PROPOSED RULEMAKING

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) proposes to revise Chapter 1021 by amending existing rules as well as adding new procedural rules to read as set forth in Annex A.

The proposed procedural rules have several objectives:

(1) To provide the regulated community and the Department of Environmental Protection (Department) and other potential litigants with more specific guidance on how to represent their interests before the Board.

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

I. *Statutory Authority for Proposed Revisions*

The Board has the authority under section 5 of the Environmental Hearing Board Act (35 P. S. § 7515) to adopt regulations pertaining to practice and procedure before the Board. These proposed revisions are based on the recommendations of the Board's Rules Committee, a nine member advisory committee created by section 5 of the Environmental Hearing Board Act (35 P. S. § 7515), to make recommendations to the Board on its rules of practice and procedure. For the recommendations to be promulgated as regulations, a majority of the Board members must approve the recommendations.

This summary provides a description of (1) the existing rules of practice and procedure when relevant to proposed revisions; (2) the Board's proposed revisions; and (3) how the proposal differs from the Board's Rules Committee's recommendations.

Some of the recommendations of the Board's Rules Committee were not in proper Legislative style and format, so they have been proposed to be modified, where necessary, to conform to those requirements. Similarly, none of the recommendations contained proper cross references to the General Rules of Administrative Practice and Procedure, 1 Pa. Code Chs. 31, 33 and 35, so references to those rules have been proposed to be added.

The proposed amendments regarding definitions (§ 1021.2), commencement, form and content of appeals (§ 1021.51), timeliness of appeal (§ 1021.52), intervention (§ 1021.62), dispositive motions (§ 1021.73), prehearing procedure (§ 1021.81), burden of proceeding and burden of proof (§ 1021.101), official notice of facts (§ 1021.109), termination of proceedings (§ 1021.120) and composition of the certified record on appeal to Commonwealth Court (§ 1021.161) in large part reflect the evolution and refinement of practice before the Board since the mid-1970's when the Board's rules of practice and procedure were first adopted.

1. *Definitions*

The Board's existing definitions include the terms "act," "action," "Board," "Costs Act," "Department," "dispositive motion," "hearing examiner," "intervenor," "party," "permittee," "person," "supersedeas" and "third party appeal." The changes to the definitions reflect the belief that the definitions should be clear and concise.

The proposed amendments include changes to "action," "intervenor," "party" and "third party appeal." The changes include eliminating the long list of examples of what is considered an "action" included in the old definition. The definition of "intervernor" should conform to the Board's rule on intervention. Thus, the definition was rewritten to pertain to a person who has been permitted to intervene by the Board as provided by the rule on intervention (Board Rule 1021.62). The definition for "party" was also simplified to include a list of who is considered a party such as an appellant, appellee, plaintiff, defendant, permittee or intervenor. "Third party appeal" has been revised to delete the list of examples of the recipient of action to only read that it is an appeal of an action by a person who is not the recipient of the action.

The proposed amendments differ from the recommendation of the Rules Committee with the incorporation of a short list of examples in the definition of "action." The incorporation makes the rule consistent with the other rules. The Board also changed "the" to "a" in the definition of "permittee."

2. *Commencement, form and content of an appeal*

The Board's existing rules provide for the service of a copy of the notice of appeal upon the office of the Department issuing the notice of the Departmental action, the Office of Chief Counsel of the Department or agency taking the appeal and the recipient of the granting of a permit, license, approval or certification within 10 days after the filing of a notice of appeal.

The proposed amendments require that service must be made on the same day as the filing of the notice of appeal.

The proposed amendments will prevent the delay of service upon these persons after the notice has been filed with the Board, thus streamlining the appeal process.

The proposed amendments differ from the recommendation of the Committee. The Board changed the language in subsection (d) concerning the attachment of the Department "notification" to the appeal. The Board believed that it is more accurate to state that a copy of the action should be attached to the appeal. Furthermore, the Board changed the languae in subsection (f)(3) so it is consistent with the revised definitions.

