

Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY
REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency

Environmental Hearing Board

(2) Agency Number: 106

Identification Number: 106-10

IRRC Number: 3008

(3) PA Code Cite: Title 25, Chapter 1021

(4) Short Title: Environmental Hearing Board Rules of Practice and Procedure

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

Contact: Maryanne Wesdock, (412) 565-5245, mwesdock@pa.gov

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

Proposed Regulation

Final Regulation

Final Omitted Regulation

Emergency Certification Regulation;

Certification by the Governor

Certification by the Attorney General

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

The proposed regulations amend the Environmental Hearing Board's Rules of Practice and Procedure and may be summarized as follows:

1021.2, 1021.32 – 1021.37, 1021.39, 1021.51, 1021.201 – Revisions to the rules on filing, service and related rules which would require filing and service by electronic means, except where the Environmental Hearing Board determines it would be an unreasonable burden.

1021.31 – Clarifies that electronically filed documents are covered by the rule on signage.

1021.81 – A comment has been added to this rule notifying parties that there are two methods for intervening in an appeal.

1021.94 and 1021.94a – The rules on dispositive motions have been revised to allow the filing of responses containing additional facts or legal theories than those stated in the original motion, and establishes a different timeframe for filing such a response, as well as a reply to the response.

1021.103 – The proposed amendment would incorporate Pa.R.C.P. into the Environmental Hearing Board's rule on subpoenas.

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1021.122 – A minor clarification to the rule on burden of proof and proceeding to avoid potential confusion over use of the term “private party” when, in fact, the rule simply intended to refer to “another party.”

1021.2, 1021.171-174, 1021.181 – The proposed amendments would eliminate all rules pertaining to the Costs Act since the Act has expired.

(8) 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 related to practice and procedure.

(9) 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 as, any deadlines for action.

No.

(10) 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.

1021.2, 1021.31 – 1021.37, 1021.39, 1021.51, 1021.201 – Rules requiring the electronic filing and service of documents will allow the Environmental Hearing Board to operate more efficiently. Additionally, electronic filing will allow the public to easily access documents on the Environmental Hearing Board’s electronic docket on its website. Electronic service ensures that all parties to an action receive filings in a timely manner.

1021.94 and 1021.94a – Amendments to the Environmental Hearing Board’s rules on dispositive motions clarify what types of responses may be filed to a dispositive motion.

1021.103 – This amendment makes the Environmental Hearing Board’s rule on subpoenas consistent with the Pa.R.C.P.

1021.122 – This amendment to the Environmental Hearing Board’s rule on burden of proof and proceeding was necessary to clarify any potential confusion over use of the term “private party” when, in fact, the language should simply read “another party.”

1021.2, 1021.171-174, 1021.181 – The deletion of rules pertaining to the Costs Act was necessitated by the expiration of the Costs Act.

(11) 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.

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

The Environmental Hearing Board has not done a study of the rules of practice and procedure of comparable administrative tribunals in other states but does not believe that the amendments could in any way put Pennsylvania at a competitive disadvantage. In fact, the electronic filing amendments will make appeals before the Pennsylvania Environmental Hearing Board more efficient for parties, including the regulated community. We have been advised by a private practitioner in Allegheny County 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.

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

We do not believe that the proposed regulations will affect the regulations of any other state agencies. Where the regulations affect other regulations of the Environmental Hearing Board, those regulations have been so revised and are contained in this set of proposed rulemaking.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. (“Small business” is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The proposed regulations are 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, 35 P.S. § 7515(a). The Committee is comprised of attorneys from both the public and private sectors appointed by the Governor, the majority and minority leadership of the House and Senate, the Secretary of the Department of Environmental Protection and the Citizens Advisory Council. Public participation in the Rules Committee meetings is encouraged and the meetings receive sunshine notice according to law.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Anyone who is a litigant before the Environmental Hearing Board will be affected by the proposed regulations. This includes the Department of Environmental Protection, the regulated community and citizens groups, and any member of the public who appeals an action of the Department of Environmental Protection. Any Commonwealth agency who appeals or joins in an action taken by the Department of Environmental Protection will also be affected by the regulations.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Any person who litigates an appeal before the Environmental Hearing Board will be required to comply with the regulations. This includes the entities listed in the response to question #15.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

The proposed regulations will benefit all litigants who appear before the Environmental Hearing Board because the regulations will clarify existing rules of practice and procedure and will also make the filing

of documents with the Board more efficient. The electronic filing regulations in particular will benefit the Commonwealth because these regulations will greatly reduce the amount of paperwork generated by the Board and by parties appearing before the Board. We do not perceive any financial, economic or social impact of the regulations on the entities listed in question 17.

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

The electronic filing regulations will greatly reduce the amount of paper generated by and to the Environmental Hearing Board and will make the use of our limited administrative staff (only 2 secretaries for the entire statewide agency) more efficient. There are no adverse effects of the regulations.

(19) 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.

Although we cannot estimate the exact dollar amount, the proposed electronic filing regulations will greatly reduce the amount of paperwork required to be filed by the regulated community who are parties to an action before the Environmental Hearing Board and will also greatly reduce their cost of mailings and delivery.

The other proposed regulations will have no economic impact on the regulated community other than to possibly reduce the need for litigation over uncertainties in the rules.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Although we cannot estimate the exact dollar amount, the proposed electronic filing regulations will greatly reduce the amount of paperwork required to be filed by any local governments who are a party to an action before the Environmental Hearing Board and will also greatly reduce their cost of mailings and delivery.

The other proposed regulations will have no economic impact on local governments other than to possibly reduce the need for litigation over uncertainties in the rules.

(21) Provide a specific estimate of the costs and/or savings to the **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.

Although we cannot estimate the exact dollar amount, the proposed electronic filing regulations will greatly reduce the amount of paperwork generated by the Environmental Hearing Board and will also greatly reduce the agency's cost of mailings. The electronic filing regulations will also greatly reduce the amount of paperwork generated by the Department of Environmental Protection and any other state agencies who are parties to an action before the Board and will reduce the cost of mailings and deliveries.

The Environmental Hearing Board spent approximately \$14,041 in FY 2011-12 to upgrade its electronic filing system so as to accommodate mandatory electronic filing. An additional \$25,545 was spent in FY 2012-13 to complete the upgrades. No additional expenses are anticipated.

The other proposed regulations will have no economic impact on state government other than to possibly reduce the need for litigation over uncertainties in the rules.

(22) For each of the groups and entities identified in items (19)-(21) above, 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.

N/A – No legal, accounting or consulting procedures, reporting or recordkeeping is required.

(23) 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. **The exact amount of savings cannot be measured as explained in the responses to questions 19, 20 and 21.**

	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	Not measurable	Not measurable	Not measurable	Not measurable	Not measurable	Not measurable
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	None	None	None	None	None	None
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	None	None	None	None	None	None

(23a) 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	None	\$14,041.00	\$25,545.00	None

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(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Not applicable.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

The proposed electronic filing amendments allow the EHB to excuse persons from the mandatory electronic filing requirement where it would impose an unreasonable burden on the filer.

(26) 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.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The concept of conducting a regulatory flexibility analysis 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.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable.

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

A. The date by which the agency must receive public comments: 30 days from publication in Pa. Bulletin.

B. The date or dates on which public meetings or hearings will be held: All Environmental Hearing Board Rules Committee meetings to discuss the proposed rules were open to the public, as well as the meeting of the Environmental Hearing Board Judges to vote on the rules. Additionally, the proposed rules will be presented to environmental practitioners for discussion and input at the Pennsylvania Bar Association Environmental and Energy Law Section meeting in Harrisburg on November 15, 2012. The proposed rules will also be circulated on the Environmental and Energy Law Section's listserv.

C. The expected date of promulgation of the proposed regulation as a final-form regulation: Upon completion of the regulatory review process – approximately 3 months.

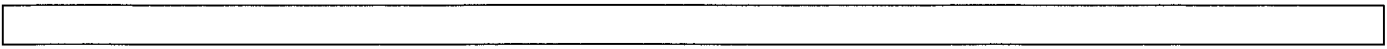
D. The expected effective date of the final-form regulation: Upon publication as a final form regulation in the Pa. Bulletin. (and within 30 days of publication for the amendment which allows electronic notices of appeal to be served on the Department of Environmental Protection)

E. The date by which compliance with the final-form regulation will be required: 30 days from publication as a final form regulation in the Pa. Bulletin.

F. The date by which required permits, licenses or other approvals must be obtained: Not applicable.

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The regulations will continue to be evaluated by the Environmental Hearing Board Rules Committee at its meetings held every other month. Additionally, the Environmental Hearing Board receives feedback on its regulations at events held by the Pennsylvania Bar Association Environmental and Energy Law Section and county bar association environmental law sections.



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Environmental Hearing Board
(Agency)

Document/Fiscal Note No. 106-10

Date of Adoption: December 17, 2013

By: Thomas W. Renwand

Title: Thomas W. Renwand, Chairman and Chief
Judge

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

By: [Signature]
(Deputy General Counsel)

MAR 25 2014
(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 106-10**

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 meeting on December 17, 2013.

Effective Date

The amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking, with the exception of Section 1021.51(f)(1)(v) which will go into effect 30 days after publication. Until such time as Section 1021.51(f)(1)(v) goes into effect, persons who choose to electronically file a notice of appeal shall follow the service requirements for a conventional filing set forth at Section 1021.51(f)(2)(vi).

Contact Person

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board at: mwesdaock@pa.gov, (412) 565-5245, or Suite 310 Piatt Place, 301 Fifth Avenue, Pittsburgh, PA 15222. If information concerning this notice is required in an alternative form, please contact Vincent Gustitus, Secretary to the Board, at vgustitus@pa.gov or (717) 787-1638. 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 proposed rulemaking amendments were adopted by the Board at its meeting of November 8, 2012 and published at 43 Pa.B. 2591 (May 11, 2013), with a 30-day public comment period. Comments were submitted by the Independent Regulatory Review Commission (IRRC), Citizens for Pennsylvania's Future (PennFuture) and the Department of Environmental Protection (Department). The comments and the Board's responses were discussed at a public meeting/conference call of the Board's Rules Committee held on July 25, 2013. In response to comments received during the official

public comment period on the proposed rulemaking, a draft final rulemaking was prepared. A summary of the comments and Board's responses is set forth below:

Section 1021.32(a) - Filing – heading of subsection (a)

PennFuture noted that under the proposed revisions, subsections (a) and (e) of Section 1021.32 would have the same heading of “*Conventional filing*.” PennFuture pointed out that contrary to its heading, subsection (a) of the rule is not limited to conventional filing, but instead identifies documents that “shall be conventionally filed *or facsimile filed*.” It recommended changing the heading of subsection (a) to “*Exceptions to electronic filing*.”

Upon reviewing the contents of subsection (a), the Rules Committee and the Board agreed with PennFuture's comment but felt it would be appropriate to give subsection (a) the title “General filing requirements.”

Section 1021.32(a) – Filing – documents that must be conventionally or facsimile filed

The proposed revisions to Section 1021.32(a) would have required that only two categories of documents be filed conventionally or by facsimile: complaints, and motions to be excused from the mandatory electronic filing requirement. During preparation of the final rulemaking it became apparent that two other categories of documents must be filed conventionally or by facsimile due to limitations in the Board's electronic filing system: entries of appearance filed by recipients of an action, pursuant to Sections 1021.32(h) and (j); and documents filed by persons who are not parties to the action at the time of the filing. Those two categories have been added to Section 1021.32(a) as subsections (3) and (4).

