

RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 20]

Conditions and Requirements Under Which Domestic Animals May Be Offered as Prizes

The Department of Agriculture (Department) establishes regulations in Chapter 20 (relating to conditions and requirements under which domestic animals may be offered as prizes).

The act of April 29, 1994 (act) (P. L. 146, No. 24) amended the cruelty to animals provision of the Crimes Code to establish, in 18 Pa.C.S. § 5511.1 (relating to live animals as prizes prohibited), a general prohibition against the offering or giving away of any live animal—except fish—as a prize in a game. Under section 2 of the act, 18 Pa.C.S. § 5511.1(b), this general prohibition does not apply to a domestic animal given away in connection with an agricultural, educational or vocational program sponsored or sanctioned by the Department. Section 2 of the act also requires, in 18 Pa.C.S. § 5511.1(b)(2), the Department to promulgate regulations necessary to provide the conditions and requirements of live animal offerings within that exception. It is under the foregoing statutory authority that these regulations are adopted.

Compliance with Executive Order 1996-1, "Regulatory Review and Promulgation"

Executive Order 1996-1, "Regulatory Review and Promulgation," requires that any regulation address a compelling public need.

These regulations prescribe the conditions and requirements which, if met, would allow an agricultural, educational or vocational program to offer a domestic animal as a prize in a contest. The regulations define and clarify terms that are not defined in the act, and set forth necessary procedures by which an agricultural, educational or vocational program can be considered sponsored or sanctioned by the Department for purposes of the exception set forth in 18 Pa.C.S. § 5511.1(b)(1).

In the absence of these regulations, an entity such as a 4-H club or a chapter of the Future Farmers of America would run the risk of being prosecuted under 18 Pa.C.S. § 5511(a) if it conducted a traditional raffle, competition or similar game in which an animal that has been historically considered a farm animal is given away as a prize.

These regulations also provide guidance to police officers and agents of societies for the prevention of cruelty to animals—which are charged with enforcement of 18 Pa.C.S. § 5511.1.

The Department is satisfied that these regulations serve a compelling public need imposed by the General Assembly, and that these regulations otherwise comply with Executive Order 1996-1.

Comments

Notice of proposed rulemaking was published at 25 Pa.B. 3870 (September 16, 1995) and provided for a 30-day public comment period.

Comments were received from the Federated Humane Societies of Pennsylvania, the Pennsylvania Legislative

Animal Network (PLAN), Representative Jerry L. Nailor, the House Agriculture and Rural Affairs Committee (House Committee) and the Independent Regulatory Review Commission (IRRC). These comments, and the Department's responses, follow.

The Federated Humane Societies of Pennsylvania offered its support for the proposed regulations recommending that they be adopted without changes.

Representative Jerry L. Nailor, the prime sponsor of the act, offered general support for the regulations, and concurred with all of the comments offered by PLAN.

IRRC offered the suggestion that the term "domestic animal" supplant "live domestic animal" throughout the regulations to make it more consistent with the act.

The Department accepts this comment, and has revised the regulations accordingly.

Several comments were received with respect to § 20.2 (relating to definitions).

PLAN suggested the definition of "live animal" include germ plasm, embryos and fertile ova. IRRC suggested that this definition be deleted altogether, since the act is sufficiently clear.

The Department accepts IRRC's suggestion, and has deleted the term "live animal."

With respect to the definition of "sanction," PLAN asked for clarification of what is meant by a "designee" of the Secretary, and an estimate of the number of designees the Secretary plans to appoint.

The Department intends the term "designee" to refer to those employees of the Department's Bureau of Animal Industry (Bureau) who will oversee the day-to-day administration of the act and its attendant regulations. These designees are most likely to include the Bureau Director and, as deemed necessary, other licensed practitioners of veterinary medicine employed by the Bureau.

PLAN and IRRC recommended the definition of "vocational program" include programs having the preparation of its participants for careers in the agricultural sciences—as opposed to the sciences in general.

The Department accepts this comment, and has revised the definition accordingly.

Proposed § 20.4 (relating to coupons or discounts as prizes) specified that a person who offers or gives away as a prize in a game a discount or coupon that would allow a domestic animal to be purchased for less than \$50 is giving or offering to give away a domestic animal as a prize in a game, for purposes of the act and this chapter. IRRC questioned whether this less-than-\$50 figure is a nominal sum justifying the transaction being considered a giving or offering to give away with respect to a domestic animal. IRRC requested the rationale behind the Department's use of this less-than-\$50 figure.

The Department intended § 20.4 to prevent game operators from avoiding the requirements of the act by awarding coupons or discounts that would allow a game participant to acquire a domestic animal at significantly less than its value. The Department acknowledges that this problem is more prevalent among game operators who offer as prizes coupons or discounts toward the purchase of live animals other than domestic animals. In light of this fact, and the Department's narrowly-prescribed authority under the act, the Department has

deleted proposed § 20.4 in its entirety and renumbered subsequent sections accordingly.

IRRC raised several concerns regarding § 20.6 (relating to applying for designation as a program sanctioned by the Department). Initially, IRRC suggested the Department develop a basic application form requiring the information described in proposed § 20.6(b), and inform prospective applicants of how they may obtain these application forms.

The Department accepts this suggestion. A basic application form will be provided upon request. A new § 20.6(b) has been added, describing the method by which a person may obtain an application. Proposed § 20.6(b)—(f) have been redesignated as § 20.6(c)—(g).