3. *Timeliness of Appeal*

The existing rule on the time within which an appeal must be filed by a person who may be affected by an action of the Department, but was neither the applicant for a permit, license or other action by the Department or the target of a Department enforcement action, is ambiguous because the rule's use of the term "party appellant" is not sufficient to delineate the difference between this type of appellant and the person to whom the Department's action is issued or directed. The existing rule also contains provisions permitting the filing of a "skeletal appeal" which may later be supplemented either at the direction of the Board or at the discretion of the appellant to remedy technical difficulties with the form of the appeal or to add additional or more specific grounds for the appeal.

The proposed rule makes it clear that, unless otherwise provided by statute, a person who is neither the applicant for a permit, license or other action by the Department

nor the target of a Department enforcement action, may file a timely appeal within 30 days of the publication of the notice of the Department's action in the *Pennsylvania Bulletin*. In case there is no publication of the Department's action, a person who only learns of the Department's action at a later time may file a timely appeal if the appeal is filed within 30 days of actual knowledge of the Department's action.

The provisions permitting the filing of a "skeletal appeal" are deleted. The Procedural Rules Committee and the Board believe these provisions to be unnecessary in view of the provisions of § 1021.53 which now permit the filing of amendments to the appeal under certain conditions and time limitations. Those provisions should govern the right to make a substantive change to the appeal. In the event the appeal should fail to meet some formal requirement of § 1021.51, the appellant may remedy any such failure upon notice from the Board or as a result of a motion filed by an opposing party. Of course, failure to effect or provide proof of service on the Department would be a ground for dismissal of the appeal.

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board.

4. *Intervention*

The existing rule used the term "intervening party" in § 1021.62(f). The proposed change to the rule would replace that term with the new term of "intervenor" so the language in the rule is consistent with new definitions of "party" and "intervenor."

The proposed amendment is the same as the one approved by the Rules Committee and submitted to the Board.

5. *Dispositive motions*

The rule does not address whether or not a response or reply must be accompanied by supporting memorandum. In addition, the rule does not address whether supporting documents must be attached to the motion or be a part of the record in order for the Board to consider those documents in rendering its decision. Language was added to subsections (d) and (e) to allow the person filing a response or reply to submit an accompanying memorandum of law.

A new subsection (f) has been proposed to require that any affidavit or document which is not already part of the record, and is relied upon in support of the dispositive motion, response or reply, will be considered by the Board only if it is attached to the motion, response or reply. The Board has required this in a number of its decisions over the past several years, but some counsel continue to base their dispositive motions on documents that are attached only to their legal briefs or memoranda.

The reason for requiring that the documents be attached to the motion or response, rather than to the brief or legal memoranda is that the Board's rules on motions (§ 1021.70) require that the motion set forth in numbered paragraphs the facts in support of the motion and the relief requested and that the response to the motion set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. Unless supporting documents are attached to the motion and response, or are otherwise a part of the record, the factual issues will not be narrowed by the motion and response.

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board.

6. *Prehearing procedure*

The existing rule does not provide for the exchange of expert reports and answers to all expert interrogatories and does not authorize the Board to direct the parties to meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.

Under the rule proposed by the Procedural Rules Committee, the party with the burden of proof must serve its expert reports and answers to all interrogatories as to experts within 120 days of the date of the prehearing order. The opposing party has 30 days after receipt to exchange its expert reports and interrogatories. Dispositive motions shall be filed within 180 days of the date of the prehearing order. Under the existing rule, dispositive motions are to be filed within 30 days after the completion of discovery.

The Board believes that 180 days for the filing of dispositive motions is inappropriate in cases not requiring expert testimony. However, the members of the Procedural Rules Committee believe that dispositive motions should not be required in any case in less than 150 days after the appeal is filed. The Board is therefore proposing that if neither party proposes to call expert witnesses, dispositive motions shall be filed within 150 days after the filing of the appeal unless that time is extended by Board order.

The rule is also amended so that the Joint Proposed Case Management Order may propose alternate dates for the exchange of all expert reports and supplemental reports. The proposed rule also authorizes the Board to direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits. This is the Board's current practice.

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board with the exception of an amendment relating to the timing of dispositive motions in a case where no party intends to call an expert witness.

