

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

OCT 28 10 38 AM '94

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

AGENCY: BUREAU OF THE ENVIRONMENT
ENVIRONMENTAL QUALITY BOARD TITLE NUMBER: 46

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

RULE TYPE: PROCEDURAL XX INTERPRETIVE

EXEMPT LEGISLATIVE RULE
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES, NO X (Repeal and Replacement)

IF YES, SERIES NUMBER OF RULE BEING AMENDED:

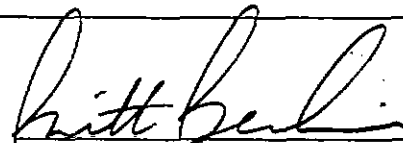
TITLE OF RULE BEING AMENDED:

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: Series 4

TITLE OF RULE BEING ADOPTED: Title 46

"Procedural Rules Governing Appeals Before the Environmental Quality Board"

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS NOV. 28, 1994



Authorized Signature
Britt A. Bernheim, Legal Counsel

9.00



DIVISION OF ENVIRONMENTAL PROTECTION

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506

DAVID C. CALLAGHAN
DIRECTOR

October 27, 1994

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305--0770

RE: CSR 46-2
Procedural Rule Governing Appeals Before
the Environmental Quality Board

Dear Mr. Hechler:

This is in regard to the above captioned procedural rule initially filed with your office on August 3, 1994 for public review and comment. Any required amendments to the rule resulting from public review and comment have been made, and the rule is approved for final filing.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David C. Callaghan".

David C. Callaghan
Director

DCC:RTH:klt

TITLE 46
PROCEDURAL RULES
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

SERIES 4
PROCEDURAL RULES GOVERNING APPEALS
BEFORE THE ENVIRONMENTAL QUALITY BOARD

§ 46-4-1. **General.**

1.1. Scope. This series governs the practice and procedure before the environmental quality board (the "board") in adjudicatory proceedings. [Note: The environmental quality board was formerly known as the state water resources board.]

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 §§ 29A-3-3; 22B-1-3(c).

1.4. Filing Date. October 28, 1994.

1.5. Effective Date. *NOV* 28, 1994.

1.6. Repeal of Former Rule. This procedural rule repeals and replaces 46 CSR 4 "Procedural Rules, Water Resources Board" which became effective on July 27, 1984.

§ 46-4-2. **Notice of Appeal; Answer.**

2.1. Parties to the Appeal. A person appealing an action of the chief shall be known as the appellant, and the chief shall be known as the appellee.

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

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 clerk of the boards, 1615 Washington Street, East, Charleston, West Virginia 25311, (304) 558-4002. All subsequent submissions shall be captioned in the same manner as the notice of appeal.

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 appropriate chief or the director to act within a reasonable time on an application for a permit, such notice of appeal shall be filed within a reasonable time.

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. An objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the board may agree

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 his or her attorney of record.

d. Attachments. Appellant shall attach the written notification of the action appealed from to the notice of appeal.

e. Service on Permit Holder. 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, 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.

f. Filing of Notice of Appeal on the Chief. 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 appropriate chief or director, and with the office of the attorney general.

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.

§ 52-1-3. The Certified Record.

3.1. Certifying the Record. Within fourteen (14) days after receipt of his or her copy of the notice of appeal, the chief 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 chief's file relating to the matter in question.

3.2. Preparation by Chief. In order to preserve the evidentiary value of the certified record, it shall be submitted by the appropriate chief in chronological order and each page shall be consecutively numbered.

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.

§ 52-1-4. Filing and Service of Documents.

4.1. Where to file: all documents required to be filed with the board under these rules shall be filed with the clerk of the boards, 1615 Washington Street East, Charleston, West Virginia 25311.

4.2. 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.

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 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.

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.

§ 46-4-5. 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 clerk of the boards.

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, and any other request which tends to regulate the course of the hearing.

5.3. Content. Any application to the board, following the notice of appeal, shall be by motion. Such motions may include, but are not limited to, requests for continuance, requests for 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 judgement, 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, except as provided for by section five, article five, chapter twenty-two of the Code of West Virginia. 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.

§ 46-4-6. Evidentiary Hearings.

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

6.2. **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 such a continuance is necessary. Such 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.

6.3. **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.

6.4. **Place of Hearing.** Unless the board determines otherwise, evidentiary hearings shall be held in the board's offices located at 1615 Washington Street, East, Charleston, West Virginia.

6.5. **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. 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.

6.6. **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.

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

6.8. **Presentation.** The board shall hear the appeal de novo. 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

present rebuttal evidence on the issues in the case, providing that such evidence is not cumulative, repetitive or immaterial to the case.

6.9. 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 eight (8) duplicate sets of the brief with the clerk of the boards, 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 one copy of all citations to case law, treatises, or periodicals. Leave to file briefs amicus curiae may also be granted by the board.

6.10. 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 30 days of the conclusion of the evidentiary hearing.

6.11. Service and Publication of Final Orders. A copy of a final order or final decision, and findings of fact and conclusions of law of the board 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 board shall be filed with the secretary of state for publication in the state register in accordance with section 9, article 2, chapter 29A of the West Virginia Code.

6.12. 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 section two, article five, chapter 29A of the Code of West Virginia.

6.13. 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 board, some such 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.

§ 52-1-7. 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.

§ 52-1-8. Confidential Information.