IRRC recommended § 20.6(c)(5) be made more specific by substituting the phrase “that may be offered or given away as a prize” for the word “offered.”

The Department accepts this recommendation, agrees that it adds clarity and has amended § 20.6(c)(5) accordingly.

IRRC noted that § 20.6(f) and (g) prescribe definite periods within which specific actions must be taken and that § 20.6(e), by contrast, merely required the Department to provide prompt notification of deficiencies in an application.

The Department accepts IRRC’s recommendation that § 20.6(e) be more specific as to what constitutes prompt notification. That subsection has been revised to require the notification be forwarded within 10 days of receiving the application.

IRRC noted that § 20.6(g) required an applicant’s hearing request to be delivered to the Department within 20 days from the date upon which the applicant received the Department’s decision, and questioned how the Department would be able to confirm the date upon which the applicant received the Department’s decision. As a more workable alternative, IRRC suggested the Department commence the appeal period on the date the decision is mailed to the applicant—rather than the date upon which it is received by the applicant—and add 5 days to the 20-day appeal period to allow for delivery time.

The Department accepts this recommendation, and has revised § 20.6(g) accordingly.

IRRC offered the comment that § 20.7 (relating to circumstances under which a game is conducted in connection with an agricultural, educational or vocational program) should be applicable only to programs sanctioned by the Department, and not to programs sponsored by the Department.

Section 20.4 requires the program sponsored by the Department to be the entity that actually conducts the game. Section 20.7 provides for a circumstance where the game could be conducted by some other entity. In light of this, the Department agrees § 20.7 should only be applicable to programs sanctioned by the Department. That section has been revised accordingly.

IRRC noted § 20.8 (relating to conditions and requirements of domestic animal offerings) required a person offering or giving away a domestic animal as a prize in accordance with that section to retain the veterinarian’s certification required at § 20.8(a)(2) and the instructions for animal care required at § 20.8(a)(3), without specifying the period for which these documents should be retained.

Since a violation of the act would constitute a summary criminal offense, IRRC recommended the regulation require retention of these records for at least 2 years, the applicable statute of limitations, as established at 42 Pa.C.S. § 5552 (relating to other offenses).

The Department accepts IRRC’s recommendation, and has revised § 20.8(a)(2) and (3) to include specific language provided by IRRC.

IRRC suggested a section be added to these regulations repeating the penalty provisions established by the act in 18 Pa.C.S. § 5511.1(d).

The Department implemented this suggestion by adding the appropriate language at § 20.8(b).

PLAN asked whether the citation for the Dog Law (3 P. S. §§ 459-101—459-1205) set forth at § 20.8(c) is accurate.

The Department responds that the citation is, in fact, accurate.

The House Committee offered its general support for the proposed regulations, and raised two separate scenarios in which bovine animals would be awarded as prizes in a game. The first scenario involved a Rotary Club raffling a bovine animal at a Grange Fair. The second scenario involved a newspaper awarding a bovine animal to the winner of a county 4-H steer show. The House Committee expressed its expectation that these activities would be permissible under the regulations.

In each scenario the entity seeking to conduct the contest would have to either apply for and obtain the written sanction of the Department under § 20.5 (relating to circumstances under which sanction is required) and § 20.6 or, if it is conducting the game to benefit an agricultural, educational or vocational program (such as a grange fair or county 4-H club) such that at least 90% of the game proceeds would benefit the program, the program itself could apply for the written sanction of the Department. The facts of each scenario would determine whether a domestic animal can be awarded as a prize in a game and by which process this could be accomplished in compliance with the act. To clearly distinguish between games and vocational exhibitions or competitions, though, the definition of “game” at § 20.2 has been revised to specifically exclude exhibitions or competitions of agricultural animals for agricultural vocational purposes.

Fiscal Impact

Commonwealth

The regulations will impose no costs and have no fiscal impact upon the Commonwealth.

Political Subdivisions

The regulations will impose no costs and have no fiscal impact upon political subdivisions.

Private Sector

The regulations will require entities conducting games in which domestic animals are awarded as prizes to incur the cost of obtaining a veterinarian’s certification that the animals are apparently free of diseases or physical defects. Although the costs involved are not readily estimable, they should be reduced to some extent by the fact that veterinarian certifications are rather commonly required with respect to cattle, horses, goats, sheep and swine moving in commerce.

General Public

The regulations will impose no costs and have no fiscal impact upon the general public.

Paperwork Requirements

The regulations are not expected to result in an appreciable increase in paperwork. The Department will develop a simple application form by which persons may seek the Department's written sanction in accordance with § 20.6.

Contact Person

Further information is available by contacting the Department of Agriculture, Attention: Max A. Van Buskirk, Jr., VMD, Bureau of Animal Industry, 2301 North Cameron Street, Harrisburg, PA 17110-9408

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 5, 1995, the Department submitted a copy of the notice of proposed rulemaking published at 25 Pa.B. 3870 to IRRC and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Committee and the Senate Committee on July 9, 1996, and were approved by IRRC on July 18, 1996, in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department of Agriculture finds that:

(1) Public notice of intention to adopt the regulations encompassed by this order has been 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, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and that the comments received were considered.

(3) The modifications that were made to these regulations in response to comments received do not enlarge the purpose of the proposed regulations published at 25 Pa.B. 3870.