Section 1021.32(c)(14) and (15) and Section 1021.51(f)(1) – completion, acceptance and rejection of electronic filings

Proposed subsection 1021.32(c)(14) provided that “[a]n electronic filing complete before midnight Eastern Time will be considered to be filed on that date so long as it is *accepted* by the Board.” 43 Pa.B. at 2596 (col. 1) (emphasis added). This same language (with the addition of a comma after the word “date”) also appeared in proposed subsection 1021.51(f)(1)(ii) governing the commencement of an appeal through the electronic filing of a notice of appeal. 43 Pa.B. at 2599 (col. 1). Proposed subsection 1021.32(c)(14) further went on to distinguish *completion* of a filing from *acceptance or rejection* of the filing by the Board, by stating, “[u]pon *completion* of the filing,” the Board's filing system “will issue a transaction receipt including the date and time the document was received,” but that “[i]f the Board *rejects* the submitted documents following review,” the filer will be notified and may have to refile the rejected documents. 43 Pa.B. at 2596 (col. 1) (emphasis added).

PennFuture raised a concern that, given the jurisdictional nature of the 30-day deadline for commencement of an appeal before the Board, the application of proposed

subsections 1021.32(c) and 1021.51(f)(1)(ii) would determine whether an appeal is dismissed for lack of jurisdiction and, therefore, the rules should specify the grounds on which the Board may reject the electronic filing of a notice of appeal or other document. IRRC also requested this information.

PennFuture's and IRRC's comments illustrate that there is much confusion over the use of the terms "completion," "reject," and "accept" with regard to electronic filing. The "rejection" of an electronic filing does not act to deprive the Board of jurisdiction over the appeal. It merely acts as a notification to the appellant that additional material may be required by the Board in order for the Board to consider the appeal perfected. The Board's "rejection" of an electronic filing acts in the same manner as does a notice to perfect sent out upon receipt of a hard copy filing of a notice of appeal where additional information is required. The "rejection" of an electronically filed notice of appeal does not affect the appeal's timeliness; it merely requires the appellant to file an amended version of the notice of appeal containing the missing information. A notice of appeal is considered filed upon completion of the transmission of the notice of appeal by means of the Board's electronic filing system.

Because the inclusion of the terms "reject" and "accept" were confusing and did not accurately describe the action taken by the Board upon receipt of a notice of appeal with missing information, Section 1021.32(c)(14) has been amended to eliminate those terms.

Additionally, subsection 1021.32(c)(15) has been amended to clarify that a party who experiences technical difficulty while filing a document electronically may seek relief under Section 1021.53a (dealing with *nunc pro tunc* relief).

Section 1021.34(g) – Service by a party

Under proposed subsection 1021.34(g), if an electronic filing were not successfully transmitted, the party sending the filing would need to "immediately upon notification of the deficiency" serve the document by other listed methods. IRRC commented that the requirement of immediate notification lacked clarity. Therefore, this provision has been amended to clarify that a party has until 4:30 p.m. of the next business day to correct the deficiency and serve the document.

The Department suggested adding a provision to subsection 1021.34(g) of the proposed rules to allow parties to effect service by email when there is problem with the electronic service using the Board's electronic filing system. The Department felt that allowing service by email, where the receiving party consents to service in that manner, will be more convenient for both the filer and the receiving party, particularly for those filers who may lack a facsimile machine. The Board agreed with the Department's suggestion and added language to subsection 1021.34(g) to allow service by email when there is a problem with electronic service under the Board's electronic filing system.

Section 1021.51(f)(1)(iii) – Notice of appeal, notice of filing

IRRC noted that subsection 1021.51(f)(1)(iii) uses the terms “notice of appeal” and “notice of filing” and questioned what is the difference between the terms. Because there is no difference in the terms and because “notice of appeal” is the proper term to be used, this subsection has been amended to use “notice of appeal” instead of “notice of filing.”

Section 1021.51(f)(1)(iv) – Service on the Department

PennFuture recommended that the rules authorize electronic service of notices of appeal on the Department’s Office of Chief Counsel and program office, and suggested that automatic electronic service on the Department should be built into the Board’s electronic filing system.

In response to PennFuture’s comment, the Board’s electronic filing system has been upgraded in order to allow automatic service of an electronically filed notice of appeal on the Department’s Office of Chief Counsel and program office. In other words, an appellant who electronically files a notice of appeal will no longer have to serve a copy of the appeal on the Department. This revision to the Board’s rules will go into effect 30 days from the date of publication in the *Pennsylvania Bulletin*.

Appellants who electronically file notices of appeal will still need to serve a copy of the appeal on a permittee, where applicable.

Section 1021.81 – Intervention

The Board’s rule at Section 1021.81 deals with traditional means of intervention. A comment has been added to Section 1021.81 to reference Section 1021.51(j) which allows persons who are “recipients of an action,” as that term is defined in Section 1021.51(h), to intervene by simply filing an entry of appearance.

Sections 1021.94 and 1021.94a – Responses to dispositive motions

In its proposed rulemaking, the Board had proposed changes to Sections 1021.94 and 1021.94a to address the following problem: When a party files a dispositive motion (such as a motion to dismiss under Section 1021.94 or a motion for summary judgment under Section 1021.94a), the other parties to the case have 30 days to file a response. In most cases, any such response will be a response in opposition to the motion. However, in the case of a third party appeal, one party may wish to file a response in support of the motion. For example, in the case of Party A v. Party B and Party C, if Party C files a motion to dismiss against Party A, Party B may wish to file a response in support of the motion. Party A, presumably, would file a response in opposition to the motion. A problem arises where the response in support of the dispositive motion is filed at or near the end of the 30 day response period, but raises new facts or legal theories not raised in the original motion. In that case, the party opposing the motion has little or no time to respond to the new facts or legal theories. Two alternative solutions to this problem were proposed:

Option 1 would prohibit parties from filing a response in support of a dispositive motion that contained new facts or legal theories. If a party wished to file a response in support of a dispositive motion containing new facts or legal theories, he/she would need to obtain leave of the Board.

Option 2 would permit the filing of a response in support of a dispositive motion containing new facts or legal theories, and would give the opposing party additional time in which to respond.

Both approaches were mentioned in the Preamble to the proposed rulemaking, but only one approach – Option 1 – appeared in the proposed text of the rule (Annex A). The Preamble stated that the Board was seeking comments on both approaches and considered each one to have equal merit.

The Board received extensive comments on the proposals from PennFuture and the Department, as well as comments from IRRC seeking clarification.

PennFuture supported Option 1, i.e., limiting responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. However, PennFuture also commented that this approach did not by itself eliminate the need for the party opposing the motion to be given additional time to address both the dispositive motion and the response in support of the dispositive motion. To ensure that the party opposing a motion for summary judgment or other dispositive motion has sufficient time to address all of the arguments and authorities presented by the moving party and any supporting parties, PennFuture recommended that the deadline for filing a response in opposition to a dispositive motion should be 30 days after service of the later of: a) the motion or b) the last timely-filed notification of joining the motion that is accompanied by a supporting memorandum of law or brief.

The Department filed comments that raised concerns about Option 1, and recommended an approach closer to that set forth in Option 2. The Department felt that parties should not be prohibited from filing a response in support of a dispositive motion that contains new facts or legal theories. The Department set forth a number of reasons in support of its position: First, the Department stated that parties often have appropriate reasons for not wanting to join in one another's dispositive motions. It pointed out that even where parties are aligned, they may have different interests with respect to the filing of a particular dispositive motion. For example, in third-party appeals, the Department's interest may be in defending the integrity of the Department process that resulted in the action, whereas the recipient of the action is simply focused on prevailing in the current litigation.

Second, the Department felt that prohibiting parties from filing responses in support of dispositive motions except as permitted by order of the Board would frustrate the "just, speedy, and inexpensive" determination of Board proceedings. For example, the Department felt that in some instances, the Board may be able to dispose of issues or

entire cases based on what is included in the supporting response, saving the parties and Board the expense and time that would be necessary to resolve them after a hearing on the merits.

Third, the Department felt that Option 1 could have a chilling effect on both the Department and other parties filing supporting responses and that Option 2 allowed for a more complete record before the Board.

The Department noted that the minutes of the Rules Committee meeting where this issue was discussed identified only one problem with the current Board rules with respect to supporting responses: the current rules do not address whether parties opposing the motions have a right to respond to the supporting responses. The Department felt that the most reasonable way to address this problem would be to amend the rules to provide that the party opposed to the dispositive motion has a right to respond, rather than to amend the rules to prohibit the filing of supporting responses except as permitted by order of the Board.

Finally, the Department felt that Option 1 was unclear because of the following: it does not address when an opposing party must respond to a supporting motion, it does not provide that an opposing party may have additional time to respond to a dispositive motion when a supporting response is filed, it does not address whether a party that files a supporting response may file a reply brief, it does not address whether a supporting response should take the form of a motion or memorandum, it does not address which "response" controls for purposes of calculating the reply time by the moving party, it does not address whether a party opposing a dispositive motion is to file one response to both the motion and the supporting response or file separate responses, and it does not contain a deadline for filing a motion requesting the Board to allow the filing of a supporting response with new facts or legal theories.

In its comments, the Department recommended an alternative amendment to the rules that would allow parties to file responses in support of a dispositive motion containing new facts or legal theories, but also provided an additional time period for the opposing party to respond to the new facts and legal theories raised in the supporting response, as well as additional time to respond to the original motion.

IRRC did not take a position on either Option 1 or 2 but raised the following questions about Option 1: What form, if any must a notification that a party is joining a dispositive motion take? How did the Board determine that 15 days is a reasonable amount of time in which to file a notification? Under what circumstances would the Board permit, by way of an order, a party to raise additional issues in support of the dispositive motion? How does a party wishing to raise additional issues request such permission in the notification and must a separate pleading or motion be filed?

After an extensive review and consideration of all of the comments, the Rules Committee recommended and the Board agreed with the alternative approach suggested by the Department in its comments. Under this approach, a party is able to file a response in

support of a dispositive motion within 15 days of service of the original motion or within 15 days of the deadline for filing dispositive motions, whichever comes first. The opposing party would then have 30 days to respond to the supporting response and between 30 and 45 days to respond to the original motion, depending on how long after the original motion the response in support was filed. This approach takes into consideration PennFuture's comment that the opposing party should be given additional time to address both the response in support and the original motion.

Both Section 1021.94 and Section 1021.94a have been revised accordingly.

Section 1021.103 – Subpoenas

Section 1021.103 of the Board's current rules, titled "Subpoenas," provides that "requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 and 234.6—234.9." 25 Pa. Code § 1021.103(a). Under the proposed amendments to section 1021.103, the title of the section would remain "Subpoenas." The only change to this section would be the addition of citations to additional Rules of Civil Procedure governing subpoenas, specifically the rules governing the use of subpoenas in discovery found at Pa.R.C.P. 4009.21—4009.27. As explained in the preamble, the proposed amendments to section 1021.103 simply makes clear that Pa.R.C.P. 4009.21—4009.27 also are incorporated into the Board's rules.

PennFuture commented that the proposed amendment would carry forward an unnecessary ambiguity that exists in the current version of section 1021.103: Although Section 1021.103 refers exclusively to "subpoenas," the Rules of Civil Procedure that it currently incorporates (and would continue to incorporate under the proposed amendment), Pa.R.C.P. 234.1—234.4 and 234.6—234.9, are *not* limited to subpoenas alone. They also cover similar devices, the "notice to attend" and "notice to produce."

PennFuture felt that the Board should take advantage of the pending rulemaking to eliminate this ambiguity, and to do so in favor of authorizing the use of *all* of the mechanisms available under the Rules of Civil Procedure – subpoenas, notices of attend, and notices to produce. PennFuture recommended changing the title of the section to "Subpoenas, notices to attend, notices to produce," and including a reference to all three in the rule itself.

The Rules Committee requested an opportunity to review this matter further and report back to the Board. The Board agreed to move forward with the proposed revision to Section 1021.103 at this time and to add PennFuture's suggestion to the agenda for the next Rules Committee meeting. If recommended, PennFuture's suggested revision will be incorporated into future rulemaking.

