

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

1615 Washington Street, East, Suite 301  
Charleston, West Virginia 25311-2126  
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**MINUTES  
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
AND AIR QUALITY BOARD**

**DECEMBER 19, 2001**

**JOINT MEETING**

On December 19, 2001, 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 Dave Samuel and AQB Chair Tom Hansen called the meeting to order at 11:05 a.m.

Environmental Quality Board members present were as follows:

Dave Samuel, Chair  
Ed Snyder  
Bob Jenkins

Absent were Board members:

Betsy Dulin  
Cameron Hackney

Air Quality Board members present were as follows:

Tom Hansen, Chair  
Dick Calvert  
Randy Curtis, designee of the Commissioner of the Bureau for Public Health  
Robert Foster

Absent were Board members:

Robert Frame, designee of the Commissioner of the Department of  
Agriculture

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. Budget Update - Review and discussion of the fiscal year 2002 Air Quality Board and Environmental Quality Board budget matters:

a.) Computer Equipment

The Board members were provided with several memos regarding various budget matters. Ms. Coleman reviewed Memo #1 which outlined the Boards' future needs with regard to a projected timetable for annual replacement costs for computer and office equipment. She projected an average annual expense of \$4,500. A copy of this memo is attached to and made a part of these minutes as Exhibit "A".

After discussing various computer upgrades, the Board members determined that the office should maintain one high quality printer in the office which would serve as the central printer which all of the staff members can use when necessary and also retain, but not replace or update the less costly printers for individual use.

#### b.) 3% Budget Reduction

Ms. Coleman provided the Board members with a memo outlining the mandated 3% reduction in the fiscal year in 2003 budget. A copy of this memo is attached to and made a part of these minutes as Exhibit "B". The Board members were informed that the WV Department of Administration has requested a 3% reduction to the fiscal year 2003 proposed budgets and an impact statement outlining the effects of such reduction. The total reduction amount for the combined budget is \$8,029, with the AQB 3% reduction of \$3,114 and the EQB 3% reduction of \$4,915. This reduction will limit the Boards' ability to hold meetings and hearings due to the lack of funds available to adequately cover Board meeting expenses.

#### c.) Groundwater Account

The Board then discussed trying to obtain additional funding from the Groundwater Protection Program. Although the Board annually receives monies from the Groundwater Protection Fund, in 1996, the funding amount was cut by \$30,000. The original purpose of the funding was to cover a portion of the Technical Advisor's salary and benefits, and Board meeting expenses related to Groundwater rulemaking. Since these expenses have increased over the past several years the Board directed the staff to contact the WV DEP regarding an increase in the amount of money allocated to the Board from these funds. A copy of Ms. Coleman's memo regarding the Groundwater funding is attached to and made a part of these minutes as Exhibit "C".

#### d.) Budget Reports

Next, Ms. Coleman briefly reviewed the budget reports which provide a financial update through November 30, 2001. The only new expenditure is a "one time charge" of approximately \$1,000 for the installation of the new T-1 line which was arranged by the WV DEP as part of an agency-wide computer upgrade. However, the new line will increase the monthly data circuit expense from \$185 per month to approximately \$500 per month, which results in an annual increase of \$3,780.

Ms. Coleman then reviewed the budget report and stated that she would provide a more thorough detailed budget analysis during the next Board meetings. The Board members were informed that the Boards' Workers'

Compensation current classification is incorrect. The Boards are currently classified under "County Employees & Quasi-Governmental Operations" but should be classified as "State Government, Clerical Agencies Only". The change in the Boards' classification will become effective January 2002 and correcting this classification will result in an annual savings of \$3,000.

In addition, after discussions, Ms. Charles informed the Board members that there is a regulation in effect which allows the Boards to seek reimbursement for the Workers Compensation premium overpayments that have been made over the previous five years since the Boards were not at fault for the misclassification. The Board directed Ms. Coleman to pursue a refund of the overpayments.

## 2. Web Site - Update on staff training and development of the Boards' Web Sites:

The Board members were informed that the "FrontPage" website software has been upgraded to the 2002 version and that two of the staff members have taken a website development training class. The next step of the process will require the staff to develop an outline of the information to be included on the website. Once the website is developed, each staff member will be assigned a specific section and will be responsible to maintain and update that section of the site.

The staff anticipates having a rough draft prepared by the next Air quality Board and Environmental Quality Board meetings. The Board members made several suggestions regarding the information to be included on the site, such as the Boards' meeting dates; rulemaking procedures, activities and deadlines; and appeal orders.

The staff was informed that the development of the website should be handled as a team project and that website development now has the highest priority. In addition, in order to make the public aware of the website once it is developed the staff should reference the website in all correspondence, and other Board documents, and insert the website address on all letterhead.

## 3. 2002 Calendar of Events:

The Board members were provided with a draft calendar highlighting various administrative deadlines and important events for the calendar year

2002. A copy of this calendar is attached to and made a part of these minutes as Exhibit "E". The Board members requested that a "review" of the calendar be placed on the agenda for every meeting of each Board as a standing agenda item. In addition, the Board members should be provided with a copy of calendar for the current month and the following month so that they may be aware of upcoming deadlines.

4. Staff Achievements – discussion of the progress made on the goals established during previous Board meetings such as equipment upgrades and software, scanning of the Boards' Final Orders, brochures, staff training, and record keeping procedures:

The Board members were informed that over the past year, two new computers have been purchased for the staff and several software programs such as Amicus and Adobe Acrobat have been upgraded. In addition, staff members have taken additional training classes on the various software programs.

The Boards' brochures have been completed but were put on hold pending the resolution of the e-mail address issue. Now that the e-mail address problem has been satisfactorily resolved the staff will proceed with the printing and distribution of the Boards' brochures.

All of the appeals files in the storage building have been organized, labeled and indexed. The files containing the water quality standards information have been reviewed and indexed. Extensive research provided additional information to update and complete these files.

The scanning of the Boards' Final Orders and putting them into a "searchable" format on the computer is still an ongoing project. The staff met several times with employees of the WV DEP who indicated that they could assist the Boards with the scanning process, however, for unknown reasons they have not followed through on the project. The Board staff has also met with a private company who quoted a fair price for scanning the orders and saving them to compact disk in a PDF file format. Because of the inaction of the DEP, the staff intends to hire this company to complete the project.

5. Ethics Update - Annual review of rules governing Board member conduct and general ethics matters:

Ms. Charles reviewed the various ethics regulations which govern Board member conduct. A copy of Ms. Charles memo regarding ethical considerations for Board members is attached to and made a part of these minutes as Exhibit "F".

a.) The Governmental Ethics Act and Open Meetings Act

The WV Governmental Ethics Act contains important provisions which apply to the members of the Boards. Some of the regulations contained in the Act include provisions regarding confidentiality; the acceptance of gifts; misuse of public office for private gain; and prohibition against the acceptance of hotel or airline "bonus points" when traveling on Board business.

Also, the WV Ethics Commission issues advisory opinions regarding the WV Open Governmental Meetings Act. The purpose of the Open Meetings Act is to ensure that the public is afforded the opportunity to know what its public servants are doing and that the business of public agencies is conducted openly. Meetings of Board members purposely arranged to discuss Board business must be held in the open. Even meetings of less than a quorum of the members of the Board must not occur in private.

b.) Model Code of Judicial Conduct

In addition to the WV Ethics Act and the Open Governmental Meetings Act, the Administrative Law Committee of the WV Bar is currently reviewing the "Model Code of Judicial Conduct for State Administrative Law Judges". The Committee proposes that the WV Bar support new legislation that will require the WV Ethics Commission to adopt regulations that will apply to all "quasi-judicial" hearing officers, Board members, ALJs, etc.