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

LAW OFFICES
ROBINSON & McELWEE
P. O. BOX 1791
CHARLESTON, WEST VIRGINIA 25326

CLARKSBURG OFFICE
P.O. BOX 128
CLARKSBURG, WEST VIRGINIA 26302
TELEPHONE (304) 622-5022
TELEFAX (304) 622-5065

TELEPHONE (304) 344-5800
TELEFAX (304) 344-9566

600 UNITED CENTER
500 VIRGINIA STREET, EAST
CHARLESTON, WEST VIRGINIA 25301

LEXINGTON OFFICE
P.O. BOX 1580
LEXINGTON, KENTUCKY 40592
TELEPHONE (606) 231-8131
TELEFAX (606) 255-1168

EDWARD J. GEORGE
DIRECT DIAL NO. (304) 347-8319

September 2, 1994

RECEIVED
SEP 02 1994
AIR QUALITY BOARD
Charleston, West Virginia

Britt A. Bernheim, Esquire
Secretary
c/o WV Air Quality Board and
WV Environmental Quality Board
Suite 301
1615 Washington Street, East
Charleston, West Virginia 25311-2126

RECEIVED
SEP 02 1994
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

Re: Comments on Proposed 52 C.S.R. 1
and 46 C.S.R. 4

Dear Britt:

Enclosed, please find for filing the comments of Robinson & McElwee regarding the West Virginia Air Quality Board's and the West Virginia Environmental Quality Board's above-referenced proposed procedural rules filed on August 3, 1994.

I thank you for according Robinson & McElwee the opportunity to comment on these proposed rules and invite you to contact me at your convenience should you wish to discuss any of these comments.

Very truly yours,


Edward J. George

EJG/asb
Enclosure

cc: Kim Brown Poland, Esquire

COMMENTS OF THE
LAW FIRM OF ROBINSON & MCELWEE
REGARDING PROPOSED TITLE 52, SERIES 1 AND TITLE 46, SERIES 4
PERTAINING TO PROCEDURAL RULES GOVERNING APPEALS BEFORE THE
AIR QUALITY BOARD AND THE ENVIRONMENTAL QUALITY BOARD
RESPECTIVELY

RECEIVED
SEP 02 1994
AIR QUALITY BOARD
Charleston, West Virginia

RECEIVED
SEP 02 1994
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

Prepared by:

ROBINSON & MCELWEE
P. O. Box 1791
Charleston, West Virginia 25326

September 2, 1994

COMMENTS OF THE
LAW FIRM OF ROBINSON & MCELWEE
REGARDING PROPOSED TITLE 52, SERIES 1 AND TITLE 46, SERIES 4
PERTAINING TO PROCEDURAL RULES GOVERNING APPEALS BEFORE THE
AIR QUALITY BOARD AND THE ENVIRONMENTAL QUALITY BOARD
RESPECTIVELY

I. INTRODUCTION

On August 3, 1994, both the West Virginia Air Quality Board ("AQB") and the West Virginia Environmental Quality Board ("EQB") (collectively "the Boards") filed with the Secretary of State proposed procedural rules pertaining to the governance of appeals as authorized at Chapter 22B, Article 1 of the West Virginia Code ("the Act"). The promulgation of these rules is specifically authorized pursuant to Section 3(c) of the Act. (Additionally, Section 6(d) of the Act requires the incorporation of, and governance by, the contested cases provisions of the West Virginia Administrative Procedures Act, W.Va. Code §29A-5-1, et seq, to appeals under the Act.) The rules, which will respectively repeal and replace the current Title 45, Series 26 and Title 46, Series 4, are proposed for inclusion in the Code of State Regulations at Title 52, Series 1 and Title 46, Series 4. Robinson & McElwee is a West Virginia law firm whose clients include a broad cross-section of large, medium and small industrial concerns located throughout the State. Because many of its clients are, or may be, parties in interest in appeals before the AQB and/or the EQB, Robinson & McElwee has been, and pledges to continue to be, involved in the development of these regulations promulgated in

order to implement procedural guidance for practice before the Boards. Robinson & McElwee strongly supports the amendments to Regulations 26 and 46 which purport to render much needed guidance to those who would participate in the appeal process before the Boards. It is in furtherance of this active and supportive role, however, that Robinson & McElwee offers the following comments.¹

II. COMMENTS

1. Section 1. (Page 1) and Throughout; Section Numbering

With regard to the AQB's proposed rule, the section numbering should be amended to reflect proposed inclusion in the Code of State Regulations at Title 52, Series 1. As drafted, the section numbering incorrectly cites "\$45-26" before each section heading throughout the proposed rule.

2. Section 2.2.a. (Page 1); Notice of Appeal -- Form

This subsection of the proposed rules would require all "submissions" made subsequent to the filing of the Notice of Appeal in any given case to be "in the form as prescribed in Appendix A." Upon a review of Appendix A, it is clear that it constitutes a form sufficient for the filing of notices of appeal. However, other documents envisioned by the proposed rules to be submitted in any given appeal to the Boards, such as motions and briefs, would have

¹ In compliance with the statutory mandate contained in W.Va. Code §22B-1-3(c), the proposed procedural rules of the AQB and EQB are virtually identical in substance. Given the substantive similarity of the two proposed rules, the comments contained herein shall be deemed to apply to both proposed rules unless otherwise noted.

virtually no similarity in form to the outline which is provided in Appendix A. Thus, Robinson & McElwee suggests that Subsection (a) be amended to read as follows:

- a. Form. The Notice of Appeal shall be in the form as prescribed in Appendix A. All subsequent submissions shall be captioned in a manner as prescribed in Appendix A.

3. Section 2.2.b. (Page 1); Notice of Appeal -- Filing Deadline

This subsection as proposed goes beyond statutory authority by purporting to enable third parties to file notices of appeal "within a reasonable time." Pursuant to Section 7(c) of the Act, such third party appeals must be perfected by the filing of a Notice of Appeal with the pertinent Board within 30 days of the date upon which service of the underlying order, permit or official action was received by the person subject to such underlying order, permit or official action.² Thus, Robinson & McElwee respectfully requests that this subsection be modified to conform with its authorizing statute and be amended accordingly.

