

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

Independent Regulatory Review Commission

SECTION I: PROFILE

(1) Agency:

Environmental Hearing Board

(2) Agency Number: 106

Identification Number: 9

IRRC Number:

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INDEPENDENT REGULATORY
HEARING COMMISSION

2732

(3) Short Title:

Environmental Hearing Board – Practice and Procedure

(4) PA Code Cite:

25 Pa. Code, Chapter 1021

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Maryanne Wesdock, Senior Assistant Counsel, Environmental Hearing Board, 1507 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222 (412) 565-3511 (phone), (412) 565-5298 (fax), Email: mwesdock@state.pa.us

Secondary Contact: The Honorable Thomas W. Renwand, Acting Chairman and Chief Judge, 1507 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222 (412) 565-3511 (phone), (412) 565-5298 (fax), Email: trenwand@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

same as #5

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;

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- Certification by the Governor
 Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

1021.32 – Filing

The amendment to this rule will require uniformity of filings similar to the requirement contained in the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 33.2. Additionally, the amendment corrects a typographical error in subsection (f) of the rule.

1021.34 – Service by a party

The amendment to this rule clarifies that if a party files a document with the Board by personal service, overnight delivery or facsimile, it must also be delivered to opposing parties on the same day or by overnight delivery.

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

Subsection (f) of the rule is being amended to reference the new rule on prepayment of penalties at Rule 1021.54 as part of this rules package. Subsection (h) is being amended to ensure that all recipients of an action receive notice of an appeal of that action. Subsections (h)(1) and (i) are being amended to include “order” in the list of actions that may subject the recipient to the jurisdiction of the Board when that action is appealed by a third party. Finally, proposed language has been removed from subsection (j) and has been moved to a comment at the recommendation of IRRC. The language addresses the holding of the Commonwealth Court in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005), which requires the Board to ensure that all necessary parties are provided an opportunity to participate in an appeal.

1021.54 – Prepayment of penalties

This rule is being adopted to clarify whether civil penalties that are challenged as part of an appeal should be prepaid to the Board or to the Department of Environmental Protection, in accordance with the statute under which the penalty was assessed.

1021.55 – Hearing on inability to prepay [a civil penalty]

This rule is being amended to reference the new rule on prepayment of penalties at Rule 1021.54.

1021.74 – Answers to complaints

This rule is being amended to reference the new rule on default judgment at Rule 1021.76.

1021.76 – Default judgment

This new rule allows the entry of default judgment where a defendant fails to file an answer to a complaint for civil penalties.

1021.93 – Discovery

This rule is being amended to require that parties certify they have conferred or attempted to confer with opposing counsel to secure requested discovery before filing a discovery motion.

1021.94a – New rule on summary judgment motions

This rule is being amended to clarify the new rule on summary judgment that was adopted two years ago. The amendments seek to clarify that summary judgment motions should be filed only where there are no material facts in dispute and should not include lengthy recitations of undisputed background facts. The amendments add a reference to Pa.R.C.P. 1035.1 – 1021.5, impose page limits, require a separate statement of undisputed material facts, and delete that portion of the previous rule that required undisputed facts to be deemed admitted.

1021.96 – 1021.96c – Expedited hearings

These new rules set the parameters for when an expedited hearing may be requested and explain what must be contained in a motion for an expedited hearing and response thereto and how an expedited hearing will be conducted.

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(9) Include a schedule for review of the regulation including:

- | | |
|--|-----------------------------|
| A. The date by which the agency must receive public comments:
received. | Comments already |
| B. The date or dates on which public meetings or hearings
will be held:
held. | Public meetings have been |
| C. The expected date of promulgation of the proposed
regulation as a final-form regulation: | Summer/Fall 2009 |
| D. The expected effective date of the final-form regulation: | Summer/Fall 2009 |
| E. The date by which compliance with the final-form
regulation will be required:
regulation in the Pennsylvania Bulletin | Upon publication as a final |
| F. The date by which required permits, licenses or other
approvals must be obtained: | N/A |

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

The Environmental Hearing Board has a nine-member Rules Committee that meets every other month for approximately 4 hours to review existing regulations and to determine where regulations may need to be amended.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The Environmental Hearing Board 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.

