

Regulatory Analysis Form

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AND REVIEW/COMMISSION

(1) Agency

Environmental Hearing Board

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

No. 106-8

IRRC Number: 2472

(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: Mary Anne Wesdock
(412) 565-5245

Secondary Contact:

(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.

1021.2 – Definitions

Change definition of “Department” from “Department of Environmental Resources” to “Department of Environmental Protection or other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board.” The purpose of this rule change is to reflect the name change of the Department of Environmental Resources to Department of Environmental Protection (DEP) and also in recognition of the fact that the Environmental Hearing Board (EHB or Board) has jurisdiction over the actions of certain agencies, boards and/or commissions other than the Department of Environmental Protection.

1021.34(b) – Service by a party

The proposed rule change would require service to opposing parties by overnight delivery where a document is filed with the EHB by either personal service or overnight delivery.

1021.51 – Commencement, form and content [of an appeal]

Subsection (e) – The proposed rule change would delete the last two sentences of this subsection dealing with amendment of appeals for “good cause.” This change is necessitated by the proposed revisions to rule 1021.53, dealing with amendments to appeals.

Subsection (h) – Subsection (g) of this rule requires that the “recipient of the action” be served with a copy of the notice of

appeal in a third party appeal. A new subsection (h) has been proposed to define "recipient of an action" as the following: (1) a recipient of a permit, license, approval or certification; (2) a municipality or municipal authority in appeals under Sections 5 or 7 of the Sewage Facilities Act, 35 P.S. §§ 750.5 and 750.7; (3) a mining company in appeals involving a claim of subsidence or water loss under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 et seq.; (4) a well operator in appeals involving a claim of pollution or diminution of water supply under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208; (5) an owner or operator of a storage tank in appeals involving a claim of an affected water supply under Section 1303 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1303; (6) other interested parties as ordered by the Board.

Subsection (i) – Under the Rules Committee's proposals, the content of former subsection (h) would be moved to create a new subsection (i) and would be revised to read that service of a notice of appeal on a recipient of a permit, license, approval or certification would subject the recipient to the jurisdiction of the Board and would cause the recipient to be added as a party to a third-party appeal without the need to file a petition for intervention. This does not constitute a substantive change from the Board's existing rules.

Subsection (j) – A new subsection (j) would be added to allow other recipients of an action in a third party appeal, as set forth in proposed subsections (h) (2) through (h) (5), to intervene as of course by simply filing an entry of appearance within 30 days of service of the notice of appeal.

Subsection (k) – The current rule set forth at subsection (j) stating that this rule supersedes the General Rules of Administrative Practice and Procedure would be moved to a new subsection (k).

1021.53 – Amendments to appeal; nunc pro tunc appeals

Caption – This rule would be revised to deal with amendments to appeals and complaints. The criteria for nunc pro tunc appeals would be moved to a separate rule. The caption would be amended accordingly.

Subsection (a) – Subsection (a) would be amended to state that an appeal *or complaint* may be amended as of right within 20 days after the filing thereof.

Subsection (b) – This subsection would be amended to make the amendment of appeals (and complaints) after the 20-day amendment as of right period more liberal. Rather than setting forth three particular circumstances under which appeals (and complaints) may be amended after the 20-day amendment as of right period, the rule would allow amendment where no undue prejudice will result to the opposing parties.

Subsection (c) – Subsection (c), stating that an appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later, would be eliminated given the revision to subsection (b).

Subsection (f) – Subsection (f), dealing with nunc pro tunc appeals, would be moved to create a separate rule dealing only with nunc pro tunc appeals.

Comment – A comment would be added to rule 1021.53 clarifying that a nunc pro tunc standard is not the appropriate standard for determining whether to grant leave for amendment of an appeal, contrary to the holding in *Pennsylvania Game Commn. v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

1021.53a – New rule on nunc pro tunc appeals

The language of existing rule 1021.53(f) would be moved to create a new rule dealing with nunc pro tunc appeals at 1021.54.

