

STATE OF WEST VIRGINIA

**PRELIMINARY PERFORMANCE REVIEW OF THE
TREE FRUIT ASSESSMENT BOARD**

**Exclusive Involvement with Apple Industry
Collection of Assessments
Noncompliance with Purchasing Guidelines
Collection of Assessments Without Legal
Authority**

**OFFICE OF LEGISLATIVE AUDITOR
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PE98-10-102

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July 1998

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Antonio E. Jones, Ph.D.
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September 13, 1998

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

The Honorable Vicki 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 Tree Fruit Assessment Board, which will be presented to the Joint Committee on Government Operations on Sunday, September 13, 1998. The issues covered herein are "Exclusive Involvement with Apple Industry; Collection of Assessments; Noncompliance with Purchasing Guidelines; and, Collection of Assessments Without Legal Authority."

Sincerely,

A handwritten signature in black ink, appearing to read "Antonio E. Jones".

Antonio E. Jones

AEJ/wsc

Joint Committee on Government and Finance

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Executive Summary

Issue Area 1: Board Deals Exclusively with Apple Improvement.

The Board devotes itself fully to the betterment of the State's apple industry and disregards all other tree fruit industries. In 1996, West Virginia's peach growers produced 16 million pounds of peaches, with a production value of over five and a half million dollars. Applying the lowest assessment amount for apples (.03 per hundred pounds), shows that, at a minimum, the assessed amount for peaches could bring the Board revenue of \$5,040 this harvest season.

Since the statute is broadly written and narrowly implemented, other commercial growers are excluded from representation, participation, promotion and development assistance. While there may be reason to focus the Board's charge entirely on apples, the Board has not followed the law as passed by the West Virginia Legislature since its inception and has not petitioned the Legislature for an amendment which would narrow the Board's role to apples only. The purpose of operating an assessment board under the auspices of state government is to ensure equitable application of the law and public accountability.

The Legislative Auditor and the Board are in agreement that the Legislature should consider termination of the Tree Fruit Industry Self-Improvement Assessment Program. If the Legislature continues the self-assessment program, it should consider amending the *Code* to provide for the assessment of apples only or the Board should immediately take steps to begin compliance with the law as it is currently written.

Issue Area 2: The Board Failed to Collect Approximately \$65,967 in Assessments from the Various Units of the Apple Industry Between Calendar Years 1994 and 1996.

The Board's current procedures fail to ensure it is collecting the proper amounts of assessments from processors, brokers and growers. The current procedure is an honor system with the Board accepting the amount remitted to them without any verification. Based on Department of Agriculture statistics, the Board should have collected an additional \$65,967 during calendar years 1994, 1995 and 1996

The lack of an enforcement mechanism inhibits the Board's ability to collect assessments. The statute provides that the Agriculture Commissioner shall revoke licenses and permits for the purchase or sale of agricultural products in the State of any entity failing to comply with the assessment. There are no such permits or licenses to revoke. Under these circumstances, it is impossible for the Board to effectively gain compliance with these assessments. If the Legislature continues the Board, legislation should be considered to ensure that assessments are collected and create statutory penalties for non-compliance. A cost effective collection program must be devised to ensure the success of the Board.

Issue Area 3: The Board does not follow the Department of Administration's Purchasing Guidelines.

The West Virginia Tree Fruit Assessment Board does not engage in competitive bidding, nor does it process requests for commodities and services exceeding \$10,000 through the Purchasing Division of the Department of Administration. Only one of the Board's three major vendors are registered with the Purchasing Division and is registered incorrectly. These controls are intended to guarantee public accountability. If the Board is continued, it should take all steps necessary to comply with State purchasing guidelines. As recommended in the 1998 Report on the Board of Examiners for Speech Language Pathology and Audiology, the Legislature should consider amending the *Code* to require training for members of professional or occupational licensing boards and other State organizations in the areas of budgeting, purchasing, open meetings, ethics, filing annual reports, rule promulgation, and records management.

Issue Area 4: The West Virginia Tree Fruit Self-Improvement Assessment Board has been collecting assessments without legal authority.

The WVTFAB has never promulgated a rule in accordance with West Virginia *Code* 29A-2-1, setting the assessment rate, as required by §19-2G-7. The enacting statute required the assessments rates to be set by referendum, but a 1993 amendment required the promulgation of rules. Therefore, *all assessments collected since 1993, amounting to \$235,186.65, are invalid and unenforceable.*

The Board's failure to file legislative rules was first identified in the 1992 Legislative performance review, which predated the statutory requirement for assessments to be set by rule. However, the Board has still not promulgated a rule of any type. Additionally, the question remains as to whether the Board could legally spend revenue which was collected without authority. The tree fruit industry does not have a valid rule to require participation and the assessment may not be legal in a court of law. If the Board is continued, it should immediately promulgate a rule on assessment rates and procedures.

Issue Area 5: Surveyed Board Members Question the Merits of Continuing the Board.

