

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: "Rules Governing Appeals, Hearings, and Rule Making Procedures for the Air Pollution Control Commission."

Type of Rule: Procedural

Agency: Air Pollution Control Commission

Address: 1615 Washington Street, East
Charleston, West Virginia 25311

1. Effect of Proposed Rule:

No fiscal effect.

2. Explanation of above estimates:

Amendment to existing procedural rule.

3. Objectives of these rules:

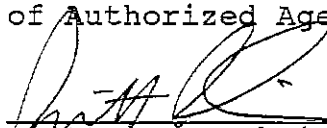
To provide procedural guidance for appeals and rule making.

4. Explanation of overall economic impact of proposed rule:

A, B, and C: Efficiency gains or no impact.

Date: February 1, 1994

Signature of Authorized Agency Representative:



Britt A. Bernheim, Esq.
Secretary
Air Pollution Control Commission

APPENDIX A

SUMMARY OF PROPOSED RULE 45 CSR 26

RULES GOVERNING APPEALS, HEARINGS, AND RULE
MAKING PROCEDURES FOR THE AIR POLLUTION CONTROL COMMISSION

The proposed rule amends title 45, series 26 of the Code of State Regulations, which became effective January 6, 1980. Among other things, the proposed amendments update the rules of procedure for the Air Pollution Control Commission (the "Commission") to reflect Executive Order 8-92, which reorganized the Commission as a separate agency from the Office of Air Quality, as well as to reflect recent amendments to the Commission's enabling statute found at chapter 16, article 20 of the West Virginia Code.

Section two, procedures governing the course of appeals, is a new section to the rule. These procedures have been added in order to provide guidance to parties wishing to appeal orders and permit actions by the Chief of the Office of Air Quality, as well as to provide a level of certainty to the appeal process.

Section three of the new rule, procedures governing the course of rule making, is substantially similar to subsection 4.2 of the "Miscellaneous Rules" section found in the former rule. Likewise, section four, requests for public records, is substantially similar to subsection 4.1 of the "Miscellaneous Rules" section found in the former rule.

TITLE 45
PROCEDURAL RULES
AIR POLLUTION CONTROL COMMISSION

SERIES 26
RULES GOVERNING APPEALS, HEARINGS, AND RULE
MAKING PROCEDURES FOR THE AIR POLLUTION CONTROL COMMISSION

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
FEB 4 3 03 PM '94

FILED

§ 45-26-1. General.

1.1. Scope. The rules of procedure herein shall govern and apply to appeal hearings, rule making, requests for information, and open governmental proceedings of the Air Pollution Control Commission (the "Commission"). It should be noted that these rules apply only to proceedings before the Commission, and no longer apply to proceedings before the Office of Air Quality.

1.2 Purpose. The purpose of these rules is to describe each of the procedures in such a way as to foster the Commission's service to the public, as well as to provide a fair and orderly ascertainment of the facts and to promote the ends of justice and fairness in the administration and effectuation of the statutory purpose of the appeal and rule making processes.

1.3. Authority. West Virginia Code § 16-20-4.

1.4. Filing Date.

1.5. Effective Date.

1.6. Repeal of Former Rule. This procedural rule repeals and replaces 45 CSR 26 "Rules governing hearing, appeals and procedures before the West Virginia Air Pollution Control Commission" which became effective January 6, 1980.

§ 45-26-2. Procedures Governing the Course of Appeals.

2.1 Form.

2.2. Parties to the Appeal. A person appealing a Cease and Desist Order, Order, terms and conditions of a permit, permit denial, issuance, or modification, shall be known as the appellant and the Chief shall be known as the appellee.

2.3. Notice of Appeal. A person may perfect an appeal by filing a Notice of Appeal in the form specified for that purpose by these rules with the Commission within fifteen days after the date upon which the order or notice of other action (such as permit denial, permit issuance, or permit modification) was received. The Notice of Appeal shall set forth the order or other action complained of, the grounds upon which the appeal is based, questions of fact and questions of law to be resolved by the Commission, and the relief sought by the appellant, address and telephone number of the appellant or his or her attorney of record, and must be signed by the appellant or his or her attorney of record.

