

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

**PRACTICE AND PROCEDURE  
MANUAL**

2006-2007 Edition  
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<sup>1</sup> Persons entitled to this information in an alternative format or another accommodation under the Americans With Disabilities Act may contact the Secretary to the Board at (717) 787-3483. TDD users please contact the Pennsylvania Relay Service at 1-800-654-5984.

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## I. APPEALS FROM ACTIONS OF THE DEPARTMENT

### A. Timely Appeals.

1. The Board has jurisdiction over appeals from final actions of the Department which adversely affect an appellant. *Borough of Ford City v. DER*, 1991 EHB 169; *see also* Rule 1021.2(a) (defining “action”).
2. If there is any doubt as to the appealability of a Department action, a notice of appeal should be filed as a protective measure within 30 days of the Department’s action. *See Russell Industries, Inc. v. DEP*, 1997 EHB 1048. If no appeal is properly filed, an action of the Department becomes final, and is no longer appealable. 35 P.S. § 7514(c).
3. The Department’s action which is the subject of an appeal to the Board is not stayed pending disposition of the appeal unless a supersedeas is obtained from the Board. Environmental Hearing Board Act, 35 P.S. § 7514(d)(1). See Section VI (Petitions for Supersedeas).

### B. Appealable Actions.

1. Issuance of an order, permit, license, certification or decisions by the Department.
2. A letter or other written communication, although not labeled an order, but which requires specific action on the part of a recipient, may possess the characteristics of an order. *Borough of Kutztown v. DEP*, 2001 EHB 1115; *202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10; *Medusa Aggregates v. DER*, 1995 EHB 414; *Martin v. DER*, 1987 EHB 612. *See also Borough of Edinboro v. DEP*, 2000 EHB 835; *Goetz v. DEP*, 2000 EHB 840 (inspection report); *Harriman Coal Corp. v. DEP*, 2000 EHB 1295. Factors the Board will consider include:
  - a. wording of the letter;
  - b. substance, meaning and purpose of the letter;
  - c. practical impact;
  - d. regulatory and statutory context;
  - e. apparent finalizing of the letter;
  - f. relief the Board may be able to offer;

- g. any other indication of a letter's impact upon the recipient's personal or property rights.

*Borough of Kutztown v. DEP*, 2001 EHB 1115. *See also Eljen Corp. v. DEP*, EHB Docket No. 2005-257-K (Opinion issued December 2, 2005); *Beaver v. DEP*, 2002 EHB 666.

- 3. Issuance of a civil penalty assessment.

## II. FORM AND CONTENT OF NOTICE OF APPEAL

A. Form of Appeal. Copies of the notice of appeal form and filing instructions are available from the Board and from its website, <http://ehb.courtapps.com>. However, it is not necessary to use them, as long as the information required by Rule 1021.51 is provided to the Board.

- 1. Concurrent with its filing, the appellant must serve a copy of the notice of appeal on the persons listed in Rule 1021.51(g), including the recipients of the Department's action. *See also* Rule 1021.34. The Board has recently amended Rule 1021.51 to include additional persons as "recipients" upon whom service is required, including among others, affected municipalities in certain actions under the Sewage Facilities Act and "other interested parties as ordered by the Board." Rule 1021.51(h).
- 2. Although important, concurrent service on the recipient of the government action is not a jurisdictional requirement. *White Township v. DEP*, EHB Docket No. 2005-097-R (Opinion issued July 18, 2005); *Thomas v. DEP*, 2000 EHB 598; *Ainjar Trust v. DEP*, 2000 EHB 505. *See also Clabatz v. DEP*, EHB Docket No. 2004-216-L (Opinion issued April 14, 2005) (failure to perfect an otherwise timely appeal by effecting service on the other parties within 30 days of the Department action, does not render an appeal untimely.)
- 3. A copy of the Department's action must also be included with a notice of appeal. Rule 1021.51(d). Where the issuance of a permit is being appealed, it is only necessary to include the permit itself, not the attachments such as maps or portions of the application incorporated into the permit by reference.
- 4. A party's signature constitutes a certification that there are good grounds to support the information contained in the notice of appeal and that it has not been filed for an improper purpose, such as to harass. 25 Pa. Code § 1021.31.
- 5. A notice of appeal is not a pleading, therefore no response is permitted or required. Rule 1021.2. *Pitikus v. DEP*, 2004 EHB 910.

## B. When to File.

1. The notice of appeal must be **received** by the Board at its offices in Harrisburg within the 30-day appeal period. Otherwise, the Board ordinarily is deprived of jurisdiction to hear the appeal. *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976); *Burnside Township v. DEP*, 2002 EHB 700; *Sweeney v. DER*, 1995 EHB 544. The 30-day appeal period is established by Rule 1021.52(a) as well as in various substantive statutes (*see, e.g.*, Section 1104(b) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1104(b)).
  - a. The appellants' claim that they did not understand that an action of the Department was final does not provide the Board with a basis for accepting jurisdiction over an untimely appeal. *Maddock v. DEP*, 2001 EHB 1000.
  
