

Regulatory Analysis Form

This space for use by IRRC

RECEIVED
2002 APR 10 PM 3:22
REGULATORY REVIEW COMMISSION

(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 **X**
 Final Order Adopting Regulation
 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.

RECEIVED

2002 APR 10 PM 3:22

REGULATORY REVIEW COMMISSION

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

Do not write in this space

#2264

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

By: *Christina J. Caputo*
(Deputy Attorney General)

MAR 15 2002

(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. 1064

Date of Adoption: February 5, 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: *W. Scott R.*
(Deputy General Counsel)

02/21/02

(Date of Approval)

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

NOTICE OF PROPOSED RULEMAKING

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

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

PRACTICE AND PROCEDURE

PROPOSED RULEMAKING

ENVIRONMENTAL HEARING BOARD [25 PA. CODE CH. 1021] PRACTICE and PROCEDURE

PREAMBLE

The Environmental Hearing Board (EHB) proposes to revise Chapter 1021 (relating to practice and procedures) by adding new procedural rules to read as set forth in Annex A.

The proposed procedural rules have several objectives:

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

I. *Statutory Authority for Proposed Revisions*

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

II. *Description of Proposed Revisions*

The proposed revisions are modifications to provisions of the rules to improve practice and procedure before the EHB. These proposed revisions are based on the recommendations of the EHB Rules Committee, a nine member advisory committee created by section 5 of the act to make recommendations to the EHB on its rules of practice and procedure. For the recommendations to be promulgated as regulations, a majority of the EHB members must approve the recommendations.

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

Some of the recommendations of the EHB Rules Committee were not in proper legislative style and format, so they have been modified, where necessary, to conform to those requirements. Similarly, some of the recommendations did not contain proper cross

references to 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure), so references to those rules have been added.

The proposed rulemaking adds three new rules and substantively and/or technically amends certain existing rules. The following new rules are added: (1) 1021.31 Signing, (2) 1021.72 Complaints filed by other persons, and (3) 1021.73 Transferred matters. The following rules are substantively amended: (1) 1021.2 Definition of "pleading," (2) 1021.71(a) and (b) Complaints filed by the Department, (3) 1021.91 General, (4) 1021.94 Dispositive Motions, (5) 1021.101 Pre-hearing procedure, (6) 1021.104(a)(5) Pre-hearing memorandum, (7) 1021.141(b) Termination of proceedings, (8) 1021.182 Application for cost and fees, (9) 1021.183 Response to application, and (10) 1021.201 Composition of the certified record on appeal to Commonwealth Court. The following rules are technically amended only for the purpose of superseding the General Rules of Administration Practice and Procedure: (1) 1021.91 General, (2) 1021.92 Procedural motions, (3) 1021.93 Discovery motions, (4) 1021.94 Dispositive motions, and (5) 1021.95 Miscellaneous motions.

1. *Definitions*

The definition of "pleading" has been amended to include complaints or answers filed by other persons against the Department under the Board's amended rules on special actions at §§ 1021.72 through 1021.74.

2. *Signing*

The EHB's rules do not contain a provision with respect to the signing of documents filed with the Board; however, both the Pennsylvania and Federal Rules of Civil Procedure contain such a rule. *See* Pa.R.C.P. 1023; Fed. R. Civ. P. 11. Signature rules are important because they guarantee that documents filed with the Board are authentic and bonafide, and require counsel or the party to attest that the documents are filed in good faith.

When drafting this new section, the Committee referenced and borrowed from Pa.R.C.P. 1023 and Fed. R. Civ. P. 11. Subsection (a) requires the signature of at least one attorney of record or if a party is proceeding *pro se* then a party to the litigation, and the address and phone number of the attorney or party filing the document. Subsections (b) and (c) require counsel or the party to represent that the document is being filed in good faith. This rule will also enable the Board to impose sanctions on those who file documents in bad faith. "Good faith" is defined in accordance with Pa.R.C.P. 1023.

The Committee recommends that the this section be renamed "Signing, Filing and Service of Documents," that the proposed rule on signing be inserted at rule 1021.31, and all other rules in this section be moved up one number starting with existing rule 1021.31 (Filing).

The Board concurs with the Committee's recommendations.