2.4. Service on Chief. Contemporaneous with filing the Notice of Appeal on the Commission, appellant shall serve a copy of the Notice of Appeal on the Chief of the Office of Air Quality at 1558 Washington Street East, Charleston, West Virginia 25311.

2.5. Certifying the Record. Within seven (7) days after receipt of his or her copy of the Notice of Appeal, the Chief shall prepare and certify to the Commission a complete record of the proceedings out of which the appeal arises, including all documents and correspondence in the Chief's file relating to the matter in question.

2.7 Answer. The Chief of the Office of Air Quality shall have the opportunity to file a written Answer to the Notice of Appeal within twenty one (21) days from receipt of the Notice of Appeal.

2.8. Filing and Service of Documents and Orders.

a. Where to file: all documents required to be filed with the Air Pollution Control Commission in an appeal under these rules shall be filed with the Secretary of the Air Pollution Control Commission at 1615 Washington Street East, Charleston, West Virginia 25311.

b. Method of filing: Filing may be accomplished by personal delivery, express mail, or by first class United States mail, postage prepaid, of eight (8) duplicate sets.

c. 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.

d. Service upon other parties: Copies of all documents filed in an appeal under these rules shall be served upon all other parties.

e. 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.

2.9. Third Party Appeals. When an appeal of a permit is filed by a party or parties who are not the holders of the permit, the issuance of which, or the terms and conditions of which are being appealed, or where such third party appellant is not the person against whom an Order of the Chief of the Office of Air Quality, Division of Environmental Protection was issued, the third party appellant shall serve upon the holder of the permit or the person named in the contested Order a copy of the Notice of Appeal at the same time that such notice is filed with the Commission. The holder of the permit or the person named in the Order shall be considered a party in interest in the appeal proceedings and shall have the right to intervene in the appeal.

2.10. Appeal Hearings.

a. Notice of Hearing. Any person, firm, corporation, partnership, or association who shall be a party in any hearing held by the Commission shall be given at least ten (10) days' written notice of such hearing and shall be served by registered or certified mail or by any proper law-enforcement officer.

b. Quorum. Any hearing shall be conducted by a quorum of the Commission, but the parties may by stipulation agree to take evidence before a hearing examiner employed by the Commission.

c. Place of Hearing. Hearings will be held in Charleston, West Virginia, unless the Commission determines otherwise.

d. Subpoenas and Subpoenas Duces Tecum. In any hearing called by the Commission, the Commission has the power and authority to issue subpoenas. Any person receiving a subpoena issued hereunder shall honor the same as though it was issued by a circuit court of the State, and shall appear as a witness in response to such subpoena. Enforcement of or relief from any subpoena or subpoena duces tecum issued by the Commission must be sought from the circuit court of the county in which the hearing is being conducted.

e. Conduct of Hearings. All appeal hearings shall be open to the public, and shall be conducted in accordance with article 5 of chapter 29A of the West Virginia Code.

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

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

h. Presentation. The Commission shall hear the appeal de novo. Appellant shall open the hearing and shall bear the burden of proof. Appellant may present testimony and offer exhibits that support the petition for review. At the conclusion of the appellant's case, the appellee may present testimony and offer exhibits in support of the final order. Witnesses shall be subject to cross examination by any other party to the appeal, and by the Commission.

i. Closing Statements. Closing statements may be made by the parties to the appeal before the record is closed or at such time as designated by the Commission.

2.11. Continuance of Hearings. After a hearing date has been set, a continuance will not be granted by the Commission except upon a showing of good cause. A party who desires a continuance shall, immediately upon receipt of the Notice of Hearing, or as soon thereafter as practicable, file a written motion with the Commission stating in detail the reasons why such a continuance is necessary. Such motion shall be filed at least five (5) days prior to the date of hearing.

