

APPEAL PROCESS

AIR QUALITY BOARD:

The West Virginia Air Quality Board's purpose is to adjudicate air quality appeals in a fair, efficient and equitable manner for the people of West Virginia. The Board is comprised of seven part-time Board members who are assisted by a full-time four person staff. You should address all appeal related documents and materials to the Clerk of the Boards.

FILING AN APPEAL WITH THE AIR QUALITY BOARD:

The West Virginia Air Quality Board is responsible for hearing appeals of permits and enforcement decisions issued by the West Virginia Department of Environmental Protection's Division of Air Quality. While citizens and regulated persons may file appeals with the Board, it is important to note that in most cases, the Board can only accept appeals which are filed within **thirty days** of the permit applicant's receipt of the permit or order.

In order to file an appeal with the Air Quality Board, the appellant (person filing the appeal) should obtain a Notice of Appeal form from the Board office. For your convenience, a copy of this form is enclosed. The appeal must include the permit or order which you are appealing, the date such permit or order was issued, and the relief being sought. (Examples of the relief being sought could include revisions to or the revocation of the permit; or vacating the order.)

When you file the Notice of Appeal you should attach a detailed description of your objections, whether factual or legal, to the permit or order. (Examples of factual or legal objections could include the issuance of the permit; or the conditions and requirements of the permit or order.) You should also include a statement of any facts which are relevant to the appeal.

In addition, when filing an appeal you must attach a Certificate of Service which lists the names and addresses of the parties to the appeal. Parties of an appeal include the permit holder and the governmental agency which issued the permit or order. An example of a Certificate of Service is attached for your review. Once you have completed the appeal form and compiled the required documents you may simply mail the original and six copies to the Board's office located at 601 57th Street, SE, Charleston, WV 25304. Please note that it is only necessary to file one copy of the permit or order that is the subject of the Appeal. The Appeal may also be filed through personal service. Please note that a copy of the appeal must also be mailed to the permit holder (if that company or person is not the filer of the appeal).

Once the Air Quality Board receives the appeal, it will be assigned an appeal number which you should reference in any further correspondence with the Board. The Board will then serve the appeal on the appropriate governmental agency and the Department of Environmental Protection's Office of Legal

Services.

The Air Quality Board will then set your appeal for a hearing before the members of the Board. The Board usually sets the appeal hearing for about two months after the date that the appeal was filed. You will receive a Notice of Hearing from the Board informing you of the date, time and location of the hearing on your appeal. This Notice will contain a Certificate of Service which will list the names and addresses of **all** parties to the appeal. All further appeal related materials and/or documents which you submit to the Board must also be served on **all** parties to the appeal. You should use the time between filing the appeal and the hearing date to prepare for the hearing by requesting any necessary documents and conducting discovery. *See the discussion of discovery on page 3 for more information about discovery.

INTERVENOR:

If you are filing an appeal of a permit held by another person or company, that permit holder has a right to participate in the appeal. The permit holder in these situations becomes an Intervenor. It is also possible for other people who have a legal interest in an appeal, to request permission from the Board to intervene in an appeal. Once a person or company qualifies as an intervenor, they must be included on the Certificate of Service and be sent copies of all documents which you file with the Board.

CERTIFIED FILE:

After the appeal is served on the appropriate governmental agency, the Director of that agency has fourteen days to provide the Board with a certified file which contains a complete record of the proceedings out of which the appeal arises, including all documents and correspondence. This file will be located at the Board's office and is available for your review. Upon your written request, a copy of the certified file will be provided to you at a cost of .25 cents per page. See the Board's Freedom of Information Act rule for more details.

MOTIONS:

After the Appeal is filed, any request for action by the Board should be made in the form of a motion. A list of motions which the Board may address can be found at 946-4-5 (page two) of the enclosed procedural rules.

The opposing party may file an objection or response to a motion. Objections must be filed no more than ten days after the receipt of the motion unless the Board has extended or shortened the time period for filing an objection.

One type of motion which may be filed with the Air Quality Board is a Motion to Dismiss. Any party to the appeal may file a Motion to Dismiss the Appeal which details why the Air Quality Board should not consider the appeal. Although the Board may grant or deny this motion without a full evidentiary

hearing, if a motion to dismiss your appeal is filed you will have the opportunity to respond, either in writing or in a motion hearing. Your response to such motion must be filed no more than 10 days after you receive the motion.

DISCOVERY:

Discovery is the process used by parties of an appeal to gather information pertinent to the hearing from another party to the appeal. Certain discovery requests such as a witness list, anticipated testimony and identification of documents which will be introduced at the hearing, do not require the Board's approval. (See WV Code §22B-1-8)

Some discovery requests, however, require the involvement of the Board. Parties may ask the Board to rule on discovery requests such as the taking of depositions and requests for the production of documents. Motions should be filed with the Board well in advance of the Hearing to allow the parties ample time to comply with the Board's decision. In addition, all parties have the right to file an objection to a discovery request with the Board. Such objection must be filed no more than ten days after the receipt of a motion for discovery unless the Board has provided an extension or other schedule for the objections to be filed.

If you have any questions regarding discovery requests, please contact the Board's staff at (304)926-0449, extension 1683 or 1-866-568-6649, extension 1682.

