

Regulatory Analysis Form

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INDEPENDENT REGULATORY
REVIEW COMMISSION

MizMizner

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
Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

No
Yes: By the Attorney General
Yes: By the Governor

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

The amendment reflects 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 proposed 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), prehearing 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 (§ 1021.171), and hearing on inability to prepay penalty (§ 1021.172).

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), transcript (§ 1021.104), 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), and view of premises (§ 1021.98).

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 proposed 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 proposed 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 proposed 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.)

None.

(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 proposed 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 proposed 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.

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 proposed 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, 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.

No accounting or consultant procedures will be required by the proposed 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.

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(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 proposed 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, 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 proposed 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, 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.

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(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
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

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

See above

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(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 proposed 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.

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(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 proposed 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.

None.

The proposed 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 proposed 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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REVIEW COMMISSION

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

Cristina S. Cooper
By: _____

(Deputy Attorney General)

FEB 09 1999.

(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: *R. E.*

Environmental Hearing Board

(Agency)

Document/Fiscal Note No. 106-4

Date of Adoption: 12/9/98

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. *R. E.*

By: _____

1/11/99
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 PROPOSED RULEMAKING

**TITLE 25 - ENVIRONMENTAL RESOURCES
ENVIRONMENTAL HEARING BOARD**

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

PRACTICE AND PROCEDURE

PREAMBLE

The Environmental Hearing Board (EHB) proposes to revise 25 Pa. Code, Chapter 1021 by amending existing rules as well as adding new procedural rules as set forth in the annex thereto.

The proposed procedural rules have several objectives:

- (1) To provide the regulated community and the Department of Environmental Protection and other potential litigants with more specific guidance on how to represent their interests before the EHB; and
- (2) To improve the rules of practice and procedure before the EHB.

I. STATUTORY AUTHORITY FOR PROPOSED REVISIONS

The EHB has the authority under Section 5 of the EHB Act (35 P.S. § 7515) to adopt regulations pertaining to practice and procedure before the EHB.

II. DESCRIPTION OF PROPOSED REVISIONS

The proposed revisions are modifications to provisions of the rules to improve practice and procedure before the EHB. These proposed revisions are based on the recommendations of the EHB Rules Committee, a nine member advisory committee created by Section 5 of the EHB Act (35 P.S. § 7515) to make recommendations to the EHB on its rules of practice and procedure. In order for the recommendations to be promulgated as regulations, a majority of the EHB members must approve the recommendations.

This Summary provides a description of (1) the existing rules of practice and procedure when relevant to proposed revisions; (2) the EHB's proposed revisions; and (3) how the proposal differs from the EHB Rules Committee's recommendations.

Some of the recommendations of the EHB Rules Committee were not in proper legislative style and format, so they have been modified, where necessary, to conform to those requirements. Similarly, some of the recommendations did not contain proper cross-references to the General Rules of Administrative Practice and Procedure, 1 Pa. Code Ch. 31, 33 and 35, so references to those rules have been added.

The proposed rules can be divided into four categories: 1) substantive amendments, 2) adoption of an existing rule, 3) changes limited to superseding the General Rules of Administrative Practice and Procedure, and 4) repeals. Substantive amendments or additions were made as follows: 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), 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), prehearing procedures (§ 1021.81), prehearing memorandum (§ 1021.82), 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), subpoenas (§ 1021.114), briefs (§ 1021.116), amicus curiae (§ 1021.117), sanctions (§ 1021.125), 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), transcript (§ 1021.104), and adjudications (§ 1021.118) .

The following are rules which recently were considered by the Procedural Rules Committee but no change was recommended: amendments to rules (§ 1021.3), notice of appearance (§ 1021.23), waiver of hearings (§ 1021.94), venue of hearings (§ 1021.96), and view of premises (§ 1021.98).

Rules which the Committee recommended be repealed are: timely filing required (§ 1021.11), appearance in person (§ 1021.21), publication of notice (§ 1021.36), 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).

These amendments in large part reflect the evolution and refinement of practice before the EHB since the mid-1970's when the EHB's rules of practice and procedure were first adopted.

Next year, in light of the revisions to the rules the Board will ask the Rules Committee to consider reorganizing the rules in a more orderly format as well as adding cross references and in order to make the rules more user friendly.

1. DEFINITIONS

The EHB's existing rule on definitions is Rule 1021.2. The rule provides definitions for the following terms: Act, Action, Board, Costs Act, Department, Dispositive Motion, Hearing examiner, Intervenor, Party, Permittee, Person, Supersedeas, and Third party appeal. The definitions supplement the General Rules of Administrative Practice and Procedure.

