

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

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2007 APR 20 PM 1:50

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: WV Dept of Environmental Protection / Surface Mine Board TITLE NUMBER: 49

CITE AUTHORITY: W.Va. Code §§29-A-3-3; 22B-1-3(c)

RULE TYPE: PROCEDURAL X INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Procedural Rules Governing Appeals Before The Surface  
Mine Board

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS \_\_\_\_\_

  
Authorized Signature

15.00

**TITLE 49**  
**PROCEDURAL RULE**  
**WEST VIRGINIA SURFACE MINE BOARD**

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**SERIES 1**  
**PROCEDURAL RULES GOVERNING APPEALS**  
**BEFORE THE SURFACE MINE BOARD**

**§49-1-1. General.**

1.1. Scope. This series governs the practice and procedure before the surface mine board (the "board") in adjudicatory proceedings. [Note: The surface mine board was formerly known as the reclamation board of review.]

1.2. Purpose. The purpose of these rules is to describe each of the rules of procedure before the board in order to provide a fair and orderly ascertainment of the facts and to promote the ends of justice and fairness.

1.3. Authority. -- W. Va. Code §§22B-1-3(c); 29A-3-3.

1.4. Filing Date. -- November 1, 2006.

1.5. Effective Date. --

1.6. Repeal of Former Rule. This procedural rule repeals and replaces 49 CSR 1, "Procedural Rules, Reclamation Board of Review," which became effective on February 24, 1997.

**§49-1-2. Notice of Appeal; Answer.**

2.1. Parties to the Appeal. The person appealing an action of the director or the director's designee shall be known as the appellant, and the director or the director's designee shall be known as the appellee.

2.2. Notice of Appeal. The adjudicatory process commences by filing a notice of appeal.

2.2.a. Form. The notice of appeal shall be in the form as prescribed in appendix A. Forms for filing the notice of appeal may be obtained from the secretary of the board, 601 57<sup>th</sup> Street, S.E. Charleston, West Virginia 25304 (304) 926-0445. Completed forms should be returned to the secretary within seven (7) days of receipt of the form. All subsequent submissions shall be captioned in the same manner as the notice of appeal.

2.2.b. When to File. An appeal filed by a person authorized by statute to seek review of an order, permit or official action shall be perfected by filing a notice of appeal with the board within thirty (30) days after the date upon which service of such order, permit or official action was complete. For persons entitled by statute to appeal the failure or refusal of the director or the director's designee to act within a reasonable time on an application for a permit, such notice of appeal shall be filed within a reasonable time.

## 49CSR1

2.2.c. Content. The notice of appeal shall set forth the action complained of and, in separate numbered paragraphs, the specific objections to the action, including questions of fact and law to be resolved by the board. The objections may be factual or legal or both. An objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the board may agree to hear the objection. The notice of appeal shall conclude with the address, telephone number, and signature of the appellant or of the appellant's attorney of record.

2.2.d. Attachments. The appellant shall attach the written notification of the action appealed from to the notice of appeal.

2.2.e. Service on Permit Holder. When an appeal of a permit is filed by a party who is not the holder of the permit, the issuance of which, or the terms and conditions of which are being appealed, the third party appellant shall serve upon the holder of the permit a copy of the notice of appeal at the same time that such notice of appeal is filed with the board. The holder of the permit shall be considered a party in interest in the appeal proceedings and shall have the right to intervene in the appeal.

2.2.f. Filing of Notice of Appeal by the Board. In accordance with W. Va. Code §22B-1-7(d), within seven (7) days after receipt of the notice of appeal, the board shall file a copy of the notice of appeal with the director or the director's designee.

2.3. Answer. The appellee may file a written answer to the notice of appeal. If an answer is filed, it shall be filed within twenty-one (21) days from receipt of the notice of appeal.

### **§49-1-3. The Certified Record.**

3.1. Certifying the Record. Within fourteen (14) days after receipt of a copy of the notice of appeal, the director or the director's designee, as the case may be, shall prepare and certify to the board a complete record of the proceedings out of which the appeal arises, including all documents and correspondence in the applicable files relating to the matter in question.

3.2. Preparation of the Record. A single copy of each document shall be submitted in chronological order with each page numbered consecutively.

