

Regulatory Analysis Form

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INDEPENDENT REGULATORY
REVIEW COMMISSION

(1) Agency

Environmental Hearing Board

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

No. 106-9

IRRC Number:

2732

(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: Maryanne 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.

1021.32 – Filing

This rule is being amended to require that documents filed with the Environmental Hearing Board (Board) must comply with Pa.R.C.P. 204.1 (regarding filing uniformity) and to correct 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 which has been proposed at Rule 1021.54 as part of this rules package. Section (h) is being amended to ensure that all recipients of an action being appealed receive notice of the appeal. The revision in subsection (i) simply parallels one of the revisions to subsection (h). Finally, subsection (j) is being amended to address 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 would allow 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.

1021.142 – Withdrawal without prejudice

This new rule allows the withdrawal of an appeal without prejudice

(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?

1021.32 – Filing

This rule change corrects a typographical error and ensures that documents filed with the Board meet the uniformity standards of Pa.R.C.P. 204.1 (regarding filing uniformity).

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.

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.

1021.142 – Withdrawal without prejudice

The existing rules did not clarify that appeals may be withdrawn without prejudice upon agreement of the parties.

(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 Board by clarifying existing Board rules of practice, and by making the rules and practice before the Board 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 Board.

(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 Board will be affected by the final regulations. This includes 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) 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 Environmental Hearing Board Rules Committee, a nine member advisory committee established by Section 5(a) of the Environmental Hearing Board 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 Board 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 Board 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 Board 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. Not Applicable

	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	\$1,733,000	\$1,690,000	\$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 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 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 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 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 Board 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 Environmental Hearing Board at a public meeting held on _____, 2008 at the Board'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 Board and its Rules Committee.

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

INDEPENDENT REGULATORY
REVIEW COMMISSION

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

[Signature]
By: _____

(Deputy Attorney General)

AUG 26 2008

(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: February 12, 2008 and May 8, 2008

By: *[Signature]*

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

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

[Signature]
By: Alex C. Clark

(Deputy General Counsel)

July 2, 2008

(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 (Board) 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 Board.
- (2) To improve the rules of practice and procedure before the Board.

I. *Statutory Authority for Proposed Revisions*

The Board 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 Board.. These proposed revisions are based on the recommendations of the Environmental Hearing Board Rules Committee, a nine member advisory committee created by section 5 of the act to make recommendations to the Board on its rules of practice and procedure. The Board 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 Board's proposed revisions; and (3) how, if any, the proposal differs from the Rules Committee's recommendations.

Where the recommendations of the 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 three categories: 1) adoption of new rules; 2) substantive amendments to existing rules; and 3) correction of typographical errors.

1. *Filing* (1021.32)

Two changes have been proposed to rule 1021.32. The first is the correction of a typographical error in subsection (f). The second is the addition of subsection (h) which would require all documents filed with the Board to conform to recently enacted Pa.R.C.P. 204.1, requiring uniformity of filings.

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

The proposed rule change at 1021.34(b) clarifies that when documents are filed with the Board in an expedited manner, i.e., by overnight mail, facsimile or same day delivery, they should also be delivered to the other parties on the same day or by overnight delivery.

3. *Commencement, form and content* (1021.51)

Subsection (f) – This change adds a reference to proposed new rule 1021.54, dealing with prepayment of penalties.

Subsections (h) through (j) ensure that all recipients of an action being appealed receive notice of the appeal and are provided an opportunity to participate in the appeal, pursuant to the Commonwealth Court's holding in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

4. *Prepayment of penalties* (1021.54)

In the last set of revisions to its rules, the Board deleted an earlier version of this rule dealing with prepayment of civil penalties since it did not conform to statutory requirements regarding prepayment of penalties. The proposed rule explains that parties must follow the requirements of the statute under which a penalty has been assessed when determining whether to submit prepayment of the penalty to either the Board or the Department of Environmental Protection.

5. *Hearing on inability to prepay* (1021.55)

The proposed change adds a reference to proposed new rule 1021.54, dealing with prepayment of penalties.

6. *Answers to complaints* (1021.74)

This change adds a reference to proposed new rule 1021.76, dealing with default judgment.

7. *Default judgment* (1021.76)

This proposed new rule clarifies that the Board, upon motion, may enter default judgment not only as to liability but also on the amount of the civil penalty requested by the Department of Environmental Protection in a complain for civil penalties when the defendant fails to file an answer to the complaint.

8. *Discovery motions* (1021.93)

This proposed amendment to subsection (b) of the existing rule would require parties to certify that they have conferred or attempted to confer with opposing parties before filing a discovery motion with the Board.

9. *Summary judgment* (1021.94a)

This rule was created in the Board's last set of rules changes in an attempt to make summary judgment practice more manageable by discouraging the filing of summary judgment motions containing lengthy recitations of undisputed background facts to which the opposing party must respond. The proposed amendments to rule 1021.94a are a further attempt to accomplish this and to discourage the filing of summary judgment motions when there are clear issues of disputed material fact. The proposed amendments require the moving party to file a statement of undisputed material facts and the opposing party to file a responding statement. The proposed amendments impose page limits on the statement of undisputed material facts, responding statement and briefs.

10. *Expedited hearings* (1021.96 – 1021.96c)

The Board has proposed new rules clarifying when parties may request an expedited prehearing and hearing schedule and setting forth the factors the Board will consider in granting the request.

11. *Withdrawal without prejudice* (1021.142)

This proposed new rule would clarify that appellants may withdraw appeals without prejudice upon agreement of the parties.

The Board concurred with each of 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 Board'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 Environmental Hearing Board voted to adopt the proposed rules at a public meeting held on February 12, 2008 at the Board'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 _____, 2008, as required by section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Board 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 Board also provided the IRRC and the Committees with copies of a Regulatory Analysis Form prepared by the Board 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 Board 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 Board, the General Assembly and the Governor of objections raised.

VII. *Public Comment Regarding Proposed Revisions*

The Board 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.

THOMAS W. RENWAND
Acting Chairman and Chief Judge

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).**

§ 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] 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, 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: Subsection (j) of this rule was amended in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

1021.54. 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) When an appellant 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).

§ 1021.76. 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 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 hearing 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.

1021.96. 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.**
- (e) 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.**

1021.96a. 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.

1021.96b. 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.

1021.96c. 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.

TERMINATION OF PROCEEDINGS

§ 1021.142. 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.

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW

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

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REVIEW COMMISSION

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
10/28/08	<i>K. Beaman</i>	HOUSE COMMITTEE Environmental Resources & Energy
10-28-08	<i>J. Chinn</i>	
10-28-08	<i>A. Rybarczyk</i>	SENATE COMMITTEE Environmental Resources & Energy
10-28-08	<i>D. Ladd</i>	
10/28/08	<i>Kathy Cooper</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
10-28-08	<i>Carolyn Huetter</i>	LEGISLATIVE REFERENCE BUREAU