

WV DEPARTMENT OF ENVIRONMENTAL PROTECTION  
**ENVIRONMENTAL QUALITY BOARD**

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**MINUTES**

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
MEETING**

**DECEMBER 9, 2004**

**I. General**

On Thursday, December 9, 2004, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the **Board**) conducted a public meeting at the Board offices located at 601 57<sup>th</sup>, SE, Charleston, Kanawha County, West Virginia. Dr. Snyder, Chair of the Board called the meeting to order at 9:00 a.m.

Board Members present were as follows:

Dr. Snyder, Chair  
Ted Armbrecht

Board Members participating by teleconference were as follows:

Dr. Simonton, Vice Chair

Board Members Absent were as follows:

Dr. Hackney

Staff Members Present were as follows:

Melissa Carte, Clerk of the Board  
Kathy Coleman, Administrative Secretary

\*Doran Burrell, the attorney assigned by the State Attorney General's office to assist the Board was present during the meeting.

\*\*Cheryl Atkinson of the US Department of Environmental Protection, Region 3 also participated in the meeting by teleconference.

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

### **I. Appeals**

#### 1.) 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. However, the parties did not provide the Board with a settlement agreement. Consequently the Board scheduled the Evidentiary Hearing in this appeal for the December 9, 2004, Board meeting. However, prior to the hearing the Board received a Consent Judgment and Order of Dismissal from the Parties. Mark Rudolph, attorney for the WV Department of Environmental Protection's Office of Legal Services appeared before the Board to discuss the settlement agreement. After further review, Mr. Armbricht moved and Dr. Simonton seconded that the Board approve the proposed agreement, and the motion carried unanimously 3 to 0. Appeal No. 04-07-EQB (Higginbotham) will be removed from the Board docket.

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

Appeal No. 04-16-EQB (Ray, Guthrie, Fink) was filed with the Board on July 21, 2004, and the evidentiary hearing was scheduled for the December 9, 2004, Board meeting. However, prior to the hearing the counsel for the Appellants filed a Motion to Dismiss the Appeal. After a review of the motion, Mr. Armbricht moved and Dr. Simonton seconded that the Board grant the Appellants' Motion to Dismiss Appeal, and that motion carried

unanimously 3 to 0. Appeal No. 04-16-EQB (Ray, Guthrie, Fink) will be removed from the Board docket.

3.) Appeal No. 04-03-EQB (Hominy) and Appeal No. 04-06-EQB (Hominy):

Appeal No. 04-03-EQB (Hominy) was filed with the Board on March 3, 2004, and Appeal 04-06-EQB (Hominy) was filed with the Board on April 22, 2004. Prior to the scheduled date of the evidentiary hearing the parties indicated that the issues raised in the appeals are questions of law that could be argued through written legal briefs. The parties have been provided with the opportunity to file briefs and responses, and the documents have been distributed to the Board members. After discussions with Mr. Burrell, the Board members determined that they will review and discuss these appeals and all related materials on January 14, 2005, after the regularly scheduled Board meeting.

4.) Board Docket:

The Board members then reviewed the appeals which are currently pending before the Environmental Quality Board.

**Appeal No. 03-14-EQB (Broadway)**

This appeal was filed by R.C. Heckert on September 19, 2003, regarding the registration by Arrow Concrete under General Permit WVG611101 (Storm water associated with Industrial Activity). The Board conducted a portion of the evidentiary hearing however, the hearing was not concluded and was then continued to allow the Appellant to recover from surgery. A Status Report submitted by the parties in July 2004 indicated that the parties were ready to proceed and the appeal was set for hearing on October 29, 2004. That hearing was continued because the Board did not have legal counsel available at that time. As requested by the Appellant, the Board has now scheduled the Evidentiary Hearing in Appeal No. 03-14-EQB for April 7, 2005.

**Appeal No. 04-09-EQB (PKC)**

This appeal was filed on May 5, 2004, by PKC and is in regards to an Order issued by the Division of Water and Waste Management which revokes their

Solid Waste Facility permit. The Evidentiary Hearing in this appeal was set for the October 29, 2004, Board meeting, however, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-09-EQB for January 14, 2005.

