

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) amends §§ 1021.94 and 1021.94a (relating to dispositive motions other than summary judgment motions; and summary judgment motions) to read as set forth in 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 regulations at its meeting on December 17, 2013.

Effective Date

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

Contact Person

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board, Suite 310 Piatt Place, 301 Fifth Avenue, Pittsburgh, PA 15222, (412) 565-5245, mwesdock@pa.gov. If information concerning this final-form rulemaking is required in an alternative form, contact Vincent Gustitus, Secretary to the Board, (717) 787-1638, vgustitus@pa.gov. TDD users may telephone the Board through the AT&T Pennsylvania Relay Center at (800) 654-5984.

Statutory Authority

This 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.

Amendments to § 1021.94

The amendments to §§ 1021.94 and 1021.94a were approved as part of final-form rulemaking 106-10. However, the amendments were not included in final-form rulemaking 106-10 as published at 44 Pa.B. 5328 (August 9, 2014). The final-form rulemaking submitted to the Independent Regulatory Review Commission (IRRC) and the House Environmental Resources and Energy Committee and the Senate Environmental Resources and Energy Committee (House and Senate Committees) did not reflect the revised text of § 1021.94(c). Final-omitted rulemaking 106-11 adopts the revised version of § 1021.94(c).

Comments and Responses

The Board received comments to the proposed rulemaking published at 43 Pa.B. 2591 (May 11, 2013) from the Department of Environmental Protection (Department), Citizens for Pennsylvania's Future (PennFuture) and IRRC. The comments and the Board's responses were discussed at a public meeting and conference call of the Board's Rules Committee on July 25, 2013. In response to comments received during the official public comment period, a draft final rulemaking was prepared that incorporated many of the comments. Sections 1021.94 and 1021.94a were revised to address the comments submitted by IRRC, the Department and PennFuture.

The Board proposed changes to §§ 1021.94 and 1021.94a to address the following problem: when a party files a dispositive motion (such as a motion to dismiss under § 1021.94 or a motion for summary judgment under § 1021.94a), the other parties to the case have 30 days to file a response. In most cases, any response will be a response in opposition to the motion. However, in the case of a third-party appeal, one party may wish to file a response in support of the motion. For example, in the case of Party A v. Party B and Party C, if Party C files a motion to dismiss against Party A, Party B may wish to file a response in support of the motion. Party A, presumably, would file a response in opposition to the motion. A problem arises when the response in support of the dispositive motion is filed at or near the end of the 30-day response period, but raises new facts or legal theories not raised in the original motion. In that case, the party opposing the motion has little or no time to respond to the new facts or legal theories.

Two alternative solutions to this problem were proposed.

Option 1 would prohibit parties from filing a response in support of a dispositive motion that contained new facts or legal theories. If a party wished to file a response in support of a dispositive motion containing new facts or legal theories, he would need to obtain leave of the Board.

Option 2 would permit the filing of a response in support of a dispositive motion containing new facts or legal theories, and would give the opposing party additional time in which to respond.

Both approaches were mentioned in the preamble to the proposed rulemaking. Only one approach, Option 1, appeared in proposed Annex A. The preamble of the proposed rulemaking stated that the Board was seeking comments on both approaches and considered each one to have equal merit.

The Board received extensive comments on the proposed rulemaking from PennFuture and the Department, as well as comments from IRRC seeking clarification.

PennFuture supported Option 1, that is, limiting responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. However, PennFuture also commented that this approach did not by itself eliminate the need for the party opposing the motion to be given additional time to address both the dispositive motion and the response in support of the dispositive motion. To ensure that the party opposing a motion for summary judgment or other dispositive motion has sufficient time to address the arguments and authorities presented by the moving party and supporting parties, PennFuture recommended that the deadline for filing a response in opposition to a dispositive motion should be 30 days after service of the later of: 1) the motion; or 2) the last timely-filed notification of joining the motion that is accompanied by a supporting memorandum of law or brief.

The Department filed comments that raised concerns about Option 1, and recommended an approach closer to that in Option 2. The Department felt that parties should not be prohibited from filing a response in support of a dispositive motion that contains new facts or legal theories. The Department set forth a number of reasons in support of its position. First, the Department stated that

parties often have appropriate reasons for not wanting to join in one another's dispositive motions. The Department pointed out that even when parties are aligned, they may have different interests with respect to the filing of a particular dispositive motion. For example, in third-party appeals, the Department's interest may be in defending the integrity of the Department process that resulted in the action, whereas the recipient of the action is simply focused on prevailing in the current litigation.

Second, the Department felt that prohibiting parties from filing responses in support of dispositive motions except as permitted by order of the Board would frustrate the "just, speedy, and inexpensive" determination of Board proceedings. For example, the Department felt that in some instances, the Board may be able to dispose of issues or entire cases based on what is included in the supporting response, saving the parties and Board the expense and time that would be necessary to resolve them after a hearing on the merits.

