

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 procedure) to read as set forth at Annex A. The final-form rulemaking amends 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 meeting on December 17, 2013.

Effective Date

The final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*, with the exception of § 1021.51(f)(1)(v) (relating to commencement, form and content), providing for automatic service of an electronically filed notice of appeal on the Department, which will go into effect on September 8, 2014. Until § 1021.51(f)(1)(v) is effective, persons who choose to electronically file a notice of appeal shall follow the service requirements for a conventional filing in § 1021.51(f)(2)(vi).

Contact Person

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Statutory Authority

The final-form rulemaking is 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 the Proposed Rulemaking

The proposed rulemaking was adopted by the Board at its meeting of November 8, 2012, and published at 43 Pa.B. 2591 (May 11, 2013) with a 30-day public comment period. Comments were submitted by the Independent Regulatory Review Commission (IRRC), Citizens for Pennsylvania's Future (PennFuture) and the Department of Environmental Protection (Department). The comments and the Board's responses were discussed at a public meeting/conference call of the Board's Rules Committee on July 25, 2013. In response to comments received during the official public comment period on the proposed rulemaking, a draft final rulemaking was prepared. A summary of the comments and Board's responses follows.

§ 1021.32(a). Filing—Heading

PennFuture noted that under the proposed amendments, subsections (a) and (e) would have the same heading of "conventional filing." PennFuture pointed out that contrary to its heading, subsection (a) is not limited

to conventional filing, but instead identifies documents that "shall be conventionally filed or facsimile filed." It recommended changing the heading of subsection (a) to "exceptions to electronic filing."

Upon reviewing subsection (a), the Rules Committee and the Board agreed with PennFuture's comment but felt it would be appropriate to give subsection (a) the heading "general filing requirements."

§ 1021.32(a)—Documents that must be conventionally or facsimile filed

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

§§ 1021.32(c)(14) and (15) and 1021.51(f)(1)—Completion, acceptance and rejection of electronic filings

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

PennFuture raised a concern that, given the jurisdictional nature of the 30-day deadline for commencement of an appeal before the Board, the application of proposed §§ 1021.32(c) and 1021.51(f)(1)(ii) would determine whether an appeal is dismissed for lack of jurisdiction and, therefore, the rules should specify the grounds on which the Board may reject the electronic filing of a notice of appeal or other document. IRRC also requested this information.

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

appeal containing the missing information. A notice of appeal is considered filed upon completion of the transmission of the notice of appeal by means of the Board's electronic filing system.

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

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

§ 1021.34(g). *Service by a party*

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

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

§ 1021.51(f)(1)(iii)—*Notice of appeal, notice of filing*

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

§ 1021.51(f)(1)(iv)—*Service on the Department*

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

In response to PennFuture's comment, the Board's electronic filing system has been upgraded to allow automatic service of an electronically filed notice of appeal on the Department's Office of Chief Counsel and program office. In other words, an appellant who electronically files a notice of appeal will no longer have to serve a copy of the appeal on the Department. This amendment will go into effect on September 8, 2014.

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

§ 1021.81. *Intervention*

Section 1021.81 (relating to intervention) deals with traditional means of intervention. A comment has been added to § 1021.81 to reference § 1021.51(j) which allows

persons who are "recipients of an action," as that term is defined in § 1021.51(h), to intervene by simply filing an entry of appearance.

§ 1021.103. *Subpoenas*

Section 1021.103(a) (relating to subpoenas) formerly provided that "requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 and 234.6—234.9." The only change to this section is the addition of citations to additional Rules of Civil Procedure governing subpoenas, specifically the rules governing the use of subpoenas in discovery in Pa.R.C.P. 4009.21—4009.27. As explained in the preamble to the proposed rulemaking, the amendments to § 1021.103 simply make clear that Pa.R.C.P. 4009.21—4009.27 also are incorporated into the Board's rules.

