

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

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

The Board approved the final-form regulations at its June 16, 1999, meeting.

Effective Date

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

Contact Person

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Statutory Authority

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

Comments and Revisions to Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC); John W. Carroll, Esq. of Pepper Hamilton; R. Timothy Weston, Esq. of Kirkpatrick & Lockhart; and Thomas A. Linzey, Esq. of the Community Environmental Defense Fund. The commentators had specific comments which will be addressed on a section-by-section basis. The Board will address the comments and recommendations as a group only when the commentators had the same comments and recommendations. However, comments and recommendations which have only been raised by one of the commentators will be separately addressed.

§ 1021.17. Extensions of time

One commentator suggested that subsection (a) should grant the Board authority to grant a motion for an extension of time for the filing of appeals. The commentator states that because the 30-day time period for filing some appeals is not established by statute, but is established solely by § 1021.52 (relating to timeliness of appeal), the Board has authority to interpret its rules to allow a motion.

The more recently adopted environmental statutes such as section 10.2 of the Air Pollution Control Act (35 P. S. § 4010.2), and section 13 of the Storage Tank and Spill Prevention Act (35 P. S. § 7313), specify that an appeal to

the Board shall be filed within 30 days. This is the same period which the Board has adopted in § 1021.52(d). This 30-day rule for an appeal is consistent with the rule which exists in the case of many other administrative agencies. In addition, § 1021.53(a) (relating to amendments to appeal; nunc pro tunc appeals) gives an appellant the right to amend its appeal within 20 days after the appeal is filed. As a practical matter this gives an appellant 50 days in which to state the grounds for the appeal as a matter of right. In addition, the appellant may further amend the grounds stated for the appeal if appellant meets the conditions of § 1021.53(b) relating primarily to facts developed during the preparation phases of the case including discovery. Accordingly, the Board thinks it is unnecessary to grant a right to obtain an extension of time for the initial filing of the appeal when the appeal is under statutes which do not specify a 30-day period. The Board also sees considerable benefit to a uniform 30-day rule for the filing of appeals.

IRRC suggested that for clarity the "Note" portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code § 7.6 and Chapter 9 (relating to format of regulations; and preparation of documents subject to codification). The Board adopts this suggestion by creating a cross reference to § 1021.71 (relating to procedural motions).

§ 1021.22. Representation

This rule relates to representation before the Board. The Board for years has required that corporations be represented by attorneys admitted to practice before the Supreme Court of Pennsylvania. The amended rule would add this requirement to unincorporated associations. One commentator with extensive experience in representation of parties before the Board when citizens groups without counsel have been represented by their officers or by other nonattorney individuals highly endorsed the direction being taken by the Board in this proposal. Its comments referred to one example where the citizens group was represented before the Board by its Secretary who dragged on the appeal for 17 months, including extensive discovery. Then, less than 3 weeks before the scheduled hearing on the merits, the citizens group withdrew its appeal with prejudice without extracting a single concession from the company which had received the permit which was the subject of the appeal. This commentator's more detailed description of the way in which it was put to undue expense emphasizes the importance of having parties represented by the Board who are subject to the Rules of Professional Conduct and who are willing to comply with the Board's Rules of Procedure.

The Community Environmental Defense Fund urged that the Board either leave the rule as is so as to permit unincorporated associations to be represented through a spokesperson or to change the rule to recognize pro se appearances by individual members of an association as a trustee ad litem. Pa.R.C.P. No. 2152 requires that an action prosecuted by an association be prosecuted in the name of member or members thereof as trustees ad litem for the association. These comments pointed out that the retention of an attorney to represent the unincorporated association involves the considerable expense that these associations are unable to afford. Many of the comments apply to an individual proceeding pro se. These comments pointed out that many successful results have been

achieved by individual pro se litigants or by unincorporated associations who are represented by pro bono counsel. The Board agrees that that is true. Nothing in the Board's rule would prohibit individuals from representing themselves or an unincorporated association from being represented by pro bono counsel.

