

Permit Hearings and Appeals Guide

Office of Environmental Advocate



west virginia department of environmental protection



Permit Hearings and Appeals Guide

Public participation is an integral part of environmental decision making. The West Virginia Department of Environmental Protection continues to seek ways to inform state residents of DEP activities and to broaden public involvement. The DEP distributes news about community cleanups, environmental enforcement penalty settlements, permit application reviews and public comment periods, legislative rules reviews and comment periods, appeals board hearings and other newsworthy environmental protection information.

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This guide is designed to provide an overview of public participation in the DEP permit application process and the steps to appeal a DEP decision. This booklet is only a guide and not to be regarded as a legal document.

Public Notification

The DEP uses various means to ensure adequate public notice is given of agency news and permit actions. One way is to subscribe to the agency's e-mail notification list at <https://dep.wv.gov>. Once you subscribe, you will receive occasional e-mails about permit actions in your community. If you do not have access to the Internet, call the DEP at (800) 654-5227 to be placed on the U.S. Postal Service mailing list, or send correspondence to:

West Virginia Department of Environmental Protection
Public Information Office
Public Notice List
601 57th Street, SE
Charleston, West Virginia, 25304

There are projects throughout the state that generate significant interest and others that interest neighbors of the facility. Through the subscriber list, you have the option to receive notices for a single county, multiple counties or statewide. The subscriber list is not the only way permit actions are made public. Notices for pollution control permits are also placed in the legal advertisement section of a local newspaper in the county where the environmental activity will occur.

The DEP regulates pollution control permits for water discharges, air emissions and natural resource extraction (oil, gas, coal, non-coal minerals). The permit applications outline pollution limits on which the public can review, comment or request changes. The DEP is then required to respond to each comment before the permit is issued, revised or denied.

Businesses, cities and individuals that discharge pollutants into the land, air or waters of the state must apply for pollution control permits from DEP. If there is a facility near you that has a permit to produce, store or discharge hazardous or toxic substances, it is probably also reporting data to the U. S. Environmental Protection Agency. The EPA has a web site to research [pollutant](#) types. The information is available to the public through a searchable tool for location information by Zip Code or county.

Pollution Control Permit Application

When an individual or business submits a completed permit application form, a DEP permit team reviews the document to ensure all the necessary questions have been answered. After a preliminary determination has been made that the permit application is administratively complete, the DEP will assign a permit application number for the draft permit, and the DEP or the company will provide notice to the public that the permit is available for a 30-day review and comment period. The review and comment period may vary, depending on the type of permit. A public notice will be published in the legal

advertisement section of a local newspaper. Those registered on the DEP notification list will also receive notice by e-mail or U. S. Postal Service.

The permit's pollution control limits are designed to reflect the best technology available at the time the permit is issued, and to meet federal and state environmental laws and regulations.

The permit application notice contains the application number, name of the company, type of permit, location of the operation, a brief overview of the permit, and DEP and company contact information. Always refer to the permit application number and the company name when requesting permit information or commenting on the permit action.

Public Participation

The DEP encourages participation in reviewing and commenting on the application by the public, community and civic groups, the regulated community, and other governmental agencies. In order to prepare your comments, you may want to schedule a visit to the DEP office referenced in the public notice to review the permit application, fact sheet, old permit, and other information that may be a resource in the file. If you are unable to visit the office, you may request copies of the documents. Depending on the size of the file, there may be copying charges and search and labor fees associated with the request.

Scheduling an appointment helps ensure that appropriate DEP staff are available to assist with any questions or concerns you may have about the permit and related documents.

You should review the permit as early in the process as possible. While most of the data is readily available on the DEP website or in the permit application file, there may be times it is necessary to write a Freedom of Information Act request. A FOIA request is a simple letter asking for agency records. Refer to [46CSR8](#), the procedural rule for requesting information. Hard copies of the rule are available through the West Virginia Secretary of State's Administrative Law Division by calling (866) SOS-VOTE or (304) 558-6000.

During the 30-day comment period, the regulated community and the general public can submit comments or questions to the DEP by e-mail, fax or letter. All written comments must be received at the DEP by the deadline published in the notice.

Submitting Comments

When submitting your questions or comments on a proposed permit application, send them to the address in the notice and always include the application number and facility name. Include convincing statements of how the proposed application improves or degrades the environment (air, land or water), and complies with or violates state or federal regulations.