7. *Burden of proceeding and burden of proof*

The existing rule provides that the burden of proceeding and of proof is the same at common law in that the burden shall rest with the party asserting the affirmative of an issue. The rule sets forth the standard of the burden as by a preponderance of the evidence. If the opposing party is the party in possession of facts or has knowledge of the facts relevant to the issue, the Board may require the opposing party to assume the burden of proceeding.

In addition, the rule describes when the Department has the burden of proof and those instances when a party appealing an action of the Department shall have the burden of proof and proceeding. Subsection (d) of the rule also distributes the burden of proof when the Department issues an order requiring abatement of alleged environmental damage. Subsection (e) states that when the Department establishes that some degree of pollution exists or is threatened, the private party alleged to be responsible will be presumed to have possession, or the duty to have possession of facts relating to the quantum and nature of the damage.

Finally, the Board may take judicial notice that a given activity normally causes or creates a substantial possibility of environmental damage and the burden of rebutting the presumption is upon the party seeking to show otherwise.

The proposed rule incorporates changes in the language, additions and deletions. These changes include use of "burden of proceeding" for burden of "going forward," "recipient of a license" for "holder of a license." The additions place the burden of proof on the Department when the Department assesses or files a complaint for a civil penalty and when it issues an order or files a complaint for any other purpose. The additions also reflect the Department's revocation powers of not only a license or permit but an approval of certification. The proposed rule provides that the appellant shall have the burden of proof when the Department denies a license, permit, approval or certification. The same burden is imposed on a party who is not the recipient of the action or protests one or more aspects of its issuance or modification.

The proposed rule also includes deletions. It deletes the detailed language which imposed the burden of proof on the appellant when the Department issues an abatement order. The Board believes the Department, not the appellant, should have the burden of proof in these cases in view of the Department's ability to obtain the evidence through discovery.

The proposed rule differs from the one submitted to the Board from the Rules Committee. The Board changed the language in subsections (c)(2) and (3) to conform with new definitions.

8. *Official notice of facts*

The existing rule uses the term "participant" to describe the individual who requests the Board to take official notice.

The proposed rule replaces "participant" with "party" to insure consistency with the rules of practice and procedure and to conform with the new definitions of "party."

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board.

9. *Termination of proceedings*

Existing § 1021.120 provides for termination of a case as the result of a settlement agreement. In such a case, the terms of the settlement are to be submitted to the Board for approval, and a summary of those terms is published in the *Pennsylvania Bulletin*. A party aggrieved by the proposed settlement may appeal to the Board within 20 days of the publication of the public notice. The settlement is final upon approval of the Board. Under this rule, the Board has permitted the appeal to be terminated by the filing of a withdrawal of the appeal by the appellant even though the withdrawal may have been made as a result of a settlement agreement. Other provisions of the rule set forth the details for the public notice. The last paragraph provision of the rule states that a withdrawal of a proceeding prior to adjudication shall be with prejudice unless otherwise provided by the Board.

Most of the proposed rule is completely new. Subsection (a) of the proposed rule sets forth the three methods by which a proceeding may be terminated. As in current practice, the appeal may be terminated by filing a withdrawal of the appeal with the Board. The appeal also may be terminated either by a settlement agreement or by Board approval of a consent adjudication.

Subsection (b) of the proposed rule states that if a proceeding is withdrawn prior to adjudication, the withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board. This provision is basically the same as in the existing rule.

Subsection (c) addresses termination by a settlement agreement. The form of the agreement may be a consent order, a consent assessment of civil penalties, a permit modification or any other basis for settling an action as permitted by law. In addition, if the settlement includes a Department action, which if taken independently is required by law to be published, the action will still be published.

If the settlement agreement provides for any appealable Department actions, those actions may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. However, a party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have reached a settlement they may do one of three things. They may simply notify the Board the case has been settled and request that the docket be marked settled. Secondly, they may choose to notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record of the case, and request that the docket be marked settled. Thirdly, they may notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, request that notice of settlement be published in the *Pennsylvania Bulletin* and request the case be marked as settled. Subsection (c) also incorporates the form and information which the parties must use if they want the notice published in the *Pennsylvania Bulletin*. Under these alternatives, the Board is not requested to approve the settlement.