1021.54 – Prepayment of penalties

The existing rule at 1021.54, dealing with prepayment of penalties, is being deleted.

1021.91 – General (Motions)

This rule currently states that it applies to all motions except dispositive motions and those made during the course of a hearing. It would be revised to say that it applies to all motions except *summary judgment motions* and those made during the

course of a hearing. A separate rule would be created for summary judgment motions.

1021.94 – Dispositive motions

This rule will be revised to delete subsections (a) and (b) and will apply generally to dispositive motions.

1021.94a – New rule on summary judgment motions

The Rules Committee has recommended creating a new rule to deal specifically with summary judgment motions. The rule would require that a summary judgment record contain a motion, supporting brief, evidentiary materials and proposed order and would define what is required for each. A comment to the rule would say that the statement of material facts in the brief should be limited to facts that are material to the disposition of the motion and should not include lengthy recitations of undisputed background facts.

1021.104 – Pre-hearing memorandum

This rule would be revised to require that copies of exhibits be attached to the pre-hearing memorandum, as well as “such other information as the Board may require.”

1021.101(a) – Pre-hearing procedure

This rule would be revised to require that the discovery period for both expert and non-expert discovery run concurrently, rather than allowing answers to expert interrogatories to be filed after the initial discovery period has closed. It would also be revised to expand the discovery period from 90 days to 180 days, but would require that discovery be completed, rather than merely served, during this timeframe. (The rule revision would not prohibit parties from seeking extensions to the discovery period.) The rule revision would also allow all dispositive motions to be filed 210 days after the pre-hearing order even in cases involving expert discovery. Finally, it would be revised to expand the time in which parties may file joint proposed case management orders from 45 days to 60 days after the issuance of the pre-hearing order.

1021.141 – Termination of proceedings

A typographical error has been corrected in this rule.

(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?

1021.1 – This change reflects the Department of Environmental Resources' name change and also recognizes that the Board has jurisdiction over agencies, boards and commissions other than the Department of Environmental Protection.

1021.34(b) – This rule change will ensure that opposing parties promptly receive documents filed with the Board by same day or overnight delivery, rather than allowing that such documents be served by regular mail.

1021.51 – This rule change will allow recipients of an action in a third party appeal (other than permittees) to intervene as of course by simply filing a notice of appearance. Permittees will continue to be added as automatic parties, as is the case under the current rule.

1021.53 – Previously there was no provision for amending a complaint. This rule change sets forth the procedure for doing so. In addition, this rule change will allow for more liberal amendment of notices of appeal.

1021.54 – The rule dealing with prepayment of civil penalties has been deleted since most of the statutory provisions requiring the prepayment of civil penalties require that the prepayment be handled by the Department of Environmental Protection not the Environmental Hearing Board.

1021.91; 1021.94; 1021.95 – These rule changes will allow for a more specific rule on summary judgment. Under the Board's current rules, summary judgment motions are often lengthy and contain a recitation of non-material facts, which must then be responded to in paragraph form in the opposing party's response. The new rules will allow for more concise motions.

1021.104 – This rule change ensures that copies of exhibits are attached to a party's pre-hearing memorandum, as well as any other information that may be required by the Board.

1021.101(a) – This rule change responds to complaints from appellants that they are unable to obtain information early in the discovery process regarding the basis for the DEP's action because it falls into the category of expert discovery. Under the existing rule, answers to expert interrogatories need not be provided until after the completion of non-expert discovery. The timeframe for conducting discovery has been expanded in order to give parties sufficient time to retain experts. Other timeframes have also been expanded accordingly.

1021.141 – This rule change simply corrects a typographical error.

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

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

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

On the whole, the 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.

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

	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	\$1,748,000	\$1,636,000	\$1,663,000	\$1,771,000

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 October 13, 2004 and November 15, 2004 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.

