

<h1 style="text-align: center;">Regulatory Analysis Form</h1>		This space for use by IRRC JUL 2 1999 99 JUL -2 PM 2:05 PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION HAZARDOUS WASTE COMMISSION  <p style="text-align: center;"><b>Mizner</b></p>	
		IRRC Number: 2005	
(1) Agency Environmental Hearing Board			
(2) I.D. Number (Governor's Office Use)  106-4			
(3) Short Title  Practice and Procedure - General Provisions			
(4) PA Code Cite  25 Pa.Code § 1021.1 et seq.		(5) Agency Contacts & Telephone Numbers  Primary Contact: Kimberly A. Hafner 787-3483 Secondary Contact:	
(6) Type of Rulemaking (check one) Proposed Rulemaking Final Order Adopting Regulation <input checked="" type="checkbox"/> X Final Order, Proposed Rulemaking Omitted		(7) Is a 120-Day Emergency Certification Attached? No <input checked="" type="checkbox"/> X Yes: By the Attorney General Yes: By the Governor	

(8) Briefly explain the regulation in clear and nontechnical language.

The amendments reflect the increasing sophistication of practice and procedure before the EHB. The rules have been amended several times since their promulgation by the Environmental Quality Board in 1979. Years of experience practicing under the rules, EHB and Commonwealth Court precedents, and numerous changes and additions to the environmental regulatory statutes provide the basis for these regulations.

The final rules can be divided into four categories: 1) substantive amendments, 2) unamended, 3) superseding the General Rules of Administrative Practice and Procedure, and 4) Repeals. Substantive amendments were made in the following: definitions (§ 1021.2), construction and application of rules (§ 1021.4), extensions of time (§ 1021.17), representation (§ 1021.22), filing (§ 1021.30), service by a party (§ 1021.32), date of service (§ 1021.33), certificate of service (§ 1021.34), number of copies (§ 1021.35), commencement, form and content (§ 1021.51), timeliness of appeal (§ 1021.52), amendments to appeal; nunc pro tunc (§ 1021.53), complaints filed by the Department (§ 1021.56), answers to complaints filed by the Department (§ 1021.57), procedure after an answer is filed (§ 1021.58), motions-general (§ 1021.70), pre-hearing procedure (§ 1021.81), continuance of hearings (§ 1021.87), motions in limine (§ 1021.88), presentation by the parties (§ 1021.89), limiting number of witnesses and additional evidence (§ 1021.90), oral argument after hearing (§ 1021.92), evidence (§ 1021.107), written testimony (§ 1021.108), briefs (§ 1021.116), amicus curiae (§ 1021.117), sanctions (§ 1021.125), adjudications (§ 1021.118), prepayment of penalties (§ 1021.161), and hearing on inability to prepay penalty (§ 1021.162).

Rules which only reflect the amendment of the EHB rules superseding the General Rules of Administrative Practice and Procedure include: effective dates of Board adjudications and preliminary orders (§ 1021.15), service by the Board (§ 1021.31), docket (§ 1021.41), consolidation (§ 1021.80), initiation of hearings (§ 1021.85), conduct of hearings (§ 1021.86), and adjudications (§ 1021.118).

The following are rules which recently were considered by the Procedural Rules Committee but which no change was recommended: amendments to rule (§ 1021.3), waiver of hearings (§ 1021.94), venue of hearings (§ 1021.96), view of premises (§ 1021.98), and transcript (§ 1021.104).

Rules which have been repealed are: timely filing required (§ 1021.11), appearance in person (§ 1021.21), general (§ 1021.56), form and content (§ 1021.57), special actions (§ 1021.61), pleadings, generally (§ 1021.64), complaints (civil penalties) (§ 1021.65) and answers (§ 1021.66).

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The EHB is authorized by Section 5(c) of the Environmental Hearing Board Act, 35 P.S. § 7515(c), to promulgate rules and regulations relating to practice and procedure.

## Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

No.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The final regulations are necessary to make the rules and practice before the Board similar to practice before the courts of common pleas and the federal district courts.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

None.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Anyone who is a litigant before the EHB will be affected by the final regulations. This includes DEP and other DER successor agencies, as well as anyone who appeals a DEP action to the EHB. Because DEP regulates a wide variety of activities conducted by individuals and businesses as well as state and local governments, they are all potential litigants before the Board.

The revisions would affect DEP, which is the appellee in every appeal filed with the EHB, as well as other State agencies which may become involved in litigation before the EHB. While agencies under the Governor's jurisdiction normally do not pursue appeals to the EHB to resolve their differences with DEP, those same agencies may be party-appellees with DEP where an appellant challenges an approval given by DEP to another Commonwealth agency (e.g. a permit issued to PennDOT to construct a highway culvert). Independent agencies, such as the Game Commission and the Fish and Boat Commission, may challenge approvals granted by DEP (e.g. a Fish and Boat Commission appeal of a surface mining permit).

The regulations of other State agencies would not be affected.

The final regulations supersede specified rules of the General Rules of Administrative Practice and Procedure, 1 Pa. Code Chs. 31, 33, and 35.

## Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

Parties, except individuals appearing in their own behalf, will be required to be represented by counsel before the Board. This requirement previously has been applied only to corporations.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Anyone who is a litigant before the EHB will be affected by the final regulations. This includes DEP and other DER successor agencies, as well as anyone who appeals a DEP action to the EHB. Because DEP regulates a wide variety of activities conducted by individuals and businesses as well as state and local governments, they are all potential litigants before the Board.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The final regulations were based on the recommendations of the EHB Rules Committee, a nine member advisory committee established by Section 5(a) of the EHB Act. The Committee is comprised of environmental law practitioners from both the public and private sectors, appointed by the Governor, the Secretary of DEP, the majority and minority leadership of the House and Senate, and DEP's Citizens Advisory Council. Comments on the proposed regulation were also received from the IRRC staff and from two law firms and one environmental group.

The Rules Committee's meetings are sunshined according to law.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

On the whole, the final regulations would have little cost impact on either the public or private sector. Some cost savings would be achieved by the rules regarding motions in limine, presentation by the parties, limiting number of witnesses and additional evidence, evidence, written testimony, and briefs. In the long-run, use of these rules may save costs by aiding in trial preparation and presentation. However, parties, except individuals appearing on their own behalf, must now be represented by an attorney. They previously could appear through an officer of the association.

No accounting or consultant procedures will be required by the final regulations. New procedures for the construction and application of rules, filing, service by a party, certificate of service, complaints filed by the Department, answers to complaints filed by the Department, and subsequent procedure in lieu of the three separate categories of special actions, pleadings, complaints (civil penalties) motions in limine, written testimony, representation, extensions of time, perfection of appeals, subpoenas, sanctions, motions-general, post-hearing briefs, *amicus curiae*, prepayment of penalties, and hearing on inability to prepay penalty will be required.

### Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

On the whole, the final regulations would have little cost impact on local governments. Some cost savings would be achieved as the rules regarding motions in limine, presentation by the parties, limiting number of witnesses and additional evidence, evidence, written testimony, perfection and briefs would expedite the processing of a matter before the Board. In the long-run, use of these rules may save costs by aiding in trial preparation and presentation.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

On the whole, the final regulations would have little cost impact on state government. Some cost savings would be achieved as the rules regarding motions in limine, presentation by the parties, limiting number of witnesses and additional evidence, evidence, written testimony, perfection and briefs would expedite the processing of a matter before the Board. In the long-run, use of these rules may save costs by aiding in trial preparation and presentation.

### Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. N/A

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Savings</b>						
<b>COSTS:</b>						
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Costs</b>						
<b>REVENUE LOSSES:</b>						
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Revenue Losses</b>						

(20a) Explain how the cost estimates listed above were derived N/A

See above

### Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
EHB	1,207,000	1,276,000	1,313,000	1,436,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

On the whole, the final regulations would have little cost impact on either the public or private sector. Some cost savings would be achieved as the rules regarding motions in limine, presentation by the parties, perfection, limiting number of witnesses and additional evidence, evidence, written testimony, and briefs would expedite the processing of a matter before the Board. In the long-run, use of these rules may save costs by aiding in trial preparation and presentation.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

None.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

The concept of alternative regulatory approaches is not germane to procedural rules for adjudicatory proceedings, as their content is dictated by relevant statutory, regulatory, and constitutional provisions, as well as judicial precedents.



## Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The Board has not made a study of the rules of procedure before comparable administrative hearing boards in other states but believe that these rules could not possibly put Pennsylvania at a competitive disadvantage. We were recently advised by one Allegheny County lawyer, who has practiced in at least 20 other states, that the Pennsylvania Environmental Hearing Board is "the most efficient and proficient environmental law tribunal I have ever encountered."

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The revisions would affect DEP, which is the appellee in every appeal filed with the EHB, as well as other State agencies which may become involved in litigation before the EHB. While agencies under the Governor's jurisdiction normally do not pursue appeals to the EHB to resolve their differences with DEP, those same agencies may be party-appellees with DEP where an appellant challenges an approval given by DEP to another Commonwealth agency (*e.g.* a permit issued to PennDOT to construct a highway culvert). Independent agencies, such as the Game Commission and the Fish and Boat Commission, may challenge approvals granted by DEP (*e.g.* a Fish and Boat Commission appeal of a surface mining permit).

The regulations of other State agencies would not be affected.

The final regulations supersede specified rules of the General Rules of Administrative Practice and Procedure, 1 Pa. Code Chs. 31, 33, and 35.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Board's staff is briefed on the new regulations prior to publication.

The new rules are printed, published and distributed with the Board's appeal packet to attorneys in applicable state agencies and in the private sector. The Board's staff is available by telephone for any assistance.

Dates, times, and locations to be determined.

## Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

None.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The rule on representation of parties makes explicit the requirement of the Supreme Court that corporations be represented by an attorney admitted to practice before the Pennsylvania Supreme Court. Unincorporated associations which are able to find out-of-state counsel to represent them will be exempt from this requirement

The final regulations are rules of procedure for proceedings before the EHB and, like rules of court, must be uniform.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

Implementation will occur immediately after adoption as final rules.

There are no conformity deadlines.

(31) Provide the schedule for continual review of the regulation.

Because the final regulations are rules of procedure for a quasi-judicial tribunal, no sunset date has been assigned. However, the effectiveness of the regulations will be evaluated on an on-going basis by the EHB and the EHB Rules Committee.

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REVENUE DIVISION

**FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU**

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#2005

Copy below is hereby approved as to form and legality. Attorney General.

By: \_\_\_\_\_  
(Deputy Attorney General)

\_\_\_\_\_  
(Date of Approval)

Check if applicable  
Copy not approved.  
Objections attached.

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Environmental Hearing Board  
(Agency)

Document/Fiscal Note No. 106-4

Date of Adoption: June 16, 1999

By: George J. Miller

Title: George J. Miller, Chairman  
(Ex. Officer, Chairman or Sec'y)

Copy below is hereby approved as to form and legality. Executive or Independent Agencies.

By: R. E. O'Connell

6/30/99  
Date of Approval

(Deputy General Counsel)  
(Chief Counsel, Indep. Agency)  
(Strike inapplicable title)

Check if applicable. No Attorney General approval or objection within 30 days after submission.

**NOTICE OF FINAL RULEMAKING**

**TITLE 25 - RULES AND REGULATIONS  
ENVIRONMENTAL HEARING BOARD**

**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
(25 Pa. Code, Chapter 1021)**

**PRACTICE AND PROCEDURE**

## **PREAMBLE**

The Environmental Hearing Board (EHB or the Board) by this order amends Title 25 of the *Pennsylvania Code* as set forth at Annex A. The amendments modify the rules of practice and procedure before the EHB by adding or correcting terminology relating to the EHB and implementing improvements in practice and procedure.

The EHB approved the final regulations at its June 16, 1999 meeting.

### **Effective Date**

The amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

### **Contact Person**

For further information, contact William T. Phillipy, IV, Secretary to the Board, 2<sup>nd</sup> Floor, Rachel Carson State Office Building, P.O. Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. If information concerning this notice is required in an alternative form, Mr. Phillipy may be contacted at the above number. TDD users may telephone the EHB through the AT&T Pennsylvania relay center at 1-800-654-5984.

### **Statutory Authority**

The regulations are promulgated under the authority of Section 5 of the Environmental Hearing Board (35 P.S. § 7515) which empowers the EHB to adopt regulations pertaining to practice and procedure before the EHB.

