RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 261a]

Hazardous Waste Management System; Proposed Exclusion for Identification and Listing of Hazardous Waste

The Environmental Quality Board (Board) amends Chapter 261a (relating to identification and listing of hazardous waste) to read as set forth in Annex A. In response to a petition to delist from MAX Environmental Technologies, Inc. (MAX), the final-form rulemaking delists treated Electric Arc Furnace Dust (EAFD), treated at the hazardous waste treatment facility operated by MAX located in Yukon, PA, from the lists of hazardous wastes.

This order was adopted by the Board at its meeting of October 18, 2005.

A. *Effective Date*

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

B. *Contact Persons*

For further information, contact D. Richard Shipman, Chief, Division of Hazardous Waste Management, P. O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105-8472, (717) 787-6239; or Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) website at www.dep.state.pa.us.

C. *Statutory Authority*

The final-form rulemaking is being made under the authority of the Solid Waste Management Act (SWMA) (35 P. S. §§ 6018.101—6018.1003). Section 105(a) of the SWMA (35 P. S. § 6018.105(a)) grants the Board the power and the duty to adopt the rules and regulations of the Department to carry out the provisions of the SWMA.

D. *Background of the Amendments*

A delisting petition is a request to exclude waste from the list of hazardous wastes under the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C.A. §§ 6901—6986) and the SWMA. Under 40 CFR 260.20 and 260.22 (relating to general; and petitions to amend part 261 to exclude a waste produced at a particular facility), which are incorporated by reference in §§ 260a.1 and 260a.20 (relating to incorporation by reference, purpose, scope and applicability rulemaking petitions), a person may petition the United States Environmental Protection Agency (EPA) or a state administering an EPA-approved hazardous waste management program to remove waste or the residuals resulting from effective treatment of a waste from a particular generating facility from hazardous waste control by excluding the waste from the lists of hazardous wastes in 40 CFR 261.31 and 261.32 (relating to hazardous wastes from non-specific sources; and hazardous wastes from specific sources). Specifically, 40 CFR 260.20 allows any person to petition to modify or revoke any provision of 40 CFR Parts 260—266, 268 and 273. A person is provided the opportunity to petition to exclude a waste on a "generator specific" basis from the hazardous waste lists under 40 CFR 260.22. Under the Commonwealth's hazardous waste regulations in § 260a.20, petitions are to be submitted to the Board in accordance with the procedures established in Chapter 23 (relating to Environmental Quality Board policy for processing petitions—statement of policy) instead of the procedures in 40 CFR 260.20(b)—(e).

Effective November 27, 2000, the Department received approval from the EPA under RCRA to administer the Commonwealth's hazardous waste management program instead of the RCRA regulations. As part of that program approval and delegation, the Department and the Board are authorized to review and approve petitions for delisting of waste.

In a delisting petition, the petitioner shall show that waste generated at a particular facility does not meet any of the criteria for which the EPA listed the waste as set forth in 40 CFR 261.11 (relating to criteria for listing hazardous waste) and the background document for the waste. In addition, a petitioner shall demonstrate that the waste does not exhibit any of the hazardous waste characteristics (that is, ignitability, reactivity, corrosivity and toxicity) and present sufficient information for the agency to decide whether factors other than those for which the waste was originally listed warrant retaining it as a hazardous waste.

On November 3, 2003, MAX submitted a delisting petition under § 260a.20 and 40 CFR 260.20 and 260.22, which are incorporated by reference in the hazardous waste regulations. The petition seeks to exclude from the lists of hazardous wastes in 40 CFR 261.32, the residues resulting from the effective treatment of EAFD conducted at the MAX Yukon facility. EAFD is listed as a hazardous waste in 40 CFR Part 261 (relating to identification and listing of hazardous waste) and bears waste code K061. EAFD/K061 is defined in 40 CFR 261.32 in the iron and steel industry group as "emission control dust/sludge from the primary production of steel in electric arc furnaces."