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

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REVIEW COMMISSION

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2472

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. 106-8

Date of Adoption: August 22, 2005

By: _____

Title: Michael L. Krancer, Chairman

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

By: DAVID J. DEVRIES
EX. (Deputy General Counsel)

11.01.05
(Date of Approval)

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

**ENVIRONMENTAL HEARING BOARD
RULES OF PRACTICE AND PROCEDURE
FINAL RULEMAKING 106-8**

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 August 22, 2005 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), Pennsylvania Department of Transportation (PennDOT) and Citizens for Pennsylvania's Future (PennFuture). The comments were discussed by the Board and by its Procedural Rules Committee. Responses to the comments are addressed below.

Definitions (1021.2)

IRRC suggested clarifying the proposed revision to the definition of "Department" by specifically listing the "other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board."

Response:

The Environmental Hearing Board (Board) elected to keep the definition somewhat flexible to reflect possible changes in its source of jurisdiction. For instance, the previous definition referenced the "Department of Environmental Resources." In 1995, the Department of Environmental Resources was broken into two separate agencies and the names were changed to the Department of Environmental Protection (DEP) and Department of Conservation and Natural Resources (DCNR). The Board clearly has jurisdiction over appeals of actions of the DEP. It is believed the Board also has jurisdiction over appeals of actions of the DCNR, though this question has not been definitively answered. In addition, in 1993, the legislature gave the Board jurisdiction over appeals of actions of the State Conservation Commission. Because of these and other possible changes in jurisdiction that may occur over time, the boards, commissions or agencies over whose appeals the Board has jurisdiction are not static. Therefore, the Board felt it would be difficult if not impossible to specifically reference all boards, commissions or agencies over which it has jurisdiction without having to continually revise its regulations.

Filing (1021.32)

The proposed revision to this rule, which would have allowed the formal filing of documents in the Board's Pittsburgh office, has not been submitted for final rulemaking at this time due to staffing concerns. In the past the Board has permitted the "informal filing" of documents, other than notices of appeal and complaints, at the Pittsburgh office, whereby parties may hand deliver documents to the Board's Pittsburgh office. In such cases, the Pittsburgh office notifies the Harrisburg office of the receipt of a document, and the Harrisburg office enters the document into the docket. The Board will continue this practice and may revisit the issue of establishing a formal filing system in the Pittsburgh office in the future.

Service by a Party (1021.34)

PennFuture opposed the proposed revision to rule 1021.34, which would require that service be made by either same day or overnight delivery if filing is made in this manner. PennFuture expressed a concern that the proposed revision would impose unnecessary expense on all parties, and particularly pro se litigants, and would discourage electronic filing (e-filing).

Response:

The intent behind the rule change was not to allow any party to gain a tactical advantage or to impose an undue burden on any party; rather, the purpose behind the rule change was to allow opposing counsel the courtesy of receiving a document at approximately the same time the Board does. For example, there have been a number of occasions where the Board has received a petition or motion, such as a request for an extension, by either same day or overnight delivery and has scheduled a conference call with all parties to the appeal, only to discover that opposing counsel have not received a copy of the petition or motion because it is being sent to him or her by regular mail.

The Code of Civility provides that a party who serves a paper on a court should deliver the paper to other parties at substantially the same time and by the same means as the document is filed with the court. Code of Civility, II.14. Thus, this rule change is simply a codification of what is already required by the Code of Civility.

If a party finds that it involves too much expense to serve counsel by an overnight delivery service, he has the option of delivering the document in person, faxing it or simply filing the document by regular mail, thereby avoiding the requirement of serving it on opposing counsel in an expedited fashion.

The rule change does not affect e-filing since the electronic filing of a document effects electronic service on opposing counsel. When parties e-file a document, opposing counsel are sent an electronic notice by the Board advising them of the e-filing.

PennFuture's comment points out, however, that the wording of the rule change should be clarified. The proposed revision appeared to require that parties must serve documents by overnight mail and may not deliver them in person, where a filing is made in person or by overnight delivery. This was not the intent of the revision. Therefore, the revision has been rewritten to make it clear that the purpose of the revision is to ensure that parties are served no later than the following day whenever a document is filed by overnight mail or hand delivery.

