

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

601 57<sup>th</sup> Street, SE  
Charleston, West Virginia 25304  
(304) 926-0445  
Fax: (304) 926-0486

**MINUTES**

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
MEETING**

**JANUARY 14, 2005**

**I. General**

On Friday, January 14, 2005, a quorum of the members of the Environmental Quality Board (hereinafter referred to as the ABoard@) conducted a public meeting at the Board offices located at 601 57<sup>th</sup> Street, 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  
Dr. Simonton, Vice Chair  
Ted Armbrecht  
Dr. Hackney

Staff Members Present were as follows:

Melissa Carte, Clerk of the Board  
Kathy Coleman, Administrative Secretary  
\*Wendy Radcliff, the attorney assigned by the State Attorney General's office to assist the Board was present during the meeting.

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

## **I. Appeals**

### **1.) Appeal No. 04-09-EQB (PKC):**

Appeal No. 04-09-EQB (PKC) was filed with the Board 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 scheduled to be conducted during the January 14, 2005, Board meeting. However, on January 13, 2005, the Counsel for the Appellant filed a Motion to Continue the evidentiary hearing citing a scheduling conflict which would preclude him from attending the Board meeting. Counsel for the Appellee appeared before the Board and stated that he was prepared to proceed to hearing. After discussion, Dr. Hackney moved and Dr. Simonton seconded that the Board grant the Appellant's Motion for Continuance and rescheduled the evidentiary hearing for the February 2005 Board meeting, and the motion carried unanimously 4 to 0.

### **2.) 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 Appellant filed a Motion for Summary Judgment, with a memorandum of argument in support thereof. The Environmental Quality Board members also received the memorandum of the Appellee in response to the motion as well as the memorandum of the Intervenor, Green Valley Coal Company. The Appellee and the Intervenor submitted arguments in opposition to the Appellant's motion and also made motions for summary judgment in their favor.

The Board members reviewed the appeals and all related materials during the January 14, 2005, Board meeting. \*Doran Burrell, an attorney assigned by the State Attorney General's office to assist the Board was present during this portion of the meeting. After discussion, Dr. Simonton moved and Dr.

Hackney seconded that the Board deny the Appellants Motion for Summary Judgment, and the motion carried unanimously 4 to 0.

After further review, Mr. Armbrecht moved and Dr. Simonton seconded that the Board deny the Appellee's and also the Intervenor's Motions for Summary Judgment, and the motion carried unanimously 4 to 0. The Evidentiary Hearing in Appeal 04-03-EQB and Appeal 04-06-EQB will be scheduled for the February 2005 Board meeting.

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

Appeal No. 04-12-EQB (Huntington Alloys) was filed on May 14, 2004. 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.

As directed by the Board, the parties provided a written status report which was reviewed by the Board during the January 14, 2005, Board meeting. The status report requests that the Board delay scheduling the evidentiary hearing in this appeal until such time as the Appellant has had the opportunity to petition the Board for a revision of the Water Quality Standards in accordance with the previously mentioned studies, or otherwise completes its justification for revised permit limits.

Dave Yaussy, representing the Appellant appeared before the Board to discuss the status report. Mr. Yaussy stated that the Company is currently working with the WV Department of Environmental Protection to resolve the issues of the appeal which are the permit limits for copper and fluoride. They are considering applying either for a Category B Use Removal or requesting site specific criteria in order to get relief from the copper limits. Triad Company is currently undertaking studies to help determine what site specific criteria would be appropriate.

The fluoride limits in the permit are tied to the Category A Use designation. Mr. Yaussy stated that removing that Use Designation from the culvert where it crosses Huntington Alloys' plant boundary, and becomes a backwater of the Guyandotte River would provide relief from the fluoride limits. He provided the Board members with a draft Category A Use Removal application. Mr. Yaussy hopes to file the completed Use Removal application with the Board prior to the February 2005, Board meeting.

