

Preliminary Performance Review

**The Environmental
Quality Board**

**The Environmental Quality Board Serves A
Needed Function And Should Be Continued**

**Despite Progress, Outstanding Disapprovals
Of Water Quality Standards Remain**



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OFFICE OF THE LEGISLATIVE AUDITOR

Aaron Allred
Legislative Auditor

John Sylvia
Director

Brian Armentrout
Research Manager

Paul Barnette
Research Analyst

Performance Evaluation and Research Division

Building 1, Room W-314

State Capitol Complex

Charleston, West Virginia 25305

(304) 347-4890

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

October 20, 2002

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Vicki V. Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Preliminary Performance Review of the Environmental Quality Board, which will be presented to the Joint Committee on Government Operations on Sunday, October 20, 2002. The issues covered herein are "The Environmental Quality Board Serves a Needed Function and Should Be Continued;" and "Despite Progress, Outstanding Disapprovals of Water Quality Standards Remain."

We transmitted a draft copy of the report to the Environmental Quality Board on September 16, 2002. The Board opted not to have an Exit Conference. We received the agency response on October 2, 2002.

Let me know if you have any questions.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

Issue 1: The Environmental Quality Board Serves A Needed Function And Should Be Continued.

According to *WV Code*, the Environmental Quality Board was created to hear appeals and establish water quality standards. Since FY 1997, the Environmental Quality Board has received 79 appeals and has issued 51 final orders. Figure 1 shows the number of appeals received and the number of final orders issued by Fiscal Year. With respect to establishing water quality standards, the Board has worked to establish standards which will pass EPA approval. Although there are currently outstanding disapprovals, the Board continues to work to remove them. As a result, the EPA has not withheld grant funding due to outstanding disapprovals.

Issue 2: Despite Progress, Outstanding Disapprovals Of Water Quality Standards Remain.

In 1999, the Legislative Auditor's Office issued a Preliminary Performance Review on the Environmental Quality Board and identified three areas of Environmental Protection Agency (EPA) disapproval of water quality standards. Since the last report, the Board has worked to resolve those outstanding disapprovals. There are currently three additional areas of outstanding disapprovals that remain. If disapprovals remain, the EPA could promulgate rules themselves which the State would have to abide by, or the EPA could withhold grant funding. However, like the previous disapprovals, the EQB has already initiated rule making action to address the disapprovals. If the State does not correct outstanding disapprovals, then the EPA's Region 3 could take action to promulgate Federal standards for the State for those disapproved items. Consequently, the State would have to abide by Federal criteria instead of establishing its own criteria. This could be significant in areas where the State has promulgated less stringent criteria than those issued by the EPA without scientific justification.

Recommendations

1. The Legislative Auditor recommends that the Environmental Quality Board be continued.
2. The Legislative Auditor recommends that the Environmental Quality Board continue to work to remove all EPA disapproved items of the state's water quality standards.

Review Objective, Scope and Methodology

This preliminary performance review of the West Virginia Environmental Quality Board is required and authorized by the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*, as amended. The Environmental Quality Board is responsible for hearing appeals of environmental enforcement and permit actions as well as establishing water quality standards.

The **Objective** of this review was to determine if the Environmental Quality Board was operating in an effective and efficient manner. The **Scope** of this evaluation covers the period from June 1999 to September 2002. The **Methodology** included but was not limited to interviews, conversations and correspondence with the Department of Environmental Protection and the Environmental Quality Board. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS).

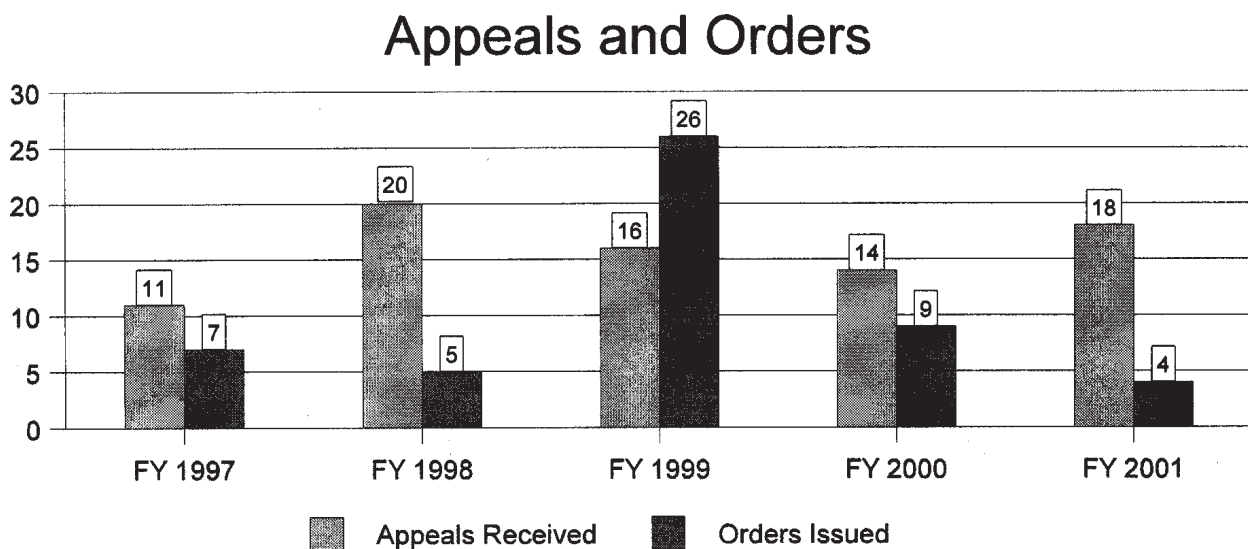
The Environmental Quality Board Serves a Needed Function and Should be Continued.