(4) The regulations meet the requirements of Executive Order 1996-1, "Regulation Review and Promulgation."

(5) The adoption of the regulations in the manner provided by this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department of Agriculture, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code, are amended by adding §§ 20.1—20.9 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General for approval as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

CHARLES C. BROSIUS,
Secretary

(Editor's Note: The proposal to add § 20.10 has been withdrawn by the Department.

For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa.B. 3776 (August 3, 1996).)

Fiscal Note: 2-92. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 7. AGRICULTURE****PART I. BUREAU OF ANIMAL INDUSTRY****CHAPTER 20. CONDITIONS AND REQUIREMENTS UNDER WHICH DOMESTIC ANIMALS MAY BE OFFERED AS PRIZES**

Sec.	
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§ 20.1. Purpose.

This chapter, which is authorized under 18 Pa.C.S. § 5511.1(b)(2) (relating to live animals as prizes prohibited), establishes the conditions under which an agricultural, educational or vocational program may conduct a game at which a domestic animal may be offered or given away as a prize. It also establishes requirements governing how a game shall be conducted.

§ 20.2. Definitions.

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

Act—The act of April 29, 1994 (P. L. 142, No. 24), which amended 18 Pa.C.S. § 5511(j) (relating to cruelty to animals) and established 18 Pa.C.S. § 5511.1 (relating to live animals as prizes prohibited).

Agricultural program—A program having the cultivation of soil or water, the production of plants, the production of domestic animals or the production of some agricultural product as its primary purpose.

Department—The Department of Agriculture of the Commonwealth.

Domestic animal—A dog, cat, equine animal, bovine animal, sheep, goat or porcine animal.

Educational program—A program having the instruction of its participants in agriculture, subjects related to agriculture, the sciences or rural community leadership as its primary purpose.

Fish—A live animal member of the superclass *Pisces*.

Game—A drawing, lottery, contest, sweepstakes or similar activity engaged in for diversion, amusement or profit, regardless of whether its outcome is determined by the skill of the participant, random chance or some combina-

tion of the two. The term does not include an exhibition or competition of agricultural animals for agricultural vocational purposes.

Person—An individual, partnership, sole proprietorship, corporation or business entity.

Prize—An article or other consideration, such as a coupon or discount, awarded to a game contestant or any other person as a result of a contestant's participation in a particular game, regardless of whether the awarding of the prize is contingent upon achieving some level of success in the game or upon mere participation in the game.

Sanction—The action taken by the Department when the Secretary or a designee issues a written notice that a particular program is an agricultural, educational or vocational program to which the exception in 18 Pa.C.S. § 5511.1(b)(1) applies.

Secretary—The Secretary of the Department.

Sponsor—The relationship of the Department to an entity to which it awards grants under authority of the Agricultural and Rural Youth Development Act (3 P. S. §§ 1601—1609), the Pennsylvania Agricultural Fair Act (3 P. S. §§ 1501—1508) or other statutory authority by which the Department may award grants or extend loans to agricultural, educational or vocational programs.

Vocational program—A program having the preparation of its participants for careers in agriculture or the agricultural sciences as its primary purpose.

§ 20.3. Requirement of sponsorship or sanction.

A person may not give or offer to give away any live animal, except fish, as a prize in a game unless the animal is a domestic animal and is offered or given away in connection with an agricultural, educational or vocational program sponsored or sanctioned by the Department.

§ 20.4. Obtaining status as a program sponsored by the Department.

An agricultural, educational or vocational program shall be considered sponsored by the Department for purposes of the act, without the requirement that it obtain written confirmation of this status from the Department in advance of conducting a game at which a domestic animal is to be offered or given away as a prize, if the following apply:

(1) The program has been sponsored by the Department at any time during the year preceding the date upon which the domestic animal is to be offered or given away as a prize in a game.

(2) The program is the entity that actually conducts the game and offers or gives away the live domestic animal.

§ 20.5. Circumstances under which sanction is required.

An agricultural, educational or vocational program that is not sponsored by the Department may apply for and obtain written confirmation that it is sanctioned by the Department for purposes of the act prior to conducting any game at which a domestic animal is to be offered or given away as a prize.

§ 20.6. Applying for designation as a program sanctioned by the Department.

(a) *Application required.* An agricultural, educational or vocational program seeking the designation that it is

sanctioned by the Department for purposes of the act shall submit a written application for the designation to the Department.

(b) *Obtaining an application.* A person may obtain an application form by mailing a written request to the address in subsection (d).

(c) *Contents of application.* The application form shall contain:

(1) The name and address of the person who proposes to offer or give away a domestic animal as a prize in a game to be held in connection with an agricultural, educational or vocational program.

(2) A description of the agricultural, educational or vocational activities conducted or promoted by the program described in paragraph (1).

(3) A statement identifying any entity that shall receive any portion of the proceeds of the game and setting forth the percentage of the proceeds that the entity shall receive.

(4) A statement setting forth the date, time and location of both the agricultural, educational or vocational program and the game at which it is proposed that any domestic animal be offered or given away as a prize.

(5) A description of the species and number of domestic animals that will be offered or given away as a prize.

(6) A copy of the written instructions for proper care of the domestic animal that would be issued to any person to whom the domestic animal is given.