Commencement, form and content (of notice of appeal) (1021.51)

IRRC suggested deleting the proposed comment to this rule and cross-referencing sections 1021.21 and 1021.22 in subsection (i) of 1021.51. This recommendation was adopted.

Amendments to appeal or complaint (1021.53)

Both IRRC and PennDOT commented on this rule, opposing the proposed change to the standard for amending a notice of appeal or complaint. They felt that the proposed change unfairly shifted the burden of proof to the non-moving party to show that undue prejudice would result from an amendment. Additionally, PennDOT raised a concern that the rule change would hinder the speedy resolution of litigation, thereby interfering with construction deadlines. IRRC also raised a concern that the proposed rule change went against the precedent established in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), as noted in the proposed comment to the rule.

Response:

The Board elected to change the standard for amendment of an appeal from one of "good cause," specifically enumerated in the rule, to one of "no undue prejudice" subject to the Board's discretion, in order to be more in line with civil practice in the courts of common pleas. The standard for allowance of an amendment in civil court is one of "no undue prejudice." Under the previous standard, it was virtually impossible for a party to amend its appeal after the initial 20-day amendment as of right period had passed. The Board felt it was not good practice to have a standard that was virtually impossible to meet. The Board also recognized that an amendment

very early in the appeal period may not be prejudicial, while the same amendment later in the litigation process could very well be prejudicial. For that reason, the decision as to whether a proposed amendment would result in prejudice to the opposing parties must be left to the discretion of the Board, rather than setting forth a rigid standard in the rule.

The *Game Commission* case was based on a reading of the Board's own rule at 21.51(e) (now 1021.51(e)), which states that the Board may agree to hear any objection not raised in the appeal provided that good cause is shown. Because this language is being deleted from the Board's rules, the *Game Commission* holding is no longer applicable.

As to PennDOT's concern that the rule change will weaken the opposing party's interest in a speedy resolution of the litigation, one of the factors that will be considered in determining whether an amendment is prejudicial will be whether it will result in a delay of the proceedings. In the alternative, PennDOT asked the Board to state that any expansion of the litigation is per se prejudicial. Such a statement would swallow the rule since there may be times when an amendment will expand what is in the case. The question is not whether the case will be expanded but whether the expansion at that stage of the proceeding is prejudicial. This will be determined on a case-by-case-basis. An expansion 21 days after an appeal has been filed may not be prejudicial, whereas the same expansion closer to the trial may be problematic.

PennDOT and IRRC raise an important concern that the burden seemingly shifts to the responding party under the new standard. The rule will clarify that the burden is on the moving party to demonstrate there is no undue prejudice to the opposing parties. Nonetheless, the Board recognizes there will be some shifting of the burden to the responding party to show that it will unduly suffer prejudice if the amendment is permitted. However, even under the previous rule there was some burden on the responding party under subsection (b)(3) to show it would suffer undue prejudice if an amendment were allowed.

Prepayment of penalties (1021.54)

The Board had proposed adding a comment to rule 1021.54 regarding the procedure followed for the handling of prepaid penalties. IRRC recommended deleting the comment and adding a statement to the rule that prepaid penalties are to be placed in an escrow account. In considering IRRC's recommendation, the Rules Committee reviewed rule 1021.54 and a majority of the Committee members determined that it did not meet the requirements of the statutes mandating the prepayment of penalties since those statutes appeared to require that the escrow account be handled by DEP and not the Board. A majority of the Rules Committee recommended deleting the rule and the proposed comment, and the Board agreed with the recommendation.

Motions – General (1021.91)

No comments were received on the proposed revisions to rule 1021.91.

Dispositive motions other than summary judgment motions (1021.94)

No comments were received on the proposed revisions to rule 1021.94.