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* 43 Pa.B. 2591 (May 11, 2013), to IRRC and the Senate and House Environmental Resources and Energy Committees for review and comment. The Board, in accordance with Section 5(b.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 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 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 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
Chairman and Chief Judge

**Response to Comments of
the Independent Regulatory Review Commission**

on

**Environmental Hearing Board Proposed Rulemaking No. 106-10
Rules of Practice and Procedure
25 Pa. Code Chapter 1021**

The Environmental Hearing Board (Board) and its Rules Committee submit the following proposals in response to the Independent Regulatory Review Commission's July 10, 2013 comments on Proposed Rulemaking No. 106-10.

1. Section 1021.32. Filing – Implementation procedures; Reasonableness; Clarity

Comment No 1:

Subsection (c)(14) allows the Board to reject electronic filings. Under what grounds would the Board reject a document that was filed electronically?

Response:

The "rejection" of an electronic filing does not act to deprive the Board of jurisdiction over the appeal. It merely acts as a notification to the appellant that additional material may be required by the Board in order for the Board to consider the appeal perfected. The Board's "rejection" of an electronic filing acts in the same manner as does a Notice to Perfect sent out upon receipt of a hard copy filing of a notice of appeal where additional information is required. The "rejection" of an electronically filed notice of appeal does not affect the appeal's timeliness; it merely requires the appellant to file an amended version of the Notice of Appeal containing the missing information. A notice of appeal is considered filed upon completion of the transmission of the notice of appeal by means of the Board's electronic filing system.

In discussing the Commission's comment, the Board and its Rules Committee determined that the terms "reject" and "rejection" were confusing since they did not accurately describe the action taken by the Board upon receipt of a notice of appeal with missing information. Section 1021.32(c)(14) has been amended in order to clarify the rule, as follows:

(14) An electronic filing complete before midnight Eastern Time will be considered to be filed on that date [so long as it is accepted by the Board]. Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt serves as proof of filing. **[If the Board rejects the submitted documents following review, the documents will not become part of the**

official Board record and the filer will receive notice of the rejection.] Filers may be required to [refile the] file amended versions of documents to meet the necessary filing requirements.

Comment No. 2:

Under Subsection (c)(15), if a party electronically files or serves a document and that filing or service is untimely because of a technical issue, the party can seek relief from the Board. However, such relief cannot be sought if there is a technical problem with a notice of appeal that was filed or served electronically. What is the reason for this difference?

Response:

Subsection (c)(15) has been amended to clarify that a party who experiences technical difficulty filing a document electronically may seek relief under Section 1021.53a (dealing with *nunc pro tunc* relief).

Comment No. 3:

If a party experiences technical difficulty filing a document via facsimile, can that party seek appropriate relief from the Board?

Response:

Subsection (c)(15) has been amended to clarify that a party who experiences technical difficulty filing a document via facsimile may seek appropriate relief under Section 1021.53 (dealing with *nunc pro tunc* relief).

2. Section 1021.34. Service by a party - Clarity

Comment:

Under Subsection (g), if an electronic filing was not successfully transmitted, the party sending the filing must “immediately upon notification of the deficiency” serve the document by other listed methods. The requirement of immediate notification lacks clarity. Has the Board considered including a specific time period, such as 24 hours, for correcting the deficiency and serving the document?

Response:

Subsection 1021.34(g) has been amended to clarify that a party has until 4:30 p.m. of the next business day to correct the deficiency and serve the document.

3. Section 1021.51. Commencement, form and content – Clarity

Comment:

Subsection (f)(1)(iii) uses the terms “notice of appeal” and “notice of filing.” What is the difference between the terms? If there is no difference, we recommend that the term “notice of appeal” be used instead of “notice of filing.”

Response:

There is no difference between the two terms, and Section 1021.51(f)(1)(iii) has been amended to use only the term “notice of appeal.”

4. Section 1021.94. Dispositive motions other than summary judgment motions – Implementation procedures; Reasonableness; Clarity

Comment:

We ask the Board to respond to the following questions as it develops the final-form rulemaking. First, what form, if any must a notification that a party is joining a dispositive motion take? Second, how did the Board determine that 15 days is a reasonable amount of time in which to file a notification? Third, under what circumstances would the Board permit, by way of an order, a party to raise additional issues in support of the dispositive motion? Finally, how does a party wishing to raise additional issues request such permission in the notification and must a separate pleading or motion be filed?

We have similar questions on Section 1021.94a, pertaining to summary judgment motions.

Response:

Based on extensive and detailed comments received on this issue from the Department of Environmental Protection (Department), which is the party most likely to file a response in support of a dispositive motion in a third-party appeal, the Board has decided to reject the proposed rule set forth in Annex A of the proposed rules package and, instead, adopt the proposal suggested by the Department, which is similar to the second option discussed in the Preamble. This option allows a party to file a response in support of a dispositive motion without seeking leave of the Board and provides an opposing party with a full 30 days to respond to the supporting response. This option enables the Board to review a complete record before ruling on a dispositive motion but delays the proceedings by only an additional 15 days.

Section 1021.94 will read in relevant part as follows:

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file a memorandum of law within 15 days of service of the motion or within 15

days of the deadline for filing dispositive motions, whichever comes first. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate dispositive motion accompanies the supporting party's memorandum of law.

(c) A response to a dispositive motion [may] shall be filed within 30 days of service of the motion, **or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law. The response to a dispositive motion** shall be accompanied by a supporting memorandum of law or brief.

(d) **A moving party, or a supporting party that files a memorandum of law alone, may file a** reply to a response to a dispositive motion within 15 days of the date of service of the response. **The reply** may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the [presiding administrative law judge] Board.

Section 1021.94a will contain similar language as follows:

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first. **The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.**

(g) *Opposition to motion for summary judgment.* Within 30 days of [the date of] service of the motion, **or, if a supporting party files a memorandum of law alone, within 30 days of service of the memorandum of the memorandum of law,** a party opposing the motion shall file the following:

* * * * *

[(g)] (h) *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 may not exceed 30 pages.

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

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

[(j)] (k) *Reply brief.* Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file a reply brief. The reply brief 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] Board.

**Response to Comments of
Department of Environmental Protection**

on

**Environmental Hearing Board Proposed Rulemaking No. 106-10
Rules of Practice and Procedure
25 Pa. Code Chapter 1021**

The Environmental Hearing Board (Board) and its Rules Committee submit the following responses to the Department of Environmental Protection's (Department) comments on Proposed Rulemaking No. 106-10.

1. Proposed amendments to Sections 1021.94 and 1021.94a of the Board's Rules

Comment 1:

Parties often have appropriate reasons for not wanting to join in one another's dispositive motions.

The Rules Committee minutes refer to only one supposed advantage that the Annex amendments would have over the alternatives: the Annex amendments might encourage aligned parties to cooperate and file joint dispositive motions.¹ However, even where parties share some common interests, they may have entirely legitimate reasons for not wanting to join in one another's dispositive motions.

Even parties that are aligned can have different interests with respect to the filing of a particular dispositive motion. For instance, in third-party appeals, the Department ordinarily has no interest in whether the recipient of the action actually prevails in the litigation, so long as the integrity of the Department process that resulted in the action is defended, and the litigation does not adversely affect the Department's mission or programs going forward. The recipient of the action, by contrast, is focused on prevailing in the current litigation, in which it typically has a significant financial stake, and it has no particular interest in how the litigation may affect the Department's mission or programs. The difference in the parties' interests is reflected in their approaches to dispositive motions. Thus, for instance, the Department's experience is that recipients of Department actions tend to be more anxious to file dispositive motions, and tend to take a more aggressive approach with respect to issues likely to

¹ July 12, 2012, Rules Committee Minutes (July 2012 Minutes), 5.

arise in dispositive motions—such as mootness, ripeness, administrative finality, and (especially) standing—than the Department.

Similarly, the Department will occasionally refuse to join in a dispositive motion because it feels the motion is unlikely to be granted and may annoy the judge, or because the Department feels that the motion is needlessly provocative in other respects. However, if the recipient of the action insists on filing the dispositive motion anyway, the Department has sometimes chosen to file a response in support of the motion, reasoning that, if the Board must address the issues raised in the motion anyway, the Board might as well have the benefit of the full factual and legal context the Department believes is relevant prior to rendering a decision. Significantly, the Department is often in a special position to provide facts or legal argument that might be helpful to resolving issues raised in a dispositive motion—such as the interpretation of statutes or regulations that the Department enforces—and which the Department may not know will be raised prior to the motion being filed.

The Department is reluctant to align itself too closely with the interests of recipients of Department actions in third-party appeals for at least two reasons. One is simply a matter of resources. Unfortunately, recipients of Department actions are sometimes content to sit back and have the Department take the primary responsibility for defending appeals of the actions issued to them, despite the fact that the recipients benefit from the actions.² The Department should be free to marshal its resources so as to best protect the Department's interests in litigation. Second, the Department is leery of aligning itself too closely with the recipients of Department actions lest the Department be perceived as being invested in the recipient having received the action, as opposed to the Department simply discharging its duties as an impartial regulator.

Even where their interests do align closely, parties may be apprehensive about filing a joint dispositive motion for other reasons. For instance, when parties do attempt to cooperate, one party is often dissatisfied with the motion filed by another. Cooperation can break down close to the filing deadline, leaving each of the parties scrambling to draft and file its own motion. And the courts have yet to address whether draft

² See, e.g., *Pine Creek Valley Watershed Association, Inc. v. Dep't of Envtl. Prot.*, EHB Docket No. 2009-168-K, slip op. at 4:

We would have taxpayers paying with public funds and with public employee time for what is in reality a private interest litigation. It is the private individuals who own the property and want to develop it or have it developed for them.... They have neglected to or refused to participate and have stepped away saying, in essence, "you, DEP and Township, do it for me."

documents shared with the Department would be protected as privileged from Right-to-Know Law requests.³

Comment 2:

Prohibiting parties from filing responses in support of dispositive motions except as permitted by order of the Board would create more problems than it solves and frustrate the “just, speedy, and inexpensive” determination of Board proceedings.

Section 1021.4 of the Board’s Rules of Practice and Procedure, 25 Pa. Code § 1021.4, provides:

The rules ... shall be liberally construed to secure the just, speedy, and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

However, the Annex amendments would impede the “just, speedy, and inexpensive” determination of Board proceedings, and would create more problems than they solve.

The Rules Committee minutes identified only one problem with current Board rules with respect to supporting responses: the current rules do not address whether parties opposing the motions have a right to respond to the supporting responses. The most reasonable way to address this problem is to amend the rules to provide that the party opposed to the dispositive motion has a right to respond, rather than to amend the rules to prohibit the filing of supporting responses except as permitted by order of the Board. In at least some instances, the Board may be able to dispose of issues or entire cases based on what is included in the supporting response, saving the parties and Board the expense and time that would be necessary to resolve them after a hearing on the merits. What purpose is served by forcing a matter to proceed to a hearing if it would be possible to dispose of it based on what could be filed in a supporting response?

