WEST VIRGINIA CODE CHAPTER 22B ARTICLE 1

WV Legislature

§22B-1-1. Declaration of policy and purpose.

It is hereby declared to be the policy of this state and the purpose of this chapter to provide fair, efficient and equitable treatment of appeals of environmental enforcement and permit actions to the boards set forth herein.

It is also the intent of the Legislature to consolidate and combine the legal, technical and support personnel of the three boards, to provide for consistent appellate processes and to maintain continuity of the boards' functions and membership. The boards shall share physical facilities, hearing rooms, technical and support staff and general overhead. In addition, it is the policy of this state to retain and maintain adequate funding and sufficient support personnel to ensure knowledgeable and informed decisions.

It is the policy of this state that administrative hearings and appeals be conducted in a quasi-judicial manner providing for discovery and case management. The appellate functions of the several environmental boards should be accomplished with similar procedural rules designed to assure expeditious and equitable hearings and decisions. Further, there shall be a central depository for appellate information and the filing of appeals. It is also the policy of this state that the rule-making authority set forth in this chapter be implemented in an efficient manner consistent with the public policy of this state.

Furthermore, it is the intent of the Legislature that all actions taken pursuant to this chapter assure implementation of the policies set forth in this chapter and chapter twenty-two of this code.

WV Legislature

§22B-1-2. Definitions.

Unless the context clearly requires a different meaning, as used in this chapter the following terms have the meanings ascribed to them:

(1) “Board” or “boards” means the applicable board continued pursuant to the provisions of this chapter, including the air quality board, the environmental quality board and the surface mine board;

(2) “Chief” means the chief of the office of water resources or the chief of the office of waste management or the chief of the office of air quality or the chief of the office of oil and gas or the chief of the office of mining and reclamation or any other person who has been delegated authority by the director, all of the Division of Environmental Protection, as the case may be;

(3) “Director” means the director of the Division of Environmental Protection or the director's designated representative;

(4) “Division” means the Division of Environmental Protection of the Department of Commerce, labor and environmental resources;

(5) “Member” means an individual appointed to one of the boards or the ex officio members of the air quality board; and

(6) “Person” or “persons” means any public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; the State of West Virginia; governmental agency; political subdivision; county commission; municipal corporation; industry; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any other legal entity whatever.

WV Legislature

§22B-1-3. General administration.

(a) The chairs of the boards shall exercise the following powers, authorities and duties:

(1) To provide for the management of facilities and personnel of the boards;

(2) To employ, terminate and compensate support staff for the boards and to fix the compensation of that staff, which shall be paid out of the State Treasury, upon the requisition of moneys appropriated for such purposes, or from joint funds as the chairs may expend;

(3) To the extent permitted by and consistent with federal or state law, to consolidate, combine or contribute funds of the boards to maintain the central physical facilities and technical and support personnel;

(4) To the extent permitted by and consistent with federal or state law, to consolidate or combine any functions of the boards;

(5) To secure funding with the assistance of the chairs from whatever source permissible by law;

(6) To secure office space, purchase materials and supplies, and enter into contracts necessary, incident or convenient to the accomplishment of the purposes of this chapter;

(7) To expend funds in the name of any of the boards;

(8) To consult with the secretary of the Department of Commerce, labor and environmental resources, or the successor agency or office, or the director of the Division of Environmental Protection who shall cooperate with the chairs in order to effectuate the powers, authorities and duties set forth in this section;

(9) To hire individuals, as may be necessary, to serve as hearing examiners for the boards; and

(10) To provide for an individual to serve as the clerk to the boards.

(b) The clerk to the boards has the following duties, to be exercised in consultation with the chairs:

(1) To schedule meetings and hearings and enter all orders properly acted upon;

(2) To receive and send all papers, proceedings, notices, motions and filings;

(3) To the maximum extent practicable, and with the cooperation of the staff and hearing examiners, to assist the boards in the case management of appeals and proceedings;

(4) To maintain records of all proceedings of the boards which shall be entered in a

WV Legislature

permanent record, properly indexed, and the same shall be carefully preserved for each board. Copies of orders entered by the boards, as well as copies of papers or documents filed with it, shall be maintained in a central location;

(5) To direct and fulfill information requests subject to chapter twenty-nine-b of this code and subject to applicable confidentiality rules set forth in the statutes and rules; and

(6) To perform such other duty or function as may be directed by the chairs to carry out the purpose of this chapter.