### **Comments and Revisions to Proposed Rulemaking**

The EHB received comments on the proposed revisions from the Independent Regulatory Review Commission (the IRRC); John W. Carroll, Esq. of Pepper Hamilton; R. Timothy Weston, Esq. of Kirkpatrick & Lockhart; and Thomas A. Linzey, Esq. of the Community Environmental Defense Fund. The commentators have specific comments which will be addressed on a section-by-section basis. We will address the comments and recommendations as a group only where the commentators have the same comments and recommendations. However, comments and recommendations which have only been raised by one of the commentators will be separately addressed.

### **§ 1021.17 Extensions of time**

One commentator suggested that Subsection (a) of this rule should grant the Board authority to grant a motion for an extension of time for the filing of appeals.

The commentator states that because the 30-day time period for filing some appeals is not established by statute, but is established solely by the provisions of the Board's Rules at 25 Pa. Code § 1021.52, the Board has authority to interpret its rules to allow such a motion.

The more recently adopted environmental statutes such as the Air Pollution Control Act, 35 P.S. § 4010.2, and the Storage Tank and Spill Prevention Act, 35 P.S. § 7313, specify that an appeal to the Environmental Hearing Board must be filed within 30 days. This is the same period which the Board has adopted at 25 Pa. Code § 1021.52(d). This 30-day rule for an appeal is consistent with the rule which exists in the case of many other administrative agencies. In addition, § 1021.53(a) gives an appellant the right to amend its appeal within 20 days after the appeal is filed. As a practical matter this gives an appellant 50 days in which to state the grounds for the appeal as a matter of right. In addition, the appellant may further amend the grounds stated for the appeal if appellant meets the conditions of § 1021.53(b) relating primarily to facts developed during the preparation phases of the case including discovery. Accordingly, we think it is unnecessary to grant a right to obtain an extension of time for the initial filing of the appeal where the appeal is under statutes which do not specify a 30 day period. We also see considerable benefit to a uniform 30-day rule for the filing of appeals.

The IRRC suggested that for clarity the "Note" portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code Section 7.6 and Chapter 9. The Board adopts this suggestion by creating a cross-reference to the provisions of Board Rule 1021.17 relating to procedural motions.

### **§ 1021.22 Representation**

These rules relate to representation before the Board. The Board for years has required that corporations be represented by attorneys admitted to practice before the Supreme Court of Pennsylvania. The proposed rule would add this requirement to unincorporated associations. One commentator with extensive experience in representation of parties before the Board where citizens groups without counsel have been "represented" by their officers or by other non-attorney individuals highly endorse the direction being taken by the Board in this proposal. Its comments refer to one example where the citizens group was represented before the Board by its Secretary who dragged on the appeal for 17 months, including extensive discovery. Then, less than three weeks before the scheduled hearing on the merits, the citizens group withdrew its appeal with prejudice without extracting a single concession from the company which had received the permit which was the subject of the appeal. This commentator's more detailed description of the way in which it was put to undue expense emphasizes the importance of having parties represented by the Board who are subject to the Rules of Professional of Conduct and who are willing to comply with the Board's Rules of Procedure.

The Community Environmental Defense Fund has urged that the Board either leave the rule "as is" so as to permit unincorporated associations to be represented through a spokesperson or to change the rule to recognize *pro se* appearances by individual members of an association as a trustee *ad litem*. Rule 2152 of the Pennsylvania Rules of Civil Procedure requires that an action prosecuted by an association be prosecuted in the name of member or members thereof as trustees *ad litem* for such association. These comments point out that the retention of an attorney to represent the unincorporated association involves the considerable expense that these associations are unable to afford. Many of the comments apply to an individual proceeding *pro se*. These comments point out that many successful results have been achieved by individual *pro se* litigants or by unincorporated associations who are represented by *pro bono* counsel. The Board agrees that that is true. Nothing in the Board's proposed rule would prohibit individuals from representing themselves or an unincorporated association from being represented by *pro bono* counsel.

The commentator argues that the representation of an association by a spokesperson or representative individual does not constitute the unauthorized practice of law because there is no pecuniary benefit to the individual who becomes a representative. This is an inaccurate statement of law. The power to subpoena witnesses, to engage in the examination of witnesses at either a deposition or at a hearing and the presentation of legal and factual contentions before the Board in its adjudicatory proceedings is the very heart of the practice of law whether the individual is compensated for the effort or not. The commentator points out that many appeals before the Board may become unmanageable because of the large number of individuals who would be parties if the association is unable to appear through a spokesperson. The Board acknowledges that this is true. However, the Board believes that the alternative of a lay spokesperson authorizes the unlawful practice of law which may subject other parties to unreasonable expense and harassment which would not occur if the association were represented by an attorney bound by the Professional Rules of Conduct.

These comments argue that Rule 2152 of the Pennsylvania Rules of Civil Procedure allows a trustee *ad litem* to be designated a representative of the association which would not require an attorney representative. The commentator's description of the rule is inaccurate. Rule 2152 of the Pennsylvania Rules of Civil Procedure merely states the rule as to how an action by an unincorporated association must be prosecuted. It provides that an action prosecuted by an association shall be prosecuted in the name of the member or members thereof as trustees *ad litem* for such association. This rule with respect to the capacity to sue has nothing to do with the question of whether or not the association must have counsel to pursue its lawsuit in the courts. As indicated below, Pennsylvania law requires that parties other than individuals be represented by an attorney admitted to the Supreme Court of Pennsylvania or by a qualified attorney from another state who has been authorized by the Board to enter an appearance *pro hac vice*.

The proposed § 1021.22(c) proposes that an out-of-state attorney may be admitted to practice before the Board *pro hac vice* if the jurisdiction where the attorney is admitted to practice grants a like privilege to Pennsylvania attorneys. One commentator suggested that this proposal be expanded to include the provisions of Pennsylvania Bar Admission Rule 301 applicable to admission *pro hac vice* which requires that the motion for admission *pro hac vice* be made by a Pennsylvania lawyer and that the attorney admitted *pro hac vice* could not serve as an attorney of record.

We believe that such a proposal would unnecessarily increase the costs of litigation before the Board. While Pennsylvania trial court judges may find it convenient to be sure that there is an attorney of record within his or her easy reach, the Board's experience with out-of-state attorneys who have practiced before it has been that these attorneys are able and responsible individuals. Since much of the Board's pre-hearing practice is conducted through motions, status reports and telephone conference calls rather than by frequent pre-hearing conferences in person, we see no practical necessity for this requirement. However, we and the members of the Board's Procedural Rules Committee have concluded that this Bar Admission Rule is a part of the law of the Commonwealth and with respect to the practice of law. Under Rule 103 the Supreme Court declared that these rules shall supersede all other court rules and practices pertaining to the admission to the bar and the practice of law. Accordingly, we have no choice but to comply with the Bar Admission Rules. The rule will be amended to require corporations to retain a Pennsylvania attorney of record should they desire to be represented by lawyers other than members of the Bar of the Supreme Court of Pennsylvania.

We will create an exemption from this requirement, as recommended by the Board's Procedural Rules Committee however, for citizen groups and unincorporated associations who are able to find an out-of-state attorney who will be willing to represent them but would be unable to afford a Pennsylvania Counsel of Record. We think that such an exception is justified under the realities of environmental practice. We note that Bar Admission Rule 311 provides an exemption from the requirement of being represented by a Pennsylvania attorney admitted to practice in the case of representation of indigent persons by law students under the direction of an organized defender association or legal services program. We believe the same consideration should be given to those citizen groups and non-profit associations who are unable to afford the burden of being represented by a Pennsylvania attorney of record.

The Board has revised the rule in conformance with the statements set forth above.

### **§ 1021.30 Filing**

Proposed § 1021.30(a) requires that documents filed with the Board shall be

filed at its headquarters in Harrisburg. The principal reason for this requirement is that all of the documents filed with the Board are placed on the Board's docket by personnel in the Board's central office.

One commentator suggested that this requirement be revised to permit filing directly with the presiding administrative law judge wherever he may sit such as the Pittsburgh Office. We will continue to require filing of all documents in the Board's central office in Harrisburg to assure that all documents filed with the Board are properly recorded on the Board's docket. Any Administrative Law Judge in another location may request that the parties also provide him with a complimentary copy so that he will be promptly advised of the request being made by the party. Consequently, we reject the suggestion.

### **§ 1021.31 Service by the Board**

The IRRC suggested that this rule be revised to clarify the language. IRRC noted that the amendment to supersede the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 33.31 (relating to service by the agency) leaves unanswered the question of whom to serve if a party has not yet entered an appearance. Existing Rule 1021.31 requires that the Board serve documents originated by it, including orders and notices, upon the person designated in the notice of appearance. The IRRC recommended either 1) that the rule continue to "supplement" and not supersede the General Rules; or 2) revise the rule to indicate that service should be made on a permittee before the permittee enters an appearance.

We will adopt the second suggestion by requiring that the Board serve any person on whom the notice of appeal or complaint was served. This will result in service on the permittee because § 1021.31 and 1021.51 requires that service be made on any permittee at the address set forth in the permit or at its chief place of business in the Commonwealth.

One commentator suggested that the provisions of these rules be expanded so as to assure that the Board properly serves the party in the event no notice of appearance has been entered and that service on an attorney be made on the particular attorney representing the client in the matter before the Board.

The Board customarily serves its orders and other notices on the party involved whether or not represented by counsel and invariably serves only the attorney who has entered an appearance for the party before it in the case where the party is represented by counsel. The Board has amended the rule to reflect the suggested changes. However, the Board will amend proposed § 1021.51(g) to assure that when service is made on any third party, such as the permittee when the appeal is filed and will continue to serve that party until an appearance is entered by an attorney. Thereafter, service will be made on that attorney. In addition, the Board will amend proposed § 1021.32 to assure that service will be made only on an



attorney representing the party in the matter before the Board.

### **§ 1021.32 Service by a party**

The existing §§ 1021.31 and .32 and proposed § 1021.32 relate to required service by a party. Proposed § 1021.32 requires the parties to file a copy of each document filed with the Board on every party to the proceeding on or before the day that the document is filed with the Board.

One commentator suggested that the Board should provide a special manner of service for the parties requesting expedited consideration of a particular motion or matter. In some instances, parties will file a document with the Board by telecopy but will serve the other parties by ordinary mail. This suggestion is being adopted in § 1021.32 by requiring that the parties be served so that they receive the document within 24 hours of filing with the Board.

### **§ 1021.33 Date of service**

One commentator strongly endorses this change in the rule which will provide an additional three days for response when service of the document is made by mail. This is the rule in both state and federal court procedure.

### **§ 1021.35 Number of copies**

Section 1021.35(a)(2) requires filing two copies of pre-hearing memoranda, petitions for supersedeas and all other motions. One commentator and the IRRC correctly point out that the rule should require filing of two copies only in the case of pre-hearing memoranda, petitions for supersedeas and all motions other than motions for stays, extensions and continuance of procedural deadlines. The rule will be amended to insert the word "**than**" in the rule as indicated above.

### **§ 1021.51 Commencement, form and content**

Subsection (f) of this rule requires prepayment of a penalty where the appeal is from an assessment of a civil penalty that requires an appellant to prepay the penalty. Commentators have pointed out that this rule should specifically state that this requirement applies only when a statute requires the prepayment of the penalty. The IRRC concurred with the commentators that the section should be revised to clearly indicate that the prepayment requirement only applies when required by statute. The Board intended that the prepayment requirement would be applicable only in the event prepayment was required by a statute, and will clarify the rule by adding that language to the final regulation.

As noted above, this rule is being amended at Subsection (g)(3) to require service on the recipient of a Department action, such as a permittee, at the address set forth in the document evidencing the Department's action or at its chief place of

business in the Commonwealth. One commentator pointed out several typographical errors in the publication of this rule. Subsection (f) (proposed subsection (g)) will be retained in the final rulemaking including subsections (1) through (3).

#### **§ 1021.56 Complaints filed by the Department**

The IRRC commented that the amendments should be revised for reasonableness and clarity. It questioned whether the change in the language in Subsection (b), specifically the replacement of notice to plead with notice of right to respond, will give adequate notice of the consequences of a failure to respond, or the failure to specifically deny factual allegations. The IRRC suggested that the Board should either: 1) revise the regulation to provide that complaints will contain a notice advising defendants of these consequences; or 2) explain how defendants are advised of these consequences through other means.

The Board amends the rule to include a provision that a complaint shall contain a notice advising defendants that a failure to respond stating all answers, objections and defenses may result in judgment being entered against them.