Ms. Charles reviewed some of the proposed regulations with the Board members. First, the right to a fair and impartial hearing is essential to the legal validity of the decision that the Board makes. A fair hearing requires not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and the opportunity to respond to such claims. Thus communication with one party outside the presence of any other party ("ex parte communication") is violative of that excluded party's constitutional due process right to a fair hearing and is strictly

forbidden. Further, it is very important that the Board members treat all parties, attorneys, witnesses, etc. equally and not be overly friendly with one party while ignoring another.

Also, whenever a Board member sees that there is a conflict of interest in a case before him or her, recusal is appropriate. Even if the Board member believes that he/she can rule impartially, if there would be an appearance that there would be bias, the member should recuse himself/herself.

Another important regulation governs Board member conduct during administrative hearings. The main role of an administrative hearing is to produce a full and fair hearing record which provides all of the necessary evidence to produce a well reasoned decision. The decision made by the Board must be supported by the record and the Board may not substitute personal knowledge for the facts deduced at the hearing.

Further, although it is permissible for a Board member to ask questions during a hearing, Board members should not put personal knowledge of the subject on the record. Board members should not judge a case too quickly; should never make indications to any party that they are in agreement or disagreement with their case; and finally the Board should be very careful in imposing time limits or pressuring any party to rush through its case or cross-examination so that a hearing can be completed in a set amount of time.

#### c.) Administrative Procedures Act

The WV Environmental Quality Board members are also subject to certain regulations during the Legislative rulemaking process. These regulations are contained in the Administrative Procedures Act. The rulemaking process requires that the Board establish a documented record to support the final outcome. This record consists of the written comments submitted during the public comment period and a transcript of the oral comments made at the public hearing.

The purpose of the public comment period is to afford the public an opportunity to provide the Board with pertinent information that it should consider before it moves forward with its proposal. The Board must properly

consider every comment received during the public comment period and respond to each comment.

It is very important that the Board members do not accept private comments for which no record exists. That would violate the principles and requirements set forth in the Administrative Procedures Act for public rulemaking and the fundamental fairness requirements of the due process clause of the constitution. No party should be given favored or greater access to the policy makers than other parties.

#### 6. Review of bids for court reporting services:

The Board recently requested bids for court reporting services. In response to the request the Boards received three bids. A summary of these bids was presented to the Board members. A copy of such summary is attached to and made a part of these minutes as Exhibit "G". After reviewing the bid analysis, Dr. Samuel moved and Mr. Foster seconded that the Board award a six month contract for court reporting services to KRM Reporting, and the motion passed unanimously 7 to 0.

#### 7. Petition of WV Attorney General:

The Board members discussed the Petition filed by the WV Attorney General with the WV Supreme Court in which the petitioner is seeking to require that all state agencies, boards, and commissions use the legal services supplied by the Attorney General's office instead of utilizing in-house counsel. In addition, the Board members were provided with a copy of the Boards' Motion for Leave of the Court to File a Brief as an Amicus Curiae filed in response to the petition and the Order of the WV Supreme Court granting such motion.

Ms. Charles informed the Boards that the WV Division of Environmental Protection along with several other state agencies will be filing briefs in the case and that the constitutional issues will basically be the same for all parties. However, the Boards' have some different factual circumstances to consider. After discussion, the Boards determined that Ms. Charles should review the DEP's submission to determine whether their brief addresses the unique interests of the Boards'. If after reviewing the DEP's brief, she determines that it does not address the issues of concern of the Boards', Ms. Charles should contact the Boards' Chairs for further direction.



#### 8. Discussion with Department of Environmental Protection:

The Boards met with Secretary Callaghan, of the WV Department of Environmental Protection at 1:00 p.m. and discussed a variety of administrative matters such as: budget matters, the computer network, the petition of the WV Attorney General, Board member appointments, and the continued transition of administration of the Boards since their re-organization under the WV DEP.

#### 9. Personnel Handbook:

The staff recently completed a review of the Boards' personnel handbook and referred to the WV Division of Environmental Protection and the WV Division of Personnel handbooks to make revisions. The Board members were previously provided with a draft version of the updated personnel handbook with strikethroughs and underlines to indicate areas where the staff proposed that changes be made.

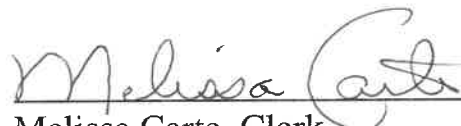
Ms. Charles reviewed for the Board members the proposed major revisions to the handbook including; the overtime pay/comp time policy; staffing of the office from 8:00 a.m. to 5:00 p.m. including during the normal lunch period; computer use and disciplinary measures; purchasing card use; educational expense reimbursement and leave program; meal periods; inclement weather conditions; the federal family leave act and the state parental/family leave act; the leave donation program and; the policy for evaluating staff merit increases. After this review, the Board members approved the proposed changes and directed the staff to finalize the employee handbook without further input from the Boards.

#### 10. Employee Evaluations:

Whereupon, Dr. Samuel moved and Dr. Jenkins seconded that the Boards go into executive session for the purpose of reviewing the staff performance evaluations, and the motion carried unanimously 7 to 0. Upon returning to the regular public session of the meeting, the Boards announced that no votes were taken while in executive session.

Whereupon, Mr. Calvert moved and Mr. Foster seconded that the December 19, 2001, joint meeting of the Air Quality Board and Environmental Quality Board be adjourned, and the motion passed unanimously 7 to 0.

I hereby certify that the forgoing is a true and correct record of the proceedings of the joint meeting held on December 19, 2001, by the West Virginia Air Quality Board and the West Virginia Environmental Quality Board. The minutes were approved by the WV Air Quality Board on March 13, 2002, and the Environmental Quality Board on January 31, 2002.

  
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Melissa Carte, Clerk



## ENVIRONMENTAL QUALITY BOARD AND AIR QUALITY BOARD

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**To:**           **Air Quality Board:**           **Environmental Quality Board:**  
                   Tom Hansen, Chair                   Dave Samuel, Chair  
                   Michael Koon, Vice Chair           Ed Snyder, Vice Chair  
                   John Calvert                            Betsy Dulin  
                   Randy Curtis                           Cameron Hackney  
                   Bob Foster                                Bob Jenkins  
                   Robert Frame  
                   Jean Neely

**From:**       Kathy Coleman  
                   Administrative Secretary

**Date:**        December 11, 2001

**Re:**          Joint Board Meeting - Computer & Office Equipment

As with all agencies, it is important to plan for the replacement and upgrading of computer and office equipment. My purpose of this analysis is to determine the Boards' future needs in regards to a projected timetable for annual replacement costs.

I have attached a projection of this expense over the next four years. My projection is an average annual expense of \$4,500 which is the same as we had predicted when preparing our improvement request in April 2001.

If the Boards approve the pursuing of additional Groundwater funding, as described in a separate memo prepared for the joint meeting, and our efforts result with the reinstatement of those funds, I would suggest increasing this projected annual expense to \$6,000, for more flexibility.

If you should have any questions regarding this analysis, please call me or let me know during the joint meeting.