In 1994, the West Virginia Legislature abolished the State Water Resources Board (created in 1964 replacing the Water Resources Board) and created the Environmental Quality Board (EQB). According to WV Code, the Environmental Quality Board was created to hear appeals and establish water quality standards. WV Code §22B-1-1 states:

It is hereby declared to be the policy of this state and the purpose of this chapter to provide fair, efficient and equitable treatment of appeals of environmental enforcement and permit actions to the boards set forth herein. It is also the policy of this state that the rule-making authority set forth in this chapter be implemented in an efficient manner consistent with the public policy of this state.

Since FY 1997, the Environmental Quality Board has received 79 appeals and has issued 51 final orders. Figure 1 shows the number of appeals received and the number of final orders issued by Fiscal Year.

Figure 1



Of the appeals heard by the Board, only 11 decisions by the board have been appealed to either the circuit court or the Supreme Court. Of those 11 appeals, 4 have resulted in a settlement agreement between the DEP and the permittees, 2 have reaffirmed the board's decision, and the remaining 5 have yet to be ruled upon.

With respect to establishing water quality standards, the Board has worked to establish standards which will pass EPA approval. Although there are currently outstanding disapprovals, the Board continues to work to remove them. As a result, the EPA has not withheld grant funding due to outstanding disapprovals.

If the Board were terminated, the Legislature would need to re-assign the two duties currently performed by the Board. First, the Legislature would need to re-assign rule making for water quality standards. This task would most likely be re-assigned to the Office of Water Resources. This would be a similar arrangement as that of the Office of Air Quality which establishes the Air Quality Standards for the State. The second duty that would need to be re-assigned is due process. Without the Board, the only due process afforded to permittees and aggrieved third parties would then be circuit court. Whereas individuals can represent themselves as pro se before the Board, this would not be a viable option in circuit court. Furthermore, the time to render a decision would be greatly increased since circuit court takes significantly longer to issue a decision than the Board currently takes. For example, Board appeal number 97-08-EQB was heard by the Board in 1997. It was appealed to circuit court where it was ruled on January of 2001. Therefore, the Legislative Auditor concludes that terminating the Environmental Quality Board is not in the best interest of the State.

Recommendation 1

The Legislative Auditor recommends that the Environmental Quality Board be continued.

Despite Progress, Outstanding Disapprovals Of Water Quality Standards Remain.

In 1999, the Legislative Auditorís Office issued a Preliminary Performance Review on the Environmental Quality Board and identified three areas of Environmental Protection Agency (EPA) disapproval of water quality standards. Since the last report, the Board has worked to resolve those outstanding disapprovals. However, there are currently three additional areas of outstanding disapprovals that remain. If disapprovals remain, the EPA could promulgate rules themselves which the State would have to abide by, or the EPA could withhold grant funding.

Water quality standards define the water quality necessary to protect *designated uses* of water bodies.¹ By Federal law, each state must specify the water uses for all water bodies in the state. Water bodies may be specified as having multiple uses. Once a state develops water quality standards, these standards are then reviewed by the EPA to determine if they are consistent with the Clean Water Act. The EPA can either approve or disapprove a stateís water quality standards.

In 1999, the EPA disapproved three sections of the stateís water quality standards. Those sections were:

- ï the lack of an anti-degradation implementation plan;
- ï site specific variances to water quality standards; and
- ï numeric values for specific water quality criteria.

Since the 1999 report, the Board has addressed these issues and is currently waiting for the EPA to review the changes and determine if they will be approved. Since that time, the EPA has disapproved three additional sections of the Stateís water quality standards. These sections are as follows:

- ï 46 CSR ß1.8.22.1, Calculation of in-stream levels when they are below quantification;
- ï 46 CSR Appendix E, Chronic Iron Aquatic Life Criterion; and
- ï 46 CSR Appendix E, Human Health Criterion for Iron.