Subsection (d) provides for Board approval of a consent adjudication. In those instances, all parties must submit the proposed consent adjudication for Board approval. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute overreaching or bad faith by any party in the Board's discretion. Prior to the Board's approval, the Board will publish the consent adjudication's major substantive provisions as provided in the form noted in subsection (c). The notice shall also provide a comment period of at least 30 days for public comments. When comments from the public are received, the parties to the consent adjudication shall respond to them. The Board may in its discretion schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall be to Commonwealth Court and, if taken by an aggrieved person not a party to the appeal, shall be filed within 30 days of the date of the Board's action.

This third method for terminating an action by the Board's approval of a consent adjudication may be desired by some parties to assure the settlement ordinarily cannot be attacked successfully by nonparties after the Board has approved the consent adjudication.

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board.

10. *Composition of the certified record on appeal to Commonwealth Court*

This is a new rule which is meant to give exact guidelines for attorneys and pro se appellants regarding the composition of record if they appeal a Board decision to Commonwealth Court.

Unless the parties file a stipulation stating otherwise within 20 days of the filing of the petition for review, the Board shall certify the record according to Pa.R.A.P. No. 1951. The record shall consist of a list of docket entries and the notice of appeal, the Department action which is

the basis of the appeal (or the complaint if the proceeding was initiated by a complaint). In addition, if the appeal is based on a Board adjudication, the record shall also include: the Board's adjudication and order; the notes of testimony from the hearing; all exhibits admitted or offered in evidence; the parties' posthearing memoranda, including requested findings of fact and conclusions of law; any petition for reconsideration or to reopen the record; any answer, as well as any accompanying exhibits; and any other document which formed the basis of the Board's adjudication.

Subsection (d) of the proposed rule states that the record for appeals of a Board opinion and orders shall include the opinion and order, the motion or petition which was the subject of the Board's opinion and order, together with any responses, answers and replies and any accompanying exhibits. The record is also to include any petitions for reconsideration of the Board's opinion and order, any responses, answers and replies and any accompanying exhibits as well as any other document which formed the basis of the Board's opinion and order.

The proposed rule is the same as the one approved by the Rules Committee and submitted to the Board.

II. *Fiscal Impact of the Proposed Revisions*

The proposed rules should have little fiscal impact on the Commonwealth, political subdivisions and the private sector, as many of the proposed procedures reflect Board practice. The impact of the new procedures, such as the required exchange of expert reports are expected to expedite appeals before the Board.

III. *Paperwork Requirements for Proposed Revisions*

The proposed revisions would require the Board to modify certain of its standard orders.

IV. *Government Reviews of Proposed Revisions*

On February 4, 1998, as required by section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted copies of the proposed revisions to the Independent Regulatory Review Commission (IRRC) and the Senate and House Standing Committees on Environmental Resources and Energy. The Board also provided IRRC and the Committees on Environmental Resources and Energy with copies of a Regulatory Analysis Form prepared by the Board in compliance with Executive Order 1996-1. Copies of the Regulatory Analysis Form are available to the public upon request.

If IRRC has objections to any of the proposed revisions, it will notify the Board within 10 days of the close of the Committees' comment period, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures for review, prior to final publication of the proposed revisions, by the Board, the General Assembly and the Governor of objections raised.

V. *Public Comment Regarding Proposed Revisions*

The Board invites interested persons to submit written comments, suggestions or objections regarding the proposed revisions to William T. Phillipy, IV, Secretary to the Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, P.O. Box 8457, Harrisburg, PA 17105-8457, within 30 days of the date of this publication.

GEORGE J. MILLER,
Chairperson

Fiscal Note: 106-3. No fiscal impact; (8) recommends adoption.