The commentator argued that the representation of an association by a spokesperson or representative individual does not constitute the unauthorized practice of law because there is no pecuniary benefit to the individual who becomes a representative. This is an inaccurate statement of law. The power to subpoena witnesses, to engage in the examination of witnesses at either a deposition or at a hearing and the presentation of legal and factual contentions before the Board in its adjudicatory proceedings is the very heart of the practice of law whether the individual is compensated for the effort or not. The commentator pointed out that many appeals before the Board may become unmanageable because of the large number of individuals who would be parties if the association is unable to appear through a spokesperson. The Board acknowledges that this is true. However, the Board believes that the alternative of a lay spokesperson authorizes the unlawful practice of law which may subject other parties to unreasonable expense and harassment which would not occur if the association were represented by an attorney bound by the Professional Rules of Conduct.

These commentators argued that Pa.R.C.P. No. 2152 allows a trustee ad litem to be designated a representative of the association which would not require an attorney representative. The commentator's description of the rule is inaccurate. Pa.R.C.P. No. 2152 merely states the rule as to how an action by an unincorporated association must be prosecuted. It provides that an action prosecuted by an association shall be prosecuted in the name of the member or members thereof as trustees ad litem for the association. This rule with respect to the capacity to sue has nothing to do with the question of whether or not the association must have counsel to pursue its lawsuit in the courts. As indicated, Commonwealth law requires that parties other than individuals be represented by an attorney admitted to the Supreme Court of Pennsylvania or by a qualified attorney from another state who has been authorized by the Board to enter an appearance pro hac vice.

The proposed § 1021.22(c) provided that an out-of-State attorney may be admitted to practice before the Board pro hac vice if the jurisdiction where the attorney is admitted to practice grants a like privilege to attorneys in this Commonwealth. One commentator suggested that this proposal be expanded to include the provisions of Pa.B.A.R. 301 applicable to admission pro hac vice which requires that the motion for admission pro hac vice be made by a lawyer in this Commonwealth and that the attorney admitted pro hac vice could not serve as an attorney of record.

The Board believes that a proposal would unnecessarily increase the costs of litigation before the Board. While Commonwealth trial court judges may find it convenient to be sure that there is an attorney of record within their easy reach, the Board's experience with out-of-State attorneys who have practiced before it has been that these attorneys are able and responsible individuals. Since much of the Board's prehearing practice is conducted through motions, status reports and telephone conference calls rather than by frequent prehearing conferences in person, the Board sees no practical necessity for this

requirement. However, the Board and the members of the Board's Procedural Rules Committee have concluded that this Bar Admission Rule is a part of the law of the Commonwealth and with respect to the practice of law. Under Pa.B.A.R. 103, the Supreme Court declared that these rules shall supersede all other court rules and practices pertaining to the admission to the bar and the practice of law. Accordingly, the Board has no choice but to comply with the Bar Admission Rules. The rule will be amended to require corporations to retain an attorney of this Commonwealth of record should they desire to be represented by lawyers other than members of the Bar of the Supreme Court of Pennsylvania.

The Board will create an exemption from this requirement, as recommended by the Board's Procedural Rules Committee however, for citizen groups and unincorporated associations who are able to find an out-of-State attorney who will be willing to represent them but would be unable to afford a Commonwealth counsel of record. The Board thinks that an exception is justified under the realities of environmental practice. The Board notes that Pa.B.A.R. 311 provides an exemption from the requirement of being represented by an attorney in this Commonwealth admitted to practice in the case of representation of indigent persons by law students under the direction of an organized defender association or legal services program. The Board believes the same consideration should be given to those citizen groups and non-profit associations who are unable to afford the burden of being represented by a Commonwealth attorney of record.

The Board has revised the rule in conformance with the statements set forth previously.

§ 1021.30. Filing

Proposed § 1021.30(a) required that documents filed with the Board be filed at its headquarters in Harrisburg. The principal reason for this requirement is that all of the documents filed with the Board are placed on the Board's docket by personnel in the Board's central office.

One commentator suggested that this requirement be revised to permit filing directly with the presiding administrative law judge wherever the judge sits, such as the Pittsburgh Office. The Board will continue to require filing of all documents in the Board's central office in Harrisburg to assure that all documents filed with the Board are properly recorded on the Board's docket. An administrative law judge in another location may request that the parties also provide him with a complimentary copy so that he will be promptly advised of the request being made by the party. Consequently, we reject the suggestion.