#### **§ 1021.57 Answers to Complaints filed by the Department**

Subsection (c) of § 1021.57 of the Board's proposed rules provides in the case of a complaint for civil penalties by the Department a defendant failing to file an answer in the prescribed time shall be deemed in default and all relevant matters in the complaint may be deemed admitted. This is in accord with the usual rule of civil practice that admissions of material facts made in a responsive pleading may be offered into evidence at the time of hearing or trial.

The IRRC and one commentator stated that this should occur only "on motion made." The Board will add "**upon motion made.**" Counsel might choose to raise this issue by a motion rather than by a simple offer of the admission as evidence.

This regulation provides that the pre-hearing procedures relating to discovery and the filing of dispositive motions provided for in § 1021.81 will be followed after an answer is filed. One commentator suggested that this should be done only after preliminary objections are decided. As indicated above, the Board will not follow this suggestion. Section 1021.57 will be amended to make it clear in subsection (e) that all affirmative defenses must be raised in the answer and that no preliminary objections are to be filed.

The IRRC's comments contained three recommendations:

- 1) Subsection (b) should be divided into two lettered paragraphs for clarity;
- 2) the regulation should be amended to resolve whether:

- a) replies to new matter and answers to preliminary objections are still required; and
- b) the same “deemed admitted” rule applies to a failure to file a reply or answer; and
- 3) it concurred with another commentator that the language “upon motion made” should be incorporated in Subsection (c) for clarity since the proposed rule leaves unclear how facts may be deemed admitted against a party.

The Board will amend Subsections (b) and (c) to reflect the IRRC’s first suggestion. The IRRC’s other two comments have been adopted in the changes made above in § 1021.57.

### **§ 1021.58 Procedure after an Answer is filed**

This regulation provides that the pre-hearing procedures relating to discovery and the filing of dispositive motions provided for in § 1021.81 will be followed after an answer is filed. One commentator suggested that this should be done only after preliminary objections are decided. As indicated above, the Board will not follow this suggestion. Section 1021.57 will be amended to make it clear that all affirmative defenses must be raised in the answer and that no preliminary objections are to be filed.

### **§1021.70 Motions - General**

Proposed § 1021.70(e) seeks to establish an admission for purposes of deciding a motion upon the failure by a party to respond to all factual averments contained in the motion. Subsection (e) requires that a response to a motion set forth in correspondingly numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. The proposed rule would add the language “material facts set forth in the motion that are not denied may be deemed admitted for the purposes of deciding the motion.” This provision is required in order to force parties responding to a motion to actually deal with the facts rather than to simply brush off the motion with generalities. Sometimes the answers filed by *pro se* appellants give a pretty good idea of what their claim is but do not address the facts in correspondingly numbered paragraphs as the rule requires. In this situation the Board needs some discretion as to whether or not it will deem the material facts admitted or not. In any event, this rule would deem admitted material facts only for purposes of deciding the motion. This should be compared to the requirement of § 1021.57 with respect to answers to complaints or replies to new matter. In this case, the Board may deem the facts admitted for all purposes of the case.

The IRRC and one commentator suggested that this provision be made consistent with subsection (f) by amending subsection (e) to include the following language set forth in bold: “Material facts set forth in a **motion other than a motion for**

**summary judgment or partial summary judgment** that are not denied. . ." The Board will make this change in the final rulemaking in order to provide consistency.

One commentator suggests that any such motion be subject to the requirement that the moving party attach a verification or affidavit supporting each of the facts set forth in the motion.

We think that such a requirement would not make an improvement in motion practice. While the Board requires affidavits based on personal knowledge for purposes of a motion for summary judgment or for a petition for supersedeas, the result of consideration of those motions by the Board are likely to affect basic substantive rights. The proposed rule is designed for those parties who choose not to aid the Board in determination of what the facts are related to the motion by simply ignoring the factual averments of the motion or fail to respond at all. We think that counsel opposing the motion can easily respond to the factual averments of the motion thus helping the Board decide the matter without the risk of an adverse conclusion by the Board based on a technical interpretation of the parties' response. In any event, we think that the requirement that the attorney filing the motion attach an affidavit based on knowledge, information and belief would not deter the broad allegations with which this commentator is concerned

#### **§ 1021.80 Consolidation**

Section 1021.80 governs the procedure on consolidation of proceedings. It also supersedes the comparable provision in GRAPP. One commentator and the IRRC suggested that the applicability of 1 Pa. Code § 35.45 should be retained because it authorizes the Board in a consolidated case to make orders concerning the conduct of the proceeding to avoid any unnecessary cost or delay. This amendment is not necessary because proposed §1021.4 authorizes the Board to interpret the regulations to secure a just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. Accordingly, the Board does not believe that a specific provision for dealing with consolidation of cases is necessary. the Board will adopt the suggestion of the IRRC that this section cross reference § 1021.4.

#### **§ 1021.88 Motions in Limine**

Section 1021.88 of the proposed regulations provides that a party may obtain a ruling on evidentiary issues by filing a motion *in limine*. One commentator suggested that this provision should be deleted because it gives no guidance to individuals who appear before the EHB. This commentator says that this provision implies that the Board must decide the evidentiary issue, but in fact the presiding administrative law judge could exercise his discretion not to rule on it as a preliminary matter. The commentator is correct that this is the effect of this provision. Under most circumstances, the motion will be decided. However, the presiding administrative law judge may decide that the decision should be reserved

until the evidence is offered. However, we think that providing for a motion *in limine* in the Board's rules does give guidance to parties that evidentiary issues may well be ruled upon in advance of the hearing.

#### **§ 1021.104 Transcript**

This rule relates to post-hearing submissions, and proposes that this rule supersede the otherwise applicable GRAPP rule at 1 Pa. Code §§ 35.131 - .133 providing the procedure for post-hearing submissions. These rules also provide a procedure for corrections in the transcript upon motion or agreement by the parties, which would not otherwise be provided for by an existing Board Rule. The Board will adopt a comment of one commentator and the IRRC and withdraw the proposed suppression.

The Board intends to propose a rule with respect to correction of the transcript in the near future before again proposing to supersede these rules. In the meantime, correction of stenographic areas in the transcript can be corrected by motion or agreement of the parties as a matter of course under GRAPP.

#### **§ 1021.107 Evidence**

The IRRC suggested that for clarity the "Note" portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code Section 7.6 and Chapter 9. The Board adopts the suggestion by stating in the rule that the Board generally applies the Pennsylvania Rules of Evidence.

#### **§ 1021.108 Written testimony**

This rule provides for the use of written testimony as a means of a party to present direct testimony, subject to cross-examination by the opposing party.

One commentator suggests that the Board should explicitly reserve the power, upon objection from other parties, to require that witnesses present their direct testimony in person and on the witness stand. In addition, this commentator says that the Board must make a clear requirement that written testimony be filed a certain number of days before the start of the hearing so that there will be ample time to prepare a meaningful response.

We believe that no change in the rule is required. This proposed rule only states that the prepared testimony "may" be admitted into evidence. The Board will have ample authority at a pre-hearing conference prior to the time of the hearing to rule on any objections to the use of prepared testimony. Indeed the proposed rule provides for objections to the use of written testimony that must be filed at least five days before the hearing.

We think it unnecessary to require that written testimony always be submitted

prior to the initial day of the hearing. In many cases, the Board's hearings will stretch out for several weeks which are not necessarily consecutive. Accordingly, the rule would permit the filing of written testimony at one of these later dates only upon motion approved by the Board. In this event the Board will permit the use of prepared testimony only if that is useful and the opposing party has ample time to respond. This will assure that the responding party will have ample time to make a meaningful response. However, as a matter of clarity, we have amended Subsection (c) to refer to the point in time that party may file written testimony to be "prior to the close of the record" in place of "at a later date."

### **§ 1021.117 Amicus Curiae**

Section 1021.117 provides for interested persons to file a brief or memorandum of law *amicus curiae* with regard to legal issues involved in the case. It provides a procedure for obtaining authorization from the Board to file such a brief. One commentator suggested that this section should be deleted because of his belief that a party should either meet the legal standing test to intervene or not be heard at all.

The Board believes that briefs *amicus curiae* by interested parties such as environmental groups and industry associations which might not otherwise have standing to be a party in the case should be heard on their views of legal issues. The Board has found in some instances that such interested parties have raised significant legal issues which justifiably were decisive of the matter which the parties did not raise before the Board. Accordingly, this rule will be retained.

### **§ 1021.125 Sanctions**

This proposed rule deals with the sanctions that the Board may impose on a party for failure to abide by a Board order or Board rule of practice and procedure. The power to dismiss the appeal or preclude the introduction of evidence for witnesses or documents not disclosed in discovery is continued. The power to bar an attorney from practice before the Environmental Hearing Board for repeated or flagrant violations of orders is removed to comply with the decision of the Pennsylvania Supreme Court. The reference to the Pennsylvania Rules of Civil Procedure for practice before the Court of Common Pleas was also removed because those rules relate only to discovery matters whereas the Board rule is designed to cover all situations in which the imposition of sanctions would be appropriate.

One commentator has suggested that the deletion of language "in compliance with an order" with respect to sanctions should be reinserted where it was deleted. He asserts that a party should not be sanctioned for failure to disclose evidence unless there was an affirmative duty to disclose the evidence either pursuant to the pre-hearing order or in response to a specific order of the Board. The Board rejects this proposal. Reinserting this language might enable a party who wants to hide a material witness or material documents in discovery to be free to introduce that

evidence in the event the Board had not previously entered an order prohibiting the introduction of that evidence. Attorneys for parties before the Board know that a failure to reveal material witnesses or material documents in the course of discovery is most likely to result in the Board sustaining an objection to the offer of that evidence at the hearing on the ground that it was not disclosed in discovery. The objecting party probably will not know in advance that there is a material witness or a material document which has not been disclosed in discovery and should be free to make an effective objection at the time that evidence is offered whether or not it previously has made a motion.

Two commentators and the IRRC state that the phrase “other appropriate sanctions” is too vague. The Board will amend the rule at the suggestion of the IRRC to read “other appropriate sanctions including those permitted under Rule 4019 of the Pennsylvania Rules of Civil Procedure relating to discovery matters.” While the language “other appropriate sanctions” will leave broad discretion in the Board as to other possible situations in which sanctions might be imposed, the Board believes that it is not possible in advance to be more specific about the types of situations that might possibly arise in the future where sanctions may be appropriate for reasons other than a failure to comply with discovery requests.

#### **§ 1021.161 Prepayment of penalties**

The IRRC suggested that the proposed rule be divided into subsections and for clarity that the “Note” portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code Section 7.6 and Chapter 9. The Board adopts these suggestions and incorporates the note concerning the bond into a new Subsection (b).

#### **§ 1021.162 Hearing on inability to prepay penalty**

This rule relates to hearings on inability to prepay a penalty or post a bond. One commentator points out that the rule improperly refers to an application for counsel fees under more than one statute. The rule will be amended as suggested so that it refers to: “(relating to commencement, form and content of appeals)”.

The IRRC suggested that the Board make the following amendments for clarity: 1) replace “in the event” with “if”; and 2) divide the first and second sentences into two separate subsections. The rule will be amended to reflect these recommendations.

#### **Other Proposed Rules**

The Board did not receive any comments on proposed rules § 1021.2 Definitions; § 1021.4 Construction and application of rules; § 1021.11 Timely filing required; § 1021.15 Effective dates of Board adjudications and preliminary orders; § 1021.21 Appearance in person; § 1021.34 Certificate of service; § 1021.41

Docket; § 1021.52 Timeliness of appeal; § 1021.61 Special actions; § 1021.64 Pleadings: generally; § 1021.65 Complaints-civil penalty proceedings; § 1021.66 Answers-civil penalty proceedings; § 1021.81 Pre-hearing procedure; § 1021.82 Pre-hearing memorandum; § 1021.85 Initiation of hearings; § 1021.86 Conduct of hearings; § 1021.87 Continuance of hearings; § 1021.89 Presentation by the parties; § 1021.90 Limiting number of witnesses and additional evidence; § 1021.92 Oral argument after hearing; § 1021.114 Subpoenas; § 1021.116 Post-hearing briefs; § 1021.118 Adjudications; and § 1021.171 Composition of the Certified Record on Appeal to Commonwealth Court.

### **Sunset Date**

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an on-going basis by the EHB and the EHB Rules Committee.

### **Regulatory Review**

On February 16, 1999, as required by Section 5(a) of the Regulatory Review Act, act of June 30, 1989, P.L. 73 (71 P.S. § 745.4(a)), the EHB submitted copies of the proposed revisions, which were published at *Pennsylvania Bulletin* Vol. 29, No. 9 (February 27, 1999), to the IRRC, the Senate and House Environmental Resources and Energy Committees for review and comment. The EHB, in accordance with Section 5(b.1) of the Regulatory Review Act (71 P.S. § 745.5(b.1)), also provided the IRRC and the Committees with the Regulatory Analysis prepared in compliance with Executive Order 1982-2 (relating to improving government regulations) and copies of comments received.