**Appeal No. 04-12-EQB (Huntington Alloys)**

This appeal was filed with the Board on May 14, 2004, by Huntington Alloys. The company currently has a WV/NPDES permit which allows it to discharge storm water from its outlets into Pat's Branch, which then enters a culvert where it crosses Huntington Alloys' plant boundary, and becomes a backwater of the Guyandotte River. The Appellant is in the process of conducting significant studies relating to the proper use classification of Pat's Branch, the availability of a mixing zone in the Guyandotte river, a water effects ratio study and a metals translator analysis, all of which will require months of data gathering and analysis. The results of these studies may assist the parties to settle the issues of the appeal without the need for an evidentiary hearing. The Evidentiary Hearing in this appeal was originally set for September 9, 2004, but was continued in order to allow the parties to conduct the various studies. A Status Report is due to be filed by the parties on January 3, 2005, and the Board will continue to monitor the appeal.

**Appeal No. 04-15-EQB (Crab Orchard/MacArthur PSD)**

This appeal was filed with the Board on July 16, 2004, and is in regards to certain terms and conditions of NPDES Permit No.WV0082309, including the effluent limits for Ammonia Nitrogen which the company believes have been improperly calculated to comply with human health criteria for un-ionized ammonia as opposed to the aquatic life criteria. The Evidentiary Hearing in this appeal was set for the October 29, 2004, Board meeting. However, the parties requested a Stay of the Proceedings pending action by the US Environmental Protection Agency (USEPA) on the Board's 2004 Water Quality Standards rule which eliminates the un-ionized ammonia human health criteria. The parties have reported that the USEPA has not taken any action of the Board's rule at this time. The Board will request another status report in the near future.

**Appeal No. 04-17-EQB (MUB)**

This appeal was filed by Morgantown Utility Board on July 30, 2004, and is regarding certain terms and conditions contained in WVNPDES Permit No. WV0023124. The evidentiary hearing in the appeal was scheduled for October 29, 2004. However, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-17-EQB for January 14, 2005.

**Appeal No. 04-18-EQB (Rapp's Dairy)**

This appeal was filed with the Board on August 6, 2004, by J. David Rapp and is regarding an Order issued by the DEP which determines that Rapp Dairy is classified as a Concentrated Animal Feeding Operation which must obtain an NPDES permit. The appeal was originally scheduled for hearing during the November 2004 Board meeting, however, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-18-EQB for January 14, 2005.

**Appeal No. 04-22-EQB (Webster Co. Solid Waste)**

This appeal was filed with the Board on August 9, 2004, and is in regards to an Order issued by the DEP which revokes the facility's Solid Waste Permit No. SWF-7810/WV0109541. The hearing in this appeal was scheduled for the November 2004, Board meeting, however, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-22-EQB for February 10, 2005.

**Appeal No. 04-23-EQB (Federal Bureau of Prisons)**

This appeal was filed by the Federal Bureau of Prisons on August 31, 2004, and is regard to certain terms and conditions contained in WVNPDES Permit No. WV0040401 which was issued to the City of Glenville. The hearing in this appeal was scheduled for November 10, 2004, however, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-23-EQB for February 10, 2005.

### **Appeal No. 04-25-EQB (Stewards of the Potomac Highlands)**

This appeal was filed with the Board on September 22, 2004, and is in regards to a decision of the Director of Water and Waste Management to allow discharges onto land under an NPDES permit and not require direct connections and velocity dissipation devices between construction drainage and waters of the state. The appeal was scheduled for hearing on December 9, 2004, however, that hearing was continued because the Board did not have legal counsel available at that time. The Board has now scheduled the Evidentiary Hearing in Appeal No. 04-25-EQB for February 10, 2005.

### **Appeal No. 04-26-EQB (Marathon Ashland Petroleum)**

This appeal was received by the Board on December 2, 2004, and is in regards to Unilateral Order No. MM-04-007 which was issued under the WV Hazardous Waste Act. The Board has now set the Evidentiary Hearing in Appeal No. 04-26-EQB for March 10, 2005.

## **II. Rulemaking**

### 1.) Nutrient Criteria Committee:

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 members were informed that the Municipal Water Quality Association has changed their representative on the Nutrient Criteria Committee to Jeremiah Johnson with Mr. Luke Richmond serving as the alternate. Also, Doug Chambers will replace Kim Miller as the representative for the US Geological Survey on the Nutrient Criteria Committee.

