

## WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD APPEAL PROCESS

### FILING AN APPEAL WITH THE ENVIRONMENTAL QUALITY BOARD

The West Virginia Environmental Quality Board is responsible for hearing appeals of permits and enforcement decisions issued by the West Virginia Department of Environmental Protection's Division of Water and Waste Management. 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 Environmental Quality Board, the appellant (person filing the appeal) should obtain a Notice of Appeal by contacting the staff or from the Board's website. The appeal must include a copy of 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 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. You may obtain a Certificate of Service form by contacting the staff or from the Board's website. Once you have completed the forms and compiled the required documents you may mail the original and six copies to the Board's office located at 601 57<sup>th</sup> Street, SE, Charleston, WV 25304. Please note that it is only necessary to file one copy of the permit or order which 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 Environmental 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 Environmental 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 discussion of discovery for more information.

## **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 46CSR8 Procedural Rule Governing Requests for Information 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 46CSR4 Procedural Rule Governing Appeals, Section 5.

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 Environmental Quality Board is a Motion to Dismiss. Any party to the appeal may file a Motion to Dismiss the Appeal which details why the Environmental 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 W. Va. 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) 926-0445 or toll free 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 Environmental 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 and 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 the Conference Room 1041 at 601 57<sup>th</sup> Street, S.E., 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 W.Va. 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 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 Environmental 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 Environmental 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 W. Va. 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 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) 926-0445 or toll free 1-866-568-6649, extension 1682 with such inquiries.