Comments should be detailed but concise in describing why the permit should or should not be issued. Comments should be substantive with information to support your stance on the issue. If possible, include studies and federal guidance about how permits should be written. If you quote studies from a website or in standard research journals, provide the name and author of the study or send a copy of the actual study. It is your responsibility to provide evidence during the public comment period, not later.

Requesting a Public Hearing/Meeting

Any interested party can make a written request to DEP for an informal public hearing during the public comment period. The director of the division with the pending permit has the discretion to grant the informal hearing. If the director does not find a significant degree of public interest on issues relevant to the draft permit, then he or she may deny the request.

When a hearing is granted, it is open to the public, which means DEP will accept written and oral comments from any individual or organization willing to participate, including the regulated community and other governmental agencies.

The DEP representatives are there to record the comments of the participants. The purpose of the public hearing is to allow the public to weigh in on the proposed permit action. Reviewing the permit will help you make informed, meaningful comments during the hearing.

Informal Public Hearing Format

- When you enter the meeting place there will be sign-in sheets at the door. Make note on the sign-in sheet if you wish to make a comment.
- When the meeting begins, all comments will be audio taped during the meeting. You may also hand in written material or documentation.
- The DEP officials will welcome you to the meeting, introduce themselves, and explain the purpose of the hearing or meeting.
- A DEP permit writer or engineer will summarize the proposed permit.
- After the proposed permit has been explained, the comment period deadline will be announced, and names of those wishing to make comments will be called. Sometimes the comment period ends at the end of the hearing, and sometimes it may be extended slightly to receive additional written comments.
- When your name is called, come to the front of the room and speak into the microphone, or as close as possible to the audio equipment, so your voice will be recorded.
- When making comments, be courteous to your fellow citizens and keep your comments concise and to the point. The hearing facilitator may limit the time you have to make comments, depending on how many participants are there.
- After all of the names have been called from the sign-in sheets, then others in attendance will also be allotted time for comments.

- When all oral comments have been submitted, the meeting will be adjourned and the audio recording equipment turned off.
- A tape recording or written transcript of the hearing will be made available to anyone requesting a copy. There is a charge associated with reproducing the tape or the transcript.

After the public comments are received, the DEP will make a final decision on the permit after all relevant comments have been considered and addressed.

Occasionally significant changes are made to the permit application as a result of public comments or changes made by the applicant. When significant changes are made, the DEP requires the permit application notice to be re-published. This will allow an additional opportunity for you to review the permit and provide comments.

For these purposes, the phrase “significant changes” means, among other things: •

Change in the size of the facility or change in the activity intended in the original proposal

- Change in the purpose for or function of the project
- Change in the location of the site
- Change in the environmental impact of the operation
- Change in the environmental medium or media (air, land or water) that would be subject to an impact from the operation

Appealing a DEP Decision to Appeals Boards

If a member of the public or the regulated community is not satisfied with DEP’s decision regarding the permit (or any environmental enforcement action), either party can file an appeal within 30 days of the decision. Depending on the type of permit, the appeal to oppose the DEP decision may be filed with the Air Quality Board, Environmental Quality Board, or the Surface Mine Board.

When you file the Notice of Appeal, attach a detailed description of your objections to the permit or order, whether factual or legal. Include a statement of any facts that are relevant to the appeal along with a copy of the permit or enforcement order.

Attorneys from the Office of Legal Services represent DEP during the appeals process. You have the opportunity to hire your own lawyer, or you may represent yourself. If you choose to appear before the board without an attorney, you should be aware of the board’s procedural rules. You can request a copy of the rules from the board’s clerk.

The company whose permit is being appealed may make a request to the board to be included in the appeals process as an intervenor. An intervenor is any person (or

company) who becomes a third party to legal proceeding that was begun by others for the protection of an alleged interest.

Beginning the Appeal Process

All appeals must be filed with the appropriate appeal board's clerk at the address listed below. Be sure to address it to the appropriate appeals board – *Air Quality*, *Environmental Quality*, or the *Surface Mine* Board.

West Virginia (____ ____) Board 601
57th Street, S.E.
Charleston, West Virginia 25304

You may the Notice of Appeal personal delivery or by U. S. Postal Service. The filing is effective upon delivery or the postmark date.

All appeals hearings are open to the public, and you are welcome to sit in on any hearing to understand the hearing process. The hearing dates are published on the DEP's calendar of events at <https://dep.wv.gov>

Air Quality Board

The West Virginia [Air Quality Board](#) hears appeals to the Division of Air Quality's enforcement and permitting actions. The AQB maintains records of pleadings, subpoenas witnesses, holds hearings, and rules on the matters before it. It is composed of seven members, five are appointed by the governor.