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:

* * * * *

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] a permit license, approval or certification.**

* * * * *

Intervenor—A person **[intervening or petitioning to intervene as provided by § 1021.62 (relating to intervention) when admitted as a party to a proceeding] who has been permitted to intervene by the Board, as provided by § 1021.62 (relating to intervention).**

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] An** appellant, appellee, plaintiff, defendant**, permittee** or intervenor.

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

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

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Subchapter C. FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

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

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(f) **[Within 10 days after] Concurrent with** the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

* * * * *

(3) **[Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof] In a third party appeal, the recipient of the action.**

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

* * * * *

§ 1021.52. Timeliness **[and perfection] of appeal.**

(a) Except as specifically provided in § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board **[within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in subsection (b).] in a timely manner, as follows, unless a different time is provided by statute:**

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within either of the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*:

(ii) Thirty days after actual notice of the action, if there is no notice of the action published in the *Pennsylvania Bulletin*.

(b) **[An appeal from the granting of a permit, license, approval or certification will not be deemed to be perfected until the recipient of the permit, license, approval or certification is served with a notice of appeal in accordance with § 1021.51 (relating to commencement, form and content).**

(c) An appeal which is perfected under this section but does not otherwise comply with the form and content requirements of § 1021.51 will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

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

Comment: The language "person to whom the action of the Department is issued or directed" is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See Sections 4(a) and (c) of the act (35 P. S. § 7515).

INTERVENTION

§ 1021.62. Intervention.

* * * * *

(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] intervenor** to participate in the proceedings remaining at the time of the order granting intervention.

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MOTIONS

§ 1021.73. Dispositive motions.

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(b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. Nos. 1035.1—1035.5 (relating to motion for summary judgment) **except for the provision of the 30-day period in which to file a response.**

* * * * *

(d) A response to a dispositive motion **[shall] may** be filed within 25 days of the date of service of the motion, **and may be accompanied by a supporting memorandum of law.**

(e) A reply to a response to a dispositive motion may be filed within 20 days of the date of service of the response, **and may be accompanied by a supporting memorandum of law.**

(f) An affidavit or other document relied upon in support of a dispositive motion, response or reply, that is not already a part of the record, shall be attached to the motion, response or reply or it will not be considered by the Board in ruling thereon.

[(f)] (g) ***

Comment: Subsection (d) supersedes the filing of a response within 30 days as set forth in Pa. R.C.P. No. 1035.3(a).

PREHEARING CONFERENCES AND PREHEARING PROCEDURES

§ 1021.81. Prehearing procedure.

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing that:

* * * * *

(2) The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories within 120 days of the date of the prehearing order. The opposing party shall serve its expert reports and answers to expert interrogatories within 30 days after receipt of the expert reports and interrogatories from the party with the burden of proof.

[(2)] (3) Dispositive motions **in a case requiring expert testimony** shall be filed within **[120] 180** days of the date of the prehearing order. **If neither party plans to call an expert witness, dispositive motions shall be filed within 150 days after the filing of the appeal unless otherwise ordered by the Board.**

[(3)] (4) ***

(b) A Joint Proposed Case Management Order shall, inter alia, propose alternate dates for the conclusion of discovery**, the service of expert reports, supplemental reports,** and the filing of dispositive motions. The Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties or other dates the Board deems appropriate.

(c) After the Board resolves all dispositive motions, it will establish a hearing date for the remaining issues. **The Board may also direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.**

* * * * *

BURDEN OF PROCEEDING AND BURDEN OF PROOF

§ 1021.101. Burden of proceeding and burden of proof.

(a) In proceedings before the Board, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish the party's case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of **[going forward] proceeding** with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

(b) The Department has the burden of proof in the following cases:

(1) When it **assesses or** files a complaint for a civil penalty.

(2) When it files a complaint for any other purpose.

[(2)] (3) When it **[has revoked] revokes** a license **[or],** permit **[for cause], approval or certification.**

[(3)] (4) When it **[orders a party to take affirmative action to abate air or water pollution; or any other condition or nuisance, except as otherwise provided in this chapter] issues an order.**

[(4) When it seeks to engage in activities which are objected to as environmentally harmful.

(5) When it orders construction of sewage treatment facilities.]

