

WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

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WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MEETING MINUTES

MARCH 10, 2005

I. General

On Thursday, March 10, 2005, 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 57th Street, S.E., 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
*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. Rulemaking

1.) Union Carbide Variance Request:

The US Environmental Protection Agency recently rejected the new criteria for chlorides in Ward Hollow that was contained in Section 7.2.d.19.3 of the Water Quality Standards rule. The company requested that it be placed on the March 10, 2005, Board meeting agenda in order determine the appropriate course of action. Lisa Burgess of Potesta and Associates appeared before the Board on behalf of the company and Cheryl Atkinson and Nina Rivera of the US Environmental Protection Agency (USEPA), Region III participated telephonically during this portion of the meeting.

Mr. Burgess stated that there was an understandable but critical error which was made during the rule-making process regarding the terminology used to describe site-specific changes to the water quality standards. There are two methods for addressing site specific changes to water quality standards: one is a variance which can be granted according to the regulations outlined in 46 CSR 6. This method is utilized if the use cannot be attained and one of several factors for not attaining such use is present. The variance method does not require a demonstration that the applicant is protecting the use or aquatic life. The second method for obtaining site-specific changes to water quality standards is a site-specific numeric criteria change. This method requires that the applicant demonstrate that the new criterion is protective of the use and is protective of aquatic life.

In 1989 Union Carbide was granted a site-specific numeric criterion for chlorides in Ward Hollow of 540 ug/l through the variance procedure. In 1997, during the Board's triennial review Union Carbide opted not to request a continuance of this variance, believing that the effluent limitations for Outfall 008, which is the outfall that discharges into Ward Hollow, would be given a permanent chloride limitation of 250 ug/l. However, during the next permit cycle the WV Department of Environmental Protection (WVDEP) utilized the USEPA's new technical support document to calculate water quality based effluent limits. This resulted in a calculated permit limit for chlorides of 188 ug/l . The company cannot routinely meet those limits.

Consequently, in 2002 the company requested a variance from the Board. The basis for that request was a “naturally occurring” chlorides due to salt springs and wells in the area. The Board reviewed that application, approved the variance request and included the proposed change to the water quality standards rule in the triennial review packet. The variance language contained in the Board’s proposed water quality standards rule at section 7.2.d.19.3. provided that “Except that in Ward Hollow of Davis Creek, the following site-specific numeric criterion for chloride shall apply for Category A and Category B1 (chronic aquatic life protection): 310,000 ug/L.” This language was approved during the legislative session and then provided to the USEPA for review and approval.

Specifically, the error or misunderstanding resulted from the term “site-specific numeric criterion” used in the water quality standards rule. The requirements for applications in support of a site-specific criteria change are different from the requirements for a variance. Union Carbide actually applied for a variance to numeric criterion for chlorides, not a site-specific criteria change.

As a result the USEPA received the Board’s rule-making package which contained the “site-specific numeric criterion” language in the rule but received an application and documentation as justification for a variance from Union Carbide. As noted, the requirements for applications in support of a site-specific criteria change are different from the requirements for a variance. The USEPA disapproved the new site-specific criteria for chlorides in Ward Hollow requested by the company. The USEPA did not review the Company’s application in the context of a variance request and therefore cannot confirm whether the information and data submitted by the company is adequate to support the company’s variance request.

Cheryl Atkinson and Nina Rivera provided general agency guidance regarding variances: a variance is granted to an individual discharger or a specific pollutant or pollutants and does not otherwise modify the standards; a variance identifies and justifies numeric criteria that will apply only during the existence of the variance; a variance is established as close to the underlying numeric criteria as possible; a variance is reviewed every three years at a minimum and extended only where the conditions were granted the variance shall apply. Further, upon expiration of the variance, the underlying numeric criteria will have full regulatory affect; a variance does not exempt the discharger from compliance with applicable technology or

other water quality based limits; and a variance does not affect effluent limitations for other dischargers.

Cheryl Atkinson and Nina Rivera further outlined the requirements for a variance from water quality standards. Ms. Atkinson stated that in order for the USEPA to approve a variance request the applicant must demonstrate that one of the “use removal” factors is present. States may remove a designated use, which is not an existing use, if it can be demonstrated that attaining that use is not feasible. The applicant may base its variance request on at least one of six factors which are outlined at 40 CFR 131.10.g. The applicant stated that it will base its variance request on the naturally occurring pollution factor.