3.3. Evidence. The certified record shall be evidence of the agency's consideration of the matter appealed, and shall form the basis of the board's review.

3.4. Amendment. In order to remedy an omission, any party may request an amendment to the certified record upon written application to the board. During the hearing on the appeal, requests for amendments may be made orally.

### **§49-1-4. Filing and Service of Documents.**

4.1. Where to File. All pleadings or documents required to be filed with the board under these rules shall be filed with the Board's secretary, 601 57<sup>th</sup> Street, S.E. Charleston, West Virginia 25304.

4.2. Method of Filing. Filing may be accomplished by filing the original and seven (7) copies of any pleading or document by personal delivery, express mail, or by first class United States mail, postage prepaid.

4.3. When Filing Effective. Filing is effective upon personal delivery, upon delivery of express mail, or upon deposit in the United States mail as ascertained by postmark.

4.4. When Receipt Effective. For the purpose of calculation of time to respond, receipt is effective upon personal delivery, upon delivery by express mail, and will be deemed to be effective three days from the date of the postmark if received by first class United States mail, postage prepaid.

4.5. Service upon Other Parties. Copies of all documents filed with the board under these rules shall be served contemporaneously upon all other parties to the appeal. Whenever a party is represented by an attorney who has signed any document filed on behalf of the party or otherwise entered an appearance on behalf of the party, service thereafter shall be made upon the attorney.

4.6. Proof of Service. Unless otherwise provided for by these rules, all documents required to be served shall be accompanied by proof of service in the form of a certificate of service, which shall include a statement of how service was accomplished.

#### **§49-1-5. Orders of the Board; Submission of Motions.**

5.1. Execution and Entry of Orders. All orders properly acted upon shall be executed by the presiding member of the board, the board's legal counsel or the board's duly authorized hearing examiner. All orders properly acted upon and so executed shall be entered into the official record by the secretary of the board.

5.2. Authority to Rule on Motions. The board may, in its administrative discretion, and in the interests of fairness and justice, rule on motions which tend to regulate the course of hearing, simplify the issues, and dispose of procedural requests or similar matters. The board may appoint its legal counsel or hearing examiner to dispose of stay requests, procedural motions, discovery motions, or any other request which tends to regulate the course of the hearing.

5.3. Content. Following the notice of appeal, any application to the board shall be by motion, which must be accompanied by a proposed order. Such motions may include, but are not limited to, requests to intervene, requests for continuance, requests for a stay, questions regarding jurisdiction, sufficiency of service of process, failure to state a claim upon which relief can be granted, request for a more definite statement, summary judgment, change of hearing location, dismissal of action or of particular issues in the appeal, and amendment of a notice of appeal.

5.4. Form. Unless made during the hearing, all motions shall be in writing, stating with particularity the grounds thereof and stating the relief or order sought. The motion may be accompanied by a memorandum or other supporting documents. The proponent shall serve the motion on the board and on all other parties to the appeal as required by these rules of procedure. Unless the board determines otherwise, a party shall have ten (10) days from receipt of the motion to respond to the same.

5.5. Stay Requests. The filing of the notice of appeal does not stay or suspend the effectiveness of the action appealed from. The appellant may request a stay of the action appealed from by written motion contemporaneous with the filing of the notice of appeal. The motion for stay shall include a copy of the action appealed from and any other documents supporting the request. The motion for stay shall be served on the board and all parties in accordance with these rules.

5.6. Informal Hearing on Motion. The board may, in its administrative discretion, and in the interests of fairness and justice, utilize informal hearings to dispose of stay requests, procedural motions, motions which tend to regulate the course of hearing, or simplify the issues, or similar matters. If an informal hearing on a motion is held, it may be conducted by the board's duly authorized legal counsel or hearing examiner, and may be conducted by telephone.

**§49-1-6. Site Visits.**

Visits to the site of any activity or proposed activity shall be conducted in the manner provided for in W. Va. Code §22B-1-7(e) and pursuant to the conditions set forth in the order granting the visit.

**§49-1-7. Intervention.**

Intervention shall be governed by the provisions of W. Va. Code §22B-1-7(e) and Rule 24 of the West Virginia Rules of Civil Procedure.

