

ENVIRONMENTAL QUALITY BOARD

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WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MEETING MINUTES

APRIL 7, 2005

I. General

On Thursday, April 7, 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 Armbrrecht

*Dr. Cameron Hackney participated telephonically during the Board's Executive Session discussion of Appeal No. 04-03 and Appeal No. 04-06-EQB only

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.

***Doren Burrell, an attorney assigned by the State Attorney General's office to assist the Board with Appeal No. 04-03 and Appeal No. 04-06 was present during the executive session of the Board meeting.

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

I. Executive Session

The Board began the meeting in Executive Session to discuss Appeal No. 04-03-EQB (Hominy) and Appeal No. 04-06-EQB (Hominy 2). These appeals were filed with the Board on March 2, 2005, and April 22, 2005, and the evidentiary hearing regarding the issues of these two appeals was conducted on February 10, 2005. In order to reach a final decision on these appeals the Board reviewed the pleadings filed in the case, the evidence admitted during the evidentiary hearing, and the legal briefs submitted by the parties. *Dr. Hackney participated in this portion of the meeting via teleconference.

After discussions, the Board members reached a split decision on these appeals. The Board members then directed Doren Burrell to draft a Final Order which reflects that decision and to provide it to the individual Board members for review and approval prior to entering and issuing the Final Order. Appeal No. 04-03-EQB and Appeal No. 04-06-EQB will be removed from the Board's docket after the Final Order is entered.

II. Appeals

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

Appeal No. 04-22-EQB (Webster Co. Solid Waste) was filed with the Board on August 9, 2004, and is in regards to an Order issued by the WV Department of Environmental Protection's Division of Water and Waste Management which revokes the facility's Solid Waste Permit No. SWF-7810/WV0109541. The Evidentiary Hearing in Appeal No. 04-22-EQB was scheduled to be conducted during the April 7, 2005, Board meeting. However the Appellant withdrew Appeal No. 04-22-EQB on April 6, 2005. Appeal No. 04-22-EQB was removed from the Board's docket.

2.) Appeal 03-14-EQB (Broadway):

Appeal No. 03-14-EQB (Broadway) was filed by RC Heckert on September 19, 2003, regarding registration by Arrow Concrete under General Permit WVG611101 (Storm water associated with Industrial Activity). The Board conducted an evidentiary hearing during which they dismissed all claims in

the appeal except the issue of the General Permit Registration No. WVG611101, Site Registration – water runoff map does not accurately reflect how the water will flow from the permitted property (Item M of the appeal). The December 11, 2003, hearing was not completed and was then continued to allow the Appellant to recover from surgery. Issue “M” of the appeal was set for evidentiary hearing during the April 7, 2005, Board meeting. However, the appellant withdrew Appeal No. 03-14-EQB on April 6, 2005. Appeal No. 03-14-EQB was removed from the Board’s docket.

3.) Appeal No. 04-26-EQB (Marathon Ashland):

On October 20, 2004, a release into the environment of Coal Tar Light Oil from TechSol Chemical Company occurred in Huntington, West Virginia. TechSol undertook initial response to the release and Marathon Ashland Petroleum (MAP) participated in the initial response per oversight and direction of representatives of the State of West Virginia and local response authorities. On November 2, 2004, the WV Department of Environmental Protection (the “WVDEP”) issued Unilateral Order No. MM-04-007 (the “Order”) directing MAP to assume primary control of the continuing abatement and remediation activities.

The Appellant filed an appeal of this Order with the Board on December 2, 2004. On February 18, 2005, the parties filed a Joint Motion for an Indefinite Extension of the Evidentiary Hearing and all Related Discovery. The parties stated that since that date of the spill and issuance of the Order which is the subject of this appeal, the Appellant has undertaken response actions at the spill site and has communicated and cooperated with response authorities. Assessment of the spill site is continuing and the Appellant will be submitting a remediation plan for consideration by the WVDEP. In addition, MAP has also conducted significant excavation of the contaminated soil at the site and appropriately handled contaminated water generated from the site. These response actions are continuing and given time for other actions to occur, the parties to the instant appeal may be able to resolve the issues of the appeal without an evidentiary hearing before the Board.