(c) A party appealing an action of the Department shall have the burden of proof **[and burden of proceeding in the following cases unless otherwise ordered by the Board] in the following cases:**

(1) **[Refusal to grant, issue or reissue] When the Department denies** a license **[or],** permit**, approval or certification.**

(2) When a party who is not the **[applicant or holder of a license or permit from] recipient of an action by** the Department protests **[its issuance or continuation] the action.**

(3) When a party who is the recipient of an action protests one or more aspects of its issuance or modification.

[(3)] (4) ***

[(d) When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established that:

(1) Some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a statute or regulation is being violated.

(2) The party alleged to be responsible for the environmental damage is in possession of the facts relating to the environmental damage or should be in possession of them.

(e) When the criteria set forth by subsection (d) are shown, the party causing, or who will probably cause, the environmental damage will be presumed to have possession, or the duty to have possession, of facts relating to the quantum and nature of the damage.

(f) The Board may take judicial notice that a given activity normally causes or creates a substantial possibility of environmental damage, and the burden of rebutting the presumption is upon the party seeking to show otherwise.]

OFFICIAL NOTICE

§ 1021.109 Official notice of facts.

(a) **[The Board may take official notice of an official or public document not relating to the proceeding and of any matter subject to judicial notice.**

(b) Subsection (a) supplements 1 Pa. Code § 35.173 (relating to official notice of facts).]

The Board may take official notice of the following:

(1) Matters which may be judicially noticed by the Courts of the Commonwealth.

(2) Facts which are not in dispute.

(3) Record facts reflected in the official docket of the Board as referenced in § 1021.41(a) (relating to docket).

(b) A party shall, on timely request, be afforded an opportunity to show why the Board should not take official notice of items listed in subsection (a).

(c) A party requesting the taking of official notice after the conclusion of the hearing shall do so in accordance with § 1021.122 (relating to reopening of record prior to adjudication).

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 any 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.]

A proceeding before the Board may be terminated by:

(1) Withdrawal of the appeal prior to adjudication.

(2) Settlement agreement.

(3) Consent adjudication.

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

(c) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following:

(1) Notify the Board that the case has been settled and request that the docket be marked settled.

(2) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record of the case, and request that the docket be marked settled.

(3) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, request the notice of the settlement be published in the *Pennsylvania Bulletin* and request that the case be marked as settled.

The notice of publication shall be in substantially the following form:

RE: (Case and Docket Number)

The Commonwealth of Pennsylvania (Department of _____) and (parties) have agreed to a settlement of the above matter. The Commonwealth had ordered under date of _____, the party (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 any interested party on request during normal business hours.

(d) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection (c). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may in its discretion schedule a hearing prior to taking action on the consent adjudication. An appeal from a consent adjudication shall lie to the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

CERTIFICATION OF RECORD

§ 1021.161. Composition of the certified record on appeal to Commonwealth Court.

(a) Unless the parties file a stipulation with the Board providing otherwise, within 20 days of the filing of the petition for review, the Board will certify the record in accordance with Pa.R.C.P. No. 1951 (relating to record below in proceedings on petition for review) and the record shall consist of:

(1) A list of the docket entries.

(2) The notice of appeal and the Department action appealed to the Board, or, if the proceedings before the Board were initiated with a complaint, the complaint.

(b) In addition to items in subsection (a), for appeals of Board adjudications, the record shall also include:

(1) The Board's adjudication and order.

(2) The notes of testimony from the hearing and all exhibits admitted into evidence.

(3) The parties' posthearing memoranda, including requested findings of fact and conslusions of law.

(4) Petitions for reconsideration or to reopen the record, answers and accompanying exhibits.

(5) Other documents which formed the basis of the Board's adjudication.

(c) In addition to items in subsection (a), for appeals of Board opinions and orders, the record shall also include:

(1) The Board's opinion and order.

(2) The motion or petition which was the subejct of the Board's opinion and order, together with any responses, answers and replies, and any accompanying exhibits.

(3) Petitions for reconsideration of the Board's opinion and order, responses, answers and replies, and accompanying exhiits.

(4) Other documents which formed the basis of the Board's opinion and order.