³ Section 305(a)(2) of the Right-to-Know Law, 65 P.S. § 67.305(a)(2), does create a presumption that records that are privileged are not “public records.” However, whether a draft dispositive motion and supporting documents shared with the Department would be protected is not clear. Arguably such documents might fall within the joint defense privilege (*i.e.*, the “common interest” or “common legal interest” privilege). However, what, if anything is protected by that privilege is unclear. Commonwealth Court has recently noted that “many issues concerning the joint defense or common interest privilege have yet to be addressed by [Pennsylvania] courts.” *In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391, 398 (Pa. Commw. Ct. 2009)

The Annex amendments do allow for the possibility that a party may raise additional legal or factual bases in support of a dispositive motion “if permitted by order of the Board.” However, the fact that the party must obtain a Board order to file a supporting response will itself deter parties from filing them. Furthermore, the process for obtaining such an order, and the procedure after one is issued, are problematic under the Annex amendments. The most basic problem is that the Annex amendments fail to address the principal problem that the amendments were supposed to resolve: *They do not provide that a party opposing a dispositive motion shall have an opportunity to respond to a supporting response when one is filed.* But there are other problems as well. For instance, the Annex amendments:

- do not address when an opposing party must respond to a supporting response (assuming the opposing party is permitted to respond).
- do not provide that an opposing party may have additional time to respond to a dispositive motion when a supporting response is filed after the dispositive motion.⁴
- do not address whether a party that files a supporting response may file a reply brief if the opposing party is permitted to respond to the supporting response.
- do not address whether a supporting response should take the form of a motion or memorandum.
- do not address which “response” controls for purposes of calculating the deadline for replies where a supporting response is filed.⁵ (*I.e.*, Assuming that the party opposing the dispositive motion is permitted to file a response to the supporting response, does the deadline for filing a reply run from the date of service of the supporting response or the date of service of the opposing party’s response to the supporting response?)
- do not address whether a party opposing a dispositive motion is to file one response to both the motion and supporting response, or file separate responses to the motion and supporting response

⁴ See the Annex amendments §§ 1021.94(b) and 1021.94a(g).

⁵ See the Annex amendments §§ 1021.94(d) and 1021.94a(k).

(assuming that the opposing party is permitted to respond to the supporting response).

- do not contain deadlines for filing supporting responses or for filing motions requesting that the Board permit the filing of a supporting response.⁶

With respect to the last item listed above, regardless of when motions for the Board to permit the filing of a supporting response should be filed under the Annex amendments, it is difficult to imagine how that process could play out in a meaningful way without a significant delay in later filings concerning the dispositive motion. For instance, assuming that the motion to file a supporting response were filed 15 days after service of the dispositive motion (the deadline for filing a notification that a party joins in a dispositive motion), only 15 days would remain prior to the deadline for filing a response in opposition, since that deadline runs from the date of filing the dispositive motion.⁷ Even if the opposing party were to respond to the motion to file a supporting response and that the Board were to grant that motion before the 15 remaining days expired, little time would remain for the party filing the supporting response to prepare and submit that filing, much less for the opposing party to address the issues raised in the supporting response in its response in opposition. As a practical matter, the party requesting permission to file a supporting response will likely have to prepare the supporting response prior to receiving the Board's decision on whether it will even permit the filing, and, where the filing is permitted, the Board will likely need to grant the party opposing the dispositive motion additional time to respond to the supporting response beyond that permitted in the Annex amendments.⁸ This approach conflicts with the goal of a "just, speedy, and inexpensive" resolution of the proceedings.

Comment 3:

The alternative amendments are a better way for the Board's rules to ensure that the substantial rights of the parties are protected, while at the same time fostering the "just, speedy, and inexpensive" resolution of the proceedings.

Given the realities of litigation before the Board—where virtually all third-party appeals will involve parties with at least three distinct interests in the proceedings—regulator, recipient of the action, and appellant—allowing the filing of supporting responses is a

⁶ See the Annex amendments §§ 1021.94(c) and 1021.94a(f).

⁷ See the Annex amendments §§ 1021.94(b) and 1021.94a(f).

⁸ See the Annex amendments §§ 1021.94(b) and 1021.94a(g).

more productive way to foster the “just, speedy, and inexpensive” resolution of proceedings, than attempting to compel parties to cooperate on joint dispositive motions by prohibiting supporting responses except by order of the Board. Thus, the Department supports the adoption of the amendments that the Rules Committee considered that would allow parties to support a pending dispositive motion (alternative amendments) without a Board order.

When the alternative amendments were discussed at the Rules Committee meetings, those present raised three concerns. The first was that, allowing a supporting party to file a dispositive motion within 15 days of a dispositive motion would result in delay because other parties might file a supporting response to a dispositive motion filed by the supporting party, and so on.⁹ This objection can easily be addressed with a slight revision to the alternative amendments the Rules Committee considered—for instance, providing in § 1021.94(b) and § 1021.94a(f) that “Parties, other than the moving party, that wish to support a pending [dispositive motion/motion for summary judgment] may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for filing dispositive motions, whichever comes first.”¹⁰ This would ensure that, even where a response in support was filed, it would delay the proceedings no more than 15 days. Under the Annex amendments, by contrast, the proceedings would likely be delayed at least that long, the procedure is unclear, and—because the Annex amendments will have a chilling effect on the filing of supporting responses--there is less chance that the Board would be able to dispose of issues or even entire matters without proceeding to a hearing on the merits.

The second objection raised was that, while previous amendments to the Board’s rules have brought the Board’s rules closer to the Pennsylvania Rules of Civil Procedure, the alternative amendments would create a hybrid and could create more problems than they solve.¹¹ However, both criticisms apply at least as much to the Annex amendments as to the alternative amendments. The Rules of Civil Procedure, like the Board’s existing rules, do not address responses in support of dispositive motions. Thus, the Annex amendments are as much of a hybrid approach and departure from the Rules of Civil Procedure as the alternative amendments. Furthermore, for the reasons explained previously, the Annex amendments are at least as likely to cause problems as the alternative amendments. The difference is that the alternative amendments expressly address the major problem with the current rules. The alternative amendments make it

⁹ July 2012 Minutes, 4.

¹⁰ The Department has included an enclosure showing the proposed revisions to the alternative amendments in context.

¹¹ July 2012 Minutes, 5.

clear that a party opposing a dispositive motion has an opportunity to respond to issues raised in a supporting response when one is filed. The Annex amendments fail to do so.

Response to Comments 1, 2 and 3:

The Board agrees with the Department's comments and the Department's proposed rule changes to Sections 1021.94 and 1021.94a.

2. Proposed amendments to Section 1021.34(g)

Comment:

The Department suggests adding a provision to Section 1021.34(g) of the proposed rules to allow parties to effect service by email when there is problem with the electronic service using the Board's electronic filing system. Although the current rule allows for service by the usual means for serving filings (mail, facsimile, hand, or other personal service), the Department believes that allowing service by email, where the receiving party consents to service in that manner, will be more convenient for both the filer and the receiving party – particularly for those filers who may lack a facsimile machine.

The language that the Department suggests adding (underlined) to the proposed Section 1021.34(g) is shown in context below.

If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile immediately upon notification of the deficiency. The filer may also effect service by electronic mail, provided the registered user consents to service in that manner.

Response:

The Board agrees with the Department's comment and the Department's proposed rule change to Section 1021.34(g).

**Response to Comments of
Citizens for Pennsylvania's Future (PennFuture)**

on

**Environmental Hearing Board Proposed Rulemaking No. 106-10
Rules of Practice and Procedure
25 Pa. Code Chapter 1021**

The Environmental Hearing Board (Board) and its Rules Committee submit the following proposals in response to Citizens for Pennsylvania's Future (PennFuture) comments on Proposed Rulemaking No. 106-10.

1. Section 1021.32. Filing – heading of subsection (a).

Comment:

Under the proposed revisions to this rule, subsections (a) and (e) would have the same heading: "*Conventional filing.*" 43 Pa. Bull. at 2595 (col. 2), 2596 (col. 2). In addition, contrary to its heading, subsection (a) of the rule is not limited to conventional filing, but instead identifies documents that "shall be conventionally filed *or facsimile filed.*" *Id.* at 2595 (col. 2) (emphasis added). PennFuture therefore recommends that the heading of subsection (a) be changed to "*Exceptions to electronic filing.*"

Response:

The Rules Committee noted that the heading of "Conventional filing" was given to subsection (a) by the Legislative Reference Bureau. Upon reviewing the contents of subsection (a), the Rules Committee and the Board agreed with PennFuture's comment but felt it would be appropriate to give subsection (a) the title "General filing requirements."

2. Completion and acceptance of electronic filings under proposed 25 Pa. Code §§ 1021.32(c)(14) and (15) and 1021.51(f)(1)(ii).

PennFuture noted the following:

Proposed subsection 1021.32(c)(14) provides, with respect to electronic filing in general, that "[a]n electronic filing complete before midnight Eastern Time will be considered to be filed on that date so long as it is accepted by the Board." 43 Pa. Bull. at 2596 (col. 1). This same language (with the addition of a comma after the word "date") appears in proposed subsection 1021.51(f)(1)(ii) governing the commencement of an appeal through the electronic filing of a notice of appeal. 43 Pa. Bull. at 2599 (col. 1). Proposed subsection 1021.32(c)(14) goes on to

further distinguish *completion* of a filing from *acceptance or rejection* of the filing by the Board. It provides that “[u]pon completion of the filing,” the Board’s filing system “will issue a transaction receipt including the date and time the document was received,” but that “[i]f the Board rejects the submitted documents following review,” the filer will be notified and may have to refile the rejected documents. 43 Pa. Bull. at 2596 (col. 1).

Given the jurisdictional nature of the 30-day deadline for commencement of an appeal before the Board, the application of proposed subsection 1021.51(f)(1)(ii), and related provisions of proposed subsection 1021.32(c), may determine whether an appeal is dismissed for lack of jurisdiction.

Comment 1:

The amended rules should not preclude a party from seeking *nunc pro tunc* relief where electronic filing of a notice of appeal is untimely because of a technical issue.

Response 1:

The Board agreed with PennFuture’s comment, and Subsection (c)(15) has been amended to clarify that a party who experiences technical difficulty filing a document electronically may seek relief under Section 1021.53a (dealing with *nunc pro tunc* relief).

Comment 2:

The rules should specify the grounds on which the Board may reject the electronic filing of a notice of appeal or other document.

Response 2:

The Board felt that PennFuture’s comment pointed out the confusion in this rule.

The “rejection” of an electronic filing does not act to deprive the Board of jurisdiction over the appeal. It merely acts as a notification to the appellant that additional material may be required by the Board in order for the Board to consider the appeal perfected. The Board’s “rejection” of an electronic filing acts in the same manner as does a Notice to Perfect sent out upon receipt of a hard copy filing of a notice of appeal where additional information is required. The “rejection” of an electronically filed notice of appeal does not affect the appeal’s timeliness; it merely requires the appellant to file an amended version of the Notice of Appeal containing the missing information. A notice of appeal is considered filed upon completion of the transmission of the notice of appeal by means of the Board’s electronic filing system.

In discussing PennFuture’s comment, the Board and the Rules Committee determined that the terms “reject” and “rejection” were confusing since they did not accurately describe the action

taken by the Board upon receipt of a notice of appeal with missing information. Section 1021.32(c)(14) has been amended in order to clarify the rule, as follows:

(14) An electronic filing complete before midnight Eastern Time will be considered to be filed on that date **[so long as it is accepted by the Board]**. Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt serves as proof of filing. **[If the Board rejects the submitted documents following review, the documents will not become part of the official Board record and the filer will receive notice of the rejection.]** Filers may be required to **[refile the] file amended versions of** documents to meet the necessary filing requirements.

3. Section 1021.51(f)(1)(iv) – Service of notice of appeal on the Department of Environmental Protection (Department).

Comment:

The rules should authorize electronic service of notices of appeal on the Department’s Office of Chief Counsel and program office, and if possible automatic electronic service on the Department should be built into the Board’s electronic filing system.

Response:

The Board agrees with PennFuture’s comment. The Department has proposed, and the Board has agreed to, enhancements to the Board’s electronic filing system that will provide for automatic service of an electronically filed notice of appeal on the Department’s Office of Chief Counsel (OCC). When a notice of appeal is filed electronically, a notice containing a link to the document will automatically go to an email address created for the OCC. OCC will also forward the notice of appeal to the appropriate program office. Additionally, the electronic service provider will automatically generate a notice to the filer notifying them that a copy of the notice of appeal has been served upon the Department. This will eliminate the need for electronic filers of a notice of appeal to serve a copy of the notice of appeal on the Department’s OCC and program office. The Rules Committee proposed adding a new subsection (v) to proposed Rule 1021.51(f)(1) that would state as follows: “The Board, through the electronic filing provider, will provide prompt notice of, and access to, all notices of appeal electronically filed to the Office of Chief Counsel of the Department of Environmental Protection at an email address designated by the Office of Chief Counsel.”

