



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
 2nd FLOOR - RACHEL CARSON STATE OFFICE BUILDING
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WILLIAM T. PHILLIP IV
 SECRETARY TO THE BOARD

February 25, 1999

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

ORIGINAL: 2005
 MIZNER
 COPIES: Tyrrell
 Nanorta
 Sandusky
 Legal
 Notebook

Dear Mr. Nyce:

On February 16, 1999 the Environmental Hearing Board transmitted a copy of proposed amendments to its rules of practice and procedure to the Independent Regulatory Review Commission for its review. It has come to our attention that some of the Annex A portions of the package may be incomplete due to an unintentional omission which occurred during copying. Enclosed is a complete version of Annex A. Please replace the previous copy of Annex A with the enclosed.

Thank you.

Sincerely yours,

ENVIRONMENTAL HEARING BOARD

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

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 99 MAR - 1 AM 8:40
 ENVIRONMENTAL HEARING BOARD

Enclosure

C: Representative Hershey
 Senator Musto
 Senator White

ANNEX A

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

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GENERAL

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1021.1.	Scope of chapter.	MIZNER
1021.2.	Definitions.	COPIES: Tyrrell
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1021.4	<u>Construction and application of rules.</u>	Sandusky
		Legal, Notebook

TIME

- 1021.11. [Timely filing required] (Reserved).
- 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] (Reserved).
- 1021.22. [Appearance by attorney] Representation
- 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)

REPRESENTATION BEFORE THE BOARD

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 Repealed.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

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

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

§1021.22. [Appearance by attorney.] Representation.

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

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

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

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

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

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

(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.

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

FILING AND SERVICE OF DOCUMENTS

§ 1021.30. Filing.

- (a) Documents filed with the Board shall be filed at its headquarters - 2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.
- (b) The date of filing shall be the date the document is received by the Board.
- (c) Documents may be filed by personal delivery, by mail, or by facsimile. When a document is filed by facsimile, the original shall be deposited in the mail on the same day. If a document exceeds ten pages, the facsimile shall consist of the first five pages and last five pages of the document and the certificate of service. Any filing received after the close of the business day at 4:30 pm Eastern Time shall be deemed to be filed on the following business day.

§ 1021.31. Service by the Board.

- (a) Orders, notices, and other documents originating with the Board shall be served upon the person designated in the notice of appearance 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

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

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- 1021.62. Intervention.

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APPEALS

§ 1021.51. Commencement, form and content.

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

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

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

v.

Docket No. _____

Commonwealth of Pennsylvania
 Department of _____, Appellee

- (c) The appeal shall set forth name, address, and telephone number of appellant.
- (d) If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.
- (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may

agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

(f) Where the appeal is from an assessment of a civil penalty that requires an appellant to prepay the penalty or post a bond, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

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

- (1) The office of the Department issuing the notice of Departmental action;
- (2) The Office of Chief Counsel of the Department or agency taking the action appealed.
- (3) In a third party appeal, the recipient of the action.

[(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 general provisions).

EVIDENCE

§ 1021.107. Evidence.

- (a) The Board is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible. Note: The Board generally applies the Pennsylvania Rules of Evidence.
- [(b)] 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 and shall serve a copy of the request on all parties.

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

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

ADJUDICATIONS

§ 1021.118. Adjudications.

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

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

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

TERMINATION OF PROCEEDINGS

§ 1021.120. Termination of proceedings.

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

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

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

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

- 1) Notify the Board that the case has been settled and request that the docket be marked settled.

2) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record of the case, and request that the docket be marked settled.

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

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

RE: (Case and Docket Number)

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

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

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

(Summarize major substantive provisions of
settlement agreement.)

Copies of the full agreement are in the hands
of:

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

(d) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive

provisions of the consent adjudication in the manner indicated in section (c)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall lie to the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within thirty days of the date of the Board's action.

REHEARING OR RECONSIDERATION

§ 1021.122. Reopening of record prior to adjudication.

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

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

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

(2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

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

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

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

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

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

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

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

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

Comment: This sets a standard which is more stringent than the materiality test of *Spang*

& Company v. DER, 592 A.2d 815 (Pa. Cmwlth. 1991), but broader than the grounds justifying reconsideration. The procedure differs from the standard motions practice under §§ 1021.70 - 1021.74.

§ 1021.123. Reconsideration of interlocutory orders.

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

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

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

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

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

§ 1021.124. Reconsideration of final orders.

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

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

(2) The crucial facts set forth in the petition

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

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

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

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

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

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

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

SANCTIONS

§ 1021.125. Sanctions.

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include [the] dismiss[al]ing [of] an appeal, [or] entering adjudication against the offending party, [orders] precluding introduction of evidence or documents not disclosed [in compliance with an order], barring the use of witnesses not disclosed [in compliance with an order, barring an attorney from practice before the Board for repeated or flagrant violation of orders], or other appropriate sanctions [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.

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

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

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

In the event an appellant submits a verified statement that he is unable to pay in accordance with Rule 1021.51, the Board may schedule a hearing on the validity of this claim and may require the appellant to supply appropriate financial information to the Department in advance of the hearing. If the Board determines that the appellant is able to prepay the penalty assessed or post a bond the Board shall order the appellant to do so, within a period not to exceed 30 days.

APPELLATE MATTERS

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

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

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

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

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



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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

March 17, 1999

Gary Hoffman
Director
PA Code and PA Bulletin
647 Main Capitol Building
Harrisburg, PA 17120

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Dear Gary:

The Environmental Hearing Board requests a 30 day extension for the public comment period on its current proposed regulatory package, 106-4, published in the February 27, 1999 *Pennsylvania Bulletin* Vol. 29, No. 9. The extension would allow the Board to apprise the environmental legal community of the package at the statewide Environmental Law Forum scheduled for April 15 and 16 and to obtain any comments from the practitioners.

Please publish this notice of extension in the next *Pennsylvania Bulletin*.
Thank you.

Sincerely,

- George J. Miller
Chairman
Administrative Law Judge

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RACHEL CARSON STATE OFFICE

c: Robert E. Nyce, Executive Director, IRRC
Senator White
Senator Musto
Representative Hershey
Representative George