(d) *Delivery of application.* The application form shall be mailed or delivered to the following address:

Bureau of Animal Industry
 Division of Regulation and Compliance
 Agriculture Building, Room 403
 2301 North Cameron Street
 Harrisburg, PA 17110

(e) *Completeness review.* The Department will review each application for completeness. If the application is incomplete, or if additional information is required, the Department will, within 10 days of receiving the application, notify the applicant of this deficiency. The notification may be accomplished by telephone or by mailing a written notice.

(f) *Determination.* Within 20 days of receiving a complete application, the Department will issue to the applicant written notice of whether the agricultural, educational or vocational program described in the application is sanctioned by the Department for purposes of the act. If the written notice states that the program is sanctioned by the Department, it shall also set forth an expiration date for this sanction.

(g) *Reconsideration.* An applicant may request that the Secretary conduct a hearing to review and reconsider any decision issued under subsection (f). The hearing request shall be in writing, and be delivered to the Department within 25 days from the date the Department's decision was mailed to the applicant. Upon receipt of a timely hearing request, the Secretary will designate a hearing examiner to take testimony, consider evidence and submit a proposed adjudication for the Secretary's consideration on the issue of whether a modification of the original decision is warranted. The Secretary will then issue a final adjudication.

§ 20.7. Circumstances under which a game is conducted by a program sanctioned by the Department.

A game may be conducted by a program sanctioned by the Department if one of the following applies:

(1) The game is conducted by the agricultural, educational program sanctioned by the Department and the program receives the proceeds of the game.

(2) The game is conducted by some other entity, such as a vendor or subcontractor, and the agricultural, educational or vocational program sanctioned by the Department receives at least 90% of the proceeds of the game.

§ 20.8. Conditions and requirements of domestic animal offerings.

(a) *General.* A person who offers or gives away a domestic animal as a prize in a game conducted in connection with an agricultural, educational or vocational program sponsored or sanctioned by the Department shall adhere to the following conditions and requirements:

(1) *Unweaned animals.* A domestic animal may not be offered or given away unless it is weaned. An animal is weaned if it accepts sufficient food and water to meet its nutritional needs from a source other than a parent.

(2) *Veterinarian's certification.* A domestic animal may not be offered or given away unless it is accompanied by written certification from a licensed veterinarian that it has been examined and found free of evidence of disease or physical defect no more than 10 days prior to the offering or giving away. The person offering or giving away the domestic animal shall retain a copy of this veterinarian certification for 2 years from the date the domestic animal was offered or given away.

(3) *Instructions for handling and care.* A domestic animal may not be offered or given away unless it is accompanied by a written statement setting forth its origin, age, sex and instructions for its proper care. The person offering or giving away the domestic animal shall retain a copy of this statement for 2 years from the date the domestic animal was offered or given away.

(4) *Persons under 18 years of age.* A domestic animal may not be given away to a person under 18 years of age unless the person giving away the animal first obtains the written consent of a parent or guardian of the prospective recipient of the animal. The person offering or giving away the domestic animal shall retain a copy of this written consent for 2 years from the date the domestic animal was given away.

(b) *Violation of conditions and requirements.* If the Department has sponsored or sanctioned an agricultural, educational or vocational program, that sponsorship or sanction will be considered void if the person offering or giving away a domestic animal as a prize in a game held in connection with the program violates a condition in subsection (a). If a person violates a condition in subsection (a), the statutory exception in 18 Pa.C.S. § 5511.1(b) (relating to live animals as prizes prohibited) does not apply, and the person offering or giving away the domestic animal shall be subject to prosecution under the act. The violation will be prosecuted as a summary criminal offense punishable by a fine of not more than \$250.

(c) *Dog Law.* The requirements of this chapter do not supersede or supplant duties or responsibilities imposed under authority of the Dog Law (3 P. S. §§ 459-101—459-1205).

§ 20.9. Liability.

The Department will not be liable or otherwise responsible for the condition of a domestic animal offered or given away in accordance with the act and this chapter.

[Pa.B. Doc. No. 96-1430. Filed for public inspection August 30, 1996, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) by this order amends Chapter 1021 (relating to practice and procedure) to read as set forth at Annex A. The amendments modify the rules of practice and procedure before the Board by adding or correcting terminology relating to the Board and implementing improvements in practice and procedure.

The Board approved the final-form regulations at its April 10, 1996, meeting.

Effective Date

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

Contact Person

For further information, contact M. Diane Smith, Secretary to the Board, 2nd Floor, Rachel Carson State Office Building, P. O. Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. If information concerning this notice is required in an alternative form, Ms. Smith may be contacted at the above number. TDD users may telephone the Board through the AT&T Pennsylvania relay center at (800) 654-5984.

Statutory Authority

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

Comments and Revisions to Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC); Brendan Collins, Esq. of Ballard Spahr Andrews & Ingersoll; John N. Cox, of Verona, PA; and the Office of Chief Counsel of the Department of Environmental Protection (DEP). The commentators had specific comments which will be addressed on a section-by-section basis. IRRC incorporated some of these comments into its review document, as well as making comments and recommendations of its own. Thus, IRRC's comments and recommendations will be separately addressed only where they raise issues not otherwise raised by the individual commentators.

§ 1021.53 (relating to amendments to appeal; nunc pro tunc appeals)

These amendments provide for an appeal as well as nunc pro tunc appeal. The existing section deals only with a nunc pro tunc appeal.

