

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

1615 Washington Street, East, Suite 301  
Charleston, West Virginia 25311-2126  
(304) 558-4002  
Fax: (304) 558-4116

**MINUTES**

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

**AND AIR QUALITY BOARD**

**DECEMBER 16, 2002**

**JOINT MEETING**

On December 16, 2002, a quorum of the members of the Environmental Quality Board and a quorum of the members of the Air Quality Board met at its offices located at 1615 Washington St. E., Charleston, West Virginia. EQB Chair Ed Snyder called the meeting to order at 1:00 p.m.

Environmental Quality Board members present were as follows:

Ed Snyder, Chair  
Bob Jenkins  
Cameron Hackney  
Edward C. Armbrecht, Jr.  
Scott Simonton

Air Quality Board members present were as follows:

Tom Hansen,  
Dick Calvert  
Robert Foster  
Randy Curtis, designee of the Commissioner of the WV Bureau for Public  
Health  
Doug Hudson, designee of the Commissioner of the WV Department of  
Agriculture

Absent were AQB Board members:

Mike Koon  
Jean Neely

Staff members present were as follows:

Libby Chatfield  
Becky Charles  
Melissa Carte  
Kathy Coleman

Whereupon, the Air Quality Board and the Environmental Quality Board addressed the administrative matters set forth in the Agenda as follows:

## **I. Administrative Matters**

### **1. Staff Achievements:**

The Board discussed the progress made on the goals established during previous Board meetings such as: the website; scanning of the Boards' Final Orders and the operation of the scanner; distribution of brochures; and staff training. The Board members were provided with a memo outlining the staff and Board achievements for fiscal year 2002 which contained excerpts from a report compiled by Ms. Charles for the Department of Environmental Protection's (DEP) annual report. This memo is attached to and made a part of these minutes as Exhibit "A".

#### **a.) Air Quality Board:**

The staff produced an informational brochure which provides general information regarding the Board and also the appeal process. The DEP graphic art staff assisted in the layout, design and printing of the brochure and staff has distributed the brochure to individuals who request information on filing an appeal; to various DEP Divisions and to other appropriate governmental agencies. In addition, the brochure was displayed at several large public events such as the WV State Fair and the Ripley Arts and Crafts festival.

Staff selected a local company to create digitized versions of all of the Board's final orders dating from 1993 through 2001, which were then formatted as Adobe pdf files with optical character recognition to provide for "key word" searches. Ms. Charles and Ms. Carte then entered "key words" for each individual order. They also reproduce these orders on CDs for easy distribution and the searchable orders have been put on the website.

A comprehensive website was developed that includes a general overview of the Board and the appeal process; the digitized version of the Board's Orders; and a calendar system from which the public may view the Board's meeting schedule and access the meeting notices and minutes. The website also provides a user friendly Freedom of Information Act (FOIA) request page and a comment page.

Other accomplishments included updating two staff computers; adding CD-ROM burners to the two other computers; and processing FOIA responses. The Air Quality Board met six times including one joint meeting with the Environmental Quality Board. There were a total of 15 appeals filed with the Board and ten final orders, consent agreements or withdrawals were entered by the Board.

b.) Environmental Quality Board:

The staff produced an informational brochure which provides general information regarding the Board, the appeal process, and the Board's rulemaking responsibilities. The DEP graphic art staff assisted in the layout, design and printing of the brochure and staff has distributed the brochure to individuals who request information on filing an appeal; to various DEP Divisions and to other appropriate governmental agencies. In addition the brochure was displayed at several large public events such as the WV State Fair and the Ripley Arts and Crafts festival.

Staff selected a local company to create digitized versions of all of the Board's final orders dating from 1993 through 2001, which were then formatted as Adobe pdf files with optical character recognition to provide for "key word" searches. Ms. Charles and Ms. Carte then entered "key words" for each individual order. They also reproduce these orders on CDs for easy distribution and the searchable orders have been put on the website.

A comprehensive website was developed that includes a general overview of the Board; the appeal process; the digitized version of the Board's Orders; a calendar system from which the public may view the Board's meeting schedule and also access the meeting notices and minutes. The website also contains detailed information regarding the Board's rulemaking activities, including a schedule of events, current issues and topics, and links to water quality standards, groundwater standards and more. In addition, the website also provides a user friendly Freedom of Information Act (FOIA) request page and a comment page.

Other accomplishments included updating two staff computers; adding CD-ROM burners to the two other computers; and processing 61 FOIA responses. There were a total of 22 appeals filed with the Board. The Board met five times to conduct evidentiary hearings in appeals and ten times to deliberate on motions and final orders. Thirteen final orders, consent agreements or withdrawals were entered by the Board.

The Board began the development of nutrient criteria for future inclusion in the state's surface water quality standards. The Board convened a committee to provide assistance and a recommended plan to the Board for the development of nutrient criteria.

