

Regulatory Analysis Form

This space for use by IRRC

20080225 10:18:00

IRRC Number: 2264

(1) Agency

Environmental Hearing Board

(2) I.D. Number (Governor's Office Use)

No. 106-7

IRRC Number: 2264

(3) Short Title

Environmental Hearing Board Rules of Practice and Procedure

(4) PA Code Cite

25 Pa. Code § 1021.1 *et seq.*

(5) Agency Contacts & Telephone Numbers

Primary Contact: Donald L. Carmelite
(717) 783-4740
Secondary Contact: Mary Anne Wesdock
(717) 565-5245

(6) Type of Rulemaking (check one)

- Proposed Rulemaking
- Final Order Adopting Regulation X
- Final Order, Proposed Rulemaking Omitted

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

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

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

This rules package adds three new rules and substantively and/or technically amends several existing rules.

Proposed rule 1021.31, governing the signing of documents, guarantees that documents filed with the Board are bona fide. The other two new rules, at 1021.72 and 1021.73, address complaints filed with the Board against the Department of Environmental Protection (Department) and matters transferred to the Board from other courts. The Board's rules do not contain provisions for complaints filed against the Department pursuant to statutory authorization, such as the Hazardous Sites Cleanup Act, 35 P.S. § 6020.505(f) or matters transferred to the Board from courts in the Commonwealth, for example courts have referred claims of regulatory takings in violation of due process to the Board. The new rules and substantive amendments at 1021.71 – 1021.75 will provide regulatory guidance to practitioners in these and similar cases. In addition, in rule 1021.2, the definition of "pleadings" has been revised in accordance with the revisions at 1021.71 – 1021.75.

The Rules Committee wants to track Pennsylvania civil practice to the greatest extent possible. Therefore, the committee substantively amended rule 1021.71(a) and (b). In Pennsylvania civil practice, filing a document commences an action, which conflicts with Board rule 1021.71(b) requiring both filing and service to commence an action with the Board. Therefore, the Committee recommends deleting the existing language in rule 1021.71(b) relating to commencement of actions, and moving the commencement of action language to rule 1021.71(a), stating that filing the complaint commences the action. In addition, tracking the language in the Pa. R.C.P. the Committee deleted "initiate" in rule 1021.71(a) and replaced it with "commence." Also tracking the Pa. R.C.P., the Committee proposes revising the rules on service of complaints, rule 1021.71(b), to conform with Pa. R.C.P. 403 governing service of original process.

The Committee recommends substantively amending rules 1021.91 and 1021.94. The amended rule 1021.94 changes to require the motion to contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought. The amendment to rule 1021.91 excludes dispositive motions from the purview of § 1021.91.

The substantive amendments to rules 1021.101(a) and 1021.104(a)(5) allow parties to respond to expert interrogatories by serving either answers or an expert report. The amendment to rule 1021.101(a)(1) also clarifies that discovery is to be served, as opposed to concluded, within 90 days of the date of the prehearing order in accordance with Board practice and practice under the Pa. Rules of Civil Procedure.

The substantive amendment of rule 1021.141(b) removes an unnecessary barrier to settlement by deleting the rule in favor of determining the effect of the withdrawal of an appeal on a case-by-case basis.

The substantive amendments to rules 1021.182-1021.183 conforms the rules to Act 138 of 2000, which sets forth new standards for the award of attorney's fees and costs in mining appeals.

The substantive amendments to rule 1021.201 provides for the procedure for certifying to Commonwealth Court those documents electronically filed with the Board, and corrects the rule's improper reference to a posthearing *memorandum* instead of posthearing *brief*.

The Committee technically amended rules 1021.91 through 1021.95 to state that the rules supersede, rather than supplement, the General Rules of Administrative Practice and Procedure.

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

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

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

No.

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

The EHB's rules do not contain a provision with respect to the signing of documents filed with the Board, but proposed rule 1021.31 does by requiring that documents filed with the Board be signed and that the signatory have a reasonable belief that the document is bona fide. Also, the Board's rules do not contain provisions for complaints filed against the Department pursuant to statutory authorization, such as the Hazardous Sites Cleanup Act, 35 P.S. at § 6020.505(f) or matters transferred to the Board from courts in the Commonwealth. The rules at 1021.71 – 1021.75 will provide regulatory guidance to practitioners in these and similar cases.

