

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

#### Practice and Procedure

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedures) to read as set forth in Annex A. The final-form amendments modify the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the final regulations at its February 5, 2002, meeting.

#### *Effective Date*

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

#### *Contact Person*

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

#### *Statutory Authority*

The final-form 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). The Board received no comments from the public. IRRC's comments are addressed as follows.

#### *Electronic Filing*

IRRC had the following comments regarding the definition of "electronic filing." First, it considered the phrases "or such other format as the Board may permit" and "other device," contained within the definition of "electronic filing," to be vague and unclear and it recommended that the Board clarify these phrases. Use of the language "or device" and "or such other format as the Board may permit" in the definition of "electronic filing" is intended to make provision for emerging technology in both computer software and hardware. These phrases are included in the definition of "electronic filing" as being anticipatory of any advances in technology that would allow parties to file electronically in a different format or by use of a different device than that now being used.

IRRC also recommended breaking the definition of "electronic filing" into two sentences for the sake of clarity and readability. This has been done in the final-form rulemaking.

#### *Registration Statement*

IRRC commented that the phrase "such other information as the Board may require" contained within the definition of "registration statement" was vague. IRRC recommended including a list of the information required in a registration statement in § 1021.33 (relating to service by a party). This has been done in the final-form rulemaking.

#### *Sunset Date*

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

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 25, 2002, the Board submitted a copy of the notice of proposed rulemaking published at 31 Pa.B. 6156 (November 10, 2001), to IRRC and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Board has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on April 2, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 9, 2002, and approved the final-form rulemaking.

#### *Findings*

The Board finds that:

(1) Public notice of 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 regulations promulgated thereunder in 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 its authorizing statute, orders that:

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.2, 1021.11, 1021.12, 1021.21—1021.23, 1021.31—1021.36, 1021.54, 1021.61, 1021.62, 1021.64, 1021.71—1021.73, 1021.81—1021.83, 1021.91—1021.95, 1021.101, 1021.104, 1021.107, 1021.111, 1021.114, 1021.116—1021.118, 1021.122—1021.125, 1021.131—1021.134, 1021.141, 1021.151, 1021.161, 1021.171; by adding §§ 1021.25, 1021.37, 1021.38, 1021.55, 1021.63, 1021.102, 1021.103, 1021.105, 1021.106, 1021.112, 1021.113, 1021.115, 1021.121, 1021.126, 1021.152, 1021.172—1021.174, 1021.181—1021.184, 1021.191, 1021.201; by deleting §§ 1021.15, 1021.17, 1021.30, 1021.41, 1021.56—1021.58, 1021.70, 1021.74, 1021.76—1021.80, 1021.84—1021.90, 1021.96,

1021.98, 1021.99, 1021.108, 1021.109, 1021.120, 1021.142—121.144 and 102.162.

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

(c) The Chairperson of the Board shall submit this order and Annex A to the House and Senate Environmental Resources and Energy Committees 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

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2646 (May 25, 2002).)*

**Fiscal Note:** Fiscal Note 106-6 remains valid for the final adoption of the subject regulations.

#### Annex A

### TITLE 25. ENVIRONMENTAL PROTECTION

#### PART IX. ENVIRONMENTAL HEARING BOARD

#### CHAPTER 1021. PRACTICE AND PROCEDURE

#### PRELIMINARY PROVISIONS

#### GENERAL

##### § 1021.1. Scope of chapter.

(a) This chapter governs practice and procedure before the Board.

(b) This chapter is not applicable to a proceeding to the extent that the applicable statute governing or authorizing the proceeding sets forth inconsistent practice or procedure.

(c) Except when inconsistent with this chapter, 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) is applicable insofar as it relates to adjudicatory proceedings. When the term "agency" is used in 1 Pa. Code Part II, "Board" is to be understood; when the term "participant" is used in 1 Pa. Code Part II, "party" is to be understood.

(d) Subsections (a)—(c) supplement 1 Pa. Code § 31.1 (relating to scope of part).

##### § 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, a permit, license, approval or certification.

*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.

*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.

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

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

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

*Intervenor*—A person who has been permitted to intervene by the Board, as provided by § 1021.81 (relating to intervention).

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

*Pa.R.A.P.*—Pennsylvania Rules of Appellate Procedure, 42 Pa.C.S.; 210 Pa. Code.

*Pa.R.C.P.*—Pennsylvania Rules of Civil Procedure, 42 Pa.C.S.; 231 Pa. Code.

*Party*—An appellant, appellee, plaintiff, defendant, permittee or intervenor.