After discussion, the Board determined that additional time to allow for the completion of the studies and to prepare an application for a Category A Use Removal would be appropriate. Further, the Board directed the parties to provide a written status report, to be received by the Board no later than June 13, 2005. The Board will review the status report(s) at its June 2005, meeting and will take appropriate action on the appeal at that time.

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

Appeal No. 04-15-EQB (Crab Orchard/MacArthur PSD) was filed on July 16, 2004, by the Company and is in regards to certain terms and conditions of NPDES Permit No.WV0082309. The parties were granted a Stay of the Proceedings pending action by the USEPA on the Board's Water Quality Standard rule (2004). The USEPA has now acted on the Board's rule. The parties of the appeal appeared before the Board and presented a Consent Order which resolved the issues of the appeal without the need for an evidentiary hearing.

After reviewing the proposed Consent Order, it was determined that the parties had not included the attachments referenced in the proposed Order. The parties stated that the attachments are merely the modified pages of the permit which show the limits set forth in the Consent Order. Dr. Hackney moved and Dr. Simonton seconded that the Board approve the Consent Order in Appeal No. 04-15-EQB, once the attachments are received and reviewed by the Board Chair, and the motion carried unanimously 4 to 0. Appeal No. 04-15-EQB will be removed from the Board's docket.

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

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

appeal was scheduled to be conducted during the January 14, 2005, Board meeting. However, on January 14, 2005, prior to the hearing the parties filed a Motion for Continuance stating that the parties have reached a settlement agreement but that it had not yet been completed and was not ready for review by the Board. After discussion, Dr. Hackney moved and Dr. Simonton seconded that in order to allow time for the parties to complete the settlement agreement, the Board grant the Joint Motion for a Continuance, and the motion carried unanimously 4 to 0. The evidentiary hearing in Appeal No. 04-17-EQB, if necessary, will be scheduled for the February 2005 Board meeting.

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

Appeal 04-18-EQB (Rapp's Dairy) was filed on August 6, 2004, by J. David Rapp 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 Evidentiary Hearing in this appeal was scheduled to be conducted during the January 14, 2005, Board meeting. However, on January 13, 2005, the parties filed a Joint Motion for Continuance stating that the Appellant has agreed to apply for the appropriate permit and requested additional time to determine whether the permit requirements will be acceptable to the parties.

On January 14, 2005, the Board members reviewed the Notice of Appeal and the Joint Motion for Continuance. Counsel for the Appellant did not attend the hearing. After review the Board determined that the issue currently under appeal is Order No. 5593, dated June 7, 2005, which was issued by the WV Department of Environmental Protection's Division of Water and Waste Management. This Order finds that the Rapp Dairy facility is a Concentrated Animal Feeding Operation (CAFO) and requires Rapp Dairy to obtain an individual WV/NPDES permit for the facility.

Based on the assertions of the parties as outlined in the January 13, 2004, Joint Motion for Continuance, the Board determined that the Appellant has agreed to apply for the WV/NPDES permit as required under Order No. 5593 and that the appeal is now moot. Dr. Simonton noted that Rapp Dairy may appeal the terms and conditions of the WV/NPDES Permit to the Environmental Quality Board if and when it is issued. Whereupon, Dr. Simonton moved and Mr. Armbricht seconded that the Board deny the parties Joint Motion for Continuance and dismiss Appeal No. 04-18-EQB,

and the motion carried unanimously 4 to 0. Appeal No. 04-18-EQB will be removed from the Board's pending docket. Dr. Hackney noted that during the 2005 Legislative session, the Legislature will be considering new or revised CAFO regulations for dairy facilities and that this operation may then fall within the guidelines for a general permit.

## **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).

Randy Sovic, who serves as a member of the Nutrient Criteria Committee appeared before the Board to provide an update of Nutrient Criteria Committee activities. Mr. Sovic stated that the Committee is proceeding with the development of lake criteria. They have collected data and have begun to compare such data to the existing data contained in a Clean Lake Survey conducted by the WVDEP in the 1990s and also some historical data that the US Army Corp of Engineers provided. The Committee anticipates making recommendations to the Board regarding nutrient criteria in lakes and reservoirs for Category B and Category C in March 2005.