The Committee noted that the Board's rules did not always conform with Pennsylvania civil practice when they otherwise could where appropriate. In Pennsylvania civil practice, filing a document commences an action, which conflicts with Board rule 1021.71(b) requiring both filing and service to commence an action. Therefore, the Committee recommends deleting the existing language in 1021.71(b) relating to commencement of actions, and moving the commencement of action language to § 1021.71(a), stating that filing the complaint commences the action. In addition, the Committee proposes tracking the language in the Pa. R.C.P. to the greatest extent possible. Accordingly, in 1021.71(a) the Committee deleted "initiate" and replaced it with "commence." Finally, the Committee proposes revising the rules on service of these complaints to conform with rule 1021.71(b) to Pa. R.C.P. 403 governing service of original process.

The Committee noted that motions, and their corresponding responses and replies, are unnecessarily long because litigants feel compelled to include both background and material facts. The Committee determined that this results in a needless burden on litigants because counsels' time and effort developing and responding to facts, bearing little materiality to the relief requested in the motion, is disproportionate to the value it creates for the Board in rendering its decision. Another problem the Committee identified with rules 1021.91 and 1021.94 is that the dispositive motion and its supporting memorandum of law or brief are repetitive because of the numbered paragraph requirement for the motion. The Committee also noted that the rules of civil procedure for Federal and Pennsylvania practice do not require the exhaustive numbered paragraph approach employed in rule 1021.91. Therefore, the Committee recommends making the rules for dispositive motions more manageable and meaningful by eliminating extraneous information in the motion, abolishing the requirement for filing lengthy motions and their corresponding responses, and allowing background information and nonmaterial facts to appear in the supporting memorandum of law or brief. The proposed rule would change to require the motion to contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought.

The amendments to rule 1021.101(a)(1) recognize that existing practice allows parties to serve discovery within the 90 days timeframe from the date of the prehearing order. The amendments to 1021.101(a)(2) and (3) and 1021.104(a)(5) recognize that parties may respond to expert interrogatories by serving either answers or an expert report.

In rule 1021.141(b) governing the withdrawal of appeals, the default presumption that a matter is withdrawn with prejudice unless otherwise indicated by the Board presents a problem for many practitioners because such a withdrawal may bar, unwittingly, a party from raising similar issues in a subsequent proceeding even though the Board has not substantively ruled on those issues. The substantive amendment of rule 1021.141(b) removes an unnecessary barrier to settlement by deleting the rule in favor of determining the effect of the withdrawal of an appeal on a case-by-case basis.

The legislature passed Act 138 of 2000, which sets forth new standards for the award of attorney's fees and costs in mining appeals. Act 138 repeals the attorney's fee provisions of Pennsylvania's mining statutes and replaces them with new provisions set forth at 27 Pa.C.S. §§ 7707 and 7708. The substantive amendments to rules 1021.182-1021.183 will bring them into conformance with Act 138 of 2000.

The Board recently initiated an elective electronic filing system for those practitioners, currently appearing before the

Board in an appeal, who choose to file and accept service of documents electronically. EHB rule 1021.201 does not specifically provide for the composition of a certified record for those Board cases taking part in the electronic filing program. The substantive amendments to rule 1021.201 provides for the procedure for certifying to Commonwealth Court those documents electronically filed with the Board, and corrects the rule's improper reference to a posthearing *memorandum* instead of posthearing *brief*.

The EHB's rules regulating motions supplement the General Rules of Administrative Practice and Procedure (GRAPP), and therefore require practitioners to cross reference GRAPP with the Board's regulations. The Committee believes that cross referencing GRAPP is unnecessary and inefficient where the EHB's rules have incorporated GRAPP or when GRAPP does not apply to the Board. The Committee technically amended rules 1021.91 through 1021.95 to state that the rules supersede, rather than supplement, the General Rules of Administrative Practice and Procedure.

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

None.

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

The proposed amendments will benefit all litigants who appear before the EHB by either clarifying existing EHB rules of practice and by making the rules and practice before the EHB similar to practice before the courts of common pleas and the federal district courts.

The Department of Environmental Protection (DEP) will be similarly affected by the proposed regulations since, with few exceptions, the DEP is the appellee in all appeals filed with the EHB.

