

Regulatory Analysis Form

This space for use by IRRC

2005 MAR 29 PM 2:11

INDEPENDENT REGULATORY
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 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.

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.

1021.32(a) – Filing

The current rule allows filing only at the EHB's Harrisburg office. The proposed rule change would allow filing at either the EHB's Harrisburg or Pittsburgh offices.

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).

Comment – A comment would be added to this rule stating that with regard to subsections (i) and (j), parties are required to abide by the rules at 1021.21 and 1021.22, dealing with representation of parties and entry of appearance.

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).

1021.54 – 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 – Old rule on prepayment of penalties

The existing rule at 1021.54, dealing with prepayment of penalties, would be renumbered to 1021.55. A comment would be added noting the fact that there is an administrative agreement between the Department and the Board which allows prepayment of penalties to be transmitted to the Commonwealth to an appropriate escrow account.

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.

1021.95 – 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.

1021.95 – Old rule on miscellaneous motions

The existing rule on miscellaneous motions would be renumbered at 1021.96.

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.

1021.32(a) – This rule change will make the filing of documents easier as it will allow filing to occur at not only the Board's Harrisburg offices but also Philadelphia and Pittsburgh.

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.

1021.91; 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.

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	\$1,748,000	\$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.

RECEIVED

2005 MAR 29 PM 2:11


INDEPENDENT REGULATORY
REVIEW COMMISSION

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

Do not write in this space

2472

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


By: _____
(Deputy Attorney General)

MAR 23 2005

(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)

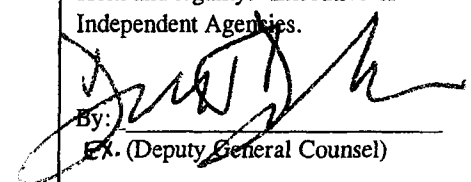
Document/Fiscal Note No. 106-8

Date of Adoption: October 13 and November 15,
2004

By: 

Title: Michael L. Krancer, Chairman

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


By: _____
EX. (Deputy General Counsel)

1.31.05

(Date of Approval)

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

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 the following 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. The EHB may promulgate proposed regulations based in whole or in part on the recommendations of the Rules Committee.

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, if any, the proposal differs from the EHB Rules Committee's recommendations.

Where the recommendations of the EHB Rules Committee were not in proper legislative style and format, they have been modified to conform to those requirements. Similarly, where recommendations did not contain proper cross references to 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure), references to those rules have been added.

The proposed rulemaking can be divided into five categories: 1) renumbering of certain rules; 2) adoption of a new rule; 3) substantive amendments to existing rules; 4) adoption of comments to certain rules; and 5) correction of typographical errors.

1. *Renumbering of certain rules*

The EHB recommends making subsection (f) of rule 1021.51 a separate rule with its own number. Rule 1021.51 deals with the commencement, form and content of appeals. Subsection (f) addresses nunc pro tunc appeals. This subsection has been moved to create a new rule at 1021.54 entitled “Nunc pro tunc appeals.” There has been no substantive change to the language of this section.

As a result of the creation of a new rule dealing with nunc pro tunc appeals at 1021.54, the current rule at 1021.54, dealing with prepayment of penalties, has been moved to 1021.55, and the current rule at 1021.55, dealing with hearing on inability to prepay penalty, has been moved to 1021.56.

The existing rule at 1021.95, dealing with miscellaneous motions, has been renumbered at 1021.96 to allow for the creation of a new rule dealing with summary judgment motions at 1021.95.

A correction has been made in rule 1021.141, dealing with termination of proceedings, to reflect the appropriate subsection being referenced.

2. *Definitions (1021.2)*

The EHB has proposed amending the definition of “Department” at rule 1021.2 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” to reflect the Department’s name change and the fact that the Board has jurisdiction over appeals from certain other agencies, boards and commissions.

3. *Filing (1021.32(a))*

The current rule at 1021.32(a) allows filing only at the Board’s Harrisburg office. The proposed rule change would allow filing at either the Board’s headquarters in Harrisburg or at its Pittsburgh office.

4. *Service by a party (1021.34(b))*

The proposed rule change at 1021.34(b) would require service to opposing parties by overnight delivery where a document is filed with the Board by either personal service or overnight delivery.

5. *Commencement, form and content [of an appeal] (1021.51)*

Subsection (e) – The proposed rule change deletes 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; and (6) other interested parties as ordered by the Board.

Subsection (i) – The content of former subsection (h) has been moved to create a new subsection (i) and has been 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) has been 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 has been moved to a new subsection (k).

Comment – A comment has been added to this rule stating that with regard to subsections (i) and (j), parties are required to abide by the rules at 1021.21 and 1021.22, dealing with representation of parties and entry of appearance.

6. *Amendments to appeals and complaints (1021.53)*

Caption – The rule at 1021.53 has been revised to deal with amendments to both appeals and complaints. The Board’s rules previously had no rules dealing with the amendment of complaints. The criteria for nunc pro tunc appeals has been moved to a separate rule. The caption has been amended accordingly.

Subsection (a) – Subsection (a) has been 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 has been amended to create a more liberal standard for allowing the amendment of appeals and complaints after the 20-day amendment as of right period. 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 allows 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, has been eliminated as a result of the revision to subsection (b).

Subsection (f) – Subsection (f), dealing with nunc pro tunc appeals, has been moved to create a separate rule at 1021.54 dealing only with nunc pro tunc appeals.

Comment – A comment has been 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).