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well

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as, any deadlines for action. No.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

1021.32 – Filing

This rule change corrects a typographical error and ensures that documents filed with the Board meet uniformity standards.

1021.34 – Service by a party

This rule change ensures that opposing parties receive documents on or about the same day they are filed with the Board.

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

The revision to subsection (f) simply adds a reference to new Rule 1021.54 which is being adopted as part of this rules package. The revisions to subsections (h) through (j) ensure that recipients of an action being appealed are given notice of the appeal and an opportunity to participate in the appeal. The revision to subsections (h)(1) and (i) ensure that recipients of an order that has been appealed by a third party are parties to the proceeding.

1021.54 – Prepayment of penalties

The previous rule stated that all prepaid civil penalties were to be made to the Board. However, certain statutes require that some prepayments be made to the Department of Environmental Protection. The new rule assists practitioners in complying with the statutes under which the penalties are assessed.

1021.55 – Hearing on inability to prepay [a civil penalty]

This rule change simply references the new rule on prepayment of penalties at 1021.54, which is being adopted as part of this rules package.

1021.74 – Answers to complaints

This rule change simply references the new rule on default judgment at Rule 1021.76, which is being adopted as part of this rules package.

1021.76 – Default judgment

Under the previous rules, the Board could enter default judgment as to liability where a defendant failed to answer a complaint for civil penalties. The new rule clarifies that default judgment may also be entered as to the penalty amount in such circumstances.

1021.93 – Discovery

This rule change would require parties to confer before filing a motion to compel or motion for sanctions; it is expected that in many cases, simply conferring with counsel will allow the requesting party to obtain the specified information without requiring formal action by the Board.

1021.94a – New rule on summary judgment motions

The revisions recommended to this rule are expected to resolve problems encountered with the current rule on summary judgment since its adoption two years ago. The revisions are expected to make summary judgment practice less cumbersome by adopting new page limits and by not requiring parties to respond to allegations not material to the disposition of the matter. It is hoped that the revisions to the rule will clarify that parties are to file summary judgment motions only in appropriate circumstances where the material facts are limited and are not in dispute. The amendments also add a reference to Pa.R.C.P. 1035.1 – 1035.5, thereby allowing the Board to rely on case law developed under those rules.

1021.96 – 1021.96c – Expedited hearings

The Board periodically receives requests to expedite the prehearing schedule. These new rules provide guidelines on when and how proceedings may be expedited.

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(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

N/A

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

Anyone who is a litigant before the Board will be affected by the final regulations. This includes the Department of Environmental Protection (DEP) and related agencies or commissions and anyone who appeals a DEP action to the Board.. 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 Board.

(16) 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 Board will be affected by the final regulations. This includes the Department of Environmental Protection (DEP) and related agencies or commissions and anyone who appeals a DEP action to the Board.. 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 Board.

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SECTION III: COST AND IMPACT ANALYSIS

(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. Explain how the dollar estimates were derived.

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 Board procedures, authority and requirements and by aiding in trial preparation and presentation.

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

(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. Explain how the dollar estimates were derived.

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 Board procedures, authority and requirements and by aiding in trial preparation and presentation.

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

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(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. Explain how the dollar estimates were derived.

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 Board procedures, authority and requirements and by aiding in trial preparation and presentation.

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

(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. N/A

	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						

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REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

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

Program	FY -3	FY -2	FY -1	Current FY
Environmental Hearing Board	\$1,733,000	\$1,690,000	\$1,771,000	\$1,389,079

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

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 communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

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The regulations are adopted by the Environmental Hearing Board on the recommendation of the Board's nine-member Rules Committee, all of whom are appointed pursuant to the Environmental Hearing Board Act, 35 P.S. Section 7515.

Additionally, the Environmental Hearing Board asks for input from the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section via the Section's listserv and at regularly scheduled meetings of the Section. The Environmental Hearing Board also seeks input on its regulations at the annual Pennsylvania Bar Institute Environmental Law Forum, a two-day event held each year in Harrisburg.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

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 regulations.