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

None.

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

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

(16) Describe the communications with and input from the public in the development and drafting of

the regulation. List the persons and/or groups who were involved, if applicable.

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

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

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

On the whole, the final regulations will have little cost impact on either the public or private sector. They may, in fact, have a favorable economic impact by eliminating potential litigation over existing uncertainties in EHB procedures, authority and requirements and by aiding in trial preparation and presentation.

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

Regulatory Analysis Form

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

On the whole, the final regulations will have little impact on either the public or private sector. Some cost savings may be achieved by eliminating potential litigation over existing uncertainties in EHB procedures, authority and requirements and by aiding in trial preparation and presentation.

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

On the whole, the final regulations will have little cost impact on either the public or private sector. Some cost savings may be achieved by eliminating potential litigation over uncertainties in EHB procedures, authority and requirements and by aiding in trial preparation and presentation.

Regulatory Analysis Form

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

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

(20a) Explain how the cost estimates listed above were derived.

N/A - See above.

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

Program	FY -3	FY -2	FY -1	Current FY
EHB	\$1,436,000	\$1,648,000	\$1,816,000	\$1,823,000

Regulatory Analysis Form

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

On the whole, the final regulations will have little cost impact on either the public or private sector. Some cost savings may be achieved by eliminating potential litigation over uncertainties in EHB procedures, authority and requirements and by aiding in trial preparation and presentation.

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

None.

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

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

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

No.

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

The EHB has not made a study of the rules of procedure before comparable administrative hearing boards of other states but does not believe the proposed rules could in any way put Pennsylvania at a competitive disadvantage. The EHB has been advised by an Allegheny County attorney who has practiced in at least 20 other states that the Pennsylvania EHB is "the most efficient and proficient environmental law tribunal" he had ever encountered.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state

agencies? If yes, explain and provide specific citations.

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

The regulations of other state agencies would not be affected.

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

The proposed rules were adopted by the EHB at public meetings held on January 9, 2002 and February 5, 2002 at the EHB's main office in Harrisburg, Pa., in accordance with Section 704 of the Sunshine Act, 65 Pa.C.S.A. § 704. Following final rulemaking, the new rules are printed, published and distributed with the Board's appeal packet to attorneys in applicable state agencies and in the private sector. In addition, the Board's staff is available by telephone for any assistance.

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

No.

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

None.

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

Implementation will occur immediately after adoption as final rules.

There are no conformity deadlines.

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

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

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

20020925 11:00
LEGISLATIVE REFERENCE BUREAU

Do not write in this space

2264

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

By: _____
(Deputy Attorney General)

(Date of Approval)

Check if applicable
Copy not approved.
Objections attached.

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

Environmental Hearing Board
(Agency)

Document/Fiscal Note No. 106-7

Date of Adoption: July 10, 2002

By: George J. Miller

Title: George J. Miller, Chairman

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

By: B. Keith Ray
(Deputy General Counsel)

9/18/02
(Date of Approval)

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

Final Form Regulation

Title 25: Environmental Protection

Part IX: Environmental Hearing Board

Chapter 1021: Practice and Procedure

**ENVIRONMENTAL HEARING BOARD
RULES OF PRACTICE AND PROCEDURE
FINAL RULEMAKING 106-7**

PREAMBLE

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

The Board approved the final regulations at its July 10, 2002 meeting.

Effective Date

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

Contact Person

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

Statutory Authority

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

Comments and Revisions to Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC). The Board received no comments from the public. The IRRC's comments are addressed below.

Electronic Filing

Proposed rule 1021.31(c) (relating to signing) stated as follows: "The Board may impose an appropriate sanction for a bad faith violation of Subsection (b)." The IRRC recommended adding a cross-reference to rule 1021.161, dealing with sanctions. This has been done in the final-form regulation.

Proposed rules 1021.71 (relating to complaints filed by the Department), 1021.72 (relating to complaints filed by other persons), and 1021.73 (relating to transferred matters) stated as follows: "Service of the complaint shall be by personal service or any form of mail requiring a receipt..." The IRRC recommended clarifying the phrase "any form of mail." The final rulemaking has been changed to read "certified or registered mail."

