

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

JAN 22 1 12 PM '97

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

Bureau of Environment-Div. Env. Prot.
AGENCY: SURFACE MINE BOARD TITLE NUMBER: 49
CITE AUTHORITY: WV Code 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 _____

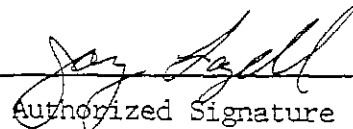
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Procedural Rules - Reclamation
Board of Review

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS February 24, 1997


Authorized Signature Jay Lazell



BUREAU OF ENVIRONMENT

10 McJunkin Road
Nitro, WV 25143-2506

CECIL H. UNDERWOOD
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.
COMMISSIONER

January 15, 1997

Ms. Judy Cooper
Director, Administrative Law Division
Office of the Secretary of State
Capitol Complex
Charleston, West Virginia 25305

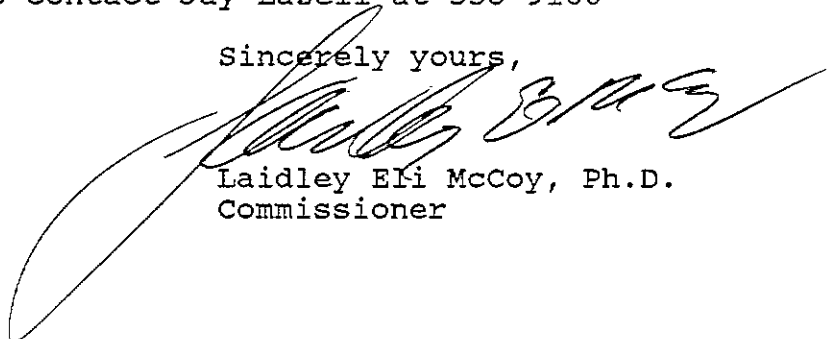
RE: 49CSR1 - "Procedural Rules - Reclamation
Board of Review"

Dear Ms. Cooper:

This is to advise you that I am giving approval for filing with your office the above-referenced rule as Notice of Agency Adoption of a Procedural Rule.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Jay Lazell at 558-9160

Sincerely yours,


Laidley Eli McCoy, Ph.D.
Commissioner

LEM:cc

Attachment

cc: Mark Scott
Jay Lazell
Carrie Chambers

REC'D

JAN 15 1997

OFFICE OF LEGAL SERVICES

**BUREAU OF ENVIRONMENT
DIVISION OF ENVIRONMENTAL PROTECTION
BRIEFING DOCUMENT**

Rule Title: 49CSR1

A. AUTHORITY: WV Code 22B-1-3(c)

B. SUMMARY OF RULE:

This rule sets forth guidelines of practice and procedures before the West Virginia Surface Mine Board - Formerly known as the Reclamation Board of Review.

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

The Reclamation Board of Review was renamed the West Virginia Surface Mine Board which is required by WV Code 22B-1-3(c) to promulgate procedural rules which reflect certain procedural requirements set forth in Article One, Chapter 22-B, and the Administrative Procedures Act, and which conform to the extent practicable to the procedural rules of the other environmental hearing boards.

(It should also be noted that this rule is being repealed and refiled as part of the Bureau of Environment's technical cleanup initiative of its legislative, interpretive, and procedural rules.)*

A public hearing was held on January 14, 1997, and no one attended. One comment was received by telephone on December 26, 1996. The substance of the comment and the response to the comment are set forth in Attachment A. There were no amendments to the proposed rule.

Attachment A

Response to Comments Received on Title 49 Procedural Rules Bureau of Environment Surface Mine Board Series 1 Procedural Rules

A commenter expressed concern that the rule on Ex Parte Contacts, 49-1-11, was too broad. Specifically, the commenter believed that under the proposed rule a telephone conversation with the Secretary to the Surface Mine Board inquiring about a harmless matter, such as a hearing date, might be construed as an ex parte contact. Additionally, the commenter believed that proposed Rule 49-1-11 was inconsistent with the rule in the West Virginia Surface Mining Reclamation Regulations on Ex Parte Communications, Rule 38-2-21.3, and, therefore, should be changed to conform to the latter rule.

Response: It is believed that Rule 49-1-11 provides a sufficient test for determining when a communication with the Board or its staff is an ex parte contact and, therefore, is not broad. It provides that communications with the Board or its staff (1) which are not on the record, (2) which are made without notice to and in the absence of other parties to the appeal, and (3) which relate to the merits of an appeal or motion are considered ex parte contacts. Any communication with the Board or its staff which does not meet all parts of the test would not be deemed an ex parte contact. Thus, an inquiry regarding a hearing date would not qualify as an ex parte communication because it does not concern the "merits of an appeal or motion." Finally, it is believed that the proposed rule on Ex Parte Contacts is consistent with the Surface Mining Regulation on Ex Parte Communications. Indeed, unlike the Surface Mining Regulation, the Board's proposed rule clarifies the term "ex parte contact" by providing a test for it.

TITLE 49
PROCEDURAL RULES
WEST VIRGINIA SURFACE MINE BOARD

SERIES 1
PROCEDURAL RULES GOVERNING APPEALS
BEFORE THE SURFACE MINE BOARD

FILED
JAN 22 1 12 PM '97
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 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. West Virginia Code §§ 22B-1-3(c); 29A-3-3.

1.4. Filing Date. -- January 22, 1997

1.5. Effective Date. -- February 24, 1997

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 5, 1987.

§ 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, 10 McJunkin Road, Nitro, West Virginia 25143-2506 (304) 759-0510. 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.

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 matter that is appealed, and shall form the basis of the board's review of the matter.

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, 10 McJunkin Road, Nitro, West Virginia 25143-2506.

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.

§ 49-1-9. evidentiary Hearing

Evidentiary

9.1. Notice of Evidentiary Hearing. Notice of evidentiary hearing at least ten (10) days' written notice by registered or certified mail or by

personal delivery shall be given to each party to any evidentiary hearing and the notice shall be served by the hearing officer.

yes

9.2. Continuance of Hearing. If a continuance 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 10 McJunkin Road, Nitro, West Virginia.

9.5. Conduct of Hearings. All appeal hearings shall be open to the public, and; parties shall be conducted in accordance with article 5, chapter 29A of the West Virginia Code. 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 themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of such hearing.

yes
Shall be
conducted
Delete ; p19

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 (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 article 5, chapter 29A of the West Virginia Code, 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.