Ms. Carte stated that she is aware that several other representatives on the NCC have changed and consequently has requested a complete listing of all current members of the Nutrient Criteria Committee from the Committee Chair. She will provide the list to the Board members as soon as it is available.

Further, with the resignation of Libby Chatfield it is imperative that the Board members be kept informed of Committee activities. On a quarterly basis, the Board will place the NCC on the Board's meeting agenda and request that a member of the Committee appear before the Board during an open meeting to discuss Committee activities.

## 2.) Water Quality Standards Rule:

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 filed the Emergency Rule on September 29, 2004. Pursuant to WV Code §29A-3-15 an Emergency Rule will become effective upon the approval of the Secretary of State or upon the forty-second day following the filing. The Board's Emergency Rule did not receive formal approval from the Secretary of State and consequently became effective on November 10, 2004.

Also, an agency must, after conducting the regular Notice and Comment Period, file the Agency Approved version of an emergency rule within ninety days following the filing of that emergency rule. The Board's Agency Approved version of the rule was also filed on September 29, 2004, and it will now proceed through the regular legislative process. The Emergency Rule will remain in effect for a total of fifteen months or until the Board's regular Legislative rule goes into effect.

The rule provides that "Until July 4, 2007, the aluminum criteria will be implemented as follows: the chronic aluminum criterion shall be 87 ug/l for trout waters (as defined in section 2.20 of this rule) and shall be 750 ug/l for all other waters of the state. The implementation of the interim criteria provides time for a study to develop aluminum

criteria for waters of the state which are based upon sound science and are protective of aquatic life.”

Jenny Henthorne, representing various industry groups appeared before the Board to discuss the aluminum study. Ms. Henthorne stated that she has circulated a Request for Proposals (RFP) to a group of approximately 13 consulting firms across the United States requesting proposals on an approach for conducting the aluminum study. To date she has received six responses.

In addition she is reviewing various funding sources and mechanisms to complete the aluminum study. Currently they are soliciting information from various industries to determine whether there would be potential revenue which could be used to fund the study.

Cheryl Atkinson of the USEPA, Region 3 stated that the USEPA did not specifically earmark funds to complete an aluminum study. However, she did previously recommend to Allyn Turner, the Director of the WVDEP’s Division of Water and Waste Management, that the 106 Federal Grant monies be used by the WVDEP to conduct the aluminum study.

Ms. Henthorne stated that the RFP was reviewed by the WVDEP prior to distribution. Ms. Carte requested a copy of the RFP for the Board members to review. Mr. Armbricht expressed concern that the aluminum study would be coordinated and funded entirely by the regulated community, stating that many other organizations commented on the Board’s proposed aluminum standard and that they should be included in the study as well. Further, any study made in response to an RFP composed entirely by the regulated community and circulated to and performed by consultants of their choosing would be perceived by the non-regulated community to be a biased study.

Mr. Armbricht stated if the study being proposed is to be considered as “the study” referenced in the Board’s legislative rule then the non-regulated community should be involved in the drafting of an RFP and the selection of the consulting firm to perform that study.

Ms. Henthorne stated that it was her understanding based on the language of the legislative rule that the Board wanted the aluminum study to be conducted and that the study must be completed by April of 2006, in order for the Board to propose a permanent change to the aluminum criteria during

the 2007 legislative session. Further, the Board does not have available funding to perform the study, so the regulated community has stepped forward to begin the process.

Dr. Snyder stated that the Board would review and consider the data generated by a study conducted by the regulated community, but would also consider all other data and information submitted by any other interested party. Further, the Board needs to be included in the aluminum study. Ms. Atkinson stated that if the purpose of the aluminum study is to develop water quality criteria, it is critical that the WVDEP and the USEPA be involved in the process as well.

Mr. Armbrecht requested that the issue be included on the January Board meeting agenda in order for the Board members to discuss the aluminum study and to reach a clear determination on the process that the Board will follow.

Mr. Jason Bostic, of the WV Coal Association questioned why the environmental community should be involved with the aluminum study since they have opposed any change to that criteria. Mr. Armbrecht stated that during the public comment period several commenters expressed concerns regarding the Board's proposed change to the aluminum criteria in the Water Quality Standards rule, including the USEPA which stated that based on the USEPA's review of current scientific literature, the 750 ug/l dissolved standard for aluminum proposed by the Board may not be protective. It was in part in response to those comments that the Board determined that further study of aluminum impacts was warranted. The Board will use the study to determine whether a permanent change to the aluminum criteria is actually appropriate and if so what that limit should be.