**AIR QUALITY & ENVIRONMENTAL QUALITY BOARDS  
COMPUTER & OFFICE EQUIPMENT  
EXPENDITURE PROJECTIONS**

<b>FY 2003</b>	<b>4,300.00</b>
<b>FY 2004</b>	<b>4,430.00</b>
<b>FY 2005</b>	<b>5,600.00</b>
<b>FY 2006</b>	<b>3,650.00</b>

**AVERAGE PER FISCAL YEAR = \$4500 PER YEAR**

**PLEASE SEE ATTACHED LIST OF COMPUTER & OFFICE EQUIPMENT**

AQB/EQB INVENTORY OF OFFICE & COMPUTER EQUIPMENT 11/01/01

ITEM	DESCRIPTION	DATE PURCHASED	AGE - AS OF 11/01	PURCHASE PRICE	PROJECTED REMAINING LIFE	APPROXIMATE REPLACEMENT COST
<b>COMPUTERS:</b>						
Libby	Tangent	2/00	1 yr. 10 mos.	1,100.00	1 yr.	1,000.00
Becky	Dell	4/01	8 mos.	1,200.00	2 yrs.	1,000.00
Melissa	Tangent	2/00	1 yr. 10 mos.	1,100.00	1 yr.	1,000.00
Kathy	Tangent	5/01	7 mos.	1,000.00	2 yrs.	1,000.00
<b>MONITORS:</b>						
Libby	Optquest	2/00	1 yr 10 mos.	350.00	2 yrs.	400.00
Becky	Spectrum	5/97	4 yrs 7 mos.	600.00	1 yr.	400.00
Melissa	Spectrum	5/97	4 yrs 7 mos.	600.00	1 yr.	400.00
Kathy	PanaSync	3/97	4 yrs 9 mos.	600.00	6 mos.	400.00
<b>PRINTERS:</b>						
Libby	HP Laserjet 6L	6/98	3 yrs. 6 mos.	400.00	2 yrs.	500.00
Becky	HP Laserjet 5	9/96	5 yrs. 3 mos.	1,700.00	2 yrs.	1,000.00
Melissa/Kathy	HP Laserjet 4 Plus	6/95	6 yrs. 6 mos.	2,200.00	1 yr.	1,500.00
<b>OTHER COMPUTER EQUIPMENT:</b>						
Server	Compaq Proliant	6/01	6 mos.	2,500.00	3 yrs.	2,500.00
Router	Cisco 2620 Series	6/01	6 mos.	1,700.00	3 yrs.	1,700.00
Scanner	Fujitsu ScanPartner	7/01	5 mos.	950.00	5 yrs.	1,000.00
<b>MISC. OFFICE EQUIPMENT:</b>						
Portable Sound System	Superscope	6/97	4 yrs. 6 mos.	1,100.00	5 yrs.	1,000.00
Conference Phone	PolyCom	97	4 yrs.	-	3 yrs.	700.00
Fax Machine	Okidata	5/95	6 yrs. 7 mos.	1,700.00	3 yrs.	600.00
Dictaphone	Sony	95	6 yrs.	-	2 yrs	450.00
Tape Recorder	Sony	98	3 yrs.	-	2 yrs.	80.00
Tape Deck - Dual	Technics	97	4 yrs.	-	3 yrs.	100.00
Typewriter	Swintec 700	95	6 yrs.	-	4 yrs.	300.00
Label Maker	Brother	97	4 yrs.	-	4 yrs.	300.00
Electric Hole Punch	Bates	97	4 yrs.	-	4 yrs.	250.00
Copier	Mincita	3 yr. lease	3 mos.	N/A	2 yrs. 9 mos.	N/A
Telephone Equipment	Comdial	3 yr. lease	1 yr.	N/A	4 yrs.	N/A



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<b>To:</b>	<b>Air Quality Board:</b> Tom Hansen, Chair Michael Koon, Vice Chair John Calvert Randy Curtis Bob Foster Robert Frame Jean Neely	<b>Environmental Quality Board:</b> Dave Samuel, Chair Ed Snyder, Vice Chair Betsy Dulin Cameron Hackney Bob Jenkins
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**From:** Kathy Coleman  
Administrative Secretary

**Date:** December 11, 2001

**Re:** Joint Board Meeting - 3% Reduction FY 2003 Budget

The Department of Administration requested a 3% reduction to the FY 2003 proposed budgets submitted September 1st and an impact statement outlining the effects of the reduction.

In response to this request, as with last year's 3% reduction request, I reduced funds designated for current operating expenses, specifically board meeting expenses. **The total reduction amount for the combined budget is \$8,029 as follows:**

**AQB 3% Reduction: \$3,114**

**EQB 3% Reduction: \$4,915**

As the impact statement explains, this reduction will limit the Boards' ability to hold meetings and hearings due to the lack of funds available to adequately cover Board meeting expenses.

The FY 2003 proposed budget includes funding for 10 AQB meetings and 15 EQB meetings. I will provide more details of the budget adjustments needed at the next Board meeting.

Please review the attached memos to the Department of Administration. If you have any questions, please let me know.





## AIR QUALITY BOARD

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**TO:** Gregory A. Burton, Cabinet Secretary  
Department of Administration

**FROM:** Kathy Coleman<sup>KC</sup>, Administrative Secretary  
Air Quality Board

**DATE:** November 29, 2001

**RE:** Impact Statement 3% Reduction - Fiscal Year 2003

The 3% reduction in current level funding for fiscal year 2003 will have a significant negative impact on the Air Quality Board's ability to carry out its statutory and mandated responsibilities.

A funding reduction would limit the Board's ability to hold meetings and hearings which would result in a disservice to the citizens and industry of West Virginia. The Board was awarded an improvement above current level funding beginning with the fiscal year 2002 budget, and it is critical that funding remain at this level. Over the prior five fiscal years, the Board has depended on the Department of Environmental Protection to enable the Board to continue to meet due to insufficient funding. For example, last year the Board had no choice but to cancel their scheduled January meeting until emergency funding was granted by DEP.

The Board is concerned that the rate of appeals of permitting actions filed may increase over historic rates. This could result from full implementation of Title V of the Federal Clean Air Act by the Division of Air Quality. An increase in the number of appeals filed would result in the need for additional meeting days to hold hearings and decide appeal issues. Additionally, due to the passage of House Bill 2912, which increased the per diem and travel allowance for Board members, additional funds from the current budget must be committed to this increase of Board meeting expenses. Other miscellaneous increase of expenses for FY 2003 include the monthly service for a computer T-1 line required per DEP and an anticipated increase of office rent.

Therefore, the 3% budget reduction for FY 2003 has the potential, depending on the number of appeals received, to put the Board at risk of returning to significant budget shortfalls as experienced in prior years.

Thank you for your attention to the Board's concerns.



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**TO:** Gregory A. Burton, Cabinet Secretary  
Department of Administration

**FROM:** Kathy Coleman<sup>KC</sup>, Administrative Secretary  
Environmental Quality Board

**DATE:** November 29, 2001

**RE:** Impact Statement 3% Reduction - Fiscal Year 2003

The 3% reduction in current level funding for fiscal year 2003 will have a significant negative impact on the Environmental Quality Board's ability to carry out its statutory and federally mandated responsibilities.

A funding reduction would limit the Board's ability to hold meetings and hearings which would result in a disservice to the citizens and industry of West Virginia. The Board was awarded an improvement above current level funding beginning with the fiscal year 2002 budget, and it is critical that funding remain at this level. Over the prior five fiscal years, the Board has depended on the Department of Environmental Protection to enable the Board to continue to meet due to insufficient funding. For example, last year the Board had no choice but to cancel their scheduled January meeting until emergency funding was granted by DEP.