The petition submitted by MAX provides: (1) descriptions and schematic diagrams of the proposed EAFD treatment system; (2) detailed chemical and physical analyses of the residuals resulting from treatment of samples of EAFD at the MAX Yukon facility; and (3) the results of modeling, using the EPA's Delisting Risk Assessment Software (DRAS) modeling software, to evaluate the risk posed to human health and the environment if the proposed delisted material was to be placed in a Subtitle D residual waste landfill, even assuming that the liner system of the landfill were to fail in containing that material.

The Department has carefully and independently reviewed the information in the petition submitted by MAX. Review of this petition included consideration of the original listing criteria, as well as the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA), as reflected in section 222 of the HSWA (42 U.S.C. § 6921(f)) and 40 CFR 260.22(d)(2)—(4).

The Department believes that this information demonstrates that the residues resulting from treatment of EAFD meeting the acceptance criteria identified in the petition which are treated at the MAX Yukon facility in accordance with the treatment protocols described in the petition and satisfy the delisting criteria in 40 CFR 260.22. The data reviewed by the Department shows that residues resulting from treatment of EAFD at the MAX Yukon facility no longer meet the criteria for which it was originally listed as hazardous waste K061. The data further demonstrate that the treated EAFD residuals do not possess hazard characteristics of ignitability, corrosivity, reactivity or toxicity as defined by RCRA. Finally, the data submitted in the petition, coupled with modeling using the EPA's DRAS model, show that treated EAFD residuals do not pose a threat to human health or the environment when disposed of in a RCRA Subtitle D/Pennsylvania Class I residual waste landfill.

Accordingly, the final-form rulemaking provides for a conditional delisting of EAFD that has been treated at the MAX Yukon facility. Under the conditions of the delisting, MAX must dispose of the treated EAFD residuals in a RCRA Subtitle D/Pennsylvania Class I residual waste landfill, which has groundwater monitoring and which is permitted to manage residual waste. The exclusion is valid for a maximum annual rate of 300,000 cubic yards per year. Any amount exceeding this volume would not be delisted under this exclusion. The conditional exclusion will require that MAX maintain operational controls and protocols to assure that the treated waste continuously meets the applicable treatment standards.

In January and May 2004, the Department briefed the Solid Waste Advisory Committee (SWAC) on the hazardous waste delisting petition submitted by MAX. On September 16, 2004, the Department presented draft proposed regulations to the SWAC for input. The SWAC recommended that the draft regulations be forwarded to the Board for consideration as a proposed rulemaking. The proposed rulemaking was published at 34 Pa.B. 6421 (December 4, 2004) with a 30-day public comment period. The SWAC was briefed on the comments received during the public comment period, and the regulatory change made as a result of the comments, at its July 14, 2005, meeting. Questions posed by members of the SWAC related to how the petitioner's data was analyzed, whether the exclusion was site and company specific and what precautions are in place to ensure waste treated from a specific generator under the delisting will not vary significantly over time. Department representatives and the petitioner satisfactorily addressed these questions, and the Committee endorsed the final rulemaking for consideration by the Board.

E. *Summary of Changes to the Proposed Rulemaking*

One change has been made to the text of the proposed rulemaking. This change results in a greater assurance that potential environmental or human health problems will not occur due to disposal of MAX's delisted treatment residues. The change lowers the levels of chemical constituents in the leachate from a facility where the delisted material has been disposed that will trigger investigative action. The more stringent trigger level is not more burdensome for MAX. It does not require any additional testing of leachate or groundwater. It only requires that MAX notify the Department in the event that routine testing of the leachate or groundwater produces results that exceed the delisting limits. The Department then has the responsibility of determining if any increased level of action or concern is necessary. The lower trigger levels are consistent with Federal delisting reopener levels.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

During a 30-day public comment period, the Department received comments from five commentators. Based on the comments received, one change has been made to the text of the proposed rulemaking described in Section E.