The Board questioned the merits of continuing the Board in its May 1997 meeting. Based on this information, a survey of Board members was conducted. Four of the six respondents stated that the Board should not continue in its present form. In conclusion, based on four of the six members indicating the Board should not continue in its present form, the Board's failure to promulgate rules and regulations providing the authority to make assessments, the Board's failure to fully implement the statute to include all tree fruit, the Board's failure to make assessments uniformly, the Board's failure to comply with State purchasing guidelines, and, no growth in demand for West Virginia grown apples, the Office of the Legislative Auditor recommends that the Legislature consider terminating the Tree Fruit Industry Self-Improvement Assessment Program in accordance with the West Virginia Sunset law.

Review Objective, Scope and Methodology

This preliminary performance review of the *Tree Fruit Assessment Board* was conducted in accordance with the *West Virginia Sunset Law*, Chapter 4, Article 10, Section 11 of the *West Virginia Code*, as amended. The review is intended to assist the Joint Committee on Government Operations in making one of the following recommendations:

1. The department, agency or board be terminated as scheduled;
2. The department, agency or board be continued and reestablished;
3. The department, agency or board be continued and reestablished, but the statutes governing it be amended in specific ways to correct ineffective or discriminatory practices and procedures, burdensome rules and regulation, lack of protection of the public interest, overlapping of jurisdiction with other governmental entities, unwarranted exercise of authority either in law or any other deficiencies;
4. A performance audit will be performed on a department, agency or board on which a preliminary review has been completed; or
5. The department, agency or board be continued for a period of time not to exceed one year for the purpose of completing a performance audit.

A preliminary review is defined in Chapter 4, Article 10, Section 3 of the *West Virginia Code*, as amended, as follows:

To determine the goals and objectives of a department, agency or board; and to determine the extent to which plan of a department, agency or board has met or is meeting those goals and objectives.

The criteria for a preliminary performance review are set forth in Chapter 4, Article 10, Section 11 of the *West Virginia Code*, as amended, as follows:

1. If the board or agency was created to solve a problem or provide a service;
2. If the problem has been solved or the service has been provided;
3. The extent to which past board or agency activities and accomplishments, current projects and operations, and planned activities and goals for the future are or have been effective;
4. The extent to which there would be significant and discernible adverse effects on the public health, safety, or welfare if the board or agency was abolished; or
5. Whether or not the board or agency operates in a sound fiscal manner.

The preliminary performance review of the Tree Fruit Assessment Board covers the period from 1994 to present. Information compiled in this report was acquired from the *West Virginia Code*, annual reports, interviews, minutes of Board meetings, fiscal records and other sources.

Background of the Board

The Tree Fruit Industry Assessment Board was created by the Legislature in 1984, within the Department of Agriculture. It is governed by Chapter 19, Article 2G, of the West Virginia *Code*, as amended. According to statute, the Board's purpose is:

...to enhance and promote the sales of tree fruits in the state and thereby enhance the profit potential of the State's tree fruit industry. This article furthers that purpose by providing support for efforts to solve problems in tree fruit crop health, production and marketing; by providing support for research and education activities related to the production and marketing of tree fruits and by informing and educating the public concerning the value and benefits of tree fruits or products made from tree fruits.

The Board is made up of nine members who are state residents and have been engaged in the business of producing tree fruits for the preceding five years. Members are appointed by the governor and serve for three years. Members may serve successive terms. If the governor fails to make an appointment within ninety days of an expired term or the occurrence of a vacancy, the Board may, with a concurrence of a majority of its members, make the necessary appointment. Members hold office until the expiration of the term or until the appointment of a successor.

The Board elects a Chairman, a secretary and a treasurer from its membership and meets at the discretion of the Chairman or a majority of the Board. Members receive a stipend of not more than thirty-five dollars per meeting in addition to reimbursement for actual incurred expenses. Meetings must comply with the Open Meetings Law and Annual Reports are submitted to the Legislature each year.

The Board is permitted by statute to contract for services, employ and discharge employees, provide for facilities and equipment and to cooperate with other state or federal agencies or other organizations whose activities may be beneficial to its statutory purpose.

The Board administers the tree fruit self-improvement assessment program. This program is defined as, "...those activities of the board designed to promote the State's tree fruit industry including, but not limited to, receiving and disbursing assessment funds, accepting gifts and grants from any private source, supporting tree fruit research, developing production and marketing practices, and sponsoring industry and public education efforts." All activities concerning this program are to be directed toward increasing the sale of tree fruits produced in the state.

As required in the enabling legislation, the Agriculture Commissioner and interested members of the industry held a public hearing, in 1989, to approve the referendum required for the program and assessment amount. The Department of Agriculture promulgated a procedural rule establishing general procedures for the conduct of referendums held under the Tree Fruit Industries Self-Improvement Assessment Board. Participants approved the creation of the Board, the program and the assessment of \$.03 per 100 pounds of WV grown apples from processors and \$.05 per carton from brokers for all WV grown apples and \$.05 per bushel from growers for West Virginia grown

apples.

In 1993, the Legislature amended the *Code* with H.B. 2082. The amendment deleted the provision for implementing or terminating the program by referendum of producers; deleted the provision allowing for refunds of assessments to producers; **required** promulgation of rules by the Board and; **required** the Board to set the amount of assessments by rule.