Third, the Department felt that Option 1 could have a chilling effect on both the Department and other parties filing supporting responses and that Option 2 allowed for a more complete record before the Board.

The Department noted that the minutes of the Rules Committee meeting when this issue was discussed identified only one problem with the current Board rules with respect to supporting responses: the rules did not address whether parties opposing the motions have a right to respond to the supporting responses. The Department felt that the most reasonable way to address this problem would be to amend the rules to provide that the party opposed to the dispositive motion has a right to respond, rather than to amend the rules to prohibit the filing of supporting responses except as permitted by order of the Board.

Finally, the Department felt that Option 1 was unclear because: it did not address when an opposing party must respond to a supporting motion; it did not provide that an opposing party may have additional time to respond to a dispositive motion when a supporting response is filed; it did not address whether a party that files a supporting response may file a reply brief; it did not address whether a supporting response should take the form of a motion or memorandum; it did not address which "response" controls for purposes of calculating the reply time by the moving party; it did not address whether a party opposing a dispositive motion is to file one response to both the motion and the supporting response or file separate responses; and it did not contain a deadline for filing a motion requesting the Board to allow the filing of a supporting response with new facts or legal theories.

In its comments, the Department recommended an alternative amendment to the rules that would allow parties to file responses in support of a dispositive motion containing new facts or legal theories, but also provided an additional time period for the opposing party to respond to the new facts and legal theories raised in the supporting response, as well as additional time to respond to the original motion.

IRRC did not take a position on Option 1 or 2 but raised the following questions about Option 1: what form, if any must a notification that a party is joining a dispositive motion take; how did the Board determine that 15 days is a reasonable amount of time in which to file a notification; under what circumstances would the Board permit, by way of an order, a party to raise additional issues in support of the dispositive motion; and

how does a party wishing to raise additional issues request permission in the notification and must a separate pleading or motion be filed.

After an extensive review and consideration of the comments, the Rules Committee recommended and the Board agreed with the alternative approach suggested by the Department in its comments. Under this approach, a party is able to file a response in support of a dispositive motion within 15 days of service of the original motion or within 15 days of the deadline for filing dispositive motions, whichever comes first. The opposing party would then have 30 days to respond to the supporting response and between 30 and 45 days to respond to the original motion, depending on how long after the original motion the response in support was filed. This approach takes into consideration PennFuture's comment that the opposing party should be given additional time to address both the response in support and the original motion.

Sections 1021.94 and 1021.94a have been revised accordingly.

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.

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

Order

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.94 and 1021.94a to read as set forth in Annex A.

(*Editor's Note:* Final-omitted rulemaking 106-11 amends § 1021.94(c). See 44 Pa.B. 7368 (November 22, 2014).)

(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*.

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. No fiscal impact; (8) recommends adoption.

(Editor's Note: This final-form rulemaking corrects the fiscal note published at 44 Pa.B. 5326, 5330.)

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART IX. ENVIRONMENTAL HEARING BOARD
CHAPTER 1021. PRACTICE AND PROCEDURE
MOTIONS**

§ 1021.94. Dispositive motions other than summary judgment motions.

(a) Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party in accordance with § 1021.34 (relating to service by a party). Dispositive motions shall be accompanied by a supporting memorandum of law or brief. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for filing dispositive motions, whichever comes first. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate dispositive motion accompanies the supporting party's memorandum of law.

(c) A response to a dispositive motion shall be filed within 30 days of service of the motion or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law. The response to a dispositive motion must be accompanied by a supporting memorandum of law or brief.

(d) A moving party, or a supporting party that files a memorandum of law alone, may file a reply to a response to a dispositive motion within 15 days of the date of service of the response. The reply may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the Board.

(e) An affidavit or other document relied upon in support of a dispositive motion or response, that is not already a part of the record, shall be filed at the same time as the motion or response or it will not be considered by the Board in ruling thereon.

(f) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon

mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

(g) Subsection (a) supersedes 1 Pa. Code § 35.177 (relating to scope and contents of motions). Subsection (b) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

§ 1021.94a. Summary judgment motions.

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Pa.R.C.P. Rules 1035.1—1035.5.

(b) *Summary judgment motion record.*

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

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

(ii) A statement of undisputed material facts in accordance with subsection (d).

(iii) A supporting brief prepared in accordance with subsection (e).

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

(v) A proposed order.

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

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

(d) *Statement of undisputed material facts.* A statement of undisputed material facts must consist of numbered paragraphs and contain only those material facts to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation must identify the document and specify the paragraphs and pages or lines thereof or the specific portions of exhibits relied on. The statement of undisputed material facts, absent the portions of exhibits and affidavits relied upon, may not exceed five pages in length unless leave of the Board is granted.