4. Section 2.2.c. (Page 1); Notice of Appeal -- Content

This subsection as proposed fails to require adequate substantiation by would-be third party appellants as to their legal standing to bring such actions. For instance, although the West Virginia Air Pollution Control Act, W.Va. Code §22-5-1, et seq., authorizes third party appeals of permitting actions of the Office

² However, please see Comment No. 5 regarding specific limitation of third party rights to appeal certain administrative actions.

of Air Quality ("OAQ"), it limits the class of such persons capable of invoking the AQB's appellate jurisdiction to those ". . . whose interest may be affected" W.Va. Code §22-5-14. Thus, the right to appeal permitting actions of the OAQ is not open-ended. Given this clear statutory limitation, and in order to better serve administrative economy, this section of the proposed rules should be amended to require third parties seeking review of administrative actions to substantiate, at the notice stage and with specificity, grounds which would constitute their legal standing to bring such an appeal. (Also, it should be noted that Appendix A attached to the proposed rules should similarly be amended to provide for the requirement of substantiation of grounds for legal standing to bring appeals.)

5. Sections 2.2.f. and 4.7. (Pages 2 and 3);
Service on Permit Holder

With regard to appeals to the AQB, the West Virginia Air Pollution Control Act at W.Va. Code §22-5-5 limits those persons authorized to appeal orders of the Chief of the OAQ to only those persons upon whom such order has been served. Thus, third party appeals of orders of the Chief of the OAQ are not authorized. As proposed, however, these sections of the AQB's rule go beyond such statutory limitation and would enable third party appeals of such orders. Thus, in order to conform these sections to their authorizing statute, references to third party appeals of orders of the Chief of the OAQ should be deleted.

6. Section 5.5 (Pages 3 and 4); Hearing on Motion

Robinson & McElwee supports the inclusion into the proposed rules of provisions providing for the convening of the Boards via telephonic conference call in situations which require expedited ruling. The AQB and EQB are both constituted by bodies of Board members who reside in all corners of the State. Thus, it is appropriate that the rules reflect this limitation by providing a mechanism which would enable the Boards to conduct hearings in the face of emergency or extenuating circumstances and where they are unable to actually convene in person in a single location. The West Virginia Open Governmental Proceeding Act embraces and provides for situations in which governing bodies (such as the AQB and EQB) may hold emergency meetings. W.Va. Code §6-9A-3. In fact, many issues which would otherwise have to be formally appealed could easily be resolved by such "informal" conference, thereby reducing administrative costs of time and resources, as well as such costs to the parties. However, for purposes of the proposed rules, the convening of the Boards by telephone should be limited to applications made to the Boards by Motions to Stay as may be authorized by statute. Actual notice should be given to the parties, and, in order to ensure compliance with the Open Governmental Proceedings Act and the Administrative Procedures Act respectively, public notice of telephonic hearings should be required to be provided by advance advertisement at the earliest opportunity via the local news media with a location specified (e.g., the AQB\EQB hearing room in Charleston) for public

attendance. Recordation of such telephone calls should be required for transcription should a party so desire.

7. Section 6.8. (Page 4); Presentation

This section purports to establish requirements for the actual presentation of appeals to the Boards. However, this section should be amended by including a provision which would require each party to an appeal to serve upon all other parties thereto, at least ten days prior to the hearing, the names of witnesses to be presented and a summary of each witness' expected testimony. It should further be provided that witnesses not so identified may then only testify upon motion made to, and granted by, the Board.

Additionally, as proposed this section would place the burden of proof on appellants in any given appeal unless otherwise directed by the Board. Robinson & McElwee objects to such provision being incorporated into the rules as nowhere in the West Virginia Administrative Procedures Act or the Act itself is there authorization for such burden to be placed on the appellant. Thus, such language should be deleted from the proposed rules as it goes beyond statutory authority.

8. Section 6.10. (Pages 4 and 5); Findings of Fact and Conclusions of Law

As proposed, this section understates and would restrict the provisions contained in Section 3 of the West Virginia Administrative Procedures Act which provides that any party to a contested case may propose findings of fact or conclusions of law

and, in such circumstance, opposing parties must be given an opportunity to except to such findings of fact and conclusions of law. Additionally, the West Virginia Administrative Procedures Act requires that a ruling by the Boards on proposed findings of fact and conclusions of law be included in final orders or decisions as rendered. Thus, Robinson & McElwee urges that this proposed section be revised accordingly to conform it with controlling statute.

9. Section 6.11. (Page 5); Final Orders

In order to serve administrative economy of the Boards' time and resources, Robinson & McElwee urges the inclusion of a provision specifically requiring disposition of matters by the Boards at the close of individual hearings on contested cases. To this end, Robinson & McElwee respectfully suggests the inclusion into this section of the following language:

A decision shall be rendered by a majority of the Board members present at the close of a hearing, unless the Board requests that briefs be submitted by the parties prior to a final decision being rendered.

10. Section 5.1. (Page 3); Motions -- Authority

Pursuant to Section 3(a)(9) of the Act, the Boards are granted authority to appoint hearing examiners. Robinson & McElwee supports the appointment by the Boards of Hearing Examiners and the delegation of the authority to resolve procedural motions and routine matters to such individuals to the extent authorized by the West Virginia Administrative Procedures Act at W.Va. Code §29A-5-

1(d). However, the Boards' delegation of authority on procedural and routine matters should be comprehensively and clearly set forth and implemented via these procedural rules. To this end, Robinson & McElwee urges the inclusion in the proposed rules of provisions which formally delegate this authority to appointed hearing examiners and which categorically set forth the scope and limitation of authority so delegated.

11. Section 6.5. (Page 4); Conduct of Hearings

This section of the proposed rules deals with the conduct of hearings, but is silent with regard to procedures for conducting appeals of claims of confidentiality and trade secrets in permit applications. Given the information sought to be protected under such claims, and the inherently sensitive nature of appeals relating thereto, any administrative review thereof not conducted in camera could cause immediate and irreparable harm to those seeking to protect such information by exposing it, in the natural course of the proceedings, to third parties. Such a circumstance would be compounded by the fact that, once exposed at the administrative review stage, an appellant would necessarily be deprived of its right to seek judicial relief on the same matter should that have become necessary. Thus, provisions should be included in the proposed rules which would authorize executive session or in camera proceedings respecting appeals on such claims which would be limited in attendance to only the Boards, their legal staffs, the administrative agency whose actions are the

subject of the appeal and its legal counsel, and the party asserting such claim, its counsel and witnesses. To this end, Robinson & McElwee suggests the addition of the following language to this section of the proposed rules:

However, in any appeal involving claims of trade secrecy or of confidentiality of information or materials contained in a permit or permit application, upon motion made and granted any party, and/or by the Board's own motion, proceedings involving the merit and disposition of such claims shall be held in camera and persons present shall be limited to (1) the Board and its legal counsel, (2) the administrative agency whose actions are the subject of the appeal and its legal counsel, and (3) the party asserting such claim, its counsel and witnesses called in support thereof.