In evaluating this request, it is important to be aware of the additional duties created through new legislation concerning the Voluntary Remediation Act, which may result in additional appeals. Recently, the Board was advised by the Division of Water Resources that an increase in appeals is expected when the new antidegradation rule is fully implemented. The USEPA just gave its approval of this rule, so the effects on appeals may begin very soon. Duties related to rulemaking have also expanded, requiring more meeting time to adequately address all issues concerning the Water Quality Standards and Groundwater Standards rules. Additionally, due to the passage of House Bill 2912, which increased the per diem and travel allowance for Board members, additional funds from the current budget must be committed to this increase of Board meeting expenses. Other miscellaneous increase of expenses for FY 2003 include the monthly service for a computer T-1 line required per DEP and an anticipated increase of office rent.

Therefore, the 3% budget reduction for FY 2003 has the potential, depending on the number of appeals received and any additional rulemaking activities, to put the Board at risk of returning to significant budget shortfalls as experienced in prior years. Thank you for your attention to the Board's concerns.





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 Bob Foster                 Bob Jenkins  
 Robert Frame  
 Jean Neely

**From:**       Kathy Coleman  
 Administrative Secretary

**Date:**        December 11, 2001

**Re:**          Joint Board Meeting - Groundwater Protection Fund

As you know, the Boards requested a total of \$68,460 improvement above current level funding from the Legislature in April 2001. The Boards were granted a total of \$63,691 which is roughly \$5,000 less than what we had requested.

In calculating the amount to request, I researched all expenses and prepared a request that was justifiable.

Since that request, the Boards have had two substantial increases of expenditures that were not anticipated: increase in the rate of per diem and travel allowances, and the upgrading of the data circuit line to a T-1 line which was mandatory per DEP. As a result, it has been necessary to increase, annually, the projected board meeting expenses by \$10,000 and projected data circuit expenses by \$5,000.



In preparing for the future, I am suggesting that the Boards pursue communication with the Department of Environmental Protection to request reinstatement of at least a portion of the \$30,000 funding from the Groundwater Protection Fund that was cut in 1996. I believe that the request is reasonable in that the purpose of the funding was to cover expenses for a portion of the Technical Advisor's salary and benefits, and board meeting expenses related to Groundwater rulemaking. As we know, all of those expenses have increased, not decreased.

Libby and Becky are supportive of this suggestion.

Please advise at the joint meeting as to your opinion in pursuing communication with the Department of Environmental Protection for reinstatement of a portion or all of the \$30,000 funding from the Groundwater Protection Fund.



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**To:**           **Air Quality Board:**           **Environmental Quality Board:**  
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Randy Curtis                Cameron Hackney  
Bob Foster                 Bob Jenkins  
Robert Frame  
Jean Neely

**From:**       Kathy Coleman  
                  Administrative Secretary

**Date:**        December 11, 2001

**Re:**          Monthly Budget Update

### **BUDGET REPORTS**

Please find attached the following reports which provide a financial update through November 30, 2001:

Air Quality Board - (**Attachment 1**)  
Environmental Quality Board - (**Attachment 2**)  
Environmental & Air Quality Boards Combined Budget - (**Attachment 3**)

**Total expenditures through November 30, 2001, are slightly lower than what I had projected. The next report will reflect 6 months into the budget year and I will provide, at that time, a more detailed analysis.**

The only new expenditure to report is a "one time charge" of approximately \$1,000 for the installation of the new T-1 line. As you know, DEP scheduled and arranged this installation as part of an agency-wide computer upgrade. It will increase our monthly data circuit expense from \$185 per month to approximately \$500 per month which results in an annual increase of \$3,780.



**UPDATE - WORKER'S COMPENSATION RATE**

As a result of researching the classifications established by Worker's Comp, it has come to my attention that the Boards are classified incorrectly. The Boards are currently classified under "County Employees & Quasi-Governmental Operations", yet should be classified as "State Government, Clerical Agencies Only". Per Brenda Potter, underwriter, even with having two attorneys on staff, the correct classification is "State Government, Clerical Agencies Only". This change will be effective January 2002 and the rate will drop from 2.37% to .63%, which is an annual savings of approximately \$3,000.

I am pursuing reimbursement for overpayment of prior quarters. For your information, the current classification was in effect before my employment with the Boards. I am not aware of how long we have been classified incorrectly but will research and report back to the Boards.

**PUBLIC EMPLOYEES' INSURANCE**

During the November 14<sup>th</sup> AQB meeting, it was brought to my attention that the AQB's Public Employee's Insurance expense thru October 31<sup>st</sup> had already expended 50%; thus, I underestimated my projection for FY 2002. EQB's projection is also lower than what it should be for FY 2002. The added expenses will be offset by over projections in the budget. However, I will pay close attention to the FY 2003 projections.

If you have any questions, please contact me or let me know during the joint meeting.

ATTACHMENT 1

AIR QUALITY BOARD - FY 2002 - EXPENSES PAID & ACCRUED 11/30/01

CODE	LINE ITEM	BUDGET	July 2001	Aug 2001	Sept 2001	Oct 2001	Nov 2001	Dec 2001	Jan 2002	Feb 2002	Mar 2002	Apr 2002	May 2002	June 2002	YTD	BALANCE	% SPENT
001	SALARIES	48,080.00	4,171.53	3,960.00	3,960.00	4,045.04	4,045.04								20,181.71	27,898.29	41.98%
002	PER DIEM	7,500.00		750.00											750.00	6,750.00	10.00%
004	ANNUAL INCREMENT	580.00	387.50												387.50	192.50	66.81%
010	PERSONNEL FEES	290.00	59.06			59.06									118.12	171.88	40.73%
011	SOCIAL SECURITY	3,710.00	343.91	298.58	298.58	305.11	305.11								1,551.29	2,158.71	41.81%
012	PUBLIC EMPLOY. INSUR.	2,800.00	402.52	317.18	317.18	317.18	317.18								1,725.24	1,074.76	61.62%
014	WORKER'S COMPENSATION	1,200.00	252.83			361.84									614.67	585.33	51.22%
015	UNEMPLOY COMPENSATION	450.00													0.00	450.00	0.00%
016	PENSION/RETIREMENT	4,630.00	433.11	376.20	376.20	384.28	384.28								1,954.07	2,675.93	42.20%
020	OFFICE EXPENSE	1,200.00	101.74	102.40	92.71	124.42	197.22								618.49	581.51	51.54%
021	PRINTING & BINDING	200.00													0.00	200.00	0.00%
022	RENTAL EXPENSE	5,948.00	495.59	495.59	495.59	495.59	495.59								2,477.95	3,470.05	41.66%
023	UTILITIES	900.00	72.75	72.75	72.75	75.00	75.00								368.25	531.75	40.92%
024	TELECOMMUNICATIONS	2,550.00	280.44	283.99	391.05	375.12	308.33								1,638.93	911.07	64.27%
025	CONTRACTUAL/PROFESS.	1,671.00	55.89	118.39	55.89	55.89	55.89								341.95	1,329.05	20.46%
026	TRAVEL - STAFF	1,250.00	178.72		242.24										421.96	828.04	33.76%
028	TRAVEL - BOARD MEMBERS	6,919.00	177.08												177.08	6,741.92	2.56%
029	COMPUTER SERVICES	570.00	72.05	72.51	50.36	70.69	70.00								335.61	234.39	58.88%
030	RENTALS - MACHINES	2,188.00	165.00	156.95	183.52	183.52	183.52								872.51	1,315.49	39.88%
031	ASSOCIATION DUES	195.00	195.00												195.00	0.00	100.00%
032	FIRE, AUTO, BOND INSUR.	1,818.00	455.00			455.00									910.00	908.00	50.06%
052	TRAINING /DEVELOPMENT	1,260.00	106.25		392.50	99.00									597.75	662.25	47.82%
053	POSTAL & FREIGHT	780.00	66.69	150.92	42.77	65.00	65.00								390.38	389.62	50.05%
054	COMPUTER SUPPLIES	150.00					38.54								38.54	111.46	25.69%
061	OFFICE EQUIPMENT REPAIRS	125.00													0.00	125.00	0.00%
077	BOOKS PERIODICALS	500.00				269.14	25.35								294.49	205.51	58.90%
110	PEIA RESERVE FUND	2,000.00	40.00	40.00	40.00	40.00	40.00								200.00	280.00	41.67%
000	UNCOMMITTED FUNDS	3,853.00			500.00										500.00	3,353.00	12.98%
	TOTAL	103,787.00	8,277.82	7,431.60	7,565.34	7,721.82	6,665.11	0.00	0.00	0.00	0.00	0.00	0.00	0.00	37,661.49	66,125.51	36.29%
	*THIS REPORT INCLUDES EXPENSES INCURRED BUT NOT YET PAID DUE TO INVOICES PENDING IN.																

