

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

Bureau of the Environment
Air Quality Board

AGENCY: (Formerly the Air Pollution Control Commission) TITLE NUMBER: 52

RULE TYPE: Procedural; CITE AUTHORITY § 29A-3-3 W. Va. Code

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 45CSR26

TITLE OF RULE BEING AMENDED: Rules Governing Hearings, Appeals, and
Rule Making Procedures Before the Air Pollution Control Commission

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Series 1

TITLE OF RULE BEING PROPOSED: Procedural Rules Governing Appeals
Before the Air Quality Board

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 September 5, 1994 AT 4:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Britt A. Bernheim

Air Quality Board

1615 Washington Street, East, Suite 301

Charleston, West Virginia 25311-2126

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



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

4.00

APPENDIX A

SUMMARY OF PROPOSED RULE 52 CSR 1

PROCEDURAL RULES GOVERNING
APPEALS BEFORE THE AIR QUALITY BOARD

The proposed rule repeals and replaces 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 (now known as the Air Quality Board) (the "Board") to reflect the passage of H.B. 4065 during the 1994 legislative session, which reorganized the Division of Environmental Protection.

Because the Board is no longer responsible for the promulgation of legislative rules for the protection of air quality, the rulemaking provisions have been deleted from the proposed procedural rule. The proposed procedural rule instead emphasizes explanation of the appeal process. Appeal procedures have been augmented in order to provide guidance to parties wishing to appeal orders and permit actions by the Division of Environmental Protection, as well as to provide a level of certainty to the appeal process.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: "Procedural Rules Governing Appeals Before the Air Quality Board."
Type of Rule: Procedural
Agency: Air Quality Board
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 before the Air Quality Board.

4. Explanation of overall economic impact of proposed rule:

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

Date: August 1, 1994.

Signature of Authorized Agency Representative:


Britt A. Bernheim
Legal Counsel
Air Quality Board.

FILED

TITLE 52
PROCEDURAL RULES
WEST VIRGINIA AIR QUALITY BOARD

AUG 3 4 30 PM '94

SERIES 1
PROCEDURAL RULES GOVERNING
APPEALS BEFORE THE AIR QUALITY BOARD

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 45-26-1. **General.**

1.1. **Scope.** This series governs the practice and procedure before the Air Quality 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 Air Quality 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.

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 hearings, appeals and procedures before the West Virginia Air Pollution Control Commission" which became effective January 6, 1980.

§ 45-26-2. **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 is begun by filing a Notice of Appeal.

a. **Form.** The Notice of Appeal and all subsequent submissions shall be in the form as prescribed in Appendix A.

b. **When to file.** Where authorized by law, a person may file a Notice of Appeal in the form prescribed for that purpose by these rules. Unless otherwise prescribed by statute, the Notice of Appeal shall be filed with the Clerk of the Boards within thirty days of the date upon which the order or notice of other action (such as permit denial, issuance, revocation, or modification) was received. In the case of a Notice of Appeal filed by a person other than the permittee, the 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. 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 Chief. Contemporaneous with filing the Notice of Appeal on the Board, appellant shall serve a copy of the Notice of Appeal on the Chief of the Office of Air Quality, 1558 Washington Street East, Charleston, West Virginia 25311.

f. 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, 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 Board. 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.

2.3. Answer. The appellee 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.

§ 45-26-3 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. 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.

3.3. Amendment. Any party may request amendment to the Certified Record upon written application to the Board.

§ 45-26-4. Filing and Service of Documents.

4.1. Where to file: all documents required to be filed with the Air Quality Board under these rules shall be filed with the Clerk of the Boards, Air Quality Board, 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 Air Quality Board under these rules shall be served contemporaneously upon all other parties.

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.

4.7. Service by Third Parties 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, 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 Board. 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.

§ 45-26-5 Motions.

5.1. Authority. 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. Unless otherwise directed by the Board, all procedural and prehearing motions may be decided by the Board's duly authorized legal counsel or hearing examiner.

5.2. Content. Any application to the Board, following the initial 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.

5.3. 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. A party shall have ten (10) days from receipt of the motion to respond to the same, unless the parties and the Board agree to an extension.

5.4. 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.

5.5. Hearing on Motion. The Board may rule on motions with or without a hearing. If a hearing on the motion is held, it may be conducted by the Board's duly authorized legal counsel or hearing examiner, and may be conducted in the Board's offices or by telephone.

§ 45-26-6 Evidentiary Hearings.

6.1. Notice of Evidentiary Hearing. Each party in any evidentiary hearing held by the Board 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.

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 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. 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.

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. Unless the Board directs otherwise, the appellant shall open the hearing and shall bear the burden of proof. Appellant may present testimony and offer exhibits that support the Notice of Appeal. At the conclusion of the appellant's case, the appellee may present testimony and offer exhibits in support of the action appealed. Witnesses shall be subject to cross examination by any other party to the appeal, and may be questioned by the Board and by the hearing examiner.

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 seven (7) 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. Final Orders. 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 in the state register in accordance with section 9, article 2, chapter 29A of the West Virginia Code.

6.12. Rules of Evidence. Consistent with section two, article five, chapter 29A of the Code of West Virginia, the rules of evidence as applied in civil cases in the circuit courts of West Virginia will inform evidentiary hearings before the Board.

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 Civil Rules of Procedure will inform 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 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.

APPENDIX A

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

APPELLANT'S NAME,

Appellant

v.

CHIEF, OFFICE OF AIR QUALITY,
DIVISION OF ENVIRONMENTAL
PROTECTION,

Appellee.

Appeal No. _____

NOTICE OF APPEAL

The appellant(s) named above respectfully represents that it is aggrieved by the following terms and conditions of the identified order, permit, or action of the Chief: _____, which was received by appellant on: _____. The appellant therefore prays that this matter be reviewed and that the Board grant the following relief: _____.

The facts alleged relevant to this appeal and the particular grounds on which this appeal is based 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 _____, 19__.

(Signature of appellant)

Address

Telephone

**DIVISION OF ENVIRONMENTAL PROTECTION**10 McJunkin Road
Nitro, WV 25143-2506GASTON CAPERTON
GOVERNORDAVID C. CALLAGHAN
DIRECTOR

August 3, 1994

Ms. Judy Cooper
Director, Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
Charleston, West Virginia 25305

RE: CSR-46-4 - Procedural Rules Governing Appeals
Before the Environmental Quality Board

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule with your Office as a proposed procedural rule.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,

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

David C. Callaghan
Commissioner
Bureau of Environment

DCC;RTH:cc

Attachment



DIVISION OF ENVIRONMENTAL PROTECTION

10 McJunkin Road
Nitro, WV 25143-2506

GASTON CAPERTON
GOVERNOR

DAVID C. CALLAGHAN
DIRECTOR

August 3, 1994

Ms. Judy Cooper
Director, Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
Charleston, West Virginia 25305

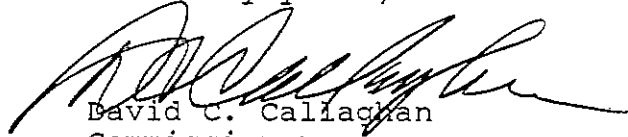
RE: CSR-52-1 - Procedural Rules Governing Appeals
Before the Air Quality Board

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned rule with your Office as a proposed procedural rule...

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,


David C. Callaghan
Commissioner
Bureau of Environment

DCC;RTH:cc

Attachment