**§49-1-8. Discovery.**

Parties may obtain discovery in accordance with the provisions of W.Va. Code §22B-1-8. Parties have twenty (20) days from receipt of the request to respond. A shorter or longer time may be agreed to in writing by the parties and filed with the Board.

**§49-1-9. Evidentiary Hearings.**

9.1. Notice of Evidentiary Hearing. The board shall give each party to any evidentiary hearing at least ten (10) days written notice of such hearing. The notice shall be served by registered or certified mail or by any proper law-enforcement officer.

9.2. Continuance of Hearings. After a hearing date has been set, a continuance will not be granted by the board except upon a showing of good cause. A party who desires a continuance shall, immediately upon receipt of a notice of hearing, or as soon thereafter as practicable, file a written motion with the board stating in detail the reasons why a continuance is necessary. The motion shall be filed at least five (5) days prior to the date of hearing. The board may at any time order a continuance upon its own motion.

9.3. Quorum. Any evidentiary hearing shall be conducted by a quorum of the board, but the parties may by stipulation agree to take evidence before any one or more members of the board or before a hearing examiner employed by the board.

9.4. Place of Hearing. Unless the board determines otherwise, evidentiary hearings shall be held in the board's offices located at 601 57<sup>th</sup> Street, S.E. Charleston, West Virginia.

9.5. Conduct of Hearings. All appeal hearings shall be open to the public, and shall be conducted in accordance with W. Va. Code §29A-5 et seq. All parties to a hearing, their legal counsel, and spectators, shall conduct themselves in a respectful manner. Public displays of any kind at hearings shall not be permitted. The board may, at its discretion, recess or continue any hearing in which the parties, legal counsel, witnesses or spectators conduct themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of such hearing.

9.6. Stipulations. Written stipulations by the parties to questions of fact may be filed with the board before the hearing of an appeal or may be read into the record at the time the hearing is held.

9.7. Testimony at Hearing. Testimony in any hearing before the board will be made on the record, and shall be given under oath.

9.8. Presentation. The board shall hear the appeal de novo. Each party will be given an opportunity to make an opening statement. The appellant shall open the hearing and present testimony and offer exhibits that support the notice of appeal. The appellant's witnesses shall be subject to cross-examination by any other party to the appeal or by the board. At the conclusion of the appellant's case, the appellee may then present testimony and offer exhibits. After initial presentations have been made, both the appellant and the appellee may present rebuttal evidence on the issues in the case, providing that such evidence is not cumulative, repetitive or immaterial to the case. After the conclusion of the presentation of evidence, the parties will be given the opportunity to present closing arguments.

9.9. Exhibits. Any item, including photographs, to be presented as an exhibit shall be separately numbered and in a sufficient number of legible, complete copies to provide one (1) copy to each party as well as one (1) copy to the board and one (1) for the record. All copies shall be distributed upon or prior to request for admission. It is recommended that large maps used for visual presentation be reduced to approximately one-half ( $\frac{1}{2}$ ) scale and similarly colored or coded for distribution in lieu of the larger map which shall be for the record. If any map or other document is marked upon or otherwise changed during presentation and testimony, the party submitting the evidence shall correspondingly mark or change each other copy within twenty-four (24) hours of the presentation.

9.10. Briefs. In addition to the presentation of oral argument, the board may require the parties to file written briefs. The board may require the filing of briefs before or after the taking of evidence. The parties shall file the original and seven (7) copies of the brief with the secretary of the board, and shall serve a copy of the same on all other parties as required by these procedural rules. The original copy of the brief shall be accompanied by a copy of each decision, treatise, or periodical cited. Leave to file briefs amicus curiae may also be granted by the board.

9.11. Proposed Findings of Fact and Conclusions of Law. In accordance with W. Va. Code §29A-5 et seq., prior to the entry of any final order or final decision, any party may propose findings of fact and conclusions of law for the board's consideration. All such findings of fact and conclusions of law shall be separated as such and shall be set out by numbered paragraph. Unless otherwise ordered by the board, all such proposed findings of fact and conclusions of law shall be filed within fifteen (15) days of the conclusion of the evidentiary hearing.

9.12. Service and Publication of Final Orders. A copy of the final order or decision, together with the board's findings of fact and conclusions of law, shall be served upon each party and his or her attorney of record, if any, in person or by registered or certified mail. Each final order or decision issued by the board shall be filed with the secretary of state for publication in the state register in accordance with W. Va. Code §29A-2-9.