The proposed rule includes a definition of "pleading" which excludes the notice of appeal so that pleadings are involved only in actions instituted by complaint. The Committee adopted the amendment at the Board's recommendation. The Board's case law on whether a notice of appeal is a pleading has been divergent. To clarify and provide uniformity for persons who appear before the Board, the Committee recommended the following definition. "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." The rule states that the definitions supplement the General Rules of Practice and Procedure except for the definition of pleadings which supersedes the definition in the General Rules of Practice and Procedure. This change is

consistent with the newly proposed rules on pleadings in actions initiated by complaint (§§ 1021.56 - 1021.58) but still permits an attack on the legal sufficiency of a notice of appeal by a motion to dismiss or a motion for summary judgment.

The Board concurs with the proposed amendments.

2. CONSTRUCTION AND APPLICATION OF RULES

The EHB's existing rules do not provide a rule for the construction and application of rules. The proposed rule, Rule 1021.4, is designed to permit the Board to act so as to secure the just, speedy and relatively inexpensive determination of proceedings before it. The proposed rule is patterned after Rule 126 of the Pennsylvania Rules of Civil Procedure. The proposed rule is the same as the one recommended by the EHB Rules Committee. The Board adopted the rule as received from the Committee.

3. TIMELY FILING REQUIRED

The EHB's existing rule, Rule 1021.11, includes provisions that documents filed with the Board shall be received within the time limits for the filing, that the date of receipt by the Board and not the date of deposit in the mail is determinative.

The Committee believed this rule's provisions were duplicative to the provisions set forth in the new rule on filing, Rule 1021.30. Thus, the Committee decided to repeal the text in the rule and mark Rule 1021.11 as Reserved.

The Board concurs with this recommendation.

4. EFFECTIVE DATES OF BOARD ADJUDICATIONS AND PRELIMINARY ORDERS

The EHB's existing rule, Rule 1021.15, provides that adjudications and orders of the Board become effective on the date of entry.

The Committee decided to retain the rule. The Committee's only recommendation is a technical change of "supplement" to "supersedes" so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure.

The Board concurs with this recommendation.

5. EXTENSIONS OF TIME

The EHB's existing rule, Rule 1021.17, provides the grounds for the extensions of time for the filing of a document and for the continuances of hearings.

The Committee recommended amendments regarding the provision for extension of time so it is clear that the time for filing an appeal cannot be extended beyond the 30 day requirements

set forth in the rules. The Committee also proposed that the language “before the expiration of the time for filing” be deleted to allow the provision to apply to requests for extensions made both before and after the expiration of the time for filing. The provision of the existing rule for continuance of hearings shall be moved to Rule 1021.87 relating to hearings.

The Board concurs with these recommendations.

6. APPEARANCE IN PERSON AND REPRESENTATION

The EHB’s existing rules, Rules 1021.21 and 1021.22, have separate rules for the appearance in person and the appearance by attorney. The rule on appearance in person provides that an individual may appear in his own behalf; that a partnership may be represented by its members, that an association may be represented by its officers; and that an authority or governmental agency, other than the Department, may be represented by an officer or employee. The rule on appearance by attorney provides that a corporation shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania, that a person may be represented in a proceeding by an attorney-at-law admitted to practice before the Supreme Court of Pennsylvania, that the Board may require that a party be represented by an attorney, that 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.

The Committee recommended that the two rules be consolidated into one rule on representation. The rule includes the following new provisions: 1) 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 subsequent to the filing of the notice of appeal and 2) pro hac vice - representation 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.

The Board’s existing rule requires that a corporation must be represented by an attorney. The proposed rule extends this requirement to unincorporated associations. This change is mandated by the statute prohibiting the unauthorized practice of law, 42 Pa. C.S.A. § 2524, and is in accordance with the General Rules of Administrative Practice and Procedure applicable to adversarial proceedings before all state agencies, 1 Pa. Code §§ 31.21, 31.22 and 31.23.

The Board recognizes that citizen groups have made great contributions to the development of environmental law. However, those contributions have been made, for the most part, by groups represented by counsel dedicated to innovation in these types of proceedings and who have the capacity to select the types of expert witnesses necessary to provide the factual backdrop for these legal developments. The Board’s experience with unrepresented citizen groups as appellants has been that these groups are rarely successful with lay representation. In addition, the Board’s efforts to administer appeals by large numbers of citizens by appointing a lay spokesperson for the group invariably leads to the unauthorized practice of law by persons who are not bound by the restrictions placed on attorneys by the Rules of Professional Conduct. While

associations may employ persons who are not attorneys, such a person may not render legal services unless admitted to practice law. 42 Pa. C.S.A. § 2524. Representation before the Board in discovery proceedings and in the hearing on the merits clearly is the rendering of legal services.

The Commonwealth Court recently reiterated that a party does not have a right to be represented in administrative procedures by anyone other than an attorney. *Westmoreland County v. Rodgers*, 693 A.2d 996, 999 (Pa. Cmwlth. 1997). The Court further stated that an administrative agency, through its rules and regulations, cannot confer the power to engage in the unauthorized practice of law.