(c) The boards shall establish procedural rules in accordance with the provisions of chapter twenty-nine-a of this code for the regulation of the conduct of all proceedings before the boards. To the maximum extent practicable, the procedural rules will be identical for each board. The procedural rules of the boards shall be contained in a single set of rules for filing with the Secretary of State.

WV Legislature

§22B-1-4. General provisions applicable to all boards and board members.

(a) Each member of a board, other than an ex officio member, shall be paid the same compensation and expense reimbursement as is paid to members of the Legislature for their interim duties as recommended by the citizens legislative compensation commission and authorized by law for each day or portion thereof engaged in the discharge of official duties.

(b) At its first meeting in each fiscal year each board shall elect from its membership a chair and vice chair to act during such fiscal year. The chair shall preside over the meetings and hearings of the board. The vice chair shall assume the chair's duties in the absence of the chair. All of the meetings shall be general meetings for the consideration of any and all matters which may properly come before the board.

(c) For the environmental quality board and the air quality board, a majority of each board is a quorum for the transaction of business and an affirmative vote of a majority of the board members present is required for any motion to carry or decision of the board to be effective. For the surface mine board four members is a quorum and no action of the board is valid unless it has the concurrence of at least four members. For all boards, in the event of a tie vote on the ultimate decision which is the subject of an appeal before the board, the decision of the chief or the director, as the case may be, shall be affirmed. Each board shall meet at such times and places as it may determine and shall meet on call of its chair. It is the duty of the chair to call a meeting of the board within thirty days on the written request of three members thereof.

(d) In all cases where the filing of documents, papers, motions and notices with the board is required or a condition precedent to board action, filing with the clerk constitutes filing with the board.

WV Legislature

§22B-1-5. General powers and duties of boards.

In addition to all other powers and duties of the air quality board, environmental quality board and surface mine board as prescribed in this chapter or elsewhere by law, the boards created or continued pursuant to the provisions of this chapter have and may exercise the following powers and authority and shall perform the following duties:

(1) To consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending before a board;

(2) On any matter properly pending before it whenever the parties achieve agreement that a person will cease and desist in any act resulting in the discharge or emission of pollutants or do any act to reduce or eliminate such discharge or emission, or do any act to achieve compliance with this chapter or chapter twenty-two or rules promulgated thereunder or do any act to resolve an issue pending before a board, such agreement, upon approval of the board, shall be embodied in an order and entered as, and has the same effect as, an order entered after a hearing as provided in section seven of this article;

(3) To enter and inspect any property, premise or place on or at which a source or activity is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter or chapter twenty-two and the rules promulgated thereunder: Provided, That nothing contained in this section eliminates any obligation to follow any process that may be required by law; and

(4) To perform any and all acts within the appropriate jurisdiction of each board to secure for the benefit of the state participation in appropriate federally delegated programs.

WV Legislature

§22B-1-6. General procedural provisions applicable to all boards.

(a) Any appeal hearing brought pursuant to this chapter 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 a hearing examiner employed by the board. For the purpose of conducting such appeal hearing, any member of a board and the clerk has the power and authority to issue subpoenas and subpoenas duces tecum in the name of the board, in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code. All subpoenas and subpoenas duces tecum shall be issued and served within the time and for the fees and shall be enforced, as specified in section one, article five of said chapter twenty-nine-a, and all of the provisions of said section one dealing with subpoenas and subpoenas duces tecum apply to subpoenas and subpoenas duces tecum issued for the purpose of an appeal hearing hereunder.

(b) In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the disobedience, neglect or refusal occurs, on application of the board or any member thereof, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from the court of a refusal to testify therein.