ATTACHMENT 2

ENVIRONMENTAL QUALITY BOARD - FY 2002 - EXPENSES PAID & ACCRUED 11/30/01

CODE	LINE ITEM	BUDGET	July 2001	Aug 2001	Sept 2001	Oct 2001	Nov 2001	Dec 2001	Jan 2002	Feb 2002	Mar 2002	Apr 2002	May 2002	June 2002	YTD	BALANCE	% SPENT	
001	SALARIES	121,184.00	9,164.33	10,012.00	10,012.00	10,178.96	10,178.96								49,546.25	71,637.75	40.89%	
002	PER DIEM	11,250.00	850.00	600.00	1,050.00	600.00	600.00								3,700.00	7,550.00	32.89%	
004	ANNUAL INCREMENT	914.00	912.50												912.50	1.50	99.84%	
010	PERSONNEL FEES	570.00		115.94			115.94								231.88	338.12	40.68%	
011	SOCIAL SECURITY	9,350.00	760.77	755.28	755.28	768.01	768.01								3,807.35	5,542.65	40.72%	
012	PUBLIC EMPLOY. INSUR.	4,225.00	333.72	419.06	525.06	419.06	419.06								2,115.96	2,109.04	50.08%	
014	WORKER'S COMPENSATION	2,900.00	650.13			702.40									1,352.53	1,547.47	46.64%	
015	UNEMPLOY COMPENSATION	450.00	70.74												70.74	379.26	15.72%	
016	PENSION/RETIREMENT	11,600.00	957.31	951.14	951.14	967.02	967.02								4,793.63	6,806.37	41.32%	
020	OFFICE EXPENSE	1,200.00	101.74	102.40	92.71	124.42	197.21								618.48	581.52	51.54%	
021	PRINTING & BINDING	200.00			20.00										20.00	180.00	10.00%	
022	RENTAL EXPENSE	5,947.00	495.60	495.60	495.60	495.60	495.60								2,478.00	3,469.00	41.67%	
023	UTILITIES	900.00	72.75	72.75	75.00	75.00	75.00								368.25	531.75	40.92%	
024	TELECOMMUNICATIONS	2,550.00	443.22	444.49	413.05	375.12	308.33								1,984.21	565.79	77.81%	
025	CONTRACTUAL/PROFESS.	3,674.00	262.65	118.40	171.45	715.15	155.90								1,423.55	2,247.45	38.78%	
026	TRAVEL - STAFF	1,250.00	179.72		262.77										442.49	807.51	35.40%	
026	TRAVEL - BOARD MEMBERS	19,978.00	983.34	301.10	1,028.00	1,276.86	1,736.86								5,326.16	14,651.84	26.66%	
027	COMPUTER SERVICES	570.00	3.00	2.00	2.00	3.00	2.00								12.00	558.00	2.11%	
030	RENTALS - MACHINES	2,188.00	165.00	156.95	183.53	183.52	183.52								872.52	1,315.48	39.88%	
031	ASSOCIATION DUES	195.00	195.00												195.00	0.00	100.00%	
032	FIRE, AUTO, BOND INSUR.	1,820.00	454.50			454.50									909.00	911.00	49.95%	
035	ADVERTISING	400.00			112.64		52.27								164.91	235.09	41.23%	
052	TRAINING /DEVELOPMENT	1,250.00	106.25		392.50	199.00	100.00								797.75	452.25	63.82%	
053	POSTAL & FREIGHT	780.00	66.69	167.83	79.97	65.00	65.00								444.49	335.51	56.98%	
054	COMPUTER SUPPLIES	150.00					38.55								38.55	111.45	25.70%	
058	MISC EQUIPMENT	0.00													977.00	977.00	ERR	
061	OFFICE EQUIPMENT REPAIRS	125.00													0.00	125.00	0.00%	
077	BOOKS PERIODICALS	500.00				269.14	25.35								294.49	205.51	58.90%	
170	COMPUTER EQUIPMENT	2,000.00	1,735.00												1,735.00	265.00	86.75%	
171	COMPUTER SOFTWARE	3,774.00	314.00	314.00	314.00	314.00	314.00								1,570.00	2,204.00	41.60%	
110	PEIA RESERVE FUND	1,210.00	100.00	100.00	100.00	100.00	100.00								500.00	710.00	41.32%	
000	UNCOMMITTED FUNDS	5,738.00	(155.25)	(96.25)	500.00	500.00	(168.67)								500.00	5,238.00	8.71%	
	FOIA INCOME		20,199.71	15,032.69	17,429.95	18,235.76	16,729.91								(574.67)	574.67	ERR	
	TOTAL	218,839.00	20,199.71	15,032.69	17,429.95	18,235.76	16,729.91	0.00	0.00	0.00	0.00	0.00	0.00	0.00	87,628.02	131,210.98	40.04%	
	*THIS REPORT INCLUDES EXPENSES INCURRED BUT NOT YET PAID DUE TO INVOICES PENDING IN.																	