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

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

*Pleading*—A complaint filed under § 1021.71 (relating to complaints filed by the Department) or answer filed under § 1021.72 (relating to answers to complaints filed by the Department). Documents filed in appeals, including the notice of appeal, are not pleadings.

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

*Registration statement*—A statement made on professional or organizational letterhead requesting the use of the Board's website for electronic filing.

*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 the action.

(b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions) except for “pleading” which supersedes the definition of “pleading” in 1 Pa. Code § 31.3.

**§ 1021.3. Amendments to rules.**

(a) The Board retains continuing jurisdiction under section 5 of the act (35 P.S. § 7515) to adopt the amendments and additions to this chapter as may be appropriate.

(b) The Board is authorized to establish forms as may be required to implement the act.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.6 (relating to amendments to rules).

**§ 1021.4. Construction and application of rules.**

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

**TIME**

**§ 1021.11. Effective dates of Board adjudications and preliminary orders.**

(a) Adjudications and orders of the Board will be effective as of the date of entry.

(b) Subsection (a) supersedes 1 Pa. Code § 31.14 (relating to effective dates of agency orders).

**§ 1021.12. Extensions of time.**

(a) The time fixed or the period of time prescribed for the filing of a document required or permitted to be filed under this chapter, other than the notice of appeal, may be extended by the Board for good cause upon motion.

(b) The motion in subsection (a) shall conform to the provisions in § 1021.92 (relating to procedural motions).

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.15 (relating to extensions of time).

**§ 1021.15. (Reserved).**

**§ 1021.17. (Reserved).**

**REPRESENTATION BEFORE THE BOARD**

**§ 1021.21. Representation.**

(a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney at all stages of the proceedings subsequent to the filing of the notice of appeal.

(b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania. Corporations may also be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion pro hac vice filed by the Pennsylvania attorney of record.

(c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.

(d) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel under subsection (c) if the Board determines they are acting in concert with or as a representative of a group of individuals.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 31.21—31.23 (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings).

**§ 1021.22. Notice of appearance.**

(a) Entries of appearance shall be filed with the Board and served upon the other parties to the proceedings.

(b) Subsection (a) supplements 1 Pa. Code §§ 31.22 and 31.25 (relating to appearance by attorney; and form of notice of appearance).

**§ 1021.23. Withdrawal of appearance.**

(a) An attorney’s appearance for a party may be withdrawn without leave of the Board if another attorney has entered or simultaneously enters an appearance for the party and the change of attorneys does not delay any stage of the litigation.

(b) In ruling on a motion for withdrawal of appearance under other circumstances, the Board will consider the following factors: the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice.

(c) In the event withdrawal of counsel will result in an unrepresented party before the Board, counsel seeking to withdraw shall provide the Board with a single contact person for future service in all proceedings.

*Comment:* This rule permits the automatic withdrawal and concurrent entry of appearance of substitute counsel under ordinary circumstances. Leave of the Board must be obtained where withdrawal would have an adverse effect on the interests of the client. Rule 1.16(b) of the Rules of Professional Conduct sets forth the bases for withdrawal for good cause; however, Rule 1.16(c) provides, “When ordered to do so by a tribunal, the lawyer shall continue representation notwithstanding good cause for terminating the representation.”

**§ 1021.24. Referral to pro bono counsel.**

(a) The Secretary to the Board is authorized to refer persons who appear before the Board on a pro se basis, and who claim not to be able to afford a lawyer, to one of the following:

(1) The pro bono committee of the Pennsylvania Bar Association’s Environmental, Mineral and Natural Resources Law Section.

(2) A county bar association lawyer referral service.

(b) The financial standard for determining a person’s inability to afford a lawyer will be the standard adopted by the appropriate bar association at the time of referral.

**§ 1021.25. Amicus curiae.**

(a) Anyone interested in legal issues involved in a matter pending before the Board may request leave to file an amicus curiae brief or memorandum of law, in regard to those legal issues. The amicus curiae shall state in its request the legal issues to be addressed in the brief and shall serve a copy of the request on all parties.

(b) If the Board grants a request, the amicus curiae shall file the brief within the time prescribed by the Board and shall serve a copy on all parties. Any party may file a response to a brief amicus curiae which is adverse to its interests.

(c) The amicus curiae may present oral argument only as the Board may direct.