Proposed rule 1021.73 (relating to transferred matters) stated that a complaint shall be filed "within the time period directed to do so by the Board." The IRRC recommended specifying the amount of time in which the Board would allow a party to file a complaint. The final rulemaking has been revised to read "within the 30-day time period directed by the Board."

Proposed rule 1021.94 (relating to dispositive motions) contained requirements for the filing of dispositive motions. The IRRC recommended that the rule should also contain a cross-reference to rule 1021.31 (dealing with service). This has been done in the final-form regulation.

Sunset Date

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

Regulatory Review

As required by Section 5(a) of the Regulatory Review Act, Act of June 30, 1989, P.L. 73, 71 P.S. § 745.4(a), the Board submitted copies of the proposed rulemaking, which was published in the *Pennsylvania Bulletin* Vol. 32, No. 16 (April 20, 2002), to IRRC and the Senate and House Environmental Resources and Energy Committees for review and comment. The Board, in accordance with Section 5(bj.1) of the Regulatory Review Act (71 P.S. § 745.5(b.1)), also provided IRRC and the Committees with the Regulatory Analysis prepared in compliance with Executive Order 1982-2 (relating to improving government regulations) and copies of comments received.

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

These final form regulations were submitted to the House Environmental Resources and Energy Committee and the Senate Environmental Resources and Energy Committee on _____, 2002. Because no action was taken by the Committees within 20 days after submission of the final form regulations, they are deemed approved. IRRC met on _____, 2002 and approved the regulations pursuant to Section 5(c) of the Regulatory Review Act.

Findings of the Board

The Board finds that

- (1) Public notice of the proposed rulemaking was given under Sections 201 and 202 of the Act of July 31, 1968, P.L. 769, No. 240, 45 P.S. §§ 1201 and 1202 and the regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2.
- (2) These regulations are necessary and appropriate for administration of the Environmental Hearing Board Act.

Order

- (1) The regulations of the Board are amended by Annex A.
- (2) The Chairman of the Board shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel as to legality and form as required by law.
- (3) The Chairman of the Board shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee, and IRRC, as required by law.
- (4) The Chairman of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (5) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

George J. Miller
Chairperson

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND PROCEDURE

* * * * *

**DOCUMENTARY FILINGS
SIGNING, FILING AND SERVICE OF DOCUMENTS**

- 1021.31. **Signing**
- 1021.32. **Filing**
- 1021.33. **Service by the Board**
- 1021.34. **Service by a party**
- 1021.35. **Date of service**
- 1021.36. **Certificate of service**
- 1021.37. **Number of copies**
- 1021.38. **Publication of notice**
- 1021.39. **Docket**

SPECIAL ACTIONS

- 1021.71. **Complaints filed by the Department**
- 1021.72. **Complaints filed by other persons**
- 1021.73. **Transferred matters**
- 1021.74. **Answers to complaints [filed by the Department]**
- 1021.75. **Procedure after an answer is filed**

**PRELIMINARY PROVISIONS
GENERAL**

§ 1021.2. Definitions.

* * * * *

Pleading – A complaint filed under § 1021.71 (relating to complaints filed by the Department), § 1021.72 (relating to complaints filed by other persons), or § 1021.73 (relating to transferred matters) or answer filed under § 1021.74 (relating to answers to complaints [filed by the Department]). Documents filed in appeals, including the notice of appeal, are not pleadings.

DOCUMENTARY FILINGS
SIGNING, FILING AND SERVICE OF DOCUMENTS

§ 1021.31. **Signing.**

- (a) Every notice of appeal, motion, legal document or other paper directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, or if a party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number.
- (b) The signature to a document described in subsection (a) constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay, or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.
- (c) The Board may impose an appropriate sanction **IN ACCORDANCE WITH § 1021.161 (RELATING TO SANCTIONS)** for a bad faith violation of subsection (b).