§ 1021.31. Service by the Board

IRRC suggested that this rule be revised to clarify the language. IRRC noted that the amendment to supersede 1 Pa. Code § 33.31 (relating to service by the agency) leaves unanswered the question of whom to serve if a party has not yet entered an appearance. Existing § 1021.31 requires that the Board serve documents originated by it, including orders and notices, upon the person designated in the notice of appearance. IRRC recommended either: 1) that the rule continue to "supplement" and not supersede the General Rules; or 2) revise the rule to indicate that service should be made on a permittee before the permittee enters an appearance.

The Board will adopt the second suggestion by requiring that the Board serve any person on whom the notice of appeal or complaint was served. This will result in service on the permittee because §§ 1021.31 and 1021.51

require that service be made on a permittee at the address in the permit or at its chief place of business in this Commonwealth.

One commentator suggested that the provisions of these rules be expanded so as to assure that the Board properly serves the party if no notice of appearance has been entered and that service on an attorney be made on the particular attorney representing the client in the matter before the Board.

The Board customarily serves its orders and other notices on the party involved whether or not represented by counsel and invariably serves only the attorney who has entered an appearance for the party before it in the case where the party is represented by counsel. The Board has amended the rule to reflect the suggested changes. However, the Board will amend proposed § 1021.51(g) to assure that when service is made on any third party, such as the permittee when the appeal is filed and will continue to serve that party until an appearance is entered by an attorney. Thereafter, service will be made on that attorney. In addition, the Board will amend proposed § 1021.32 to assure that service will be made only on an attorney representing the party in the matter before the Board.

§ 1021.32. Service by a party

The existing §§ 1021.31 and 1021.32 and proposed § 1021.32 relate to required service by a party. Proposed § 1021.32 required the parties to file a copy of each document filed with the Board on every party to the proceeding on or before the day that the document is filed with the Board.

One commentator suggested that the Board should provide a special manner of service for the parties requesting expedited consideration of a particular motion or matter. In some instances, parties will file a document with the Board by telecopy but will serve the other parties by ordinary mail. This suggestion is being adopted in § 1021.32 by requiring that the parties be served so that they receive the document within 24 hours of filing with the Board.

§ 1021.33. Date of service

One commentator strongly endorsed this change in the rule which will provide an additional 3 days for response when service of the document is made by mail. This is the rule in both State and Federal court procedure.

§ 1021.35. Number of copies

Section 1021.35(a)(2) requires filing two copies of prehearing memoranda, petitions for supersedeas and all other motions. One commentator and IRRC correctly pointed out that the rule should require filing of two copies only in the case of prehearing memoranda, petitions for supersedeas and all motions other than motions for stays, extensions and continuances of procedural deadlines. The rule will be amended to insert the word "than" in the rule as indicated previously.

§ 1021.51. Commencement, form and content

Subsection (f) requires prepayment of a penalty where the appeal is from an assessment of a civil penalty that requires an appellant to prepay the penalty. Commentators have pointed out that this rule should specifically state that this requirement applies only when a statute requires the prepayment of the penalty. IRRC concurred with the commentators that the section should be revised to clearly indicate that the prepayment requirement only applies when required by statute. The Board intended

that the prepayment requirement would be applicable only in the event prepayment was required by a statute, and will clarify the rule by adding that language to the final-form regulations.

As noted previously, this rule is being amended in subsection (g)(3) to require service on the recipient of a Department action, such as a permittee, at the address in the document evidencing the Department's action or at its chief place of business in this Commonwealth. One commentator pointed out several typographical errors in the publication of this rule. Subsection (f) (proposed subsection (g)) will be retained in the final rulemaking including paragraph (1)—(3).

§ 1021.56. Complaints filed by the Department

IRRC commented that the amendments should be revised for reasonableness and clarity. It questioned whether the change in the language in subsection (b), specifically the replacement of notice to plead with notice of right to respond, will give adequate notice of the consequences of a failure to respond, or the failure to specifically deny factual allegations. IRRC suggested that the Board should either: 1) revise the regulation to provide that complaints will contain a notice advising defendants of these consequences; or 2) explain how defendants are advised of these consequences through other means.

The Board amends the rule to include a provision that a complaint shall contain a notice advising defendants that a failure to respond stating all answers, objections and defenses may result in judgment being entered against them.