## DOCUMENTARY FILINGS

### FILING AND SERVICE OF DOCUMENTS

#### § 1021.30. (Reserved).

#### § 1021.31. Filing.

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

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

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

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

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

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

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

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

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

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

(f) Hard copy of any electronically filed legal document which exceeds 50 pages in length must also be filed with the Board in accordance with subsections (a) and (c) and § 1021.36 (relating to the number of copies). Exhibits to legal documents may be filed and served either electronically or by hard copy in accordance with the sections in this chapter relating to filing and service. If these requirements are met by hard copy of exhibits, they must be sent to the Board by mail or express delivery and, in the case of requests for expedited disposition, service shall mean actual receipt by the opposing party as required by § 1021.33(b) (relating to service by a party).

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

#### § 1021.32. Service by the Board.

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

(b) Subsection (a) supersedes 1 Pa. Code § 33.31 (relating to service by the agency).

#### § 1021.33. Service by a party.

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

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

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

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

#### § 1021.34. Date of service.

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

(b) Subsection (a) supersedes 1 Pa. Code § 33.34 (relating to service by participant).

#### § 1021.35. Certificate of service.

(a) Each document which is required to be filed with the Board shall include a certificate of service which shall certify the date and manner of service and the name and address of the person served.

(b) Subsection (a) supersedes 1 Pa. Code § 33.35 (relating to proof of service).

#### § 1021.36. Number of copies.

(a) Except in the case of electronically filed documents, including exhibits, and unless otherwise ordered by the Board, the following number of copies shall be filed with the Board:

- (1) One original and two copies of each of the following:
  - (i) Notices of appeal.
  - (ii) Complaints.
  - (iii) Answers.
  - (iv) Posthearing briefs.
  - (v) Dispositive motions and related memoranda, responses and replies.
- (2) One original and one copy of each of the following:
  - (i) Petitions for supersedeas and any related responses.
  - (ii) Prehearing memoranda.
  - (iii) Nondispositive motions and petitions (other than motions for stays, extensions and continuances of procedural deadlines), and related memoranda, responses and replies.
- (3) One original of other documents.

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

**§ 1021.37. Publication of notice.**

Publication of a notice of action or proposed action by the Department or Board in the *Pennsylvania Bulletin* shall constitute notice to or service upon all persons, except a party, effective as of the date of publication.

**§ 1021.38. Docket.**

(a) The Board will maintain a docket of proceedings and a proceeding as initiated shall be assigned an appropriate designation. The Board will maintain the docket on its website available to all members of the public and will accept filings of legal documents by electronic transmission from registered attorneys.

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

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

(d) The electronic docket will be available on the Board's website and the hard copy portion of the official file shall be available for inspection and copying by the public during the office hours of the Board insofar as consistent with the proper discharge of the duties of the Board.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 33.51 (relating to docket).

**§ 1021.41. (Reserved).**

**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 the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, a copy of the action 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) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

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

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

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

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

(h) The service upon the recipient of an action as required by this section, shall subject the recipient to the jurisdiction of the Board as a party.

(i) Appellant shall provide satisfactory proof that service has been made as required by this section.

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

**§ 1021.52. Timeliness of appeal.**

(a) Except as specifically provided in § 1021.53 (relating to amendments to appeal; appeal nunc pro tunc), 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 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 one 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 a notice of the action is not published in the *Pennsylvania Bulletin*.

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required by § 1021.51(c), (d) and (i) (relating to commencement, form and content) or suffer dismissal of the appeal.

(c) Subsections (a) and (b) supersede 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 section 4(a) and (c) of the act (35 P. S. § 7514 (a) and (c)).

**§ 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 §§ 1021.91 and 1021.95 (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).

**§ 1021.54. Prepayment of penalties.**

(a) When a statute requires that an appellant prepay or post a bond to secure payment of a penalty assessed by the Department, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty as required by statute. The check shall be made payable to the Commonwealth of Pennsylvania.

(b) A bond shall be in favor of the Department of Environmental Protection except in the case of the Air Pollution Control Act (35 P. S. §§ 4001—4106 ) which currently requires the bond to be in favor of the Board.

**§ 1021.55. Hearing on inability to prepay penalty.**

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

(b) If the Board determines that the appellant is able to prepay the penalty assessed or post a bond the Board will order the appellant to do so, within a period not to exceed 30 days.

**§ 1021.56. (Reserved).**

**§ 1021.57. (Reserved).**

**§ 1021.58. (Reserved).**

**SUPERSEDEAS**

**§ 1021.61. General.**

(a) A petition for supersedeas under section 4(d) of the act (35 P. S. § 7514(d)) may be filed at any time during the proceeding.