3. *Special Actions*

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 for a decision on whether such a taking has occurred. The rules at 1021.71 – 1021.75 will provide regulatory guidance to practitioners in these and similar cases.

The Committee proposes adding two new subsections titled "Complaints filed by other persons," rule 1021.72, and "Transferred matters," rule 1021.73. The Committee also noted that 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, the Committee proposes tracking the language in the Pa.R.C.P. to the greatest extent possible. Accordingly, in rule 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 rule 1021.71(b) to Pa.R.C.P. 403 governing service of original process.

The Board concurs with the Committee's recommendations.

4. Dispositive Motions

The EHB's existing regulation at rule 1021.91 applies generally to all motions filed with the Board except those made during a hearing. Specifically, rules 1021.91(a) and (d) require litigants to file dispositive motions setting forth, in numbered paragraphs, the facts in support of the motion and the relief requested. The Committee reviewed the practical effect that rule 1021.91 has on dispositive motions filed with the Board. It 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 rule 1021.91 is that the 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. Second, the Committee recommends that dispositive

motions be excluded from the purview of rule 1021.91, which now requires the numbered paragraph approach.

The EHB concurs with the Committee's recommendations.

5. *Motions*

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. Accordingly, under those circumstances, after reviewing the Board's rules on motions and GRAPP, the Committee recommends superseding GRAPP in the following subsections: 1021.91(h), 1021.92(h), 1021.93(e), 1021.94(g), 1021.95(e).

The Board concurs with the Committee's recommendation.

6. *Prehearing Procedure, Expert Reports and Prehearing Memoranda*

Rule 1021.101(a)(1) has been amended to clarify that discovery must be *served*, as opposed to *concluded*, within 90 days of the date of the prehearing order in accordance with existing Board practice, as well as practice under the Pennsylvania Rules of Civil Procedure. The deadlines set forth in subsections (a)(2) and (3) for responding to expert interrogatories and filing dispositive motions have been modified accordingly. The change with respect to the service of discovery removes the ambiguity with respect to the time for completion of discovery by specifying that service of the discovery is the key point rather than the receipt of answers to written discovery or the conclusion of all depositions. This gives needed flexibility to counsel in concluding discovery without unnecessary intervention of the Board.

Subsection (a)(2) has been revised so that a party may respond to expert interrogatories by either answering the interrogatories or by serving an expert report along with a statement of qualifications. Rule 1021.104(a)(5) has been revised so that a party may file with his prehearing memorandum an expert report or answers to expert interrogatories or, if no such report or answers exist, a summary of the testimony of each expert witness he intends to call at the hearing. The change with respect to expert reports was adopted to give the parties flexibility as to when they need to incur the expense of an expert's fee for preparing a written opinion and whether such a written opinion should be prepared in advance of the time for filing prehearing memoranda with the Board. At the same time, it requires disclosure of the opinions and qualifications of any expert by way of answers to interrogatories and in the prehearing memorandum to avoid surprise at the hearing on the merits.

The Board concurs with the Committee's recommendation.

7. *Termination of Proceedings*

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. This provision

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 problem typically occurs during settlement negotiations because the litigants often face the obstacle of negotiating the withdrawal of their appeal without prejudice, to avoid the preclusive effect of rule 1021.141(b). The Committee determined that the rule is not desirable because it presents an unnecessary barrier to settlement. Under almost all circumstances the 30 day requirement for filing an appeal will act as a bar against subsequent untimely appeals. The Board recommended the deletion of the rule in favor of determining the effect of the withdrawal of an appeal may occur on a case-by-case basis, and the Committee agrees. Despite this change, practitioners must still consider if administrative finality might bar litigation of a similar issue in a subsequent appeal.

The Board concurs with the Committee's recommendations.

8. *Application for cost and fees.*

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 that will be set forth at 27 Pa.C.S. §§ 7707 and 7708. The Committee reviewed Act 138 and the Board's rules on awarding attorneys fees and costs, 1021.181 – 1021.184, and determined that the Board's regulations needed to be revised to make them uniform with Act 138. Therefore, the Committee proposes amending Board rules 1021.181 – 1021.184, to make them consistent with Act 138.

The Board concurs with the Committee's recommendation.