§ 1021.57. Answers to Complaints filed by the Department

Section 1021.57(c) of the Board's proposed rules provided in the case of a complaint for civil penalties by the Department a defendant failing to file an answer in the prescribed time shall be deemed in default and all relevant matters in the complaint may be deemed admitted. This is in accord with the usual rule of civil practice that admissions of material facts made in a responsive pleading may be offered into evidence at the time of hearing or trial.

IRRC and one commentator stated that this should occur only "on motion made." The Board will add "upon motion made." Counsel might choose to raise this issue by a motion rather than by a simple offer of the admission as evidence.

This rule provides that the prehearing procedures relating to discovery and the filing of dispositive motions provided for in § 1021.81 (relating to prehearing procedure) will be followed after an answer is filed. One commentator suggested that this should be done only after preliminary objections are decided. The Board will not follow this suggestion. Section 1021.57 will be amended to make it clear in subsection (e) that all affirmative defenses must be raised in the answer and that no preliminary objections are to be filed.

IRRC's comments contained three recommendations:

- 1) Subsection (b) should be divided into two numbered paragraphs for clarity.
- 2) The rule should be amended to resolve whether:
 - a) Replies to new matter and answers to preliminary objections are still required.
 - b) The same deemed admitted rule applies to failure to file a reply or answer.

3) It concurred with another commentator that the language "upon motion made" should be incorporated in subsection (c) for clarity since the proposed rule leaves unclear how facts may be deemed admitted against a party.

The Board will amend subsections (b) and (c) to reflect IRRC's first suggestion. IRRC's other two comments have been adopted in the changes made in § 1021.57.

§ 1021.58. Procedure after an Answer is filed

This rule provides that the prehearing procedures relating to discovery and the filing of dispositive motions provided for in § 1021.81 will be followed after an answer is filed. One commentator suggested that this should be done only after preliminary objections are decided. The Board will not follow this suggestion. Section 1021.57 will be amended to make it clear that all affirmative defenses must be raised in the answer and that no preliminary objections are to be filed.

§ 1021.70. Motions—General

Proposed § 1021.70(e) sought to establish an admission for purposes of deciding a motion upon the failure by a party to respond to all factual averments contained in the motion. Subsection (e) requires that a response to a motion set forth in correspondingly numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. The proposed rule would have added the language "material facts set forth in the motion that are not denied may be deemed admitted for the purposes of deciding the motion." This provision is required to force parties responding to a motion to actually deal with the facts rather than to simply brush off the motions with generalities. Sometimes the answers filed by pro se appellants give a pretty good idea of what their claim is but do not address the facts in correspondingly numbered paragraphs as the rule requires. In this situation the Board needs some discretion as to whether or not it will deem the material facts admitted or not. This rule would deem admitted material facts only for purposes of deciding the motion. This should be compared to the requirement of § 1021.57 with respect to answers to complaints. In this case, the Board may deem the facts admitted for all purposes of the case.

IRRC and one commentator suggested that this provision be made consistent with subsection (f) by amending subsection (e) to include the following language set forth in italics: "Material facts set forth in a motion other than a motion for summary judgment or partial summary judgment that are not denied . . ." The Board will make this change in the final rulemaking in order to provide consistency.

One commentator suggested that any motion be subject to the requirement that the moving party attach a verification or affidavit supporting each of the facts set forth in the motion.

The Board thinks that this requirement would not make an improvement in motion practice. While the Board requires affidavits based on personal knowledge for purposes of a motion for summary judgment or for a petition for supersedeas, the result of consideration of those motions by the Board is likely to affect basic substantive rights. The proposed rule was designed for those parties who choose not to aid the Board in determination of what the facts are related to the motion by simply ignoring the factual averments of the motion or failing to respond. The Board thinks that counsel opposing the motion can easily respond to the factual averments of the motion thus helping the Board decide the

matter without the risk of an adverse conclusion by the Board based on a technical interpretation of the parties' response. The Board thinks that the requirement that the attorney filing the motion attach an affidavit based on knowledge, information and belief would not deter the broad allegations with which this commentator is concerned.

§ 1021.80. Consolidation

Section 1021.80 governs the procedure on consolidation of proceedings. It also supersedes the comparable provision in 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) (GRAPP). One commentator and IRRC suggested that the applicability of 1 Pa. Code § 35.45 (relating to consolidation) should be retained because it authorizes the Board in a consolidated case to make orders concerning the conduct of the proceeding to avoid any unnecessary cost or delay. This amendment is not necessary because proposed § 1021.4 authorizes the Board to interpret the regulations to secure a just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. Accordingly, the Board does not believe that a specific provision for dealing with consolidation of cases is necessary. The Board will adopt the suggestion of IRRC that this section cross reference § 1021.4.