§ [1021.31] 1021.32. **Filing.**

* * * * *

§ [1021.32] 1021.33. **Service by the Board.**

* * * * *

§ [1021.33] 1021.34. **Service by a party.**

* * * * *

§ [1021.34] 1021.35. **Date of service.**

* * * * *

§ [1021.35] 1021.36. **Certificate of service.**

* * * * *

§ [1021.36] 1021.37. **Number of copies.**

* * * * *

§ [1021.37] 1021.38. **Publication of notice.**

* * * * *

§ [1021.38] 1021.39. **Docket.**

* * * * *

SPECIAL ACTIONS

§ 1021.71. **Complaints filed by the Department.**

- (a) When authorized by statute the Department may [initiate] commence the action by filing a complaint or petition[, together with a certificate of service] and a notice of a right to respond. **The action is commenced when the complaint or petition is filed with the Board.**
- (b) [This action shall commence when the complaint is filed and service of the complaint and a notice of a right to respond is made upon the defendant.] **Service of the complaint or petition shall be by personal service or by ~~any form of mail requiring a receipt signed by the party or the party's authorized agent~~ CERTIFIED OR REGISTERED MAIL. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34.**
- (c) * * * * *
- (d) * * * * *
- (e) * * * * *

§ 1021.72. **Complaints filed by other persons.**

- (a) **When authorized by statute, a person may institute an action against the Department by filing a complaint.**
- (b) **Service of the complaint or petition shall be by personal service or by ~~any form of mail requiring a receipt signed by the party or the party's authorized agent~~ CERTIFIED OR REGISTERED MAIL. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34.**

- (c) **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).**

§ 1021.73. Transferred matters.

- (a) **This rule addresses matters transferred to the Board from a court.**
- (b) **Within the 30-DAY time period directed to do so by the Board, the party who initiated the transferred action shall file a complaint with the Board.**
- (c) **Service of the complaint or petition shall be by personal service or by any ~~form of mail requiring a receipt signed by the party or the party's authorized agent~~ CERTIFIED OR REGISTERED MAIL. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34.**
- (d) **The complaint shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for relief is based.**
- (e) **Subsections (a) – (b) supersede 1 Pa. Code § 35.5 – 35.7 and 35.9 – 35.11 (relating to informal complaints and formal complaints).**

§ [1021.72] 1021.74. Answers to Complaints [filed by the Department].

*** * * * ***

§ [1021.73] 1021.75. Procedure after an answer is filed.

*** * * * ***

MOTIONS

§ 1021.91. General.

- (a) **This section applies to all motions except dispositive motions and those made during the course of a hearing.**
- (b) *********

- (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) *****
- (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 a motion, **other than a motion for summary judgment or partial summary judgment,** that are not denied may be deemed admitted for the purposes of deciding the motion.
- (f) **[Except in the case of motions for summary judgment or partial summary judgment,]** For purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.
- (g) **[Except as provided in § 1021.73(e) (relating to dispositive motions),]** The moving party may not file a reply to a response to its motion unless the Board orders otherwise.
- (h) Subsection (b) supplements 1 Pa. Code § 33.11 (relating to execution of motions) and **supersedes 1 Pa. Code § 35.178** (relating to presentation of motions). Subsection (c) **[supplements] supersedes 1 Pa. Code §§ 33.32, [(relating to service by a participant) and supersedes 1 Pa. Code §] 33.35 and 33.36**(relating to **service by a participant; proof of service; and form of certificate of service**). Subsections (d) – (f) **[supplement] supersede 1 Pa. Code §§ 35.177 and 35.178** (relating to scope and content of motions; and presentation of motions).

§ 1021.92. Procedural motions.

- (h) Subsection (b) **[supplements] supersedes 1 Pa. Code § 33.12** (relating to verification). Subsections (c) and (e) **[supplement] supersede 1 Pa. Code § 35.177** (relating to scope and contents of motions). Subsection (d) **[supplements] supersedes 1 Pa. Code § 35. 179** (relating to objections to motions).

§ 1021.93. Discovery motions.

- (e) Subsection (b) [supplements] supersedes 1 Pa. Code § 33.12 (relating to verification). Subsections (b) and (d) [supplement] supersede 1 Pa. Code § 35.177 (relating to scope and contents of motions). Subsection (c) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

§ 1021.94. Dispositive motions.