(b) The Board will not issue a supersedeas without a hearing, but a hearing may be limited under subsection (d).

(c) A hearing on a supersedeas, if necessary, shall be held expeditiously—if feasible within 2 weeks of the filing of the petition—taking into account the available time of a Board member or hearing examiner, and taking into account the urgency and seriousness of the environmental or other problem to which the order or action of the Department applies. If good cause is shown, the hearing shall be held as soon as possible after the filing of the petition.

(d) At the discretion of the Board, if necessary to ensure prompt disposition, supersedeas hearings may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery or of cross-examination.

(e) Under § 1021.161 (relating to sanctions), the Board may impose costs or other appropriate sanctions on parties or attorneys who, in the Board’s opinion, have filed requests for supersedeas in bad faith or on frivolous grounds.

**§ 1021.62. Contents of petition for supersedeas.**

(a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:

(1) Affidavits, prepared as specified in Pa.R.C.P. 76 and 1035.4 (relating to definitions; and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

(b) A petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.

(c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:

(1) Lack of particularity in the facts pleaded.

(2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.

(3) An inadequately explained failure to support factual allegations by affidavits.

(4) A failure to state grounds sufficient for the granting of a supersedeas.

(d) The Board, upon motion or sua sponte, may direct that a prehearing conference be held.

**§ 1021.63. Circumstances affecting grant or denial.**

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

**§ 1021.64. Temporary supersedeas.**

(a) An application for temporary supersedeas may be filed when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas.

(b) The application for temporary supersedeas shall be accompanied by a petition for supersedeas which comports with § 1021.62 (relating to contents of petitions for supersedeas).

(c) The application for temporary supersedeas and accompanying petition for supersedeas shall:

(1) Be served upon the office of the Department which issued notice of the action the applicant seeks to supersede and upon the Department's Office of Chief Counsel.

(2) Include a proof of service in accordance with Pa.R.A.P. 122 (relating to content and form of proof of services).

(d) The Board will not issue a temporary supersedeas until it determines that the Department has been served

in accordance with subsection (c) and has had a reasonable opportunity to respond by conference call or otherwise.

(e) When determining whether it will grant an application for temporary supersedeas, the Board will consider:

(1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.

(2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.

(3) The length of time required before the Board can hold a hearing on the petition for supersedeas.

(f) Unless the Board orders otherwise, a temporary supersedeas will automatically terminate 6 business days after the date of issuance.

**SPECIAL ACTIONS**

**§ 1021.70. (Reserved).**

**§ 1021.71. Complaints filed by the Department.**

(a) When authorized by statute, the Department may initiate the action by filing a complaint or petition, together with a certificate of service and a notice of a right to respond.

(b) This action shall commence when the complaint is filed and service of the complaint and of a notice of a right to respond is made upon the defendant.

(c) The complaint shall set forth the statutory authority under which the Board is authorized to act and shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for action is based.

(d) The notice of a right to respond or defend shall conform to the following:

[Case Caption]

**NOTICE**

If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served by entering a written appearance personally or by attorney and filing in writing with the Board your answers, defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Board without further notice for any claim or relief requested by the Department.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, contact the Secretary to the Board at (717) 787-3483.

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

**§ 1021.72. Answers to complaints filed by the Department.**

(a) Answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint, unless for cause the Board, with or without motion, prescribes a different time. An answer will not be required in less than 10 days after date of service.

(b) Answers to complaints shall set forth any legal objections as well as any denial of facts, in a single pleading.

(c) Answers shall be in writing and so drawn as to fully and completely advise the parties and the Board as to the nature of the defense, including affirmative defenses. Answers shall admit or deny specifically and in detail each material allegation of the complaint and state clearly and concisely the facts and matters of law relied upon.

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

(e) No new matter or preliminary objections shall be filed.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.5—35.7 and 35.35 (relating to informal complaints; and answers to complaints and petitions).

**§ 1021.73. Procedure after an answer is filed.**

After an answer is filed the prehearing procedures in § 1021.101 (relating to prehearing procedures) shall be followed.

**§ 1021.74. (Reserved).**

**§§ 1021.76—1021.80. (Reserved).**

**CONSOLIDATION, INTERVENTION AND  
SUBSTITUTION OF PARTIES**

**§ 1021.81. 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 intervenor 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).

**§ 1021.82. Consolidation.**

(a) The Board, on its own motion or on the motion of any party, may order proceedings involving a common

question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings.

(b) Subsection (a) supersedes 1 Pa. Code § 35.45 (relating to consolidation).