One commentator noted extensive comments to § 1021.53. The commentator noted that amending a notice of appeal inserts new issues into the appeal, expands the scope of discovery and increases the amount of preparation for any party responding to the appeal. It was suggested that if the Board elects to allow the appellant 20 days to amend the appeal as a matter of right, the time allowed for discovery and dispositive motions under § 1021.81 (relating to prehearing procedure) also should be expanded.

The Board believes that such an automatic extension of time is unnecessary because in any given appeal an amendment may not be sought. If an amendment is filed, the Board member assigned to deal with these appeal matters on a case-by-case basis will work with the parties to make necessary adjustments in the discovery schedule. In its response, the Rules Committee noted that subsection (e) and § 1021.17 (relating to extensions of time; continuance of hearings) and § 1021.81(a)(3) and (b) provide various mechanisms for the parties jointly and individually, to request additional time for discovery. Consequently, the Rules Committee does not believe that any party's rights will be prejudiced by proceeding under § 1021.53. IRRC concurred with the Board and the Rules Committee. The Board's intended approach and the rules provisions previously cited will adequately address this commentator's concern. Accordingly, this section of the final rule has not been modified.

This commentator expressed concern that subsection (b) allowing new issues to be raised beyond the 20-day amendment of right period will complicate and prolong litigation. The Board believes that the concern is unwarranted as any prolonged litigation will be prevented by the assigned Board member's case management strategy. However, while it is possible that the amendments may lengthen the process somewhat in certain cases, it is important to protect the right of appeal by giving the appellant adequate time to develop its claims that the action appealed from was improper. IRRC concurs with the Board's position. Therefore, the final version of subsection (b) has not been modified.

The same commentator suggested that allowing amendments beyond the 20-day period should be limited to those arising from the discovery of new facts. Neither IRRC nor the Board concur with this suggestion as this is already provided for in subsection (b)(1) and (2). The Board will not modify the proposal for this reason.

Another commentator suggested that the notice of appeal need not set forth any grounds for the appeal until after discovery is complete. The Board rejects this suggestion as it fails to recognize that the notice of appeal before the Board is analogous to a complaint in civil practice. The notice of appeal in civil practice comes not only after all discovery has taken place but after there has been a hearing or a decision on dispositive motions in which the issues of the case have been thoroughly developed and dealt with.

IRRC recommended minor changes in the wording of subsection (b) to improve construction and clarity and the Board concurs with this recommendation. The final rule has been modified to reflect this recommendation.

Regarding subsection (c), a commentator stated that an amendment of a notice of appeal shortly before the filing of prehearing memoranda comes too late in the process and undermines the newly established prehearing procedures of § 1021.81. The commentator recommends that the period for requesting amendments should end 30 days before the final date for dispositive motions.

In considering this comment, the Board concluded that there is merit in the view that an amendment permitted just before the filing of prehearing memoranda may come too late. On the other hand, the Board believes that a bar on amendments before dispositive motions are filed may be too early because a party may not fully appreciate the strengths or weaknesses of its position until after discovery is complete and dispositive motions are fully responded to. Accordingly, the Board will modify the section so as to bar amendments which are sought after the case is scheduled for a hearing or after the Board rules on dispositive motions, whichever is later. This will conform with the practice in Pennsylvania courts where amendments to complaints are freely allowed at least before the filing of prehearing memoranda.

The Rules Committee did not believe that any party's rights would be prejudiced by proceeding under § 1021.53 as proposed because subsection (e) and §§ 1021.17 and 1021.81(a)(3) and (b) provide various mechanisms for the parties, jointly or individually, to request additional time for discovery under this section. IRRC concurred with the Rules Committee but requested the Board review § 1021.53 with other provisions of this rulemaking and with all other Board prehearing procedure rules to be sure they are all internally consistent. The Board has reviewed the rules for internal consistency. The final rule has not been modified except as previously noted.

Regarding subsection (d), the commentator noted that §§ 1021.73 and 1021.74 (relating to dispositive motions; and miscellaneous motions) provide two very different procedures for filing motions and suggested that only one procedure should be specified to avoid confusion. The Board and the Rules Committee concurred with this suggestion. The Board decided to strike the reference to § 1021.73 and include "except that the motion shall be verified and supported by affidavits." The final rule has been modified to incorporate these changes.

IRRC recommended that the Board substitute "deemed" for "felt to be necessary therefor" in subsection (e) to improve structure and clarity. The Board concurs with the suggestion and has modified the final rule to reflect this suggestion.

IRRC also recommended that the Board delete some of the language contained in subsection (f) or make other corrective amendments in order for the rule to concur with the Board's limits of jurisdictional authority. The Board considered the recommendation and deleted subsection (f) of the proposal in the final version.

In reviewing the proposed section, the Board noted that the proposal inadvertently deleted an existing subsection specifying the procedure for filing nunc pro tunc appeals. The final rule has been modified to contain this provision as subsection (f).

In addition, § 1021.51(e) (relating to commencement, form and content) has been modified to make it clear that a failure to raise a ground for appeal in the initial notice of appeal will not result in a waiver if the appeal is amended to state that ground under § 1021.53.