This change was proposed only after a great deal of discussion and deliberation both by the Committee and the Board. Citizen involvement helps ensure that the decisions of the Board are grounded upon complete and full information. The Board desires to comply with the law regarding the unauthorized practice of law yet still make sure that such a rule not act to curtail citizen involvement in its adjudicatory proceedings. In this regard the Board has worked closely with the Pennsylvania Bar Association to implement a program to provide representation by an attorney before the Board to qualified *pro se* individuals. This program will begin a one-year trial period in January, 1999.

The Committee decided to retain the existing provisions that: 1) an individual may appear on his own behalf or be represented in a proceeding by an attorney admitted to practice before the Supreme Court of Pennsylvania and in appropriate circumstances the Board may require an individual or group of individuals to be represented by an attorney and 2) 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.

The Board concurs with these recommendations.

7. FILING

The EHB's existing rules do not include a rule governing filing of documents. The proposed rule, Rule 1021.30, is designed to provide universal guidelines for the filing of documents.

This proposed rule is new and consists of three sections which require: 1) that all documents be filed at the Board's headquarters; 2) that the date of filing is the date the Board receives the document; and 3) that the documents may be filed by personal delivery, by mail or by facsimile. Furthermore, the rule provides that the original of a faxed document shall be deposited in the mail on the same day of the faxing. In addition, if the document which is faxed exceeds ten pages then only the first five pages and the last five pages as well as the certificate of service must be faxed. Finally, the rule provides that a 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.

The Board's concurs with these recommendations.

8. SERVICE BY THE BOARD

The current rule, Rule 1021.31, provides that orders, notices and other documents from the Board shall be served on the person designated in the notice of appearance by mail or in person.

The Committee recommended a technical change of "supplement" to "supersedes" in subsection (b) so that this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 33.31 relating to service by the agency.

The Board concurs with this recommendation.

9. SERVICE BY A PARTY

The EHB's existing rule on service by a party is Rule 1021.32. This rule provides that pleadings, submittals, briefs and other documents shall be served upon participants when they are filed or tendered to the Board; that complaints for civil penalties should include a notice to plead and a statement certifying that it is a true and complete copy of the complaint; that appeals of Department actions should be filed with the Department officer taking the action and the office of chief counsel of the Department or agency taking the action; that service of an appeal upon the recipient of a permit, license, approval or certification shall be made at the address in the document evidencing the action by the Department or at the chief place of business and that documents filed with the Board shall be filed at its headquarters.

The proposed rule, which will supersede the comparable requirements of the General Rules of Practice and Procedure, is rewritten to coincide with amendments to other rules and to streamline the requirements of service. The proposed rule deletes all of the current provisions regarding service for pleadings, submittals, briefs, other documents; complaints for civil penalties; appeals from actions; service of an appeal upon recipient of a permit, license, approval or certification; and where the documents are to be filed. The rule provides that 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 and the service upon a party represented by an attorney shall be made by serving the attorney.

The Committee proposed that service be made on the same day the document is filed with the Board.

The Board decided the proposed rule should require service on or before the date of filing but otherwise concurs with the recommendations.

10. DATE OF SERVICE

The EHB's rules provide for the date of service, Rule 1021.33. Under the existing rule the date of service is the date the document served is deposited in the United States mail, or is delivered in person.

The Committee proposed amendments to make the date of service the date the document is mailed or delivered in person. If service is made by mail three additional days are added to the time required for filing a response. The rule provides the additional time because it allows for the time for the processing and receipt of mail by the receiving party and is similar to the provisions applicable in Pennsylvania courts.

The Board concurs with the proposed amendments.

11. CERTIFICATE OF SERVICE

The EHB's existing rule, Rule 1021.34, provides for the proof of service. The rule gives the Board discretion to require proof of service.

The Committee proposed to require a certificate of service for every document. The proposed rule provides that all filings include a certificate of service as well as the name and address of the person served.

The Board concurs with the Committee's recommendation but limits the requirement to documents "required to be" filed with the Board. This eliminates the need for such a certificate for correspondence or other informal requests for administrative action by the Board.

12. NUMBER OF COPIES

The EHB's existing rule, Rule 1021.35, provides the following number of copies for 1) pleadings and briefs -- three copies, and 2) other documents -- one copy as well as that a copy of briefs and other documents be served on the other party in a proceeding.

The Committee proposed to amend the rule to more accurately reflect the practice before the Board. The proposed amendments include requiring three copies of dispositive motions and post-hearing briefs and giving the Board discretion to alter the requirements by order if it deems necessary.

The Board generally concurred with the amended rule. However, the Board decided also to require two copies for pre-hearing memoranda, petitions for supersedeas and all motions, other than motions for stays, extensions and continuances of procedural deadlines.