The Board uses Quicken, an accounting software program, to maintain accounting records. The revenue of the Tree Fruit Self-Improvement Assessment Program recorded in Quicken was reconciled with the State Auditor's Account Status Report for fiscal year 1997, and up to May 31, of fiscal year 1998. There were no discrepancies of reported revenues noted between the two systems during this period.

Issue Area 1: Board Deals Exclusively with Apple Improvement.

The West Virginia Tree Fruit Self-Improvement Assessment Board (WVTFAB) assess only apples. By virtue of its name and governing statute, the WVTFAB is intended to improve the tree fruit industry in West Virginia. The Board, however, has devoted itself fully to the betterment of the state's apple industry, disregarding the peach, nectarine, cherry, pear and plum industries. *Code* §19-2G-2 states:

The purpose of this article is to enhance and promote sales of *tree fruits* in the State and thereby enhance the profit potential of the State's *tree fruit* industry. This article furthers that purpose by providing support for efforts to solve problems in *tree fruit* crop health, production and marketing; by providing support for research and education activities related to the production and marketing of *tree fruits* and by informing and educating the public concerning the value and benefits of *tree fruits* or products made from *tree fruits*. (Emphasis added).

The Board Chairman stated in a letter to the Legislative Auditor, "Specifically, the assessment applies only to apples grown for sale in West Virginia..." In its Grant Proposal Outline, the Board states that the applicant must "Indicate how the effects of this project will benefit the apple industry." From its inception, the Board focused only on the apple industry. The following is a quote from the referendum hearing, held in accordance with the enacting statute:

The Horticultural Society Board members met last week and we wanted to make a recommendation of what the board was thinking in line and I think we had a pretty good representation of the members and the representation for the four county area here and we have come up with an idea that we think five cents per bushel for fresh fruit, three cents for 100 weight on canners and including juice and *we will exclude peaches altogether, and any other stone fruit...*

It should also be noted that the referendum which was required by statute to create the Board was worded to narrow the assessment to only apples. The referendum reads in part as follows:

The purpose of this referendum is to authorize the development of a Tree Fruit Industry Self-Improvement Assessment Program to be funded by an assessment of \$0.05 per bushel on fresh packed tree fruit and \$0.03 per hundred weight on processing tree fruits excluding peaches and other stone fruit as provided for in the public hearing held on June 19th, 1989.

There are other fruit crops in West Virginia. In 1996, West Virginia's peach growers produced 16 million pounds of peaches, with a production value of over five and a half million dollars. The Board Chairman reported that West Virginia peach producers predict a harvest of 350,000 bushels for 1998. Applying the lowest assessment amount for apples (.03 per hundred pounds), shows that, at a minimum, the assessed amount for peaches could bring the Board revenue

of \$5,040 this harvest season. The same computation shows that the Board could have collected a minimum of \$4,800 in 1996. The value of utilized production for commercial apples in 1996 was \$11.2 million compared to peaches at \$5.7 million.

By selective assessment on apples, the Board's revenue was restricted as illustrated by product statistics on peaches (see Table 2 under Issue Area 2). When asked why the Board assesses only apples, the Director of the Marketing and Development Division of the Department of Agriculture, who is independent of the Board, stated that the Board does not assess peaches or cherries because they are quickly absorbed by the market, are sold almost exclusively as a fresh fruit product and have a very short shelf life compared to apples. All Board members surveyed, indicated that they do view the role of the Tree Fruit Assessment Board to assess, promote and research only apples. Respondents gave several reasons for this: the state does not grow enough of other fruits to advertise; the Board was created just for apples; the Legislature changed the name; and it has a hard enough time collecting on apples. Board members feel that the original statute was created specifically for the assessment of the apple industry.

Since the statute is broadly written and narrowly implemented, other commercial growers are excluded from representation, participation, promotion and development assistance. While there may be reason to focus the Board's charge entirely on apples, the Board has not followed the law as passed by the West Virginia Legislature since its inception and has not petitioned the Legislature for an amendment which would narrow the Board's role to apples only. The purpose of operating an assessment board under the auspices of state government is to ensure equitable application of the law and public accountability.

Recommendation 1:

The Legislative Auditor and the Board are in agreement that the Legislature should consider termination of the Tree Fruit Industry Self-Improvement Assessment Program. If the Legislature continues the self-assessment program, it should consider amending the Code to provide for the assessment of apples only or the Board should immediately take steps to begin compliance with the law as it is currently written.

Issue Area 2: The Board Failed to Collect Approximately \$65,967 in Assessments from the Various Units of the Apple Industry Between Calendar Years 1994 and 1996.