Other issues raised by the commentators included a concern that this final-form rulemaking will result in recoverable metals being disposed rather than recovered at a metals recovery facility and challenges relative to the merits of the technical information provided by MAX in support of its delisting request, as well as the Department's review. Since continually fluctuating market conditions determine what levels of metals in waste are economically recoverable, the Department does not believe it is appropriate to include provisions in a regulation that define what wastes should be disposed and what should be recycled. It is best that this matter be handled under the Department's waste management hierarchy and acceptance procedures included in MAX's hazardous waste management permit. As far as the challenges to the technical merit of MAX's request and the Department's review procedure, the Department followed National delisting procedure protocols established by the EPA and has consulted with EPA Region III staff in the development, acceptance and review of this delisting request.

G. *Benefits, Costs and Compliance*

Benefits

The final-form rulemaking will provide for treatment and disposition of EAFD, providing services to the steel-making operations that produce EAFD. The steel industry in this Commonwealth and across the country is changing to remain competitive, and one of the major changes has been the increased use of the electric arc furnaces and associated air pollution control equipment to capture EAFD generated in the steel-making process. One important feature of the electric arc furnaces is the recycling of a significant percentage of scrap steel. This method produces steel at reduced costs and provides greater environmental protection than other steel-making processes. In the last decade, the use of electric arc furnaces has increased in the United States to become the major method of steel production. As a result, EAFD is now the largest single hazardous waste produced in the United States. This is not a sign of environmental detriment, but rather the result of efforts across the industry to capture and sequester the metallic compound by-products resulting from steel making through more efficient pollution control devices. New electric arc furnaces are expected to be built in this Commonwealth. The proposed delisting of the residuals resulting from effective treatment of EAFD will assist steel-making operations by providing a cost-effective alternative for management of their wastes—by converting it from a hazardous waste to a nonhazardous residual waste that can be managed in an environmentally responsible manner in permitted residual waste facilities.

Compliance Costs

MAX will be required to comply with the conditions set forth in the delisting regulation, including testing and recordkeeping requirements. However, the delisting of the residuals resulting from treatment of EAFD should result in an overall reduced waste management cost to the steel-making industry that would utilize the treatment services being offered by MAX.

Compliance Assistance Plan

The final-form rulemaking should not require any educational, technical or compliance assistance efforts. The Department has and will continue to provide manuals, instructions, forms and website information consistent with the final-form rulemaking. In the event that assistance is required, the Department's Central Office will provide it.

Paperwork Requirements

The final-form rulemaking creates some new paperwork requirements to be satisfied by MAX to demonstrate ongoing compliance with the conditions of the delisting regulation. The paperwork requirements are consistent with the protocols suggested by MAX as part of its delisting petition.

H. *Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials or the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. For this final-form rulemaking, the Department would require no additional pollution prevention efforts. The Department already provides pollution prevention educational material as part of its hazardous waste program.

I. *Sunset Review*

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 22, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 6421, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate 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 the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on January 4, 2006, the 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 January 5, 2006, and approved the final-form rulemaking.

K. *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, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 34 Pa.B. 6421.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 261a, are amended by adding § 261a.32 and Appendix IXa to read as set forth in Annex A.

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

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(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 immediately.

KATHLEEN A. MCGINTY,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 362 (January 21, 2006).)

Fiscal Note: Fiscal Note 7-393 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE VII. HAZARDOUS WASTE MANAGEMENT

CHAPTER 261a. IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

Subchapter D. LISTS OF HAZARDOUS WASTES

§ 261a.32 Hazardous wastes from specific sources.

In addition to the requirements for lists of hazardous wastes incorporated by reference in 40 CFR 261.32 (relating to hazardous waste from specific sources), the solid wastes listed in Appendix IXa (relating to wastes excluded under 25 Pa. Code § 260a.20 and 40 CFR 260.20 and 260.22) are excluded under §§ 260a.1 and 260a.20 (relating to incorporation by reference, purpose, scope and applicability; and rulemaking petitions).