§ 1021.88. Motions in Limine

Section 1021.88 of the proposal provides that a party may obtain a ruling on evidentiary issues by filing a motion in limine. One commentator suggested that this provision should be deleted because it gives no guidance to individuals who appear before the Board. This commentator says that this provision implies that the Board must decide the evidentiary issue, but in fact the presiding administrative law judge could exercise his discretion not to rule on it as a preliminary matter. The commentator is correct that this is the effect of this provision. Under most circumstances, the motion will be decided. However, the presiding administrative law judge may decide that the decision should be reserved until the evidence is offered. However, the Board thinks that providing for a motion in limine in the Board's rules does give guidance to parties that evidentiary issues may well be ruled upon in advance of the hearing.

§ 1021.104. Transcript

This rule relates to posthearing submissions, and proposes that this rule supersede the otherwise applicable GRAPP rule in 1 Pa. Code §§ 35.131—35.133 (relating to transcript) providing the procedure for posthearing submissions. These rules also provide a procedure for corrections in the transcript upon motion or agreement by the parties, which would not otherwise be provided for by an existing Board rule. The Board will adopt a comment of one commentator and IRRC and withdraw the proposed supersession.

The Board intends to propose a rule with respect to correction of the transcript in the near future before again proposing to supersede these rules. In the meantime, correction of stenographic areas in the transcript can be corrected by motion or agreement of the parties as a matter of course under GRAPP.

§ 1021.107. Evidence

IRRC suggested that for clarity the "Note" portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code § 7.6 and Chapter 9. The Board adopts the

suggestion by stating in the rule that the Board generally applies the Pennsylvania Rules of Evidence.

§ 1021.108. Written testimony

This rule provides for the use of written testimony as a means of a party to present direct testimony, subject to cross examination by the opposing party.

One commentator suggested that the Board should explicitly reserve the power, upon objections from other parties, to require that witnesses present their direct testimony in person and on the witness stand. In addition, this commentator stated that the Board must make a clear requirement that written testimony be filed a certain number of days before the start of the hearing so that there will be ample time to prepare a meaningful response.

The Board believes that no change in the rule is required. This proposed rule only stated that the prepared testimony "may" be admitted into evidence. The Board will have ample authority at a prehearing conference prior to the time of the hearing to rule on any objections to the use of prepared testimony. Indeed the proposed rule provided for objections to the use of written testimony that must be filed at least 5 days before the hearing.

The Board thinks it unnecessary to require that written testimony always be submitted prior to the initial day of the hearing. In many cases, the Board's hearing will stretch out for several weeks which are not necessarily consecutive. Accordingly, the rule would permit the filing of written testimony at one of these later dates only upon motion approved by the Board. The Board will permit the use of prepared testimony only if that is useful and the opposing party has ample time to respond. This will assure that the responding party will have ample time to make a meaningful response. However, as a matter of clarity, the Board has amended subsection (c) to refer to the point in time that party may file written testimony to be "prior to the close of the record" in place of "at a later date."

§ 1021.117. Amicus curiae

Section 1021.117 provides for interested persons to file brief or memorandum of law amicus curiae with regard to legal issues involved in the case. It provides a procedure for obtaining authorization from the Board to file a brief. One commentator suggested that this section should be deleted because of his belief that a party should either meet the legal standing test to intervene or not be heard at all.

The Board believes that briefs amicus curiae by interested parties such as environmental groups and industry associations which might not otherwise have standing to be a party in the case should be heard on their views of legal issues. The Board has found in some instances that the interested parties have raised significant legal issues which justifiably were decisive of the matter which the parties did not raise before the Board. Accordingly, this rule will be retained.

§ 1021.125. Sanctions

This proposed rule dealt with the sanctions that the Board may impose on a party for failure to abide by a Board order or Board rule of practice and procedure. The power to dismiss the appeal or preclude the introduction of evidence for witnesses or documents not disclosed in discovery is continued. The power to bar an attorney from practice before the Board for repeated or flagrant violations of orders is removed to comply with the decision of

the Pennsylvania Supreme Court. The reference to the Pennsylvania Rules of Civil Procedure for practice before a court of common pleas was also removed because those rules relate only to discovery matters whereas the Board rule is designed to cover all situations in which the imposition of sanctions would be appropriate.