*Comment:* See also § 1021.4 (relating to construction and application of rules) authorizing the Board to interpret its rules to insure just, speedy and inexpensive determinations.

**§ 1021.83. Substitution of parties.**

(a) A person who has succeeded to the interests of a party to an appeal by operation of law, election to public office, appointment or transfer of interest may become a party to the pending action by filing with the Board a verified petition for substitution of party, which includes a statement of material facts upon which the right to substitute is based.

(b) The substituted party shall have all the rights and liabilities of the original party to the proceeding provided that any other party to the proceeding may move to strike the substituted party for just cause. A substituted party-appellant is limited to pursuing only those objections raised by the original appellant in its appeal, unless both the original appellant and the substituted appellant meet the conditions of § 1021.53(b)(2) (relating to amendments to appeal; nunc pro tunc appeals).

**§§ 1021.84—1021.90. (Reserved).**

**MOTIONS**

**§ 1021.91. General.**

(a) This section applies to all motions except those made during the course of a hearing.

(b) Motions and responses shall be in writing, signed by a party or its attorney and shall be accompanied by a proposed order.

(c) A copy of the motion or response shall be served on the opposing party. The motion or response shall include a certificate of service indicating the date and manner of service on the opposing party.

(d) A motion shall set forth in numbered paragraphs the facts in support of the motion and the relief requested.

(e) A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. Material facts set forth in a motion, other than a motion for summary judgment or partial summary judgment, that are not denied may be deemed admitted for the purposes of deciding the motion.

(f) Except in the case of motions for summary judgment or partial summary judgment, for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

(g) Except as provided in § 1021.94(e) (relating to dispositive motions), the moving party may not file a reply to a response to its motion, unless the Board orders otherwise.

(h) Subsection (b) supplements 1 Pa. Code §§ 33.11 and 35.178 (relating to the execution; and presentation of motions). Subsection (c) supplements 1 Pa. Code § 33.32 (relating to service by a participant) and supersedes 1 Pa. Code §§ 33.35 and 33.36 (relating to proof of service; and form of certificate of service). Subsections (d)—(f)



supplement 1 Pa. Code §§ 35.177 and 35.178 (relating to the scope and content of motions; and presentation of motions).

**§ 1021.92. Procedural motions.**

(a) This section applies to motions pertaining to the procedural aspects of a case, including motions for continuance, for expedited consideration, for extensions of time in which to file documents and for stay of proceedings.

(b) Procedural motions do not require verification.

(c) Procedural motions shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position.

(d) If all parties consent to the relief requested, the request may be embodied in a letter, provided the letter indicates the consent of the other parties.

(e) Requests for extensions or continuances, whether in letter or motion form, shall be accompanied by a proposed order.

(f) A response to a procedural motion shall be filed with the Board within 15 days of the date of service of the motion unless otherwise ordered by the Board.

(g) Procedural motions may not be accompanied by supporting memoranda of law unless otherwise ordered by the Board.

(h) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification). Subsections (c) and (e) supplement 1 Pa. Code § 35.177 (relating to the scope and contents of motions). Subsection (d) supplements 1 Pa. Code § 35.179 (relating to objections to motions).

**§ 1021.93. Discovery motions.**

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

(b) Discovery motions shall contain as exhibits the discovery requests and answers giving rise to the dispute.

(c) Responses to discovery motions shall be filed within 15 days of the date of service of the motion, unless the Board orders otherwise.

(d) A party may file a memorandum of law in support of its discovery motion or its response to a discovery motion. The supporting memorandum of law shall be filed at the same time the motion or response is filed.

(e) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification). Subsections (b) and (d) supplement 1 Pa. Code § 35.177 (relating to the scope and contents of motions). Subsection (c) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

**§ 1021.94. Dispositive motions.**

(a) This section applies to dispositive motions.

(b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 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.

(c) Dispositive motions shall be accompanied by a supporting memorandum of law. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law.

(d) A response to a dispositive motion 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.

(g) Subsection (c) supplements 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection (d) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

*Comment.* Subsection (d) supersedes the filing of a response within 30 days set forth in Pa.R.C.P. 1035.3(a).

**§ 1021.95. Miscellaneous motions.**

(a) This section applies to a motion not otherwise addressed in §§ 1021.92—1021.94 (relating to procedural motions; discovery motions; and dispositive motions), including a motion in limine, a motion to strike and a motion for recusal.

(b) Miscellaneous motions do not require verification.