- (a) This section applies to dispositive motions. **Dispositive motions shall contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought.**
- (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, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party **IN ACCORDANCE WITH § 1021.34 (RELATING TO SERVICE)**. **Dispositive motions shall be accompanied by a supporting memorandum of law or brief.** The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.
- (d) A response to a dispositive motion may be filed within [25] 30 days of the date of service of the motion and [may] shall be accompanied by a supporting memorandum of law or brief.
- (e) A reply to a response to a dispositive motion may be filed within [20] 15 days of the date of service of the response and may be accompanied by a supporting memorandum of law or brief. **Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the presiding administrative law judge.**
- (f) An affidavit or other document relied upon in support of a dispositive motion[,], or response[,], or reply[,], that is not already a part of the record, shall be attached to the motion[,], or response[,], or reply[,], or it will not be considered by the Board in ruling thereon.
- (g) Subsection (c) [supplements] supersedes 1 Pa. Code § 35.177 (relating to 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. 1035.3(a).]
§ 1021.95. Miscellaneous motions.

* * * * *

- (e) Subsection (b) **[supplements]** supersedes 1 Pa. Code § 33.12 (relating to verification).

**PREHEARING PROCEDURES AND
PREHEARING CONFERENCES**

§ 1021.101. Prehearing procedure.

- (a) Upon the filing of an appeal, the Board will issue a prehearing order providing, among other things, that:
- (1) **All discovery, including any discovery of expert witnesses, shall be [concluded] served [within] no later than 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] 150 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] answers to all expert interrogatories from the party with the burden of proof. The service of a report of an expert together with a statement of qualifications may be substituted for an answer to interrogatories.**
 - (3) **Dispositive motions in a case requiring expert testimony shall be filed within [180] 210 days of the date of the prehearing order. If neither party plans to call an expert witness, dispositive motions shall be filed within [150] 180 days after the filing of the appeal unless otherwise ordered by the Board.**

* * * * *

- (f) Subsection (d) **[supplements]** supersedes 1 Pa. Code § 35.121 (relating to initiation of hearings.)

§ 1021.104. Prehearing memorandum.

- (a) A prehearing memorandum shall contain the following:

* * * * *

(5) For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under § 1021.101(a) (2). In the absence of answers to expert interrogatories or an expert report, a summary of the testimony of each expert witness.

TERMINATION OF PROCEEDINGS

§ 1021.141. Termination of proceedings.

* * * * *

[(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.]

(b) [(c)] * * * * *

(c) [(d)] * * * * *

Comment: The prior rule at § 1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule.

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

§ 1021.182. Application for costs and fees.

- (a) A request for costs and fees shall conform to any requirements set forth in the statute under which costs are being sought.**
- (b) 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.] An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of such costs and fees.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of the party from whom costs and fees are sought.

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

(d) 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.

§ 1021.183. Response to Application

A response to an application shall be filed within [15] 30 days of service. A factual basis for the response shall be verified by affidavit.

APPELLATE MATTERS

§ 1021.201. Composition of the certified record on appeal to Commonwealth Court.

(b) * * * * *

(3) The parties' posthearing [memoranda] briefs, including requested findings of fact and conclusions of law.

*** * * * ***

(d) In the event that a legal document was electronically filed, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.39(c) that the official copy of an electronically filed document shall be that appearing on the Board's website.



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

September 26, 2002

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

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

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

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

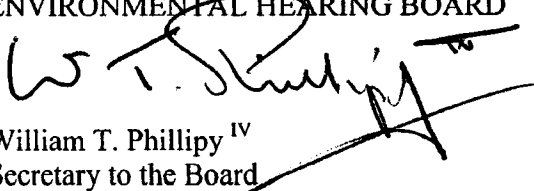
✓ Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Madam and Gentlemen:

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

Sincerely,

ENVIRONMENTAL HEARING BOARD


William T. Phillipy^{IV}
Secretary to the Board

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

I.D. NUMBER: 106-7
 SUBJECT: Practice and Procedure
 AGENCY: ENVIRONMENTAL HEARING BOARD

SEP 25 11:50

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

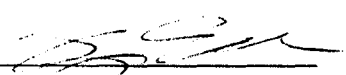
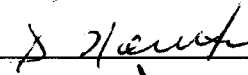

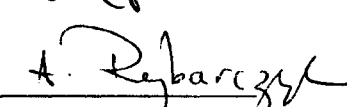
120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
9/20/02		HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
9/24/02		SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
9-26-02		INDEPENDENT REGULATORY REVIEW COMMISSION
9/26/02		ATTORNEY GENERAL
_____	_____	LEGISLATIVE REFERENCE BUREAU