Edward C. Armbrrecht, Jr.

Cameron Hackney

Staff members present were as follows:

Libby Chatfield

Melissa Carte

Kathy Coleman

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

I. Appeals

1.) Appeal No. 04-03-EQB (Hominy):

Appeal No. 04-03-EQB (Hominy) was filed with the Board on March 2, 2004, and was set for hearing during the August 26, 2004, Board meeting. However prior to the August 26, 2004, Board meeting the parties to the Appeal indicated to the Board staff that issues raised in the appeal are questions of law that could be argued through written legal briefs instead of an evidentiary hearing. The Board members were informed that the issue was discussed with the Board's Vice Chair who granted a continuance of the evidentiary hearing in order to afford the parties the opportunity to submit written briefs.

The appellant's written brief is due on September 9, 2004, the Response briefs are due on September 23, 2004 and Reply briefs must be submitted by October 7, 2004. An evidentiary hearing may still be scheduled at a later date if, after a review of the written briefs, the Board determines that the hearing is necessary or would be beneficial.

2.) Appeal No. 04-06-EQB (Hominy 2):

Appeal No. 04-06-EQB (Hominy 2) was filed with the Board on April 22, 2004, and is set for hearing during the August 26, 2004, Board meeting. However prior to the August 26, 2004, Board meeting the parties to the Appeal indicated to the Board staff that issues raised in the appeal are questions of law that could be argued through written legal briefs instead of an evidentiary hearing. The Board members were informed that the issue was discussed with the Board's Vice Chair who granted a continuance of the evidentiary hearing in order to afford the parties the opportunity to submit written briefs.

The appellant's written brief is due on September 9, 2004, the Response briefs are due on September 23, 2004 and Reply briefs must be submitted by October 7, 2004. An evidentiary hearing may still be scheduled at a later date if, after a review of the written briefs, the Board determines that the hearing is necessary or would be beneficial.

3.) Appeal No. 04-04-EQB (Evergreen Mining):

Appeal No. 04-04-EQB (Evergreen Mining) was filed with the Board on March 16, 2004, and was set for hearing during the August 26, 2004, Board meeting. However, on August 19, 2004, the parties submitted A proposed Agreed Order, which resolves the issues of the appeal without the need for an evidentiary hearing, for the Board's consideration. The Intervenor Appellee did not object to the proposed Agreed Order. Jay Lazell, counsel for the Appellee, appeared before the Board to review the terms of the settlement. After discussion, Dr. Hackney moved and Dr. Simonton seconded that the Board approve the proposed Agree Order, and remove Appeal 04-04-EQB from the Board's docket, and the motion carried unanimously 4 to 0.

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

Appeal No. 04-10-EQB (Weirton) was filed with the Board on May 13, 2004. The Board heard arguments on preliminary motions filed in the appeal during the July Board meeting and were scheduled to rule on those motions during the August 26, 2004, Board meeting and if necessary, reschedule the evidentiary hearing in the appeal. However, on August 9, 2004, the parties submitted a letter stating that the parties have reached an agreement in principal which will settle all matters of the appeal without the need for an evidentiary hearing. The parties were scheduled to complete the agreement and present a proposed Consent Order to the Board for review and approval during the August 26, 2004, Board meeting. However, Mark Rudolph, counsel for the Appellee appeared before the Board and stated that the parties, while still maintaining the agreement in principal, have not yet finalized the proposed settlement agreement. Whereupon, Dr. Hackney moved and Dr. Simonton seconded that the settlement agreement in Appeal 04-10-EQB be placed on the meeting agenda for the September 9, 2004, Board meeting, and the motion carried unanimously 4 to 0.