(e) *Brief in support of the motion for summary judgment.* The motion for summary judgment shall be accompanied by a brief containing an introduction, summary of the case and the legal argument supporting the motion.

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(g) *Opposition to motion for summary judgment.* Within 30 days of service of the motion or, if a supporting party files a memorandum of law alone, within 30 days of

service of the memorandum of law, a party opposing the motion shall file the following:

(1) A response to the motion for summary judgment which includes a concise statement, not to exceed two pages in length, as to why the motion should not be granted.

(2) A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant's statement. Any response must include citation to the portion of the record contravening a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted.

(3) A brief containing the legal argument in opposition to the motion.

(h) *Length of brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion may not exceed 30 pages.

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

(j) *Proposed order.* The motion must be accompanied by a proposed order.

(k) *Reply brief.* Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file a reply brief. The reply brief may not exceed 15 pages unless leave of the Board is granted. Additional briefing may be permitted at the discretion of the Board.

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

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

Comment

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

[Pa.B. Doc. No. 14-2428. Filed for public inspection November 21, 2014, 9:00 a.m.]

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

The Environmental Hearing Board (Board), by this final-omitted rulemaking, amends § 1021.94(c) (relating to dispositive motions other than summary judgment motions) to read as set forth in Annex A. The amendments modify the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the regulation at its meeting on December 17, 2013.

Effective Date

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

Contact Person

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board, Suite 310 Piatt Place, 301 Fifth Avenue, Pittsburgh, PA 15222, (412) 565-5245, mwesdock@pa.gov. If information concerning this final-omitted rulemaking is required in an alternative form, contact Vincent Gustitus, Secretary to the Board, (717) 787-1638, vgustitus@pa.gov. TDD users may telephone the Board through the AT&T Pennsylvania Relay Center at (800) 654-5984.

Statutory Authority

This final-omitted 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.

Submission as Final-Omitted Rulemaking

These amendments to § 1021.94(c) were submitted as a final-omitted rulemaking under section 204(3) of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. § 1204(3)), known as the Commonwealth Documents Law (CDL). An earlier version of the amendments was published as proposed rulemaking at 43 Pa.B. 2591 (May 11, 2013). Comments on the proposed rulemaking were submitted by the Independent Regulatory Review Commission (IRRC), the Department of Environmental Protection (Department) and Citizens for Pennsylvania's Future (PennFuture).

The comments and the Board's responses were discussed at a public meeting and 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 that incorporated many of the comments. Section 1021.94(c) was revised to address the comments submitted by IRRC, the Department and PennFuture. However, the revised version of § 1021.94(c) was inadvertently omitted from the text of the final-form rulemaking submitted to IRRC, the House Environmental Resources and Energy Committee and the Senate Environmental Resources and Energy Committee (House and Senate Committees). Therefore, the revisions to § 1021.94(c) were not approved by IRRC and the House and Senate Committees and did not appear in the final-form rulemaking published at 44 Pa.B. 5328 (August 9, 2014). This final-omitted rulemaking corrects that error.

The amendments to § 1021.94(c) allow parties to file responses in support of a dispositive motion containing

new facts or legal theories and provide an additional time period for the opposing party to respond to the new facts and legal theories raised in the supporting response.

Sunset Date

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

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on October 3, 2014, the Board submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to IRRC and to the Chairpersons of the House and Senate Committees. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(j.2) of the Regulatory Review Act, on November 5, 2014, the final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 6, 2014, and approved the final-omitted rulemaking.

Findings

The Board finds that:

(1) Public notice of the Board’s intention to amend its regulations under the procedures in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) has been omitted under the authority of section 204 of the CDL because public comment is unnecessary.

(2) The amendment of the Board’s regulation in the manner provided in this order is necessary and appropriate for the administration of the act.

Order

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending § 1021.94(c) to read as set forth in Annex A, with ellipses referring to the text of the regulations.

(Editor’s Note: Final-form rulemaking 106-10 also amends § 1021.94. See 44 Pa.B. 7365 (November 22, 2014).)

(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*.

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. 7424 (November 22, 2014).)

Fiscal Note: 106-11. No fiscal impact; (8) recommends adoption.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART IX. ENVIRONMENTAL HEARING BOARD
CHAPTER 1021. PRACTICE AND PROCEDURE
MOTIONS**

§ 1021.94. Dispositive motions other than summary judgment motions.

* * * * *

(c) A response to a dispositive motion shall be filed within 30 days of service of the motion or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law. The response to a dispositive motion must be accompanied by a supporting memorandum of law or brief.

* * * * *

[Pa.B. Doc. No. 14-2429. Filed for public inspection November 21, 2014, 9:00 a.m.]