Recommendations for Category A nutrient criteria in lakes and reservoirs will most likely be delayed until March 2006. The Committee is working closely with the WV Bureau for Public Health to collect additional data in relation to water treatment plants that are associated with lakes.

Also, the Committee is now beginning the literature review for rivers and streams in an effort to identify the existing data gaps. Mr. Sovic stated that

the development of nutrient criteria for rivers and streams in the state will be a longer, more costly process than for the development of nutrient criteria for lakes and reservoirs.

Ms. Coleman provided the Board with a financial update of Nutrient Criteria Development Grant. A copy of this report is attached to and made a part of these minutes as Exhibit "A". The initial grant award was \$60,000 and the remaining projected balance is \$10,931. This money will be available until September 30, 2005. Ms. Coleman also provided a detailed list of all expenses paid from the grant to date and requested that the Board review a specific expenditure made by the WVDEP's Division of Water and Waste Management for the purchase a motor for the aluminum boat in the amount of \$4,476 and other various repairs to the Boat and trailer which totaled an additional \$2,329.00. Pat Campbell, WVDEP's Division of Water and Waste Management informed the Board that the WVDEP used a portion of the Nutrient Criteria grant money to hire an intern to perform the water sampling at the lakes and reservoirs, and also volunteered to provide the boat needed for the sampling. However, before the water sampling was completed, the boat motor had to be replaced and the boat trailer also required significant repairs.

Mr. Armbrecht questioned whether given the Board's current financial problems, it was the Nutrient Criteria Committee's responsibility to cover the entire cost of WVDEP's purchase of a new boat motor and trailer repair, which the WVDEP will continue to utilize after the Nutrient Criteria Committee has completed the water sampling. Mr. Campbell stated that the WVDEP has also provided over \$20,000 in additional staff time to the Nutrient Criteria Committee. After further discussion, Dr. Hackney moved and Dr. Simonton seconded that the Board approve the expenditure for the boat motor and trailer repair, and the motion carried unanimously 4 to 0. Dr. Snyder requested that the WVDEP notify the Board prior to making such expenditures in the future.

Mr. Armbrecht moved and Dr. Simonton seconded that the Board add the proportional amount of last years NCC expenses (approximately \$2,500) to the Board's fiscal year 2005 budget, and the motion carried unanimously 4 to 0.

## **2.) Update on actions taken by the US Environmental Protection Agency (USEPA) on the Board's 2004 Water Quality Standards rule:**

The Board's Triennial Review package was submitted for consideration by the WV Legislature during the 2004 Legislative session. The Legislature passed a Water Quality Standards bill on March 12, 2004, and the bill was signed by the Governor in April 2004, with an effective date of July 1, 2004. However, all new or revised water quality standards must be approved by the US Environmental Protection Agency (USEPA) in order to become effective for federal Clean Water Act purposes. The Board forwarded the Water Quality Standards rule and all supporting documentation to the USEPA Region III, in June 2004.

The Board members were provided with a copy of the letter dated December 17, 2004, from Donald Welsh, Regional Administrator of the USEPA Region III, which states that the USEPA has now completed its review of the Board's new or revised Water Quality Standards. The specific revisions in the Water Quality Standards rule which were approved by the USEPA include: the Weirton Steel exemption from the half-mile rule for the Category A criterion for iron at section 7.2.a.2.; the Weirton Steel Harmon Creek socioeconomic variance at section 7.2.d.; and the deletion of the Category A ammonia criterion from Appendix E, Table 1.

The USEPA is deferring action on the addition of the "Manganese Five Mile Rule" sentence in section 6.2.d. while the USEPA evaluates and collects additional information sufficient to finalize a decision.

The USEPA disapproved section 7.2.d.19.3 which establishes site-specific numeric criteria for chlorides in Ward Hollow/Davis Creek (Union Carbide). Mr. Charles Armstead, representing Union Carbide informed the Board that he is currently reviewing the USEPA disapproval to determine the Company's next course of action.