Current procedures and authority fail to ensure the Board is collecting the proper amounts of assessments from processors, brokers and growers. The current procedure is an honor system with the Board accepting the amount remitted to it without any verification. Based on Department of Agriculture statistics, the Board should have collected an additional \$65,967 during calendar years 1994, 1995 and 1996. The WVTFAB is a revenue driven Board and operations are paid by assessing fees at the point of sale from tree fruit markets, packers, processors, wholesalers, dealers and other persons except those individuals who purchase for personal consumption. The assessment on apples collected by the Board and the calculated assessments per agriculture statistics on apple production are provided in Table 1 as follows:

**Table 1
Board's Assessments Collected Comparison To Calculated Amounts**

Calendar Year	Assessments per the Boards Records	Calculated Assessments Due Board	Assessments Not Collected
1994	\$56,246	\$69,458	\$13,212
1995	\$36,328	\$76,167	\$39,839
1996	\$31,918	\$44,833	\$12,915
Total	\$124,492	\$190,458	\$65,967
<i>Notes:</i>	<i>Calculated assessments based on WVASS data, applying the assessment rate of \$.05 per bushel (48 pounds) for fresh apples and \$.03 per hundred pounds of utilized production less fresh apple production (processed rate). Statistics for 1997 were not available.</i>		
<i>Sources:</i>	<i>Information on assessment amount provided by the Board. Production information from the 1997 WV Agricultural Statistics Bulletin No. 28.</i>		

As discussed in **Issue Area 1**, the Board's narrowing of its charge to apples exclusively has also resulted in lost revenue. Table 2 estimates the amount of revenue that could have been collected from the peach industry alone.

Table 2			
Estimated Peach Assessments			
Fiscal Year	Peach Production (pounds)	Revenue Collected	Projected Lost Revenue
90-91	3 million	0	\$900.00
91-92	18 million	0	\$5,400.00
92-93	20 million	0	\$6,000.00
93-94	18 million	0	\$5,400.00
94-95	0*	0	\$0.00
95-96	18 million	0	\$5,400.00
96-97	16 million	0	\$4,800.00
97 to present	Data not available	Data not available	Data not available
<p><i>* This year the peach crop was destroyed by frost.</i></p> <p><i>Sources: Production information from the 1997 WV Agricultural Statistics Bulletin No. 28. Assessment rate for processed apples (\$.03 per hundred pounds) assumed for projected peach revenue.</i></p>			

According to the Director of Marketing and Development, the Department of Agriculture does not maintain a list of all commercial tree fruit producers owing assessments because there are no regulatory requirements for these individuals. The West Virginia Agriculture Statistic Service (WVASS) maintains a list of commercial growers. The Legislative Auditor was unable to survey state growers or to reconcile the Board's database with the list maintained by the WVASS because the confidentiality of that list is protected by federal statute.

Statutory Enforcement Provisions are Moot

West Virginia *Code* §19-2G-9, as amended, provides penalties for non-compliance. It states:

When a person who should collect the assessment...fails to do so or fails to forward it to the treasurer of the board within thirty days, the board shall certify that fact to the commissioner. The commissioner shall write to the person informing him that he has fifteen days to begin the collection or forwarding of the assessment. The person may submit to the board a written justification for nonpayment and upon receiving the justification, the board may extend the allowable payment period. If payment is not made within the fifteen-day period or any extension thereof approved by the board, *the commissioner shall revoke any license or permit the person may have to engage in the purchase or sale of agricultural products for resale in this state.* (Emphasis added).

Thus, the statute provides that the Agriculture Commissioner shall revoke licenses and permits for the purchase or sale of agricultural products in the State of any entity failing to comply with the assessment. In short, there are no such permits or licenses to revoke. The Board also lacks full-time staff to properly administer the assessments. Currently the assessments are made under an honor system, relying solely on the growers, packers and processors to be honest and remit the correct amount of the assessment. Under these circumstances, it is impossible for the Board to effectively gain compliance with these assessments.

Members of the Board who were surveyed by the Legislative Auditor (See survey instrument in Appendix C) stated that the assessment is not enforced or would be hard to enforce. One member even represented the assessment as a “voluntary” program.

Recommendation 2:

If the Legislature continues the Board, legislation should be considered to ensure that assessments are collected and create statutory penalties for non-compliance. A cost effective collection program must be devised to ensure the success of the Board.

Issue Area 3: The Board does not follow the Department of Administration's Purchasing Guidelines.

The West Virginia Tree Fruit Assessment Board does not engage in competitive bidding, nor does it process requests for commodities and services exceeding \$10,000 through the Purchasing Division of the Department of Administration. The West Virginia *Code* §5A-3-12, as amended, states in part:

The director shall not accept any bid received from any vendor unless the vendor has paid the annual fee specified in section four [§5A-3-4] of this article and has filed with the director an affidavit of the vendor...

Section four of the Department of Administration's *Purchasing Guidelines* covers vendor responsibilities. The section applies to all purchases for products and services. It states:

All vendors doing business with the State of West Virginia **must** be registered by having a **Vendor Registration and Disclosure Statement**, WV-1 or WV-1A, on file with the Purchasing Division per §5A-3-12 of the *West Virginia Code*.