Ms. Atkinson stated that a variance may be granted if “naturally occurring pollution concentrations prevent the attainment of the use”. The applicant must demonstrate that meeting the current standard is unattainable, that the designated use is not being met and that the existing use will not be impaired or degraded. The variance application must be subject to a public notice and comment period. Ms. Rivera stated that one reason the USEPA regarded the amendment to the water quality standards rule in question as a site-specific criteria change is because unlike other variances contained in the Board’s rule, this site-specific variance was not granted for a specific period of time and did not cite 40 CFR 131.10.g.

Ms. Rivera stated that the company should resubmit its variance application to the Board. The application should clearly outline which of the six feasibility factors outlined at 40 CFR 131.10.g. that is the basis for its variance request, adequately demonstrate that such factor is present and explain how it prevents the attainment of the designated use. Further the applicant must detail the existing uses and how such existing uses will not be impaired by the variance. The Board, if it grants the variance, should include language similar to other variances contained in the water quality standards rule, should cite the applicable section of 40 CFR 131.10.g. and grant the variance for a specific length of time.

Ms. Rivera reiterated that the USEPA did not review the Company’s application in the context of a variance request and therefore cannot confirm whether the information and data submitted by the company is adequate to support the company’s variance request.

The company stated that it will submit a new variance application with the Board as soon as possible. Once the Board receives the new variance application, it must be reviewed and approved if appropriate. The variance request will be subject to public review and comment and must then proceed through the regular rulemaking process. In order for the variance request to be considered during the 2006 legislative session, the Board must file the Agency Approved version of the water quality standards rule (after filing the Agency Proposed Rule and conducting the 45-day public comment period) by July 29, 2005.

II. Appeals

1.) Appeal 04-07-EQB (Higginbotham):

Appeal No. 04-07-EQB (Higginbotham) was filed with the Board on April 30, 2004. Prior to the scheduled date of the evidentiary hearing the parties submitted a proposed Consent Judgment and Order for Dismissal which resolved the issues of the appeal without the need for the evidentiary hearing. The Board approved that joint Consent Judgment and Order of Dismissal on December 9, 2004.

Mark Rudolph, counsel for the Appellee appeared before the Board to discuss the actions taken by the Appellant in response to the Consent Order entered by the Board. The Consent Order established a 45-day time period during which the Appellant was required to submit sampling and remediation plans and also allowed 30 days for payment of a civil penalty in the amount of \$5,000. Mr. Rudolph stated that the Appellant has submitted the \$5,000 as required but to date has not submitted either of the sampling and remediation plans as provided for in the Consent Order. The Appellee would need to proceed to Circuit Court for enforcement of the Board's Order. The Board requested that Mr. Rudolph continue to update the Board on the status of the Appellant's compliance with the Consent Order.

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

Appeal No. 04-22-EQB (Webster Co. Solid Waste) was filed on August 9, 2004, and is in regards to an Order issued by the WVDEP which revokes the facilities Solid Waste Permit No. SWF-7810/WV0109541. The Evidentiary Hearing in Appeal No. 04-22-EQB was scheduled to be conducted during the March 10, 2005, Board meeting. However, prior to the date of the

evidentiary hearing, the Appellant filed a Motion for a Continuance which was granted by the Board Chair. The Evidentiary Hearing in Appeal No. 04-22-EQB is now scheduled to be conducted during the April 7, 2005, Board meeting.

3.) Appeal No. 04-27-EQB (ICG Eastern)

Appeal No. 04-27-EQB (ICG) was filed on December 20, 2004, and is in regards to the effluent limits for manganese established in WVNPDES Permit No. 0098868 which was issued by the WVDEP on November 20, 2005. The Evidentiary Hearing in Appeal No. 04-27-EQB was scheduled to be conducted during the March 10, 2005, Board meeting. However, prior to the dated of the evidentiary hearing, the parties submitted a proposed Consent Order for the Board's approval. Mr. Robert McLusky, counsel for the Appellant appeared before the Board to discuss the proposed Consent Order. Mr. McLusky stated that the parties to the appeal have agreed to establish interim manganese limits until action by the USEPA on the Board's proposed "5 mile" rule regarding manganese which is currently pending before that agency. If the USEPA approves the Board's proposed "5 mile" manganese rule then the WVDEP will apply that standard to the permit, if it is not approved the company may re-file the appeal before the Board for further action.

After a review of the proposed Consent Order, Dr. Simonton moved and Dr. Hackney seconded that the Board approve the proposed Consent Order submitted in Appeal No. 04-27-EQB, and the motion carried unanimously 4 to 0. Appeal No. 04-27-EQB (ICG) will be removed from the Board's docket of pending appeals.