13. PUBLICATION OF NOTICE

The Board's existing rule, Rule 1021.36, states that the publication of a notice of an 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.

The Committee recommended deleting the rule because it is unnecessary in view of the provisions of Rule 1021.52 relating to the timeliness of an appeal.

The Board does not concur with this recommendation because this rule is necessary with respect to notices which must be published by the Board.

14. DOCKET

The EHB's existing rule, Rule 1021.41, provides that the Board will maintain a docket of proceedings and that proceeding, as initiated, shall be assigned an appropriate designation, that the Board will maintain a complete official file on proceedings, and that 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.

The Committee recommends a technical change of "supplement" to "supersedes" so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 33.57 relating to docket.

The Board concurs with this recommendation.

15. COMMENCEMENT, FORM AND CONTENT

The Board's existing rule, Rule 1021.51, did not have a provision with respect to prepayment of a penalty in an appeal from an assessment of a civil penalty.

The proposed amendment of subsection (f) requires that an appeal from an assessment of a civil penalty must be accompanied by a check in the amount of the penalty or a bond to secure payment or a verified statement that the appellant is unable to pay.

The Board concurs with the recommendations.

16. TIMELINESS AND PERFECTION

The Board's existing rule, Rule 1021.52, no longer contains a provision which allows for the dismissal of an appeal if the appellant does not submit information required for an appeal by Rule 1021.51 after the Board requests it. This authority was inadvertently omitted when the Board recently revised its rules to eliminate the practice of filing a "skeletal appeal."

The proposed rule includes in subsection (b) a provision that the appellant shall submit any missing information required by Rule 1021.51(c)(d) and (i) within 20 days or suffer dismissal of the appeal. Any failure to include specific grounds for appeal as required by subparagraph (e) of this rule will be considered only in connection with a motion from the opposing party.

The Board concurs with this recommendation.

17. COMPLAINTS FILED BY THE DEPARTMENT

The Board's existing rules include Rules 1021.56 and 1021.57 relating to complaints for

civil penalties. The rules set forth the following: 1) that complaints for civil penalties may be filed by the Department when authorized; 2) that action for civil penalties shall commence when the complaint is filed and service of the complaint and of notice to plead is made upon the defendants; and 3) the form and content requirements of a complaint.

The proposed rules, Rules 1021.56, 1021.57 and 1021.58, more accurately reflect the practice before the Board. The Board not only has jurisdiction over complaints for civil penalties but also has jurisdiction over other proceedings which must be instituted by complaint. A prominent example is a complaint to recover the Department's costs of response to releases of hazardous substances under the Hazardous Sites Cleanup Act. The Committee believed that these rules should apply to all Department actions that must be instituted by complaint. Thus in order to avoid confusion and to provide consistency the Committee redrafted the rules. The Committee decided to make the following changes: 1) rename the subchapter from "Complaints for civil penalties" to "Special Actions;" 2) state more specific guidelines on when and how a complaint may be filed and the required contents of a complaint in one rule, Rule 1021.56; and 3) change Rule 1021.57 to address the requirements for answers to complaints which must be filed with the Board within 30 days after the date of service of the complaint, unless for cause the Board prescribes a different time. The answer must state any legal objections and denials in a single pleading whether or not they might under other civil practice be expressed by way of preliminary objection. The answers must be in writing and must express the matters of fact and law relied upon for a defense. The failure to do so may result in the admission of facts set forth in the complaint or other sanctions.

The Committee proposed a totally new rule, Rule 1021.58, which addresses subsequent procedures to an answer to a complaint. The rule provides that after an answer is filed the prehearing procedures set forth in Rule 1021.81, which is also applicable to an appeal, shall be followed.

Having made these comprehensive amendments the Committee determined that existing Board Rules 1021.61 (Special actions), 1021.64 (Pleadings: generally), 1021.65 (Complaints (Civil penalties)) and 1021.66 (Answers (Civil penalties)) were no longer necessary and thus repealed them.

The Board concurs with these recommendations.

18. COMPLAINTS FOR CIVIL PENALTIES - GENERAL

As noted above the existing rule, Rule 1021.56 Complaints for civil penalties - general, is repealed.

19. COMPLAINTS FOR CIVIL PENALTIES - FORM AND CONTENT

As noted above the existing rule, Rule 1021.57 Complaints for civil penalties- form and content, is repealed.

20. SPECIAL ACTIONS

For the reasons stated above, the existing rule, Rule 1021.61 Special actions, is repealed.

21. PLEADINGS: GENERALLY

For the reasons stated above, the existing rule, Rule 1021.64 Pleadings: generally, is repealed.

22. COMPLAINTS (CIVIL PENALTIES)

For the reasons stated above, the existing Rule 1021.65 Complaints (Civil penalties), is repealed.