On February 22, 2005, the Board Chair reviewed Appeal No. 04-26-EQB and the Joint Motion, and determined that good cause existed and granted the Joint Motion for an Indefinite Extension of the Evidentiary Hearing and

all Related Discovery. The evidentiary hearing in Appeal No, 04-26-EQB was continued until a date yet to be determined in 2005.

The Board ordered the Appellant to submit a written status report to the Board every 60 days beginning on March 31, 2005. The information in the status report should update the Board on the status of the spill response and the parties' continued efforts to resolve the issues of Appeal No. 04-26-EQB. The Board members were provided with a copy of the initial status report during the April 7, 2005, Board meeting.

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

Appeal No. 05-01-EQB (North Lake) was filed with the Board on January 19, 2005, and is in regards to an Order for Compliance No. 5632, which was issued by the WV Department of Environmental Protection's 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 April 7, 2005, Board meeting. However, the Appellant withdrew Appeal No. 05-01-EQB on April 1, 2005. Appeal No. 05-01-EQB was removed from the Board's docket.

5.) Appeal No. 05-03-EQB (Shavers Fork/Bowden/Faulkner):

Appeal No. 05-03-EQB was filed with the Board on February 22, 2005, and is in regards to WVPNDES No. WV1017578 which was issued by the WV Department of Environmental Protection's Division of Water and Waste Management to the J.F. Allen Company for its Pond Lick Mountain Quarry. On March 25, 2005, the Board granted the permit holder Intervenor status as a party Appellee. The Evidentiary Hearing in Appeal 05-03-EQB was scheduled to be conducted during the April 7, 2005, Board meeting.

However, on April 6, 2005, the parties filed a Joint Motion to Continue. In support of the Motion the parties stated that they reached an agreement which calls for J.F. Allen Company to collect additional water data and submit such data to the WVDEP. The parties acknowledge that the agency's review of this additional data may result in a modification of the effluent limits contained in the permit. This in turn may resolve all or some of the issues of the appeal. Accordingly the Board Chair granted a continuance of the Evidentiary Hearing until such time as the data is collected and the WVDEP issues a decision on the additional water data. In addition the Board ordered the parties to submit a written status report regarding the

progress on this matter to the Board every 60 days beginning on June 1, 2005. The Board will review each report during its regularly scheduled meetings and will continue to take appropriate action on the appeal as needed. At the November Board meeting the Appellant must submit written notification whether the Evidentiary Hearing regarding the issues of Appeal No. 05-03 will be necessary.

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. The date for lifting the suspension of the chronic aluminum value was established to provide time for the Board 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. In order to facilitate 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 stated that Advent has been selected as the consultant to perform the Aluminum study. On April 1, 2005, the members of the Technical Review Committee met with Scott Hall, a representative of Advent to discuss the Request for Proposals (RFP) and the work plan.

The Board staff will be providing public Notice that the Board is seeking aquatic toxicity test data for aluminum in support of efforts to validate aluminum water quality criteria for West Virginia surface waters. The Committee will gather all available data for review and also to determine whether there are any gaps in the data. The next meeting of the Committee will occur after phase two of this work plan is completed, possibly in June 2005.

2.) Union Carbide Variance Request:

Appeal No. 02-06-EQB (Carbide) was filed with the Board on February 25, 2002, and is in regards to the permit limits for Chloride at Outlet 008

contained in WVNPDES No. WV0000124. The parties entered into an Agreed Order on March 21, 2002, in which the Board granted interim limits for chloride at Outlet 008 until April 15, 2004. Upon expiration of the interim limits the water quality based effluent limits contained in the permit for the discharge of Chloride would be enforceable unless a site specific variance for the discharge for Chloride at Outlet 008 had been granted by the Board.

In accordance with the Agreed Order, Union Carbide submitted to the Board a site specific variance application for the discharge of Chlorides at Outlet 008 on May 15, 2002. June 2002, the Board did grant a variance to Union Carbide for Chloride discharge at Outlet 008 and during the 2004 Legislative session, the terms of that variance were incorporated by the WV Legislature as an amendment to the Water Quality Standards rule at section 7.2.d.19.3. This amendment was the submitted to the US Environmental Protection Agency for review. On December 17, 2004, the US Environmental Protection Agency (USEPA) 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 has indicated that the USEPA rejected the variance because of a misunderstanding. 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. The requirements for applications in support of a site-specific criteria change are different from the requirements for a variance.