In preparing the final form regulations, the EHB has considered all comments received from the public and the IRRC. No comments on the proposed regulations were received from either of the legislative committees.

These final form regulations were \_\_\_\_\_ by the House Environmental Resources and Energy Committee, and were \_\_\_\_\_ by the Senate Environmental Resources and Energy Committee on \_\_\_\_\_ . IRRC met on \_\_\_\_\_ , and the regulations pursuant to Section 5(c) of the Regulatory Review Act.

### **Findings of the EHB**

The EHB finds that:

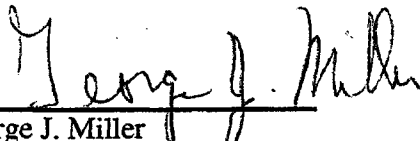
- (1) Public notice of the proposed rulemaking was given under Sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2.



- (2) These regulations are necessary and appropriate for administration of the EHB Act.

**Order**

- (a) The regulations of the EHB are amended by Annex A.
- (b) The Chairperson of the EHB shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel as to legality and form as required by law.
- (c) The Chairperson of the EHB shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee, and the IRRC, as required by law.
- (d) The Chairperson of the EHB shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (e) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

  
\_\_\_\_\_  
George J. Miller  
Administrative Law Judge  
Chairman

ANNEX A

**TITLE 25. ENVIRONMENTAL PROTECTION**  
**PART IX. ENVIRONMENTAL HEARING BOARD**  
**CHAPTER 1021. PRACTICE AND PROCEDURES**  
**Subchapter A. PRELIMINARY PROVISIONS**

**GENERAL**

Sec.	
1021.1.	Scope of chapter.
1021.2.	Definitions.
1021.3.	Amendments to rules
<u>1021.4</u>	<u>Construction and application of rules.</u> <sup>1</sup>

**TIME**

1021.11.	[Timely filing required] ( <u>Reserved</u> ).
1021.12.	(Reserved).
1021.13.	(Reserved).
1021.14.	(Reserved).
1021.15.	Effective dates of Board adjudications and preliminary orders.
1021.16.	(Reserved).
1021.17.	Extensions of time[; continuance of hearings].

**REPRESENTATION BEFORE BOARD**

1021.21.	[Appearance in person] ( <u>Reserved</u> ).
1021.22.	[Appearance by attorney] <u>Representation</u> .
1021.23.	Notice of appearance.

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<sup>1</sup>

**KEY**

[ ] Denote deletions.

— Denote amendments

**Bold** Denotes revisions from the proposed package

[ ] Denotes deletions from the proposed package

## GENERAL

### § 1021.1. Scope of chapter.

- (a) This chapter governs practice and procedure before the Environmental Hearing Board.
- (b) This chapter is not applicable to a proceeding to the extent that the applicable statute governing or authorizing the proceeding sets forth inconsistent practice or procedure.
- (c) Except when inconsistent with this chapter, 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) is applicable insofar as it relates to adjudicatory proceedings. When the term "agency" is used in 1 Pa. Code Part II, "Board" is to be understood; when the term "participant" is used in 1 Pa. Code Part II, "party" is to be understood.
- (d) Subsections (a)--(c) supplement 1 Pa. Code § 31.1 (relating to scope of part).

### § 1021.2. Definitions.

- (a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Act* -- The Environmental Hearing Board Act (35 P.S. §§ 7511-7516).

*Action*-- An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, license, approval or certification.

*Board*--The Environmental Hearing Board, consisting of its chairperson and four members, all of whom are administrative law judges appointed by the Governor to hear appeals from actions of the Department.

*Costs Act*-- The act of December 13, 1982 (P.L. 1127, No.257) (71 P.S. §§ 2031-2035), known as the Commonwealth Agency Adjudicatory Expenses Award.

*Department*--The Department of Environmental Resources or its successor agencies.

*Dispositive Motion*--A motion that seeks to resolve the issues in an appeal without the need for hearing or further hearing. The term includes a motion to quash appeal, a motion to dismiss, a motion for summary judgment, and a motion for partial summary judgment, but not a motion in limine.

*Hearing examiner*--A person other than a Board member designated by the Board to preside at hearings or conferences.

*Intervenor*- A person who has been permitted to intervene by the Board, as provided by §1021.62 (relating to intervention).

*Party*-- An appellant, appellee, plaintiff, defendant, permittee or intervenor.

*Permittee*--The recipient of a permit, license, approval or certification in a third-party appeal.

*Person*--An individual, partnership, association, corporation, political

subdivision, municipal authority, or other entity.

Pleading--A complaint filed under 25 Pa. Code § 1021.56 or answer filed under 25 Pa. Code § 1021.57. Documents filed in appeals, including the notice of appeal, are not pleadings.

Supersedeas--A suspension of the effect of an action of the Department pending proceedings before the Board.

Third-party appeal--The appeal of an action by a person who is not the recipient of the action.

(b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions), except for "pleading" which supersedes the definition of "pleading" in 1 Pa. Code § 31.3 (relating to definitions).

### **§ 1021.3. Amendments to rules.**

(a) The Board retains continuing jurisdiction under section 5 of the act (35 P.S. § 7515 to adopt the amendments and additions to this chapter as may be appropriate.

(b) The Board is authorized to establish forms as may be required to implement the act.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.6 (relating to amendments to rules).

### **§ 1021.4. Construction and Application of Rules.**

These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of any such appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

## **TIME**

### **§ 1021.11. [Timely filing required.]**

(a) Appeals, briefs, notices, and other documents required or permitted to be filed under this chapter shall be received by the Board within the time limits, if any, for the filing. The date of receipt by the Board and not the date of deposit in the mails is determinative.

(b) Subsection (a) supplements 1 Pa. Code § 31.11 (relating to timely filing).]

Repealed. (Reserved).

### **§ 1021.12. (Reserved).**

§ 1021.13. (Reserved).

§ 1021.14. (Reserved).

§ 1021.15. **Effective dates of Board adjudications and preliminary orders.**

(a) Adjudications and orders of the Board will be effective as of the date of entry.

(b) Subsection (a) [supplements] supersedes 1 Pa. Code § 31.14 (relating to effective dates of agency orders).

§ 1021.16. (Reserved).

§ 1021.17. **Extensions of time[; continuance of hearings].**

(a) The time fixed or the period of time prescribed for the filing of a document required or permitted to be filed under this chapter, other than the notice of appeal, may be extended by the Board for good cause upon motion [before expiration of the time for filing].

[(b) Hearings may not be continued except for compelling reasons. Requests for continuances shall be submitted to the Board in writing with a copy served upon the other parties to the proceedings, except that during the course of a hearing in a proceeding, the requests may be made by oral motion in the hearing.]

(b) **The motion in subsection (a) shall conform to the provisions in Rule 1021.71 (relating to Procedural motions).**

(c) [(b)] [(c)] Subsections (a) and (b) [supplement] supersedes 1 Pa. Code § 31.15 (relating to extensions of time).

[Note: The motion in subsection (a) shall conform to the provisions in Rule 1021.71 (relating to Procedural motions)]

## **REPRESENTATION BEFORE THE BOARD**

§1021.21. **[Appearance in person.] Repealed. (Reserved).**

[(a) An individual may appear in his own behalf; a partnership may be represented by its members; an association may be represented by its officers; and an authority or governmental agency, other than the Department, may be represented by an officer or employee.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.21 and 31.23 (relating to appearance in person; and other representation prohibited at hearings).]

§1021.22. **[Appearance by attorney.] Representation.**

[(a) A corporation shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania.

(b) A person may be represented in a proceeding by an attorney-at-law admitted to

practice before the Supreme Court of Pennsylvania. In appropriate circumstances, the Board may require a that a party be represented by an attorney.]

[(a) Parties, except individuals appearing in their own behalf, shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania at all stages of the proceedings subsequent to the filing of the notice of appeal.]

(b) [A person] An individual may be represented in a proceeding by an attorney [at-law] admitted to practice before the Supreme Court of Pennsylvania. In appropriate circumstances, the Board may require an individual or group of individuals to be represented by an attorney.

(c) Representation by *pro hac vice* may, upon written request, be by an attorney admitted to practice in jurisdictions other than the Commonwealth if the jurisdiction where they are admitted to practice accords a like privilege to attorneys of the Commonwealth.

[(c)] (d) A party, other than the Commonwealth, may not be represented by an attorney or person who is at the same time an employee of the Commonwealth.]

**(a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney at all stages of the proceedings subsequent to the filing of the notice of appeal.**

**(b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania. Corporations may also be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion *pro hac vice* filed by the Pennsylvania attorney of record.**

**(c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.**

**(d) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel pursuant to subparagraph (c) if the Board determines they are acting in concert with or as a representative of a group of individuals.**

(e) Subsections (a)--[(c)](d) [supplement] supersede 1 Pa. Code §§ 31.21, (relating to appearance in person), 31.22 (relating to appearance by attorney) and 31.23 (relating to other representation prohibited at hearings).

#### **§ 1021.23. Notice of appearance.**

**(a) Entries of appearance shall be filed with the Board and served upon the other parties to the proceeding.**

**(b) Subsection (a) supplements 1 Pa. Code § 31.22 and § 31.25 (relating to appearance and form of notice of appearance).**

### **Subchapter B. DOCUMENTARY FILINGS**

## FILING AND SERVICE OF DOCUMENTS

Sec.

<u>1021.30.</u>	<u>Filing.</u>
1021.31.	Service by the Board.
1021.32.	Service by a party.
1021.33.	Date of service.
1021.34.	Proof of service.
1021.35.	Number of copies.
1021.36.	Publication of notice.
1021.41	Docket

## FILING AND SERVICE OF DOCUMENTS

### § 1021.30. Filing.

(a) Documents filed with the Board shall be filed at its headquarters - 2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(b) The date of filing shall be the date the document is received by the Board.

(c) Documents may be filed by personal delivery, by mail, or by facsimile. When a document is filed by facsimile, the original shall be deposited in the mail on the same day. If a document exceeds ten pages, the facsimile shall consist of the first five pages and last five pages of the document and the certificate of service. Any filing received after the close of the business day at 4:30 pm Eastern Time shall be deemed to be filed on the following business day.

### **§ 1021.31. Service by the Board.**

(a) Orders, notices, and other documents originating with the Board shall be served upon the person designated in the notice of appearance, **or if no notice of appearance has been entered, upon the person upon whom the notice of appeal or complaint was served** by mail or in person.

(b) Subsection (a) [supplements] supersedes 1 Pa. Code § 33.31 (relating to service by the agency).

### **§ 1021.32. Service by a party.**

[(a) Pleadings, submittals, briefs and other documents filed in the proceedings pending before the Board, when filed or tendered to the Board shall be served upon participant in the proceeding. The service shall be made by delivering in person, or by mailing, properly addressed with postage prepaid.

(b) Complaints for civil penalties when served, shall be enclosed with the following:

(1) A statement certifying that it is true and complete copy of the complaint

filed with the Board.

- (2) A notice to plead.
- (c) Appeals from actions of the Department shall be served upon the following:
  - (1) The officer of the Department taking the action.
  - (2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(d) If service of an appeal upon the recipient of a permit, license, approval, or certification is required, the service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient. Reference should be made to § 1021.51(f) (relating to commencement, form and content).

(e) Documents filed with the Board shall be filed at its headquarters, 2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.]

(a) Copies of each document filed with the Board, shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

**(b) In matters involving requests for expedited disposition service shall be made within the ensuing 24 hours of the time of filing with the Board. For purposes of this subsection service shall mean actual receipt by the opposing party.**

(c) ~~[(b)] [(f)]~~ Subsection[s] (a)[- (e) supplement] supersedes 1 Pa. Code § 33.32 (relating to service by a participant).

**§ 1021.33. Date of service.**

(a) The date of service shall be the date the document served is [deposited in the United States mail, or is delivered in person] mailed or delivered in person. When service is by mail, three days shall be added to the time required by these rules for responding to the document.

(b) Subsection (a) [is identical] supersedes 1 Pa. Code § 33.34 (relating to service by participant).

**§ 1021.34. [Proof] Certificate of service.**

(a) [The Board may require, if appropriate, a proof of service] Each document which is required to be filed with the Board shall include a certificate of service which shall certify the date and manner of service and the name and address of the person served.