No.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

The Environmental Hearing Board 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

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put Pennsylvania at a competitive disadvantage. The Board has been advised by an Allegheny County attorney who has practiced in at least 20 other states that the Pennsylvania Environmental Hearing Board is "the most efficient and proficient environmental law tribunal" he had ever encountered.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulations would affect the Department of Environmental Protection (DEP), which is a party to every case filed with the Environmental Hearing Board, as well as any other state agency that may become involved in litigation before the Board. While agencies under the Governor's jurisdiction normally do not pursue appeals to the Environmental Hearing Board to resolve their differences with DEP, those same agencies may be parties 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) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

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

(28) 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.

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

INDEPENDENT REGULATORY
REVIEW COMMISSION

Do not write in this space

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. 106-9

Date of Adoption: March 30, 2009

By: TRM

Title: Thomas W. Renwand, Acting Chairman and Chief Judge

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

By: Andrew C. Clark
(Deputy General Counsel)

Andrew C. Clark

JUN 25 2009

(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 106-9**

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 March 30, 2009 meeting.

Effective Date

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

Contact Person

For further information, contact either Maryanne Wesdock, Senior Assistant Counsel, 1507 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222, (412) 565-3511, or William T. Phillipy^{IV}, Secretary to the Board, 2nd Floor, Rachel Carson State Office Building, P.O. Box 8457, Harrisburg, PA 17105-8457 (717) 787-3483. If information concerning this notice is required in an alternative form, Mr. Phillipy may be contacted at the above number. TDD users may telephone the Board through the AT&T Pennsylvania relay center at 1-800-654-5984.

Statutory Authority

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

Comments and Revisions to Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC). The comments were discussed by the Board and by its Procedural Rules Committee. Responses to the comments are addressed below.

Automatic Party Status (Rule 1021.51(h)(1))

IRRC expressed a concern that by amending the language “recipient of a permit, license, certification or approval” to “person to whom the action of the Department is directed or issued” in subsection (h)(1), the Board may be extending its jurisdiction beyond its statutory authority. Entities covered by (h)(1) are automatic parties to an action, and IRRC was concerned that

individuals merely impacted by a Department action, but not necessarily recipients of the action, could be added as parties to an appeal, thereby requiring them to expend legal fees to participate in the proceeding. IRRC recommended that the Board narrow the language of this section to ensure that the regulation does not impermissibly expand the scope of the Board's jurisdiction in violation of any statute. The Board agreed to delete the proposed revision. The Board has left the current language of the regulation intact and added "recipient of an order" to the list of entities covered by subsection (h)(1), in order to clarify that (h)(1) applies only to third party appeals of permits, licenses, certifications, approvals or orders directed at or held by a regulated entity.

IRRC also expressed a concern regarding the proposed revision to subsection (j), stating that as to any entities covered by subsections (h)(2)—(4) who chose not to enter a proceeding after being given notice of it, their "right to appeal from the Board's adjudication in the matter may be adversely affected." Because IRRC felt this language did not establish a binding norm, it should be omitted from the body of the regulation. IRRC agreed with the Board's proposal to move the language to the comment to the rule.

Prepayment of Penalties (Rule 1021.54a)

IRRC asked for clarification on what would constitute a "verified statement" and accepted the Board's explanation that it would follow the definition of "verified statement" set forth in the Pa. Rules of Civil Procedure. IRRC also questioned why the language "[i]f a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute" was set forth in a comment to the rule, rather than in the rule itself, since the statement established a binding norm. The Board agreed to move the language to the body of the rule at subsection (c).

Default Judgment (Rule 1021.76a)

IRRC asked for more specificity regarding when a hearing may be conducted under subsection (d) of this rule. The Board revised the rule to clarify that the hearing would be an evidentiary hearing as directed by the Board. The Board also clarified that this subsection pertained to a situation where default judgment had been entered, not sought.