[Pa.B. Doc. No. 98-254. Filed for public inspection February 13, 1998, 9:00 a.m.]

STATE BOARD OF MEDICINE

[49 PA. CODE CH. 16]

Licensure, Certification, Examination and Registration Fees

The State Board of Medicine (Board) proposes to amend § 16.13 (relating to licensure, certification, examination and registration fees) by raising the renewal fees to read as set forth in Annex A. The following indicates the change in fees for Board regulated practitioners:

License Class	*Current Fee*	*Proposed Fee*
Medical Doctor	$80	$125
Graduate Trainee	$10	$ 15
Midwife	$25	$ 40
Physician Assistant	$25	$ 40
Acupuncturist	$25	$ 40
Drugless Therapist	$25	$ 35

Since 1975, the Board's revenue and expenses have been reserved in a restricted receipts account in the General Fund for exclusive use of the Board in implementing its licensure and enforcement activities. See section 907(b) of the Health Care Services Malpractice Act (40 P. S. § 1301.907(b)). Additionally, the sole purpose of the fund is to provide for the operations of the Board. Further, the Board derives all of its revenue from licensees.

The increase is proposed to take effect for the next biennial renewal, due by December 31, 1998. From 1976 through 1980, the renewal fees for physicians was $75. This fee was reduced to $50 from 1980 to 1982, and was further reduced to $25 from 1982 through 1990. During this period of time, the renewal fee was waived three times in 1982, 1984 and 1986. These reductions and waivers were taken to reduce the size of the Board's account balance at a time when revenues exceeded expenditures. The fee has been $80 since 1990.

Section 6 of the Medical Practice Act of 1985 (act) (63 P. S. § 422.6) requires the Board to fix fees by regulation to meet expenditures over a 2-year period so that projected revenues would meet or exceed projected expenditures.

The beginning balance in the Board's restricted account for FY 1994-95 was $1,265,234.53. Because FY 1994-95 was a biennial renewal year, revenues increased the beginning balance in the Board's restricted account for FY 1995-96 to $2,859,334.71. The beginning balance was reduced to $1,002,720.52 for FY 1996-97. FY 1996-97 was a biennial renewal year, thus, the balance in the restricted account rose to $2,220,647.33 for the beginning of FY 1997-98. This figure, however, represents a $638,687.38 decrease from the previous renewal cycle.

Projected expenditures will further reduce the account balance to $431,432.14 by the end of FY 1997-98. If revenues are not increased for the renewal period FY 1998-99, the projected beginning balance for FY 1999-00 will be $1,251,377.14. Because FY 1999-00 is a nonrenewal year, revenues will be significantly overtaken by expenditures, thus leaving a $1,324,202.86 deficit by the end of FY 1999-00. Even in FY 2000-01, a biennial renewal year, the deficit will remain at $386,105.26, and is projected to worsen from there.

It should be noted that account balance figures for FY 1997-98 and FY 1998-99 include a $300,000 loan and repayment from the Professional Licensure Augmentation Account, a pooled account for 22 licensing boards situated within the Bureau of Professional and Occupational Affairs. This loan was authorized by the General Assembly by Act 2-A of 1997, act of April 25, 1997, to forestall a potential shortfall in the Board's account.

Biennial revenues for the Board have remained relatively constant. In contrast, expenditures over the past 3 fiscal years have increased by an average of 7% per year and are projected to increase by 3% per year through FY 2000-01: (FY 1994-95: $2,191,515; FY 1995-96: $2,334,722; FY 1996-97: $2,494,215; Projected FY 1997-98: $2,851,000; Projected FY 1998-99: $2,986,000; Projected FY 1999-00: $3,075,580; Projected FY 2000-01: $3,167,847).

Because the Board's operations are funded almost entirely by licensee fees, the Board is in need of an increase in revenue in order to meet its statutory obligations in a timely and responsive manner. These obligations include issuing licenses, hearing and adjudicating complaints and assisting licensees and the public with legal-medical issues which come before the Board.