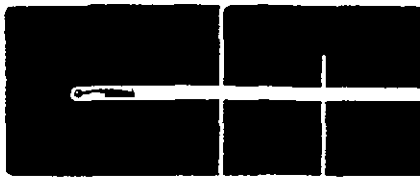
12. Section 7. (Page 5); Ex Parte Contacts

This proposed section should be revised to specifically prohibit ex parte communications to not only the Board, but also its duly appointed hearing examiners.

III. CONCLUSION

In these comments, Robinson & McElwee offers its position on major concerns presented by the proposed procedural rules. We appreciate the opportunity to present these comments and offer them in a spirit of cooperation and assistance in order to aid in the refining of the current regulatory proposals to as much a position of mutual acceptance and ease of implementation as possible.

Contact: Edward J. George, Esquire
(304) 347-8319



WEST VIRGINIA COAL ASSOCIATION

September 1, 1994

RECEIVED
SEP 06 1994
AIR QUALITY BOARD
Charleston, West Virginia

Britt A. Bernheim, Esquire
West Virginia Environmental and
Air Quality Boards
1615 Washington Street, East
Suite 301
Charleston, WV 25311-2126

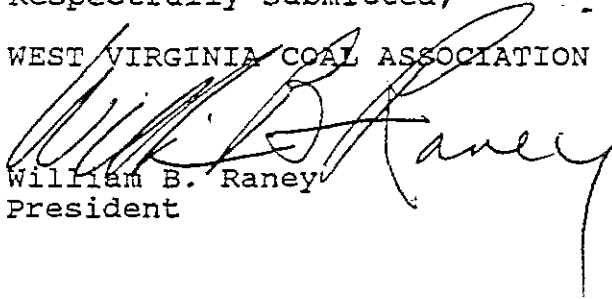
Re: Procedural Rules for the Environmental Quality and
Air Quality Boards

Dear Ms. Bernheim:

We have attached for your consideration our comments on the Boards' proposed procedural rules. Generally, though, while we believe some of the changes are appropriate, others appear to be substantive rules that must go through the legislative rulemaking review process.

Respectfully submitted,

WEST VIRGINIA COAL ASSOCIATION


William B. Raney
President

WBR:rw

Attachment

cc: Chairman, Legislative Rulemaking
Review Committee

RECEIVED
SEP 06 1994
ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

1301 Laidley Tower • Charleston, West Virginia 25301 • Telephone (304) 342-4153

WEST VIRGINIA COAL: MORE IMPORTANT THAN EVER
We've Got A Job To Do!

**West Virginia Coal Association's Comments on
Proposed Procedural Rules Governing Appeals Before
Air Quality Board and Environmental Quality Board**

I. Review of Procedural Rules Governing Appeals before the Environmental and Air Quality Boards.

A. §§ 45-26-2.2.b and 46-4-2.2.b.

The regulation provides that for persons other than the permittee, the "notice of appeal shall be filed within a reasonable time." A problem has long existed with respect to those people who do not receive actual notice of a permit action who seek to file an appeal long after a permit has been finalized and the permittee has spent considerable sums of money to construct a new unit or modify an existing one in reliance upon a "final" permit. We suggest that to be fair to all parties the Board require the Office of Air Quality and the Chiefs of the Offices of Waste Management and Water Resources to publish a notice either in the State Register or in a newspaper of general circulation in the vicinity of a permitted facility of the fact that a permit has been issued and give interested parties either 20 or 30 days from the date of publication to file an appeal with the appropriate Board. Otherwise, needless litigation will ensue concerning the meaning of a "reasonable time" for persons who do not learn about the issuance of a permit for months or years after permit issuance.

B. §§ 45-26-2.2.f & 46-4-2.2.f. Service on permit holder.

This is a good idea. The only problem with the proposal as written is it does not specify how service shall be accomplished on the permit holder.

C. §§ 45-26-4.7 & 46-4-4.7. Service by third parties on permit holder.

Is this the same provision as set forth in § 2.2.f?

D. §§ 45-26-5.1 & 46-4-5.1. Authority.

This provision allows the Board's legal counsel or hearing examiner to decide all "procedural and prehearing motions." We do not believe that it was the intention of this regulation to allow the hearing examiner or legal counsel to decide dispositive motions such as motions to dismiss or for summary judgment, but rather procedural issues involving discovery, timing of hearings and briefs, etc. We believe that the regulation should be changed to reflect the fact that the hearing examiner or legal advisor cannot, without the Board convening, rule on dispositive motions. Otherwise, we believe that the rule will both contravene the

language of the various statutes involved, which impose non-delegable duties on Board members, and make this rule a substantive, as opposed to a procedural or interpretive rule.

E. §§ 45-26-5.3 & 46-4-5.3. Form.

This regulation provides that parties shall have only ten days from receipt of a motion to respond "unless the parties and the Board agree to an extension." While the parties should not be permitted to agree to an extension where the Board will not grant one, likewise the Board should be allowed to grant an extension where the parties are unable to agree. For example, it is quite likely that situations will arise in which more than ten days are needed to respond to a lengthy dispositive motion. Under the terms of the rule as written, however, if the moving party will not agree to an extension of the ten day period even the Board cannot grant an extension. The regulation should allow the Board to grant an extension even if the moving party opposes it.