ATTACHMENT 3

ENVIRONMENTAL & AIR QUALITY BOARDS - FY 2002 - EXPENSES PAID & ACCRUED 11/30/01

CODE	LINE ITEM	BUDGET	July 2001	Aug 2001	Sept 2001	Oct 2001	Nov 2001	Dec 2001	Jan 2002	Feb 2002	Mar 2002	Apr 2002	May 2002	June 2002	YTD	BALANCE	% SPENT
001	SALARIES	169,264.00	13,335.96	13,972.00	13,972.00	14,224.00	14,224.00	14,224.00							69,727.96	99,536.04	41.19%
002	PER DIEM	18,750.00	850.00	1,350.00	1,050.00	600.00	600.00								4,450.00	14,300.00	23.73%
004	ANNUAL INCREMENT	1,494.00	1,300.00												1,300.00	194.00	87.01%
010	PERSONNEL FEES	860.00	175.00				175.00								350.00	510.00	40.70%
011	SOCIAL SECURITY	13,060.00	1,104.68	1,053.86	1,053.86	1,073.12	1,073.12								5,358.64	7,701.36	41.03%
012	PUBLIC EMPLOY. INSUR.	7,025.00	736.24	736.24	896.24	736.24	736.24								3,841.20	3,183.80	54.68%
014	WORKER'S COMPENSATION	4,100.00	902.96			1,064.24									1,967.20	2,132.80	47.98%
015	UNEMPLOY COMPENSATION	900.00	70.74												70.74	829.26	7.86%
016	PENSION/RETIREMENT	16,230.00	1,390.42	1,327.34	1,327.34	1,351.30	1,351.30								6,747.70	9,482.30	41.58%
020	OFFICE EXPENSE	2,400.00	203.48	204.80	185.42	248.84	394.43								1,236.97	1,163.03	51.54%
021	PRINTING & BINDING	400.00			20.00										20.00	380.00	5.00%
022	RENTAL EXPENSE	11,895.00	991.19	991.19	991.19	991.19	991.19								4,955.95	6,939.05	41.66%
023	UTILITIES	1,800.00	145.50	145.50	145.50	150.00	150.00								736.50	1,063.50	40.92%
024	TELECOMMUNICATIONS	5,100.00	723.66	728.48	804.10	750.24	616.66								3,623.14	1,476.86	71.04%
025	CONTRACTUAL/PROFESS.	5,342.00	318.54	236.79	227.34	771.04	211.79								1,765.50	3,576.50	33.05%
026	TRAVEL - STAFF	2,500.00	359.44		505.01										864.45	1,635.55	34.58%
026	TRAVEL - BOARD	26,897.00	983.34	478.18	1,028.00	1,276.86	1,736.86								5,503.24	21,393.76	20.46%
027	COMPUTER SERVICES	1,140.00	75.05	74.51	52.36	73.69	72.00								347.61	792.39	30.49%
030	RENTALS - MACHINES	4,376.00	330.00	313.90	367.05	367.04	367.04								1,745.03	2,630.97	39.88%
031	ASSOCIATION DUES	390.00	390.00												390.00	0.00	100.00%
032	FIRE, AUTO, BOND INSUR.	3,638.00	909.50			909.50									1,819.00	1,819.00	50.00%
035	ADVERTISING	400.00			112.64		52.27								164.91	235.09	41.23%
052	TRAINING/DEVELOPMENT	2,500.00	212.50	785.00	298.00	298.00	100.00								1,395.50	1,104.50	55.82%
053	POSTAL & FREIGHT	1,560.00	133.38	318.75	122.74	130.00	130.00								834.87	725.13	53.52%
054	COMPUTER SUPPLIES	300.00					77.09								77.09	222.91	25.70%
058	MISC EQUIPMENT	0.00	977.00												977.00	(977.00)	ERR
061	OFFICE EQUIPMENT REPAIRS	250.00													0.00	250.00	0.00%
077	BOOKS PERIODICALS	1,000.00				538.28	50.70								588.98	411.02	58.90%
170	COMPUTER EQUIPMENT	4,000.00	1,735.00												1,735.00	2,265.00	43.38%
171	COMPUTER SOFTWARE	3,774.00	314.00	314.00	314.00	314.00	314.00								1,570.00	2,204.00	41.60%
110	PEIA RESERVE FUND	1,690.00	140.00	140.00	140.00	140.00	140.00								700.00	990.00	41.42%
000	UNCOMMITTED FUNDS	9,591.00			1,000.00										1,000.00	8,591.00	10.43%
	FOIA INCOME		(155.25)	(96.25)	(104.50)	(50.00)	(168.67)								(574.67)	574.67	ERR
	TOTAL	322,626.00	28,477.33	22,464.29	24,995.29	25,957.58	23,395.02		0.00	0.00	0.00	0.00	0.00	0.00	125,289.51	197,336.49	38.83%
	*THIS REPORT INCLUDES EXPENSES INCURRED BUT NOT YET PAID DUE TO INVOICES PENDING IN.																



*put on every board meeting agenda*

**ENVIRONMENTAL QUALITY BOARD AND AIR QUALITY BOARD**

1615 Washington Street East, Suite 301  
 Charleston, WV 25311-2126  
 (304) 558-4001  
 1-800-480-4598  
 Fax: (304) 558-4116  
 e-mail: clerk@aqbeqb.state.wv.us

**To:**           **Air Quality Board:**           **Environmental Quality Board:**  
                   Tom Hansen, Chair                   Dave Samuel, Chair  
                   Michael Koon, Vice Chair       Ed Snyder, Vice Chair  
                   John Calvert                           Betsy Dulin  
                   Randy Curtis                          Cameron Hackney  
                   Bob Foster                            Bob Jenkins  
                   Robert Frame  
                   Jean Neely

**From:**       Kathy Coleman  
                   Administrative Secretary

**Date:**        December 11, 2001

**Re:**          Joint Board Meeting - Calendar

Last year, the Boards requested a month by month calendar with important Board deadlines regarding the budget, Legislative rulemaking, administrative matters, etc.

Please see the attached draft of this calendar. It was decided that we would use the calendar on our Groupwise database so that staff could have easy access to the monthly calendar on their computers. There was a limited amount of space with each calendar day, therefore, I abbreviated and shortened as necessary.

Please review the attached draft and let me know if you have any questions or suggestions.















June 2002

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3 ● Board term ends for one member on each Bd, June 30th	4	5	6	7	8
9	10 ● Prepare MOA Groundwater due July 1st, send to OWR	11	12	13	14	15
16	17 ● Begin FY 2004 budget request due to DEP mid-Aug	18	19	20 ● HOLIDAY - West Virginia Day	21	22
23	24	25	26	27	28	29
30						















# Memo

**To:** Members of the Air Quality and Environmental Quality Boards  
**From:** Rebecca Charles  
**Subject:** Ethical Considerations for Board Members  
**Date:** December 12, 2001

## ETHICAL CONSIDERATIONS FOR BOARD MEMBERS

### I. ETHICS ACT and the BOARDS

Members of the Environmental and Air Quality Boards are covered by the West Virginia Governmental Ethics Act. W. Va. Code §§ 6B-1-1 et. seq. The Ethics Commission implements the Act and provides answers to any specific ethical issues that may arise. Feel free to write or call the Commission with any question that you have.

#### **A. Criminal Penalties**

It is important to be familiar with the Ethics Act because it contains a provision for criminal penalties for some violations. You can be charged with a misdemeanor punishable by confinement in the county jail for up to six months or fined up to one thousand dollars or both. W. Va. Code § 6B -2-10. There are other penalties for filing false financial statements and wilful disclosure of confidential material.



## **B. Confidentiality**

Confidentiality of documents is covered in the Environmental Boards Act. The Act states: "With respect to any information obtained in the course of an appeal, all members of boards and all personnel employed thereby shall maintain confidentiality to the same extent required of the chief or director." W. Va. Code § 22B-1-10. Primarily what is of concern is that documents that contain trade secrets are not revealed to any other source. Sometimes the certified records submitted to the Boards contain some records that are marked "confidential" because they contain specific chemical process information. It is important that you do not distribute copies of these materials to non-board members. If you have a question regarding the nature of any document, contact the Boards' attorney.