**§49-1-10. Rules of Evidence and Procedure.**

10.1. Rules of Evidence. The rules of evidence as applied in civil cases in the circuit courts of West Virginia will govern evidentiary hearings before the board in accordance with W. Va. Code §29A-5-2.

10.2. Rules of Procedure. While the differences in the functions of the courts and administrative boards preclude the "wholesale transportation" of the Rules of Civil Procedure into the hearings before the board, some rules must be utilized to manage board hearings. Thus, as a matter of policy and to assure fairness, the appropriate Rules of Civil Procedure will guide the appeals process before the board.

**§49-1-11. Ex Parte Contacts.**

An ex parte contact is an oral or written communication with the board or its staff regarding the merits of an appeal or motion which is not on the record in the proceeding and which is made without notice to and in the absence of the other party or parties. Such ex parte contacts are prohibited and any such communication will not be considered in the determination of an appeal.

**§49-1-12. Confidential Information.**

The board may utilize in camera proceedings to review any document or other information that is claimed to be protected as confidential.

APPENDIX A<sup>1</sup>

WEST VIRGINIA SURFACE MINE BOARD  
CHARLESTON, WEST VIRGINIA

\_\_\_\_\_  
APPELLANT'S NAME,

Appellant,

v.

Appeal No. \_\_\_\_\_

DIRECTOR, DIVISION OF

\_\_\_\_\_  
DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

NOTICE OF APPEAL

Action Complained Of: The appellant(s) named above respectfully represent(s) that it is aggrieved by: (describe the order, failure or refusal, or permit, and give date of the order or permit): \_\_\_\_\_  
\_\_\_\_\_

Relief Requested: The appellant(s) therefore pray(s) that this matter be reviewed and that the Board grant the following relief (describe the relief sought): \_\_\_\_\_  
\_\_\_\_\_

Specific Objections: The specific objections to the action, including questions of fact and law to be determined by the Board, are set forth in detail in separate numbered paragraphs and attached hereto. The objections may be factual or legal.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
<sup>1</sup> This form is offered as guidance to unrepresented parties.

**AGENCY RESPONSES TO PUBLIC COMMENTS**  
**49 CSR 1: PROCEDURAL RULES OF THE SURFACE MINE BOARD**  
**FOR FILING WITH THE SECRETARY OF STATE**

February 2007

**I. INTRODUCTION**

Proposed procedural rules of the Environmental Quality, Surface Mine Board, and Air Quality Boards, 46 CSR 4, 49 CSR 1, and 52 CSR 1, were filed with the Secretary of State on November 15, 2006. The public comment period closed on December 15, 2006 at 5:00 p.m. Comments were received from the Law Firm of Robinson & McElwee on behalf of the West Virginia Manufacturers Association and the West Virginia Oil and Natural Gas Association. Comments were received from the West Virginia Chamber of Commerce. Comments were filed with the Boards and distributed in accordance with § 29A-1-4(d) of the West Virginia Code.

This documents contains the responses of the Surface Mine Board to public comments. Separate responses by the Environmental Quality Board and Air Quality Board to public comments were filed with the Secretary of State and distributed to individuals who filed comments on the rule.

**II. COMMENTS SUBMITTED BY ROBINSON & McELWEE**

**COMMENT 1: FORM FOR FILING THE NOTICE OF APPEAL**

This comment suggests an amendment to paragraph 2.2.a to provide more specificity with respect to the form for filing submissions subsequent to the Notice of Appeal.

Comment: “Section 2.2.a states that ‘the notice of appeal shall be in the form as prescribed in Appendix A.’ Section 2.2.c states that ‘the notice of appeal shall set forth the action complained of, and in separate numbered paragraphs the specific objections to the action, including questions of fact and law to be resolved by the board.’ The notice of appeal form that is attached to the rule states that ‘facts alleged relevant to this appeal and the particular grounds on which this appeal is based, including questions of fact and questions of law to be determined by the Board, are set forth in detail in numbered paragraphs and attached hereto’. Both the rule and the Board’s attachment require the appellant to identify questions of fact and law, but it is not clear whether there should be separate sections for operative facts, grounds for appeal and specific objections. This leaves appellants uncertain as to whether, for example, the ‘particular grounds for appeal’ that are required by the Board’s appeal form consist of ‘the action complained of, and. . . specific objections to the action’ referred to in § 2.2.c. In short, it is difficult to tell exactly what categories of information are required for an appeal. It might be better if the Board substituted the language in §2.2.c for that which is currently found in the Board’s appeal form, and require in both documents the same information.”