F. §§ 45-26-5.5 & 46-4-5.5. Hearing on Motion.

W.Va. Code §29A-5-1 grants all parties the opportunity for a hearing before the Board(s), including the opportunity to present "evidence and argument." The proposed rule appears to contradict these provisions. We suggest that the Boards must allow argument on all dispositive motions.

G. §§ 45-26-6.1 & 46-4-6.1. Notice of Evidentiary Hearing.

This regulation requires notice by registered or certified mail or personal service of an evidentiary hearing at least ten days before the hearing. It is unclear whether this is a requirement imposed upon the Boards or on a party which has requested an evidentiary hearing. We suggest that the regulation clarify that the Board will itself provide such notice.

H. §§ 45-26-6.8 & 46-4-6.8. Presentations.

This rule purports to impose the burden of proof on the appellant. In appeals of enforcement actions, however, the State should have to establish a prima facie case that a violation has occurred before any burden "shifts" to the appellant. This is "hornbook" administrative law. Indeed, this rule should be rewritten to establish that in appeals of enforcement action, the State must first present its prima facie case before the appellant is required to present any evidence.

In addition, no "hearing examiner" should be entitled to question witnesses except in those instances where they are serving as a hearing examiner in the absence of the Board(s).

I. §§ 45-26-6.10 & 46-4-6.10. Proposed Findings of Fact and Conclusions of Law.

While the Board may be required to issue findings of fact and conclusions of law as part of the final order, we do not believe that final disposition of cases should be delayed where the Board is willing and able to rule "on the spot" simply to allow parties to submit proposed findings of fact and conclusions of law. We believe that this regulation should be rewritten to provide that the Boards may request that the parties submit proposed findings of facts and conclusions of law but not provide that all parties shall have the right to file them even where the Boards have ruled and intend to issue an order themselves. In addition, the rule should make clear that where the Boards do allow parties to submit proposed findings and conclusions, the other parties shall be allowed to respond in accordance with W.Va. Code §29A-5-3.

RGM:dla



WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

1615 Washington Street, East, Suite 301

Charleston, West Virginia 25311-2126

(304) 558-4002

Fax: (304) 558-0899

Gaston Caperton
Governor

Dr. Charles R. Jenkins
Chairman

AGENCY RESPONSES TO PUBLIC COMMENTS 46 CSR 4: PROCEDURAL RULES OF THE ENVIRONMENTAL QUALITY BOARD FOR FILING WITH THE SECRETARY OF STATE OCTOBER 1994

I. INTRODUCTION

Proposed procedural rules of the Environmental Quality and Air Quality Boards, 46 CSR 4 and 52 CSR 1, were filed with the Secretary of State on August 3, 1994. The public comment period closed on September 5, 1994 at 4:00 p.m. Because September 5, 1994 fell on a State holiday, comments were accepted through the following day. Comments were received from the Law Firm of Robinson & McElwee on September 2, 1994, and from the West Virginia Coal Association on September 6, 1994. Because a second set of comments were filed by the West Virginia Coal Association after the close of the public comment on September 7, 1994, they have been excluded from the record and were not distributed to members of either the Air Quality Board or the Environmental Quality Board (the "Boards") in accordance with § 29A-1-4(d) of the West Virginia Code.

This documents contains the responses of the Environmental Quality Board to public comments. A separate document of responses by the Air Quality Board to public comments will also be distributed when the Air Quality Board adopts a final rule for filing with the Secretary of State.

II. RESPONSES TO COMMENTS SUBMITTED BY ROBINSON & McELWEE

COMMENT 1: SECTION NUMBERING

This comment identifies an error in the schematic numbering of proposed procedural rule 52 CSR 1. Both rules contained errors in their schematic numbering, and 46 CSR 4 has been amended to correct the problem.

COMMENT 2: 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. The procedural rule has been amended to incorporate this suggestion.

COMMENT 3: TIME FOR FILING THE NOTICE OF APPEAL

This comment suggests that paragraph 2.2.b enlarges the deadline for third parties to file an appeal before the Board beyond that allowed by § 22B-1-7 of the Code. Section 22B-1-7(c) of the Code provides that:

"For parties entitled to appeal other than the person subject to such order, permit or official action, an appeal shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which service was complete."

W. Va. Code § 22B-1-7(c) requires that appeals of orders, permits, and other official actions, must be filed within thirty days of service. For appeals of the failure or refusal of official action, the appeal must be filed within a reasonable time. Thus, paragraph 2.2.b of 46 CSR 4 has been amended in response to comment 3.

COMMENT 4: SUBSTANTIATION OF GROUNDS FOR NOTICE OF APPEAL FILED BY THIRD PARTY APPELLANTS

This comment suggests an amendment to paragraph 2.2.c to require adequate substantiation by third party appellants of their legal standing to bring such an action. The information required by the form contained in Appendix A should be sufficient to provide adequate notice of the claims of any appellant. Further, in order to preserve the informality of the administrative process, and the access to administrative review before the Boards by third party appellants appearing pro se, paragraph 2.2.c will not be amended in response to comment 4.

COMMENT 5: APPEAL OF AIR ORDERS BY THIRD PARTIES TO THE AIR QUALITY BOARD

This comment suggests that third party appeals to the AQB are precluded by language in section five of the Air Pollution Control Act (W.Va. Code § 22-5-5), which limits appeals of the issuance of cease and desist orders and permit suspensions to those persons upon whom such order has been served. Indeed, W. Va. Code §§ 22-5-5 and 22-5-14 preclude the appeal of cease and desist orders or permit suspensions by third parties, and paragraphs 2.2.e of 46 CSR 4 has been amended in response to this comment.

COMMENT 6: PUBLIC NOTICE AND RECORDATION OF INFORMAL PROCEEDINGS

Written motions filed in advance of an evidentiary hearing may address a variety of matters, including stay requests,

discovery, motions for summary judgment on all or part of an appeal, and evidentiary matters. This comment suggests that subsection 5.5 (now 5.6) of the rule should be amended to limit the use of telephonic hearings to requests for stay, and that a provision be made for advertisement of such telephonic hearings in order to comply with the Open Governmental Proceedings Act and the West Virginia Administrative Procedures Act, and that recordation of the telephonic hearing be required.