7. *Dispositive motions* (1021.91, 1021.94, 1021.95)

Rule 1021.91 (General) – The prior rule stated that it applied to all motions except dispositive motions and those made during the course of a hearing. The rule has been 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 has been created for summary judgment motions.

Rule 1021.94 (Dispositive motions) – This rule has been revised to delete subsections (a) and (b) and will apply generally to dispositive motions.

Rule 1021.95 (Summary judgment motions) – A new rule has been created to deal specifically with summary judgment motions. The rule requires that a summary judgment record contain a motion, supporting brief, evidentiary materials and proposed order and defines what is required for each. A comment to the rule clarifies 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.

8. *Pre-hearing procedure* (1021.101(a))

Rule 1021.101(a) has been revised to require that the discovery period for both expert and non-expert discovery run concurrently. Under the old rule, the initial period for discovery ran for 90 days. During this time, all requests for discovery – both expert and non-expert –

were to be served; however, response times differed depending on whether the request was for expert or non-expert discovery. *Non-expert discovery* followed the Pennsylvania Rules of Civil Procedure and required answers to be served within 30 days of service of the discovery request. Responses to *expert discovery* were not required to be served until 150 days after issuance of Pre-Hearing Order No. 1. Under the revised rule, answers to all discovery will be due 30 days after service of the discovery request; there will be no special timeframe for responding to expert discovery. This revision has been adopted in response to complaints from appellants that they have been unable to obtain information regarding the basis for the DEP's action in the early stages of discovery because it may fall into the category of expert discovery. The rule change allows this information to be obtained earlier in the discovery process. (The rule change does not interfere with a party's right or duty to supplement its answers to discovery.)

In order to provide parties with sufficient time to secure an expert, the discovery period has been extended from 90 days to 180 days; however, whereas the prior rule said that discovery was to be *served* within the requisite timeframe, the rule now requires discovery to be *completed* within this timeframe. (The rule change does not affect the parties' ability to seek an extension of the discovery period.)

The rule has also been amended to allow all dispositive motions to be filed within 210 days of the prehearing order regardless of whether there will be expert testimony. Finally, the time period for filing a joint proposed case management order has been extended from 45 days to 60 days.

9. *Pre-hearing memorandum* (1021.104)

Rule 1021.104 has been 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." In addition, a comment has been added, explaining that there is an administrative agreement between the Board and the Department of Environmental Protection allowing the prepayment of penalties to be transmitted to the Commonwealth to an appropriate escrow account.

10. *Termination of proceedings* (1021.141)

The only change in this rule is the correction of two typographical errors. Subsection "(h)" has been corrected to read "(c)," and the reference in that subsection to "(c)(3)" has been corrected to read "(b)(3)."

The EHB concurred with the recommendations set forth above.

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 may require only minor changes to the EHB's standard orders.

V. *Public Meeting on Proposed Rules*

In accordance with § 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 October 13, 2004 and November 15, 2004 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 March 29, 2005, 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 the 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 the 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.

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
1021.52	Timeliness of appeal
1021.53	Amendments to appeal; [Nunc pro tunc appeals]
1021.54	Nunc pro tunc appeals
1021.55	Prepayment of penalties
1021.56	Hearing on inability to prepay penalty
1021.57	(Reserved)
1021.58	(Reserved)

* * * * *

MOTIONS

1021.91	General
1021.92	Procedural motions
1021.93	Discovery motions
1021.94	Dispositive motions
1021.95	Summary judgment motions
1021.96	Miscellaneous motions
1021.97	(Reserved)
1021.98	(Reserved)
1021.99	(Reserved)

**PRELIMINARY PROVISIONS
GENERAL**

§ 1021.2.	Definitions
-----------	-------------

* * * * *

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.

* * * * *

§ 1021.34. Service by a party

* * * * *

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

(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**. **[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).

§ 1021.54. [Prepayment of penalties] 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] 1021.55. Prepayment of penalties

* * * * *

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.

§ [1021.55] 1021.56. Hearing on inability to prepay penalty

* * * * *

[§ 1021.56. Reserved]

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) 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).]

[(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).

§ 1021.95. 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. 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.

[§ 1021.95.] §1021.96. Miscellaneous motions.

* * * * *

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

* * * * *

[(h)] (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
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PENNSYLVANIA 17105-8457
(717) 787-3483
TELECOPIER: (717) 783-4738
<http://ehb.cpcourt.com>
March 29, 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

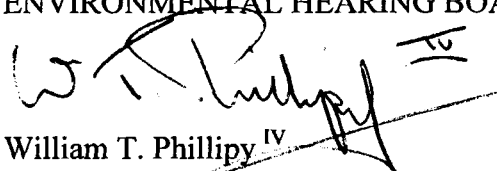
Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harrisburg 2
333 Market Street
Harrisburg, PA 17101

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- 8

SUBJECT: Practice and Procedures - General Revisions

AGENCY: Environmental Hearing Board

2472

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

RECEIVED
2005 MAR 29 PM 2:11
INDEPENDENT REGULATORY
REVIEW COMMISSION

FILING OF REGULATION

DATE SIGNATURE

DESIGNATION

3/29/05 Cenale K. K. K. HOUSE COMMITTEE
Conservation

3/29/05 Tatiana SENATE COMMITTEE
Environmental Resources & Energy

3/29/05 Steph F. Hoff INDEPENDENT REGULATORY
REVIEW COMMISSION

3/29/05 Marisa Garas LEGISLATIVE REFERENCE BUREAU