APPENDIX IXa. WASTES EXCLUDED UNDER 25 Pa. Code § 260a.20 AND 40 CFR 260.20 AND 260.22.

Table 2a. Wastes Excluded from Specific Sources

Facility	*Address*	*Waste Description*
Max Environmental Technologies, Inc.	233 Max Lane Yukon, PA 15698	Electric arc furnace dust (EAFD) that has been treated on site by MAX Environmental Technologies, Inc. (MAX) at a maximum annual rate of 300,000 cubic yards per year and disposed of in a Permitted Resource Conservation and Recovery Act Subtitle D/ Pennsylvania Class 1 residual waste landfill that has groundwater monitoring. (1) *Delisting Levels:* (i) The constituent concentrations measured in either of the extracts specified in paragraph (2) may not exceed the following levels (mg/L): Antimony-0.206; Arsenic-0.0094; Barium-21; Beryllium-0.416; Cadmium-0.11; Chromium-0.60; Lead-0.75; Mercury-0.025; Nickel-11.0; Selenium-0.58; Silver-0.14; Thallium-0.088; Vanadium-21.1; Zinc-4.3. (ii) Total mercury may not exceed 1 mg/kg. (2) *Verification Testing:* (i) On a batch basis, MAX must analyze a representative sample of the waste using the following: (A) The Toxicity Characteristic Leaching Procedure (TCLP) , test Method 1311 in "Test Methods for Evaluating Solid Waste. Physical/Chemical Methods." EPA publication SW-846, as incorporated by reference in 40 CFR 260.11. (B) The TCLP as referenced above with an extraction fluid of pH 12 ±0.05 standard units. (C) SW-846 Method 7470 for mercury. (ii) The constituent concentrations measured must be less than the delisting levels established in paragraph (1). (3) *Changes in Operating Conditions:* (i) If any of the approved EAFD generators significantly changes the manufacturing process or chemicals used in the manufacturing process or MAX significantly changes the treatment process or the type of chemicals used in the treatment process, MAX must notify the Department of the changes in writing. (ii) MAX must handle wastes generated after the process change as hazardous until MAX has demonstrated that the wastes continue to meet the delisting levels set forth in paragraph (1) and that no new hazardous constituents listed in Appendix VIII of Part 261 have been introduced and MAX has received written approval from the Department. (4) *Data Submittals:* (i) MAX must submit the data obtained through routine batch verification testing, as required by other conditions of this rule or conditions of the permit, to the Pennsylvania Department of Environmental Protection Southwest Region, 400 Waterfront Drive, Pittsburgh, Pennsylvania 15222. (ii) The data from the initial full scale batch treatments following permit modification and construction of the treatment unit shall be submitted to the Department as it becomes available and prior to disposal of those batches. (iii) The data submission frequency can be modified by the Department upon demonstration that the treatment method is effective. (iv) All data must be accompanied by a signed copy of the certification statement in 40 CFR 260.22(i)(12). (v) MAX must compile, summarize, and maintain on site for a minimum of 5 years records of operating conditions and analytical data. MAX must make these records available for inspection. (5) *Reopener Language:*

Facility	*Address*	*Waste Description*
		(i) If, at any time after disposal of the delisted waste, MAX possesses or is otherwise made aware of any data for any of the approved disposal facilities (including but not limited to leachate data or groundwater monitoring data) relevant to the delisted waste indicating that any constituent identified in paragraph (1) is at a level in the leachate higher than the delisting level established in paragraph (1), or is at a level in the groundwater higher than the specific facility action levels, then MAX or the disposal facility must report such data, in writing, to the Regional Director of the Pennsylvania Department of Environmental Protection Southwest Region within 10 days of first possessing or being made aware of that data. (ii) Based on the information described in subparagraph (i) and any other information received from any source, the Regional Director will make a preliminary determination as to whether the reported information requires Department action to protect human health or the environment. Further action may include suspending or revoking the exclusion or other appropriate response necessary to protect human health and the environment. (iii) If the Regional Director determines that the reported information does require Department action, the Regional Director will notify MAX in writing of the actions the Regional Director believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing MAX and/or the approved disposal facility with an opportunity to present information as to why the proposed Department action is not necessary or to suggest an alternative action. MAX and/or the approved disposal facility shall have 30 days from the date of the Regional Director's notice to present the information. (iv) If after 30 days MAX and/or the approved disposal facility presents no further information, the Regional Director will issue a final written determination describing the Department actions that are necessary to protect human health or the environment. Any required action described in the Regional Director's determination shall become effective immediately, unless the Regional Director provides otherwise.