5.) Appeal No. 04-07-EQB (Higginbotham):

Appeal No. 04-07-EQB was filed with the Board on April 30, 2004, and an evidentiary hearing concerning the matters set forth in the Notice of Appeal was scheduled for July 22, 2004. However on July 22, 2004, prior to the hearing, the parties informed the Board's counsel that they had entered into a settlement agreement which resolved the issues of the appeal and that an

evidentiary hearing was not necessary. The Board continued the evidentiary hearing to allow the settlement to be finalized and the parties then outlined the agreement on an audiotape retained by the Board.

The Board anticipated that the proposed settlement agreement would be submitted to the Board prior to the August 26th Board meeting. Mr. Rudolph, counsel for the Appellee appeared before the Board and stated that the parties had not finalized the settlement agreement.

The Board noted that it will not allow the appeal to remain pending on the docket indefinitely and if the parties do not provide the Board with a proposed Agreed Order by the September 9, 2004, Board meeting, the Board members will review the matter at that Board meeting to determine a further course of action.

6.) Appeal No. 04-16-EQB (Ray, Guthrie, Fink):

Appeal No. 04-16-EQB (Ray, Guthrie, Fink) was received by the Board on July 21, 2004, and an evidentiary hearing concerning the matters set forth in the Notice of Appeal is scheduled for the October 29, 2004, Board meeting. The Appellant's Notice of Appeal also included a request for the Board to stay the permit which is the subject of the appeal. In addition to the request for stay in the Notice of Appeal, Appellants also filed a Motion to Request Site Visit. In that motion, and accompanying correspondence, Appellants waived the requirement for the Board to hear the stay request within 5 days, and further, requested that the Board conduct a site visit in order to see the actual conditions at the site prior to hearing the Stay Request. Appellants indicated that at the site visit they expect the EQB will take note of the conditions at the site relating to the directing, collecting, treatment and discharge of the water at the site.

The Board considered both of the Appellants' requests. Ms. Chatfield noted that the Board may grant a stay of a permit if it appears to the Board "... that an unjust hardship to the appellant will result from the execution or implementation of the director's order, permit or official action pending determination of the appeal . . .". The Board determined that a site visit is not necessary to evaluate whether an unjust hardship to the Appellant will result from implementation of the permit. The Board further determined that the issues cited by the Appellants in the Motion to Request Site Visit and the

Request for Stay relate more to the substance of the appeal which will be more appropriately heard during the evidentiary hearing.

The Board then scheduled the hearing on the Appellants' Motion for Stay for the September 9, 2004, Board meeting in Charleston. Staff will advise the Appellants that they may introduce evidence supporting their claims of unjust hardship, including photographs, at that Stay Hearing.

II. Rulemaking

1.) Proposed Legislative Rule (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." During the August 11, 2004, Board meeting, the Board reviewed and approved the Proposed Rule, the Rule Summary, the Statement of Circumstances, and the Fiscal Note. In order to amend the current legislative rule the Board then filed a Notice of Public Comment Period and Notice of Hearing with the WV Secretary of State's office and the Legislative Rule-Making Review Committee. The Board members were informed that the complete proposed rule packet was filed on August 11, 2004. The Board will conduct a public hearing on September 15, 2004, at 6:00 p.m. and will accept written comments on the proposal through Friday, September 24, 2004, at 5:00 p.m.

The Board scheduled a teleconference on September 28, 2004, at 1:00 p.m. to review all comments received during the public comment period and to finalize a version of the rule which will be filed as both the "Agency Approved" rule and the Emergency rule with the Secretary of States office and the Legislative Rule-Making Review Committee. These rules must be filed with the Secretary of States office and the Legislature by September 29, 2004.

2.) Agency Approved Legislative Rule (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.

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 reclassification began to proceed through the legislative process. 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 Rule-Making 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 until Friday August 6, 2004.

During the August 11, 2004, Board meeting, the Board members considered the written and oral comments received at the public hearing and during the public comment period, and reviewed and approved the proposed rule. During the August 26, 2004, Board meeting, the Board members were informed that the "Agency Approved" version of the proposed rule was filed on August 20, 2004, for consideration by the Legislature.