¹*Water Quality standards contain criteria developed by the Federal Environmental Protection Agency (EPA) for States as guidance. the criteria are based on the latest scientific information on the effects that concentrations of pollutants have on aquatic species and human health.*

However, like the previous disapprovals, the EQB has already initiated rule making action to address the disapprovals. In a letter from the Board, the technical advisor stated:

Let me first make a clarification to the letter I sent you on July 8. In that letter I explained that two letters from EPA outline the disapproved sections of the WQS [Water Quality Standards] rule. As I stated in the letter, the Board has conducted rulemaking actions since that time which have addressed most of the disapproved items. I should clarify that those revisions have been completed by the Board and submitted to USEPA for review. USEPA, however, has not yet responded to those submissions.

Cause and Effect of Inadequate Standards

During the last report, the causes of disapprovals were discussed. According to the 1999 report, the process of establishing water quality standards is complicated and it requires the coordination of other agencies, public comment, and finally legislative approval. Upon legislative review some changes may be made that may not be approved by the EPA. These factors combined with a Board that has limited staff and limited time to meet, it is expected that the process may be time consuming. Another contributing factor to the length of time to achieve adequate water quality standards lies with the EPA. Once the Board initiates rule making procedures and adopts changes to water quality standards, these changes must then be approved by the EPA. This process can be very lengthy. For example, the outstanding disapprovals from the previous report were changed during the 2001 legislative session. However, the Board has yet to receive a response from the EPA as to whether or not these changes will be sufficient to remove the outstanding disapprovals.

In addition to the reasons for disapprovals, the effects of these disapprovals was also discussed. An immediate impact of inadequate water quality standards is the loss of water quality and water uses. This in turn can result in the loss of aquatic life and create human health concerns. One of the more forceful actions that Region 3 can take against a state is to initiate the promulgation of water quality standards for the state. According to federal regulations (40 CFR §131.22):

If a state does not adopt the changes specified by the Regional Administrator (of the EPA) within 90 days after notification of the Regional Administrator's disapproval, the Administrator shall promptly propose and promulgate such standards.

If the State does not correct outstanding disapprovals, then the EPA's Region 3 could take action to promulgate Federal standards for the State for those disapproved items. Consequently, the State would have to abide by Federal criteria instead of establishing its own criteria. This could be significant in areas where the State has promulgated less stringent criteria than those issued by the EPA without scientific justification.

Conclusion

West Virginia currently has three rules that the EPA has disapproved. Despite the inadequacies of the state's water quality standards, the Board has made progress in addressing deficiencies over the years, and the Board has continued to work with the EPA to correct outstanding disapprovals. However, any outstanding disapproved or conditionally approved items in the State's water quality standards are at risk of being promulgated by the EPA. The loss of this authority would be significant to the state.

Recommendation 2

The Legislative Auditor recommends that the Environmental Quality Board continue to work to remove all EPA disapproved items of the state's water quality standards.

Appendix A: Transmittal Letter to Agency

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

September 16, 2002

Ms. Elizabeth Chatfield, Technical Advisor
Environmental Quality Board
1615 Washington St., East
Suite 301
Charleston, WV 25311 - 2126

Dear Ms. Chatfield:

This is to transmit a draft copy of the Preliminary Performance Review of the Environmental Quality Board. This report is scheduled to be presented Sunday, October 20, 2002 at the interim meeting of the Joint Committee on Government Operations. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have. If you would like to schedule an exit conference to discuss any concerns you may have with the report please notify us. We need your written response by noon on October 1, 2002 in order for it to be included in the final report.

We request that your personnel treat the draft report as confidential and request that it not be disclosed to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

Joint Committee on Government and Finance

Appendix B: Agency Response



ENVIRONMENTAL QUALITY BOARD

1615 Washington Street, East, Suite 301
Charleston, West Virginia 25311-2126

Telephone: (304) 558-4002
1-800-480-4598
Fax: (304) 558-4116
E-Mail: Clerk@aqbeqb.state.wv.us

October 2, 2002

John Sylvia, Director
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610

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PERFORMANCE EVALUATION AND
RESEARCH DIVISION

Dear Mr. Sylvia:

Thank you for the opportunity to respond to the preliminary performance review that your office recently conducted on the Environmental Quality Board. The Board believes that the review was conducted thoroughly and fairly, and we appreciate the effort expended by your staff in preparing the report.

As your report indicates, the Board has worked hard to establish Water Quality Standards consistent with EPA recommendations and the requirements of the federal Clean Water Act. The next federally mandated triennial review of the Water Quality Standards is scheduled for completion by April 2003. During this review we intend to consider, and make every effort to resolve, any provisions in the rule that have not received approval by USEPA.

We note for clarification that the three provisions identified in your letter as having been disapproved by EPA since 1999 (calculation of in-stream levels below quantification, aquatic life criterion for iron and the human health criterion for iron) were actually disapproved by EPA during prior reviews. As stated above, we intend to address them in the upcoming review.

A staff member will be present at the committee meeting on October 20th to address any questions that may arise as your report is considered.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward M. Snyder".

Edward M. Snyder, Ph. D.
Chair