23. ANSWERS (CIVIL PENALTIES)

For the reasons stated above, the existing Rule 1021.66 Answers (Civil penalties), is repealed.

24. MOTIONS - GENERAL

The Board had requested the Committee to include orders precluding a party from contesting well pled facts in a complaint or motion which the responding party does not fairly meet in its response in the sanction rule. The Board already has a rule in terms of motions that requires people to come back with detailed responses to factual averments of a motion. Thus, where the party does not respond to a motion or address the motion the Board should have a mechanism to deem any facts admitted when that happens. After discussion with the Committee, the Committee recommended that the motions rule - Rule 1021.70, specifically subsection (e), be amended to empower the Board to find facts consistent with those averred when there is no response to the facts. The exact proposed language reads, "... Material facts set forth in the motion that are not denied may be deemed admitted for the purposes of deciding the motion."

The Board concurs with this recommendation.

25. CONSOLIDATION

The Board's existing rule, Rule 1021.80, allows the Board to consolidate proceedings involving a common question of law or fact for hearing of any or all of the matters in issue in such proceedings whether it is on its own motion or on the motion of any party.

The Committee recommends a technical change of "supplement" to "supersedes" in subsection (b) so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.45 relating to consolidation.

The Board concurs with this recommendation.

26. PREHEARING PROCEDURE

The Board's existing rule, Rule 1021.81, provides among other items, that 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 interrogatories from the party with the burden of proof.

The Board believes that in order to clarify the second sentence of this provision, the following language should be added so the sentence would read, "The opposing party ... within 30 days after receipt of the expert reports and all answers to expert interrogatories from the party with the burden of proof."

27. INITIATION OF HEARINGS

Rule 1021.85 provides that if the proceedings are at issue and hearing is required, a formal evidentiary hearing shall be scheduled and a notice of hearing shall be sent to all parties to the proceedings.

The Committee recommends a technical change of "supplement" to "supersedes" so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 25 Pa. Code § 35.121 relating to initiation of hearings.

The Board concurs with the Committee's recommendations.

28. CONDUCT OF HEARINGS

The EHB's existing rule, Rule 1021.86, provides that hearings may be held, at the discretion of the Board, before the whole Board, by individual members as administrative law judges or by hearing examiners; any hearing held by a hearing examiner who is not a member of the Board will be decided by the Board after review of the record and the examiner's proposed adjudication; all final decisions of the Board shall be decided by majority vote; and petitions for supersedeas and other petitions and motions may be decided by the Board member hearing the petition or motion.

The Committee recommends a technical change of "supplement" to "supersedes" so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.123 relating to the conduct of hearings.

The Board concurs with this recommendation.

29. CONTINUANCE OF HEARINGS

The existing rule, part of Rule 1021.17, provides that 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 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.

The Committee recommended that this provision be moved to the section in the rules for hearings, specifically Rule 1021.87, since that is the most logical location for such a rule. This rule will supersede the General Rules of Practice and Procedure at 1 Pa. Code § 31.15 relating to extensions of time.

The Board concurs with that recommendation.

30. MOTIONS IN LIMINE

The Board currently does not have a rule which specifies the procedure to be used for motions in limine, although such a motion is referenced in the rules on prehearing motions. Since the Board does receive these requests the Board believes that it would be appropriate to have a rule as guidance to those individuals who appear before the Board.

The proposed rule, Rule 1021.88, states that a party may get a ruling on evidentiary issues by filing a motion in limine similar to practice in Pennsylvania civil courts. Such a threshold motion may be made before or during the hearing.

The Board concurs with this recommendation.

31. PRESENTATION BY THE PARTIES

The current Board rule, Rule 1021.88, provides that parties shall have the right of presentation of evidence, cross examination, objection, motion and argument.

The Committee recommends that the rule be renumbered to Rule 1021.89 and amended to state that parties have the right to an opening statement and closing argument in addition to those matters already listed and that the party with the burden of proof is required to make a *prima facie* case by the close of its case-in-chief. In addition, the Committee recommends a technical change of "supplement" to "supersedes" so that this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code 35.126 relating to presentation by the parties.

The Board concurs with this recommendations.

32. LIMITING NUMBER OF WITNESSES AND ADDITIONAL EVIDENCE

The Board's existing rule, Rule 1021.90, states that the Board may limit the number of witnesses upon an issue and may require a party to present additional evidence on an issue.

The Committee recommended to the Board that “require” be amended to “request.” This amendment permits the parties, rather than the presiding judge, to decide what evidence will be presented to the full Board.

The Board concurs with the Committee’s recommendation.

33. ORAL ARGUMENT AFTER HEARING

The current rule, Rule 1021.92, provides that a party may, within 5 days after hearing and prior to adjudication, request oral argument before the entire Board and that the Board may grant or deny such request.