## **C. Acceptance of Gifts**

The Ethics Act prohibits public servants from accepting gifts from lobbyists or "interested persons." A public servant may not accept a gift which comes directly or indirectly from a lobbyist or interested person unless the gift fits into an exception listed below:

1. Meals or beverages
2. Ceremonial gifts or gifts or awards of insignificant value
3. Gifts of nominal value (less than \$25) or trivial items of informational value
4. Reasonable expenses incurred in appearing at a speaking engagement
5. Free tickets to political, charitable or cultural events customarily given as a courtesy to the office (tickets to sports events are NOT included in this category)
6. Purely private and personal gifts
7. Gifts from relatives by blood or marriage or a member of the same household
8. Lawful political contributions

#### **D. Private Gain**

Public Servants may not use their public positions or their influence for their own private gain OR the private gain of another. The use of private property for personal projects or activities that may result in private gain to you or another person is prohibited. Also, a public servant may not use subordinates to work on personal projects or activities during work hours or compel them to do so on their own time.

#### **E. Hotel/Airline/Travel Bonus Points**

When traveling for Board business, Board members receive payment for travel expenses. Since the state is paying for travel expenses to the meetings, Board members are not permitted under the Ethics Act to accept bonus points for future travel discounts. If you belong to travel points clubs but are traveling on state business, please make sure when you check into your hotel room that bonus points are not added to your account. Technically, the bonus points are the property of the state of W V although the state does not participate in these redemption clubs. Accepting bonus points for state business travel is a violation of the WV Ethics Act.

## **II. ETHICS AND THE ADJUDICATIVE ROLE OF THE BOARDS**

There is a "Model Code of Judicial Conduct for State Administrative Law Judges." The Administrative Law Committee of the WV Bar is currently reviewing this model code. They will propose to the WV State Bar that the Bar support new legislation that will require the Ethics Commission to adopt regulations that will apply to all "quasi-judicial" hearing officers, Board members, ALJs, etc. The proposal states that in adopting regulations that the Ethics Commission consider the Model Code. The proposal also requires the implementation of penalties for the violation of the regulations by Board members, etc.

#### **A. Impartiality and the Right to a Fair Hearing**

Equal treatment of all parties, attorneys, witnesses etc. is paramount to any judicial proceeding. Be careful not to be overly friendly with one counsel while ignoring another. This behavior can look extremely bad to clients of either attorney and especially to pro se parties. Consider how it looks to outsiders if the judges are overly friendly or familiar with one party.

In administrative proceedings of a quasi-judicial character the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. A fair and open hearing is essential to the legal validity of the decision that the board makes. These elements are also essential to the maintenance of public confidence in the process.

The right to a fair hearing requires not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and the opportunity to respond. Thus communication with one party outside the presence of any other party (*“ex parte communication”*) is violative of that excluded party’s constitutional due process right to a fair hearing.

Fair hearings before quasi-judicial bodies, like the Boards, are the subject of several opinions by the United States Supreme Court. Thus, they are considered important by the rest of the formal judicial system. In one case, the United States Supreme Court stated:

“The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.” Morgan v. U.S., 304 U.S. 1, 22 (1938).

An interesting body of case law exists regarding the process and procedures of administrative appeals. Consider the following examples of cases concerning ethical matters:

1. Where an ALJ had lunch with one counsel and a witness from the same side of the case as the attorney, it created such an appearance of partiality so as to taint the entire proceeding. Wells v. Del Norte School Dist. C-7, 753 P.2d 770 (Colo. Ct. App. 1987).
2. Where a judge made sarcastic comments to one counsel and the plaintiff’s expert witness and engaged in extensive (nine consecutive pages in the transcript) cross-examination of the same expert, the case was reversed and remanded because, among other reasons, the judge had assumed the role of the advocate. “Thus, during trial a judge must not ‘desert the high position to which the judge is elevated, and assume the role of the advocate.’” Block v. Target Stores, Inc., 458 N.W. 2d 705 (Minn. Ct. App. 1990.)



## **B. Recusal**

Whenever a judge sees that there is a conflict of interest in a case before him or her, recusal is appropriate. Even if the judge believes that he/she can rule impartially, if there would be an appearance that there would be bias, the judge should recuse him/herself. When considering a motion for recusal, it is best to step down if there is any question. A motion for recusal should not be taken personally or considered to be a statement of that judges' ability to rule on a case. The test is whether a disinterested observer would conclude that the decision maker had adjudged the facts of a particular case in advance of the hearing. It is not permissible for a judge to comment on propriety of an industry or a particular company, or an association. If this is done, the judge should recuse him/herself from a case involving that group. Even if recusal results in having no quorum to rule in a matter, it is best to recuse. The WV Supreme Court has ruled that where there is no quorum, a board is to proceed and issue a decision so that the decision can be appealed to Circuit Court if desired.

## **B. Developing a Full, Fair Hearing Record**

The main role of an administrative hearing Board is to produce a full and fair hearing record. A full hearing record ensures that the Board had before it all the necessary evidence to produce a well reasoned decision. The decision made by the Board must be supported by the record. The Board may not substitute facts from individual members' knowledge. A court, upon review of the Boards' decisions should be able to determine the source for the Boards' findings. If the Boards' findings are not supported by the record (transcript, certified file, exhibits) then the decision is at risk of being overturned by the Court. *Ex parte* conversations do not produce a record that can be used for a Board decision. For this reason, and the fact that the excluded party has no opportunity to respond, *ex parte* conversations must be avoided.

It is permissible for a judge to ask questions during hearings. As one jurist has noted, an ALJ is not a "potted palm" in the courtroom. The degree of participation of hearing officer depends on type of hearing. In our cases you are permitted to be active as long as you do not take the case away from counsel or parties. Do not judge a case too quickly and make indications to any party that you are in great agreement or disagreement with their case. Let the case be fully developed. A judge can call witnesses in any case, ask questions on all sides or ask a participant to develop a certain issue. Judges may not become the prosecutor - ask questions but do not try put all your personal knowledge of a subject on the record. That would be improper. Judges must protect the record. In some cases, for protection of the record, a judge may make objections to evidence.

Be especially careful not to cut off cross-examination. The opportunity to cross-examine is a crucial part of one's due process rights. The inability to properly cross-examine can be a factor in a Court's overturning a Board decision. It follows that the Boards should be very careful in imposing time limits or pressuring a party to rush through its case or cross-examination so that a hearing can be completed in a set amount of time.

#### **D. Open Meetings Act and Adjudication**

The deliberative process of the Boards for purposes of deciding appeals is exempt from the requirements of the Open Meetings Act. Hearings before the Boards are public, just as trials in the Circuit Courts and Supreme Courts (except for *in camera* proceedings). The deliberations of the Boards when deciding motions or making final decisions are exempt from the Open Governmental Proceedings Act. The Act applies to "meetings" and "the term meeting does not include . . . any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding." W. Va. Code §6-9A-2(4)(A).

### **III. ETHICS AND THE RULEMAKING ROLE OF THE BOARDS**

#### **A. Open Meetings Act**

The purpose of the WV Open Governmental Meetings Act is to ensure that the public be afforded the opportunity to know what its public servants are doing and that the business of public agencies be conducted openly. Meetings of Board members purposely arranged to discuss Board business must be held in the open. Even meetings of less than a quorum of the members of the Board must not occur in private. In *McComas v. Board of Education of Fayette County*, 197 W. Va. 188 (1996), the West Virginia Supreme Court held that a private but informal meeting of a few Board members (fewer than a quorum) and a superintendent constituted a meeting that should have been conducted in public. The Court rejected arguments of the Board members that the meeting was informal and that it was merely an information gathering session and was not a meeting where a decision would be made. The Court also rejected the Board members' argument that they did not intend to violate the Act.