Expedited Proceedings (Rule 1021.96a)

IRRC objected to the language in subsection (d) stating that "[t]he Board will grant a motion for expedited hearing only in *rare* circumstances." Because this is unenforceable, non-regulatory language, IRRC felt it did not establish a binding norm and recommended omitting it from the final-form regulation. The Board agreed with IRRC's recommendation and omitted the language from the final-form regulation.

Withdrawal without Prejudice (1021.141b)

IRRC questioned whether the language of subsection (a) allowed withdrawal of an appeal without prejudice only if all parties agreed, and recommended that the final-form regulation

should explain whether the Board may approve a withdrawal without prejudice over the objection of a non-moving party. Because it was not the intention of the Board to allow withdrawals of appeals without prejudice only if all parties agree, the Board determined that the regulation was not appropriately drafted to express the intent of the Board. Therefore, this regulation has not been included in this package as a final-form regulation. Rather, it will be considered by the Board and Rules Committee over the next year in order to determine whether the rule is necessary.

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. 38, No. 45 (November 8, 2008), 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*.

Thomas W. Renwand
Acting Chief Judge and Chairman

Annex A

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

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing

* * * * *

(f) Hard copy of any electronically filed legal document which exceeds 50 pages in length must also be filed with the Board in accordance with subsections (a) and (c) and § 1021.37 (relating to the number of copies). Exhibits to legal documents may be filed and served either electronically or by hard copy in accordance with the sections in this chapter relating to filing and service. If these requirements are met by hard copy of exhibits, they must be sent to the Board by mail or express delivery and, in the case of requests for expedited disposition, service shall mean actual receipt by the opposing party as required by § 1021.34 [(b)] (c) (relating to service by a party).

* * * * *

~~(h) — Pleadings and other documents filed with the Board shall comply with Pa.R.C.P. 204.1 (relating to filing uniformity).~~

(h) DOCUMENTS FILED WITH THE BOARD, OTHER THAN EXHIBITS, SHALL BE TYPEWRITTEN ON LETTER SIZE PAPER (APPROXIMATELY 8 TO 8 ½ INCHES BY 10 ½ TO 11 INCHES) AND PAGES AFTER THE FIRST SHALL BE NUMBERED. LEGAL DOCUMENTS, AS DEFINED IN § 1021.2 (RELATING TO DEFINITIONS), SHALL BE DOUBLE SPACED, EXCEPT THAT FOOTNOTES SHALL BE SINGLE SPACED AND QUOTATIONS IN EXCESS OF A FEW LINES SHALL BE SINGLE SPACED AND INDENTED. PHOTOCOPIED DOCUMENTS WILL BE ACCEPTED AS TYPEWRITTEN, PROVIDED THAT ALL COPIES ARE LEGIBLE. FAILURE TO COMPLY WITH THIS SUBSECTION SHALL NOT RESULT IN DISMISSAL OF A FILING, BUT THE BOARD MAY REQUEST THE PARTY TO RESUBMIT THE DOCUMENT IN PROPER FORM.

§ 1021.34. Service by a party.

* * * * *

(b) When a document is filed with the Board by overnight delivery, **facsimile** or personal service, it shall be [served] **delivered to the opposing parties on the same day or** by overnight delivery [**or personal service on the parties**].

FORMAL PROCEEDINGS

APPEALS

1021.51. Commencement, form and content.

* * * * *

(f) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall **follow the procedures set forth in § 1021.54 (relating to prepayment of civil penalties)** [submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay].

* * * * *

(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 **OR ORDER; person to whom the action of the Department is directed or issued;**

(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] **A mining company, well operator or owner or operator of a storage tank** in appeals involving a claim of subsidence damage, [or] water loss **or contamination** [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)] (4) Other interested parties as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval, [or] certification **OR ORDER**, as required by subsection (h)(1), **person to whom the action of the Department is directed or issued** shall subject the recipient to the jurisdiction of the Board, 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} ~~person to whom the action of the Department is directed or issued~~ 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] under** subsections (h)(2), (h)(3)[,] **or** (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. ~~If a recipient of an action pursuant to subsections (h)(2), (h)(3) or (h)(4) elects not to intervene as of course following service of notice of an appeal, said recipient's right to appeal from the Board's adjudication in the matter may be adversely affected.~~