(b) Subsection (a) supersedes 1 Pa. Code § 33.35 (relating to proof of service).

**§ 1021.35. Number of copies.**



(a) Unless otherwise ordered by the Board, the following number of copies shall be filed with the Board:

(1) [Pleadings and] Dispositive motions and post-hearing briefs -- three copies.

(2) Pre-hearing memoranda, petitions for supersedeas and all motions, other than motions for stays, extensions and continuances of procedural deadlines -- two copies.

[(2)](3) Other documents -- one copy.

(b) One copy of briefs and other documents shall be served on the other [party in a] parties to the proceeding.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.37 (relating to number of copies).

#### **§ 1021.36. Publication of notice.**

Publication of a notice of action or proposed action by the Department or Board in the *Pennsylvania Bulletin* shall constitute notice to or service upon all persons, except a party, effective as of the date of publication.

#### **§ 1021.41. Docket.**

(a) The Board will maintain a docket of proceedings and a proceeding as initiated shall be assigned and appropriate designation.

(b) The Board will maintain a complete official file on proceedings.

(c) The docket and the official file shall be available for inspection and copying by the public during the office hours of the Board insofar as consistent with the proper discharge of the duties of the Board.

(d) Subsections (a)-(c) [supplement] supersede 1 Pa. Code § 33.57 (relating to docket.).

### **Subchapter C. FORMAL PROCEEDINGS**

#### **APPEALS**

Sec.

1021.51. Commencement, form and content.

1021.52. Timeliness of appeal.

1021.53. Amendments to Appeal; Nunc Pro Tunc Appeals.

#### **[COMPLAINTS FOR CIVIL PENALTIES]SPECIAL ACTIONS**

- 1021.56. [General.] Complaints filed by the Department.  
1021.57. [Form and content.] Answers to Complaints filed by the Department.

### **SUBSEQUENT PROCEDURES**

- 1021.58. Procedure after an Answer is filed.

### **[SPECIAL ACTIONS]**

- 1021.61. [Special actions.] (Reserved).

### **INTERVENTION**

- 1021.62. Intervention.

### **[PLEADINGS: GENERALLY]**

- 1021.64. [Pleadings: generally.] (Reserved).

### **[PLEADINGS: CIVIL PENALTY PROCEEDINGS]**

- 1021.65. [Complaints.] (Reserved).  
1021.66. [Answers.] (Reserved).

### **MOTIONS**

- 1021.70. General.  
1021.71. Procedural motions.  
1021.72. Discovery motions.  
1021.73. Dispositive motions.  
1021.74. Miscellaneous motions.

### **SUPERSEDEAS**

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**APPEALS**

**§ 1021.51.               Commencement, form and content.**

- (a)   An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.
- (b)   The caption of an appeal shall be in the following form:

ENVIRONMENTAL HEARING BOARD  
2nd Floor, Rachel Carson State Office Building  
400 Market Street, Post Office Box 8457  
Harrisburg, Pennsylvania 17105-8457

JOHN DOE, Appellant  
234 Main Street, Smithtown,  
Jones County, Pennsylvania 15555  
(Telephone (123) 456-7890)

v.

Docket No. \_\_\_\_\_

Commonwealth of Pennsylvania  
Department of \_\_\_\_\_, Appellee

- (c)   The appeal shall set forth name, address, and telephone number of appellant.
- (d)   If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.
- (e)   The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.
- (f)   Where the appeal is from an assessment of a civil penalty [that] for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing

payment of the penalty or a verified statement that the appellant is unable to pay.

[(f)] (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

- (1) The office of the Department issuing the notice of Departmental action;
- (2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(3) In a third party appeal, the recipient of the action. **The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.**

[(g)] (h) The service upon the recipient of an action as required by this section, shall subject the recipient to the jurisdiction of the Board as a party.

[(h)](i) Appellant shall provide satisfactory proof that service has been made as required by this section.

[(i)](i) Subsections (a)--[(h)](i) supersede 1 Pa. Code §§ 35.5 - 35.7 and §§ 35.9 - 35.11 (relating to informal complaints; and formal complaints).

#### **§ 1021.52. Timeliness of appeal.**

(a) Except as specifically provided in § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*;

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file any missing information required by Rule 1021.51(c),(d) and (i) or suffer dismissal of the appeal.

[(b)](c) Subsections (a)-- (b) supersede 1 Pa. Code §§ 35.5 - 35.7 and 35.9 - 35.11 (relating to informal complaints; and formal complaints).

Comment: The language "person to whom the action of the Department is issued or directed" is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See Sections 4(a) and (c) of the act (35 P.S. § 7515)

#### **§ 1021.53. Amendments to appeal; Nunc Pro Tunc Appeals.**

(a) An appeal may be amended as of right within 20 days after the filing thereof.

(b) After the 20 day period for amendment as of right, the Board, upon motion by the appellant, may grant leave for further amendment of the appeal. This leave may be granted if appellant establishes, that the requested amendment satisfies one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

(c) An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.

(d) These motions shall be governed by the procedures in §§ 1021.70 and 1021.74 (relating to general; and miscellaneous motions) except that the motion shall be verified and supported by affidavits.

(e) If motion to amend is granted, a party may request, in writing, a period of time to conduct additional discovery limited to the issues raised by the amendment. These requests shall specify a period deemed necessary therefor. The Board will act on any such request as its discretion requires.

(f) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(g) Subsections (a)--(f) supersede 1 Pa. Code §§ 35.5 - 35.7 and 35.9 - 35.11 (relating to informal complaints; and formal complaints).

### **[Complaints for Civil Penalties] Special Actions**

#### **§ 1021.56. [General] Complaints filed by the Department.**

(a) [Complaints for civil penalties may be filed by the Department when authorized by statute.] Where authorized by statute the Department may initiate the action by filing a complaint or petition, together with a certificate of service and a notice of a right to respond.

(b) [An] Such action [for civil penalties] shall commence when the complaint is filed and service of the complaint and of a notice [to plead] of a right to respond is made upon the defendant.

(c) [Subsections (a) and (b) supersede 1 Pa.Code §§ 35.5-35.7 and 35.9-35.11 (relating to informal complaints; and formal complaints).] The complaint shall set forth the statutory authority under which the Board is authorized to act and shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for action is based.

(d) **The notice of a right to respond or defend shall conform to the following:**

[Case Caption]

NOTICE

If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served by entering a written appearance personally or by attorney and filing in writing with the Board your answers, defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Board without further notice for any claim or relief requested by the Department.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, contact the Secretary to the Board at (717) 787-3483.

- (e) [(d)] Subsections (a)-[(c)] (d) supersede 1 Pa. Code §§ 35.5-35.7 and 35.9-35.11 (relating to informal complaints; and formal complaints).

§ 1021.57. [Form and content.] Answers to Complaints filed by the Department.

- [(a) The caption of a complaint for civil penalties shall be in the following form:

Commonwealth of Pennsylvania,  
Department of \_\_\_\_\_

v.

EHB Docket No. \_\_\_\_\_

John Doe  
234 Main Street  
Smithtown, Jones County, Pennsylvania

- (b) The complaint for civil penalties shall set forth the statutory authority under which the Board is authorized to assess the penalties.

- (c) The complaint for civil penalties shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for civil penalties is based.]

- (a) Answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint, unless for cause the Board, with or without motion, prescribes a different time. An answer shall not be required in less than 10 days after date of service.
- (b) Answers to complaints shall set forth any legal objections as well as any denial of facts, in a single pleading.[, regardless of whether they would ordinarily be raised as preliminary objections or other preliminary pleading.]
- (c) Answers shall be in writing and so drawn as to fully and completely [to] advise the parties and the Board as to the nature of the defense[.], including affirmative



defenses. Answers shall admit or deny specifically and in detail each material allegation of the complaint and state clearly and concisely the facts and matters of law relied upon.

- (d) [(c)] A defendant failing to file an answer within the prescribed time shall be deemed in default and , upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.125 (relating to sanctions).
- (e) [(d)] **No new matter or preliminary objections shall be filed.**
- (f) [(e)] [(d)] Subsections (a)-[(c)] (e) supersede 1 Pa. Code § 35.5-35.7 and § 35.35 (relating to informal complaints; and answers to complaints and petitions).

### **Subsequent Procedure**

#### **§ 1021.58. Procedure after an Answer is filed.**

After an answer is filed the prehearing procedures set forth in Rule 1021.81 shall be followed.

### **[SPECIAL ACTIONS]**

#### **§ 1021.61. [Special actions.**

(a) In cases when the Department chooses or is required to take or request action after a hearing or an opportunity for a hearing, it may initiate or request the action by filing a verified complaint or petition, together with an order to show cause issued by the Department or the Board, upon the person against whom it is directed.

(b) Within 20 days from the date of service of the complaint, petition, or motion, the person against whom it is directed shall file with the Board a verified answer responding to the allegations in the complaint, petition, or motion and setting forth whether a hearing is desired. Allegations in the complaint, petition, or motion which are not specifically denied shall be deemed to have been admitted. Failure to file an answer or to specifically deny the essential allegations of the complaint, petition, or motion shall constitute a sufficient basis for the entry of a default order or adjudication.] Repealed. **(Reserved).**

### **INTERVENTION**

#### **§ 1021.62. Intervention.**

(a) A person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence.

(b) A petition to intervene shall be verified, and shall contain sufficient factual

averments and legal assertions to establish the following:

- (1) The reasons the petitioner seeks to intervene.
  - (2) The basis for asserting that the identified interest is greater than that of the general public.
  - (3) The manner in which that interest will be affected by the Board's adjudication.
  - (4) The specific issues upon which the petitioner will offer evidence or legal argument.
- (c) A copy of the petition shall be served upon the parties to the proceedings.
  - (d) A party may file an answer to the petition. An answer shall be verified and filed within 15 days after service of the petition, unless a shorter time is ordered by the Board.
  - (e) The Board will deny the petition if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene.
  - (f) If the Board grants the petition, the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention.
  - (g) Subsections (a)--(d) supersede 1 Pa. Code §§ 35.27 - 35.32 and 35.36 (relating to intervention; and answers to petitions to intervene).

#### [PLEADINGS: GENERALLY]

##### § 1021.64. [Pleadings: generally.]

- (a) Except as provided in this chapter, the various pleadings described in Pa.R.C.P. are the pleadings permitted before this Board, and the pleadings shall have the functions defined in the Pa.R.C.P.
- (b) The form of pleadings, including when applicable the requirement for verification, shall be as specified in the Pa.R.C.P.
- (c) Due to the nature of appeal proceedings, unless otherwise ordered by the Board, neither the Department nor a permittee shall be required to file an answer to an appeal from an action of the Department.
- (d) A party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed under § 1021.125 (relating to sanctions). The sanctions may include treating all relevant facts stated in the pleading or motion as admitted.
- (e) A response shall be in writing. The response shall admit or deny specifically and in detail the material allegation of the pleading answered, and state clearly and concisely the facts and matters of the law relied upon.
- (f) Subsections (a)--(e) supersede 1 Pa. Code §§ 35.5 - 35.7 and 35.9 - 35.11 (relating to informal complaints; and formal complaints).] Repealed. **(Reserved)**.

#### [PLEADINGS: CIVIL PENALTY PROCEEDINGS]

##### § 1021.65. [Complaints.]

(a) Complaints for civil penalties shall conform to the requirements of §§ 1021.56 and 1021.57 (relating to complaints for civil penalties).

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.5 - 35.7 and 35.9 - 35.11 (relating to informal complaints; and formal complaints).] Repealed. **(Reserved)**.

**§ 1021.66. [Answers.**

(a) Answers to complaints for civil penalties shall be filed with the Board within 20 days after the date of service of the complaint, unless for cause the Board, with or without motion, prescribes a different time. An answer will not be required in less than 10 days after date of service.

(b) Answers to complaints for civil penalties shall set forth any legal objections as well as any denial of facts, in a single pleading, regardless of whether they would ordinarily be raised as preliminary objections or other preliminary pleading.

(c) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts stated in the complaint for civil penalties may be deemed admitted. Further, the Board may impose sanctions for failure to file an answer in accordance with § 1021.125 (relating to sanctions).

(d) Answers shall be in writing and so drawn as fully and completely to advise the parties and the Board as to the nature of the defense. Answers shall admit or deny specifically and in detail each material allegation of the pleading answered and state clearly and concisely the facts and matters of law relied upon.

(e) A reply to new matter and answers to preliminary objections shall be filed within 20 days after the date of service of the new matter or preliminary objection.

