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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 28, 1999

George J. Miller, Chairman
Environmental Hearing Board
Rachel Carson State Office Building
400 Market Street, 2nd Floor
Harrisburg, PA 17105

Re: IRRC Regulation #106-4 (#2005)
Environmental Hearing Board
Practice and Procedure

Dear Chairman Miller:

Enclosed are our Comments on your proposed regulation #106-4. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact Chuck Tyrrell at 772-3455 or John Nanorta at 787-8491.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Kimberly A. Hafner
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL HEARING BOARD REGULATION NO. 106-4

PRACTICE AND PROCEDURE

MAY 28, 1999

We have reviewed this proposed regulation from the Environmental Hearing Board (Board) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 1021.31(a). Service by the Board. - Clarity

Subsection (a) provides that service of orders, notices and other documents is to be made, by mail or in person, upon the person designated in the notice of appearance. The Board proposes to have this rule supersede, rather than supplement, the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 33.31, relating to service by the agency. This change leaves unanswered the question of whom to serve if a party has not yet entered an appearance.

The Board advises that this problem arises only in one specific type of case involving a permittee. In that type of case, the permittee's name and address is attached to the complaint. Service may then be made on the permittee, or on the permittee's attorney. To ensure that this process is clear, the Board's rules should continue to supplement, and not supersede, Section 33.31 of 1 Pa. Code. In the alternative, the Board should revise Section 1021.31 to indicate that service should be made on a permittee before the permittee enters an appearance.

2. Section 1021.51. Commencement, forms and content. - Clarity

Subsection (f) requires an appellant to prepay a penalty in an appeal from an assessment of a civil penalty. This section should be revised to clearly indicate that the prepayment requirement only applies when required by statute. The following amendment will accomplish this change:

“Where the appeal is from an assessment of a civil penalty [that] for which the statute requires an appellant to prepay the penalty or post a bond,”

3. Section 1021.56. Complaints filed by the Department. – Reasonableness and Clarity

In Subsection (b), the Board has replaced notice to plead with notice of right to respond. Given the large number of *pro se* defendants who appear before the Board, we question whether the change in language will give adequate notice of the consequences of a failure to respond, or the failure to specifically deny factual allegations.

The Board should revise the regulation to provide that complaints will contain a notice advising defendants of these consequences, or explain in its response document how defendants are advised of these consequences through other means (pamphlets, etc.).

4. Section 1021.57. Answers to Complaints filed by the Department. – Reasonableness and Clarity

In Section 1021.57, the Board has proposed a new rule pertaining to answers. This rule, which will replace Section 1021.66, will apply to all proceedings which must be instituted by complaint. Although Section 1021.66 will be deleted, most of its substantive provisions will be incorporated into the new Section 1021.57. However, certain differences between the new and deleted provisions have created confusion.

First, Section 1021.57(b) combines in one provision the following two distinct directives: (1) all defenses, legal and factual, should be combined in a single pleading; and (2) answers should be written and complete, should admit or deny specifically each allegation, and should clearly state the facts and legal arguments relied upon. This provision incorporates the substance of Subsections (b) and (d) of Section 1021.66. Combining these two provisions into a single provision results in diminished clarity. Therefore, Subsection 1021.57(b) should be divided into two lettered paragraphs, modeled after Subsections (b) and (d) of Section 1021.66.

Second, Section 1021.57 leaves doubt as to whether a party must reply to new matter and preliminary objections. Section 1021.57(b) contains the same requirement as Section 1021.66(c), that preliminary objections must be included in answers and may not be filed separately. However, Section 1021.66(e), which requires the filing of a reply to new matter and answer to preliminary objections, was not carried over to Section 1021.57. This has resulted in confusion as to whether: (1) replies to new matter and answers to preliminary objections are still required; and (2) the same “deemed admitted” rule applies to a failure to file a reply or answer. The regulation should be amended to resolve these questions.

Third, Section 1021.57(c) leaves unclear how facts may be deemed admitted against a party. This provision was modeled after Section 1021.66(c), with one important difference. Section 1021.66(c) provides that 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 (emphasis ours). Section 1021.57(c) leaves out the phrase “upon motion made.” The absence of this language gives rise to the question whether all relevant facts may be deemed admitted against a party even if its opponent does not make a motion to that effect.

Under Section 1021.70(h), motions may be made orally during the course of a hearing, and do not have to be preliminarily filed in writing. In the interest of fairness, and given the ease with which a motion may be made, the requirement for a motion should be retained in Section 1021.57(c).