* * * * *

***Comment:* IF A RECIPIENT OF AN ACTION PURSUANT TO SUBSECTIONS (H)(2), (H)(3) OR (H)(4) ELECTS NOT TO INTERVENE FOLLOWING SERVICE OF NOTICE OF AN APPEAL OR NOTICE BY THE BOARD THAT THEIR RIGHTS MAY BE AFFECTED BY AN APPEAL, SAID RECIPIENT'S RIGHT TO APPEAL FROM THE BOARD'S ADJUDICATION IN THE MATTER MAY BE ADVERSELY AFFECTED. Subsection (j) of this rule was amended THIS COMMENT IS ADDED in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).**

1021.54a. Prepayment of penalties.

(a) **When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Department, the appellant shall submit to the Office of Chief Counsel of the Department a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.**

(b) **When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Board, the appellant shall submit to the Board a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.**

(c) **IF A CIVIL PENALTY IS ASSESSED UNDER MORE THAN ONE STATUTE, AN APPELLANT SHALL FOLLOW THE PROCEDURES SET FORTH IN EACH STATUTE.**

(D) **When an appellant SUBMITS A VERIFIED STATEMENT OF INABILITY TO PREPAY, PURSUANT TO (A) OR (B) OF THIS SECTION, A COPY OF THE VERIFIED STATEMENT SHALL BE INCLUDED WITH THE NOTICE OF APPEAL.** ~~claims it does not have the ability to prepay a civil penalty assessment, it shall include with~~

~~the notice of appeal a verified statement that alleges financial inability to prepay or post an appeal bond.~~

Comment: Practitioners should note that the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, requires that prepayment of a civil penalty be made to the Board and not to the Department. If a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute.

1021.55. Hearing on inability to prepay penalty.

(a) If an appellant submits a verified statement that he is unable to pay in accordance with §§ 1021.51 (f) and 1021.54 (c) (relating to commencement, form and content of appeals; and prepayment of penalties), the Board may schedule a hearing on the validity of this claim and may require the appellant to supply appropriate financial information to the Department in advance of the hearing.

SPECIAL ACTIONS

§ 1021.74. Answers to complaints.

* * * * *

(d) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made as set forth in § 1021.76 (relating to entry of default judgment), all relevant facts in the complaint may be deemed admitted and default judgment may be entered. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

§ 1021.76a. Entry of default judgment.

(a) The Board, on motion of the plaintiff, may enter default judgment against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.

(b) The motion for default judgment shall contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least ten days prior to filing the motion.

(c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.

(d) Where default judgment is sought ENTERED in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim or may assess the amount of the penalty following a AN EVIDENTIARY hearing, AS DIRECTED BY THE BOARD, at which the issues shall be limited to the amount of the civil penalties.

Comment: This rule is modeled after Pa.R.C.P. 237.1 and 1037.

MOTIONS

§ 1021.93. Discovery motions.

(a) This section applies to motions filed to resolve disputes arising from the conduct of discovery.

(b) No discovery motion shall be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action. Discovery motions shall contain as exhibits the discovery requests and answers giving rise to the dispute.

* * * * *

§ 1021.94a. Summary judgment motions.

(a) Rules governing summary judgment motions. Except as otherwise provided by these rules, motions for summary judgment shall be governed by Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure.

[(a)] (b) Summary judgment motion record.

(1) A summary judgment motion record must contain the following separate items:

(i) a motion prepared in accordance with subsection [(b)] (c).

(ii) a statement of undisputed material facts in accordance with subsection (d).

(iii) a supporting brief prepared in accordance with subsection [(c)] (e).

(iv) the evidentiary materials relied upon by the movant; and

(v) a proposed order.

(2) 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)] (c) *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.