The Board also conducted five public hearings regarding changes to the Water Quality Standards rule, the groundwater quality standards rule, and a remaining variance application. The Board also filed "proposed", "agency approved" and "final" versions of the Water Quality Standards rule (46 CSR 1) and the Groundwater Quality Standards rule (46 CSR 12).

## 2. Ethics Update:

Ms. Charles conducted the annual review of the rules governing Board member conduct; highlighted general ethical guidelines and discussed the make-up of the Boards.

### a.) Composition of the Air Quality Board:

The Air Quality Board is comprised on seven members, five of whom are appointed by the Governor with the advice and consent of the Senate. The Commissioner for the Bureau for Public Health and the Commissioner of Agriculture serve as ex-officio members. Although the statute creating the

Air Quality Board specifically requires that two members of the Board be representative of industries engaged in business in this state, that does not mean that these Board members advocate the industry position during the appeal process, but rather that they have specialized knowledge, skills and experience which may be beneficial during deliberations.

b.) Composition of the Environmental Quality Board:

The Environmental Quality Board comprised of five members all of whom are appointed by the Governor with the advice and consent of the Senate. Board members must be knowledgeable in the husbandry of the state's water resources and at least one member must have experience in industrial pollution control. However, no member may be employed by or have an interest in a NPDES permit holder. The exception to this prohibition are employees of colleges or universities whose employing institution may hold a NPDES permit.

c.) Ex Parte Communications:

In order to ensure that all parties of an appeal receive the fair and unbiased appeal hearing to which they are entitled, Board members must be very careful to avoid ex parte communications. An ex parte communication is any oral or written communication with a Board member regarding the merits or substance of an appeal that is made outside of the hearing and in the absence of the other parties or attorneys involved in the appeal. As an officer of the court, Ms. Charles, should she become aware of attorneys participating in ex parte communication, would have a duty to report such attorney conduct to the WV State Bar.

d.) Appearance of Impropriety:

Board members should also be very careful to avoid the appearance of impropriety. Too much time spent talking with one party of the appeal or an attorney for a party, even about general or non-appeal related matters could be perceived as a friendship and consequently that the Board member is biased or prejudiced. Further, Board members should avoid arguing or chastising any witness. A Board member should always seek to be recused if he or she has a conflict of interest.

e.) Decisions based on the Record:

Decisions of the Board must be based on the record of the appeal which is comprised of the certified file, the written briefs and the oral testimony adduced at the hearing. The Board members should ensure that the information required to make a decision has been introduced and that the record is complete. Once the hearing has concluded, the record is considered to be closed and the taking of additional evidence is prohibited. Further, the Board members may not attempt to research, question or “fact find” on their own, either before or after the hearing.

Most importantly, the basis and justification for the Board decision must be provided in the Board’s Final Order and must be based on the record of the appeal.

f.) Conduct of Board Members during an Appeal Hearing:

Although the Board members are free to ask questions during the evidentiary hearing, they should only pose questions to the individual who is on the witness stand. It is also recommended that the Board hold all its questions until the witness has been questioned and the opposing attorney has concluded the cross-examination. Also, the Board members should not ask factual questions of the attorneys and remember that members of the public are not permitted to comment regarding the appeal either on or off the record. Finally, the Board members should avoid inserting their own personal knowledge or thoughts into the record and should not “testify” regarding the issues during the hearing.

3. Discussion with Department of Environmental Protection:

The Boards met with Secretary Callaghan, of the WV Department of Environmental Protection at 2:00 p.m. to discuss a variety of administrative matters such as: the new DEP building and related requirements and projected expenses; budget matters; and Board member appointments. Ms. Coleman provided the Board members with a memo containing the budget update. A copy of that memo is attached to and made a part of these minutes as Exhibit “B”.

As of November 20, 2002, which is 42% of fiscal year 2003, the Boards have spent 38% of the combined budget. However, Governor Wise has

mandated a 3.4% budget reduction for fiscal year 2003. This would involve an AQB budget reduction of \$3,473 and an EQB budget reduction of \$5,471. Ms. Coleman prepared a preliminary projection of expenditures over the remaining fiscal year and estimates an approximate year-end balance of \$22,000. This balance will be carried forward to the 2004 fiscal year.

Secretary Callaghan also explained that the Governor has implemented a 10% budget reduction for the fiscal year 2004, and that additional cuts may be requested. In addition, the Governor has requested that all agencies review two specific areas of expenditures: employee travel and new hires. Although there is not a specific prohibition regarding these areas, all non-ordinary travel must be reviewed and approved by the Division Director, and all new hires must be approved by the Department Secretary and then by the Governor's office.

Secretary Callaghan then discussed the Department of Environmental Protection's new building project. The ground-breaking for the new building will be in late January 2003 with a projected completion date of mid-summer 2004. The building will have 180,000 square feet of space, superior technology, additional meeting rooms and will house 600 employees.

By comparing the cost of the new building to the expenses incurred for each current location, Secretary Callaghan projects a net savings to the State of approximately \$600,000 per year. Additional benefits include increased productivity and efficiency in having most employees in a centralized location.