One commentator suggested that the deletion of language "in compliance with an order" with respect to sanctions should be reinserted where it was deleted. The commentator asserted that a party should not be sanctioned for failure to disclose evidence unless there was an affirmative duty to disclose the evidence either under the prehearing order or in response to a specific order of the Board. The Board rejects this proposal. Reinserting this language might enable a party who wants to hide a material witness or material documents in discovery to be free to introduce that evidence if the Board had not previously entered an order prohibiting the introduction of that evidence. Attorneys for parties before the Board know that a failure to reveal material witnesses or material documents in the course of discovery is most likely to result in the Board sustaining an objection to the offer of the evidence at the hearing on the ground that it was not disclosed in discovery. The objecting party probably will not know in advance that there is a material witness or a material document which has not been disclosed in discovery and should be free to make an effective objection at the time that evidence is offered whether or not it previously has made a motion.

Two commentators and IRRC stated that the phrase "other appropriate sanctions" is too vague. The Board will amend the rule at the suggestion of IRRC to read "other appropriate sanctions including those permitted under Pa.R.C.P. Rule 4019 (relating to sanctions regarding discovery matters)." While the language "other appropriate sanctions" will leave broad discretion in the Board as to other possible situations in which sanctions might be imposed, the Board believes that it is not possible in advance to be more specific about the types of situations that might possibly arise in the future when sanctions may be appropriate for reasons other than a failure to comply with discovery requests.

§ 1021.161. Prepayment of penalties

IRRC suggested that the proposed rule be divided into subsections and for clarity that the "Note" portion should conform to the standard format for regulations established by the Joint Committee on Documents, 1 Pa. Code § 7.6 and Chapter 9. The Board adopts these suggestions and incorporates the note concerning the bond into a new subsection (b).

§ 1021.162. Hearing on inability to prepay penalty

This rule relates to hearings on inability to prepay a penalty or post a bond. One commentator pointed out that the rule improperly refers to an application for counsel fees under more than one statute. The rule will be amended as suggested so that it refers to: "(relating to commencement, form and content of appeals)."

IRRC suggested that the Board make the following amendments for clarity: 1) replace "in the event" with "if"; and 2) divide the first and second sentences into two separate subsections. The rule will be amended to reflect these recommendations.

Other Proposed Rules

The Board did not receive any comments on proposed rules: § 1021.2 Definitions; § 1021.4 Construction and application of rules; § 1021.11 Timely filing required;

§ 1021.15 Effective dates of Board adjudication and preliminary orders; § 1021.21 Appearance in person; § 1021.34 Certificate of service; § 1021.41 Docket; § 1021.52 Timeliness of appeal; § 1021.61 Special actions; § 1021.64 Pleadings: generally; § 1021.65 Complaints-civil penalty proceedings; § 1021.66 Answers-civil penalty proceedings; § 1021.81 Prehearing procedure; § 1021.82 Prehearing memorandum; § 1021.85 Initiation of hearings; § 1021.86 Conduct of hearings; § 1021.87 Continuance of hearings; § 1021.89 Presentation by the parties; § 1021.90 Limiting number of witnesses and additional evidence; § 1021.92 Oral argument after hearing; § 1021.114 Subpoenas; § 1021.116 Posthearing briefs; § 1021.118 Adjudications; and § 1021.171 Composition of the Certified Record on Appeal to Commonwealth Court.

Sunset Date

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

Regulatory Review

On February 16, 1999, as required by section 5(a) of the Regulatory Review Act (71 P. S. § 745.4(a)), the Board submitted copies of the proposed revisions, which were published in 29 Pa.B. 1074 (February 27, 1999), to IRRC and the Senate and House Environmental Resources and Energy Committees for review and comment. The Board, in accordance with section 5(b.1) of the Regulatory Review Act (71 P. S. § 745.5(b.1)), also provided IRRC and the Committees with the Regulatory Analysis Form prepared in compliance with Executive Order 1982-2 (relating to improving government regulations) and copies of comments received.