Response: The form found in Appendix A of the procedural rule has been amended to incorporate this suggestion.

COMMENT 2:        DISCOVERY

This comment suggests that the procedural rule be modified to include reference to the statutory provisions governing discovery found at W.Va. Code § 22B-1-8 and to incorporate a 30-day deadline for responses to requests for discovery similar to the deadline imposed by the West Virginia and Federal Rules of Civil Procedure.

Comment:        “We would also suggest clarification regarding discovery. *W.Va. Code* §22B-1-8 allows parties to request from other parties the identity of persons expected to be called as witnesses, the facts being alleged, anticipated testimony, the identity of documents that will be relied upon, and whether the witness will be called as an expert. The WVMA and WVONGA believe that these provisions of *W.Va. Code* §22B-1-8 could be placed in the Board’s rule so that all parties are aware of the discovery that can take place without leave of the Board. In addition, establishing response deadlines of thirty days from the date of receipt might help eliminate some of the current confusion as to when responses are due.”

Response:        The Board agrees with this comment and the Board has agreed to revise section 49-1-8 to address the comment.

**II.        COMMENTS SUBMITTED BY WV CHAMBER OF COMMERCE**

**COMMENT 1:        ELECTRONIC FILING AND SERVICE OF DOCUMENTS**

This comment requests the Board to change section 4.2 to allow for electronic filing of documents and section 4.3 related to effective date of filing.

Comment:        “[W]e urge that Section 4.2 be revised to allow filings to be made electronically. Even now parties often file documents by attaching them to an email. This revision would provide that such a filing would be as effective as personal delivery, express mail of US Mail. We also suggest that Section 4.3 be revised to provide that a filing be effective upon actual filing with the Board, upon deposit in US Mail or upon deposit in express mail. In addition, we urge that electronic filings be effective when sent. Moreover, we suggest that Section 4.4 be revised to provide that response time be tied to the date of personal delivery, and the date an email is sent. Finally we suggest that three days be added to the date of postmark in US mail or the date of filing in express mail.”

Response:        The Board understands the request. However, it does not find it necessary to make the change at this time. Currently, if parties request to submit and file documents electronically, the Board will accommodate provided that there is no party that objects to electronic filing. The Board recognizes that there are still practicing attorneys and pro se appellants that do not have the means or capability to file documents electronically. The Board has requested its clerk to investigate the need and report back to the board on potential methods of developing a system for electronic filing of documents.

COMMENT 2: CERTIFIED RECORD

This comment requests the EQB and AQB to reverse a prior position of the boards that a Freedom of Information Act request is necessary to obtain a copy of the certified record.

Comment: "With regard to the Certified Record, the Chamber urges the Boards to adopt a consistent practice regarding the distribution of these documents to parties to proceedings. The Surface Mine Board automatically sends a copy of the Certified Record to each party once it is received from DEP. However, the Environmental Quality Board and Air Quality Board require parties to send a Freedom of Information Act ("FOIA") request to receive copies of the Certified Record. The Chamber recognizes that the Boards' budgets may limit their ability to provide these documents to parties without charge. However, parties are not made aware that the Certified Record has been prepared and is available, and the requirement that parties file a FOIA request to receive the Certified Record appears unduly cumbersome. The Chamber suggests that this matter be addressed in the procedural rules to provide clarity and consistency regarding the availability of the Certified Record to parties to an appeal."

Response: The Boards understand the comment and agree with it. However, the Board does not find it necessary to amend the procedural rules to make the changes necessary to accommodate this request. The Board will change its in-house practice to notify the parties when the certified record is available for review and copying. The Boards will no longer require a FOIA to be filed but will require some form of written request for tracking and processing.

COMMENT 3: DISCOVERY

This comment makes a similar request to that of the WVONGA and WVMA submitted by Robinson & McElwee PLLC.