3.) Legislative RuleMaking Review Committee:

The Board members were informed that the Legislative Rule-Making Review Committee continues to meet to review water quality standards issues. During the Committee meeting on August 23, 2004, there were presentations by the WV Chamber of Commerce, the WV Rivers Coalition, and the WVDEP. Ms. Chatfield stated that she presented information regarding the USEPA's methodology for calculating human health criteria. Also, she presented the list of the 69 pollutants that the Board proposed for adoption during the previous triennial but which were not adopted by the Legislature. In order to address the toxicity and human health issues relating to the pollutants, the list was compiled to demonstrate which criteria are deemed to be carcinogens and which are not. In addition, Ms. Chatfield updated the Committee on the current rule-making activities of the Board.

Legislative Interim Meetings will be held on September 19th, 20th and 21st in Charleston. In October the interims will be held in Shepherdstown on the 10th, 11th, and 12th. The November interims will be held in Charleston on the 7th, 8th and 9th, and in December the meetings will be held in Charleston on the 5th, 6th and 7th.

4.) Nutrient Criteria Committee Meeting:

The US Environmental Protection Agency has directed that all states must adopt nutrient criteria for the various water body types and ecoregions by the end of 2004. In response, the West Virginia Environmental Quality Board (the “Board”) has created a Nutrient Criteria Committee that includes stakeholders such as point source industries, nonpoint source industries, municipal water treatment facilities, sewage treatment facilities, the environmental community, the general public, and various State and Federal agencies. The Committee is charged with reviewing and analyzing existing data, identifying the additional information needed, and using such information to provide recommendations to the Board regarding development of nutrient criteria in the water quality standards (46 CSR 1 – Requirements Governing Water Quality Standards).

The Board received an update of Nutrient Criteria Committee activities. The Committee is continuing to collect the lake sampling data. The WVDEP provides the truck and the boat for the sampling and they conduct much of the water testing. The WV Department of Agriculture has provided assistance as well. The first round of sampling has been completed successfully and the Committee intends to sample each site three times.

Although there had been some concerns voiced by members of the Committee regarding the user survey and how effective it actually is, the Committee voted to continue to conduct the user surveys. These surveys are taken on the same day that the water sampling occurs.

Further, the committee is moving forward on the development of stream criteria. During the last Committee meeting an employee of the WV Department of Natural Resources provided a presentation regarding the fish sampling data being compiled by the agency. In addition the Committee is attempting to contact other states to determine their approaches for establishing criteria.

III. Remining Variance Requests

1.) Upper Kanawha Valley Development Corp.:

On September 11, 2003, Upper Kanawha Valley Development Corp. (UKVD) submitted an application for a variance from water quality standards for remining activities for “Phase Two” of their remining project. The application was updated and revised on March 25, 2004, May 6, 2004, and July 16, 2004. The Board determined that the application is now complete. During the August 26, 2004, Board meeting Dr. Hackney moved and Mr. Armbrrecht seconded that the Board grant a preliminary approval of the remining variance application, and proceed through the public notice and comment period process.

Ms. Chatfield noted that the he Federal Clean Water Act requires a 45-day public notice and comment period regarding any changes made to the State’s water quality standards. However, Mr. Wellford of the UKVD requested that the Board expedite the process. Board members stated that there are usually very few written public comments submitted as well as low attendance at public hearings regarding these variance requests and agreed to expedite the variance application. The Board will conduct a public hearing on September 27, 2004, at 6:00 p.m. and accept written comments through the end of that public hearing.

Staff expressed additional concerns regarding the scheduling of the public hearing on September 27th because of several deadlines which fall within that timeframe. The Board will be conducting a public hearing on the Catenary Coal Company remining variance application on September 15, 2004, and will then need to issue an Order regarding that application.

