

11/28/94

**TITLE 46
PROCEDURAL RULES
DIVISION OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

**SERIES 4
RULES OF PROCEDURE**

§46-4-1. General

1.1. Scope -- The rules of procedure herein shall govern and apply to appeal hearings before the State Water Resources Board. The purpose of these rules is to provide a fair and orderly ascertainment of the facts and to promote the ends of justice and fairness in the administration and effectuation of the statutory purpose of the appeal.

1.2. Authority -- W. Va. Code §§29A-3;, 20-5 and 5A

1.3. Filing Date -- June 27, 1984

1.4. Effective Date -- July 27, 1984

1.5. Forms --

a. Notice of Appeal

b. Notice of Hearing

c. Motions will generally follow the format used in civil cases in the Circuit Courts of West Virginia.

1.6. Filing and Service of Documents and Orders.

a. Where to file: All documents required to be filed in an appeal under these rules shall be filed with the Executive Secretary of the State Water Resources Board either by personal delivery to the Board's Offices at 1260 Greenbrier Street or by mail to the Board's mailing address which is 1205 Greenbrier Street, Charleston, West Virginia 25311.

b. How to file: All filing may be accomplished by personal delivery or first class mail and shall be in six (6) duplicate sets.

c. When filing effective: Filing is effective upon delivery or upon mailing as determined by postmark.

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

e. Method of service; service on attorney: Service of documents shall be accomplished by personal delivery or by registered or certified mail, return receipt requested, unless otherwise provided in these rules. Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney.

f. When service effective: In the case of personal delivery, service is effective upon delivery. In the case of mailing, service is effective upon mailing.

g. Proof of service: Unless otherwise provided in these rules, all documents required to be served shall be accompanied by proof of service in the form of a certificate of service. The certificate of service shall include a statement of how service was accomplished.

h. Time for filing Briefs: Unless otherwise ordered by the Board, the appellant shall have twenty (20) days after receipt of the hearing transcript to file its brief. The appellee shall have twenty (20) days after receipt of appellant's brief to file its brief. The appellant and appellee shall have ten (10) days to file a

reply to each other's respective briefs if so desired.

1.7. Third Party Appellant(s) -- Where an appeal 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 the order of the Chief, Division of Water Resources, Department of Natural Resources, 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 contested order shall be considered a party in interest in the appeal proceedings and shall have the right to intervene.

1.8. Hearing Presentation --

a. The Board shall hear the approval 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, providing such evidence is not cumulative, repetitive or immaterial to the case. All witnesses shall be subject to cross-examination as set forth herein.

b. All appeal hearings shall be conducted in accordance with Article 5 of Chapter 29A of the West Virginia Code of 1931, as amended, as if the same were herein set out in full.

c. Written stipulations by the parties to some or all the facts may be filed with the Executive Secretary of the Board before the hearing of an appeal or may be read into the record at the time the hearing is held.

d. Closing statements and statements of position may be made by the parties to the appeal before the hearing is closed or at such time as designated by the Board. No order shall be made which is not supported by competent legal evidence as defined by West Virginia Code 29A-5-2.

e. Appeal hearings shall be open to the public.

1.9. Continuance of Hearings -- After date for hearing has been set, continuance will not be granted by the Board except for good and sufficient cause. A party who desires a continuance shall, immediately upon receipt of notice of the hearing, or as soon thereafter as facts requiring such continuance comes to his knowledge, file a written motion with the Board stating in detail the reasons why such continuance is necessary. Such motion shall be filed at least five (5) days prior to the date of hearing. In case of hardship or other good cause, a party may by oral motion move for a continuance at any time up to the time of the hearing. The Board may grant such a continuance and may at any time order a continuance upon its own motion.

1.10. Conduct at Hearings -- All parties to hearings, their counsel, and spectators, shall conduct themselves in a respectful manner. Demonstrations of any kind at hearings shall not be permitted. The Board may, at its discretion, recess or continue any hearing in which the parties, attorneys, witnesses or spectators conduct themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of such hearing.

1.11. Briefs, Oral Argument -- The Board may require the parties to file briefs and reply briefs, to present oral argument or both. It shall be the policy of the Board to encourage oral argument in lieu of the filing of briefs. Requests by the Board for the filing of briefs or the presentation of oral arguments shall be made before or at the conclusion of the taking of evidence. The time schedule for filing of briefs and reply briefs shall be established by the

Board. The parties shall file six (6) duplicate sets of the brief or reply brief with the Board and shall serve a copy of the same on all other parties as required by Section 1.6 of these regulations.

The requirements of this section may be altered by agreement of the parties with the consent of the Board.

1.12. Motions - Any application to the Board, following the initial appeal, shall be by motion. Such motions may include, but are not limited to, questions regarding jurisdiction, sufficiency of service of process, failure to state a claim upon which relief can be granted, request for a more definite statement, summary judgement, change of hearing location, dismissal of action or particular items of appeal and amendment of a Notice of Appeal.

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 affidavit. The proponent of the motion shall serve it on the Board and all parties to the appeal as required by Section 1.6 of these regulations. 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.

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 the hearing, simplify the issues and dispose of procedural requests or similar matters. Upon motion of any party to an appeal and for good cause shown, the Board may, within its discretion, grant leave to amend the Notice of Appeal or any other documents filed in a proceeding before the Board.

1.13. Rules of Evidence and Procedures - The rules of evidence as applied in civil cases in the Circuit Courts of West Virginia will be followed in appeal hearings before the Board (as provided by West Virginia Code 29A-5-2). The differences in the functions of courts and administrative boards preclude the "wholesale

transportation" of the Rules of Civil Procedure to the Boards hearings; however some informal rules must be followed to effectively manage the proceeding.

As a matter of policy then and to assure fairness, it is reasonable to utilize appropriate Rules of Procedure as guidelines in appeals before the Board to ascertain facts upon which the Board will make decisions in the interest of justice and to achieve its statutory purpose.