On March 30, 2005, Union Carbide submitted a letter requesting that the Board confirm that the permit limits for Chloride at Outlet 008 contained in the Agreed Order entered in Appeal 02-06-EQB are in effect since the Board did grant a site specific variance to the company.

Representatives from the Company and the WVDEP submitted a proposed Order for the Board's consideration. The Order provides that the Board did grant the company's variance request but due to confusion regarding the type of variance sought and the type of variance approved, this variance was disapproved by the USEPA. The company will submit a new variance application with the Board by May 1, 2005. Once the Board receives the new variance application it will be reviewed by the Board and will be subject to public review and comment. The variance must then proceed through the regular rulemaking process. The interim Chloride limits at Outlet 008 shall continue to apply pending the review and approval of the variance by the Board and the USEPA.

After discussion, Dr. Simonton moved and Mr. Armbrecht seconded that the Board approve the proposed Order and the motion carried unanimously 3 to 0.

3.) Update on Senate Bill 287:

The Board members were provided with an update regarding the current status of Senate Bill 287, which removes the Board's rulemaking authority and delegates such authority to the WV Department of Environmental Protection. Senate Bill 287 was approved by the Senate on a vote of 27 to 7. In addition, the House of Delegates has approved similar legislation. The effective date of the legislation is July 1, 2005.

Mr. Armbrecht expressed concerns regarding a provision of the bill which exempts the discussions between the WVDEP and regulated entities regarding variances and changes to the current criteria contained in the water quality standards from the requirements of the Open Governmental Meetings law once the WVDEP assumes rulemaking responsibilities.

IV. Administrative Matters

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

Whereupon, the minutes of the March 10, 2005, Board meeting were presented to the Board for consideration. After discussion, Dr. Simonton moved and Mr. Armbrecht seconded that the minutes of the March 10, 2005, Board meeting be approved as written, and the motion carried unanimously 3 to 0.

2.) General Budget Update:

Ms. Coleman provided the Board members with a budget update. As of March 31, 2005, the Boards have spent 54% of the combined budget which represents a nine month period, or 75% of the fiscal year. There is a projected year-end balance of \$65, 000 (\$45,000 for the EQB and \$20,000 for the AQB) which will be carried forward to fiscal year 2006. Ms. Coleman stated that the budget balance is a result of the loss of two staff members since the Board did not hire a technical consultant or a full-time attorney. A copy of this budget report is attached to and made a part of these minutes as Exhibit "A".

Ms. Coleman noted that since effective July 1, 2005, the Board does not have rulemaking responsibilities, the EQB budget may no longer include the \$50,000 in funding from the Groundwater Protection Fund. Ms. Coleman noted that she cannot accurately calculate the Boards' budget for fiscal year 2006 until the Legislature passes the 2006 budget bill in mid-April.

3.) 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 "Respondent's Report of Compliance with Provision of Court Order " which was prepared and submitted by Doren Burrell on behalf of the surface Mine Board and is in response to 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. Dr. Snyder informed the Board members that the consolidation is ongoing and that additional meetings between the Board Chairs and staff are planned.

4.) Chamber of Commerce Position Paper:

The Board Chair was made aware of a position paper which was posted on the WV Chamber of Commerce website. Because of inaccuracies contained in the Chamber's position paper the Board Chair drafted a response to the position paper. The Board Chair's response was distributed to all members of the legislature and was provided to Board members during the March 10, 2005, Board meeting. During the April 7, 2005, Board meeting the Board members were provided with a copy of the Chamber's Response to the

Board's letter regarding the inaccuracies contained in the Chamber's initial position paper.

Whereupon, Dr. Simonton moved and Mr. Armbricht seconded that the April 7, 2005, Environmental Quality Board meeting 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 April 7, 2005, by the West Virginia Environmental Quality Board. These minutes were approved by the Environmental Quality Board on May 5, 2005.


Melissa Carte, Clerk