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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 8, 2005

Michael Krancer, Chairman  
Environmental Hearing Board  
400 Market Street, 2nd Floor  
Harrisburg, PA 17105

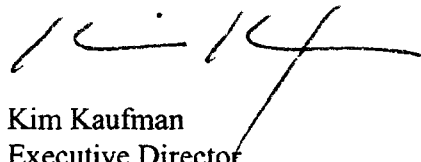
Re: Regulation #106-8 (IRRC #2472)  
Environmental Hearing Board  
Practice and Procedure

Dear Chairman Krancer:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me at 783-5506.

Sincerely,



Kim Kaufman  
Executive Director

wbg

Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee  
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee  
Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee  
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee

# **Comments of the Independent Regulatory Review Commission**

**on**

## **Environmental Hearing Board Regulation #106-8 (IRRC #2472)**

### **Practice and Procedure**

**June 8, 2005**

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Environmental Hearing Board (Board) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on May 9, 2005. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

#### **1. Section 1021.2. Definitions. – Clarity.**

The definition of “Department” references “other boards, commissions or agencies whose decisions are appealable to the Board.” Clarity would be improved by specifically listing the applicable “boards, commissions or agencies.”

#### **2. Section 1021.53. Amendments to appeal or complaint. – Reasonableness; Need; Clarity.**

Under Subsection (b) an appeal may be amended if the amendment satisfies one of the following three conditions:

1. It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
2. It is based upon facts, identified in the motion, that were discovered during preparation of appellant’s case, that the appellant, exercising due diligence, could not have previously discovered.
3. It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

The Board is amending Subsection (b) to delete these standards and allow amendments to appeals or complaints after the initial 20-day period merely upon a showing that “no undue prejudice will result to the opposing parties.” In a comment included in the proposal, the Board acknowledges that the new standard is “contrary to the apparent holding in *Pennsylvania Game Commission. v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), affirmed, 555 A.2d 812 (1989).” In that case, Commonwealth Court ruled that an amendment to an appeal may only be allowed upon a showing of good cause. In view of this precedent, we believe it is unreasonable to replace the current standards with a more liberal standard.

In addition, since only the responding party can prove undue prejudice, the proposed amendments will unfairly shift the burden of proving undue prejudice to the responding party.

Therefore, the Board should retain the existing standards for allowing amendment, or explain why the undue prejudice standard is reasonable and necessary.

Finally, we agree with the Department of Transportation that the new standard will hinder the speedy resolution of litigation. This is especially important when construction deadlines hang in the balance.

**3. Comments included within the regulation. – Need; Reasonableness.**

The Board has inserted several “comments” throughout the proposed regulation. Some of these comments contain substantive provisions. However, these provisions are not enforceable because “comments” are not regulatory mandates. Therefore, we recommend the following revisions:

1. *Section 1021.51.* Delete the comment and include a cross-reference to Sections 1021.21 and 1021.22 in Subsection (i). (Subsection (k) already cross-references these sections.)
2. *Section 1021.54.* Delete the comment and add a Subsection (c) which indicates that the prepayment of penalties will be placed in an escrow account.
3. *Section 1021.94a.* Delete the comment and include these provisions as subsections under Section 1021.94a. Replace “should” with “shall,” and replace “should not” with “may not.”

## Facsimile Cover Sheet

**Kristine M. Shomper**  
Administrative Officer



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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

**To:** William T. Phillipy  
**Agency:** Environmental Hearing Board  
**Phone:** 7-3483  
**Fax:** 3-4738  
**Date:** June 8, 2005  
**Pages:** 4

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Hearing Board's regulation #106-8 (IRRC #2472). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:

Bette Lambert

Date:

June 8, 2005

FAX

RECEIVED  
JUN 8 2005  
11:20 AM  
HARRISBURG, PA