## **3.) Aluminum Study:**

In response to a legislative directive, the Board began a review of the current aluminum criteria contained in the Water Quality Standards rule and opted to suspend the chronic aquatic life aluminum criterion of 87 ug/liter from all

waters of the state except trout streams, until July 4, 2007. (The Board filed an Emergency Rule and also an Agency Approved version of the rule on September 29, 2004. The Emergency Rule became effective on November 10, 2004 and will remain in effect for a total of fifteen months or until the Board's regular Legislative rule goes into effect.) In arriving at its decision, the Board agreed that additional scientific data was needed to fully evaluate the impacts of aluminum to aquatic life, particularly, but not exclusively, to fish. The date for lifting the suspension of the chronic value was established to provide time for the Board to work with all interested parties, including the US Environmental Protection Agency, WV Department of Environmental Protection, WV Division of Natural Resources, the environmental community, the regulated community and other interested parties, to develop and implement appropriate scientific studies to evaluate the aquatic life impacts of dissolved and total aluminum concentrations in state waters. The results of these scientific studies will be used to evaluate the appropriateness of the aquatic life criteria currently recommended by USEPA in West Virginia's waters and possibly to serve as the basis for new criteria to protect aquatic life from acute and chronic toxicity from aluminum.

Pat Campbell, WVDEP's Division of Water and Waste Management appeared before the Board to outline the WVDEP's proposal for conducting the aluminum study. A copy of his Power-Point presentation is attached to and made a part of these minutes as Exhibit "B".

After discussion, the Board opted to proceed with the aluminum study in two phases. For phase one of the study, the Board will create a technical review team which will be comprised of one representative from the USEPA, WVDEP, the Division of Natural Resources (DNR), industry and the environmental community and will be headed by Dr. Simonton. This Committee will review and approve the Request for Proposal (RFP) which outlines the scope of the aluminum study. The approved RFP will then be sent to various vendors. Since the industry groups will be funding a portion of the aluminum study, the Review Committee will approve a list of four final candidate companies, one of which will be selected by the industry groups to collect and analyze the aluminum data.

Phase two of the aluminum study will entail creating a larger Board Committee to review and monitor the data collection and analysis, and to provide direction to the vendor as needed. These meetings will be

conducted in accordance with the Open Governmental Meetings Act requirements, including public notice of all meetings and will include Committee meeting agendas, as well as the preparation and approval of Committee meeting minutes. All decisions made on issues before the Committee will be made by a majority vote of the members. The Board currently has approximately \$23,000 available to support the function of the Committee, including reimbursement of travel expenses.

Whereupon, Mr. Armbrecht moved and Dr. Hackney seconded that the Board form a Technical Review Committee to begin the aluminum study process. Dr. Simonton will serve as the Chair of Technical Review Committee which will review and approve the RFP as well as the list of potential vendors, and proceed with the aluminum study as outlined, and the motion carried unanimously 4 to 0.

#### **4.) Update on WV Legislative Rule Making Review Committee (LRMRC) action on Manganese and Mercury:**

The WV LRMRC is currently reviewing two criterion contained in the Board's Water Quality Standards rule. Members of the Board were scheduled to appear before the LRMRC on January 11<sup>th</sup> to discuss previous Board actions on manganese and mercury. Dr. Snyder was present to attend the Committee meeting but it was cancelled due to a lack of a quorum of Committee members.

However, on January 13, 2005, the Board received a letter from the Senate Judiciary Committee, the House Judiciary Committee and the Legislative Rule Making Review Committee requesting that the Environmental Quality Board continue its review of the manganese criterion contained in the Water Quality Standards rule.

This request was made in response to the December 27, 2004, letter from the Donald Welsh of USEPA, Region III, which stated that the review of the revised Water Quality Standards has been completed but that the USEPA "is deferring action on the addition of the Manganese Five Mile Rule sentence in section 6.2.d. while the USEPA evaluates and collects additional information sufficient to finalize a decision."