The WV Legislature amended the act a few years ago. They inserted an exclusion where there are chance meetings of Board members such as an "educational, training, informal, ceremonial or similar setting, without the intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action." W. Va. Code § 6-9A-3(4). This prevents the concern of some members of happenstance encounters with other board members being accused of collaborating on board business. However, note that the code does not condone "purposeful" or "intentional" discussions of board business. Any possible business discussed at such a meeting is recommended to be brief and inconsequential.

If members have a specific question regarding whether a certain discussion would violate the Open Governmental Meetings Act, you should ask your attorney or contact the Committee on Open Governmental Meetings (COGM) which is a subset of the Ethics Commission. The COGM can issue an advisory opinion which, if followed, provides immunity from prosecution under the Act.

Criminal penalties are provided for violations of the Open Governmental Meetings Act. The Act provides that any person who is a member of a public body "who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and upon conviction thereof, shall be fined not more than five hundred dollars. . . ." W.Va. Code § 6-9A-7(a). The agency may also be liable to a prevailing party for attorney fees and expenses in pursuing a civil action and the decisions made in violation of the act may be annulled.

### **B. Closure of Comment Period**

The rulemaking process is similar to the appeal process in the aspect that a documented record should support the final outcome of both processes. The Administrative Procedures Act (the "APA"), W.Va. Code §29A-3-1, regulates the rulemaking process. A comment period for the proposed rule must be held in accordance with the APA. In rulemaking, the record consists of the written comments submitted during the comment period and a transcript of oral comments made at the public hearing (also required for legislative rulemaking).

At the time a rule is first proposed and filed with the Secretary of State, a closure date for comments is set. Sometimes, the closure date is at the end of the public hearing. Often, however, the deadline for comment is set a day or two beyond the public hearing to enable interested parties to comment on comments made at the hearing. The APA states that:

"After the public hearing or the close of the public comment period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider, any attempted ex parte communications directed to it in the form of additional comment prior to the submission of its final agency-approved rule to the legislative rule-making review committee pursuant to the provisions of section eleven [§29A-3-11] of this article."

W.Va. Code §29A-3-5.

It is important that the Board not accept private comments for which no record exists. It violates the principles and requirements set forth in the APA for public rulemaking and fundamental fairness requirements of the due process clause of the Constitution. The policy behind this restriction is two-fold: one, that no party be given favored access and greater access to the policy makers than other parties; two, that an agency be allowed time to reflect on comments and make a decision without interruption of further comment by interested parties.

### **C. Consideration of Comments**

The best policy for the Board is to seriously consider all comments received during the public comment period and to make some public comment regarding each comment received during the Board's discussion of public comments. The purpose of the comment period is to afford public an opportunity to provide the Board with information that it should consider before it moves forward on its proposal. If the Board failed to properly consider a comment, an interested party

can file suit for this failure and cause the promulgated rule to be voided.

The West Virginia Supreme Court has ruled that where negative comments on a proposed rule are “summarily rejected without even an inquiry” of assertions made and the agency “refused to give fair consideration to the objections” that the agency acted arbitrarily and capriciously. *State ex rel. White v. Parsons*, 199 W.Va. 1 (1996). Specifically the court in *White* ruled that “when an agency has before it substantial objections to the proposal made by interested persons, as a result of a comment period or hearing precedent to the approval of a regulation, the agency must conduct a good faith review of those objections and reflect the substance of that review on the rule-making record.” *Id.* At 10.

#### **D. Rule Filing with USEPA**

When the Board files its rules with USEPA for approval, the Board must submit a statement issued from the WV Attorney General’s Office that states that the rule was promulgated in compliance with state law. The Board’s technical advisor makes a representation to the Attorney General’s Office that the rule was promulgated properly. Typically, the Attorney General’s office relies on the word of the technical advisor. However, it is possible that if a person or group lodged a complaint about the process and showed how the process was not performed appropriately, that the Attorney General’s Office might refuse to sign a statement. The USEPA will not accept the rules without the statement so there would be a potential problem if this were to occur. It is important that the Board follow the appropriate statutory and regulatory requirements when promulgating rules.



## ENVIRONMENTAL QUALITY BOARD AND AIR QUALITY BOARD

1615 Washington Street East, Suite 301  
 Charleston, WV 25311-2126  
 (304) 558-4001  
 1-800-480-4598  
 Fax: (304) 558-4116  
 e-mail: clerk@aqbeqb.state.wv.us

**To:**           **Air Quality Board:**           **Environmental Quality Board:**  
                   Tom Hansen, Chair           Dave Samuel, Chair  
                   Michael Koon, Vice Chair   Ed Snyder, Vice Chair  
                   John Calvert                Betsy Dulin  
                   Randy Curtis                Cameron Hackney  
                   Bob Foster                    Bob Jenkins  
                   Robert Frame  
                   Jean Neely

**From:**       Kathy Coleman  
                   Administrative Secretary

**Date:**        December 11, 2001

**Re:**          Joint Board Meeting - Court Reporter Services

I have completed the bid process for court reporter services for the Boards. The bid process was necessary because the Boards spend in excess of \$1000 annually for the services.

Please see the attached analysis, comparing fees received from the following certified court reporters: Janet Surface, KRM Court Reporting and Rebecca Baker. The Boards' current court reporter is Janet Surface and has been for several years.

There are many differences in fees and staff is in the process of reviewing the analysis to make a decision.

Please review the attached analysis. If you have any suggestions or comments, please let me know during the joint meeting.



AIR QUALITY & ENVIRONMENTAL QUALITY BOARDS			
COURT REPORTER SERVICES			
RESULTS OF BID REQUEST			
PREPARED 11/21/01	JANET SURFACE	KRM COURT REPORTING	REBECCA BAKER
FEES:			
APPEARANCE FEE - HALF DAY (LESS THAN 4 HOURS)	50.00	60.00	50.00
APPEARANCE FEE - FULL DAY (4 HOURS OR LONGER)	100.00	60.00	100.00
APPEARANCE FEE - IF BEGIN AFTER 5:00 PM	100.00	60.00	100.00
OVERTIME FEE IF HEARING LASTS PAST 5:00 PM	25.00 PER HR	0.00	0.00
RATE PER PAGE TRANSCRIPT	3.00	3.15	3.25
RATE PER PAGE OF WORD INDEX	0.60	0.00	3.25
RATE PER PAGE OF WITNESS NAME INDEX	3.00	0.00	3.25
FEE FOR PROCESSING EXHIBITS	SEE * BELOW	<50=NONE; >50=20.00	.15 PER PAGE
TRANSCRIPT ON DISK	2.50	5.00	0.00
RATE FOR TRAVEL REIMBURSEMENT	IF NOT CHAS - STATE RATE	IF EXCESS OF 100 MILES ONE WAY = .34/MILE & PAY HOTEL FEE \$50 +MILEAGE IF EN ROUTE OR ARRIVE	IF NOT CHAS - STATE RATE EXCEPTION: FAIRMONT & PRINCETON - NO CHARGE 50.00
CANCELL FEE AFTER 5 PM DAY BEFORE HEARING	100.00		
REQUEST SERVICES LESS THAN 24 HRS BEFORE HEARING	NOT IN QUOTE	"NOT NORMALLY ABLE TO DO"	"CAN NOT GUARANTEE", REQUESTED AT LEAST 48 HRS
*\$.25 PER PAGE FOR 8.5 X 11 SIZE. MAPS, OR ANY LARGE DOCUMENTS THAT WILL BE CHARGED AT PRINTING COMPANY RATE PLUS 10% FOR HANDLING		MUST GO TO THE PRINTER	