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

These final-form regulations were approved by the House Environmental Resources and Energy Committee and the Senate Environmental Resources and Energy Committee on July 22, 1999. IRRC met on August 5, 1999, and approved the final-form regulations under section 5(c) of the Regulatory Review Act.

Findings of the Board

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. §§ 1021 and 1202) and the regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2.

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

Order

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

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by adding §§ 1021.4, 1021.30, 1021.82 and 1021.108, amending §§ 1021.2, 1021.15, 1021.17, 1021.22, 1021.31—1021.35, 1021.41, 1021.51, 1021.52, 1021.56—1021.58, 1021.70, 1021.80, 1021.81, 1021.85—1021.90, 1021.92, 1021.104, 1021.107, 1021.114, 1021.116—1021.118, 1021.125, 1021.161, 1021.162 and 1021.171; and by deleting §§ 1021.11, 1021.21, 1021.61 and 1021.64—1021.66.

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

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

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

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

GEORGE J. MILLER,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 4497 (August 21, 1999).)

Fiscal Note: Fiscal Note 106-4 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 PROCEDURES

Subchapter A. PRELIMINARY PROVISIONS

GENERAL

§ 1021.2. Definitions.

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

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

Action—An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.

Board—The Environmental Hearing Board, consisting of its chairperson and four members, all of whom are administrative law judges appointed by the Governor to hear appeals from actions of the Department.

Costs Act—The act of December 13, 1982 (P. L. 1127, No. 257) (71 P. S. §§ 2031—2035), known as the Commonwealth Agency Adjudicatory Expenses Award.

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

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

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 § 1021.62 (relating to intervention).

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 § 1021.56 (relating to complaints filed by the Department) or answer filed under § 1021.57 (relating to answers to complaints filed by the Department). Documents filed in appeals, including the notice of appeal, are not pleadings.

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 (relating to definitions).

§ 1021.4. Construction and application of rules.

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

TIME

§ 1021.11. (Reserved).

§ 1021.15. Effective dates of Board adjudications and preliminary orders.

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

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

§ 1021.17. Extensions of time.

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

(b) The motion in subsection (a) shall conform to the provisions in § 1021.71 (relating to procedural motions).

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

REPRESENTATION BEFORE THE BOARD

§ 1021.21. (Reserved).

§ 1021.22. Representation.

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

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

(c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of

Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.

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

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

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

§ 1021.30. Filing.

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

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

(c) Documents may be filed by personal delivery, by mail or by facsimile. When a document is filed by facsimile, the original shall be deposited in the mail on the same day. If a document exceeds ten pages, the facsimile shall consist of the first five pages and last five pages of the document and the certificate of service. A filing received after the close of the business day at 4:30 pm Eastern Time shall be deemed to be filed on the following business day.

§ 1021.31. Service by the Board.

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

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

§ 1021.32. Service by a party.

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

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

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

§ 1021.33. Date of service.

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

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

§ 1021.34. Certificate of service.

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

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

§ 1021.35. Number of copies.

(a) Unless otherwise ordered by the Board, the following number of copies shall be filed with the Board:

(1) Dispositive motions and post-hearing briefs—three copies.

(2) Prehearing memoranda, petitions for supersedeas and all motions, other than motions for stays, extensions and continuances of procedural deadlines—two copies.

(3) Other documents—one copy.

(b) One copy of briefs and other documents shall be served on the other parties to the proceeding.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.37 (relating to number of copies).

§ 1021.41. Docket.

(a) The Board will maintain a docket of proceedings and a proceeding as initiated shall be assigned an appropriate designation.

(b) The Board will maintain a complete official file on proceedings.

(c) The docket and 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.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.57 (relating to docket).

Subchapter C. FORMAL PROCEEDINGS**APPEALS****§ 1021.51. Commencement, form and content.**

(a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.

(b) The caption of an appeal shall be in the following form:

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

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

v. Docket No. _____

Commonwealth of Pennsylvania
Department of _____, Appellee

(c) The appeal shall set forth the name, address and telephone number of the appellant.

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

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

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

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

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

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

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

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

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

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

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

§ 1021.52. Timeliness of appeal.

(a) Except as specifically provided in § 1021.53 (relating to appeal nunc pro tunc), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

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

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

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

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

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

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

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

SPECIAL ACTIONS

§ 1021.56. Complaints filed by the Department.