(f) Subsections (a)–(e) supersede 1 Pa. Code §§ 35.5 - 35.7 and 35.35 (relating to informal complaints; and answers to complaints and petitions).] Repealed. **(Reserved)**.

**MOTIONS**

**§ 1021.70. General.**

(a) This section applies to all motions except those made during the course of a hearing.

(b) Motions and responses shall be in writing and be signed by a party or its attorney.

(c) A copy of the motion or response shall be served on the opposing party. The motion or response shall include a certificate of service indicating the date and manner of service on the opposing party.

(d) A motion shall set forth in numbered paragraphs the facts in support of the motion and the relief requested.

(e) A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. **Material facts set forth in [the] a motion, other than a motion for summary judgment or partial summary judgment, that are not denied may be deemed admitted for the purposes of deciding the motion.**

(f) Except in the case of motions for summary judgment or partial summary judgment,

for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

(g) Except as provided in § 1021.73(e) (relating to dispositive motions), the moving party may not file a reply to a response to its motion, unless the Board orders otherwise.

(h) Subsection (b) supplements 1 Pa. Code §§ 33.11 and 35.178 (relating to the execution of filed documents; and presentation of motions). Subsection (c) supplements 1 Pa. Code § 33.32 (relating to service by a participant) and supersedes 1 Pa. Code §§ 33.35 and 33.36 (relating to proof of service; and form of certificate of service). Subsections (d)-(f) supplement 1 Pa. Code §§ 35.177 and 35.178 (relating to the scope and content of motions; and presentation of motions).

**§ 1021.71. Procedural motions.**

(a) This section applies to motions pertaining to the procedural aspects of a case, including motions for continuance, for expedited consideration, for extensions of time in which to file documents, and for stay of proceedings.

(b) Procedural motions do not require verification.

(c) Procedural motions shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position.

(d) If all parties consent to the relief requested, the request may be embodied in a letter, provided the letter indicates the consent of the other parties.

(e) Requests for extensions or continuances, whether in letter or motion form, shall contain a specific date for the extension or continuance.

(f) A response to a procedural motion shall be filed with the Board within 15 days of the date of service of the motion unless otherwise ordered by the Board.

(g) Procedural motions may not be accompanied by supporting memoranda of law unless otherwise ordered by the Board.

(h) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification). Subsections (c) and (e) supplement 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection (d) supplements 1 Pa. Code § 35.179 (relating to objections to motions).

**§ 1021.72. Discovery motions.**

(a) This section applies to motions filed to resolve disputes arising from the conduct of discovery.

(b) Discovery motions shall contain as exhibits the discovery requests and answers giving rise to the dispute.

(c) Responses to discovery motions shall be filed within 15 days of the date of service of the motion, unless the Board orders otherwise.

(d) A party may file a memorandum of law in support of its discovery motion or its response to a discovery motion. The supporting memorandum of law shall be filed at the same time the motion or response is filed.

(e) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification).

Subsections (b) and (d) supplement 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection (c) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

**§ 1021.73. Dispositive motions.**

- (a) This section applies to dispositive motions.
- (b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 1035.1 - 1035.5 (relating to motion for summary judgment) except for the provision of the 30 day period in which to file a response.
- (c) Dispositive motions shall be accompanied by a supporting memorandum of law. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law.
- (d) A response to a dispositive motion may be filed within 25 days of the date of service of the motion, and may be accompanied by a supporting memorandum of law.
- (e) A reply to a response to a dispositive motion may be filed within 20 days of the date of service of the response, and may be accompanied by a supporting memorandum of law.
- (f) An affidavit or other document relied upon in support of a dispositive motion, response, or reply, that is not already a part of the record, shall be attached to the motion, response or reply or it will not be considered by the Board in ruling thereon.
- (g) Subsection (c) supplements 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection (d) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

Comment: Subsection (d) supersedes the filing of a response within 30 days set forth in Pa. R.C.P. No.1035.3(a).

**§ 1021.74. Miscellaneous motions.**

- (a) This section applies to any motion not otherwise addressed in §§ 1021.71--1021.73 (relating to procedural motions; discovery motions; and dispositive motions), including a motion in limine, a motion to strike, and a motion for recusal.
- (b) Miscellaneous motions do not require verification.
- (c) Responses to miscellaneous motions shall be filed within 15 days of the date of service of the motion, unless otherwise ordered by the Board.
- (d) A memorandum of law in support of a miscellaneous motion or response to a miscellaneous motion shall be filed with the miscellaneous motion or response.
- (e) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification).

**SUPERSEDEAS**

**§ 1021.76. General.**

- (a) A petition for supersedeas under § 4(d) of the Act (35 P.S. §7514(d)) may be filed at any time during the proceeding.
- (b) The Board will not issue a supersedeas without a hearing, but a hearing may be limited under subsection (d).

(c) A hearing on a supersedeas, if necessary, shall be held expeditiously--if feasible within 2 weeks of the filing of the petition--taking into account the available time of a Board member or hearing examiner, and taking into account the urgency and seriousness of the environmental or other problem to which the order or action of the Department applies. If good cause is shown, the hearing shall be held as soon as possible after the filing of the petition.

(d) At the discretion of the Board, if necessary to ensure prompt disposition, supersedeas hearings may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery or of cross-examination.

(e) Under § 1021.125 (relating to sanctions), the Board may impose costs or other appropriate sanctions on parties or attorneys who, in the Board's opinion, have filed requests for supersedeas in bad faith or on frivolous grounds.

**§ 1021.77. Contents of petition for supersedeas.**

(a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:

(1) Affidavits, prepared as specified in Pa.R.C.P. Nos. 76 and 1035.4 (relating to definitions; and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

(b) A petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.

(c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or *sua sponte*, without hearing, for one of the following reasons:

(1) Lack of particularity in the facts pleaded.

(2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.

(3) An inadequately explained failure to support factual allegations by affidavits.

(4) A failure to state grounds sufficient for the granting of a supersedeas.

(d) The Board, upon motion or *sua sponte*, may direct that a prehearing conference be held.

**§ 1021.78. Circumstances affecting grant or denial.**

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered :

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public

health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

**§ 1021.79. Temporary supersedeas.**

(a) An application for temporary supersedeas may be filed when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas.

(b) The application for temporary supersedeas shall be accompanied by a petition for supersedeas which comports with the requirements of § 1021.77 (relating to contents of petitions for supersedeas).

(c) The application for temporary supersedeas and accompanying petition for supersedeas shall:

(1) Be served upon the office of the Department which issued notice of the action the applicant seeks to supersede and upon the Department's Office of Chief Counsel;

(2) Include a proof of service in accordance with Pa. R.A.P. No. 122 (relating to content and form of proof of services).

(d) The Board will not issue a temporary supersedeas until it determines that the Department has been served in accordance with subsection (c) and has had a reasonable opportunity to respond by conference call or otherwise.

(e) When determining whether it will grant an application for temporary supersedeas, the Board will consider:

(1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.

(2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.

(3) The length of time required before the Board can hold a hearing on the petition for supersedeas.

(f) Unless the Board orders otherwise, a temporary supersedeas will automatically terminate 6 business days after the date of issuance.

**CONSOLIDATION**

**§ 1021.80. Consolidation.**

(a) The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings.

(b) Subsection (a) [supplements] supersedes 1 Pa. Code § 35.45 (relating to consolidation).

Comment: See also Section 1021.4 (construction and application of rules) authorizing the Board to interpret its rules to insure just, speedy and inexpensive determinations.

## **PRE-HEARING CONFERENCES AND PRE-HEARING PROCEDURES**

### **§ 1021.81. Pre-hearing procedure.**

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing that:

- (1) Discovery shall be concluded within 90 days of the date of the prehearing order.

- (2) The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories within 120 days of the date of the prehearing order.

The opposing party shall serve its expert reports and answers to all expert interrogatories within 30 days after receipt of the expert reports and all answers to expert interrogatories from the party with the burden of proof.

- (3) Dispositive motions in a case requiring expert testimony shall be filed within 180 days of the date of the prehearing order. If neither party plans to call an expert witness, dispositive motions shall be filed within 150 days after the filing of the appeal unless otherwise ordered by the Board.

- (4) The parties may, within 45 days of the date of the prehearing order, submit a Joint Proposed Case Management Order to the Board.

(b) A Joint Proposed Case Management Order shall, *inter alia*, propose alternate dates for the conclusion of discovery, the service of expert or supplemental reports, and the filing of dispositive motions. The Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties or other dates the Board deems appropriate.

(c) After the Board resolves all dispositive motions, it will establish a hearing date for the remaining issues. The Board may also direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date.

(e) Subsection (d) supplements 1 Pa. Code § 35.121 (relating to initiation of hearings).

### **§ 1021.82. Pre-hearing memorandum.**

(a) A prehearing memorandum shall contain the following:

- (1) A statement of the facts in dispute and the facts upon which the parties agree.

- (2) A statement of the legal issues in dispute, including citations to statutes, regulations, and caselaw supporting the party's position.

- (3) A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.

- (4) A list of expert witnesses whose qualifications will not be challenged and which may be entered into the record as an unchallenged exhibit.

- (5) A summary of the testimony of each expert witness.



- (6) The proposed order of witnesses.
  - (7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction.
  - (8) Signed copies of any stipulations reached by the parties.
- (b) The Board may impose sanctions on a party which does not comply with the requirements of subsection (a). These sanctions may include the preclusion of testimony or documentary evidence and the cancellation of the hearing.
- (c) The requirements of this section apply only to a party's case-in-chief.

**§ 1021.83. Pre-hearing conferences.**

- (a) The Board, on its own motion or on motion of a party, may hold a conference either prior to or during a hearing for purpose of considering offers of settlement, adjustment of the proceeding or any issue therein, or other matters to expedite the orderly conduct and disposition of a hearing.
- (b) A stipulation of the parties or rulings of the Board as a result of the conference shall be binding upon the parties.
- (c) The Board may issue such prehearing orders as it considers necessary for limiting issues of fact and law.
- (d) The Board shall, at any time, be authorized to delay a formal hearing and order settlement discussions or stipulations, either on or off the record.
- (e) Subsections (a)--(d) supplement 1 Pa. Code §§ 35.111 - 35.115.

**§ 1021.84. Voluntary mediation.**

- (a) Upon request by all the parties, the Board may stay a matter for a period of up to 120 days to allow the parties to utilize voluntary mediation services.
- (b) The parties are responsible for selection of a mediator and payment of the mediator's fees.
- (c) The request shall be filed at least 14 days before the initiation of hearings by the Board. The request shall identify the mediator selected and shall certify that the parties have made arrangements for payment of the mediator's fee.
- (d) At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, which sets forth the history of mediation activities conducted. The parties may request an additional stay if necessary to complete the mediation process.
- (e) The grant of an additional stay for mediation is in the Board's discretion and the Board may impose such limitations as the Board deems appropriate.
- (f) A settlement reached by the parties as a result of voluntary mediation shall be submitted to the Board for approval pursuant to § 1021.120 (relating to termination of proceedings).
- (g) Only a signed settlement agreement shall be binding and it shall bind only the parties signing it.
- (h) A party's participation in voluntary mediation may not be used as evidence in a proceeding before the Board. Communications between the parties during the mediation period

shall be regarded as offers of settlement and are neither discoverable nor admissible as evidence in a proceeding before the Board.

(i) Subsections (a)--(h) supplement 1 Pa. Code §§ 35.111 and 35.115 (relating to conferences to adjust, settle or expedite proceedings; offers of settlement).

## **HEARINGS**

### **§ 1021.85. Initiation of hearings.**

- (a) If the proceedings are at issue and a hearing is required, a formal evidentiary hearing shall be scheduled and a notice of hearing shall be sent to all parties to the proceedings.
- (b) Subsection (a) [supplements] supersedes 1 Pa. Code § 35.121 (relating to initiation of hearings).

### **§ 1021.86. Conduct of hearings.**

- (a) Hearings may be held, at the discretion of the Board, before the Board as a whole, by individual Board members sitting as administrative law judges, or by hearing examiners who are not members of the Board. Hearings held by hearing examiners not members of the Board will be decided by the Board based upon its review of the record and the examiner's proposed adjudication. All final decisions shall be decisions of the Board decided by majority vote. Petitions for supersedeas and other petitions and motions may be decided by the Board member hearing the petition or motion.
- (b) Subsection (a) [supplements] supersedes 1 Pa. Code § 35.123 (relating to the conduct of the hearings).