(c) Responses to miscellaneous motions shall be filed within 15 days of the date of service of the motion, unless otherwise ordered by the Board.

(d) A memorandum of law in support of a miscellaneous motion or response to a miscellaneous motion shall be filed with the miscellaneous motion or response.

(e) Subsection (b) supplements 1 Pa. Code § 33.12 (relating to verification).

**§ 1021.96. (Reserved).**

**§ 1021.98. (Reserved).**

**§ 1021.99. (Reserved).**

**PREHEARING PROCEDURES AND PREHEARING CONFERENCES**

**§ 1021.101. Prehearing procedure.**

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

(1) Discovery shall be concluded within 90 days of the date of the prehearing order.

(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 all expert interrogatories within 30 days after receipt of the expert reports and answers to all expert interrogatories from the party with the burden of proof.

(3) Dispositive motions in a case requiring expert testimony shall be filed within 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.

(4) The parties may, within 45 days of the date of the prehearing order, submit a Joint Proposed Case Management Order to the Board.

(b) A Joint Proposed Case Management Order shall propose alternate dates for the conclusion of discovery, the service of expert or 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.

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date.

(e) Subsection (d) supplements 1 Pa. Code § 35.121 (relating to initiation of hearings).

#### **§ 1021.102. Discovery.**

(a) Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by the Pa.R.C.P. When the term "court" is used in the Pa.R.C.P., "Board" is to be understood; when the terms "prothonotary" or "clerk of court" are used in the Pa.R.C.P., "Secretary to the Board" is to be understood.

(b) Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

(c) If a person or party is to be deposed by oral examination more than 100 miles from his or its residence or principal place of business, the Board may, upon motion, order the payment of reasonable expenses, including attorney's fees, as the Board deems proper.

(d) Discovery disputes shall be resolved pursuant to a motion filed in accordance with § 1021.93 (relating to discovery motions), except that to facilitate the prompt completion of discovery, the Board may hear argument on discovery disputes by telephone conference call at the time the dispute arises and may issue oral rulings which will be later memorialized in written orders.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 35.145—35.152 (relating to depositions).

#### **§ 1021.103. Subpoenas.**

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

(b) Proof of service of the subpoena need not be filed with the Board.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.139 and 35.142 (relating to fees of witnesses; and subpoenas).

#### **§ 1021.104. Prehearing memorandum.**

(a) A prehearing memorandum shall contain the following:

(1) A statement of the facts in dispute and the facts upon which the parties agree.

(2) A statement of the legal issues in dispute, including citations to statutes, regulations and caselaw supporting the party's position.

(3) A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.

(4) A list of expert witnesses whose qualifications will not be challenged and which may be entered into the record as an unchallenged exhibit.

(5) A summary of the testimony of each expert witness.

(6) The proposed order of witnesses.

(7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction.

(8) Signed copies of any stipulations reached by the parties.

(b) The Board may impose sanctions on a party which does not comply with the requirements of subsection (a). These sanctions may include the preclusion of testimony or documentary evidence and the cancellation of the hearing.

(c) The requirements of this section apply only to a party's case-in-chief.

#### **§ 1021.105. Prehearing conferences.**

(a) The Board, on its own motion or on motion of a party, may hold a conference either prior to or during a hearing for the purpose of considering offers of settlement, adjustment of the proceeding or any issue therein, or other matters to expedite the orderly conduct and disposition of a hearing.

(b) A stipulation of the parties or rulings of the Board as a result of the conference shall be binding upon the parties.

(c) The Board may issue prehearing orders as it considers necessary for limiting issues of fact and law.

(d) The Board will, at any time, be authorized to delay a formal hearing and order settlement discussions or stipulations, either on or off the record.

(e) Subsections (a)—(d) supplement 1 Pa. Code §§ 35.111—35.115.

#### **§ 1021.106. Voluntary mediation.**

(a) Upon request by all the parties, the Board may stay a matter for up to 120 days to allow the parties to utilize voluntary mediation services.

(b) The parties are responsible for selection of a mediator and payment of the mediator's fees.

(c) The request shall be filed at least 14 days before initiation of hearings by the Board. The request shall identify the mediator selected and shall certify that the parties have made arrangements for payment of the mediator's fee.

(d) At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, which sets forth the history of mediation activities conducted. The parties may request an additional stay if necessary to complete the mediation process.

(e) The grant of an additional stay for mediation is in the Board's discretion and the Board may impose limitations the Board deems appropriate.

(f) A settlement reached by the parties as a result of voluntary mediation shall be submitted to the Board for approval under § 1021.141 (relating to termination of proceedings).