Summary judgment motions (1021.94a)

Both IRRC and PennFuture recommended incorporating the text of the proposed comment to rule 1021.94a into the actual rule itself. The Rules Committee considered PennFuture's and IRRC's comments and agreed that the second sentence of the proposed comment should be added to subsection (d) of the rule. However, the Rules Committee recommended keeping the first sentence of the proposed comment as a comment, rather than adding it to the rule, since it was not procedural. The Board adopted the Rules Committee's recommendations.

Prehearing procedure (1021.101)

No comments were received on the proposed revisions to rule 1021.101.

Prehearing memorandum (1021.104)

PennFuture objected to the proposed revision to rule 1021.104(a)(7) requiring parties to submit copies of proposed exhibits along with their prehearing memorandum. The existing rule required only that parties submit a list of the proposed exhibits. PennFuture objected on the basis that the proposed rule change would impose unnecessary expense on parties and consume additional paper without any apparent benefit.

Response:

Although the existing rule requires only the listing of exhibits, a majority of the judges have required parties to submit copies of their exhibits with their prehearing memoranda and this has been the typical practice of a large number of parties appearing before the Board. Thus, the rule change simply codifies existing practice.

As to PennFuture's concern that the rule change will impose additional expense on parties and result in additional paperwork, that is not the case since parties must otherwise provide copies of exhibits for the Board and opposing counsel at trial. The rule change simply requires that the exhibits be provided to the Board and opposing counsel at the time of the filing of the prehearing memorandum. This results in more efficiency in the distribution of exhibits rather than waiting until the trial.

PennFuture also raised a concern that this requirement would discourage the use of electronic filing since the addition of exhibits to the prehearing memorandum would likely result in exceeding the 50 page limit for electronic filing. However, exhibits to e-filed documents may be either e-filed or delivered in hard copy by mail or messenger. Therefore, a prehearing memorandum may still be e-filed even if the exhibits are sent by mail or delivered in person.

Termination of proceedings (1021.141)

No comments were received on the proposed change to rule 1021.141, which involved only the correction of a typographical error.

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. 35, No. 15 (April 9, 2005), 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 _____. 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 _____ 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 Chief Judge and 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 Chief Judge and 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 Chief Judge and 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*.

Michael L. Krancer
Chief Judge and Chairman

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART IX. ENVIRONMENTAL HEARING BOARD
CHAPTER 1021. PRACTICE AND PROCEDURE

* * * * *

FORMAL PROCEEDINGS
APPEALS

- 1021.51 Commencement, form and content
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- 1021.92 Procedural motions
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- 1021.94 Dispositive motions
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PRELIMINARY PROVISIONS
GENERAL

- § 1021.2. Definitions

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Department – The Department of Environmental [Resources or its successor agencies] Protection or other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board.

DOCUMENTARY FILINGS

SIGNING, FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing

(a) Documents filed with the Board shall be filed at ~~either of the following offices:~~

~~(1) its headquarters -- 2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457, or~~

~~(2) its Pittsburgh office -- 1507 State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222.~~

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§ 1021.34. Service by a party

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(b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery OR PERSONAL SERVICE on the parties.

~~[(b)]~~ (c) In matters involving requests for expedited disposition, service shall be made within the ensuing 24 hours of the time of filing with the Board. For purposes of this subsection, service means actual receipt by the opposing party.

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

~~[(d)]~~ (e) * * * * *

FORMAL PROCEEDINGS APPEALS

§ 1021.51. Commencement, form and content

* * * * *

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. ~~[An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for~~

determining through discovery the basis of the action from which the appeal is taken.]

* * * * *

(h) For purposes of this section, the term “recipient of the action” shall include the following:

- (1) The recipient of a permit, license, approval or certification;
- (2) Any affected municipality, its municipal authority, and the proponent of the decision, where applicable, in appeals involving a decision under Sections 5 or 7 of the Sewage Facilities Act, 35 P.S. §§ 750.5, 750.7;
- (3) The mining company in appeals involving a claim of subsidence damage or water loss under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.*;
- (4) The well operator in appeals involving a claim of pollution or diminution of a water supply under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208;
- (5) The owner or operator of a storage tank in appeals involving a claim of an affected water supply under Section 1303 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1303;
- (6) Other interested parties as ordered by the Board.