[Pa.B. Doc. No. 06-219. Filed for public inspection February 10, 2006, 9:00 a.m.]

ENVIRONMENTAL HEARING BOARD
[25 PA. CODE CH. 1021]
Practice and Procedure

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedure). The final-form rulemaking modifies the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the final-form rulemaking at its August 22, 2005, meeting.

Effective Date

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

Contact Person

For further information, contact William T. Phillipy 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 Phillipy may be contacted at the previous number. TDD users may telephone the Board through the AT&T Pennsylvania Relay Center at (800) 654-5984.

Statutory Authority

The final-form rulemaking is promulgated under 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 the Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC), Department of Transportation (DOT) and the Citizens for Pennsylvania's Future (PennFuture). The comments were discussed by the Board and by its Procedural Rules Committee (Rules Committee). Responses to the comments are as follows.

Rule 1021.2. Definitions.

IRRC suggested clarifying the proposed amendment to the definition of "Department" by specifically listing the "other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board."

Response

The Board elected to keep the definition somewhat flexible to reflect possible changes in its source of jurisdiction. For instance, the previous definition referenced the "Department of Environmental Resources." In 1995, the Department of Environmental Resources was broken into two separate agencies and the names were changed to the Department of Environmental Protection (DEP) and De-

partment of Conservation and Natural Resources (DCNR). The Board clearly has jurisdiction over appeals of actions of the DEP. It is believed the Board also has jurisdiction over appeals of actions of the DCNR, though this question has not been definitively answered. In addition, in 1993, the legislature gave the Board jurisdiction over appeals of actions of the State Conservation Commission. Because of these and other possible changes in jurisdiction that may occur over time, the boards, commissions or agencies over whose appeals the Board has jurisdiction are not static. Therefore, the Board felt it would be difficult if not impossible to specifically reference all boards, commissions or agencies over which it has jurisdiction without having to continually revise its regulations.

Rule 1021.32. Filing.

The proposed amendment to this rule, which would have allowed the formal filing of documents in the Board's Pittsburgh office, has not been submitted for final rulemaking at this time due to staffing concerns. In the past, the Board has permitted the "informal filing" of documents, other than notices of appeal and complaints, at the Pittsburgh office, whereby parties may hand deliver documents to the Board's Pittsburgh office. In these cases, the Pittsburgh office notifies the Harrisburg office of the receipt of a document and the Harrisburg office enters the document into the docket. The Board will continue this practice and may revisit the issue of establishing a formal filing system in the Pittsburgh office in the future.

Rule 1021.34. Service by a party.

PennFuture opposed the proposed amendment to Rule 1021.34, which would require that service be made by either same day or overnight delivery if filing is made in this manner. PennFuture expressed a concern that the proposed amendment would impose unnecessary expense on all parties, and particularly pro se litigants, and would discourage electronic filing (e-filing).

Response

The intent behind the amendment was not to allow any party to gain a tactical advantage or to impose an undue burden on any party; rather, the purpose behind the amendment was to allow opposing counsel the courtesy of receiving a document at approximately the same time the Board does. For example, there have been a number of occasions when the Board has received a petition or motion, such as a request for an extension, by either same day or overnight delivery and has scheduled a conference call with all parties to the appeal, only to discover that opposing counsel have not received a copy of the petition or motion because it is being sent to him by regular mail.