(g) Only a signed settlement agreement shall be binding and it shall bind only the parties signing it.

(h) A party's participation in voluntary mediation may not be used as evidence in a proceeding before the Board. Communications between the parties during the mediation period shall be regarded as offers of settlement and are neither discoverable nor admissible as evidence in a proceeding before the Board.

(i) Subsections (a)—(h) supplement 1 Pa. Code §§ 35.111 and 35.115 (relating to conferences to adjust, settle or expedite proceedings; and offers of settlement).

**§ 1021.107. Authority delegated to hearing examiners.**

(a) The Board may appoint hearing examiners to preside at hearings. Subject to the approval of the Board member assigned to the case, the hearing examiner shall have the following authority:

- (1) To schedule and regulate the course of the hearings.
- (2) To administer oaths and affirmations.
- (3) To rule on motions in limine, offers of proof and the admission or exclusion of evidence.
- (4) To conduct pretrial conferences, settlement conferences and related pretrial proceedings and to dispose of procedural matters.
- (5) To schedule the filing of posthearing briefs following the conclusion of the hearing.
- (6) To recommend to the Board member or to the Board an opinion and order or adjudication disposing of the matters considered at the hearing.

(b) Subsection (a) supersedes 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers).

**§ 1021.108. (Reserved).**

**§ 1021.109. (Reserved).**

**HEARINGS**

**§ 1021.111. Initiation of hearings.**

(a) If the proceedings are at issue and a hearing is required, a formal evidentiary hearing shall be scheduled and a notice of hearing shall be sent to all parties to the proceedings.

(b) Subsection (a) supersedes 1 Pa. Code § 35.121 (relating to initiation of hearings).

**§ 1021.112. Waiver of hearings.**

(a) A hearing need not be held if waived by appellant or respondent or if parties stipulate the essential facts or agree to submit direct and rebuttal testimony or documentary evidence in affidavit form (sworn or affirmed on personal knowledge) or by deposition.

(b) Subsection (a) supersedes 1 Pa. Code § 35.101 (relating to waiver of hearing).

**§ 1021.113. Continuance of hearings.**

(a) Hearings may not be continued except for compelling reasons. Requests for continuances shall be submitted to the Board in writing with a copy served upon the other parties to the proceedings, except that during the course of a hearing in a proceeding, the requests may be made by oral motion in the hearing.

(b) Subsection (a) supersedes 1 Pa. Code § 31.15 (relating to extensions of time).

**§ 1021.114. Venue of hearings.**

At the discretion of the Board, hearings will be held at the Commonwealth facility nearest the location of the complaint sought to be remedied by the Department with consideration for the convenience of witnesses, the public and the parties in attending the hearings.

**§ 1021.115. View of premises.**

The Board may upon reasonable notice and at reasonable times inspect any real estate including a body of water, industrial plant, building or other premises when the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board.

**§ 1021.116. Conduct of hearings.**

(a) Hearings may be held, at the discretion of the Board, before the Board as a whole, by individual Board members sitting as administrative law judges, or by hearing examiners who are not members of the Board. Hearings held by hearing examiners not members of the Board will be decided by the Board based upon its review of the record and the examiner's proposed adjudication. All final decisions shall be decisions of the Board decided by majority vote. Petitions for supersedeas and other petitions and motions may be decided by the Board member hearing the petition or motion.

(b) Subsection (a) supersedes 1 Pa. Code § 35.123 (relating to conduct of hearings).

**§ 1021.117. Presentation by the parties.**

(a) Parties shall have the right to an opening statement, presentation of evidence, cross-examination, objection, motion and argument, and closing argument.

(b) The party with the burden of proof is required to make a prima facie case by the close of its case-in-chief.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.126 (relating to presentation by the parties).

**§ 1021.118. Transcript.**

(a) Hearings shall be stenographically reported and a transcript of the report shall be a part of the record.

(b) Parties desiring copies of the transcript shall obtain the copies from the official reporter.

(c) Parties shall have the opportunity to review a copy of the transcript on file with the Board.

(d) Subsections (a)—(c) supplement 1 Pa. Code §§ 35.131—35.133 (relating to general provisions).

**§ 1021.120. (Reserved).**

**EVIDENCE**

**§ 1021.121. Motions in limine.**

A party may obtain a ruling on evidentiary issues by filing a motion in limine.

**§ 1021.122. 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 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.

(3) When it revokes or suspends a license, permit, approval or certification.

(4) When it issues an order.