[(h)] (i) The service upon the recipient of a permit, license, approval or certification, as required by subsection (h)(1), shall subject the recipient to the jurisdiction of the Board [as a party], and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene pursuant to § 1021.81. THE RECIPIENT OF A PERMIT, LICENSE, APPROVAL OR CERTIFICATION WHO IS ADDED TO AN APPEAL PURSUANT TO THIS SECTION MUST STILL COMPLY WITH §§ 1021.21 AND 1021.22 (RELATING TO REPRESENTATION OF PARTIES; AND NOTICE OF APPEARANCE.)

(j) Other recipients of an action appealed by a third party, served as required by subsections (h)(2), (h)(3), (h)(4) or (h)(5), may intervene as of course in such appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene pursuant to § 1021.81.

[(i)] (k) Appellant shall provide satisfactory proof that service has been made as required by this section.

[(j)] (l) Subsections (a) through [(i)] (k) supersede 1 Pa. Code §§ 35.5 – 35.7 and 35.9 – 35.11 (relating to informal complaints; and formal complaints).

~~**Comment: With regard to subsections (i)-(j), parties are required to abide by the rules set forth at §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance.)**~~

§ 1021.53. Amendments to appeal **or complaint** [; **nunc pro tunc appeals**]

(a) An appeal **or complaint** may be amended as of right within 20 days after the filing thereof.

(b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant **or complainant**, may grant leave for further amendment of the appeal **or complaint**. This leave may be granted if **no undue prejudice will result to the opposing parties. THE BURDEN OF PROVING THAT NO UNDUE PREJUDICE WILL RESULT TO THE OPPOSING PARTIES IS ON THE PARTY REQUESTING THE AMENDMENT.** [appellant establishes that the requested amendment satisfies one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

(c) An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.]

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

[(e)] (d) * * * * *

[(f)] The Board upon written request and for good cause shown may grant leave for the filing of an appeal **nunc pro tunc**, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.]

[(g)] (e) Subsections (a) – [(f)] (d) supersede 1 Pa. Code §§ 35.5 – 35.7 and 35.9 – 35.11 (relating to informal complaints; and formal complaints).

Comment: In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission. v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

§ 1021.53a. Nunc pro tunc appeals

The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

~~§ 1021.54. Prepayment of penalties~~

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

~~—(b) A bond shall be in favor of the Department of Environmental Protection except in the case of the Air Pollution Control Act (35 P.S. §§ 4001 – 4106) which currently requires the bond to be in favor of the Board.~~

~~Comment:~~ ~~There is an administrative agreement between the Department and the Board which allows the prepayment of penalties to be transmitted to the Commonwealth to an appropriate escrow account.~~

MOTIONS

§ 1021.91. General

(a) This section applies to all motions except **[dispositive] summary judgment** motions and those made during the course of a hearing.

* * * * *

(g) The moving party may not file a reply to a response to **[its motion] procedural, discovery or miscellaneous motions** unless the Board orders otherwise.

§ 1021.94. Dispositive motions other than summary judgment motions

[(a)] (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)] (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).]

[(c)] (a) 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)] (b) A response to a dispositive motion may be filed within 30 days of service of the motion and shall be accompanied by a supporting memorandum of law or brief.

[(e)] (c) A reply to a response to a dispositive motion may be filed within 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)] (d) An affidavit or other document relied upon in support of a dispositive motion or response, that is not already a part of the record, shall be **[attached to]** **filed at the same time as** the motion or response or it will not be considered by the Board in ruling thereon.

[(g)] (e) Subsection **[(c)] (a)** supersedes 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection **[(d)] (b)** supersedes 1 Pa. Code § 35.179 (relating to objecting to motions).