(d) Statement of undisputed material facts. A statement of undisputed material facts shall consist of numbered paragraphs and shall contain only those material facts 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 paragraphs and pages or lines thereof or the specific portions of exhibits relied on. The statement of undisputed material facts, absent the portions of exhibits and affidavits relied upon, shall not exceed five pages in length unless leave of the Board is granted.

[(c)] (e) Brief in support of the motion for summary judgment. 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.]

(f) Opposition to motion for summary judgment. Within 30 days of the date of service of the motion, a party opposing the motion shall file:

(1) a response to the motion for summary judgment which shall include a concise statement, not to exceed two pages in length, as to why the motion should not be granted, and

(2) a [brief containing a responding statement] response to the statement of undisputed material facts 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)] Any response shall include citation to the portion of the record contravening a material fact. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on 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] and contain citations to the motion record. The response to the statement of undisputed material facts shall not exceed five pages in length unless leave of the Board is granted. [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.]

(3) a brief containing the legal argument in opposition to the motion.

(g) Length of brief in support of and in opposition to summary judgment. Unless leave of the Board is granted, the brief in support of or in opposition to the motion shall not exceed 30 pages.

[(d)(h) *Evidentiary materials.* **[All]** Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment **or response** shall accompany the motion or response **[and brief]** and shall be separately bound and labeled as exhibits. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

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

[(g)(j) *Reply brief.* A **[concise]** reply brief may be filed by the movant within 15 days of the date of service of the response. **It may not exceed 15 pages unless leave of the Board is granted.** Additional briefing may be permitted at the discretion of the presiding administrative law judge.

[(h)(k) *Summary judgment.* 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)(l) *Judgment rendered.* 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.

1021.96a. Motions for expedited hearing.

(a) A motion for an expedited hearing may be filed at any time in either an appeal or special action, or the Board may order an expedited hearing on its own motion.

(b) The Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure at 25 Pa. Code §1021.101, or the Pennsylvania Rules of Civil Procedure relating to discovery.

(c) In issuing such an order the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

(1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings;

(2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings;

(3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing;

(4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest;

(5) The effect of expedited proceedings on the non-requesting party.

~~(d) The Board will grant a motion for expedited hearing only in rare circumstances.~~

(d) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings as well as the time and place of the hearing.

1021.96b. Contents of motion for expedited hearing.

(a) A motion for an expedited hearing shall state facts with particularity and shall be supported by one of the following:

(1) Affidavits based on personal knowledge or experience setting forth facts supporting the issuance of an order for an expedited hearing, or

(2) An explanation of why affidavits have not accompanied the motion if no affidavits are submitted with the motion for an expedited hearing.

(b) A motion for an expedited hearing shall be accompanied by a memorandum of law.

(c) No motion shall be filed unless it contains a certification that the moving party has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure an agreement on expediting the proceeding.

1021.96c. Response to motion for expedited hearing.

A response and supporting memorandum of law shall be filed within 10 days of service unless otherwise ordered by the Board.

1021.96d. Conduct of expedited hearing.

(a) Nothing contained in this rule shall limit the rights of the parties to a full hearing before the Board under the applicable rules of evidence with full rights of cross-examination of witnesses. The Board may limit the number of witnesses or the subjects of examination in order to avoid duplication of evidence as provided at 25 Pa. Code § 1021.126.

(b) Testimony may be submitted by prepared written testimony as provided for by 25 Pa. Code § 1021.124.

(c) After the conclusion of the hearing the Board shall direct the prompt filing of post hearing briefs.

COMMENT: THE BOARD WILL GRANT A MOTION FOR EXPEDITED HEARING ONLY IN RARE CIRCUMSTANCES.

TERMINATION OF PROCEEDINGS

~~§ 1021.141b. Withdrawal without prejudice.~~

~~(a) Upon agreement of all parties, an appellant may withdraw an appeal without prejudice.~~

~~(b) Except as agreed by the parties under subsection (c), when an appeal is withdrawn without prejudice the withdrawal of the appeal shall have no effect upon the ability of any party to raise, in future proceedings, any issue of law or fact raised or that could have been raised in the withdrawn appeal.~~

~~(c) Any agreement by the parties that limits the issues that may be raised or that determines the finality of the action being appealed will be binding in future proceedings.~~

Environmental Hearing Board Regulation #106-9 (IRRC #2732)

Practice and Procedure

Environmental Hearing Board Response to IRRC Comments of January 7, 2009 in Preparation for Meeting of March 4, 2009

1. 1021.51. Commencement, form and content. – Statutory authority; Clarity.