Comment: "Finally, W.Va. Code § 22B-1-8 allows parties to proceedings before the Boards to request limited discovery from other parties without filing for leave of the Board. Only the Surface Mine Board rule, 49 CSR § 1-8 contains a provision related to discovery, which simply states that discovery may be obtained in accordance with W.Va. §22B-1-8. To assist parties who may be unfamiliar with discovery practices, such as citizen appellants or intervenors, the Chamber proposes that the procedural rules be modified to include time limits for filing and responding to discovery requests. Currently, most Appellants follow the response schedules contained in the West Virginia Rules of Civil Procedure. The Chamber believes that adding a section on discovery setting forth timelines would add certainty to the appeals process and would assist parties in complying with the discovery requirements."

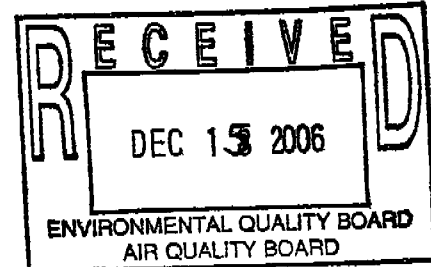
Response: The Board agrees and has revised section 49-1-8 of the procedural rule to accommodate this request.



**WEST VIRGINIA CHAMBER OF COMMERCE**  
*The Voice of Business in West Virginia*

December 15, 2006

Wendy Radcliff  
Counsel, Environmental Boards  
601 57<sup>th</sup> Street, SE  
Charleston, WV 25304



**RE: Revisions to Environmental Quality Board Rules (46 CSR 4, 49 CSR 1, and 52 CSR 1)**

The Environmental Quality Board, the Surface Mine Board, and the Air Quality Board (collectively, the "Boards") have proposed revisions to the rules which govern procedure before each of them. The proposed revisions update the addresses contained within these rules to reflect the Boards' current location at the Department of Environmental Protection ("DEP") headquarters in Charleston, West Virginia.

These comments are filed on behalf of the West Virginia Chamber of Commerce (the "Chamber"). The Chamber is the largest general business organization in West Virginia, representing all business sectors in every region of the state. Members range from small business enterprises to mid-size manufacturers to tourism destinations to Fortune 500 companies. However, small businesses are the core of our membership – making up 95% of the Chamber's companies and firms. Chamber members are frequently involved in matters before the Boards, and the Chamber appreciates the opportunity to provide comments on the Boards' proposed revisions to their governing rules.

The Chamber is supportive of the Boards' decisions to update the rules to include the Boards' current locations at DEP's headquarters in Kanawha City. While parties before the Boards have been made aware of the changed filing address through the Boards' websites and through contact with staff for the Boards, a formal change will ensure uniformity of information and remove the possibility of any confusion on behalf of those practicing before the Boards.

We would also like to offer a few additional comments for the Boards' consideration. These comments focus on the method of filing documents, the Certified Record, and the discovery process.

First, we suggest that the Boards update the process set forth in the procedural rules for filing of documents. Specifically, we urge that Section 4.2 be revised to allow filings to be made electronically. Even now parties often file documents by attaching them to an email. This revision would provide that such a filing would be as effective as personal delivery, express mail of US Mail. We also suggest that Section 4.3 be revised to provide that a filing be effective upon actual filing with the Board, upon deposit in US Mail or upon deposit in express mail. In addition, we urge that electronic filings be effective when sent. Moreover, we suggest that Section 4.4 be revised to provide that response time be tied to the date of personal delivery, and the date an email is sent. Finally we suggest that three days be added to the date of postmark in US mail or the date of filing in express mail.

With regard to the Certified Record, the Chamber urges the Boards to adopt a consistent practice regarding the distribution of these documents to parties to proceedings. The Surface Mine Board

T. M. Boggs to Wendy Ratcliff  
December 15, 2006  
Page 2 of 2


automatically sends a copy of the Certified Record to each party once it is received from DEP. However, the Environmental Quality Board and Air Quality Board require parties to send a Freedom of Information Act ("FOIA") request to receive copies of the Certified Record. The Chamber recognizes that the Boards' budgets may limit their ability to provide these documents to parties without charge. However, parties are not made aware that the Certified Record has been prepared and is available, and the requirement that parties file a FOIA request to receive the Certified Record appears unduly cumbersome. The Chamber suggests that this matter be addressed in the procedural rules to provide clarity and consistency regarding the availability of the Certified Record to parties to an appeal.