4. Supportive responses to summary judgment motions and other dispositive motions under 25 Pa. Code §§ 1021.94, 1021.94a.

Comment 1:

The proposed amendments to sections 1021.94(c) and 1021.94a(f) of the Board's rules would require a party joining a summary judgment motion or other dispositive motion to file "[a] notification to the Board that a party joins in [the] motion . . . within 15 days of service of the motion." 43 Pa. Bull. at 2600 (col. 1) (§ 1094(c)); *id.* at 2600 (col. 2) (§ 1094a(f)). It is unclear, however, what the "notification" must or may include, what must or may accompany it (such as a supporting memorandum of law or brief), and what other effect it might have (for example, whether it entitles the notifying party to file a reply to a response in opposition to the motion). The proposed rule should resolve all of those issues definitively. PennFuture recommends that the rule make clear that any supporting memorandum of law or brief must accompany the notification, and that only parties who file such a memorandum or brief may file a reply to the non-moving party's response in opposition to the motion.

In the remainder of this comment, PennFuture assumes that the "notification" could be accompanied by a supporting memorandum of law or brief that is limited to the factual and legal bases presented in the motion.

Comment 2:

The proposed amendments to sections 1021.94(c) and 1021.94a(f) of the Board's rules generally would limit responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. *See* 43 Pa. Bull. at 2600 (col. 1-2). The new proposed comment explains. "The responses to a dispositive motion should be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for granting a dispositive motion should file a separate motion before the dispositive motion deadline or seek leave from the Board to file a dispositive motion after the dispositive motion deadline." *Id.* at 2600 (col. 2) (proposed comment to § 1021.94). *See also id.* at 2601 (col. 1) (substantially identical comment to § 1021.94a). The preamble to the proposed rule further explains that "[t]he alternative option would be to allow responses in support of a dispositive motion to include legal and factual bases not in the original motion, but would provide a different time period for the filing of responses to allow the opposing party ample time to address both the dispositive motion and the response in support of the dispositive motion." 43 Pa. Bull. 2592 (col. 2) – 2593 (col. 1).

PennFuture supports the option chosen by the Board of limiting of responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. This approach, however, does not by itself eliminate the need for the party opposing the motion to be given additional time "to address both the dispositive motion and the response in support of the dispositive motion." 43 Pa. Bull. 2593 (col. 1). That is to say, additional time beyond the usual 30-day deadline for opposing the motion under §§ 1021.94(b) and 1021.94a(g) (currently (f)) may be warranted, even when a response in support of a summary judgment or other dispositive motion is limited to the legal and factual bases presented in the motion. One example would be where a party files a motion raising a single issue and relying on a single case that, through dispositive if on point, is clearly distinguishable. The supportive response is limited to the exact same legal issue, but extensively addresses a line of cases more directly on point. Indeed, allied parties might coordinate their filings in this calculated manner – an

innocuous “set” followed by the real “kill” – in order to effectively cut in half the amount of time the party opposing the motion has to address the true argument.

To avoid this sort of situation (whether coordinated or not), and to ensure that the party opposing a motion for summary judgment of other dispositive motion has sufficient time to address all of the arguments and authorities presented by the moving party and any supporting parties, the deadline for filing a response in opposition to a the motion under §§ 1021.94(b) and 1021.94a(g) (currently (f)) should be 30 days after service of the *later of*: a) the motion of b) the last timely-filed notification of joining the motion that is accompanied by a supporting memorandum of law or brief.

Response to Comments 1 and 2:

During meetings leading up to preparation of the proposed rulemaking, the Rules Committee discussed two alternative amendments to the rules on dispositive motions (25 Pa. Code §§ 1021.94 and 1021.94a). Option 1 would prohibit responses in support of a dispositive motion from containing legal and factual bases not in the original motion, unless the party seeking to file such a response obtained leave of the Board. Option 2 would allow responses in support of a dispositive motion to include legal and factual bases not in the original motion, and would give the opposing party additional time to respond to the supporting response. Although Option 1 was placed into Annex A of the proposed rulemaking, it was agreed by the Committee and the Board that both options had equal merit and that the Board should solicit comments on both approaches.

In its comments, PennFuture supported Option 1 but also recommended that the deadline for a party filing an opposition to a dispositive motion should be changed to 30 days after service of the *later of*: a) the motion or b) the last timely-filed notification of joining the motion that is accompanied by a supporting memorandum of law or brief.

The Department of Environmental Protection (Department) also filed extensive comments on this proposed rule change. The Department enumerated various reasons why a party might not want to simply join in another’s dispositive motion. It proposed an alternative similar to Option 2. The Department proposed an amendment to Sections 1021.94 and 1021.94a that would allow the filing of supporting responses within 15 days of service of the original motion or within 15 days of the deadline for filing dispositive motions, whichever comes first, and would give opposing parties 30 days to respond to the supporting response. This approach ensures that even where a supporting response is filed it will not delay the proceedings by more than 15 days.

Additionally, the rule proposed by the Department addresses the timing issue raised by PennFuture. Under the Department’s approach an appellant would have 30 days to respond to a supporting party’s filing and between 30 to 45 days to respond to the original motion, depending on how long after the original motion the response in support was filed.

The amendment to Section 1021.94 proposed by the Department reads as follows:

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for filing dispositive motions, whichever comes first. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate dispositive motion accompanies the supporting party's memorandum of law.

(c) A response to a dispositive motion [may] shall be filed within 30 days of service of the motion, **or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law.** The response to a dispositive motion shall be accompanied by a supporting memorandum of law or brief.

(d) A moving party, or a supporting party that files a memorandum of law alone, may file a reply to a response to a dispositive motion within 15 days of the date of service of the response. **The reply** may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the [presiding administrative law judge] Board.

The amendment to Section 1021.94a reads as follows:

(f) Other parties supporting a motion for summary judgment. Parties, other than the moving party, that wish to support a pending motion for summary judgment may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(g) Opposition to motion for summary judgment. Within 30 days of [the date of] service of the motion, or, if a supporting party files a memorandum of law alone, within 30 days of service of the memorandum of the memorandum of law, a party opposing the motion shall file the following:

[j] (k) Reply brief. Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file a reply brief. The reply brief 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] Board.

The Board agrees with the alternative proposed by the Department and also feels that it addresses the comments raised by PennFuture because it allows sufficient time for an opposing party to respond both to the original motion and to the supporting response.

5. 25 Pa. Code § 1021.103 – “Subpoenas.”

Comment:

Section 1021.103 of the Board’s current rules, titled “Subpoenas,” provides that “requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 and 234.6—234.9.” 25 Pa. Code § 1021.103(a). Under the proposed amendments to section 1021.103, the title of the section would remain “Subpoenas.” The only change to this section would be the addition of citations to additional Rules of Civil Procedure governing subpoenas, specifically the rules governing the use of subpoenas in discovery found at Pa.R.C.P. 4009.21—4009.27. 43 Pa. Bull at 2601 (col. 1). As explained in the preamble, the proposed amendments to section 1021.103 simply makes clear that Pa.R.C.P. 4009.21—4009.27 also are incorporated into the Board’s rules. 43 Pa. Bull. at 2601 (col. 1). This clarifying addition of the citation to Pa.R.C.P. 4009.21—4009.27 is a good idea.

The proposed amendment would carry forward, however, an unnecessary ambiguity that exists in the current version of section 1021.103. The Board should take this opportunity to eliminate that ambiguity.

Although section 1021.103 refers exclusively to “subpoenas,” the Rules of Civil Procedure that it currently incorporates (and would continue to incorporate under the proposed amendment), Pa.R.C.P. 234.1—234.4 and 234.6—234.9, are *not* limited to subpoenas alone. They also cover similar devices, the “notice to attend” and “notice to produce.” A notice to attend may be used to “compel the attendance of another party of an officer or managing agent thereof for trial or hearing.” Pa.R.C.P. 234.3(a). *See also* Pa.R.C.P. 234.7 (Form of Notice to Attend). A notice to produce may be used to “compel the production of documents or things by the other party” at a trial or hearing. Pa.R.C.P. 234.3(b). *See also* Pa.R.C.P. 234.8 (Form of Notice to Produce). Although these mechanisms are similar to subpoenas in their effect, they are *not* subpoenas. *Cf.* Pa.R.C.P. 234.1, 234.2, 234.4(a) (“The party serving a subpoena or notice to attend or notice to produce may excuse compliance therewith.”), 234.6 (Form of Subpoena).

One possible reading of section 1021.103 of the Board’s rules is that, by incorporating a range of Rules of Civil Procedure that includes the specific rules governing the notice to attend and notice to produce, Pa.R.C.P. 234.3, 234.7, 234.8, it likewise authorizes the use of those non-subpoena devices. The contrary reading, however, finds support in the failure of Section 1021.103 to mention either the notice to attend or the notice to produce. The argument on that side of the ledger is that because the Board’s rule only refers to “subpoenas,” it only incorporates those Rules of Civil Procedure within the cited range that apply to *subpoenas*, and *not* the rules or portions thereof that apply to notices to attend and notices to produce.

The Board should take advantage of the pending rulemaking to eliminate this ambiguity, and to do so in favor of authorizing the use of *all* of the mechanisms available under the Rules of Civil Procedure – subpoenas, notices of attend, and notices to produce. PennFuture recommends that the final rule read as follows:

§ 1021.103. Subpoenas, notices to attend, notices to produce.

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas, notices to attend, and notices to produce shall be governed by Pa.R.C.P. 234.1—234.4, 234.6—234.9 and 4009.21—4009.27. When the term “court” is used in Pa.R.C.P., “Board” is to be understood; when the terms “Prothonotary” or “clerk of court” are used in Pa.R.C.P., “Secretary to the Board” is to be understood.

Response:

PennFuture’s comment was addressed during a conference call of the Rules Committee held on July 25, 2013. One member of the Rules Committee stated that it was his understanding that “notices to attend” under Pa.R.C.P. 234.1-234.4 and 234.6-234.9 apply only to officers and agents, not to employees. Therefore, he felt those rules would not apply to Department of Environmental Protection (Department) employees. He questioned whether it might be necessary to have a separate rule on notices to attend dealing with Department employees.

Based on this ambiguity, the Rules Committee recommended that the Board not incorporate PennFuture’s suggestion at this time but, instead, add it to the agenda for the next Rules Committee meeting so that it could be fully discussed by the Committee.¹

¹ The next meeting of the Rules Committee is scheduled for November 14, 2013 at 10:00 a.m.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND [PROCEDURES] PROCEDURE

PRELIMINARY PROVISIONS

GENERAL

§ 1021.2. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Board—The Environmental Hearing Board, consisting of its chairperson and four members, all of whom are administrative law judges appointed by the Governor to hear appeals from actions of the Department.

Business day—A day that is not a Saturday, Sunday or a legal holiday. (~~“Legal holiday” means any.”~~)

[*Costs Act*—The act of December 13, 1982 (P. L. 1127, No. 257) (71 P. S. §§ 2031—2035), known as the Commonwealth Agency Adjudicatory Expenses Award.]

Conventional filing—Presenting documents to the Board by hand, mail or other personal delivery services, for purposes of filing.

* * * * *

Electronic filing—[The electronic transmission of legal documents by means of a computer or device, other than by facsimile transmission. Legal documents may be electronically transmitted in the format of Word Perfect for Windows or Microsoft Word for Windows or other format as the Board may permit.] **The electronic transmission of documents to the Board through the electronic filing provider for purposes of filing.**

Electronic filing provider—The entity providing electronic filing and electronic service of documents by means of the Internet in Board proceedings.