This revision to the Water Quality Standards rule (46 CSR 1) which was considered and adopted by the Legislature during the 2004 Legislative session addresses the “5 mile rule” for the manganese criterion (§6.2.d.). The provision outlines an exemption from the application of the manganese criterion from all waters other than those within five miles above a drinking water intake.

The Environmental Quality Board is required by federal law to submit all revisions to the Water Quality Standards rule to the US Environmental Protection Agency and also to provide supporting documentation for such revisions. Since the Board did not originate the revision to the manganese criteria no public comments or data were received in support of that revision during the Board’s public comment period on the Water Quality Standards rule. Therefore, prior to submitting the Water Quality Standards rule to the USEPA for review and approval in June 2004, the Board contacted both the Senate and House Judiciary Committees seeking any written submission or other information that was considered in the Committee’s deliberations on the rule that would serve as supporting documentation for the revisions to section 6.2.d.

The Committees responded that no such information was available and encouraged the Board to develop an adequate record to facilitate the approval of the manganese revision in the Water Quality Standards Rule by the USEPA. In response the Board submitted all of the materials that were provided by the WV Coal Association to the USEPA. Subsequently, the Board also conducted another public comment period to further solicit additional public comments regarding manganese. All comments received during this public comment period were also forwarded to the USEPA.

Dr. Hackney moved and Dr. Simonton seconded that the Board assist the Legislature and the USEPA in continuing to address the manganese issue in the Water Quality Standards rule, and the motion carried unanimously 4 to 0. In an effort to do this, the Board established a 45-day public comment period as required by the Federal Clean Water Act.

The Public Hearing regarding the manganese criterion will be conducted on February 23, 2005, at 6:30 p.m. and written comments will be accepted through 5:00 p.m. on March 24, 2005. The Board then scheduled a public meeting to review and discuss these comments and to prepare a written

response in an attempt to provide the public comments and a Board response to the Legislature before the end of the 2005 Legislative session.

### **III. Administrative Matters**

1.) Review and Approval of the December 9, 2004, Board meeting minutes:

The minutes of the December 9, 2004, Board meeting were presented to the Board members for review and consideration. Whereupon, Dr. Hackney moved and Dr. Simonton seconded that the minutes of the December 9, 2004, Board meeting be approved as written, and the motion carried unanimously 4 to 0.

2.) General Budget Update:

Ms. Coleman provided the Board members with a monthly budget report which provides a financial update through December 31, 2004. As of December 31, 2004, the Boards have spent 30% of the combined budget which represents a six month period, or 50% of the fiscal year. A copy of this report is attached to and made a part of these minutes as Exhibit "C".

3.) Purchasing Card Report:

Ms. Coleman provided the Board with a quarterly Purchase Card Report which details the purchases made by the authorized staff members for the months of October through December 2004. A copy of this report is attached to and made a part of these minutes as Exhibit "D". After review, Dr. Hackney moved and Dr. Simonton seconded that the Board approve the Purchase Card report, and the motion carried unanimously 4 to 0.

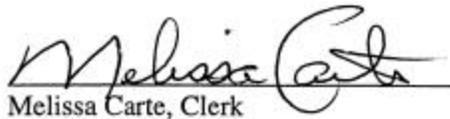
4.) Web Site:

Ms. Coleman provided the Board with a report of website activity. Over the past two years the Board's website has averaged over 527 visitors per month. After further discussion of the website, the Board decided to add a page to the website which provides the meeting Notices and agendas for the Nutrient Criteria Committee. The Board requested that the site include a link to the Canaan Valley Institute website which currently posts the approved meeting minutes of the Committee.

In addition, Dr. Hackney moved and Dr. Simonton seconded that the Board create a page for the website which discusses remining activities and which includes the Board's Remining Variance Orders and also pending applications, and the motion carried unanimously 4 to 0.

Whereupon, Mr. Armbrecht moved and Dr. Simonton seconded that the January 14, 2005, 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 January 14, 2005, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on February 10, 2005.

  
Melissa Carte, Clerk