The Committee recommended that the rule be changed so that such a request need not be filed until after the parties have fully briefed the case. This change gives the parties a better chance to evaluate whether they should make such a request.

The Board concurs with the recommended amendment, but has changed the language from “briefing” to “the last posthearing brief.”

34. TRANSCRIPT

The current rule, Rule 1021.104, provides: that hearings shall be stenographically reported, a transcript of the report be made a part of the record, parties can obtain copies of the transcript from the court reporter, and parties shall have the opportunity to review a copy of the transcript on file with the Board.

The Committee discussed the ramifications of the decision of *Sierra Club v. PUC*, 702 A.2d 131 (Pa. Cmwlth. 1998), which upheld the validity of a similar regulation of the Pennsylvania Public Utility Commission against a claim that the Commission was required by the Right-to-Know Act to provide a copy of the transcript to the public for the cost of copying. The Supreme Court has granted a petition for review of the case. The Committee recommended only the technical change of “supplement” to “supersedes” so that this rule will supersede the provision of the General Rules of Administrative Practice and Procedure and to add two other sections of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§ 35.132 and 133, which are superseded by the Board’s rules.

The Board concurs with the recommendation.

35. EVIDENCE

The Board’s existing rule, Rule 1021.107, provides that the Board is not bound by technical rules of evidence but that relevant and material evidence of reasonable probative value is admissible as provided in section 505 of the Administrative Law and Procedure, Act of April 28, 1978, P.L. 202 *as amended*, 2 Pa. C.S. §§ 101 - 754. The rule also provides that written testimony 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 received by other parties. It also requires that copies of an exhibit to be offered into evidence shall be made available to parties at the time is identified as an exhibit and witnesses shall be sworn or shall affirm.

The proposed rule would make the following amendments: add a note to subsection (a) that the Board generally applies the Pennsylvania Rules of Evidence, repeal current subsection (b) in favor of a new rule, Rule 1021.108 - Written testimony, renumber the remaining subsections, and change "supplement" to "supersede" in the reference to the General Rules of Administrative Practice and Procedure.

The Board concurs with the recommendations.

36. WRITTEN TESTIMONY

The Committee believed that a separate rule on written testimony would enhance the practice before the Board and offer more specific guidance to parties who come before the Board.

The Committee has proposed a new rule, Rule 1021.108, which provides: 1) that a witness' written testimony be on numbered lines in a question and answer form; 2) that the testimony may be admitted into evidence provided the witness is present for cross-examination; 3) that written testimony shall be filed concurrently with the pre-hearing memorandum unless the Board prescribes otherwise; 4) that any objections to the testimony which can be reasonably anticipated prior to hearing must be in writing and filed at least five days before the hearing or unless ordered by the Board; and 5) a party who wishes to file written testimony at a later date must obtain Board approval by motion. Any such approval shall include the scope of the testimony and the time for filing and service upon opposing counsel.

The Board concurs with the recommendations.

37. SUBPOENAS

The EHB's existing rule, Rule 1021.114, provides that the Board will provide parties with subpoenas for the attendance of witnesses or for the production of documentary evidence upon request.

The Committee proposed that, except as otherwise provided in this regulatory chapter or by order of the 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 and that proof of service of the subpoena need not be filed with the Board. The proposal provides that upon the request of a party the Secretary to the Board shall issue a subpoena in blank signed and under seal of the Board in accordance with the Pennsylvania Rules of Civil Procedure.

The Board concurs with the recommendation.

38. BRIEFS

The current rule, Rule 1021.116, provides that the parties may submit briefs upon their request and within the time prescribed by the Board. The briefs must be served on other parties and will include suggested findings of fact and conclusions of law.

The Committee recommends that the rule be amended as follows: the rule be renamed "post-hearing" briefs, that initial post-hearing briefs contain proposed findings of fact with appropriate references to the exhibit or page of the transcript, an argument with citations to supporting legal authority, and proposed conclusions of law. The proposed rule also provides for reply briefs which shall be concise as possible and not exceed 25 pages, unless the presiding administrative law judge permits otherwise. Finally, the proposed rule contains a provision which specifically states that any issue which is not argued in a post-hearing brief is waived. This rule supersedes the General Rules of Administrative Practice and Procedure.

These changes reflect the Committee's desire to make the Board's rules more specific and to codify policies which the Board already implements. The limit on reply briefs is necessary to assure the parties state their full position in their initial briefs. The waiver of arguments not presented in post-hearing briefs has been the rule adopted by the Commonwealth Court in *Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1988), in which the court stated that issues not raised in a post-hearing brief are deemed to have been waived.

The Board concurs with these recommendations.

39. AMICUS CURIAE

The Board's existing rules do not have a provision for *amicus curiae* filings. The Board however submitted to the Committee for review a proposed Rule 1021.117 for *amicus curiae*. The Board believes that in order to better serve the citizens of the Commonwealth and to have the Board's practice more closely track judicial practice in other courts of the Commonwealth its procedural rules should include a rule for *amicus curiae* briefs.