2.12. Briefs, Oral Argument. The Commission may require the parties to file briefs and reply briefs, to present oral argument, or both. Requests by the Commission for the filing of briefs or the presentation of oral arguments shall be made before or at the conclusion of the taking of evidence. The schedule for the filing of briefs and reply briefs shall be established by the Commission. The parties shall file the original and seven (7) duplicate sets of the brief or reply brief with the Commission and shall serve a copy of the same on all other parties as required by these procedural rules. All citations to case law, treatises, or periodicals shall be accompanied by one copy of the cited material.

2.13. Motions.

a. Content. Any application to the Board, following the initial appeal, shall be by motion. Such motions may include, but are not limited to, 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 judgement, change of hearing location, dismissal of action or of particular issues in the appeal, and amendment of a Notice of Appeal.

b. 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 of the motion shall serve it on the Commission and all parties to the appeal as required by these rules of procedure. A party shall have ten (10) days from receipt of the motion to respond to the same, unless the parties and the Commission agree to an extension.

c. Decision. The Commission 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. Upon motion of any party to an appeal and for good cause shown, the Commission may, within its administrative discretion, grant leave to amend a Notice of Appeal or any other documents filed in a proceeding before the Commission.

2.14. Final Orders.

a. 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, and each final order or final decision shall include a ruling on such proposed findings of fact and conclusions of law.

b. Service and Publication of Final Orders. A copy of the final order or final decision and accompanying 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. Further, each final order or final decision issued by the Commission shall be filed in the state register in accordance with section 9, article 2, chapter 29A of the West Virginia Code.

2.15. Rules of Evidence. Consistent with section 2, article 5, chapter 29A of the West Virginia Code, the rules of evidence as applied in civil cases in the Circuit Courts of West Virginia will be followed in appeal hearings before the Commission.

2.16. Rules of Procedure. While the differences in the functions of courts and administrative boards preclude the "wholesale transportation" of the Rules of Civil Procedure into the hearings before the Commission, some such rules must be utilized to manage Commission hearings. Thus, as a matter of policy and to assure fairness, the appropriate Civil Rules of Procedure will guide appeals before the Commission so that it may ascertain facts upon which the Commission will make decisions in the interest of justice and to achieve its statutory purposes.

§ 45-26-3. **Procedures Governing the Course of Rule Making.**

3.1. **Notice of Participatory Rule Making Hearings.** For rule making hearings at which an opportunity shall be afforded all interested persons to submit data, objections, suggested amendments, views, and arguments orally or in writing, notice of the time, place, and purpose of the meeting shall be:

a. Filed in the state register not less than thirty (30) nor more than sixty (60) days prior to the date of hearing;

b. Published as a Class II legal advertisement in compliance with the provisions of chapter 59, article 3 of the West Virginia Code, and the publication area shall be in each of the State's air quality control regions which will be affected; and

3.2. **Public Inspection of Proposed Rule.** Prior to a participatory rule making hearing, a copy of the proposed rule or regulation or amendments to existing rules or regulations shall be available for public inspection in at least one location in each region to which it will apply.

3.3. **Notice of Meetings for the Final Consideration of Proposed Rules.** For meetings at which the Commission will finally adopt the rule or regulation or amendment as proposed, amend and finally adopt the proposed rule or regulation or amendment, as amended, or withdraw the proposed rule, regulation, or amendment, notice shall be filed in the State Register not less than ten (10) nor more than thirty (30) days prior to the date of the meeting.

3.4. **Other Regularly Scheduled Meetings.** In accordance with article 9A of chapter 6 of the West Virginia Code, notice all other regularly scheduled meetings shall be filed with the secretary of state for publication in the state register at least five days prior to the date of the meeting. Further, and to the extent practicable, notice of all regularly scheduled meetings will be given via United States mail to all persons requesting such notice in advance.