### **§ 1021.87. Continuance of hearings.**

(a) Hearings may not be continued except for compelling reasons. Requests for continuances shall be submitted to the Board in writing with a copy served upon the other parties to the proceedings, except that during the course of a hearing in a proceeding, the requests may be made by oral motion in the hearing.

(b) Subsection (a) supersedes 1 Pa. Code § 31.15 (relating to extensions of time).

### **§ 1021.88. [Presentation by the parties] Motions in limine.**

A party may obtain a ruling on evidentiary issues by filing a motion in limine.

### **§ 1021.89. [(Reserved)]Presentation by the parties.**

- (a) Parties shall have the right [of] to an opening statement, presentation of evidence, cross-examination, objection, motion and argument, and closing argument.

- (b) The party with the burden of proof is required to make a *prima facie* case by the close of its case-in-chief.
- [(b)](c) [Subsection (a) supplements] Subsections (a) and (b) supersede 1 Pa. Code § 35.126 (relating to presentation by the parties).

**§ 1021.90. Limiting number of witnesses and additional evidence.**

- (a) The Board may limit the number of witnesses upon an issue and may [require] request a party to present additional evidence on an issue.
- (b) Subsection (a) supplements 1 Pa. Code §§ 35.127 and 35.128 (relating to limiting number of witnesses; and additional evidence).

**§ 1021.91. (Reserved).**

**§ 1021.92. Oral argument after hearing.**

- (a) A party may, within 5 days after [hearing] the last post-hearing briefing and prior to adjudication, request oral argument before the entire Board. The Board may grant or deny such request.
- (b) Subsection (a) supersedes 1 Pa. Code § 35.204 (relating to oral argument before presiding officer).

**§ 1021.93. (Reserved).**

**§ 1021.94. Waiver of hearings.**

- (a) A hearing need not be held if waived by appellant or respondent or if parties stipulate the essential facts or agree to submit direct and rebuttal testimony or documentary evidence in affidavit form (sworn or affirmed on personal knowledge) or by deposition.
- (b) Subsection (a) supersedes 1 Pa. Code § 35.101 (relating to waiver of hearings).

**§ 1021.95. (Reserved).**

**§ 1021.96. Venue of hearings.**

At the discretion of the Board, hearings will be held at the Commonwealth facility nearest the location of the complaint sought to be remedied by the Department with consideration for the convenience of witnesses, the public and the parties in attending the hearings.

**§ 1021.97. (Reserved).**

**§ 1021.98. View of premises.**

The Board may upon reasonable notice and at reasonable times inspect any real estate including a body of water, industrial plant, building, or other premises when the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board.

## **BURDEN OF PROCEEDING AND BURDEN OF PROOF**

### **§ 1021.101. Burden of proceeding and burden of proof.**

(a) In proceedings before the Board, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish the party's case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of proceeding with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

(b) The Department has the burden of proof in the following cases:

- (1) When it assesses or files a complaint for a civil penalty.
- (2) When it files a complaint for any other purpose.
- (3) When it revokes or suspends a license, permit, approval or certification.
- (4) When it issues an order.

(c) A party appealing an action of the Department shall have the burden of proof in the following cases:

- (1) When the Department denies a license, permit, approval or certification.
- (2) When a party who is not the recipient of an action by the Department protests the action.
- (3) When a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification.
- (4) When a party appeals or objects to a settlement of a matter between the Department and a private party.

## **TRANSCRIPT**

### **§ 1021.104. Transcript.**

(a) Hearings shall be stenographically reported and a transcript of the report shall be a part of the record.

(b) Parties desiring copies of the transcript shall obtain the copies from the official reporter.

(c) Parties shall have the opportunity to review a copy of the transcript on file with the Board.

(d) Subsections (a)--(c) [supplement] ~~[supersede]~~ **supplements** 1 Pa. Code §§ 35.131-

133 (relating to general provisions).

## EVIDENCE

### § 1021.107. Evidence.

(a) The Board is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible. [Note:] The Board generally applies the Pennsylvania Rules of Evidence.

[(b)] (b) Written testimony, on numbered lines in either narrative or question and answer form of a witness may be admitted into evidence provided the witness is present for cross examination and provided a copy of the testimony was served upon and actually received by other parties at least three days prior to the hearing.]

[(c)] (b) Copies of an exhibit to be offered into evidence shall be made available to parties at the time it is identified as an exhibit unless otherwise ordered by the Board.

[(d)] (c) Witness shall be sworn or shall affirm.

[(e)] (d) Subsection (a)-[(d)] (c) [supplement] supersede, 1 Pa. Code § 35.137 - 35.139 (Subchapter C: evidence and witnesses - general), 1 Pa. Code § 35.166 (relating to Evidence: Form and Admissibility of Evidence) and 1 Pa. Code § 35.162 (relating to Evidence: Reception and Ruling on Evidence).

### § 1021.108. Written Testimony.

(a) Written testimony of a witness, on numbered lines in question and answer form, may be admitted into evidence provided the witness is present for cross-examination.

(b) Written testimony shall be filed concurrently with the pre-hearing memorandum unless a different time is prescribed by the Board. Any objections to written testimony which can be reasonably anticipated prior to hearing shall be in writing and filed at least five days before the hearing unless otherwise ordered by the Board.

(c) If a party desires to file written testimony [at a later date] prior to the close of the record, it may do so only upon motion approved by the Board. Such approval shall include the scope of the written testimony and the time for filing the testimony and service upon opposing counsel.

## OFFICIAL NOTICE

### § 1021.109. Official notice of facts.

(a) The Board may take official notice of the following:

- (1) Matters which may be judicially noticed by the Courts of this Commonwealth.
- (2) Facts which are not in dispute.

(3) Record facts reflected in the official docket of the Board as referenced in §1021.41(a)(relating to docket).

(b) Any party shall, on timely request, be afforded an opportunity to show why the Board should not take official notice of items listed in subsection (a).

(c) A party requesting the taking of official notice after the conclusion of the hearing shall do so in accordance with §1021.122 (relating to reopening of record prior to adjudication).

## DISCOVERY

### § 1021.111. Discovery.

(a) Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by Pa.R.C.P. (relating to rules of civil procedure). When the term "court" is used in Pa.R.C.P., "Board" is to be understood; when the terms "prothonotary" or "clerk of court" are used in Pa.R.C.P., "Secretary to the Board" is to be understood.

(b) Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

(c) If a person or party is to be deposed by oral examination more than 100 miles from his or its residence or principal place of business, the Board may, upon motion, order the payment of reasonable expenses, including attorney's fees, as the Board deems proper.

(d) Discovery disputes shall be resolved pursuant to a motion filed in accordance with § 1021.72 (relating to discovery motions), except that to facilitate the prompt completion of discovery, the Board may hear argument on discovery disputes by telephone conference call at the time the dispute arises and may issue oral rulings which will be later memorialized in written orders.

(e) Subsections (a)--(d) supplement 1 Pa. Code §§ 35.145 - 35.152 (relating to depositions).

## SUBPOENAS

### § 1021.114. Subpoenas.

[(a) Upon request, the Board will provide to the parties subpoenas for the attendance of witnesses or for the production of documentary evidence.

(b) Subsection (a) supplements 1 Pa. Code § 35.142(relating to subpoenas).]

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas shall be governed by Pa. R.C.P. 234.1 through 234.4 and 234.6 through 234.9. When the term "court" is used in Pa.R.C.P. "Board" is to be understood; when the terms "Prothonotary" or "clerk of court" are used in Pa.R.C.P. "Secretary to the Board" is to be understood.

- (b) Proof of service of the subpoena need not be filed with the Board.
- (c) Subsections (a) and (b) supersede 1 Pa. Code § 35.142 (relating to subpoenas) and § 35.139 (relating to fees of witnesses).

## BRIEFS

### § 1021.116. [Briefs] Post-hearing briefs.

(a) [The parties may, upon request, submit briefs within the time as the Board prescribes and serve a copy of the brief on the other parties.] The initial post-hearing brief of each party shall contain proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law.

(b) [Post-hearing briefs shall include suggested findings of fact (with references to the appropriate exhibit or page of the transcript) and conclusions of law.] Reply briefs shall be as concise as possible and shall not exceed 25 pages. Longer briefs may be permitted at the discretion of the presiding administrative law judge.

(c) Any issue which is not argued in a post-hearing brief may be waived.

[(c)](d) Subsections [(a) and (b)] (a)-(c) [supplement] supersede 1 Pa. Code § 35.191-35.193 (relating to briefs).

### § 1021.117. Amicus Curiae.

(a) Anyone interested in legal issues involved in any matter pending before the Board may request leave to file an amicus curiae brief or memorandum of law, in regard to those legal issues. The amicus curiae shall state in its request the legal issues to be addressed in the brief and shall serve a copy of the request on all parties.

(b) Where the Board grants a request, the amicus curiae shall file the brief within the time prescribed by the Board and shall serve a copy on all parties. Any party may file a response to a brief amicus curiae which is adverse to its interests.

(c) The amicus curiae may present oral argument only as the Board may direct.

## ADJUDICATIONS

### § 1021.118. Adjudications.

(a) At the conclusion of the proceeding, the Board will issue an adjudication containing a discussion, findings of fact, conclusions of law and an order.

(b) The Board will serve a copy of the adjudication on all parties to the proceeding or their representatives.

(c) Subsections (a) and (b) [supplement] supersede 1 Pa. Code § 35.226 (relating to final orders).

## TERMINATION OF PROCEEDINGS

### § 1021.120. Termination of proceedings.

(a) A proceeding before the Board may be terminated by one of the following:

1. Withdrawal of the appeal prior to adjudication.
2. Settlement agreement.
3. Consent adjudication.

(b) When a proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board.

(c) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of the settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following:

- 1) Notify the Board that the case has been settled and request that the docket be marked settled.
- 2) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record of the case, and request that the docket be marked settled.
- 3) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, request the notice of the settlement be published in the *Pennsylvania Bulletin* and request that the case be marked as settled.

The notice of publication shall be in substantially the following form:

RE: (Case and Docket Number)

The Commonwealth of Pennsylvania  
(Department of \_\_\_\_\_) and (parties)  
have agreed to a settlement of the above matter.  
The Commonwealth had ordered under date of  
\_\_\_\_\_, the party (party or parties) to:



(Summarize order or appeal describing other action of the Commonwealth from which appeal was taken).

The parties have agreed to a settlement, the major provisions of which include:

(Summarize major substantive provisions of settlement agreement.)

Copies of the full agreement are in the hands of:

(Names, addresses of counsel and telephone numbers) and at the office of the Environmental Hearing Board, and may be reviewed by any interested party on request during normal business hours.

(d) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in section (c)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall lie to the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within thirty days of the date of the Board's action.

## **REHEARING OR RECONSIDERATION**

### **§ 1021.122. Reopening of record prior to adjudication.**

(a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.

(b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:

(1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.

(2) The evidence is discovered after the close of the record and could not

have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

(c) The record may also be reopened to consider evidence which has become material as a result of a change in legal authority occurring after the close of the record. A petition to reopen the record on this basis shall specify the change in legal authority and demonstrate that it applies to the matter pending before the Board. Such a petition need not meet the requirements of subsection (d)(2) and (3).

(d) A petition seeking to reopen the record shall:

(1) Identify the evidence which the petitioner seeks to add to the record.

(2) Describe the efforts which petitioner had made to discover such evidence prior to the close of the record.

(3) Explain how the evidence was discovered after the close of the record.

A petition filed under subsection (b) shall be verified and all petitions shall contain a certification by counsel that the petition is being filed in good faith and not for the purpose of delay.

(e) The petition shall be served upon the parties to the proceedings. A petition will be treated as a miscellaneous motion under § 1021.74 (relating to miscellaneous motions) except that the motion would have to be verified or supported by affidavits. The answer shall be verified if it includes factual assertions which are not of record.

(f) Subsections (a)-- (e) supersede 1 Pa. Code §§ 35.232 and 35.233 (relating to reopening of record; and reopening by agency action).

Comment: This sets a standard which is more stringent than the materiality test of *Spang & Company v. DER*, 592 A.2d 815 (Pa. Cmwlth. 1991), but broader than the grounds justifying reconsideration. The procedure differs from the standard motions practice under §§ 1021.70 - 1021.74.

#### **§ 1021.123. Reconsideration of interlocutory orders.**

(a) A petition for reconsideration of an interlocutory order or ruling shall be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board.

(b) A copy of the petition shall be served upon the parties. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

(c) The failure of a party to file a petition under this section, shall not result in a waiver of any issue.

(d) Subsections (a)--(c) supersede 1 Pa. Code § 35.241 (relating to rehearing or reconsideration).

