

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

Form #2

Do Not Mark In This Box

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE 11/9/06 11:15AM *je*
ADMINISTRATIVE LAW DIVISION

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WV Dept of Environmental Protection/Air Quality Board TITLE NUMBER: 52

RULE TYPE: Procedural CITE AUTHORITY: WV Code §§29A-3-3; 22B-1-3(c)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Procedural Rules Governing Appeals Before The
Air Quality Board

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON December 15, 2006 AT 12:00 a.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

WV Dept of Environmental Protection

Air Quality Board

Jackie D. Shultz, Clerk

601 57th Street, S.E.

Charleston, WV 25304

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Stephen R. Timmerman
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
AIR QUALITY BOARD**

BRIEFING DOCUMENT

**RULE TITLE: PROCEDURAL RULES GOVERNING APPEALS BEFORE THE AIR
QUALITY BOARD**

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

B. SUMMARY OF RULE:

Address change for filing appeal related documents to the appropriate Board

C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:

**Change address and phone number for filing appeals and related documents from 1615
Washington Street, East West Virginia 25311. (304)558-4002 to 601 57th Street,
S. E., Charleston, West Virginia 25304 (304) 926.0445.**

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 52CSR1 Procedural Rules Governing Appeals Before The Air Quality Board

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Department of Environmental Protection

Address: Air Quality Board
601 57th Street, S.E.
Charleston, West Virginia 25304

Phone Number: 304-926-0445 Email: clerk@wvaqbeqb.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

Proposed changes are clerical changes only. There will be no impact on costs and revenue of state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: 52CSR1 Procedural Rules Governing Appeals Before The Air Quality Board

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Proposed changes are clerical changes only. There will be no impact on costs and revenue of state government.

Date: _____

Signature of Agency Head or Authorized Representative

Shawn P. Timmerman

TITLE 52
PROCEDURAL RULE
WEST VIRGINIA AIR QUALITY BOARD

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE 11/9/06 11:15AM Jc
ADMINISTRATIVE SERVICES DIVISION

SERIES 1
PROCEDURAL RULES GOVERNING APPEALS
BEFORE THE AIR QUALITY BOARD

§52-1-1. General.

1.1. Scope. -- This series governs the practice and procedure before the air quality board (the "board") in adjudicatory proceedings. [Note: The air quality board was formerly known as the air pollution control commission.]

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

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

1.4. Filing Date. -- ~~November 30, 1994.~~ November 15, 2006.

1.5. Effective Date. -- ~~December 30, 1994.~~

1.6. Repeal of Former Rule. -- This procedural rule repeals and replaces ~~45 CSR 26 "Rules governing hearings, appeals and procedures before the West Virginia Air Pollution Control Commission"~~ 52CSR1 Procedural Rules Governing Appeals Before The Air Quality Board which became effective on ~~January 6, 1980.~~ December 30, 1994.

§52-1-2. 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.~~ 601 57th Street, S.E., Charleston, West Virginia 25304, (304) 926-0445. 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 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~~ Office of Legal Services, West Virginia Department of Environmental Protection.

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.~~ 601 57th Street, S. E., Charleston, West Virginia 25304.

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.

§52-1-5. 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 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 W. Va. Code §22-5-5. 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.

§52-1-6. 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~~; 601 57th Street, S.E. Charleston, West Virginia 25304.

6.5. Conduct of Hearings. All appeal hearings shall be open to the public, and shall be conducted in accordance with W. Va. Code §29A-5-1 et seq. All parties to a hearing, their legal counsel, and spectators, shall conduct themselves in a respectful manner. Public displays of any kind at hearings shall not be permitted. The board may, at its discretion, recess or continue any hearing in which the parties, legal counsel, witnesses or spectators conduct themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of such hearing.

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 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.

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 W. Va. Code §29A-5-1 et seq. 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 W. Va. Code §29A-2-9.

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 W. Va. Code §29A-5-2.

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.

APPENDIX A

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

APPELLANT'S NAME,)	
)	
Appellant,)	
)	
v.)	Appeal No. _____
)	
CHIEF , DIRECTOR, OFFICE OF AIR QUALITY,)	
DIVISION OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Appellee.)	

NOTICE OF APPEAL

The appellant(s) named above respectfully represents that it is aggrieved by (identify the order, failure or refusal, or permit, and give date of the order or permit): _____

The appellant therefore prays that this matter be reviewed and that the Board grant the following relief (describe the relief sought): _____

The facts alleged relevant to this appeal and the particular grounds on which this appeal is based, including questions of fact and questions of law to be determined by the Board, are set forth in detail in numbered paragraphs and attached hereto. Amendment of this Notice of Appeal may be had only by leave of the Board, and only for good cause shown.

Dated this _____ day of _____, 20__.

(Signature)

(Address)

(Telephone)