Two vendors, who receive over one thousand dollars a year have failed to file with the Director of Purchasing. The Partnership of Packer, Osterling and Smith (PPO&S), a public relations firm from Harrisburg, Pennsylvania, receives \$17,000 a year from the Board for the Eastern Select and Processed Apple Show-Off programs. The Processed Apple Show-Off and the 1996 Eastern Select Program are discussed in the March 1996 Board minutes when a representative from the advertising agency reported:

The Washington D.C. market was targeted in Safeway and Giant principally with sampling. They are attempting to expand to Super Fresh and Sutton Place next year. The Processed Apple Show-Off has 4,000 entries this year and runs March through May with the average length of displays 16 days...PPO&S is currently working on a budget for the next year and requests that West Virginia increase its support by \$2,000 in each program: \$12,000 for the processed program and \$7,000 for the Eastern Select...

Later in the meeting, the Board agreed to fund both programs at a cost of \$17,000 for FY 1997. PPO&S received 44% of the Board's total revenue for Fiscal Years 1995 to 1998. Although the public relations firm receives this amount of the Board's resources, overall demand for apples

has not increased.¹

The other major unregistered vendor, the International Apple Institute (IAI), a national trade association which receives one million dollars in annual income, \$10,000 from the WVTFAB. For Fiscal Years 1995 to 1998, the IAI received 24% of the Board's revenue. The association serves as the national apple industry's advocate on federal policy issues, manages its national public relations program and acts as a resource for industry information. Its role as an advocate on federal policy issues may violate §19-2G-6(d) of the West Virginia State *Code*, as amended, which prohibits the Board from expending funds to influence legislation. According to the Board Chairman, monies paid to the IAI included an attached statement defining the activities for which the funds may be used.

The West Virginia State Horticultural Society (WVSHS) is registered as a sole source vendor and a vendor providing services amounting to one thousand dollars or less annually. Financial records, as well as documentation provided by the Board, indicate that the **WVSHS receives over \$10,000 a year from the Board**. For Fiscal Years 95 to 98, the WVSHS received 39% of the Board's revenue. The vendor registration form on file with the Purchasing Division indicates that the WVSHS provides "publications." The WVSHS, in fact, is involved in several other activities including: funding for the coordinator of a sub-committee, the *Apple Task Force*; office services; compensation for donated apples; participation in trade shows; and billboards. Records indicate that the WVSHS provides more than "publications" at a cost significantly greater than one thousand dollars a year.

The Department of Purchasing may have determined these vendors to be sole providers, which would remove bidding requirements, but none of the vendors approached the Division of Purchasing for such a determination. The IAI and PPO&S failed to even register as vendors. Chapter 4, Section 7 of the state Purchasing *Manual* states:

The authority to spend state tax dollars for products and services for state government is a public trust. The highest degree of discretion and ethical behavior is demanded of participants in the process. If an agency authorizes or approves a purchase which violates the regulations, policies or procedures adopted by the Purchasing Division, the department head shall be *personally liable* for the cost of the purchase. Such purchase orders shall be void and of no effect.

Vendors violating purchasing law and regulations may be suspended by the Purchasing Division from the right to bid on purchases of commodities and services for a period of up to one year.

¹Given the highly competitive nature of the apple industry, maintaining demand may be an accomplishment in itself.

Further complicating this issue is the overlapping relationship between the WVTFAB, the West Virginia State Horticultural Society (WVSHS) and the Apple Task Force (ATF), a sub-committee of the WVSHS. The Board's recording secretary/administrative assistant is also the Secretary/Treasurer of the WVSHS and the coordinator of the ATF. The Treasurer of the WVSHS's, signature appears on the vendor registration document on which the WVSHS incorrectly states that it will receive \$1000 or less annually and does not disclose promotional activities undertaken by the WVSHS other than "publications." In addition, the current Treasurer of the WVTFAB is also the current President of the WVSHS. Another current Board member is a former President of the WVSHS. The current Board Chairman is a member of the ATF. According to the Chairman, "WVSHS officers (with the exclusion of Secretary/Treasurer) and Board Members are not paid [by the WVSHS]." *The Legislative Auditor is concerned with these inter-organizational relationships, though it should be noted that redundant memberships in organizations interested in promoting tree fruits may be inherent due to the smallness of the industry. In light of these inter-organizational relationships, abidance with State purchasing guidelines would have given the Board an impartial review of the propriety and merits of proposed financial commitments and likely, justification of the same.*

The advantage of running an industry's self-improvement program under the auspices of state government, which forces participation of the industry, carries with it the responsibility of public accountability in all aspects of the program.

The Legislative Auditor believes that this and other issues in the report, as well as issues identified in the 1998 Board of Examiners for Speech Language Pathology and Audiology report, are symptomatic of deficiencies which extend beyond a Board's control. According to the Tree Fruit Assessment Board's Chairman:

The Board neither maintains a bank account nor cuts checks. All funds are held by the state which also issues checks. The Board was never furnished with a list of registered vendors or a copy of the state Purchasing Manual. The invoices submitted to the state were accompanied by a WVTFAB generated document which was labeled "Grant Request." It was not uncommon for the State to request additional documentation or to deny payment based on insufficient documentation. The issue of vendors was brought to the Board's attention when the WVSHS was requested to supply such a document for ATF coordinator and for secretarial services for the WVTFAB. Until this performance review, WVTFAB was not aware that vendors had to be registered with the state. Additionally, until approximately two years ago, invoices were prepared by the West Virginia Department of Agriculture which also signed as preparer of the document.