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

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

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

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

[Case Caption]

NOTICE

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

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

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

§ 1021.57. Answers to complaints filed by the Department.

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

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

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

(d) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any

other sanctions for failure to file an answer in accordance with § 1021.125 (relating to sanctions).

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

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

SUBSEQUENT PROCEDURE

§ 1021.58. Procedure after an answer is filed.

After an answer is filed the prehearing procedures in § 1021.81 (relating to prehearing procedures) shall be followed.

§ 1021.61. (Reserved).

§ 1021.64. (Reserved).

§ 1021.65. (Reserved).

§ 1021.66. (Reserved).

MOTIONS

§ 1021.70. General.

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

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

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

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

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

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

(g) Except as provided in § 1021.73(e) (relating to dispositive motions), the moving party may not file a reply to a response to its motion, unless the Board orders otherwise.

(h) Subsection (b) supplements 1 Pa. Code §§ 33.11 and 35.178 (relating to the execution of filed documents; and presentation of motions). Subsection (c) supplements 1 Pa. Code § 33.32 (relating to service by a participant) and supersedes 1 Pa. Code §§ 33.35 and 33.36 (relating to proof of service; and form of certificate of service). Subsections (d)—(f) supplement 1 Pa. Code §§ 35.177 and 35.178 (relating to the scope and content of motions; and presentation of motions).

CONSOLIDATION

§ 1021.80. Consolidation.

(a) The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings.

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

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

PREHEARING CONFERENCES AND PREHEARING PROCEDURES

§ 1021.81. Prehearing procedure.

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

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

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

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

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

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

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

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

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

§ 1021.82. Prehearing memorandum.

(a) A prehearing memorandum shall contain the following:

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

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

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

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

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

(6) The proposed order of witnesses.

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

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

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

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

HEARINGS

§ 1021.85. Initiation of hearings.

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

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

§ 1021.86. Conduct of hearings.

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

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

§ 1021.87. Continuance of hearings.

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

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

§ 1021.88. Motions in limine.

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

§ 1021.89. Presentation by the parties.

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

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

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

§ 1021.90. Limiting number of witnesses and additional evidence.

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

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

§ 1021.92. Oral argument after hearing.

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

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

TRANSCRIPT

§ 1021.104. Transcript.

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

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

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

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

EVIDENCE

§ 1021.107. Evidence.

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

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

(c) Witnesses shall be sworn or shall affirm.

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

§ 1021.108. Written testimony.

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

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

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

SUBPOENAS

§ 1021.114. 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.Rs.C.P. 234.1—234.4 and 234.6—234.9. When the term “court” is used in Pa.R.C.P. “Board” is to be understood; when the terms “Prothonotary” or “clerk of court” are used in Pa.R.C.P. “Secretary to the Board” is to be understood.

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

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

BRIEFS

§ 1021.116. Posthearing briefs.

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

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

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

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

§ 1021.117. Amicus curiae.

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

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

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

ADJUDICATIONS

§ 1021.118. Adjudications.

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

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

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

SANCTIONS

§ 1021.125. Sanctions.

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

PREPAYMENT OF PENALTIES

§ 1021.161. Prepayment of penalties.

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

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

§ 1021.162. Hearing on inability to prepay penalty or post a bond.

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

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

APPELLATE MATTERS

§ 1021.171. Composition of the Certified Record on Appeal to Commonwealth Court.

(a) Unless the parties file a stipulation with the Board providing otherwise, within 20 days of the filing of the petition for review, the Board shall certify the record in accordance with Pa.R.C.P. 1951 (relating to record below in proceedings on petition for review) and the record shall consist of:

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

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

- (1) The Board's adjudication and order.
- (2) The notes of testimony from the hearing, all exhibits admitted into evidence.
- (3) The parties' posthearing memoranda, including requested findings of fact and conclusions of law.
- (4) Petitions for reconsideration or to reopen the record, answers and accompanying exhibits.
- (5) Other documents which formed the basis of the Board's adjudication.

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

- (1) The Board's opinion and order.
- (2) The motion or petition which was the subject of the Board's opinion and order, together with responses, answers, and replies, and accompanying exhibits.
- (3) Petitions for reconsideration of the Board's opinion and order, responses, answers, and replies, and accompanying exhibits.
- (4) Other documents which formed the basis of the Board's opinion and order.

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