The Board members then discussed various ways to cut expenses including video conferencing, conducting 2-day Board meetings six times each year, stream-lining the appeal process and other functions, and reducing Board member reimbursements. Secretary Callaghan informed the Board that the Department of Environmental Protection would assist the Board with any future financial difficulties as much as possible.

Secretary Callaghan informed the Boards that there is currently a bill which may be introduced before the state Legislature which will remove the Environmental Quality Board's rulemaking authority and give such authority to the WV DEP. He stated that the agency is not interested in the rulemaking authority unless the Legislature provides the agency with the

funding to perform such tasks effectively. The Board then asked the staff to prepare a cost analysis regarding the rule-making function of the Board.

The Boards discussed Board member appointments with Secretary Callaghan. Although all of the members of the Environmental Quality Board are serving under current appointments, the Air Quality Board has two members who are serving with expired terms. Jean Neely's term expired on June 30, 2001, and Bob Foster's term expired on June 30, 2002.

In addition, Secretary Callaghan discussed the status of the petition filed by the West Virginia Attorney General with the WV Supreme Court in which he sought to bar all state agencies and boards from employing their own counsel and to require use of the Attorney General's office for all legal services. The WV Supreme Court issued its decision on the petition on June 12, 2002. The opinion generally provides that the Attorney General is the chief legal officer of the State but that the employment and use of attorneys, who are not employees of the Attorney General, by other State entities is not unconstitutional. The Supreme Court declined to rule on specific attorney positions and instead directed the parties to address and resolve the specific issues using "principals of accommodation, respect, and comity." Consequently, the Attorney General and Governor Wise are engaged in ongoing discussions regarding the issues.

Dr. Hackney left the meeting.

#### 4. Budget Update:

After Secretary Callaghan left the Board meeting, the Board members continued to review the Air Quality Board and Environmental Quality Board budget matters. Ms. Coleman informed the Boards that for fiscal year 2003, the Boards have allocated \$1,500 for staff training and development, and \$2,000 for related staff travel. After discussions, the Boards determined that staff should obtain prior approval for travel related to out-of-state seminars or training from the Boards' chairs.

In addition, the Board discussed the per diem and travel expenses provided to the Board members. Board members are entitled to a \$150 per diem for each day or portion thereof, spent on Board business. In addition, Board members participating in Board meetings which require an overnight stay also receive a \$115.00 per diem allowance to cover such expenses. The



Board members receive a \$55.00 expense reimbursement for attending a Board meeting which does not include overnight travel. One suggestion was to discontinue the \$55.00 per diem allowance for local Board members, particularly when they participate in a Board meeting which lasts only a few hours.

Mr. Armbrrecht stated that as a local Board member, he chooses to receive only the \$150 per diem and does not accept the travel and meal allowance and thus suggested that Board members consider a reduction in the amount of their per diem from \$150 to \$112.50. In effect, this would reduce the Board member expense portion of the budget, which is 15% of the total Boards budget, by 10%. Another option was to reduce both the per diem amount and the expense reimbursement by an equal percentage, thus the Board member per diem would go from \$150 to \$135.

Other proposed options included reimbursement of only actual expenses incurred or to conduct two-day meetings every other month. In addition, Dr. Jenkins requested that the staff research video conferencing and the costs involved if the EQB held meetings via this technology. Dr. Jenkins inquired whether the Board could streamline appeals and specifically conduct the evidentiary hearings at certain intervals during certain months. Ms. Charles responded that this approach could pose problems with the Boards' legislative audit, which has in the past, been critical of cases remaining on the docket for an extended period of time.

The Board instructed all of the staff members to explore these and any other viable options and make suggestions to the Board. The Board further requested that Ms. Coleman compile a cost analysis showing a comparison of these different options by using any available figures from previous years. The Boards will continue to review and discuss further options for cost reduction.

#### 5. Calendar of Events:

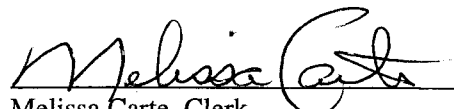
The Board members reviewed calendars highlighting various administrative deadlines and important events for December 2002 and January 2003.

6. Personnel Matters:

a.) Staff Evaluations: The Board Chairs have received the written 360 evaluations from the staff members and the Chairs will be meeting to discuss the evaluations in detail and synthesize the results. The Chairs will then meet individually with the staff to review evaluations.

Whereupon, Mr. Calvert moved and Mr. Foster seconded that the December 16, 2002, joint meeting of the Air Quality Board and Environmental Quality Board be adjourned, and the motion passed unanimously 10 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the joint meeting held on December 16, 2002, by the West Virginia Air Quality Board and the West Virginia Environmental Quality Board. These minutes were approved by the WV Air Quality Board on February 11, 2003, and by the Environmental Quality Board on February 20, 2003.

  
Melissa Carte, Clerk