Finally, W.Va. Code §22B-1-8 allows parties to proceedings before the Boards to request limited discovery from other parties without filing for leave of the Board. Only the Surface Mine Board rule, 49 CSR § 1-8, contains a provision related to discovery, which simply states that discovery may be obtained in accordance with W.Va. Code §22B-1-8.

To assist parties who may be unfamiliar with discovery practices, such as citizen appellants or intervenors, the Chamber proposes that the procedural rules be modified to include time limits for filing and responding to discovery requests. Currently, most Appellants follow the response schedules contained in the West Virginia Rules of Civil Procedure. The Chamber believes that adding a section on discovery setting forth specific timelines would add certainty to the appeals process and would assist parties in complying with the discovery requirements.

The Chamber thanks you for the opportunity to comment on these proposed rule revisions.

Sincerely,



Thomas Boggs,  
Vice President and Chief Financial Officer,  
West Virginia Chamber of Commerce

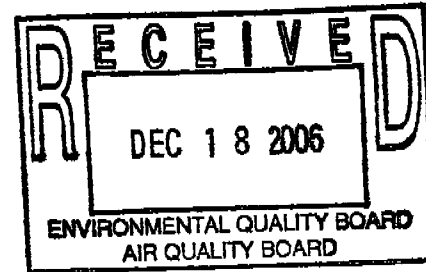


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December 15, 2006



Edward Snyder, Ph.D.  
West Virginia Environmental Quality Board  
601 57<sup>th</sup> Street, SE  
Charleston, WV 25304

Re: Revision to Environmental Quality Board  
Rule 46 C.S.R. 4

Dear Dr. Snyder:

It is our understanding that the *Procedural Rules Governing Appeals Before the Environmental Quality Board* 46 C.S.R. 4, are undergoing revision to correct the Environmental Quality Board's address in the rule. While that rule is open, the West Virginia Manufacturers Association ("WVMA") and the West Virginia Oil and Natural Gas Association ("WVONGA") urge the Board to consider two additional changes that we believe would improve the rule.

Section 2.2.a states that "the notice of appeal shall be in the form as prescribed in Appendix A." Section 2.2.c states that "the notice of appeal shall set forth the action complained of, and in separate numbered paragraphs the specific objections to the action, including questions of fact and law to be resolved by the board." The notice of appeal form that is attached to the rule states that "facts alleged relevant to this appeal and the particular grounds on which this appeal is based, including questions of fact and questions of law to be determined by the Board, are set forth in detail in numbered paragraphs and attached hereto". Both the rule and the Board's attachment require the appellant to identify questions of fact and law, but it is not clear whether there should be separate sections for operative facts, grounds for appeal and specific objections. This leaves appellants uncertain as to whether, for example, the "particular grounds for appeal" that are required by the Board's appeal form consist of "the action complained of, and . . . specific objections to the action" referred to in § 2.2.c. In short, it is difficult to tell exactly what categories of information are required for an appeal. It might be better if the Board substituted the language in §2.2.c for that which is currently found in the Board's appeal form, and require in both documents the same information.

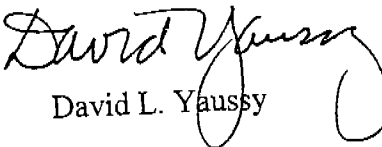
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We would also suggest clarification regarding discovery. *W.Va. Code* §22B-1-8 allows parties to request from other parties the identity of persons expected to be called as witnesses, the facts being alleged, anticipated testimony, the identity of documents that will be relied upon, and whether the witness will be called as an expert. The WVMA and WVONGA believe that these provisions of *W. Va. Code* §22B-1-8 could be placed in the Board's rule so that all parties are aware of the discovery that can take place without leave of the Board. In addition, establishing response deadlines of thirty days from date of receipt might help eliminate some of the current confusion as to when responses are due.

We appreciate the opportunity to offer these comments and hope that they will be given careful consideration by the Board.

Sincerely yours,

  
David L. Yaussy

DLY:shb

cc: Karen S. Price  
Nicholas DeMarco