4.) Appeal No. 05-01-EQB (North Lake, LLC)

Appeal No. 05-01-EQB (North Lake) was filed on January 19, 2005, and is in regards to a WVDEP Order for Compliance No. 5632, which was issued by the Division of Water and Waste Management on December 20, 2004. The Evidentiary Hearing in Appeal No. 05-01-EQB was scheduled to be conducted during the March 10, 2005, Board meeting. However, prior to the dated of the evidentiary hearing, the Appellant filed a Motion for a Continuance which was granted by the Board Chair. The Evidentiary Hearing in Appeal No. 05-01-EQB is now scheduled to be conducted during the April 7, 2005, Board meeting.

III. Rulemaking

1.) 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. In arriving at its decision, the Board agreed that additional scientific data was needed to fully evaluate the impacts of aluminum to aquatic life. The date for lifting the suspension of the chronic value was established to provide the Board time to work with all 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 Board opted to proceed with the aluminum study in two phases. For phase one of the study, the Board created a Technical Review Committee which is comprised of one representative from the USEPA, WVDEP, the Division of Natural Resources (DNR), industry and the environmental community and is chaired by a member of the Board.

Dr. Simonton provided the Board with an overview of the Technical Review Committee's activities to date. This Committee has previously reviewed and approved the Request for Proposal (RFP) which outlines the scope of the aluminum study and the approved RFP was sent to various vendors. During the February 25, 2005, Technical Review Committee discussed the vendors' responses to the RFP, and approved a list of four final candidate companies to collect and analyze the aluminum data. Advent has been selected as the vendor for the aluminum study. The Committee will conduct a public meeting on April 1, 2005, and the purpose of this meeting will be to meet with the contractor to discuss the RFP and work plan.

The Board members were provided with a copy of Open Meetings Advisory Opinion No. 2005-03 which was issued by the WV Ethics Commission's Committee On Open Governmental Meetings. This opinion was issued in response to a request from the Board to address the issue of whether the meetings of the Board's Technical Review Committee are subject to the open meetings requirements. The Advisory Opinion held that: "The committee constitutes a subunit of a state board which has been authorized

to exercise some portion of the board's executive power. The committee has been delegated authority to approve the RFP for an important scientific study as well as to direct the vendor ultimately selected to accomplish this study. Therefore, meetings of the Committee are subject to the requirements of the Open Meetings Act.”

Representatives from industry questioned the information regarding the role of the Committee which was contained in the Board's initial Advisory Opinion request letter. However, the request letter was drafted using information taken directly from the minutes of the January 14, 2005, Board meeting which were approved unanimously by the Board.

Dr. Simonton stated that clarification regarding the role of the Technical Review committee is necessary since the Board members' perception of the function of the Committee seems to differ from that of the Committee members. The Technical Review Committee perceives its function to be to provide scientific peer review and input to the consultant. Dr. Simonton stated that although the Committee members may have individual opinions regarding the data and the aluminum study, he does not believe that the Technical Review Committee should endorse or make a final recommendation regarding the aluminum study to the Board. The Board may look to the Committee to endorse the process but not the end product.

In order to address concerns regarding the openness of the aluminum study review process, the Technical Review Committee will establish weekly meetings in order to address any problems or questions that the consultant may have. A public meeting notice will be filed and the meetings will be open to the public.

Dr. Simonton stated that this study is not necessarily “the study” which the Board will base its final decision on regarding aluminum. There is available data and existing aluminum studies which represent several lines of thinking which are available for review. He suggested that the Board encourage additional input from all interested parties. After discussion, Dr. Simonton moved and Dr. Hackney seconded that the Board publish a public notice requesting that all interested persons submit to the Board any available aluminum information, data or studies which they would like to have reviewed by the consultant and considered by the Board, and the motion carried unanimously 4 to 0.

The Board then discussed the issue of funding for the study. Previously the Board considered approaching the WVDEP or the USEPA for a grant to fund the aluminum study. However, industry representatives informed the Board that industry will fund the study and that it is not necessary for the Board to seek grants or other additional sources of funding. After discussion the Board determined that it would use monies currently available in the Board budget to provide reimbursement of travel and meeting attendance expenses to the Committee members. All travel reimbursement expense requests should be submitted to Dr. Simonton for approval.