§ 1021.62 (relating to intervention)

IRRC recommended that this section be reorganized to improve its construction and clarity. The second sentence in subsection (c) should be the only sentence in that subsection, the current proposed first sentence in subsection (c) should become subsection (e), and the current proposed subsections (e) and (f) should be relabeled as (f)

and (g), respectively. The Board concurs with this recommendation. The final rule has been modified to reflect this recommendation.

§ 1021.122 (relating to reopening of record prior to an adjudication)

One commentator stated that subsection (b)(3) appeared to sanction the reopening of the record merely on the recent discovery of noncumulative evidence. He suggested that the noncumulative criteria should be a threshold requirement for all other circumstances in which the record may be reopened, but should not be a stand-alone reason for reopening the record. The Rules Committee noted in its response that some language which appeared in prior drafts of the rule did not appear in the published version and some words were added for style conformity. The Rules Committee recommended that the Board make changes to the rule to reflect the prior drafts. IRRC and the Board concur. Subsection (b) has been modified to reflect this recommendation.

The Board also received a suggestion that it adopt a rule similar to an existing Pennsylvania Rule of Appellate Procedure which would preclude communications with the Board after the case has been submitted other than a letter bringing new case law to the attention of the Board. IRRC noted that this is a worthwhile suggestion and asked the Board to consider it. The Board believes that such a rule is unnecessary. Counsel freely brings new case law to the attention of the Board even in the absence of a rule, and, since the Board is more analogous to a trial than an appellate court, it is important that free communication be permitted even after the submission of final briefs. The Board now accepts submissions with respect to new case law in either letter or motion form. Furthermore, it has been longstanding policy at the Board for its members and staff to routinely remain abreast of the current environmental law in this Commonwealth.

One commentator suggested that subsection (d) should apply only to petitions filed under subsection (b) as it would be inappropriate to require a petitioner who is filing for reopening due to a change of law to demonstrate when evidence was discovered. The Board considered the suggestion and amended subsection (c). The final rule has been modified by adding the following sentence at the end of the subsection: "Such a petition need not meet the requirements of subsection (d)(2) and (3)."

§ 1021.124 (relating to reconsideration of final orders)

One commentator stated that subsection (b) does not provide sufficient time for the party to respond when service is by mail. It recommended that the section be revised to require the petitioner to serve all parties simultaneous with, and in the same manner as, the filing with the Board. IRRC concurred with the recommendation. In addition, IRRC recommended that the section also include a statement that the running of the Board's reconsideration period occurs contemporaneously with the running of the 30-day right of appeal to Commonwealth Court. The Board noted that the recommendations have merit and has modified the final rule to reflect these recommendations.

§ 1021.132 (relating to application for fees and expenses)

IRRC recommended amendments to subsection (a) for improved clarity and structure so it would read as follows:

"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:"

The Board concurs with IRRC's recommendation. The final rule has been modified to include these amendments.

§ 1021.151 (relating to application for counsel fees under more than one statute)

IRRC suggested that the Board should further amend this section to furnish additional instructional information regarding the application of this section or incorporate a reference to other rules for how determinations will be made under this section. The Board believes this is unnecessary because it is obvious from the structure of the rule that the procedures set forth in the previous sections are to be followed except when those procedures may be inconsistent with the specific statute under which the application is being made. To provide any further instruction would require a survey of procedures applicable under a great number of environmental statutes when the Board rarely receives applications for counsel fees under statutes other than the Costs Act or the Surface Mining Law. The Board has asked the Rules Committee for a recommendation on a rule specific to fee applications under the Surface Mining Law and intends to propose such a specific rule in the near future.

Sunset Date

A sunset date has not been established for these regulations. The effectiveness of the amendments will be evaluated on an ongoing basis by the Board and the Rules Committee.

Regulatory Review

On December 8, 1996, as required by section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Board submitted copies of the proposed revisions, which were published at 25 Pa.B. 5981 (December 23, 1995), to IRRC 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, also provided IRRC and the Committees with the Regulatory Analysis Form prepared in compliance with Executive Order 1982-2 (relating to improving government regulations) and copies of the comments received.

In preparing the final-form regulations, the Board has considered all comments received from the public and IRRC. No comments on the proposed amendments were received from either of the legislative committees.

These final-form regulations were approved by the House Environmental Resources and Energy Committee, and were approved by the Senate Environmental Resources and Energy Committee on July 18, 1996. IRRC met on July 18, 1996, and approved the regulations under section 5(c) of the Regulatory Review Act.

Findings

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 final-form regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) These regulations are necessary and appropriate for administration of the act.

Order

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.2, 1021.32, 1021.51, 1021.53, 1021.57, 1021.62, 1021.120, 1021.122 and 1021.124; and by adding §§ 1021.123, 1021.125, 1021.131—1021.134 and 1021.141—1021.144 and 1021.151 to read as set forth in Annex A. (*Editor's Note:* § 1021.51 was not included in the notice of proposed rulemaking at 25 Pa.B. 5981.)

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel for review as to legality and form as required by law.

(c) The Chairperson 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.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

GEORGE J. MILLER,
Chairperson

Fiscal Note: Fiscal Note 106-2 remains valid for the final adoption of the subject regulations.

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa.B. 3776 (August 3, 1996).)

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND PROCEDURES

Subchapter A. 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:

Act—The Environmental Hearing Board Act (35 P. S. §§ 7511—7516).

Action—An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of this Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from complaints for the assessment of civil penalties.

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.