Electronic service—The electronic transmission of documents through the electronic filing provider to a party, attorney or representative under this chapter.

Facsimile filing—The transmission of documents to the Board, for purposes of filing, using a machine that can send and receive a facsimile transmission either as a stand-alone device or as part of a computer system.

Facsimile transmission—The transmission of a source document between locations by encoding the document into electronic signals, transmitting the signals over the telephone system and reconstructing the electronic signals to print a duplicate of the document at the receiving destination.

[***Filing attorney***—A registered attorney who files a legal document by means of electronic filing on behalf of a client whom the attorney represents in a proceeding before the Board.]

* * * * *

[***Legal document***—A motion, answer or other paper filed in a proceeding before the Board other than a notice of appeal or a complaint that is original process naming a defendant or defendants. A subpoena or a bond or check issued to secure payment of a penalty is not a legal document; the original of the documents excluded from this definition must be filed or served.]

Legal holiday – A day designated as a holiday by the President or Congress of the United States or by the Commonwealth.

* * * * *

[***Registered attorney***—An attorney admitted to practice in this Commonwealth, or other counsel permitted by Board order to represent a party for purposes of a particular proceeding, who has filed an electronic filing registration statement with the Board and to whom the Board has issued a password authorizing filing and service through the Board's website.]

Registration statement—[A statement made on professional or organizational letterhead requesting the use of the Board's website for electronic filing.] **A completed application to use the electronic filing provider for electronic filing and electronic service in Board proceedings.**

Registered user—An individual who has submitted a registration statement to the Board and to whom the Board has issued a password authorizing electronic filing and electronic service.

* * * * *

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.31. Signing.

(a) Every [notice of appeal, motion, legal document or other paper] **document** directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, or if a party is not represented by an attorney, shall be signed by the party. Each [paper shall] **document must** state the signer's **mailing address, e-mail** address and telephone number.

* * * * *

§ 1021.32. Filing.

[(a) Documents filed with the Board shall be filed at its headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(b) The date of filing shall be the date the document is received by the Board.

(c) Documents may be filed by personal delivery, by mail or by facsimile. Legal documents, as defined in § 1021.2 (related to definitions), may be filed electronically in accordance with this chapter. When a document is filed by facsimile, the original shall be deposited in the mail on the same day. If a document exceeds ten pages, the facsimile shall consist of the first five pages and last five pages of the document and the certificate of service.

(d) Legal documents may be filed with the Board electronically through the Board's website by a filing attorney unless provided otherwise by Board order. A legal document filed electronically shall be deemed the equivalent of the original document subject to the following conditions:

(1) The electronic filing of a legal document constitutes a certification by the filing attorney that the original hard copy was properly signed and, where applicable, verified.

(2) An executed hard copy of the legal document, with any required verifications, shall be maintained by the filing attorney and produced at the request of the Board or any other party within 14 days of the request.

(e) In filing legal documents electronically, a filing attorney shall be responsible for the following:

(1) An objective description of the legal document consistent with the title placed on the legal document as required by the Board's website.

(2) Any delay, disruption, interruption of the electronic signals and readability of the legal document.

(3) Any risk that a legal document may not be properly or timely filed with the Board.

(f) Hard copy of any electronically filed legal document which exceeds 50 pages in length shall 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(c) (relating to service by a party).

(g) Documents filed by United States mail, hand or other delivery services after the close of the business day at 4:30 p.m. Eastern Time shall be deemed to be filed on the following business day. Documents filed electronically, including by facsimile, shall be deemed filed on the day received by the Board.

(h) Documents filed with the Board, other than exhibits, must be typewritten on letter size paper (approximately 8 to 8 1/2 inches by 10 1/2 to 11 inches) and pages after the first must be numbered. Legal documents, as defined in § 1021.2, must be double spaced, except that footnotes must be single spaced and quotations in excess of a few lines must be single spaced and indented. Photocopied documents will be accepted as typewritten, provided that all copies are legible. Failure to comply with this subsection will not result in dismissal of a filing, but the Board may request the party to resubmit the document in proper form.]

(a) GENERAL FILING REQUIREMENTS. ~~Conventional filing.~~ The following documents shall be conventionally filed or facsimile filed:

(1) A complaint that is original process naming a defendant or defendants.

(2) A motion to be excused from the Board's mandatory electronic filing requirement.

(3) AN ENTRY OF APPEARANCE FILED PURSUANT TO SECTION 1021.51(j) (RELATING TO INTERVENTION BY RECIPIENT OF AN ACTION).

(4) A DOCUMENT FILED ON BEHALF OF A PERSON WHO IS NOT A PARTY TO THE PROCEEDING AT THE TIME OF THE FILING.

(b) *Filing of notice of appeal.* An original notice of appeal may be filed electronically, conventionally, or by facsimile.

(c) *Electronic filing.*

(1) Documents except those listed in subsections (a) and (b) shall be electronically filed unless the Board orders otherwise in a particular proceeding. Persons ~~must~~ WISHING TO BE EXCUSED FROM THE MANDATORY FILING REQUIREMENTS

SHALL file a motion under § 1021.92 (relating to procedural motions) ~~to be excused from the mandatory filing requirement~~. The Board will excuse persons from the mandatory electronic filing requirement, with respect to all filings or with respect to specific filings, if the Board determines that the requirement would impose an unreasonable burden on the potential filer.

(2) Documents filed electronically may not also be filed by other means unless the Board orders otherwise or the document to be filed includes an original bond or check. When electronically filing documents including an original bond or check, a copy of the document, including a copy of the original bond or check, shall be electronically filed. The original, including the original bond or check, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in subsection (e)(1).

(3) Electronic filing can be performed only by registered users. Individuals who are not registered users can become registered users by submitting a registration statement to the Board and receiving a password authorizing electronic filing and service. The registration statement must be on a form prepared by the Board and include the user's name and mailing address, e-mail address, attorney identification number (if the registered user is an attorney), a request for authorization to participate in electronic filing and electronic service, and consent to accept electronic service of documents permitted to be electronically filed.

(4) When registration is complete, a registered user may not withdraw from the electronic filing and electronic service system except with leave from the Board.

(5) ~~A filer is~~ FILERS ARE responsible for providing an objective description of documents electronically filed. The description must include:

(i) The party filing or serving the document.

(ii) The title of the document (for example, Appellant ABC Corporation's Motion for Summary Judgment, Appellant Smith's Motion to Compel Permittee XYZ, Inc. to Produce Documents).

(6) When a document has been filed electronically, the official record is the electronic document filed with the Board and the filer is bound by the document as filed.

(7) The registered user's log-in and password required to file documents using the electronic filing provider serve as the registered user's signature on electronic documents filed with the Board. The log-in and password serve as a signature for purposes of § 1021.31 (relating to signing) and other purposes for which a signature is required in connection with proceedings before the Board.

(8) If an electronically filed document does not bear the actual signature of the registered user, the name of the registered user under whose log-in and password the

document is submitted must be preceded by "s/" and typed in the space in the document's signature block where the signature would otherwise appear (for example, "s/ Jane Doe").

(9) A NO registered user or other person may not knowingly permit or cause a registered user's password to be used by an individual ANYONE other than an authorized agent of the registered user.

(10) A document that is electronically filed and requires an original signature other than that of the registered user must be maintained by counsel or, if the party is not represented, by the party itself, for 1 year after periods for appeals expire. Documents shall be maintained by the filer and produced at the request of the Board or other party within 14 days of the request.

(11) Each document filed electronically must indicate in the caption that it has been electronically filed.

(12) Documents may be electronically filed in WordPerfect format, Microsoft Word format, PDF format or other formats permitted by AS the Board MAY PERMIT. The electronic filing provider automatically converts uploaded documents not already in PDF format to PDF format. A document may exceed page limitation rules if the additional pages result solely from the electronic conversion by the electronic filing provider.

(13) To the extent practicable, electronically filed documents must be formatted in accordance with subsection (e)(4).

(14) An electronic filing completed before midnight Eastern Time will be considered to be filed on that date, ~~so long as it is accepted by the Board.~~ Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt shall serve as proof of filing. ~~In the event that the Board rejects the submitted documents following review, the documents shall not become part of the official Board record and the filer will receive notification of the rejection.~~ Filers may be required to re-file the FILE AMENDED VERSIONS OF documents to meet the necessary filing requirements.

(15) Except in the case of notices of appeal, WHICH SHALL BE GOVERNED BY § 1021.53a, if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.

(16) A registered user shall submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the Board. Excerpted information must be clearly and prominently identified as such. A registered user who files excerpts of documents as exhibits or attachments under this paragraph does so without prejudice to his right to timely file additional excerpts or the complete document and shall, upon request, provide responding parties with the complete document. A responding party may timely file the complete document or additional excerpts that it believes are directly germane.

(d) *Facsimile filing.*

(1) Documents permitted under subsections (a), (b) and (c)(1) and (2) to be filed by facsimile shall be transmitted to the Board's facsimile line at (717) 783-4738.

(2) The date of facsimile filing is the date the document is received by the Board.

(3) For documents more than ten pages long, the facsimile filed must consist of the certificate of service and the first five pages and last five pages of each document except exhibits. Exhibits shall be omitted from the filing transmitted to the Board's facsimile line.

(4) On the same day a document is transmitted to the Board's facsimile line, the original (including exhibits) shall be deposited in the mail, addressed to the Board's headquarters at the address provided in subsection (e)(1). When facsimile filing a document including an original bond or check, a copy of the bond or check must be included with the document transmitted by facsimile. The original bond or check must be included with the original of the document deposited in the mail.

(5) Documents must be formatted in accordance with subsection (e)(4).

(6) EXCEPT IN THE CASE OF FILING A NOTICE OF APPEAL, WHICH SHALL BE GOVERNED BY § 1021.53a, IF FACSIMILE FILING OR SERVICE DOES NOT OCCUR OR IS MADE UNTIMELY BECAUSE OF A TECHNICAL ISSUE, THE PARTY AFFECTED MAY SEEK APPROPRIATE RELIEF FROM THE BOARD.

(e) *Conventional filing.*

(1) Documents permitted to be conventionally filed with the Board under subsections (a), (b) and (c)(1) and (2) shall be filed at the Board's headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(2) The date of conventional filing is the date the document is received by the Board.

(3) Only hard copies may be conventionally filed unless the filer has secured prior approval from the Board to conventionally file documents in other formats, such as CDs, DVDs or other digital storage media.

(4) With the exception of exhibits, documents filed with the Board must be typewritten on letter-size paper (approximately 8 to 8 1/2 inches by 10 1/2 to 11 inches) and pages after the first must be numbered. With the exception of exhibits, notices of appeal, and complaints, documents filed must be double spaced, except that footnotes must be single spaced and quotations in excess of a few lines must be single spaced and indented. Photocopied documents will be accepted as typewritten, provided that all copies are legible.

(f) *Format of Filing.* Failure to comply with subsection (c)(5) or (11), (d)(5) or (e)(4) will not result in dismissal of a filing, but the Board may request that the party resubmit the document in proper form.

§ 1021.32a. Privacy issues.

A persons filing documents shall refrain from including, or shall redact when inclusion is necessary, the following personal identifiers from documents filed with the Board, including exhibits, unless filed under seal or otherwise ordered by the Board:

- (1) Social Security numbers.**
- (2) Financial account numbers.**
- (3) Dates of birth.**
- (4) Names of minor children.**

§ 1021.33. Service by the Board.

(a) Orders, notices and other documents [originating with] entered or issued by the Board [shall] will be served upon the person designated in the notice of appearance, or if no notice of appearance has been entered, upon the person upon whom the notice of appeal or complaint was served [by mail or in person].

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons other than registered users by mail or in person.

(c) An order filed electronically without the original signature of an administrative law judge has the same force and effect as if the administrative law judge had affixed a signature to a paper copy of the order.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 1021.34. Service by a party.