Two board members are state industry representatives and three are representatives of the public at large. The commissioner of the Bureau for Public Health and the commissioner of the Department of Agriculture serve on the Board as ex-officio members.

The AQB operates under the [WV Air Pollution Control Act](#). The board hearings and procedures are performed in accordance with [the procedural rule governing appeals 52CSR1](#), along with the [WV Rules of Civil Procedure](#), West Virginia Rules of Evidence, and the [WV Administrative Procedures Act – Contested Cases](#).

The appeals process begins when the individual or business completes and returns the [Notice of Appeal Form](#) to the AQB clerk. You can request the appeals form and instructions of the [Appeal Process](#) by writing to the Air Quality Board, calling (866) 568-6649, Ext. 1683, or downloading it from the Air Quality Board website at www.wvaqb.org.

Environmental Quality Board

The West Virginia [Environmental Quality Board](#) hears appeals regarding the issuance or denial of permits, permit conditions, or enforcement actions made by the DEP's Division of Water and Waste Management. The EQB is composed of five members who are appointed by the governor for five-year terms. The members of the board must be "persons who by reason of previous training and experience are knowledgeable in the husbandry (conservation) of the state's water resources and with at least one member with experience in industrial pollution control."

The EQB operates under the [WV Administrative Procedures for Contested Cases](#) and [46CSR4 Procedural Rule Governing Appeals](#) in accordance with requirements governing the [WV Rules of Civil Procedure](#), West Virginia Rules of Evidence, [water quality standards](#), and [groundwater standards](#). As with the AQB, you may request the [EQB Notice of Appeal Form](#) and instructions for the [EQB Appeals Process](#) by writing the WV Environmental Quality Board, calling (866) 568-6649, Ext. 1682, or downloading it from the website at www.wveqb.org.

Surface Mine Board

The West Virginia Surface Mine Board hears appeals regarding the Division of Mining and Reclamation's issuance or denial of mine permits, permit conditions, and notices of violations for alleged violations of environmental laws or regulations of coal and quarry operations. The governor appoints seven members with advice and consent of the Senate.

The appointment terms of the SMB members range from two to five years. One appointee is to be experienced in coal mining, one experienced in agriculture, one experienced in modern forestry practices, one experienced in engineering, one experienced in water pollution control or water conservation problems, one with significant experience in the advocacy of environmental protection, and one person who represents the general public interest.

To file an appeal with the SMB, you must complete and return the Notice of Appeal to the board's clerk. You can obtain a Notice of Appeal and instructions for filing a SMB Appeal Process by writing the Surface Mine Board clerk or by calling (304) 926-0445. Completed forms should be returned to the clerk within seven days of receiving the form. You must file the original appeal form and seven copies of any pleading or other documents.

Filing an Appeal

The appeals process begins when the individual or business completes and returns the Notice of Appeal form to the appropriate board clerk. After filing an appeal, the clerk will notify you that your appeal has been placed on the docket along with the date and time you are to appear before the board. You will also be assigned an appeal number that you should reference in all future correspondence with the board. Within 14 days of

receiving the notice of appeal, DEP will provide a complete, or certified, record that includes all documents and correspondence in the agency's files relating to the appeal.

The certified record is the basis on which the board will make its decision. Please review the certified record and use it to prepare for your hearing.

Be prepared to present your testimony, witnesses and exhibits on the scheduled hearing date. If you have any questions about the hearing procedures, contact the board as soon as possible, and no fewer than five days before the hearing date.

In cases where there are several unrepresented parties on the same side, the board will request that one of the parties be selected as a spokesperson. Having only one spokesperson makes it easier for the board to conduct the hearing in an orderly manner. However, all the parties retain the right to speak and participate fully in the hearing.

All parties to a hearing – this includes legal counsel and spectators – must conduct themselves in a respectful manner before the board. Public displays of any kind at the hearings will not be permitted.

Each side is allowed to present and question witnesses during the hearing. Each witness will give testimony under oath before the board, and the testimony will be recorded on the record by a court reporter. All witnesses will be subject to cross-examination by the other parties to the appeal, and by the board.

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. 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.

In most cases, the 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 appeal board's final order along with findings of fact and conclusions of law will be served in person or by registered mail on all parties of the appeal, and his or her attorney of record, if applicable.

After the board enters a final order, any party may appeal the order to circuit court as prescribed in the [WV Code Section 22B-3-3](#). The appeal must be filed within 30 days of receipt of the board's final order.