PennFuture commented that the proposed amendment would carry forward an unnecessary ambiguity that existed in § 1021.103. Although § 1021.103 refers exclusively to "subpoenas," the Rules of Civil Procedure that it incorporates, Pa.R.C.P. 234.1—234.4 and 234.6—234.9, are not limited to subpoenas. They also cover similar devices, the notice to attend and notice to produce.

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

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

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 26, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 2591, to IRRC and 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 House and Senate 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 Board 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 June 18, 2014, 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 June 19, 2014, and approved the final-form rulemaking.

Findings

The Board finds that:

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

(b) This final-form rulemaking is necessary and appropriate for administration of the act.

Order

The Board, under the authority of the act, orders that:

(1) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by adding §§ 1021.32a, 1021.36a and 1021.74a, deleting §§ 1021.171—1021.174 and amending §§ 1021.2, 1021.31, 1021.32, 1021.33—1021.36, 1021.37, 1021.39, 1021.51, 1021.81, 1021.103, 1021.122, 1021.181 and 1021.201 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(*Editor's Note:* The proposed amendments to §§ 1021.94 and 1021.94a published at 43 Pa.B. 2591 have been withdrawn by the Board.)

(2) 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.

(3) The Chairperson of the Board shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee and IRRC as required by law.

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

(5) This order takes effect upon publication in the *Pennsylvania Bulletin*, except for the amendment to § 1021.51(f)(1)(v), which takes effect on September 8, 2014.

THOMAS W. RENWAND,
Chairperson and Chief Judge

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 4263 (July 5, 2014).)

Fiscal Note: Fiscal Note 106-10 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****§ 1021.2. 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 obliga-

tions 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.

Business day—A day that is not a Saturday, Sunday or a legal holiday.

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

Department—The Department of Environmental Protection or other boards, commissions or agencies whose decisions are appealable to the Board.

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 documents to the Board through the electronic filing provider for purposes of filing.

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

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

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

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

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

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, § 1021.72 or § 1021.73 (relating to complaints filed by the Department; complaints filed by other persons; and

transferred matters) or answer filed under § 1021.74 (relating to answers to complaints). Documents filed in appeals, including the notice of appeal, are not pleadings.

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

Registration statement—A completed application to use the electronic filing provider for electronic filing and electronic service in Board proceedings.

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.

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.31. Signing.

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

(b) The signature to a document described in subsection (a) constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.

(c) The Board may impose an appropriate sanction in accordance with § 1021.161 (relating to sanctions) for a bad faith violation of subsection (b).

§ 1021.32. Filing.

(a) *General filing requirements.* The following documents shall be conventionally filed or facsimile filed:

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

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

(3) An entry of appearance filed under § 1021.51(j) (relating to commencement, form and content).

(4) A document filed on behalf of a person who is not a party to the proceeding at the time of the filing.

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

(c) *Electronic filing.*

(1) Documents except those listed in subsections (a) and (b) shall be electronically filed unless the Board orders otherwise in a particular proceeding. Persons wishing to be excused from the mandatory filing requirements shall file a motion under § 1021.92 (relating to

procedural motions). The Board will excuse persons from the mandatory electronic filing requirement, with respect to all filings or with respect to specific filings, if the Board determines that the requirement would impose an unreasonable burden on the potential filer.

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

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

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

(5) Filers are responsible for providing an objective description of documents electronically filed. The description must include:

(i) The party filing or serving the document.

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

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

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

(8) If an electronically filed document does not bear the actual signature of the registered user, the name of the registered user under whose log-in and password the document is submitted must be preceded by “s/” and typed in the space in the document’s signature block where the signature would otherwise appear (for example, “s/ Jane Doe”).

(9) No registered user or other person may knowingly permit or cause a registered user’s password to be used by anyone other than an authorized agent of the registered user.

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

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

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

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

(14) An electronic filing completed before midnight Eastern Time will be considered to be filed on that date. Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt serves as proof of filing. Filers may be required to file amended versions of documents to meet the necessary filing requirements.