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

(1) When the Department denies a license, permit, approval or certification.

(2) When a party who is not the recipient of an action by the Department protests the action.

(3) When a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification.

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

**§ 1021.123. Evidence.**

(a) The Board is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible. The Board generally applies the Pennsylvania Rules of Evidence.

(b) Copies of an exhibit to be offered into evidence shall be made available to parties at the time it is identified as an exhibit unless otherwise ordered by the Board.

(c) Witnesses shall be sworn or shall affirm.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.137—35.139, 35.162 and 35.166.

**§ 1021.124. Written testimony.**

(a) Written testimony of a witness, on numbered lines in question and answer form, may be admitted into evidence provided the witness is present for cross-examination.

(b) Written testimony shall be filed concurrently with the prehearing memorandum unless a different time is prescribed by the Board. Objections to written testimony which can be reasonably anticipated prior to hearing shall be in writing and filed at least 5 days before the hearing unless otherwise ordered by the Board.

(c) If a party desires to file written testimony prior to the close of the record, it may do so only upon motion approved by the Board. This approval shall include the scope of the written testimony and the time for filing the testimony and service upon opposing counsel.

**§ 1021.125. Official notice of facts.**

(a) 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) Any 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 § 1021.133 (relating to reopening of record prior to adjudication).

**§ 1021.126. Limiting number of witnesses and additional evidence.**

(a) The Board may limit the number of witnesses upon an issue and may request a party to present additional evidence on an issue.

(b) Subsection (a) supplements 1 Pa. Code §§ 35.127 and 35.128 (relating to limiting number of witnesses; and additional evidence).

**POSTHEARING PROCEDURES**

**§ 1021.131. Posthearing briefs.**

(a) The initial posthearing brief of each party shall contain proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law.

(b) Reply briefs shall be as concise as possible and may not exceed 25 pages. Longer briefs may be permitted at the discretion of the presiding administrative law judge.

(c) An issue which is not argued in a posthearing brief may be waived.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.191—35.193 (relating to briefs).

**§ 1021.132. Oral argument after hearing.**

(a) A party may, within 5 days after the last post-hearing briefing and prior to adjudication, request oral argument before the entire Board. The Board may grant or deny the request.

(b) Subsection (a) supersedes 1 Pa. Code § 35.204 (relating to oral argument before presiding officer).

**§ 1021.133. 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 § 1021.95 (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 §§ 1021.91—1021.95 (relating to motions).

**§ 1021.134. Adjudications.**

(a) At the conclusion of the proceedings, the Board will issue an adjudication containing a discussion, findings of fact, conclusions of law and an order.

(b) The Board will serve a copy of the adjudication on all parties to the proceeding or their representatives.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.226 (relating to final orders).

**TERMINATION OF PROCEEDINGS**

**§ 1021.141. Termination of proceedings.**

(a) A proceeding before the Board may be terminated by one of the following:

- (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 the 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 Environmental Protection and (name of party or parties) have agreed to a settlement of the above matter. The Commonwealth had ordered under date of \_\_\_\_\_, (name of 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)(3). 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 schedule a hearing prior to taking action on the consent adjudication. Any 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.

**§§ 1021.142—1021.144. (Reserved).**

**RECONSIDERATION**

**§ 1021.151. 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. A party may file a memorandum of law at the time the motion or response is filed.

(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.

**§ 1021.152. 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. A party may file a memorandum of law at the time the motion or response is filed. 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.

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

*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.

**SANCTIONS**

**§ 1021.161. 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 dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

**§ 1021.162. (Reserved).**

**ATTORNEY FEES AND COSTS AUTHORIZED BY THE COSTS ACT**

**§ 1021.171. Scope.**

This section and §§ 1021.172—1021.174 apply to applications for an award of fees and expenses under the Costs Act.

**§ 1021.172. 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.

**§ 1021.173. 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.

**§ 1021.174. 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**

**§ 1021.181. Scope.**

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

**§ 1021.182. 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.

**§ 1021.183. 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.

**§ 1021.184. 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**

**§ 1021.191. 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.

**APPELLATE MATTERS**

**§ 1021.201. 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 shall certify the record in accordance with Pa.R.A.P. 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 listed in subsection (a), for appeals of Board adjudication, the record shall also include:

(1) The Board's adjudication and order.

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

(3) The parties' posthearing memoranda, including requested findings of fact and conclusions 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 listed 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 subject of the Board's opinion and order, together with responses, answers, and replies, and accompanying exhibits.

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

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

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