The disposition of motions in which facts are not in dispute do not require the agency to hold a meeting of a quorum of the Board to conduct an oral evidentiary hearing. Furthermore, it would overburden the volunteer members of the Boards and tax the Boards' slim financial resources if a quorum of the respective Boards must be convened to hear arguments and decide each motion that is filed before it.

Nothing in the proposed rules prohibits either Board from convening a quorum to hear arguments on a motion. Further, the Boards may utilize informal telephonic proceedings for the disposition of the various written motions that are filed in advance of an evidentiary hearing. Otherwise, a decision may be made upon the written submissions, and no further proceeding is necessary.

A. The Boards would be in Violation of the Administrative Procedures Act if they were Required to Convene a Quorum to Conduct Hearings on Stay Requests.

W.Va. Code § 22B-1-8(d) requires the Boards to make a decision on a request for stay within five days of its receipt. W.Va. Code § 29A-5-1(a) requires the parties to a hearing to be given written notice at least ten days prior to the hearing. If "hearing" as contemplated by W.Va. Code § 29A-5-1(a) by a quorum of either Board were required in order to consider each stay request, W.Va. Code § 22B-1-8(d) would conflict with W.Va. Code § 29A-5-1(a).

B. The Boards would be in Violation of the Open Governmental Proceedings Act if they were Required to Convene a Quorum to Conduct Hearings on Stay Requests.

The Open Governmental Proceedings Act at W.Va. Code §§ 6-9A-1 to 7 prescribes the procedures that must be followed by agencies organized under the executive branch of government in the conduct of their business. In particular, section 6-9A-3 of the Act requires that:

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each

notice shall state the time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

Thus, if a meeting of a quorum of the Board were required to consider each stay request, and such a meeting and such a meeting constituted a "meeting" under the Open Governmental Proceedings Act, W.Va. Code § 22B-1-8(d) would conflict with W.Va. Code § 6-9A-3, which requires that notice of a meeting be filed with the secretary of state's office for publication in the State Register at least five days in advance of the meeting, unless the meeting could be justified as an "emergency."

C. Informal Proceedings for the Purpose of Deciding Motions do not Meet the Definition of a "Meeting" Under the Open Governmental Proceedings Act.

If a hearing on a motion were held, it does not meet the definition of a "meeting" under the Open Governmental Proceedings Act. Contrary to the assertion of this comment, it is doubtful whether a hearing on a motion which is not dispositive of an appeal comes within the definition of a "meeting" under W.Va. Code § 6-9A-2(4).

A "Meeting" is defined by the Open Governmental Proceeding Act in W.Va. Code § 6-9A-2(4) to mean:

The convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter, but such term does not include (a) any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding. . . .

W. Va. Code § 22B-1-6(a) requires that "any appeal hearing brought pursuant to this chapter shall be conducted by a quorum of the board. . . ." While the term "hearing" is not defined within chapter 22B, the meaning may be discerned by looking to section 22B-1-7(e), which, among other things, provides that "the board shall hear the appeal de novo, and evidence may be offered on behalf of the appellant, appellee and by any intervenors." Thus, the "hearing" contemplated by W.Va. Code § 22B-1-6 is an oral evidentiary hearing that is conducted on the record, and informal or other telephonic hearings which are held to decide procedural motions, motions for stay, or other prehearing motions do not require a quorum of the Board and are not within the meaning of a "meeting" under W.Va. Code § 6-9A-2(4).

D. The Recordation of Informal Proceedings is Not Required.

This comment also suggests that any informal proceeding must be recorded by stenographic or other means. The recording of evidentiary hearings by stenographic or other mechanical means is required under both W.Va. Code § 29A-5-1(a) and § 22B-1-6(c). As discussed above, since informal and telephonic proceedings are not "hearings" as contemplated by either W.Va. Code chapter 29A, article 5, or chapter 22B, article 1, their recordation by stenographic or other mechanical means is not required. Further, the administrative cost and difficulty of arranging for a court reporter to be present upon short notice, would prohibit the Boards from conducting any such informal proceeding.

COMMENT 7: PRESENTATION DURING EVIDENTIARY HEARINGS

This comment suggests that subsection 6.8 should be amended to require parties to serve on all other parties, at least ten days prior to a hearing, the names of witnesses to be presented and a summary of their expected testimony. Information concerning witnesses and their expected testimony is addressed in the Code as amended in 1994 by § 22B-1-8. The suggested amendment goes beyond the requirement of the Code, and the rule will not be amended to incorporate the suggestion.

This comment also raises concerns regarding upon whom the burden of proof rests. Please see response to comment H below.

COMMENT 8: FINDINGS OF FACT AND CONCLUSIONS OF LAW

This comment suggests that subsection 6.10 of the proposed rules does not conform with the West Virginia Administrative Procedures Act. Subsection 6.10 of the procedural rules states that findings of fact and conclusions of law may be submitted in accordance with the article 5, chapter 29A of the Code, which is the article of the West Virginia Administrative Procedures Act that addresses contested cases. In response to the comment, subsection 6.10 has been amended to enumerate exceptions as well as findings of fact and conclusions of law.

COMMENT 9: RULING OF THE BOARDS IMMEDIATELY FOLLOWING EVIDENTIARY HEARINGS

This comment suggests that subsection 6.11 should be amended to require the Boards to render their decision at the close of an evidentiary hearing. The suggestion to require the Boards to make a decision in a case immediately upon the close of a hearing would deprive the Boards of the flexibility to require additional proceedings, to receive legal advice from the Boards' counsel or hearing examiner, or to deliberate on the matter. Further, if a hearing has been held before less than a quorum of Board members or before a hearing examiner in accordance with W. Va. Code

§ 22B-1-6(a), this suggestion would require a decision to be made by only those members present, by the hearing examiner, and may force the Board to be in violation of other provisions in its procedural rules.