[(a) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

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

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

(d) Service of legal documents may be made electronically on a registered attorney by any other registered attorney. The filing of a registration statement constitutes a certification that the registered attorney will accept electronic service of any legal document from any other registered attorney. A registration statement includes the attorney's name and address, e-mail address, attorney identification number, and a request to register to file and accept service electronically. A registered attorney may withdraw his registration statement for purposes of a specific case if he chooses not to receive electronic service in that case by filing an amendment to the filing party's registration statement.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 33.32 (relating to service by a participant).]

(a) Notices of appeal shall be served as provided in § 1021.51(h) (relating to commencement, form and content). Complaints filed by the Department will be served as provided in § 1021.71(b) (relating to complaints filed by the Department).

(b) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

(c) Electronic service of documents to other registered users through the electronic filing provider shall be considered valid and effective service and shall have the same legal effect as serving an original paper document. Registered users who receive documents by electronic service shall access the documents using the electronic filing provider.

(d) Documents filed electronically shall be served by hand, mail, other personal delivery, or facsimile upon parties not represented by registered users or, for parties representing themselves, upon parties who are not registered users.

(e) Subpoenas and documents that must be conventionally filed with the Board under § 1021.32(b) (relating to filing) shall be served by hand, mail or other personal delivery. Documents that are conventionally or facsimile filed with the Board under § 1021.32(a) shall be served by hand, mail, other personal delivery or facsimile.

(f) If a party does not receive electronic service in a matter involving a request for expedited disposition, service shall be made upon that party within 24 hours of filing the document with the Board. For purposes of this subsection, service means actual receipt by the party served.

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile BY 4:30 P.M. ON THE

BUSINESS DAY FOLLOWING ~~immediately upon~~ notification of the deficiency. THE FILER MAY ALSO EFFECT SERVICE BY ELECTRONIC MAIL, PROVIDED THE REGISTERED USER CONSENTS TO SERVICE IN THAT MANNER.

(h) The filing of a registration statement constitutes a certification that the registered user will accept electronic service of documents permitted to be electronically filed.

(i) Subsections (a)—(h) supersede 1 Pa. Code § 33.32 (relating to service by a participant).

§ 1021.35. Date of service.

[(a) The date of service shall be the date the document served is mailed, delivered in person or transmitted electronically. When service of the document, or hard copy of exhibits to a legal document filed electronically, is by mail, 3 days shall be added to the time required by this chapter for responding to the document.

(b) Subsection (a) supersedes 1 Pa. Code § 33.34 (relating to date of service).]

(a) For electronic service, the date of service of a document is the date that the electronic filing provider transmits the notice of electronic filing. For other types of service, the date of service is the date the document served is mailed, delivered in person or transmitted to the party's facsimile line.

(b) For the sole purpose of computing the deadlines under this chapter for responding to documents:

(1) Documents served by electronic service shall be deemed served, for purposes of responding, when notice of the electronic filing is transmitted to registered users in the proceeding, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by electronic service shall be deemed served the next business day.

(2) Documents served by facsimile shall be deemed served, for purposes of responding, when transmission of the facsimile is complete, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by facsimile shall be deemed served the next business day.

(3) Documents served by mail shall be deemed served 3 days after the date of actual service.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.34 (relating to date of service).

§ 1021.36. Certificate of service.

(a) Each document [which is required to be] filed with the Board [shall] **must** include a certificate of service which [shall certify] **certifies** the date and manner of service and the name and **mailing** address of the person served, **except as provided in subsection (b)**.

(b) **For electronic service, it shall be sufficient for the certificate to state that the document was filed using the electronic filing provider and to identify the registered users in the proceedings.**

(c) **Subsections (a) and (b) supersede 1 Pa. Code § 33.35 (relating to proof of service).**

§ 1021.36a. E-mail addresses.

A-registered user shall maintain an active e-mail address to receive electronic notice and electronic service from the electronic filing provider. A registered user has a duty to promptly update his e-mail account information with the electronic filing provider when there is a change in e-mail address.

§ 1021.37. Number of copies.

(a) [Except in the case of electronically filed documents, including exhibits, and unless otherwise ordered by the Board, the following number of copies shall be filed with the Board:] **When a document is electronically filed, the filer shall electronically file one copy of the document.**

[(1) One original and two copies of each of the following:

(i) Notices of appeal.

(ii) Complaints.

(iii) Answers.

(iv) Posthearing briefs.

(v) Dispositive motions and related memoranda, responses and replies.

(2) One original and one copy of each of the following:

(i) Petitions for supersedeas and any related responses.

(ii) Prehearing memoranda.

(iii) Nondispositive motions and petitions (other than motions for stays, extensions and continuances of procedural deadlines), and related memoranda, responses and replies.

(3) One original of other documents.]

(b) **For conventional filings and hard copies mailed to the Board in association with a facsimile filing, one original shall be filed unless the Board orders otherwise.**

(c) One copy of all documents submitted to the Board shall be served on the other parties to the proceeding.

§ 1021.39. Docket.

(a) The Board will maintain a docket of proceedings and a proceeding as initiated **will** [shall] be assigned an appropriate designation. The Board will maintain the docket on its [website] **web site** available to all members of the public and will accept [filings of legal documents by electronic transmission from registered attorneys] **electronic filing of documents from registered users subject to the provisions in this chapter.**

(b) The docket will register the date of all filings as well as the time of the filing if the filing is made electronically. When a document is filed electronically, the [Board will transmit electronically a status message to all registered attorneys in the proceeding when the document is filed] **electronic filing provider will transmit a notice of the electronic filing to all registered users in the proceeding.**

(c) The Board will maintain a complete official file on all proceedings consisting of [both] electronic and hard copy filings. The official copy of an electronically filed document or Board order shall be that appearing on the Board's [website] **web site.**

* * * * *

FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

(a) An appeal from an action of the Department shall commence with the filing of a [written] notice of appeal with the Board.

(b) The caption of [an] **a notice of appeal** must be in the following form:

**ENVIRONMENTAL HEARING BOARD
2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457**

JOHN DOE, Appellant
234 Main Street, Smithtown,
Jones County, Pennsylvania 15555
(Telephone (123) 456-7890)

[_____ v. Docket No. _____

Commonwealth of Pennsylvania
Department of _____, Appellee]

(c) The **notice of appeal** must set forth the name, **mailing address, e-mail address** and telephone number of the appellant. **If the appellant is represented by an attorney, the notice of appeal shall be signed by at least one attorney of record in the attorney's individual name.**

(d) If the appellant has received written notification of an action of the Department, a copy of the action **must [shall]** be attached to the **notice of appeal**.

(e) The **notice of appeal** must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

(f) **An original notice of appeal shall be filed electronically, conventionally or by facsimile.**

(1) *Electronic filing.*

(i) **If a bond or check is required to secure payment of a penalty, a copy of the bond or check must be included with the electronic filing. The notice of appeal and attachments, including the original bond or check, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in paragraph (2)(i).**

(ii) **An electronic filing complete before midnight Eastern Time will be considered to be filed on that date, ~~so long as it is accepted by the Board.~~**

(iii) **To the extent practical, the notice of appeal must be formatted in accordance with paragraph (2)(v). Failure to comply with this requirement will not result in rejection or dismissal of the notice of ~~the filing~~ APPEAL. The Board may request that the appellant ~~resubmit~~ FILE AN AMENDED VERSION OF the notice of appeal in proper form.**

(iv) **IN A THIRD-PARTY APPEAL, the appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on each ~~of the following:~~ THE RECIPIENT OF THE ACTION.**

~~(A) The office of the Department issuing the notice of Departmental action.~~

~~(B) The Office of Chief Counsel of the Department or agency taking the action appealed.~~

~~(C) In a third party appeal, the recipient of the action.~~

The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

(v) THE BOARD, THROUGH THE ELECTRONIC FILING PROVIDER, WILL PROVIDE PROMPT NOTICE OF, AND ACCESS TO, ALL NOTICES OF APPEAL ELECTRONICALLY FILED TO THE OFFICE OF CHIEF COUNSEL OF THE DEPARTMENT, AT AN EMAIL ADDRESS DESIGNATED BY THE OFFICE OF CHIEF COUNSEL.

(2) *Conventional filing.*

(i) An original notice of appeal that is conventionally filed shall be filed at the Board's headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(ii) The date of conventional filing is the date the original notice of appeal is received by the Board.

(iii) One copy of the notice of appeal and attachments shall be conventionally filed unless the Board orders otherwise.

(iv) ONLY Hard copies of original notices of appeal shall be conventionally filed unless the filer has secured prior approval from the Board to conventionally file the original notice of appeal in another format, such as CDs, DVDs or other digital storage media.

(v) The notice of appeal must be typewritten on letter-size paper (approximately 8 to 8 1/2 inches by 10 1/2 to 11 inches) and pages after the first must be numbered. Photocopies will be accepted as typewritten, provided that the copies are legible. Failure to comply with these requirements will not result in rejection or dismissal of the notice of appeal. The Board may request that the appellant file an amended version of the notice of appeal in proper form.

(vi) The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on ~~the individuals and entities listed in paragraph (1)(iv)(A)-(C)~~ EACH OF THE FOLLOWING in the same manner in which the notice of appeal is filed with the Board.

(A) THE OFFICE OF THE DEPARTMENT ISSUING THE DEPARTMENTAL ACTION.

(B) THE OFFICE OF CHIEF COUNSEL OF THE DEPARTMENT.

(C) IN A THIRD PARTY APPEAL, THE RECIPIENT OF THE ACTION. THE SERVICE SHALL BE MADE AT THE ADDRESS SET FORTH IN THE DOCUMENT EVIDENCING THE ACTION BY THE DEPARTMENT OR AT THE CHIEF PLACE OF BUSINESS IN THIS COMMONWEALTH OF THE RECIPIENT.

(3) *Facsimile filing.*

(i) Original notices of appeal filed by facsimile shall be transmitted to the Board's facsimile line at (717) 783-4738. If a bond or check is required to secure payment of a penalty, a copy of the bond or check must be included with the facsimile filing. The notice of appeal and attachments, including the original bond or check, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in paragraph (2)(i).

(ii) The date of facsimile filing is the date the original notice of appeal is received by the Board.

(iii) For original notices of appeal more than ten pages long, the facsimile filed must consist of the certificate of service and the first five pages and last five pages of each document except exhibits. Except for copies of checks and bonds required to secure payment of a penalty, exhibits shall be omitted from the filing transmitted to the Board's facsimile line.

(iv) On the same day an original notice of appeal is transmitted to the Board's facsimile line, the original, including exhibits, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in paragraph (2)(i).

(v) The notice of appeal must be formatted in accordance with paragraph (2)(v). Failure to comply with this requirement will not result in rejection or dismissal of the notice of appeal. The Board may request that the appellant ~~resubmit~~ FILE AN AMENDED VERSION OF the notice of appeal in proper form.

(vi) THE APPELLANT SHALL, CONCURRENT WITH OR PRIOR TO THE FACSIMILE FILING OF A NOTICE OF APPEAL, SERVE A COPY BY FACSIMILE ON THE INDIVIDUALS AND ENTITIES LISTED IN PARAGRAPH (2)(vi).

(g) 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 in § 1021.54a (relating to prepayment of penalties) in addition to the procedures in this section.

[(g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.]

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

(1) The recipient of a permit, license, approval, certification or order.

(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 and 750.7).

(3) A mining company, well operator or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested parties as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval, certification or order, as required under subsection (h)(1), 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 under § 1021.81 (relating to intervention). The recipient of a permit, license, approval [or,] certification **or order** who is added to an appeal under this section shall still comply with §§ 1021.21 and 1021.22 (relating to representation; and notice of appearance.)

(j) Other recipients of an action under subsection (h)(2), (3) or (4)[,] may intervene as of course in the 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 under § 1021.81.