AGREED ORDER:

It is possible that your appeal can be resolved through an Agreed Order. Settlement negotiations can be conducted between the parties of the appeal without the participation of the Air Quality Board. If an agreement is reached, the parties file a proposed agreed order with the Board for review and approval. If the issues of the appeal are resolved and the Board approves the agreed order, your appeal will be removed from the hearing docket and no further action will be taken by the Board.

HEARING:

If your appeal is not resolved through an agreed order it will proceed to an evidentiary hearing. Once an evidentiary hearing date is set, the Board will not grant an extension or a continuance unless there is a showing of good cause. In order to request a continuance the party must file a written motion with the Board detailing why a continuance of the hearing is necessary. This motion must be filed at least five (5) days prior to the date of the hearing but should be filed as soon as a need for a continuance arises. The Board may at any time order a continuance upon its own motion.

Hearings are usually held in Conference Room #1041 at 601 57th Street, SE, Charleston, West Virginia, before a quorum of the Board members and are open to the public. During the Hearing, the Board follows the rules of evidence as applied in the civil courts of West Virginia. Also see specific rules of evidence at West Virginia Code 29A-5-2 which apply to these types of hearings.

The Appellant has the Burden of Proof and must introduce evidence that establishes or supports the existence of a fact in issue. An allegation is not evidence but rather something that must be proven by the introduction of competent admissible evidence. In order to prevail, the appellant has the burden to raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect – that it violated a statute or regulation or otherwise should have acted other than it did. Then, the Appellee must produce evidence demonstrating its reasoning in making its decision.

Testimony in any hearing before the Board is given on the record and under oath. The appellant appears before the Board to present witness testimony and any exhibits which are relevant to the appeal. Please bring ample copies of documents so that you can provide them to the Board members and opposing counsel. The Board will need to keep any exhibit, including photograph, map, or other evidence that you offer during the hearing. All witnesses are subject to cross-examination by any party to the appeal or by the Board members. Once you have presented your case, the Appellee may then present testimony and offer exhibits. At the conclusion of this portion of the hearing, parties may offer rebuttal evidence on the issues of the case. A transcript of the entire hearing is available for review at the Board's office or a copy may be obtained for a fee from the court reporter or the Board.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW/RESPONSES:

After the hearing is complete the Board will establish a time frame during which the parties may file proposed findings of fact and conclusions of law for the Board's consideration. In addition you will be allowed to respond to the other parties' proposed findings. You may use the transcript to review the hearing and to make your final written statement to the Board. Please note that if you include a legal citation or cite case law in your proposed findings of fact and conclusions of law, you must provide the Board with a copy of that case.

FINAL ORDER:

In most cases, (except those decided by a procedural motion without an evidentiary hearing) the Air Quality Board will render a final decision on your appeal after a complete review of the entire record, which includes the certified file, the hearing transcript, case law, regulations, statutes, the proposed findings of fact and conclusions of law and the responses to the same as submitted by the parties. The Air Quality Board's Final Order along with the Findings of Fact and Conclusions of Law will be served on all parties of the appeal.

APPEALING THE BOARD'S FINAL ORDER:

After the Board enters a Final Order in the Appeal, any party may appeal such order to the Circuit Court as prescribed in WV Code §22B-3-3. This appeal must be filed within thirty days of your receipt of the Board's Final Order.

EX PARTE COMMUNICATIONS:

An ex parte communication is any oral or written communication with the Board members or its staff regarding the merits or the substance of an appeal or motion, which is made in the absence of the other parties of the appeal. **Such contact is strictly forbidden**. Further, **the staff cannot render legal advice to you**. We can, however, answer any questions which you may have regarding the appeal process, general hearing procedures or other administrative matters. Please feel free to contact our office at (304)926-0449, extension 1683 or 1-866-568-6649, extension 1682 with such inquiries.

CERTIFICATE OF SERVICE:

I, _____, do hereby certify that I, on this _____, served the attached _____ to all parties in the Appeal no. _____, as follows:

By United States Mail, postage prepaid:

Melissa Carte, Clerk
Air Quality Board
601 57th Street, SE
Charleston, WV 25304

(DEP ATTORNEY)
601 57th Street, SE
Charleston, WV 25304

(THE DIRECTOR OF THE DIVISION)
Division of Air Quality
601 57th Street, SE
Charleston, WV 25304

(NAME OF INTERVENOR)
Person or Company holding
the permit – if other than yourself

(When filing any appeal related motions, documents or materials you must provide copies to all parties of the appeal. To certify that you have done this, include the names and addresses of all parties to the appeal on the Certificate of Service and attach it to the document. ** Any names and addresses of additional parties to the appeal will be supplied to you in the Certificate of Service attached to the Notice of Hearing issued by the Air Quality Board.)

**WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

_____,
APPELLANT'S NAME,

Appellant,

v.

Appeal No. _____

DIRECTOR, DIVISION OF

_____,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee.

NOTICE OF APPEAL

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

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

Specific Objections: The specific objections to the action, including questions of fact and law to be determined by the Board, are set forth in detail in separate numbered paragraphs and attached hereto. The objections may be factual or legal.

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)