In addition, the Board has proposed for promulgation an emergency and legislative rule to revise the aquatic life aluminum criterion in the Water Quality Standards rule. The Board will conduct a public hearing regarding that proposal on September 15, 2004, at 6:00 p.m. and will accept written comments on the proposal through Friday, September 24, 2004, at 5:00 p.m. Once the written comments are submitted, they must be forwarded to the Board members for their review prior to the teleconference on September 28, 2004. During the teleconference the Board members must review and respond to all comments received during the public comment period and finalize a version of the rule which will be filed as both the “Agency

Approved” rule and the Emergency rule with the Secretary of States office and the Legislative Rule-Making Review Committee. Then the entire rule-making packet must be completed, copied and filed with the Secretary of States office and the Legislature by October 1, 2004.

Further, during this period the staff must pack the entire Board office in preparation for the move to the new WVDEP building which is scheduled for September 30th through October 4th. Staff will not have access to their computers after September 29th at 4:00 p.m. and the office will be completely dismantled on September 30, 2004. The Board members acknowledged the staff’s concerns and reiterated that the Board does not receive a significant number of public comments regarding remining variances.

Ken Politan, WVDEP’s Division of Mining and Reclamation requested clarification of the Board’s remining variance orders. Concerns have been expressed regarding the exceedances of the alternate criteria established in the variance granted by the Board that occur in a watershed prior to the initiation of remining activities. These violations could occur for a variety of reasons.

Ms. Chatfield provided the Board members with draft language which addresses that issue. The language provides that **prior to the initiation of the remining activity that will impact this watershed**, the criterion shall be set at the lowest recorded pH and highest recorded manganese values taken or baseline data established during pre-mining stream sampling. Upon an exceedance of this value, the company shall resample the stream within seven (7) days of the receipt of the sampling results indicating the exceedance. Copies of the retesting results shall be provided to the Board and WVDEP immediately upon receipt of the resampling results. If the second sample shows compliance with the limits testing shall continue in accordance with the requirements as proscribed in the Board’s original variance Order, and in accordance with other applicable permit requirements. However, if the results of the second test show an exceedance of the limit, the company shall advise the Board and the WVDEP of this circumstance and shall provide a report outlining how the company will investigate the cause of the exceedance. Weekly sampling shall continue until attainment of the minimum value is reached. The company will be required to immediately advise the Board in writing of the initiation of the mining activity in this watershed. Once the remining activities begin the

alternate criteria that were calculated based on an improvement to the watershed and included in the Board's Order shall apply.

After discussion, Dr. Hackney moved and Mr. Armbrecht seconded that the previous motion to grant a preliminary approval of the remining variance application and proceed through the public notice and comment period process, be amended to include the proposed language regarding exceedances of the alternate criteria that occur in a watershed prior to the initiation of remining activities and the motion carried unanimously 4 to 0. The Board then voted on the motion as amended and the motion carried unanimously 4 to 0.

2.) 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). During the July 22, 2004, Board meeting, the Board made a preliminary determination to approve the remining variance application. The Board established a 45-day public comment period on the variance request as required by the Federal Clean Water Act. In addition the Board will conduct a public hearing on the application on September 15, 2004, at 6:00 p.m. and accept written comments through the end of that public hearing.

In addition, Ms. Chatfield stated that she would contact Linda Torre, of Decota Consulting which is representing Catenary Coal Copany, to discuss the language regarding exceedances of the alternate criteria that occur in a watershed prior to the initiation of remining activities, which will be included in the Board's Final Order on the Catenary Remining Variance application.

III. Administrative Matters

1.) Review and Approval of the July 22, 2004, Board meeting minutes:

Whereupon, the minutes of the July 22, 2004, Board meeting were presented to the Board for consideration. After review, Dr. Hackney moved and Mr.

Armbrecht seconded that the minutes of the July 22, 2004, Board meeting be approved as written and the motion carried unanimously 4 to 0.