(15) Except in the case of notices of appeal, which are governed by § 1021.53a (relating to nunc pro tunc appeals), if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.

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

(d) *Facsimile filing.*

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

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

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

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

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

(6) Except in the case of filing a notice of appeal, which is governed by § 1021.53a, if facsimile filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.

(e) *Conventional filing.*

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

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

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

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

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

§ 1021.32a. **Privacy issues.**

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

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

§ 1021.33. **Service by the Board.**

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

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

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

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

§ 1021.34. **Service by a party.**

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

(b) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before

the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

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

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

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

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

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile by 4:30 p.m. on the business day following notification of the deficiency. The filer may also effect service by e-mail, provided the registered user consents to service in that manner.

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

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

§ 1021.35. Date of service.

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

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

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

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

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

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

§ 1021.36. Certificate of service.

(a) Each document filed with the Board must include a certificate of service which certifies the date and manner of service and the name and mailing address of the person served, except as provided in subsection (b).

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

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

§ 1021.36a. E-mail addresses.

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

§ 1021.37. Number of copies.

(a) When a document is electronically filed, the filer shall electronically file one copy of the document.

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

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

§ 1021.39. Docket.

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

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

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

(d) The electronic docket will be available on the Board's web site 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).

**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 notice of appeal with the Board.

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

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

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

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

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

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

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

(1) *Electronic filing.*

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

(ii) An electronic filing complete before midnight Eastern Time will be considered to be filed on that date.

(iii) To the extent practical, the notice of appeal must be formatted in accordance with paragraph (2)(v). Failure to comply with this requirement will not result in rejection or dismissal of the notice of appeal. The Board may request that the appellant file an amended version of the notice of appeal in proper form.

(iv) In a third-party appeal, the appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on the recipient of the action. The service shall be made at the address in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

(v) The Board, through the electronic filing provider, will provide prompt notice of, and access to, all notices of appeal electronically filed to the Office of Chief Counsel of the Department, at an e-mail address designated by the Office of Chief Counsel.

(2) *Conventional filing.*

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

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

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

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

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

(vi) The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on each of the following in the same manner in which the notice of appeal is filed with the Board:

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

(B) The Office of Chief Counsel of the Department.

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

(3) *Facsimile filing.*

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

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

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

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

(v) The notice of appeal must be formatted in accordance with paragraph (2)(v). Failure to comply with this requirement will not result in rejection or dismissal of the notice of appeal. The Board may request that the appellant file an amended version of the notice of appeal in proper form.

(vi) The appellant shall, concurrent with or prior to the facsimile filing of a notice of appeal, serve a copy by facsimile on the individuals and entities listed in paragraph (2)(vi).

(g) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall follow the procedures in § 1021.54a (relating to prepayment of penalties) in addition to the procedures in this section.

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

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

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

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

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

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

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

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

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

Comment: If a recipient of an action under subsection (h)(2), (3) or (4) elects not to intervene following service of notice of an appeal or notice by the Board that the recipient’s rights may be affected by an appeal, the recipient’s right to appeal from the Board’s adjudication in the matter may be adversely affected. This comment is added in response to the Commonwealth Court’s ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

SPECIAL ACTIONS

§ 1021.74a. Verification of pleadings.

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

**CONSOLIDATION, INTERVENTION AND
SUBSTITUTION OF PARTIES**

§ 1021.81. Intervention.

* * * * *

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

Comment: A recipient of an action, as that term is defined in § 1021.51(h) (relating to commencement, form and content), may automatically intervene in an appeal by simply filing an entry of appearance under § 1021.51(j).

**PREHEARING PROCEDURES AND PREHEARING
CONFERENCES**

§ 1021.103. Subpoenas.

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

(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).

EVIDENCE

§ 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 another private party.

§§ 1021.171—1021.174. (Reserved).

**ATTORNEY FEES AND COSTS AUTHORIZED BY
STATUTE**

§ 1021.181. Scope.