### **III. Administrative Matters**

1.) Review and Approval of the August 26, 2004, Board meeting minutes:

Whereupon, the Board reviewed the draft minutes of the August 26, 2004, Board meeting. After discussion, Mr. Armbrecht moved and Dr. Simonton seconded that the August 26, 2004, meeting minutes be approved as written, and the motion carried unanimously 3 to 0.

2.) Review and Approval of the September 28, 2004, Board meeting minutes:

Whereupon, the Board reviewed the draft minutes of the September 28, 2004, Board meeting. After discussion, Mr. Armbrrecht moved and Dr. Simonton seconded that the September 28, 2004, meeting minutes be approved as written, and the motion carried unanimously 3 to 0.

3.) Review and Approval of the October 14, 2004, Air Quality Board and Environmental Quality Board joint meeting minutes:

Whereupon, the Board reviewed the draft minutes of the October 14, 2004, joint Board meeting. After discussion, Mr. Armbrrecht moved and Dr. Simonton seconded that the October 14, 2004, joint meeting minutes be approved as written, and the motion carried unanimously 3 to 0.

4.) Review and Approval of the October 29, 2004, Air Quality Board and Environmental Quality Board joint meeting minutes:

Whereupon, the Board reviewed the draft minutes of the October 29, 2004, joint Board meeting. After discussion, Mr. Armbrrecht moved and Dr. Simonton seconded that the October 29, 2004, joint meeting minutes be approved as written, and the motion carried unanimously 3 to 0.

5.) Budget Update:

#### General Budget Report

Ms. Coleman provided the Board with a financial update through October 31, 2004. As of October 31, 2004, the Boards have spent 37% of the combined budget which represents a four month period, or 33% of the fiscal year. A copy of this budget report is attached to and made a part of these minutes as Exhibit "A".

## Projected Expenses

As requested by the Boards, Ms. Coleman provided reports detailing projected expenses from November 1, 2004, through June 30, 2005. The reports are based on the following assumptions: that the Boards do not conduct Board meetings and will not incur Board meeting expenses; that the Boards do not employ a legal counsel and will not pay salary and benefits; and that the Boards do not employ a technical advisor and will not pay salary and benefits for that period. Based on these assumptions, the analyses project an excess of funds in the amount of \$26,292.62 for the AQB and \$47,461.94 for the EQB. The combined total in excess funds for the remainder of fiscal year 2005 is \$73,754.56. These remaining funds may be expended by each Board to cover Board meeting expenses, and any expenses incurred for both the legal counsel and technical advisor positions. Copies of these budget analyses are attached to and made a part of these minutes as Exhibit "B".

In addition, Ms. Coleman provided the Board members with an analysis of projected Board meeting expenses. This analysis is based on the assumption that the Air Quality Board will conduct six Board meetings with all members attending and that the Environmental Quality Board will conduct six Board meetings with all members attending. The analysis also provides funding for court reporter fees including the cost of hearing transcripts, and fees for legal services from the Attorney General's office. In addition, the analysis provides funding for some members of the EQB to attend Legislative Session meetings, and for the Chair of the EQB to attend six Nutrient Criteria Committee meetings. A copy of this analysis is attached to and made a part of these minutes as Exhibit "C".

Based on the assumptions outlined above, the Air Quality Board's projected meeting expenses would be \$15,757 and the EQB's projected expenses would be \$33,307. **The combined total of projected expenses for the remainder of fiscal year 2005 is \$49,064.** This would leave an excess in funding for the AQB of \$10,535.62 and an excess in funding for the EQB of \$14,154.94. **The combined total of excess funding for fiscal year 2005 is \$24,690.56.** These funds may be used by the Boards to cover extra expenses such as additional Board meetings, public hearings, computer equipment upgrades, and Technical Advisor fees.