We are concerned that amendments to this section represent an impermissible attempt to assert jurisdiction over third parties when the facts and statute under which a claim is being pursued do not allow for Board review. In the preamble, the Board states it is amending subsections (h) through (j) to “ensure that all recipients of an action being appealed receive notice of the appeal and are provided an opportunity to participate in the appeal, under the Commonwealth Court’s holding in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).” In *Schneiderwind*, the Court made two distinct rulings: first, that the Board erred in considering Mr. Schneiderwind’s appeal and reviewing the merits of his complaint; and second, that the Board’s determination of liability for a third party violated that party’s due process rights.

Amendments to subsection (h) define the term “recipient[s] of the action” to include persons “to whom the action of the Department is directed or issued” and delete references to specific statutes. An amendment to subsection (i) states that “service upon the person to whom the action of the Department is directed or issued shall subject the recipient to the jurisdiction of the Board.” In *Schneiderwind*, the “person to whom the action of the Department is directed or issued” was Delaware Valley Concrete Company. However, the *Schneiderwind* court determined that the Department’s “discretionary refusal to prosecute the claim on [Mr. Schneiderwind’s] behalf” was not reviewable by the Board pursuant to the Board’s enabling statute (35 P.S. § 7514) and the Noncoal Surface Mining Conservation and Reclamation Act, which provided for review by the filing of a civil action, not by appeal to the Board.

While we agree with the Board that *Schneiderwind* requires promulgation of enhanced notice and “opportunity to be heard” provisions, we disagree that implementation of such provisions can expand the Board’s jurisdiction in violation of the Board’s enabling statute or any other statute. In the final-form, the Board should narrow the language of this section to ensure that the regulation does not impermissibly expand the scope of the Board’s jurisdiction in violation of any statute.

Additionally, an amendment to subsection (j) states that if a recipient of an action elects not to intervene, “the recipient’s right to appeal from the Board’s adjudication in the matter may be adversely affected.” Because this language does not establish a binding norm, the final-form regulation should omit it.

Response:

To address this comment, the Environmental Hearing Board Rules Committee pointed out there are two types of jurisdiction at issue in the *Schneiderwind* case: *subject matter* jurisdiction, i.e. the types of cases over which the Board has jurisdiction, and *personal* jurisdiction, i.e. persons over whom the Board has jurisdiction.

The Court’s ruling in *Schneiderwind* – that the Board did not have jurisdiction because the action being appealed involved prosecutorial discretion – dealt with *subject matter* jurisdiction – i.e., the Court held that the Environmental Hearing Board does not have subject matter jurisdiction where the action being appealed involves the exercise of prosecutorial discretion.

However, the Court also touched on the issue of *personal* jurisdiction, a separate matter, when it held that Delaware Valley Concrete Company should have been a party to the original action and that its due process rights were violated by its not having been a party. The Board’s proposed revision to Rule 1021.52 is an attempt to address this aspect of the Court’s ruling. The Board does not intend to extend its subject matter jurisdiction by saying it has jurisdiction over cases involving prosecutorial discretion. Rather, the Board is attempting to ensure that an entity such as Delaware Valley Concrete Company is a party to any action where its rights may be adjudicated.

In the *Schneiderwind* case, representatives of the Delaware Valley Concrete Company attended the hearing, consulted with Department of Environmental Protection attorneys, and participated in the case in every way other than having the company’s name on the docket. There clearly was no violation of Delaware Valley’s due process rights. It chose not to enter the case as a party. For the Court to say that the Environmental Hearing Board violated Delaware Valley’s due process rights by not providing the company with an opportunity to participate in the proceeding left the Board a bit stymied as to how to avoid this situation from occurring again in the future. The proposed revision to 1021.52 tries to resolve this problem: The revision will act to encourage persons such as Delaware Valley to enter a proceeding as a party if its rights may be affected. If that person chooses *not* to enter the proceeding, the rule simply advises that it may lose its opportunity to appeal those issues to the Commonwealth Court, in the event the Court decides that the Board provided ample opportunity for it to enter the proceeding and it chose not to do so.