Recommendation 3:

If the Legislature continues the Board, the Board should immediately notify all vendors of the need to properly register with the Purchasing Division, and request the Purchasing Division to determine the merits and propriety of the Board's existing commitments.

Recommendation 4:

As previously stated in the Legislative Auditor's 1998 Report on the Board of Examiners for Speech Language Pathology and Audiology, in lieu of the existing lack of coordination and training of members of professional and occupational licensing boards and other State organizations, the Legislature should consider amending the Code to require training for members of professional or occupational licensing boards and other State organizations to be conducted by the State Auditor's Office, with the cooperation of the Budget and Purchasing Divisions of the Department of Administration, the Ethics Commission, the Attorney General's Office, and the Secretary of State's Office. Training should include budgeting, purchasing, open meetings, ethics, filing annual reports, rule promulgation, and records management.

Issue Area 4: The West Virginia Tree Fruit Self-Improvement Assessment Board has been collecting assessments without legal authority.

The West Virginia Tree Fruit Assessment Board has never promulgated a rule in accordance with West Virginia *Code* 29A-2-1, setting the assessment rate, as required by §19-2G-7. West Virginia Code § 19-2G-7 paragraph (a) states,

All tree fruit markets, packers, processors, wholesalers, dealers and other persons, excluding persons purchasing tree fruits for their personal consumption or use, purchasing tree fruits, including direct shipments from producers, shall deduct the assessments, ***which shall be set by rules promulgated by the board as provided for in section six*** [§19-2G-6] of this article, from the settlement for such tree fruit and to forward it within thirty days to the treasurer of the board. (Emphasis added).

The Board has a document that it refers to as its “rule.” The document specifies assessment rates, but has not been promulgated in accordance with statute and is therefore not valid and enforceable. The Board’s governing statute was amended in 1993 by H.B. 2082. It was the 1993 law that required assessments to be set by rule. Prior to H.B. 2082, the assessment rates had been established through a referendum provision that was repealed by the bill. While the assessment rates levied by the Board have not changed, the new law required the promulgation of a rule for the old rates to be effective.

Therefore, the Board is not in compliance with the West Virginia Administrative Procedures Act. West Virginia *Code* §29A-3-1 provides a rule is effective only if it is promulgated in accordance with the process described therein. According to the legal opinion provided by Legislative Services (see Appendix B), the assessment **is not effective and is invalid and unenforceable.** *Code* §29A-4-2 provides a procedure by which a person may challenge the validity of a rule. The validity may be tested by instituting an action for a declaratory judgement in the Circuit Court of Kanawha County. The West Virginia Supreme Court of Appeals in W.V. Chiropractic Soc., Inc. v. Merritt, 178 W.V. 173, 174, 358 S.E.2d 432, 433 (1987), stated in relevant part:

...a state agency covered by the APA must comply with its requirements when acting in a rule-making capacity, and that rules not promulgated in accordance with its requirements are invalid and unenforceable.

Since 1993, the Board collected \$235,186.65 in invalid assessments. During the January 6, 1994 meeting, the Chairman updated the Board on the change in the legislation. The minutes indicate that “assessment rates are to be set by the Board.” The Board agreed upon a plan to notify “...growers and processors who pay assessments” of the change in the law. The meeting’s minutes do not reflect that the promulgation of a rule to set the assessment rate was a topic of discussion. Board members surveyed by the Legislative Auditor indicated that they were either not aware that

rules required promulgation or did not know why one had not been promulgated. (Survey instrument is available in Appendix C).

The amendment to the *Code* in 1993 also eliminated refunds from the program. However, as Table 3 shows, the Board refunded \$242.46 in assessments in 1994. The Board's Chairman stated in a July 22, 1998 correspondence,

The \$242.46 refund was done before the Board was informed that the code had been changed. Even though legislation was changed during the 1993 legislative session, the WVTAB was not informed until November 1993. Once the Board was informed that refunds were no longer authorized, it immediately ceased to do so.

Perhaps as a result of the lack of outreach to the Board by State offices, the WFTAB failed to follow several requirements imposed upon it through the legislative process (as evidenced by the issues discussed in this report). The Board's failure to file a rule was first identified in its 1992 Legislative performance review, which predated the statutory requirement for assessments to be set by rule. However, the Board has still not promulgated a rule of any type. Additionally, the question remains as to whether the Board could legally spend revenue which was collected without authority. The Tree Fruit Board does not have a valid rule to require participation and the assessment may not be legal in a court of law.

Fiscal Year	Apple Production in Pounds	Revenue Collected	Amount Refunded	Total Collected
92-93	225 million	\$58,746.18	\$8,328.17	\$50,418.01
93-94	190 million	\$59,236.95	\$242.46	\$58,994.49
94-95	150 million	\$35,629.91	0	\$35,629.91
95-96	165 million	\$32,457.40	0	\$32,457.40
96-97	105 million	\$26,238.79	0	\$26,238.79
97 to present	Data not available	\$22,877.42	0	\$22,877.42
Total	835 million +	\$235,186.65	\$8,570.63	\$226,616.02
<i>Source: Board assessment records. Data compiled by the Legislative Auditor.</i>				

Recommendation 5:

If the Legislature continues the Board, the Board should immediately promulgate a rule on assessment rates and procedures.