## Available Funding for Fiscal Year 2005

In addition the Air Quality Board will receive \$21,000 from the Governor's Contingency fund and the Environmental Quality Board will receive \$34,000 from the Governor's Contingency fund. This \$55,000 was provided by the Governor to assist the Boards in continuing to carry out their mandated function during fiscal year 2005. With these additional funds the Air Quality Board will have excess funding for fiscal year 2005 in the amount of \$31,535.62 and the Environmental Quality Board will have excess funding for fiscal year 2005 in the amount of \$48,154.94. **Including the additional funding from the Governor's Contingency fund, the Boards will have a combined total excess funding for fiscal year 2005 in the amount of \$79,690.56.**

## Purchase Card Report

Ms. Coleman presented the Board members with a Purchasing Card Report which details the purchases made by authorized staff members for the months of July through September 2004 and also provided the members with the bank statements. After a review of the statement Mr. Armbrecht moved and Mr. Simonton seconded that the Board accept the report, and the motion carried unanimously 6 to 0.

### 6.) Personnel Matters:

Although the Boards now have a combined excess funding for fiscal year 2005 in the amount of approximately \$79,690.56, this excess is a result of the loss of two of the Boards' four staff members (the Boards' legal counsel and the EQB's technical advisor) and \$55,000 in temporary funding provided from the Governor's Contingency fund. The Boards have not received permanent additional funding.

## Attorney

Until the Board's continuing budget issues have been resolved, the Board has procured legal assistance from the State Attorney General's office. That office will provide the Boards with an attorney on a part-time basis of twenty-five hours per week. The Boards will be responsible to pay the

hourly rate of \$38.00 but the Attorney General's office will cover the cost of employee benefits. The Attorney General's office has assigned Wendy Radcliff to serve as the Boards' legal counsel and she will begin on December 16, 2004.

### Technical Advisor

The Board determined that employing a technical advisor is critical to the function of the Board and the rulemaking process, including participation in the aluminum study and attendance at the upcoming legislative session to discuss the Water Quality Standards rule currently pending before Legislature. The Board determined that it would hire a technical advisor on a consultant fee basis through the end of June 30, 2005, which is the end of the fiscal year. Dr. Simonton stated that he would like to be involved in the search for and selection of the Board's new Technical Advisor. Mr. Armbrecht moved and Dr. Simonton seconded that the Board Chair, in full consultation with the Vice-Chair, begin the process of retaining a Technical Advisor as soon as possible, and the motion carried unanimously 3 to 0.

### **7.) Miscellaneous Matters:**

The Board staff informed the Board members of several matters which may need to be addressed. Currently, staff is experiencing difficulties with two printers in the office, these printers are eight years old and need to be replaced. Also, staff members are currently utilizing outdated computers and would like the Board to consider replacing two of these computers and monitors. In the past the Board has received replacement computers from the WV Department of Environmental Protection that were actually computers which were originally intended to be placed in surplus property. Mr. Armbrecht moved and Dr. Simonton seconded that Dr. Snyder be given the authority to approve the purchase of computer equipment and similar items once they are researched and selected, and the motion carried unanimously 3 to 0.

In addition, the software program Amicus which is used by the Board clerk on a daily basis is not functioning properly. This program will need to be repaired or replaced as soon as possible. The clerk will continue to work with the Amicus technical support team to determine whether the problem is within the software or the computer and update the Board members during the next Board meeting.

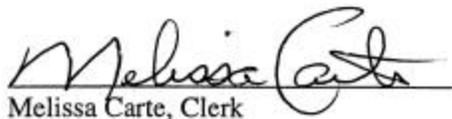
The Board clerk also discussed the procedure utilized by the Board to complete service of process. Currently, all Board Orders are served on all parties of an appeal by certified mail with return receipt requested which costs the Board approximately \$5.00 per letter and requires additional staff time to complete. However now that the Board is physically located in the same building as the Office of Legal Services and also the Division of Water and Waste Management, two agencies which are involved in all EQB appeals, it would be less expensive and less time consuming to hand deliver these Orders. The Board determined that these Orders could be hand delivered provided that the parties served provide some form of written acknowledgement of the receipt of the Board Order.

8.) Establish Future Board Meetings Dates:

The Board members scheduled Board meetings on January 14, 2005, February 10, 2005, March 10, 2005, and April 7, 2005.

Whereupon, Mr. Armbrach moved and Dr. Simonton seconded that the December 14, 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 December 14, 2004, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on January 14, 2005.

  
Melissa Carte, Clerk