(c) In accordance with the provisions of section one, article five of said chapter twenty-nine-a, all of the testimony at any hearing held by a board shall be recorded by stenographic notes and characters or by mechanical or electronic means. If requested by any party to an appeal, the hearing and any testimony offered shall be transcribed in which event the cost of transcribing shall be paid by the party requesting the transcript. The record shall include all of the testimony and other evidence and the rulings on the admissibility of evidence, but any party may at the time object to the admission of any evidence and except to the rulings of the board thereon, and if the board refuses to admit evidence the party offering the same may make a proffer thereof, and the proffer shall be made a part of the record of the hearing.

(d) All of the pertinent provisions of article five, chapter twenty-nine-a of this code, apply to and govern the hearing on appeal authorized by the provisions of this section and the administrative procedures in connection with and following such hearing, with like effect as if the provisions of said article five were set forth in extenso in this section, except as specifically provided herein.

WV Legislature

§22B-1-7. Appeals to Boards.

(a) The provisions of this section are applicable to all appeals to the boards, with the modifications or exceptions set forth in this section.

(b) Any person authorized by statute to seek review of an order, permit, or official action of the chief of air quality, the chief of water resources, the chief of waste management, the chief of mining and reclamation, the chief of oil and gas, or the secretary may appeal to the air quality board, the environmental quality board, or the surface mine board, as appropriate, in accordance with this section. The person so appealing shall be known as the appellant and the appropriate chief or the secretary shall be known as the appellee.

(c) An appeal filed with a board by a person subject to an order, permit, or official action shall be perfected by filing a notice of appeal with the board within 30 days after the date upon which such order, permit, or official action was received by such person as demonstrated by the date of receipt of registered or certified mail or of personal service. For parties entitled to appeal other than the person subject to such order, permit, or official action, an appeal shall be perfected by filing a notice of appeal with the board within 30 days after the date upon which service was complete. For purposes of this subsection, service is complete upon tendering a copy to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge of the facility or activity involved, or to the permittee; or by tendering a copy by registered or certified mail, return receipt requested to the last known address of the person on record with the agency. Service is not incomplete by refusal to accept. Notice of appeal must be filed in a form prescribed by the rule of the board for such purpose. Persons entitled to appeal may also file a notice of appeal related to the failure or refusal of the appropriate chief or the secretary to act within a specified time on an application for a permit; such notice of appeal shall be filed within a reasonable time.

(d) The filing of the notice of appeal does not stay or suspend the effectiveness or execution of the order, permit or official action appealed from, except that the filing of a notice of appeal regarding a notice of intent to suspend, modify, or revoke and reissue a permit, issued pursuant to the provisions of §22-5-5 of this code, does stay the notice of intent from the date of issuance pending a final decision of the board. If it appears to the appropriate chief, the secretary, or the board that an unjust hardship to the appellant will result from the execution or implementation of a chief's or secretary's order, permit, or official action pending determination of the appeal, the appropriate chief, the secretary, or the board, as the case may be, may grant a stay or suspension of the order, permit or official action and fix its terms: *Provided*, That unjust hardship shall not be grounds for granting a stay or suspension of an order, permit or official action for an order issued pursuant to §22-3-1 *et seq*. of this code. A decision shall be made on any request for a stay within five days of the date of receipt of the request for stay. The notice of appeal shall set forth the terms and conditions of the order, permit, or official action complained of and the grounds upon which the appeal is based. A copy of the notice of appeal shall be filed by the board with the appropriate chief or secretary within seven days after the notice of appeal is filed with the board.

(e) Within 14 days after receipt of a copy of the notice of appeal, the appropriate chief or the secretary, 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 applicable files relating to the matter in question. With the consent of the board and upon such terms and conditions as the board may prescribe, any person affected by the matter pending before the board may, by petition, intervene as a party appellant or appellee. In any appeal brought by a third party, the permittee or regulated entity shall be granted intervenor status as a matter of right where issuance of a permit or permit status is the subject of the appeal. The board shall hear the appeal de novo, and evidence may be offered on behalf of the appellant, appellee, and by any intervenors. The board may visit the site of the activity or proposed activity which is the subject of the hearing and take such additional evidence as it considers necessary: *Provided*, That all parties and intervenors are given notice of the visit and are given an opportunity to accompany the board. The appeal hearing shall be held at such location as may be approved by the board including Kanawha County, the county wherein the source, activity, or facility involved is located or such other location as may be agreed to among the parties.