The Code of Civility provides that a party who serves a paper on a court should deliver the paper to other parties at substantially the same time and by the same means as the document is filed with the court. Code of Civility, II.14. Thus, this amendment is simply a codification of what is already required by the Code of Civility.

If a party finds that it involves too much expense to serve counsel by an overnight delivery service, the party has the option of delivering the document in person, faxing it or simply filing the document by regular mail, thereby avoiding the requirement of serving it on opposing counsel in an expedited fashion.

The amendment does not affect e-filing since the e-filing of a document effects electronic service on opposing counsel. When parties e-file a document, opposing counsel are sent an electronic notice by the Board advising them of the e-filing.

PennFuture's comment points out, however, that the wording of the amendment should be clarified. The proposed amendment appeared to require that parties must serve documents by overnight mail and may not deliver them in person, when a filing is made in person or by overnight delivery. This was not the intent of the amendment. Therefore, the amendment has been rewritten to make it clear that the purpose of the amendment is to ensure that parties are served no later than the following day whenever a document is filed by overnight mail or hand delivery.

Rule 1021.51. Commencement, form and content.

IRRC suggested deleting the proposed comment and cross-referencing Rules 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance) in subsection (i). This recommendation was adopted.

Rule 1021.53. Amendments to appeal or complaint.

Both IRRC and DOT commented on this rule, opposing the proposed amendment to the standard for amending a notice of appeal or complaint. They felt that the proposed amendment unfairly shifted the burden of proof to the nonmoving party to show that undue prejudice would result from an amendment. Additionally, DOT raised a concern that the amendment would hinder the speedy resolution of litigation, thereby interfering with construction deadlines. IRRC also raised a concern that the proposed amendment went against the precedent established in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), as noted in the proposed comment.

Response

The Board elected to change the standard for amendment of an appeal from one of "good cause," specifically enumerated in the rule, to one of "no undue prejudice" subject to the Board's discretion to be more in line with civil practice in the courts of common pleas. The standard for allowance of an amendment in civil court is one of "no undue prejudice." Under the previous standard, it was virtually impossible for a party to amend its appeal after the initial 20-day amendment as of right period had passed. The Board felt it was not good practice to have a standard that was virtually impossible to meet. The Board also recognized that an amendment very early in the appeal period may not be prejudicial, while the same amendment later in the litigation process could very well be prejudicial. For that reason, the decision as to whether a proposed amendment would result in prejudice to the opposing parties must be left to the discretion of the Board, rather than setting forth a rigid standard in the rule.

The *Game Commission* case was based on a reading of Rule 1021.51(e), which states that the Board may agree to hear an objection not raised in the appeal provided that good cause is shown. Because this language is being deleted, the *Game Commission* holding is no longer applicable.

As to DOT's concern that the amendment will weaken the opposing party's interest in a speedy resolution of the litigation, one of the factors that will be considered in determining whether an amendment is prejudicial will be whether it will result in a delay of the proceedings. In the

alternative, DOT asked the Board to state that any expansion of the litigation is per se prejudicial. Such a statement would swallow the rule since there may be times when an amendment will expand what is in the case. The question is not whether the case will be expanded but whether the expansion at that stage of the proceeding is prejudicial. This will be determined on a case-by-case-basis. An expansion 21 days after an appeal has been filed may not be prejudicial, whereas the same expansion closer to the trial may be problematic.

DOT and IRRC raise an important concern that the burden seemingly shifts to the responding party under the new standard. The rule will clarify that the burden is on the moving party to demonstrate there is no undue prejudice to the opposing parties. Nonetheless, the Board recognizes there will be some shifting of the burden to the responding party to show that it will unduly suffer prejudice if the amendment is permitted. However, even under the previous rule there was some burden on the responding party under subsection (b)(3) to show it would suffer undue prejudice if an amendment were allowed.

Rule 1021.54. Prepayment of penalties.