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 Law.

Department—The Department of Environmental Resources or its successor agencies.

Dispositive motion—A motion that seeks to resolve the issues in an appeal without the need for hearing or further hearing. The term includes a motion to quash appeal, a motion to dismiss, a motion for summary judgment, and a motion for partial summary judgment, but not a motion in limine.

Hearing examiner—A person other than a Board member designated by the Board to preside at hearings or conferences.

Intervenor—A person intervening or petitioning to intervene as provided by § 1021.62 (relating to intervention) when admitted as a party to a proceeding.

Party—A person with the right to institute or defend or otherwise appear and participate in proceedings before the Board. A party shall be an appellant, appellee, plaintiff, defendant or intervenor.

Permittee—The recipient of the permit, license, approval or certification in a third-party appeal.

Person—An individual, partnership, association, corporation, political subdivision, municipal authority or other entity.

Supersedeas—A suspension of the effect of an action of the Department pending proceedings before the Board.

Third-party appeal—The appeal of an action by a person who is not the recipient of a permit, license, approval or certification.

(b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions).

**Subchapter B. DOCUMENTARY FILING
SERVICE OF DOCUMENTS**

§ 1021.32. Service by a party.

(a) Pleadings, submittals, briefs and other documents filed in proceedings pending before the Board, when filed or tendered to the Board, shall be served upon participants in the proceeding. The service shall be made by delivering in person, or by mailing, properly addressed with postage prepaid.

(b) Complaints for civil penalties when served, shall be enclosed with the following:

(1) A statement certifying that it is a true and complete copy of the complaint filed with the Board.

(2) A notice to plead.

(c) Appeals from actions of the Department shall be served upon the following:

(1) The officer of the Department taking this action.

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

(d) If service of an appeal upon the recipient of a permit, license, approval or certification is required, 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. Reference should be made to § 1021.51(f) (relating to commencement, form and content).

(e) 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.

(f) Subsections (a)—(e) supplement 1 Pa. Code § 31.32 (relating to service by a participant).

**Subchapter C. 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 appeal shall 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 appeal shall set forth name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, the notification shall be attached to the appeal.

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

(f) Within 10 days after 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) Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof.

(g) The service upon the recipient of a permit, license, approval or certification as required by this section, shall subject the recipient to the jurisdiction of the Board as a party appellee.

(h) Upon order of the Board, the appellant shall provide satisfactory proof that service has been made as required by this section.

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

§ 1021.53. Amendments to appeal; nunc pro tunc appeals.

(a) An appeal may be amended as of right within 20 days after the filing thereof.

(b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant, may grant leave

for further amendment of the appeal. This leave may be granted if appellant establishes that the requested amendment satisfies one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

(c) An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.

(d) These motions shall be governed by the procedures in §§ 1021.70 and 1021.74 (relating to general; and miscellaneous motions) except that the motion shall be verified and supported by affidavits.

(e) If motion to amend is granted, a party may request, in writing, a period of time to conduct additional discovery limited to the issues raised by the amendment. These requests shall specify a period deemed necessary therefor. The Board will act on any such request as its discretion requires.

(f) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

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

COMPLAINTS FOR CIVIL PENALTIES

§ 1021.57. Form and content.

(a) The caption of a complaint for civil penalties shall be in the following form:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF _____

v. Docket No. _____

Joe Doe
234 Main Street
Smithtown, Jones County, Pennsylvania

(b) The complaint for civil penalties shall set forth the statutory authority under which the Board is authorized to assess the penalties.

(c) The complaint for civil penalties shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for civil penalties is based.

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

INTERVENTION

§ 1021.62. Intervention.

(a) A person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence.

(b) A petition to intervene shall be verified, and shall contain sufficient factual averments and legal assertions to establish the following:

- (1) The reasons the petitioner seeks to intervene.
 - (2) The basis for asserting that the identified interest is greater than that of the general public.
 - (3) The manner in which that interest will be affected by the Board's adjudication.
 - (4) The specific issues upon which the petitioner will offer evidence or legal argument.
- (c) A copy of the petition shall be served upon the parties to the proceedings.
- (d) A party may file an answer to the petition. An answer shall be verified and filed within 15 days after service of the petition, unless a shorter time is ordered by the Board.

(e) The Board will deny the petition if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene.

(f) If the Board grants the petition, the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervening party to participate in the proceedings remaining at the time of the order granting intervention.

(g) Subsections (a)—(d) supersede 1 Pa. Code §§ 35.27—35.32 and 35.36 (relating to intervention; and answers to petitions to intervene).

TERMINATION OF PROCEEDINGS

§ 1021.120. Termination of proceedings.

(a) In cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of the settlement shall be submitted to the Board for approval and the major substantive provision thereof shall simultaneously be published in the *Pennsylvania Bulletin*. The settlement, unless the terms of the settlement itself provide otherwise, is effective immediately upon approval by the Board subject to reopening if an objection is filed as set forth in subsection (b), and upheld by the Board. An aggrieved party objecting to the proposed settlement may, within 20 days after publication, appeal to the Board under this section and request a hearing on its objections.

(b) The notice shall be in substantially the following form:

RE: (Case and Docket Number)

The Commonwealth of Pennsylvania (Department of _____) and (party or parties) have agreed to a settlement of the above matter. The Commonwealth had ordered under date of _____, the (party or parties) to:

(Summarize order or appeal describing other action of the Commonwealth from which appeal was taken.)