Issue Area 5: Surveyed Board Members Question the Merits of Continuing the Board.

The Board members questioned the merits of continuing the Board at its May 1997 meeting. After a review of the amount of assessments collected, the Board's consensus was to continue. Based on this information, a survey of the nine Board members was conducted by the Legislative Auditor's Office. Six of the nine Board members responded to the telephone survey. The members were asked the following question "*Do you think the Tree Fruit Industry Self-Improvement Assessment Program should Continue? Why or Why not?*" Responses to this question are paraphrased below.

Member One:

No. It does not provide enough benefit at this time. I don't think it should continue.

Member Two:

No, not the way it is now. But if the law were changed back to 1.) provide an industry-wide referendum to vote on every five years or so, and 2.) enable growers to receive a refund in a hardship year, I would be for continuing the program.

Member Three:

No. I think the majority of growers (75%) would say no. The Board doesn't create enough revenue to make a difference.

Member Four:

Only if it is revamped or re-voted. A couple of members on the Board feel the same way.

Member Five:

Yes. If anyone should make the decision about terminating the Board, it should be the ones who put in the most money. There are too many Washington apples in West Virginia. I will agree with whatever the program's major contributors want to do.

Member Six:

Yes, because it (the Board) really does promote the industry. Government won't do it, so we have to do it ourselves.

In addition, all six members surveyed believe the role of the Board is to promote the apple industry and that the assessments are hard to enforce. In conclusion, based on four of the six members indicating the board should not continue in its present form, the Board's failure to promulgate rules and regulations providing the authority to make assessments, the Board's failure to fully implement the statute to include all tree fruit, the Board's failure to make assessments uniformly, the Board's failure to comply with State purchasing guidelines, and no growth in demand

for West Virginia grown apples, the Office of the Legislative Auditor recommends that the Legislature consider terminating the Tree Fruit Industry Self-Improvement Assessment Program in accordance with the West Virginia Sunset law.

Recommendation 6:

Pursuant to the West Virginia Sunset Law, the Legislature should consider terminating the Tree Fruit Assessment Board.

APPENDIX A
Official Ballot

OFFICIAL BALLOT

DATE: _____ No. _____

REFERENDUM

TREE FRUIT SELF-IMPROVEMENT ASSESSMENT PROGRAM

The purpose of this referendum is to authorize the development of a Tree Fruit Industry Self-Improvement Assessment Program to be funded by an assessment of \$0.05 per bushel on fresh packed tree fruit and \$0.03 per hundred weight on processing tree fruits excluding peaches and other stone fruit as provided for in the public hearing held on

June 19th, 1989
Month Day Year

FOR _____ AGAINST _____

APPENDIX B
SURVEY of The Tree Fruit Industry Self-Improvement Assessment Board

SURVEY of The Tree Fruit Industry Self-Improvement Assessment Board

Name: _____ Title/Position: _____

1. Do you see the role of the *tree fruit* self-improvement assessment board to assess, promote and research apples?
2. If so, why does the board not see other tree fruit crops within their jurisdiction?
3. Our records indicate that assessments have declined in the past few years; why do you think this is the case?
4. How do you enforce the mandatory assessment fee?
5. Do you think the Tree Fruit Industry Self-Improvement Assessment Program should be changed in any way?
6. How do you think the program supports the industry?
7. Does the program have the support of the industry?
8. Why has the board not promulgated a rule dealing with the assessment amount?
9. Do you think The Tree Fruit Industry Self-Improvement Assessment Program should continue?
10. Why or why not?

Manager: _____ Date: _____

Analyst: _____ Date: _____

APPENDIX C
Legal Opinion

MEMORANDUM

CONFIDENTIAL
ATTORNEY/CLIENT
PRIVILEGE

I N T E R
O F F I C E

To: Antonio E. Jones, Director
Performance Evaluation and Research Division

From: Randall Elkins, Counsel *RE*

Subject: West Virginia Tree Fruit Self-Improvement Assessment Board

Date: May 20, 1998

I am writing in response to the request you made to John Homburg concerning assessments imposed by the Tree Fruit Industry Self-Improvement Assessment Board (Board). He assigned the matter to me for response.

You state in your letter that your staff has identified a potential issue concerning the Board's assessment of taxes¹ without a rule empowering it to do so. The problem is the Board did not comply with West Virginia's Administrative Procedures Act in promulgating the "rule" on which it bases its assessments. Your review has found the Board's "rule" has not been reviewed by the Legislature or filed with the Secretary of State. You ask if the lack of a properly promulgated rule makes all assessments collected by the Board since its creation in 1984 illegal, and if so, what legal recourse exists for those assessed these fees.