COMMENT 10: AUTHORITY TO RULE ON MOTIONS

Subsection 5.1 (now 5.2) of the procedural rules was drafted to reflect a grant of authority by the Boards to their legal counsel to act as hearing examiner to decide all procedural motions as well as motions for stay. Further, the Boards have granted its legal counsel the discretion to conduct informal hearings as the situation warrants.

This comment suggests that subsection 5.1 of the rules should be amended to include a limiting grant of authority to the Boards' hearing examiners to rule on procedural motions to the extent authorized by the West Virginia Administrative Procedures Act at W.Va. Code §29A-5-1(d), which provides:

(d) All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three [§ 29A-3-1 et seq.] of this chapter.

Thus, to the extent that the Boards' legal counsel or hearing examiner has been delegated the authority to make decisions beyond items 1-5 enumerated in § 29A-5-1(d), that authorization should be set forth in the procedural rule in accordance with §29A-5-1(d)(5).

As proposed, subsection 5.1 of the procedural rules provided that:

Unless determined otherwise by the Board, procedural motions, motions for stay, and other non-dispositive prehearing motions may be decided by the Board's duly authorized legal counsel or hearing examiner.

In response to public comments, subsection 5.1 has been amended and replaced with subsection 5.2, which retains the language of the rule currently in effect, and has been redrafted to reflect the specific grant of authority to the Boards' legal counsel or hearing examiner "to dispose of stay requests, procedural motions, discovery motions, and any other request which tends to regulate the course of the hearing."

COMMENT 11: CONDUCT OF HEARINGS OF APPEALS OF CLAIMS OF CONFIDENTIALITY BY THE AIR QUALITY BOARD

The disclosure or protection of confidential material by the Office of Air Quality is governed by 45 CSR 31. Paragraph 4.3.b of the 45 CSR 31 provides for an appeal to the Air Quality Board of a determination by the Office of Air Quality of whether material is to be afforded the protection of confidentiality. This comment suggests an amendment to subsection 6.5 of the proposed procedural rules to include provisions for the handling of information in a proceeding to determine whether the information will be protected as confidential.

Confidentiality issues frequently arise during the course of appeals before both Boards. Thus, the proposed procedural rule has been amended to provide for the in camera review of confidential material regardless of whether encountered in the ordinary course of an appeal or in an appeal of a confidentiality determination.

COMMENT 12: EX PARTE CONTACTS

Section 7 of the proposed procedural rule addresses the prohibition of ex parte contacts with the members of the Boards. This comment suggests an amendment to the section in order to prohibit ex parte contacts with the Boards' duly appointed hearing examiners. The procedural rule has been amended to prohibit ex parte contacts with the Board or any member of the Boards' staff.

III. RESPONSES TO COMMENTS PREPARED BY THE WEST VIRGINIA COAL ASSOCIATION

COMMENT A: TIME FOR FILING THIRD PARTY APPEALS

This comment raises the concern that the time for filing third party appeals must be limited. This suggestion would have the Board require the DEP to publish notices of permit actions in order to toll a time limitation. While public notice of such actions would be beneficial to members of the public, the Boards are without the authority to require the DEP to publish such notice. In any case, the limiting the time to file third party appeals has been addressed in the amended procedural rule.

COMMENT B: SERVICE ON PERMIT HOLDER

This comment suggests that paragraph 2.2.f does not provide the method by which service must be complete. Section four of the proposed procedural rules is entirely devoted to the topic of the service of documents.

COMMENT C: DUPLICATE PROVISIONS

This comments points out that paragraphs 2.2.f and 4.7 are identical. Subsection 4.7 of the proposed rule has been deleted.

COMMENT D: AUTHORITY TO RULE ON DISPOSITIVE MOTIONS

Prior to their entry, all orders issued by the Boards are executed by the chairman of the Board, or the Board's legal counsel or hearing examiner who has determined that the order has been duly authorized by the Board. Once executed by the chairman of the Board or by the Board's legal counsel or hearing examiner, the order is officially "entered" into the official record by the Clerk of the Boards.

Dispositive motions, such as a motion for summary judgement, or a motion to dismiss, may be filed prior to hearing. Dispositive motions ask the Board to dispose of the appeal without the taking of further evidence.

W.Va. Code § 29A-5-1(a) allows informal disposition to be made of an appeal by stipulation, agreed settlement, consent order or default. Thus, unless the request for dismissal is made by the appellant, operates by consent or settlement, or is for default, dispositive motions are acted upon by a majority of the Board members.

Execution of an order to dismiss by the chairman of the Board, the Board's legal counsel or hearing examiner signifies that the order has been properly acted upon by the Board. Subsection 5.1 has been amended (now as section 5.2) in response to other comments, but will not be amended to contain any prohibition as suggested by the Association. Subsection 5.1 has been added to clarify the practice of execution of orders by the Board.

COMMENT E: TIME FOR RESPONDING TO MOTIONS

This comment proposes an amendment to subsection 5.3 in order to allow the Board to extend the ten (10) day time limitation for responding to motions even if a party objects to the extension. The language in the proposed rule is identical to the existing 46 CSR 4. However, subsection 5.3 has been amended to incorporate the suggestion.

COMMENT F: PRESENTATION OF EVIDENCE AND ARGUMENT

This comment suggests that subsection 5.5 of the proposed procedural rule, which allows the Boards to rule upon a motion without a hearing, contradicts the West Virginia Administrative Procedures Act at W.Va. Code § 29A-5-1. As discussed above, to comment 6, the "hearing" contemplated by W.Va. Code § 29A-5-1 is a formal evidentiary hearing conducted on the record which reaches the merits of the case. W.Va. Code § 29A-5-1 cannot be read to require the Boards to conduct a formal evidentiary hearing for each motion that they receive.