9. *Composition of certified record on appeal to Commonwealth Court*

The Board recently initiated an elective electronic filing system for those practitioners who choose to file and accept service of documents electronically. The EHB's 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. Therefore, the Committee proposes rule 1021.201(d), which provides for the procedure for certifying to Commonwealth Court those documents electronically filed with the Board.

In addition, the Committee noted that rule 1021.201(a) improperly referred to a posthearing *memorandum* instead of posthearing *brief*; therefore, the Committee recommends amending subsection (a) to replace posthearing memorandum with posthearing brief.

The Board concurs with the Committee's recommendations.

III. *Fiscal Impact of the Proposed Revisions*

The proposed amendments will have no measurable fiscal impact on the Commonwealth, political subdivision or the private sector. The amendments may have a favorable economic impact in that they may eliminate potential litigation over existing uncertainties in EHB procedures, authority and requirements.

IV. *Paperwork Requirements for Proposed Revisions*

The proposed revisions will not require the EHB to modify its standard orders.

V. *Public Meeting on Proposed Rules*

In accordance with section 704 of the Sunshine Act, Act of October 15, 1998, P.L. 729, 65 Pa.C.S.A. §§ 701 – 716, a quorum of the members of the EHB voted to adopt the proposed rules at public meetings held on January 9, 2002 and February 5, 2002 at the EHB's Harrisburg office, Hearing Room 2, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

VI. *Government Reviews of Proposed Revisions*

On April 10, 2002, as required by section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the EHB submitted copies of the proposed revisions to the Independent Regulatory Review Commission (IRRC) and the Senate and House Standing Committees on Environmental Resources and Energy. The EHB also provided IRRC and the Committees with copies of a Regulatory Analysis Form prepared by the EHB in compliance with Executive Order 1982-2 (relating to improving government regulations). Copies of the Regulatory Analysis Form are available to the public upon request.

If IRRC has objections to any of the proposed revisions, it will notify the EHB within 10 days of the close of the Committee's review period, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures for review, prior to final publication of the proposed revisions, by the EHB, the General Assembly and the Governor of objections raised.

VII. *Public Comment Regarding Proposed Revisions*

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

GEORGE J. MILLER
Chairman

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 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. 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. 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 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. 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. **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 - MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
(717) 787-3483
TELECOPIER: (717) 783-4738

April 10, 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, Harrisstown 2
333 Market Street
Harrisburg, PA 17101

Madam and Gentlemen:

Re: Environmental Hearing Board
Proposed Rulemaking 106-7

Please be advised that the Environmental Hearing Board is re-submitting Proposed Rulemaking Package 106-7 and withdrawing the package that was delivered to your office on April 2, 2002, due to a procedural defect.

If you should have any questions, please contact either Mary Anne Wesdock at (412) 565-5245 or Don Carmelite at (717) 783-4740.

We apologize for any inconvenience.

Sincerely,

Mary Anne Wesdock
Senior Assistant Counsel



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

April 10, 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

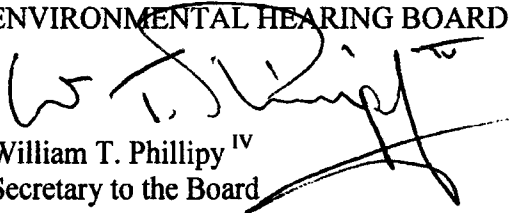
Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Madam and Gentlemen:

In accordance with the provisions of the Regulatory Review Act, the Environmental Hearing Board is transmitting a copy of the proposed 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: I.D. No. 106-7
SUBJECT: Practice and Procedures - General Revisions
AGENCY: Environmental Hearing Board

RECEIVED
 2002 APR 10 PM 3:22
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation**
- Final Regulation with Notice of Proposed Rulemaking Omitted**
- Final Regulation**
- 120-day Emergency Certification of the Attorney General**
- 120-day Emergency Certification of the Governor**

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
4/10	<i>D. Penick</i>	HOUSE COMMITTEE Conservation
4/10	<i>A. R. ...</i>	SENATE COMMITTEE Environmental Resources & Energy
4-10	<i>D. Castelli</i>	
4-10-02	<i>E. Dagan</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
4/10	<i>C. De ...</i>	LEGISLATIVE REFERENCE BUREAU