W. Va Code §29A-3-1 provides a rule is effective only if it is promulgated in accordance with Article 3, Chapter 29A of the Code. Based on the facts as presented, it is clear that the Board's rule was not properly promulgated. The Supreme Court of Appeals in W. Va. Chiropractic Soc., Inc. v. Merritt, 178 W.Va. 173, 174, 358 S.E.2d 432, 433 (1987), stated in relevant part:

...a State agency covered by the APA must comply with its requirements when acting in a rule-making capacity, and that rules not promulgated in accordance with its requirements are invalid and unenforceable.

¹ Although you characterize the assessments as taxes, it is not clear the assessments are taxes. Using the Court's analysis in Solid Waste Auth. v. Div. of Nat. Res., 195 W.Va. 1, 462 S.E.2d 349 (1995), the assessment may be considered a regulatory fee instead of a tax.

Consequently, it appears the rule is not effective and is invalid and unenforceable.

Based on this conclusion a person may have sufficient reason for not paying the assessment. However, once paid I am not aware of a statutory provision requiring refunds of amounts paid.²

W. Va. Code §29A-4-2 provides a procedure by which a person may challenge the validity of a rule. The validity of a rule may be tested by instituting an action for a declaratory judgment in the Circuit Court of Kanawha County.

It is not clear whether a person may recover fees previously paid. There is insufficient information in your letter to offer an opinion on that issue. However, some factors a court may consider in determining if refunds should be required are whether the person:

- (1) Paid the fees under protest or duress;
- (2) Passed the fees paid along to consumers;
- (3) Benefited from the activities sponsored by the Board through the fees; and
- (4) Made a timely challenge of the rule or request for a refund.

I hope that this response meets your needs. If you need further assistance in this matter, do not hesitate to contact me.

cc. John Homburg, Director, Legislative Services

² The Legislature repealed the section that allowed refunds in 1993. Acts of the Legislature 1993, Chapter 63.

APPENDIX D
Agency Response



West Virginia Tree Fruit Assessment Board
P. O. Box 865
Kearneysville, WV 25430



September 2, 1998

RECEIVED

SEP 2 1998

RESEARCH AND PERFORMANCE
EVALUATION DIVISION

Mr. Antonio E. Jones, Ph.D. Director
Performance Evaluation and Research Division
West Virginia Legislature
Building 1, Room W-314
State Capitol Complex
Charleston, WV 25305

Dear Mr. Jones,

I wish to make the following comments concerning your performance evaluation report on our board.

ISSUE AREA 1: Board deals exclusively with apple improvement.

The referendum that growers voted on was to exclusively assess apples at the rate that was indicated in that referendum. Certainly the enabling legislation was broad in its coverage. However when it came time to decide by those who were going to pay the money, it was apples and apples alone that they voted on to be assessed. The board's activities and collections were determined by that vote. All other fruits combined are small in comparison to the West Virginia apple crop.

ISSUE AREA 2: The board failed to collect approximately \$65,967 in assessments from the various units of the apple industry between calendar years 1994 and 1996.

We can agree that not all of the assessments were collected. Some growers refused to pay and others quite likely did not pay all that they owed. There is no system currently available to the board to compute what each grower should pay. The legislation never enabled the board to have any enforcement ability to collect unpaid assessments. Stating the amount of uncollected funds in your report is only guesswork on your part since the production figures are based on Agriculture Statistics which are full of assumptions and depend on grower reporting.

ISSUE AREA 3: The board does not follow the Department of Administration's purchasing guidelines.

One of the areas of the board's spending was joining with other eastern states to promote eastern apples from the mid-atlantic area. Since these programs were mostly run by our larger neighbors of Virginia and Pennsylvania we did not and could not do any competitive bidding in this process. We were not aware of the vendor registration requirements. Up until about two years ago all of our requests for payments were


processed by the Department of Agriculture, a service that they had helped us with from our very beginning. Surely if they did not know of this requirement how should we have known? You quote the purchasing manual stating " The authority to spend state tax dollars for products and services for state government is a public trust. The highest degree of discretion and ethical behavior is demanded of the participants in the process." I say to you this money is not state tax dollars but is the money paid by hardworking apple growers and it has been spent with the highest degree of discretion and ethical behavior.

ISSUE AREA 4: The board has been collecting assessments without legal authority.

Following the change in the law by the 1993 legislature which created this possible problem, the board did seek advice from the Department of Agriculture about the changes in the law. We were not advised of the need to promulgate a rule.

In conclusion the board for some time has questioned the merits of continuing its activities. The struggles of growing apples in these tight economic times, crop failures and increased production pressure from other growing areas both foreign and domestic have created hardships on West Virginia growers and ultimately the board. With the lack of support by all growers, the declining revenues, and the difficulties of the board to work in its present form the board should not continue. The board recommends that the Legislature terminate the Tree Fruit Industry Self-Improvement Assessment Program in accordance with the West Virginia Sunset law. We ask that the duties of the board not be assigned to another department. This collection of assessments was voluntarily agreed upon by the majority of growers but with the 1993 legislature changes their ability to also agree to terminate the program was taken from them. We ask that we be given an appropriate amount of time to use the remaining funds and close out the boards activities.

Sincerely,



Ronald Slonaker
Chairman