COMMENT G: SERVICE OF NOTICE OF HEARING

This comment suggests that subsection 6.1 of the proposed procedural rules could be interpreted to require the parties to an appeal to give ten days written notice of a hearing, and that the section should be amended to emphasize that it is the Boards that must give notice to the parties. It was not intended to require the parties to provide notice, and the section has been amended to incorporate the suggestion.

COMMENT H: PRESENTATIONS

This comment suggests that subsection 6.8 of the proposed procedural rules shifts the burden of proof onto the appellant contrary to "hornbook" administrative law, which requires the State to establish a prima facie case that a violation has occurred. Of course, this comment neglects to recognize that the great majority of appeals that are received by the Boards involve challenges to permits issued by the State, and it is not "hornbook" law to require the State to prove that its permit is valid. In fact, it is "hornbook" law to require the proponent of an action to shoulder the burden of proof.

Further, the existing language of 46 CSR 4.18(a) rests the burden of proof upon the appellant. 46 CSR 4.18(a) provides that:

The Board shall hear the appeal de novo, with appellant(s) opening the hearing and presenting testimony and offering exhibits that support the petition. Appellant's witnesses will be subject to cross-examination by any other party to the appeal or by the Board. At the conclusion of appellant's case, the appellee may then present testimony and offer exhibits in support of the final order. After initial presentations have been made, both the appellant and the appellee may present rebuttal evidence on the issues in the case

In order to preserve the present practice of presentation before the Boards, the section has been amended to incorporate the existing language of 46 CSR 4.18(a).

The comments has also been made that "in addition, no 'hearing examiner' should be entitled to question witnesses except in those instances where they are serving as a hearing examiner in absence of the Board(s)." The comment gives no rationale for this comment, and subsection 6.8 of the proposed rules will not be amended to incorporate the suggestion.

COMMENT I: FINDINGS OF FACT AND CONCLUSIONS OF LAW

The comment suggests an amendment to subsection 6.10 of the proposed procedural rule to preclude the submission of proposed findings of fact and conclusions of law when and if the Board rules "on the spot." This suggestion is clearly contrary to W.Va. Code § 29A-5-3, which requires that each party to a proceeding be allowed to propose findings of fact and conclusions of law. However, the parties may waive their right to submit such proposed findings of fact and conclusions of law. However, the section has been amended to incorporate the suggestion of Comment 8 above.



WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

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

(304) 558-4002

Fax (304) 558-0899

Gaston Caperton
Governor

Dr. Charles R. Jenkins
Chairman

October 1994

SUMMARY OF AMENDMENTS
MADE TO PROPOSED RULE 46 CSR 4
PROCEDURAL RULES OF THE ENVIRONMENTAL QUALITY BOARD
ADOPTED BY THE ENVIRONMENTAL QUALITY BOARD FOR FINAL FILING

Amendments made in response to public comments. All amendments made by the Environmental Quality Board (the "Board") to the proposed rule that were made in response to comments received during the public comment period are identified in the agency's written responses to public comments. The agency's responses to public comments includes identification of all instances where the agency has declined to amend to the proposed rule in response to public comments.

Other Amendments. The agency has made various amendments to the proposed rule in order to effect drafting and other improvements to the language.

A summary of amendments to 46 CSR 4:

- Section 1. Subsection 1.3 was amended to include the specific grant of authority in W.Va. Code § 22B-1-3(c) to promulgate procedural rules. Subsection 2.2.e was replaced with amended language in subsection 2.2.f to reflect the requirement contained in chapter 22B, article 1 of the Code, which requires the Board to serve the chief with a copy of the Notice of Appeal.
- Section 2. Subsection 2.3 was amended to effect a drafting improvement.
- Section 3. Subsection 3.2 was added to the rule to require numbering of pages certified to the Board. Subsection 3.3 is identical to subsection 3.2 in the proposed rule, with the addition of the heading "Evidence." Subsection 3.4 is similar in substance to subsection 3.3 of the proposed rule, with the addition of clarifying language.

- Section 4. Subsection 4.5 was amended to effect a drafting improvement. Subsection 4.7 was amended in response to public comments; please see agency responses to public comments for a detailed explanation.
- Section 5. For a detailed discussion of the amendments made to this section, see agency responses to public comments. The procedural rule was amended to add subsection 5.1 in order to clarify the procedure that is in use to execute orders acted upon by the Board. Subsection 5.2 of the procedural rule was amended in response to public comments. Subsections 5.3, 5.4, and 5.5 of the procedural rule are substantially the same as the proposed procedural rule subsections 5.2, 5.3, and 5.4, respectively. Subsection 5.6 was amended in response to public comments.
- Section 6. Subsection 6.1 was amended in response to public comments. Subsection 6.2, and subsection 6.5 have been amended to effect drafting improvements to the rule. Subsection 6.8 was amended in response to public comments; for a detailed explanation of the amendment, please see agency responses to public comments. Subsection 6.11 was amended to eliminate a dual heading.
- Section 7. This section was amended in response to public comments; please see agency responses to public comments for a more detailed explanation.
- Section 8. This section was added to the rule to give notice to the public that in camera proceedings are available to resolve disputes regarding claims of confidentiality in appeals before the Board.
- Appendix A. Appendix A contains the form for filing a notice of appeal. Appendix A has been amended to effect drafting improvements.



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

A. RENEE COE
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

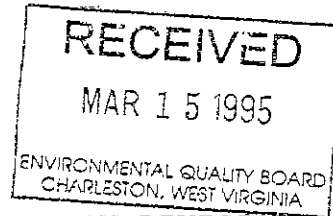
(Plus all the volunteer
help we can get)

FAX: (304) 558-0900

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770



TO: Fran Hunter

AGENCY: DEP, Environmental Quality

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: March 10, 1995

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 4 TITLE: 46 DEP, Environmental Quality

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: *Frances E Hunter*

TITLE OF PERSON SIGNING: *Executive Secretary*

DATE: *4-3-95*

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.