(f) Any such hearing shall be held within 30 days after the date upon which the board received the timely notice of appeal, unless there is a postponement or continuance. The board may postpone or continue any hearing upon its own motion, or upon application of the appellant, the appellee, or any intervenors for good cause shown: *Provided*, That an appeal of any permit pursuant to §22-5-14 of the code shall be heard by the Air Quality Board within 60 days of the filing of the notice of appeal, unless all parties to the appeal consent to a postponement or continuance, and issue its decision on the appeal as promptly as reasonably possible following the hearing, but in no event later than two months after the completion of the hearing. The chief or the secretary, as appropriate, may be represented by counsel. If so represented, they shall be represented by the Attorney General or with the prior written approval of the Attorney General may employ counsel who shall be a special assistant Attorney General. At any such hearing the appellant and any intervenor may represent themselves or be represented by an attorney-at-law admitted to practice before the Supreme Court of Appeals.

(g) After such hearing and consideration of all the testimony, evidence, and record in the case:

(1) The environmental quality board or the air quality board as the case may be shall make and enter a written order affirming, modifying, or vacating the order, permit, or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued; and

(2) The surface mine board shall make and enter a written order affirming the decision appealed from if the board finds that the decision was lawful and reasonable, or if the board finds that the decision was not supported by substantial evidence in the record considered as a whole, it shall make and enter a written order reversing or modifying the decision of the

WV Legislature

secretary.

(h) In appeals of an order, permit or official action taken pursuant to §22-6-1 *et seq.*, §22-11-1 *et seq.*, §22-12-1 *et seq.*, §22-13-1 *et seq.*, or §22-15-1 *et seq*. of this code, the environmental quality board established in article three of this chapter, shall take into consideration, in determining its course of action in accordance with subsection (g) of this section, not only the factors which the appropriate chief or the secretary was authorized to consider in issuing an order, in granting or denying a permit, in fixing the terms and conditions of any permit, or in taking other official action, but also the economic feasibility of treating, or controlling, or both, the discharge of solid waste, sewage, industrial wastes, or other wastes involved.

(i) An order of a board shall be accompanied by findings of fact and conclusions of law as specified in §29A-5-3 of this code, and a copy of such order and accompanying findings and conclusions shall be served upon the appellant, and any intervenors, and their attorneys of record, if any, and upon the appellee in person or by registered or certified mail.

(j) The board shall also cause a notice to be served with the copy of such order, which notice shall advise the appellant, the appellee, and any intervenors of their right to judicial review, in accordance with the provisions of this chapter. The order of the board shall be final unless vacated or modified upon judicial review thereof in accordance with the provisions of this chapter.

WV Legislature

§22B-1-8. General provisions governing discovery.

(a) Parties to a hearing may petition a board to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending hearing, subject to the procedural rules of the boards and the limitations contained herein.

(b) The following limited discovery may be commenced and obtained by any party to the hearing without leave of a board:

(1) Requests for disclosure of the identity of each person expected to be called as a witness at the hearing and, at a minimum, a statement setting forth with specificity the facts alleged, the anticipated testimony and the identity of any documents relied upon in support of the anticipated testimony of each witness and whether that witness will be called as an expert; and

(2) Requests to identify with reasonable particularity the issues which are the subject of the hearing.

(c) Any party may object to a request or manner of discovery authorized by this section provided the objection sets forth with particularity the grounds for the objection. A party may move the board to rule on the propriety of the discovery or objection and request the board to enter an order as the board deems appropriate.