The Committee adopted the following amendments to the proposed rule: 1) that anyone interested in legal issues in any matter pending before the Board may request leave to file an *amicus curiae* brief or memorandum of law regarding those issues, 2) the *amicus curiae* shall state in its request the legal issues to be addressed in the brief and a copy of the request must be served on all parties, 3) the brief shall be filed within the time prescribed by the Board and a copy be served on all the parties, 4) any party may file a response to the brief *amicus curiae* which is adverse to its interests, and 5) the *amicus curiae* may present legal argument only as the Board may direct.

The Board concurs with the rule as proposed by the Committee.

40. ADJUDICATIONS

The Board's existing rule, Rule 1021.118, provides that the Board will issue an adjudication which will contain a discussion, findings of fact, conclusions of law and an order at

the conclusion of the proceedings and that it will serve a copy of the adjudication on all parties to the proceedings or their representatives.

The Committee recommends a technical change of “supplement” to “supersedes” so this rule will supersede the provision of the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.226 relating to final orders.

The Board concurs with the recommendation.

41. SANCTIONS

The EHB’s existing rule, Rule 1021.125, provides that the Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Those sanctions may include, dismissing an appeal or adjudication against the offending party, precluding the introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed in compliance with an order, barring an attorney from practice before the Board for repeated flagrant violation of orders or other sanctions permitted in similar situations by the Pennsylvania Rules of Civil Procedure.

The Committee proposed changes to the language of the rule to ensure clarity and to be grammatically correct. The proposed rule also eliminates the sanction of barring an attorney from practice before the Board because disbarment is a power exercised only by the Supreme Court of Pennsylvania.

The Board concurs with the recommendations.

42. PREPAYMENT OF PENALTIES

The Board’s rules currently do not specify a procedure for required prepayment of penalties or the posting of a bond in lieu of prepayment.

The proposed Rule 1021.161 is to give guidance to parties who have to meet the requirement of a number of statutes which condition the right to appeal from a penalty assessment the prepayment of the penalty or the posting of a bond to secure payment if the appeal is unsuccessful. This new rule sets forth the procedure for prepayment or posting and to whom a check should be made payable. In addition to the rule, a note is also included which sets forth that a payment of posting of a bond under the Air Pollution Control Act must be made in favor of the Board. The Air Pollution Control Act, however, is the only exception to the rule of other statutes which require that the bond must be made in favor of the Department of Environmental Protection.

The Board concurs with the recommendations.

43. HEARING ON INABILITY TO PREPAY PENALTY OR POST A BOND

The Board does not have an existing rule for a hearing on an inability to prepay a penalty or post a bond.

The proposed Rule 1021.162 provides that if an appellant submits with the appeal a verified statement that he is unable to pay, the Board may at its discretion schedule a hearing on the validity of this claim and may require appellant to submit appropriate financial information to the Department in advance of the hearing. Finally, the rule provides that if the Board determines that the appellant is able prepay the assessed penalty or post a bond it will order the appellant to do so within a period not to exceed 30 days.

The Board concurs with the recommendation.

44. RULES WHICH WERE CONSIDERED BUT WERE NOT CHANGED

The Committee decided not to change several rules: Amendments to rules (§ 1021.3), Notice of appearance (§ 1021.23), Waiver of hearings (§ 1021.94), Venue of hearings (§ 1021.96) and View of premises (§ 1021.98).

II. FISCAL IMPACT OF THE PROPOSED REVISIONS

The proposed rules should have little fiscal impact on the Commonwealth, political subdivisions, and the private sector, as many of the proposed procedures reflect Board practice. The impact of the new procedures, such as the required exchange of expert reports are expected to expedite appeals before the EHB.

III. PAPERWORK REQUIREMENTS FOR PROPOSED REVISIONS

The proposed revisions would require the EHB to modify certain of its standard orders.

IV. GOVERNMENT REVIEWS OF PROPOSED REVISIONS

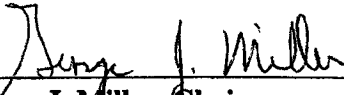
On February 16, 1999, as required by Section 5(a) of the Regulatory Review Act, Act of June 30, 1989, P.L. 73 (71 P.S. § 745.5(a)), the EHB submitted copies of the proposed revisions to the Independent Regulatory Review Commission (IRRC) and the Senate and House Standing Committees on Environmental Resources and Energy. The EHB also provided the IRRC and the Committees on Environmental Resources and Energy with copies of a Regulatory Analysis Form prepared by the EHB in compliance with Executive Order 1982-2 (relating to improving government regulations). Copies of the Regulatory Analysis Form are available to the public upon request.