The parties have agreed to a settlement, the major provisions of which include:

(Summarize major substantive provisions of settlement agreement.)

Copies of the full agreement are in the hands of:

(Names, addresses of counsel and telephone numbers) and at the office of the Environmental Hearing Board, and may be reviewed by an interested party on request during normal business hours.

A person believing himself aggrieved by the above settlement has a right to appeal to the Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, 400 Market Street, P. O. Box 8457, Harrisburg, Pennsylvania 17105-8457.

Appeals shall be filed within 20 days of this publication.

The Environmental Hearing Board is empowered to approve this settlement which becomes final if no objection is timely made.

(c) The parties shall be responsible for the contents and publication of the notice.

(d) The cost of publication shall be borne by the party appealing the Department action, unless otherwise ordered by the Board.

(e) When a proceeding is withdrawn from the Board by a party prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board.

REHEARING OR RECONSIDERATION

§ 1021.122. Reopening of record prior to adjudication.

(a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.

(b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:

(1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.

(2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

(c) The record may also be reopened to consider evidence which has become material as a result of a change in legal authority occurring after the close of the record. A petition to reopen the record on this basis shall specify the change in legal authority and demonstrate that it applies to the matter pending before the Board. Such a petition need not meet the requirements of subsection (d)(2) and (3).

(d) A petition seeking to reopen the record shall:

(1) Identify the evidence which the petitioner seeks to add to the record.

(2) Describe the efforts which the petitioner had made to discover the evidence prior to the close of the record.

(3) Explain how the evidence was discovered after the close of the record. A petition filed under subsection (b) shall be verified and all petitions shall contain a certification by counsel that the petition is being filed in good faith and not for the purpose of delay.

(e) The petition shall be served upon the parties to the proceedings. A petition will be treated as a miscellaneous motion under § 1021.74 (relating to miscellaneous motions) except that the motion would have to be verified or supported by affidavits. The answer shall be verified if it includes factual assertions which are not of record.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.232 and 35.233 (relating to reopening of record; and reopening by agency action).

Comment: This sets a standard which is more stringent than the materiality test of *Spang & Company v. DER*, 592 A.2d 815 (Pa. Cmwlth. 1991), but broader than the grounds justifying reconsideration. The procedure differs from the standard motions practice under §§ 1021.70—1021.74.

§ 1021.123. Reconsideration of interlocutory orders.

(a) A petition for reconsideration of an interlocutory order or ruling shall be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board.

(b) A copy of the petition shall be served upon the parties. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

(c) The failure of a party to file a petition under this section will not result in a waiver of any issue.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.241 (relating to rehearing or reconsideration).

Comment: There is no need to file a petition for reconsideration of an interlocutory order in order to preserve an issue for later argument. Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board.

§ 1021.124. Reconsideration of final orders.

(a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:

(1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.

(2) The crucial facts set forth in the petition:

(i) Are inconsistent with the findings of the Board.

(ii) Are such as would justify a reversal of the Board's decision.

(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

(b) A copy of the petition shall be served upon all parties simultaneously with and in the same manner as the filing of an appeal with the Board. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

Comment: This provides a shorter time than the standard motions practice, since reconsideration must be granted within 30 days under Pa.R.A.P. 1701. The Board's period for reconsideration of final orders will run contemporaneously with the 30-day right of appeal to Commonwealth Court.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.241 (relating to rehearing or reconsideration).

Comment: This subsection is derived from the prior § 21.122.

SANCTIONS

§ 1021.125. Sanctions.

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice

and procedure. The sanctions may include the dismissal of an appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with an order, barring the use of witnesses not disclosed in compliance with an order, barring an attorney from practice before the Board for repeated or flagrant violation of orders, or other sanctions as are permitted in similar situations by Pa.R.C.P. for practice before the court of common pleas.

ATTORNEY FEES AND COSTS AUTHORIZED BY THE COSTS ACT

§ 1021.131. Scope.

This section and §§ 1021.132—1021.134 applies to applications for an award of fees and expenses under the Costs Act.

§ 1021.132. Application for fees and expenses.

(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.

§ 1021.133. Response to application.

(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.

§ 1021.134. Disposition of application.

- (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

§ 1021.141. 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.

§ 1021.142. Application for costs and fees.

- (a) A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:
 - (1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.
 - (2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.
 - (3) A detailed listing of the costs and attorney fees incurred in the proceedings.

(b) An applicant shall file an application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the application upon the other parties to the proceeding.

(c) The Board may deny an application 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.

§ 1021.143. Response to application.

A response to an application shall be filed within 15 days of service. A factual basis for the response shall be verified by affidavit.

§ 1021.144. Disposition of application.

- (a) Each party may file a brief in accordance with a schedule established by the Board.
- (b) The Board may allow discovery and the taking of testimony in order to resolve any factual issues raised by the application and response.

ATTORNEY FEES AND COSTS UNDER MORE THAN ONE STATUTE

§ 1021.151. Application for counsel fees under more than one statute.

An applicant seeking to recover fees and costs under more than one statute shall file a single application which sets forth, in separate counts, the basis upon which fees and costs are claimed under each statute.

[Pa.B. Doc. No. 96-1431. Filed for public inspection August 30, 1996, 9:00 a.m.]