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

APPELLATE MATTERS

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

* * * * *

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

[Pa.B. Doc. No. 14-1664. Filed for public inspection August 8, 2014, 9:00 a.m.]

Title 58—RECREATION

**FISH AND BOAT COMMISSION
[58 PA. CODE CHS. 61 AND 69]
Fishing; American Eel**

The Fish and Boat Commission (Commission) amends Chapters 61 and 69 (relating to seasons, sizes and creel limits; and fishing in Lake Erie and boundary lakes). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code).

A. Effective Date

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

B. Contact Person

For further information on the final-form rulemaking, contact Wayne Melnick, Esq., P.O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at www.fish.state.pa.us.

C. Statutory Authority

The amendments to §§ 61.1, 61.2, 61.4 and 69.12 are published under the statutory authority of section 2102(b) of the code (relating to rules and regulations).

D. Purpose and Background

The final-form rulemaking is designed to improve, enhance and update the Commission's fishing regulations. The specific purpose and background of the amendments is described in more detail under the summary of changes.

E. Summary of Changes

In May 2012, the Atlantic States Marine Fisheries Commission (ASMFC) approved a coastwide stock assessment of American eel that concluded that the American

eel population is depleted in United States waters. The stock is at or near historically low levels due to a combination of historical overfishing, habitat loss, food web alterations, predation, turbine mortality, environmental changes, toxins and contaminants, and disease. An independent panel of scientists that reviewed the stock assessment urged the ASMFC Board to examine alternative reference points to provide more protection to the spawning stock biomass.

In response to these findings, the ASMFC Board tasked the ASMFC American Eel Technical Committee (Committee) with developing potential management actions which would reduce mortality on all life stages of American eel. A range of options was developed by the Committee and subsequent action was taken by the ASMFC Board to release certain management options for public comment. These comments were considered by the ASMFC Board when, on August 8, 2013, it approved Amendment III to the ASMFC American Eel Fisheries Management Plan. Among the requirements of this amendment is a reduction in recreational harvest of eels by way of a coastwide establishment of a creel limit of 25 fish and a size limit of 9 inches. Currently, the Commonwealth has a 50 fish creel limit for American eel coupled with an 8-inch size limit for recreational harvested eels and a 6-inch to 8-inch slot limit for eels harvested for bait.

ASMFC requested that its member states implement the regulatory changes by January 1, 2014. Because the Commission's adoption of this final-form rulemaking by January 1, 2014, was not possible, the Commission's Executive Director exercised his authority under § 65.25 (relating to temporary changes to fishing regulations) to make temporary modifications. The temporary modifications went into effect on January 1, 2014.

To address the coastwide regulation directed by ASMFC, the Commission amends §§ 61.1, 61.2, 61.4 and 69.12 to increase the size limit and decrease the daily limit for American eel in this Commonwealth. The Commission amends these sections to read as set forth in the proposed rulemaking published at 43 Pa.B. 7095 (December 7, 2013).

F. Paperwork

The final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

G. Fiscal Impact

The final-form rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will not impose new costs on the private sector or the general public.

H. Public Involvement

Notice of proposed rulemaking was published at 43 Pa.B. 7095. The Commission did not receive public comments concerning the proposed rulemaking.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided and public comments were not received.

(3) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statute.

Order

The Commission, acting under the authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapters 61 and 69, are amended by amending §§ 61.1, 61.2, 61.4 and 69.12 to read as set forth at 43 Pa.B. 7095.

(b) The Executive Director will submit this order and 43 Pa.B. 7095 to the Office of Attorney General for

approval as to legality and form as required by law.

(c) The Executive Director shall certify this order and 43 Pa.B. 7095 and deposit them with the Legislative Reference Bureau as required by law.

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

JOHN A. ARWAY,
Executive Director

Fiscal Note: Fiscal Note 48A-254 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 14-1665. Filed for public inspection August 8, 2014, 9:00 a.m.]