(d) Any party may seek, by motion, a protective order from the discovery sought by another party and, if required, the board may protect a party from unwarranted discovery. Upon motion of a party or upon a board's own motion, the board may enter such protective order limiting discovery, which order shall not be inconsistent with the standards for protective orders set forth in the West Virginia rules of civil procedure.

(e) Upon motion of a party or upon a board's own motion, the board may authorize or order any additional discovery as may be appropriate or necessary to identify or refine the issues which are the subject of the hearing. Upon agreement of the parties, or upon order of a board, the board may authorize or order the taking of the deposition of any witness with information or knowledge relevant to the subject matter of the hearing which deposition may be noticed by subpoena or subpoena duces tecum.

(f) Upon motion of a party or upon a board's own motion, a board may hold a prehearing conference, as soon as practicable after the commencement of an appeal, which conference shall be for purposes of promoting a fair, efficient and expeditious hearing process. Following the conference, the board may enter an order or take such other action as may be appropriate with respect to discovery issues.

(g) For purposes of this section, in all cases where the board is authorized or empowered to issue orders, a member of the board, with the concurrence of a majority of the board, may act on behalf of the board, the board may act itself or through its clerk or hearing examiner,

WV Legislature

as such person is authorized to do so by the board.

(h) Every request for discovery or response or objection thereto made by a party shall be signed in the same manner as is provided for in Rule 26 of the West Virginia rules of civil procedure.

WV Legislature

§22B-1-9. General provisions for judicial review.

(a) Any person, or the secretary, as the case may be, adversely affected by an order made and entered by a board after an appeal hearing, held in accordance with the provisions of this chapter, is entitled to judicial review thereof. All of the provisions of §29A-5-4 of this code apply to and govern the review with like effect as if the provisions of §29A-5-4 of this code were set forth in extenso in this section, with the modifications or exceptions set forth in this chapter: Provided, That the exceptions set forth in §22B-2-3, §22B-3-3, and §22B-4-3 of this code apply.

(b) The filing of a petition of appeal under the provisions of this chapter does not automatically stay or suspend the effectiveness or execution of the order, permit, or official action pending appeal. The board shall file with the clerk of the court wherein the petition for appeal is filed all papers, documents, evidence, and other records comprising the complete record in the case, or certified copies thereof, as were before the board at the time of the entry of the order from which the appeal is taken.

(c) Notwithstanding any provisions of this code to the contrary, the secretary may employ in-house legal counsel to perform all legal services for the department and secretary or any director, chief, or division therein in all proceedings made under the provisions of this chapter, including those in any administrative proceeding or before any state or federal court. Additionally, the secretary may call upon the Attorney General for any legal assistance and representation as provided by law.

WV Legislature

§22B-1-10. Confidentiality.

With respect to any information obtained in the course of an appeal, all members of boards and all personnel employed thereby shall maintain confidentiality to the same extent required of the chief or director.

WV Legislature

§22B-1-11. Conflict of interest.

In addition to the specific conflict of interest provisions set forth in this chapter, any member who has any financial interest in the outcome of a decision of the board shall not vote or act on any matter which shall directly affect the member's personal interests.

WV Legislature

§22B-1-12. Savings provisions.

(a) All orders, determinations, rules, permits, grants, contracts, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted or allowed to become effective by a board in the performance of functions which are affected by the enactment of this chapter, and which are in effect on the date this chapter becomes effective, shall continue in effect according to their terms until modified, terminated, superseded, set aside or revoked in accordance with the law.

(b) The provisions of this chapter do not affect any appeals, proceedings, including notices of proposed rulemaking, or any application for any license, permit, certificate or financial assistance pending on the effective date of this chapter, before any of the boards. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this chapter had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded or revoked by the board within which jurisdiction to do so is vested, by a court of competent jurisdiction or by operation of law. Nothing in this subsection prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that the proceeding could have been discontinued or modified if this chapter had not been enacted.

(c) Orders and actions of a board in the exercise of functions amended by under this chapter are subject to judicial review to the same extent and in the same manner as if such orders and actions had been by a board exercising such functions immediately preceding the enactment of this chapter.

WV Legislature