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

(k) The original notice of appeal must include a certificate of service which certifies the date and manner of service and the name and mailing address of the person served.

(l) Subsections (a)—(k) supersede 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

SPECIAL ACTIONS

§ 1021.74a. Verification of pleadings.

Pleadings authorized under §§ 1021.71—1021.74 shall be verified in accordance with Pa.R.C.P. 1024 (relating to verification).

CONSOLIDATION, INTERVENTION AND SUBSTITUTION OF PARTIES

§ 1021.81. Intervention.

* * * * *

Comment

A recipient of an action, as that term is defined in section 1021.51(h) (relating to recipient of an action), may automatically intervene in an appeal by simply filing an entry of appearance pursuant to section 1021.51(j) (relating to intervention by recipient of an action).

MOTIONS

§ 1021.94. Dispositive motions other than summary judgment motions.

* * * * *

(b) PARTIES, OTHER THAN THE MOVING PARTY, THAT WISH TO SUPPORT A PENDING DISPOSITIVE MOTION MAY FILE A MEMORANDUM OF LAW WITHIN 15 DAYS OF SERVICE OF THE MOTION OR WITHIN 15 DAYS OF THE DEADLINE FOR FILING DISPOSITIVE MOTIONS, WHICHEVER COMES FIRST. THE SCOPE OF FACTS THAT THE BOARD WILL CONSIDER IN SUPPORT OF THE MOTION IS LIMITED TO THE SCOPE IN THE ORIGINAL MOTION UNLESS A SEPARATE DISPOSITIVE MOTION ACCOMPANIES THE SUPPORTING PARTY'S MEMORANDUM OF LAW.

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

~~(e) A notification to the Board that a party joins in a dispositive motion shall be filed within 15 days of service of the motion. Non-moving parties shall not raise any additional~~

~~legal or factual bases in support of the dispositive motion except as permitted by order of the Board.~~

~~[(c)](d)~~ **A MOVING PARTY, OR A SUPPORTING PARTY THAT FILES A MEMORANDUM OF LAW ALONE, MAY FILE** a reply to a response to a dispositive motion ~~may be filed~~ within 15 days of the date of service of the response, ~~and~~. **THE REPLY** may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the [presiding administrative law judge] **Board**.

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

(f) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

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

Comment

~~The responses to a dispositive motion should be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for granting a dispositive motion should file a separate motion before the dispositive motion deadline or seek leave from the Board to file a dispositive motion after the dispositive motion deadline.~~

§ 1021.94a. Summary judgment motions.

* * * * *

(f) Other parties supporting a motion for summary judgment. PARTIES, OTHER THAN THE MOVING PARTY, THAT WISH TO SUPPORT A PENDING MOTION FOR SUMMARY JUDGMENT MAY FILE A MEMORANDUM OF LAW WITHIN 15 DAYS OF SERVICE OF THE MOTION OR WITHIN 15 DAYS OF THE DEADLINE FOR DISPOSITIVE MOTIONS, WHICHEVER COMES FIRST. THE SCOPE OF FACTS THAT THE BOARD WILL CONSIDER IN SUPPORT OF THE MOTION IS LIMITED TO THE SCOPE IN THE ORIGINAL MOTION UNLESS A SEPARATE MOTION FOR SUMMARY JUDGMENT ACCOMPANIES THE SUPPORTING PARTY'S MEMORANDUM OF LAW. A notification to the Board that a party joins in a motion for summary judgment may be filed within 15 days of service of the motion. Non-moving

~~parties shall not raise any additional legal or factual bases in support of the motion for summary judgment except as permitted by order of the Board.~~

~~[(f)] (g) *Opposition to motion for summary judgment.* Within 30 days of [the date of] service of the motion, **OR, IF A SUPPORTING PARTY FILES A MEMORANDUM OF LAW ALONE, WITHIN 30 DAYS OF SERVICE OF THE MEMORANDUM OF LAW,** a party opposing the motion shall file the following:~~

* * * * *

~~[(g)] (h) *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 may not exceed 30 pages.~~

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

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

~~[(j)] (k) *Reply brief.* **WITHIN 15 DAYS OF SERVICE OF THE RESPONSE, THE MOVANT, OR A SUPPORTING PARTY THAT FILES A MEMORANDUM OF LAW ALONE, MAY FILE A REPLY BRIEF.** ~~A reply brief may be filed by the movant within 15 days of the date of service of the response.~~ **THE REPLY BRIEF** 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] **Board.**~~

~~[(k)] (l) *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.~~

~~[(l)] (m) *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 should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. ~~The responses to a motion for summary~~

~~judgment should ordinarily be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for summary judgment should file a separate motion before the dispositive motion deadline, or seek leave from the Board to file a motion for summary judgment after the dispositive motion deadline.~~

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.103. Subpoenas.

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 [and], 234.6—234.9 and 4009.21—4009.27. When the term "court" is used in Pa.R.C.P. "Board" is to be understood; when the terms "Prothonotary" or "clerk of court" are used in Pa.R.C.P. "Secretary to the Board" is to be understood.

EVIDENCE

§ 1021.122. Burden of proceeding and burden of proof.

* * * * *

(c) A party appealing an action of the Department shall have the burden of proof in the following cases:

* * * * *

(4) When a party appeals or objects to a settlement of a matter between the Department and [a] **another** private party.

[ATTORNEY FEES AND COSTS AUTHORIZED BY THE COSTS ACT]

§ 1021.171. [Scope] (Reserved).

[This section and §§ 1021.172—1021.174 (relating to application for fees and expenses; response to application; and disposition of application) apply to applications for an award of fees and expenses under the Costs Act.]

§ 1021.172. [Application for fees and expenses] (Reserved).

[(a) An application for fees and expenses shall be verified and shall set forth sufficient grounds to justify the award. It shall also include the following:

(1) Identification of the final order under which the applicant claims to be a prevailing party.

(2) A statement of the basis upon which the applicant claims to be a prevailing party under the Costs Act.

(3) Specific information which is sufficient to demonstrate that the applicant meets the definition of "party" under the Costs Act.

(4) An itemized list of recoverable fees and expenses including hours worked, the rate charged, a reasonable description of the work performed during those hours, and the nature and reasonableness of the expenses.

(5) The basis for the allegation that the position of the Department was not substantially justified.

(b) An applicant shall file an application with the Board within 30 days of the date of the final order under which the applicant claims to have prevailed, and shall be docketed at the same number as that order. An applicant shall simultaneously serve upon counsel of record for the Department a copy of the application in the same manner that it is filed with the Board. Service by telefax shall satisfy the requirements of this rule, if an additional copy is mailed on the same day.

(c) An application may be denied sua sponte if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested.

Comment: In preparing the petition to submit to the Board, an applicant should consider the material contained in 4 Pa. Code Chapter 2, Subchapter A (relating to submission and consideration of applications for awards of fees and expenses) and the Board's prior decisions.]

§ 1021.173. [Response to application] **(Reserved)**.

[(a) The Department or other interested party shall file its response within 15 days of the filing of an application. The response shall include the following:

- (1) Raise any challenge to the sufficiency of the application.
- (2) Demonstrate, if applicable, that the Department's action was substantially justified.
- (3) Identify special circumstances which would make the award unjust.

(b) If the response asserts that the action of the Department was substantially justified, it shall include the following:

- (1) A statement of the Department's basis for its action.
- (2) A summary of the testimony and exhibits either in evidence or offered into evidence in support of that basis.

(3) The legal justification for the action taken.

(c) When an applicant prevails and no record has been made before the Board, the Department may justify its action with affidavits.]

§ 1021.174. [Disposition of application] **(Reserved)**.

[(a) Each party shall file a brief simultaneously with the filing of its application or response.

(b) The Board will award fees and expenses based upon the application and response if it finds the following:

(1) The applicant is a prevailing party as defined in the Costs Act.

(2) The application presents sufficient justification for the award of fees and expenses.

(3) The action of the Department was not substantially justified, in that it had no reasonable basis in law or in fact.

(4) There are no special circumstances which would make the award unjust or unreasonable.

(c) The Board will not find the Department's action to be substantially justified, if the response fails to present a prima facie case in support of the Department's legal position.

(d) The Board may reduce the amount of an award of fees and expenses, or deny the award, to the extent that the applicant engaged in conduct during the course of the proceedings which unduly and unreasonably protracted the final resolution of the matter in controversy.]

ATTORNEY FEES AND COSTS AUTHORIZED BY STATUTE [OTHER THAN THE COSTS ACT]

§ 1021.181. Scope.

This subchapter applies to requests for costs and attorney fees when authorized by statute [other than the Costs Act]. When a statute provides procedures inconsistent with these procedures, the statutory procedures will be followed.

APPELLATE MATTERS

§ 1021.201. Composition of the certified record on appeal to Commonwealth Court.

* * * * *

(d) [In the event that a legal document was electronically filed] **For electronic filings**, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.39(c) (relating to docket) that the official copy of an electronically filed document shall be that appearing on the Board's [website] **web site**.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PENNSYLVANIA 17105-8457
(717) 787-3483
TELECOPIER: (717) 783-4738
<http://ehb.courtapps.com>

April 30, 2014

Honorable Gene Yaw
Chair, Senate Committee on
Environmental Resources and Energy
Room 362 Main Capitol
Harrisburg, PA 17120-3023

Honorable John Yudichak
Minority Chair, Senate Committee on
Environmental Resources and Energy
Room 366 Main Capitol
Harrisburg, PA 17120-3014

Honorable Ron Miller
Chair, House Committee on
Environmental Resources and Energy
115 Ryan Office Building
Harrisburg, PA 17120-2093

Honorable Greg Vitali
Minority Chair, House Committee on
Environmental Resources and Energy
38B East Wing
Harrisburg, PA 17120-2166

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
Attn: Scott Schalles

RE: Final Revisions to Environmental Hearing Board Rules of Practice and Procedure, 25 Pa.
Code Chapter 1021 (Final Rulemaking 106-10) (resubmittal)

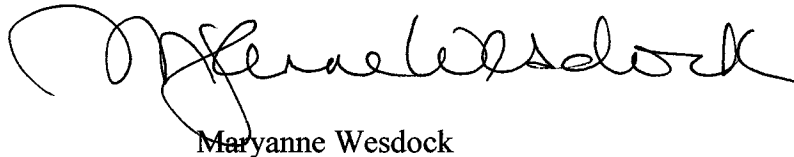
Dear Sir or Madam:

In accordance with the provisions of the Regulatory Review Act, the Environmental Hearing Board is transmitting a copy of final revisions to its rules of practice and procedure at 25 Pa. Code Chapter 1021 (Final Rulemaking 106-10) for review.

An earlier copy was submitted to your office on April 17, 2014 but was withdrawn in order to correct the formatting.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Maryanne Wesdock". The signature is fluid and cursive, with a large initial "M" and "W".

Maryanne Wesdock
Senior Assistant Counsel
ENVIRONMENTAL HEARING BOARD
mwesdock@pa.gov
(412) 565-5245

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

I.D. NUMBER: 106-10
 SUBJECT: RULES OF 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

2014 APR 30 AM 10:10

RECEIVED
IRRC

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<i>HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY</i>
4/30/14	<i>R. Kozmerinski</i>	MAJORITY CHAIR <u>HONORABLE RON MILLER</u>
4-30-14	<i>Jenni Kuhl</i>	MINORITY CHAIR
		<i>SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY</i>
4/30/14	<i>P. Gilroy</i>	MAJORITY CHAIR <u>HONORABLE GENE YAW</u>
4/30/14	<i>R. Kof</i>	MINORITY CHAIR
4/30/14	<i>K Cooper</i>	<i>INDEPENDENT REGULATORY REVIEW COMMISSION</i>
		<i>ATTORNEY GENERAL (for Final Omitted only)</i>
		<i>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</i>