The Board had proposed adding a comment to Rule 1021.54 regarding the procedure followed for the handling of prepaid penalties. IRRC recommended deleting the comment and adding a statement to the rule that prepaid penalties are to be placed in an escrow account. In considering IRRC's recommendation, the Rules Committee reviewed Rule 1021.54 and a majority of the Rules Committee members determined that it did not meet the requirements of the statutes mandating the prepayment of penalties since those statutes appeared to require that the escrow account be handled by DEP and not the Board. A majority of the Rules Committee recommended deleting the rule and the proposed comment, and the Board agreed with the recommendation.

Rule 1021.91. Motions.

No comments were received on the proposed amendments to Rule 1021.91.

Rule 1021.94. Dispositive motions other than summary judgment motions.

No comments were received on the proposed amendments to Rule 1021.94.

Rule 1021.94a. Summary judgment motions.

Both IRRC and PennFuture recommended incorporating the text of the proposed comment to Rule 1021.94a into the actual rule itself. The Rules Committee considered PennFuture's and IRRC's comments and agreed that the second sentence of the proposed comment should be added to subsection (d). However, the Rules Committee recommended keeping the first sentence of the proposed comment as a comment, rather than adding it to the rule, since it was not procedural. The Board adopted the Rules Committee's recommendations.

Rule 1021.101. Prehearing procedure.

No comments were received on the proposed amendments to Rule 1021.101.

Rule 1021.104. Prehearing memorandum.

PennFuture objected to the proposed amendment to Rule 1021.104(a)(7) requiring parties to submit copies of proposed exhibits along with prehearing memorandum. The existing rule required only that parties submit a list of the proposed exhibits. PennFuture objected on the basis that the proposed amendment would impose unnecessary expense on parties and consume additional paper without any apparent benefit.

Response

Although the existing rule requires only the listing of exhibits, a majority of the judges have required parties to submit copies of exhibits with prehearing memoranda and this has been the typical practice of a large number of parties appearing before the Board. Thus, the amendment simply codifies existing practice.

As to PennFuture's concern that the amendment will impose additional expense on parties and result in additional paperwork, that is not the case since parties must otherwise provide copies of exhibits for the Board and opposing counsel at trial. The amendment simply requires that the exhibits be provided to the Board and opposing counsel at the time of the filing of the prehearing memorandum. This results in more efficiency in the distribution of exhibits rather than waiting until the trial.

PennFuture also raised a concern that this requirement would discourage the use of e-filing since the addition of exhibits to the prehearing memorandum would likely result in exceeding the 50-page limit for e-filing. However, exhibits to e-filed documents may be either e-filed or delivered in hard copy by mail or messenger. Therefore, a prehearing memorandum may still be e-filed even if the exhibits are sent by mail or delivered in person.

§ 1021.141. Termination of proceedings.

No comments were received on the proposed amendment to Rule 1021.141, which involved only the correction of a typographical error.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 29, 2005, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 2107 (April 9, 2005), to IRRC and 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 the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on December 14, 2005, the 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 December 15, 2005, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968, P. L. 769, No. 240 (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The 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, 1021.91, 1021.94, 1021.101, 1021.104 and 1021.141; and by adding § 1021.53a to read as set forth at 35 Pa.B. 2107; and by amending §§ 1021.34, 1021.51 and 1021.53; by adding § 1021.94a; and by deleting § 1021.54 to read as set forth in Annex A.

(b) The Chief Judge and Chairperson of the Board shall submit this order, 35 Pa.B. 2107 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 Chief Judge and Chairperson of the Board shall submit this order, 35 Pa.B. 2107 and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee and IRRC as required by law.

(d) The Chief Judge and Chairperson of the Board shall certify this order, 35 Pa.B. 2107 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*.

MICHAEL L. KRANCER,
Chairperson

(*Editor's Note*: The amendments to §§ 1021.32 and 1021.54, included in the proposal at 35 Pa.B. 2107, have been withdrawn by the Board.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 7072 (December 31, 2005).)