3.5. **Notice of Emergency Meetings.** For emergency meetings, notice shall be placed on the door of the Office of Air Quality and the offices of the Commission, and shall be transmitted to the news media.

[NOTE: The provisions for notice of rule making are substantially similar to the provisions of subsection 4.2 of the "Miscellaneous Rules" section found in the former rule.]

§ 45-26-4. **Requests for Public Records.**

4.1. **Fees for Freedom of Information Requests.** Any person, firm, corporation, partnership or association has the right to inspect and request a copy of those public records prepared, owned, and retained by the Commission pursuant to chapter 29B, article 1 of the West Virginia Code, as amended, and in accordance thereto, the Commission adopts the following fee schedule:

a. Papers, maps, cards, or other documentary materials in sheet form no larger than 8 1/2" x 14": \$0.50 per page copied;

b. Books: \$0.50 per page copied or actual cost of the book plus a 25% procurement and handling fee;

c. Photographs: Actual cost of reproduction plus a 25% procurement and handling fee;

d. Tapes and other magnetic recordings: \$50.00 per 600 foot reel, both sides, or \$50.00 per 60 minute cassette, both sides;

e. All other materials: \$0.50 per page copy or actual cost of copy, whichever is greater, plus 25% handling fee;

f. A search fee of \$15.00 per hour or any fraction thereof shall be charged for the Commission or an agent of the Commission's time spent locating the requested records beyond the initial half hour used to locate such records.

4.2. Cost of Postage. The person requesting the information shall also remit the cost of shipping the requested materials.

4.3. Copyrighted Material. If, in the opinion of the Commission, the requested material is the subject of a copyright restriction, the Commission shall deny the request of any such material.

4.4. Use of recycled paper. Whenever practicable, requested materials shall be copied double-sided and onto recycled paper.

4.5. The Commission may request payment in advance if it appears that the fee for requested materials will exceed \$10.00.

[Note: This section is substantially similar to former subsection 4.1 of the "Miscellaneous Rules" section, and with the exception of the addition of an hourly search fee, the fees have not been raised since 1980.]

BEFORE THE AIR POLLUTION CONTROL COMMISSION
CHARLESTON, WEST VIRGINIA

_____)	
_____)	
Appellant,)	
v.)	Appeal No. _____
Chief, Office of Air)	
Quality, Division of)	
Environmental Protection,)	
Appellee.)	

NOTICE OF APPEAL OF [specify agency action appealed]

This form is provided for illustration only and is intended to be produced independently by the appellant. The appellant may wish to attach a memorandum as an opportunity to more fully develop its arguments.

THE NOTICE OF APPEAL SHALL CONTAIN THE FOLLOWING INFORMATION:

1. Identification and date of the agency action appealed from (Cease and Desist Order, Order, or Permit Denial, Permit Modification or Permit Issuance).
2. Grounds upon which the appeal is based.
3. Issues of fact to be resolved by the Commission.
4. Issues of law to be resolved by the Commission.
5. Request for review and relief sought.
6. Name and address of appellant.
7. Name, address, telephone number, and signature of appellant's attorney of record, if any.



DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol, Room M-146
Charleston, West Virginia 25305-0310
Telephone: (304) 558-0400
Fax No.: (304) 558-4983

GASTON CAPERTON
Governor

JOHN M. RANSON
Cabinet Secretary

February 3, 1994

Ms. Britt A. Bernheim, Esq.
Secretary
Air Pollution Control Commission
1615 Washington Street, E.
Charleston, West Virginia 25311

Re: Proposed Procedural Rule, Title 45, Series 26 -
Rules Governing Appeals, Hearings, and Rulemaking
Procedures for the Air Pollution Control Commission

Dear Ms. Bernheim:

Pursuant to West Virginia Code Section 5F-2-2(a)(12), I
hereby consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing with
the Secretary of State as evidence of my consent.

Sincerely yours,

John M. Ranson
John M. Ranson
Cabinet Secretary

JMR/ec

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