IV. Administrative Matters

1.) Review and Approval of the February 10, 2005, Board meeting minutes:

Whereupon, the minutes of the February 10, 2005, EQB meeting were presented to the Board members for consideration. After review, Dr. Simonton moved and Dr. Hackney seconded that the draft minutes of the February 10, 2005, Board meeting be approved as written, and the motion carried unanimously 4 to 0.

2.) General Budget Update:

Ms. Coleman was not available during the March 10, 2005, Board meeting to discuss the budget update. However, the Board members were provided with a written monthly budget analysis and spreadsheet for their review. A copy of the budget analysis is attached to and made a part of these minutes as Exhibit "A".

3.) Personnel Matters:

During November 2004, the Board's Technical Advisor resigned her position with the Board. The Boards' Clerk and the Board Chair have been fulfilling some of the technical advisor responsibilities and the Board was considering hiring a new technical advisor. However, after discussion, the members opted not to hire a technical advisor until after the conclusion of the 2005 legislative session since there is currently pending before the legislature, a bill which will remove the Board's rule-making authority. If the Board does not retain its rulemaking authority, the Board will not require the assistance of a full-time technical advisor. In addition, the Board is

uncertain whether the budget for fiscal year 2006 will provide adequate funding for the technical advisor position.

4.) Consolidation of the Air Quality Board, the Environmental Quality Board and the Surface Mine Board:

The Board Members were provided with a copy of the Final Order issued by the Kanawha County Circuit Court regarding the consolidation of the Surface Mine Board with the Air Quality Board and the Environmental Quality Board. The Court has directed the Boards to consolidate immediately. The Chairs of the three Board held a meeting to discuss the initial steps needed to consolidate these Boards. Ms. Coleman will oversee all aspects of the three Boards' budgets, Ms. Radcliff or another representative of the State Attorney General's office will provide legal assistance to the three Boards and Melissa Carte will serve as the Clerk of all three Boards. The Board Chairs will continue to conduct further staff meetings to facilitate the consolidation process.

5.) Schedule Future Meeting Dates:

The Board members scheduled future Board meetings on May 5th, May 27th, and July 15th. The Board will not conduct a Board meeting during the month of June.

6.) Response to Chamber of Commerce Position paper:

The Board's staff discovered a position paper which was posted on the WV Chamber of Commerce website. The Board Chair was made aware of the paper and determined that there were several inaccuracies contained in the position paper. Inaccurate statements included an indication that the USEPA had notified the Board that it had failed to complete its enhancement of the state water quality programs pursuant to the Federal Clean Water Act prompting a threat by the USEPA of withdrawal of funding for the state water permitting program as well as a citizen suit by the environmental community. Dr. Snyder stated that such statements are entirely false.

Because of this statement in the Chamber's position paper as well as other documented inaccuracies, the Board Chair drafted a response to the position paper. The Board Chair's response was distributed to all members of the legislature. A copy of the Chamber's position paper as well as the Board

Chair's response was provided to Board members during the March 10, 2005, Board meeting.

7.) Circuit Court Order entered in Lusk Disposal Appeal:

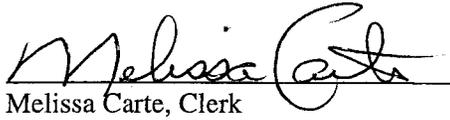
Appeal No. 03-20-EQB(Lusk Disposal) was filed with the Board on November 20, 2003. The subject of the appeal was Unilateral Order No. SW-0049 which ordered Lusk Disposal to cease and desist operating a transfer station until it received a permit from the WVDEP. The Order was issued because the WVDEP determined that the Company was operating a transfer station and not a recycling facility.

The Board conducted an evidentiary hearing on the issues of the appeal and after a review of testimony and pleadings filed in the appeal, the Board issued a Final Order finding in favor of the WVDEP, holding that the Appellant was in fact not operating a recycling facility but rather was operating a transfer station. The Board ordered Lusk Disposal to submit an application for the appropriate operating permit. The Appellant filed an appeal of the Board's Final Order (Civil Action No. 04-C-432) in Circuit Court.

On February 28, 2005, the Circuit Court entered an Order upholding the Board's finding that the Company was not operating a recycling station. However, the Circuit Court found that the Company was operating a mixed waste processing facility (not a transfer station as held by the Board). This finding still requires that the Company to obtain a permit and pay the appropriate fees. The parties have 60 days to appeal the Circuit Court Order to the WV Supreme Court.

Whereupon, Mr. Armbecht moved and Dr. Simonton seconded that the March 10, 2005, Environmental Quality 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 March 10, 2005, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on April 7, 2005.


Melissa Carte, Clerk