The proposed fee increase will generate approximately $6,526,250 in the biennium as indicated:

Licensee	*No.*	*Fee*	*Revenue*
Acupuncturists	240	$ 40	$ 9,600
Physician Assistants	1,504	$ 40	$ 60,160
Physician	43,532	$125	$5,441,500
Trainee	8,000	$ 15	$ 120,000
Midwife	265	$ 40	$ 10,600
Respiratory Care Practitioner	5,356	$ 25	$ 133,900
Non-renewal Revenue			$ 750,000
Total			$6,526,250

The current medical doctor renewal fee is the second lowest in the nation, behind only Arkansas. With the increase, it will be the ninth lowest. The current fee is the lowest of the Medical Board fees for the surrounding states and will remain the lowest of these states even with the increase. A review of the medical doctor renewal fees indicates a National average of $108.50. Twenty-eight state medical boards renew biennially, like the Commonwealth. Twenty-two states renew annually, and two renew every 3 years. Calculated annually, the Commonwealth currently charges medical doctors $40. That figure will rise to $62.50 with the increase.

Maryland	$400	West Virginia	$200
New Jersey	$345	Delaware	$160
New York	$330	Pennsylvania	$ 80
Ohio	$250		

The proposed fee is also reasonable relative to other Commonwealth health care professionals:

Chiropractor	$210	Pharmacist	$120
Dentist	$100	Podiatrist	$175
Nursing Home Admin.	$108	Psychologist	$120
Osteopathic Phys.	$140	Registered Nurse	$ 21
Optometrist	$135	Veterinarian	$105

If the proposed fee increase is implemented, the Board's financial status is projected to remain stable through FY 1998-2001.

Statutory Authority

Section 6 of the act requires the Board to establish fees by regulation. The same provision requires the Board to increase fees to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet expenditures.

Fiscal Impact

The proposed amendment will increase the biennial renewal fees for licensees of the Board, but should have no other fiscal impact on the private sector, the general public or political subdivisions.

Paperwork Requirements

The proposed amendment will require the Board to alter some of its forms to reflect the new biennial renewal fees; however, the proposed amendment should not create additional paperwork for the private sector.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the proposed amendment on February 4, 1998, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Professional Licensure and the Senate Committee on Consumer Protection and Professional Licensure. In addition to submitting the proposed amendment, the Board has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Board in compliance with Executive Order 1996-1. A copy of the material is available to the public upon request. If IRRC has objections to any portion of the proposed amendments, it will notify the Board by within 10 days of the close of the Committees' comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections prior to final publication of the regulation by the Board, the General Assembly and the Governor.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Cindy L. Warner, Board Administrator, State Board of Medicine, Post Office Box 2649, Harrisburg, PA 17105-2649, within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

DANIEL B. KIMBALL, Jr., M.D.
Chairperson

Fiscal Note: 16A-498. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 16. STATE BOARD OF MEDICINE—GENERAL PROVISIONS

SUBCHAPTER B. GENERAL LICENSE, CERTIFICATION AND REGISTRATION PROVISIONS

§ 16.13. Licensure, certification, examination and registration fees.

* * * * *

(b) The fee for a license without restriction for a graduate of an accredited medical college is $20. The fee for a license without restriction for a graduate of an unaccredited medical college is $80. The biennial registration fee for a license without restriction is $**[80] 125.**

* * * * *

(e) The fee for a graduate license for a graduate of an accredited medical college is $15. The fee for a graduate license for a graduate of an unaccredited medical college is $80. The fee to renew a graduate license is $**[10] 15.**

* * * * *

(h) The fee for a midwife license is $20. The biennial registration fee for a midwife license is $**[25] 40.**

(i) The fee for a physician assistant certificate is $15. The biennial registration fee for a physician assistant certificate is $**[25] 40.**

* * * * *

(m) The fee for an acupuncturist registration is $15. The biennial registration fee for an acupuncturist registration is $**[25] 40.**

* * * * *

(o) The biennial registration fee for a drugless therapist license is $**[25] 40.**

* * * * *

[Pa.B. Doc. No. 98-255. Filed for public inspection February 13, 1998, 9:00 a.m.]