Comment: There is no need to file a petition for reconsideration of an interlocutory order in order to preserve an issue for later argument. Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board.

#### **§ 1021.124. Reconsideration of final orders.**

(a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:

(1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.

(2) The crucial facts set forth in the petition

(a) Are inconsistent with the findings of the Board.

(b) Are such as would justify a reversal of the Board's decision.

(c) Could not have been presented earlier to the Board with the exercise of due diligence.

(b) A copy of the petition shall be served upon all parties simultaneously with and in the same manner as the filing of an appeal with the Board. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

Comment: This provides a shorter time than the standard motions practice, since reconsideration must be granted within 30 days under Pa.R.A.P. 1701. The Board's period for reconsideration of final orders will run contemporaneously with the 30 day right of appeal to Commonwealth Court.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.241 (relating to rehearing or reconsideration).

Comment: This subsection is derived from the prior Rule 21.122.

## SANCTIONS

### § 1021.125. Sanctions.

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include [the] dismiss[al]ing [of] an appeal, [or] entering adjudication against the offending party, [orders] precluding introduction of evidence or documents not disclosed [in compliance with an order], barring the use of witnesses not disclosed [in compliance with an order, barring an attorney from practice before the Board for repeated or flagrant violation of orders], or other appropriate sanctions **including those permitted under Rule 4019 of the Pennsylvania Rules of Civil Procedure relating to discovery matters**[ as are permitted in similar situations by Pa.R.C.P. for practice before the court of common pleas].

## ATTORNEY FEES AND COSTS

### ATTORNEY FEES AND COSTS AUTHORIZED BY THE COSTS ACT

### § 1021.131. Scope.

This section and §§ 1021.132 - 1021.134 apply to applications for an award of fees and expenses under the Costs Act.

**§ 1021.132. Application for Fees and Expenses.**

(a) An application for fees and expenses shall be verified and shall set forth sufficient grounds to justify the award. It shall also include the following:

(1) Identification of the final order under which the applicant claims to be a prevailing party.

(2) A statement of the basis upon which the applicant claims to be a prevailing party under the Costs Act.

(3) Specific information which is sufficient to demonstrate that the applicant meets the definition of "party" under the Costs Act.

(4) An itemized list of recoverable fees and expenses including hours worked, the rate charged, a reasonable description of the work performed during those hours, and the nature and reasonableness of the expenses.

(5) The basis for the allegation that the position of the Department was not substantially justified.

(b) An applicant shall file an application with the Board within 30 days of the date of the final order under which the applicant claims to have prevailed, and shall be docketed at the same number as that order. An applicant shall simultaneously serve upon counsel of record for the Department a copy of the application in the same manner that it is filed with the Board. Service by telefax shall satisfy the requirements of this rule, if an additional copy is mailed on the same day.

(c) An application may be denied sua sponte if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested.

Comment: In preparing the petition to submit to the Board, an applicant should consider the material contained in 4 Pa. Code Chapter 2, Subchapter A (relating to submission and consideration of applications for awards of fees and expenses) and the Board's prior decisions.

**§ 1021.133. Response to Application.**

(a) The Department or other interested party shall file its response within 15 days of the filing of an application. The response shall include the following:

(1) Raise any challenge to the sufficiency of the application.

(2) Demonstrate, if applicable, that the Department's action was substantially justified.

(3) Identify any special circumstances which would make the award unjust.

(b) If the response asserts that the action of the Department was substantially justified, it shall include the following:

(1) A statement of the Department's basis for its action.

(2) A summary of the testimony and exhibits either in evidence or offered into evidence in support of that basis.

(3) The legal justification for the action taken.

(c) When an applicant prevails and no record has been made before the Board, the Department may justify its action with affidavits.

**§ 1021.134. Disposition of Application.**

(a) Each party shall file a brief simultaneously with the filing of its application or response.

(b) The Board will award fees and expenses based upon the application and response if it finds the following:

(1) The applicant is a prevailing party as defined in the Costs Act.

(2) The application presents sufficient justification for the award of fees and expenses.

(3) The action of the Department was not substantially justified, in that it had no reasonable basis in law or in fact.

(4) There are no special circumstances which would make the award unjust or unreasonable.

(c) The Board will not find the Department's action to be substantially justified, if the response fails to present a prima facie case in support of the Department's legal position.

(d) The Board may reduce the amount of an award of fees and expenses, or deny the award, to the extent that the applicant engaged in conduct during the course of the proceedings which unduly and unreasonably protracted the final resolution of the matter in controversy.

**ATTORNEY FEES AND COSTS AUTHORIZED BY STATUTE OTHER THAN THE COSTS ACT**

**§ 1021.141. Scope.**

This subchapter applies to requests for costs and attorney fees when authorized by statute other than the Costs Act. When a statute provides procedures inconsistent with these procedures, the statutory procedures will be followed.

**§ 1021.142. Application for Costs and Fees.**

(a) A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.

(3) A detailed listing of the costs and attorney fees incurred in the proceedings.

(b) An applicant shall file an application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the application upon the other parties to the proceeding.

(c) The Board may deny an application sua sponte if it fails to provide all the

information required by this section in sufficient detail to enable the Board to grant the relief requested.

**§ 1021.143. Response to Application.**

A response to an application shall be filed within 15 days of service. A factual basis for the response shall be verified by affidavit.

**§ 1021.144. Disposition of Application.**

- (a) Each party may file a brief in accordance with a schedule established by the Board.
- (b) The Board may allow discovery and the taking of testimony in order to resolve any factual issues raised by the application and response.

**ATTORNEY FEES AND COSTS UNDER MORE THAN ONE STATUTE**

**§ 1021.151. Application for Counsel Fees under more than One Statute.**

An applicant seeking to recover fees and costs under more than one statute shall file a single application which sets forth, in separate counts, the basis upon which fees and costs are claimed under each statute.

**PREPAYMENT OF PENALTIES**

**§ 1021.1[7]61. Prepayment of penalties.**

(a) Where a statute requires that an appellant prepay or post a bond to secure payment of a penalty assessed by the Department, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty as required by statute. The check shall be made payable to the Commonwealth of Pennsylvania.

(b) [Note:] [The] A bond shall be in favor of the Department of Environmental Protection except in the case of the Air Pollution Control Act which currently requires the bond to be in favor of the Board.

**§ 1021.1[7]62. Hearing on inability to prepay penalty or post a bond.**

(a) [In the event] If an appellant submits a verified statement that he is unable to pay in accordance with Rule 1021.51 (relating to commencement, form and content of appeals), the Board may schedule a hearing on the validity of this claim and may require the appellant to supply appropriate financial information to the Department in advance of the hearing.

(b) If the Board determines that the appellant is able to prepay the penalty assessed or post a bond the Board shall order the appellant to do so, within a period not to exceed 30 days.

## APPELLATE MATTERS

### § 1021.1[6]71.       **Composition of the Certified Record on Appeal to Commonwealth Court.**

(a) Unless the parties file a stipulation with the Board providing otherwise, within 20 days of the filing of the petition for review, the Board shall certify the record in accordance with Pa.R.C.P. No. 1951 (relating to record below in proceedings on petition for review) and the record shall consist of:

- (1) A list of the docket entries.
  - (2) The notice of appeal and the Department action appealed to the Board, or, if the proceedings before the Board were initiated with a complaint, the complaint.
- (b) In addition to items listed in subsection (a), for appeals of Board adjudication, the record shall also include:
- (1) The Board's adjudication and order.
  - (2) The notes of testimony from the hearing, all exhibits admitted into evidence.
  - (3) The parties' post-hearing memoranda, including requested findings of fact and conclusions of law.
  - (4) Petitions for reconsideration or to reopen the record, answers and accompanying exhibits.
  - (5) Other documents which formed the basis of the Board's adjudication.

(c) In addition to items listed in subsection (a), for appeals of Board opinions and orders, the record shall also include:

- (1) The Board's opinion and order.
- (2) The motion or petition which was the subject of the Board's opinion and order, together with responses, answers, and replies, and accompanying exhibits.
- (3) Petitions for reconsideration of the Board's opinion and order, responses, answers, replies, and accompanying exhibits.
- (4) Other documents which formed the basis of the Board's opinion and order.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457  
(717) 787-3483  
TELECOPIER: (717) 783-4738  
July 2, 1999

Honorable Mary Jo White  
Majority Chairman  
Senate Environmental Resources  
and Energy Committee  
168 Main Capitol Building  
Harrisburg, PA 17120

Honorable Arthur D. Hershey  
Majority Chairman  
House Environmental Resources  
and Energy Committee  
214 Capitol Annex  
Harrisburg, PA 17120

Honorable Raphael J. Musto  
Minority Chairman  
Senate Environmental Resources  
and Energy Committee  
17 Capitol, East Wing  
Harrisburg, PA 17120

Honorable Camille George  
Minority Chairman  
House Environmental Resources  
and Energy Committee  
38-B Capitol, East Wing  
Harrisburg, PA 17120

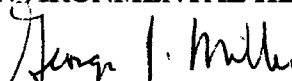
Robert E. Nyce, Executive Director  
Independent Regulatory Review Commission  
14<sup>th</sup> Floor, Harrisstown 2  
333 Market Street  
Harrisburg, PA 17101

Gentlemen:

In accordance with the provisions of the Regulatory Review Act, the Environmental Hearing Board is transmitting the enclosed copy of the final regulatory package to its rules of practice and procedure to the Senate Environmental Resources and Energy Committee, to the House Environmental Resources and Energy Committee, and to the Independent Regulatory Review Commission for their review.

Sincerely,

ENVIRONMENTAL HEARING BOARD

  
George J. Miller  
Chairman

Enclosures





COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457  
717-787-3483  
TELECOPIER 717-783-4738

99 JUL -2 PM 2:15

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

July 2, 1999

John W. Carroll, Esq.  
Pepper Hamilton LLP  
North Front and Market Streets  
P.O. Box 1181  
Harrisburg, PA 17108-1181

Dear Attorney Carroll:

In accordance with the Regulatory Review Act, attached for your review is a copy of the final-form regulation to the Environmental Hearing Board's rules of practice and procedure. Copies of the regulation have been provided to the Board's Standing Committees and to the Independent Regulatory Review Commission.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD

*George J. Miller*  
George J. Miller  
Chairman

Enclosure

c: John Nanorta, Jr.

*John,*  
*Please note that all three received a copy of the entire package. I have included one with your copies of the cover letters so your files would not have unnecessary paper clutter.*

*Gene*



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
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HARRISBURG, PA 17105-8457  
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RENEWAL DIVISION

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

July 2, 1999

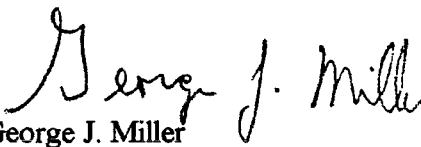
Thomas Alan Linzey, Esq.  
Community Environmental Legal Defense Fund  
2244 Lindsay Lot Road  
Shippensburg, PA 17257

Dear Attorney Linzey:

In accordance with the Regulatory Review Act, attached for your review is a copy of the final-form regulation to the Environmental Hearing Board's rules of practice and procedure. Copies of the regulation have been provided to the Board's Standing Committees and to the Independent Regulatory Review Commission.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD

  
George J. Miller  
Chairman

Enclosure

c: John Nanorta, Jr.



COMMONWEALTH OF PENNSYLVANIA  
**ENVIRONMENTAL HEARING BOARD**  
2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457  
717-787-3483  
TELECOPIER 717-783-4738

69 JUL -2 PM 2:15

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

July 2, 1999

R. Timothy Weston, Esq.  
Kirkpatrick & Lockhart LLP  
Payne-Shoemaker Building  
240 North Third Street  
Harrisburg, PA 17101-1507

Dear Attorney Weston:

In accordance with the Regulatory Review Act, attached for your review is a copy of the final-form regulation to the Environmental Hearing Board's rules of practice and procedure. Copies of the regulation have been provided to the Board's Standing Committees and to the Independent Regulatory Review Commission.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD

A handwritten signature in cursive script that reads "George J. Miller".

George J. Miller  
Chairman

Enclosure

c: John Nanorta, Jr.

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

RECEIVED

I.D. NUMBER: 106-4  
SUBJECT: Practice & Procedure  
AGENCY: ENVIRONMENTAL HEARING BOARD

99 JUL -2 PM 2:05

REGULATORY REVIEW BOARD

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
7/2/99	<i>Bonnie P. Brockhill</i>	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
7/2/99	<i>D. Smith</i>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
7/2/99	<i>Kim C. Steiner</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

June 30, 1999