5. Section 1020.70. General. – Clarity

The new language proposed to be added to Section 1020.70(e) is inconsistent with both Section 1020.70(f) and Section 1021.73(b). The new language in Subsection (e) would presumably apply to all motions, including motions for summary judgement and motions for partial summary judgement. It would provide that material facts set forth in a motion that are not denied may be deemed admitted for the purposes of deciding the motion. Subsection (f), however, does not apply to motions for summary judgement or motions for partial summary judgement. It provides that, for the purposes of the relief sought, 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. Section 1021.73(c), which incorporates by reference Pa.R.C.P. Rule 1035.3(d), provides that summary judgement may be entered against a party who does not respond.

This inconsistency gives rise to several questions. First, with respect to motions for summary judgement and motions for partial summary judgement, it is not clear whether failure to respond at all, or failure to specifically deny factual allegations, will result in an order granting summary judgement. (Compare the proposed change to Section 1020.70(e) with Section 1021.73(b) and Pa.R.C.P. Rule 1035.3(d).) If a failure to respond at all results in this penalty, what consequences will result from a failure to specifically deny factual allegations?

Second, with respect to motions that are not dispositive, it is not clear why the Board would differentiate between the purpose of deciding the motion in Subsection (e) and the purpose of the relief sought in Subsection (f). Presumably, if a motion were decided in the mover's favor, the relief sought would be granted. Third, Subsection (e) does not explain whether facts that are not specifically denied will be deemed admitted upon motion of the opposing party or the Board's own motion, or whether the Board may deem facts admitted even if a motion to that effect is not made. The Board should revise the language in Subsection (e) to resolve these inconsistencies.

6. Section 1021.80. Consolidation. – Clarity

Section 1021.80 provides that the Board, upon motion made, may consolidate proceedings involving a common question of law or fact. The proposed change to Subsection (b) indicates that Section 1021.80 will supersede, rather than supplement, the Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.45. This change would seem to prevent the Board from issuing orders necessary to have the proceedings conducted in an efficient manner. Therefore, the Board should retain "supplements" and not replace it with "supersedes."

The Board has explained that this authority is reserved under the newly proposed Section 1021.4, which is patterned after the Pa.R.C.P. Rule 126. So that this will be made apparent, the Board should cross-reference Section 1021.4 in Section 1021.80.

7. Section 1021.104. Transcript. – Reasonableness and Clarity

Section 1021.104 sets forth the requirement for transcripts. In Subsection (d), the Board proposes to have this section supersede, rather than supplement, the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§ 35.131 - 35.133. Superseding Section 35.132 of 1 Pa. Code will have the effect of eliminating the procedure for correcting errors in transcripts. Therefore, the Board should not replace “supplements” with “supersedes.” In the alternative, the Board should revise Section 1021.104 to indicate how errors in transcripts can be corrected.

8. Section 1021.125. Sanctions. – Clarity

Section 1021.125 provides that the Board may impose sanctions for failure to abide by a Board order or practice and procedure rule. With respect to the type of sanctions that may be imposed, the Board proposes to delete the phrase “as are permitted in similar situations by Pa.R.C.P. for practice before the court of common pleas,” and replace that phrase with “appropriate.” By deleting the reference to the Pa.R.C.P., the Board has not provided any means through which a party may be put on notice as to what sanctions the Board may find “appropriate.”

The Board has explained that it intends to be guided by Pa.R.C.P. Rule 4019 (relating to production of documents and things; sanctions), and will state its intention in the Preamble to the final-form regulation. However, the Board does not want to include a cross-reference to Rule 4019 in the regulation, because this rule has limited application to discovery practice.

Because the Preamble is not codified, the mention of the Board’s intention therein is not sufficient to place parties on notice as to how the Board’s discretion will be limited. Therefore, the cross-reference to Rule 4019 should be included, with clarification that it will apply generally to proceedings before the Board. In the alternative, the Board should list in Section 1021.125 the sanctions set forth in Rule 4019 that it will apply where circumstances warrant.

9. Miscellaneous – Clarity

The following revisions will improve the clarity of the regulation:

1. Section 1021.35(a)(2). Insert the word “than” between “other” and “motions.”
2. Sections 1021.17, 1021.107 and 1021.161. Do not place substantive provisions in “Note” paragraphs, which are neither numbered nor lettered. To avoid confusion, use the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code, Section 7.6 and Chapter 9.
3. Section 1021.162. Replace “In the event” with “If.” Also, divide the first and second sentences into Subsections (a) and (b).

INDEPENDENT REGULATORY REVIEW COMMISSION

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 Commission
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Date: May 28, 1999
of Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Hearing Board's regulation 106-4. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *K. Hafner* Date: 5/28/1999