§ 1021.94a. Summary judgment motions

(a) A summary judgment motion record shall contain the following separate items: (i) a motion prepared in accordance with subsection (b); (ii) a supporting brief prepared in accordance with subsection (c); (iii) the evidentiary materials relied upon by the movant; and, (iv) a proposed order. Motions and responses 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).

(b) *Motion.* A motion for summary judgment shall contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(c) *Brief.* The motion for summary judgment shall be accompanied by a brief containing an introduction and summary of the case, a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

(d) *Evidentiary Materials.* All affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief **AND SHALL BE SEPARATELY BOUND AND LABELED AS EXHIBITS.** Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

(e) *Proposed Order.* The motion shall be accompanied by a proposed order.

(f) Within 30 days of the date of service of the motion, a party opposing the motion shall file a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion. All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c) demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record. Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.

(g) A concise reply brief may be filed by the movant within 15 days of the date of service of the response. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(h) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(i) The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. ~~The evidentiary materials relied upon should not be attached to the motion or the brief but should be bound as a separate item and labeled as exhibits to facilitate reference.~~

PRE-HEARING PROCEDURES AND PRE-HEARING CONFERENCES

§ 1021.101. Pre-hearing procedure.

(a) Upon the filing of an appeal, the Board will issue a pre-hearing order providing that :

(1) All discovery[, including any discovery of expert witnesses,] shall be [served] completed no later than [90] 180 days from the date of the pre-hearing order.

(2) [The party with the burden of proof shall serve its answers to all expert interrogatories within 150 days of the date of the prehearing order. The opposing party shall serve its answers to all expert interrogatories within 30 days after receipt of the 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 expert interrogatories.

(3) Dispositive motions [in a case requiring expert testimony] shall be filed within 210 days of the date of the pre-hearing order. [If neither party plans to call

an expert witness, dispositive motions shall be filed within 180 days after the filing of the appeal unless otherwise ordered by the Board.]

(4) The parties may, within **[45] 60** days of the date of the pre-hearing order, submit a Joint Proposed Case Management Order to the Board.

§ 1021.104. Pre-hearing memorandum.

(a) A pre-hearing memorandum shall contain the following:

* * * * *

(7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. **A copy of each exhibit shall be attached.**

* * * * *

(9) **Such other information as may be required by the Board's pre-hearing orders.**

TERMINATION OF PROCEEDINGS

§ 1021.141. Termination of proceedings

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(c) . . . Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection **[(c)] (b) (3)** . . .



**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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300 LIBERTY AVENUE
PITTSBURGH, PA 15222-1210**

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**WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD**

November 10, 2005

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

Honorable William F. Adolph, Jr.
Majority Chairman
House Environmental and Energy
Committee
110 Ryan Office Building
Harrisburg, PA 17120-2020

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

MaryAnne Wesdock
Senior Assistant Counsel



Copies of Environmental Hearing Board Final Rules Package 106-8 are also being provided to the following who provided comment during the rulemaking process:

Andrew S. Gordon, Esq.
Chief Counsel
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212

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Citizens for Pennsylvania's Future
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**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 106-8
SUBJECT: Practice & Procedures: General Revisions
AGENCY: ENVIRONMENTAL HEARING BOARD

2472

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

RECEIVED
2005 NOV 10 PM 1:00
INDEPENDENT REGULATORY
REVIEW COMMISSION

FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

11/10/05

[Signature]

HOUSE COMMITTEE ON ENVIRONMENTAL
RESOURCES & ENERGY

11/10/05

[Signature]

SENATE COMMITTEE ON ENVIRONMENTAL
RESOURCES & ENERGY

11/10/05

[Signature]

11/10/05

[Signature]

INDEPENDENT REGULATORY REVIEW COMMISSION

11/10/05

[Signature]

ATTORNEY GENERAL (for Final Omitted only)

LEGISLATIVE REFERENCE BUREAU (for Proposed only)

November 1, 2005