Fiscal Note: Fiscal Note 106-8 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

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.34. Service by a party.

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

(b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery or personal service on the parties.

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

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

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

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 must 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 must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

(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. (*Editor's Note:* Section 1021.54 dealing with prepayment of penalties has been deleted in this final rulemaking. Section 1021.51(f) should have been amended to reflect this change and will be corrected in future rulemaking.)

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

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

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

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

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

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

(2) Any affected municipality, its municipal authority, and the proponent of the decision, when applicable, in appeals involving a decision under sections 5 or 7 of the Sewage Facilities Act (35 P. S. §§ 750.5 and 750.7).

(3) The mining company in appeals involving a claim of subsidence damage or water loss under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.2).

(4) The well operator in appeals involving a claim of pollution or diminution of a water supply under section 208 of the Oil and Gas Act (58 P. S. § 601.208).

(5) The owner or operator of a storage tank in appeals involving a claim of an affected water supply under section 1303 of the Storage Tank and Spill Prevention Act (35 P. S. § 6021.1303).

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

(i) The service upon the recipient of a permit, license, approval or certification, as required by subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention). The recipient of a permit, license, approval or certification who is added to an appeal pursuant to this section shall still comply with §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance).

(j) Other recipients of an action appealed by a third party, served as required by subsections (h)(2), (3), (4) or (5), may intervene as of course in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene pursuant to § 1021.81.

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

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

§ 1021.53. Amendments to appeal or complaint.

(a) An appeal or complaint 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 or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

(c) 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.

(d) 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.

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

Comment: In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission. v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

§ 1021.54. [Reserved].

MOTIONS

§ 1021.94a. Summary judgment motions.

(a) *Summary judgment motion record.*

(1) A summary judgment motion record must contain the following separate items:

(i) A motion prepared in accordance with subsection (b).

(ii) A supporting brief prepared in accordance with subsection (c).

(iii) The evidentiary materials relied upon by the movant.

(iv) A proposed order.

(2) Motions and responses must be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).

(b) *Motion*. A motion for summary judgment must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(c) *Brief*. The motion for summary judgment shall be accompanied by a brief containing an introduction and summary of the case, a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

(d) *Evidentiary materials*. Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief and shall be separately bound and labeled as exhibits. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

(e) *Proposed order*. The motion shall be accompanied by a proposed order.

(f) *Brief by party in opposition to motion.* Within 30 days of the date of service of the motion, a party opposing the motion shall file a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion. All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c) demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contendsare material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs together with citations to the motion record. Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.

(g) *Reply brief.* A concise reply brief may be filed by the movant within 15 days of the date of service of the response. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(h) *Motion for summary judgement.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(i) *Judgement rendered.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.

[Pa.B. Doc. No. 06-220. Filed for public inspection February 3, 2006, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF VEHICLE MANUFACTURERS, DEALERS AND SALESPERSONS

[49 PA. CODE CH. 19]

[Correction]

Protest Proceedings

An error occurred in the ordering language for the document which appeared at 36 Pa.B. 536, 537 (February 4, 2006).

The correct version of the order is as follows, with ellipses referring to the existing text:

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 19, are amended by adding §§ 19.32—19.38 to read as set forth at 35 Pa.B. 2408; and by amending § 19.3 and adding § 19.31 to read as set forth in Annex A.

* * * * *

[Pa.B. Doc. No. 06-178. Filed for public inspection February 3, 2006, 9:00 a.m.]

Title 67—TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 211]

[Correction]

Official Traffic Control Devices

The following sections were inadvertently omitted from the order at 36 Pa.B. 537, 538 (February 4, 2006) which rescinded sections of the regulations contained in Chapter 211:

§§ 211.182—211.190, 211.354a, 211.422a, 211.546a, 211.592b and 211.592c.

[Pa.B. Doc. No. 06-179. Filed for public inspection February 3, 2006, 9:00 a.m.]