However, if the Commission feels strongly that this provision should not be contained in the rule itself, the Environmental Hearing Board proposes moving it to the comment as being simply advisory.

2. 1021.54a. Prepayment of penalties. – Clarity.

This section allows appellants to file “a verified statement that the appellant is unable to pay” in lieu of a prepaid penalty or bond securing payment. Any requirements for verified statements should be included in the final-form regulation. Additionally, the comment following this section states that “[i]f a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute.” The Board should include this rule in the final-form regulation or explain why it is omitted.

Response:

Because “verified statement” is defined in the Pennsylvania Rules of Civil Procedure at Pa. R.C.P 76 and is a commonly used term, the Board will simply defer to that definition.

The Board will delete the first sentence of the comment and move the last sentence to the body of the rule itself, as per the Commission’s comment.

3. 1021.76a. Entry of default judgment. – Clarity; Implementation procedure.

Subsection (d) briefly references a hearing to determine civil penalties, but it lacks detail as to the procedure for conducting one. The final-form regulation should provide further detail, including information about whether a moving party must request such a hearing or whether the Board may convene one on its own motion, the kind of notice the parties entitled to, and whether a party may object to the setting of such a hearing.

Response:

The final form rule will clarify that the type of hearing is an evidentiary hearing, and it will be held “as directed by the Board.”

4. 1021.96a. Motions for expedited hearing. – Clarity, Reasonableness.

Subsection (d), a notice that “[t]he Board will grant a motion for expedited hearing only in rare circumstances,” is comprised of unenforceable non-regulatory language. Because this language does not establish a binding norm, the Board should omit it from the final-form regulation.

Response:

The Board agrees to delete the language set forth above.

5. 1021.141b. Withdrawal without prejudice.

Subsection (a) allows a party to withdraw an appeal without prejudice, if all parties agree. The final-form regulation should explain whether the Board may approve a withdrawal without prejudice over the objection of a non-moving party.

Response:

The Board is withholding this proposed rule from moving forward until the Rules Committee has more opportunity to consider the Commission’s comment and determine whether the rule is necessary.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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June 30, 2009

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

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

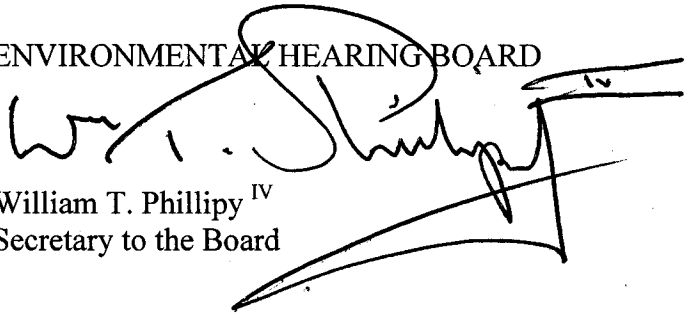
✓ Kim Kauffman, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Madam and Gentlemen:

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

Sincerely,

ENVIRONMENTAL HEARING BOARD


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

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

I.D. NUMBER: 106-9
 SUBJECT: PRACTICE AND PROCEDURE
 AGENCY: ENVIRONMENTAL HEARING BOARD

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
 2009 JUN 30 AM 11:03
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
6/30	<i>Madonna Miller</i>	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY MAJORITY CHAIRMAN _____
6/30	<i>Jack A. Costello</i>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY MAJORITY CHAIRMAN _____
6/30	<i>Kathy Cooper</i>	INDEPENDENT REGULATORY REVIEW COMMISSION ATTORNEY GENERAL (for Final Omitted only) LEGISLATIVE REFERENCE BUREAU (for Proposed only)