If the IRRC has objections to any of the proposed revisions, it will notify the EHB by _____, 1999, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures for review, prior to final publication of the proposed revisions, by the EHB, the General Assembly, and the Governor of objections raised.

V. PUBLIC COMMENT REGARDING PROPOSED REVISIONS

The EHB invites interested persons to submit written comments, suggestions, or objections regarding the proposed revisions to William T. Phillipy, IV, Secretary to the Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, P.O. Box 8457, Harrisburg, Pennsylvania 17105-8457, within 30 days of the date of this publication.

BY ENVIRONMENTAL HEARING BOARD



George J. Miller, 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>

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.

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.]

[(c)] (b) 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)

§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) Pro Hac Vice. Representation 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.

(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.

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 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 shall be made by serving the attorney.

(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 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

- 1021.76. General.
1021.77. Contents of petition for supersedeas.
1021.78. Circumstances affecting grant or denial.
1021.79. Temporary supersedeas.

CONSOLIDATION

1021.80. Consolidation.

PREHEARING CONFERENCES AND PREHEARING PROCEDURES

1021.81. Prehearing procedure.
1021.82. Prehearing memorandum.
1021.83. Prehearing conferences.
1021.84. Voluntary mediation.

HEARINGS

1021.85. Initiation of hearings.
1021.86. Conduct of hearings.
1021.87. [(Reserved)] Continuance of hearings.
1021.88. [Presentation by the parties] Motions in limine.
1021.89. [(Reserved)] Presentation by the parties.
1021.90. Limiting number of witnesses and additional evidence.
1021.91. (Reserved).
1021.92. Oral argument after hearing.
1021.93. (Reserved).
1021.94. Waiver of hearings.
1021.95. (Reserved).
1021.96. Venue of hearings.
1021.97. (Reserved).
1021.98. View of premises.

BURDEN OF PROCEEDING AND BURDEN OF PROOF

1021.101. Burden of proceeding and burden of proof.

TRANSCRIPT

1021.104. Transcript.

EVIDENCE

1021.107. Evidence.
1021.108. Written testimony.

OFFICIAL NOTICE

1021.109. Official notice of facts.

DISCOVERY

1021.111. Discovery.

SUBPOENAS

1021.114. Subpoenas.

BRIEFS

1021.116. Briefs.

ADJUDICATIONS

1021.118. Adjudications.

TERMINATION OF PROCEEDINGS

1021.120. Termination of proceedings.

REHEARING OR RECONSIDERATION

1021.122. Reopening of record prior to adjudication.

1021.123. Reconsideration of interlocutory orders.

1021.124. Reconsideration of final orders.

SANCTIONS

1021.125. Sanctions.

ATTORNEY FEES AND COSTS

ATTORNEY FEES AND COSTS AUTHORIZED BY THE COSTS ACT

1021.131. Scope.

1021.132. Application for Fees and Expenses.

1021.133. Response to Application.

1021.134. Disposition of Application.

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

1021.141. Scope.

1021.142. Application for Costs and Fees.

1021.143. Response to Application.

1021.144. Disposition of Application.

ATTORNEY FEES AND COSTS UNDER MORE THAN ONE STATUTE

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

PREPAYMENT OF PENALTIES

1021.161. Prepayment of penalties.

1021.162. Hearing on inability to prepay penalty.

APPELLATE MATTERS

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

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 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 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.

[(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)](j) 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) Subsections (a)-(c) 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. 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. 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.

(c) A defendant failing to file an answer within the prescribed time shall be deemed in default and 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).

(d) Subsections (a)-(c) 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 motion 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).

PREHEARING CONFERENCES AND PREHEARING PROCEDURES

§ 1021.81. Prehearing 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. Prehearing 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. Prehearing 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 1 Pa. Code §§ 35.131-133 (relating to recording of proceedings; transcript corrections and copies of transcript).

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, 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 or 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 or 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 [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.



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

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

February 16, 1999

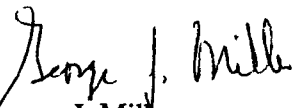
Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Dear Mr. Nyce:

In accordance with the provisions of the Regulatory Review Act, the Environmental Hearing Board is transmitting a copy of proposed amendments to its rules of practice and procedure to the Independent Regulatory Review Commission for its review.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD


George J. Miller
Administrative Law Judge
Chairman

Enclosures

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

RECEIVED

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

99 FEB 16 PM 3: 52

INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- X Proposed Regulation
- 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
	<u>Cindy Zim</u>	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
	<u>Bonnie Castelli</u>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
<u>2/16/99</u>	<u>Kemi C Garner</u>	INDEPENDENT REGULATORY REVIEW COMMISSION ATTORNEY GENERAL
	<u>Janet Potts</u>	LEGISLATIVE REFERENCE BUREAU

February 11, 1999