2.) Review and Approval of the July 23, 2004, Board meeting minutes:

Whereupon, the minutes of the July 23, 2004, Board meeting were presented to the Board for consideration. After review, Dr. Hackney moved and Mr. Armbrecht seconded that the minutes of the July 23, 2004, Board meeting be approved as written and the motion carried unanimously 4 to 0.

3.) Review and Approval of the August 11, 2004, Board meeting minutes:

Whereupon, the minutes of the August 11, 2004, Board meeting were presented to the Board for consideration. Dr. Snyder noted a typographical error on page 6 of the minutes should be corrected. After review, Dr. Hackney moved and Mr. Armbrecht seconded that the minutes of the August 11, 2004, Board meeting be approved as corrected and the motion carried unanimously 4 to 0.

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 April 2004 through June 2004. In addition the Board members received a copy of the bank statements. A copy of this report is attached to and made a part of these minutes as Exhibit "A". After a review of the report, Mr. Armbrecht moved and Dr. Simonton seconded that the Board approve the Purchase Card report, and the motion carried unanimously 4 to 0.

5.) Budget Update:

Fiscal Year 2005 – Ms. Coleman informed the Board that the Boards are anticipating a \$55,000 budget shortfall for fiscal year 2005. The Boards' Chairs met with Randy Huffman, Assistant Secretary of the Department of Environmental Protection on August 9, 2004, to discuss supplemental funding. Several additional sources of funding were proposed by the Board during that meeting: for the AQB – WV Code §22-5-4 states that the AQB is entitled to a share of the monies deposited in the "Air Pollution Control

Fund” for the purpose of paying salaries and expenses of the Air Quality Board. Historically, the WVDEP has not disbursed any monies from this fund to the AQB. For the EQB – Section 106 and 604(b) for the federal Clean Water Act provide for use of grant funds to, among other things, assist in the development of state Water Quality Standards. In the past these funds have been used by the DEP to fund the Environmental Enforcement office. The Board Chairs discussed with Mr. Huffman the possibility of expanding that grant request to include funding for the development of water quality standards that is done by the EQB.

Ms. Coleman stated that these funding options were presented in order that the Boards could obtain long term funding to permanently fund the Board rather than continuing to seek an infusion of monies from the WVDEP each year. She recommended that the Board request a specific reason why the WVDEP will not provide funding to the AQB from the Air Pollution Control fund since the balance of that fund at the end of fiscal year 2004 was almost one million dollars.

However, as of August 26, 2004, the WVDEP has not committed additional funding for the Boards. In addition the Board Chairs have been unsuccessful in their attempts to schedule a meeting with the Secretary of the Department of Environmental Protection to discuss the matter. The Board members then discussed possible options regarding the budget shortage.

Fiscal Year 2006 - Ms. Coleman provided the Board members with a summary of the Boards projected expenses for fiscal year 2006. She has allocated funds for 14 EQB meetings, 2 public hearings, 4 meetings of the Board chair with staff, 5 payments of a per diem for Board member attendance at the Nutrient Criteria Committee meetings and 5 payments of a per diem for Board member attendance at legislative meetings. The Board approved those funding allocations. Ms. Colman noted that the Boards’ operating expenses will increase by \$8,600 as a result of the move to the new DEP building. In addition, the WV I S & C will begin charging the Boards \$1,690 per year to host the Boards’ websites.

In addition, all state agencies have been informed that the fiscal year 2006 General Revenue Budget requests must be submitted with an additional 5.5% reduction. Ms. Coleman projects a \$115,000 budget deficit for fiscal year 2006. Dr. Snyder stated that he and Tom Hansen, who is the Chair of

the Air Quality Board, will continue to try to schedule a meeting with Secretary Timmermeyer to discuss the Boards' serious budget issues.

Whereupon, Dr. Simonton moved and Dr. Hackney seconded that the August 26, 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 26, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on December 9, 2004.



Melissa Carte, Clerk