2. The 30-day period begins:
  - a. When the person to whom the action of the Department is directed or issued has received written notice of the action. *See* Rule 1021.52(a). *See Laurel Land Development v. DEP*, 2003 EHB 500.
  
  - b. As to any other person aggrieved by an action of the Department, such as a citizens group opposed to a landfill, (i) 30 days after notice of the action is published in the *Pennsylvania Bulletin*; or (ii) 30 days after actual notice of the action if no notice of the action is published in the *Pennsylvania Bulletin*. Rule 1021.52(a). *See Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 546 A.2d 1330 (Pa. Cmwlth. 1988); *Clabatz v. DEP*, EHB Docket No. 2004-216-L (Opinion issued January 26, 2005); *Barra v. DEP*, 2004 EHB 276; *Hopwood v. DEP*, 2001 EHB 661. *But see Stevens v. DEP*, 2000 EHB 438 (although an appeal of general permit coverage for land application of sludge was filed 30 days after publication in the *Pennsylvania Bulletin*, the appellants were not aggrieved until they received notice that sludge would be applied to a specific parcel); *Solebury Township v. DEP*, 2003 EHB 208 (notice in the *Pennsylvania Bulletin* was not reasonably calculated to provide notice of the Department action, therefore third party municipalities' appeals were not untimely).
  
  - c. Official notice in the *Pennsylvania Bulletin* is insufficient to begin the 30-day appeal period where the interested person is entitled to personal notice by law. *Fontaine v. DEP*, 1996 EHB 1333, 1347.

3. The Air Pollution Control Act contains two statutory provisions which affect the general rule as to the time within which an appeal must be filed:
  - a. The general rule under the Air Pollution Control Act (APCA) is that appeals must be filed within 30 days of either actual or constructive notice of the Department's action. 35 P.S. § 4010.2; *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997) (must be final order; "advance notice" was not a final Department action).
  - b. Section 7(e) of APCA provides that plan approvals and operating permits must be appealed within 30 days of either personal service or service by certified mail. 35 P.S. § 4006.1.
4. If one is undecided about the appeal, and the 30-day appeal period is about to expire, a protective appeal should be filed stating all known grounds for appeal which may later be amended pursuant to Rule 1021.53. Once the 30-day appeal period expires, the Department action is final and cannot ordinarily be challenged in subsequent Board appeals. *See Department of Environmental Resources v. Williams*, 425 A.2d 871 (Pa. Cmwlth. 1981).
5. Faxing. The notice of appeal may be faxed to the Board. It will be docketed as of the date of receipt of the telecopy transmission. *See* Rule 1021.32. The original must be sent to the Board via normal delivery channels.

#### C. Statement of Grounds for Appeal.

1. The notice of appeal should state all likely grounds for the appeal. *See Farmer v. DEP*, 1998 EHB 1194. Although the Board's rules permit amended appeals (see below) the original notice should represent a good faith effort to state the grounds for objecting to the action of the Department.
2. An appellant who fails to specify its objections to a Department action in a timely-filed notice of appeal or amendment to a notice of appeal waives those objections. *E.g., Fuller v. Department of Environmental Resources*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., filed October 28, 2004); *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Moosic Lakes Club v. DEP*, 2002 EHB 396. A broadly worded objection that the Department's action violated the provisions of a statute may be sufficient to preserve objections that the action was contrary to a particular regulation adopted under that statute. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *Ainjar*

*Trust v. DEP*, 2000 EHB 75. It is not required to cite specific regulations in a notice of appeal. *Goheen v. DEP*, 2003 EHB 92.

- a. One should not assume that a general allegation of an abuse of discretion or unlawful action made in an appeal filed within the 30-day period, but without identifying any specific ground for appeal, is certain to provide a sufficient platform for an amendment of the appeal. *Cf. Williams v. DEP*, 1999 EHB 708.
- b. In the case of the issuance of a permit, it is important to raise an objection to all conditions of the permit which are believed to be unlawful. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41.
- c. Whether the issue is raised or not, the doctrine of administrative finality may prevent an appellant from challenging a condition restated in a renewed permit issuance. Administrative finality does not prohibit consideration of issues which arise subsequent to the original permit or approval process. *Wheatland Tube Company v. DEP*, 2004 EHB 131; *Hankin v. DEP*, 2004 EHB 509; *Kelly Run Sanitation, Inc. v. DER*, 1992 EHB 382. For further analysis of when the principle of administrative finality does not attach, see *Dithridge House Assoc. v. Department of Environmental Resources*, 541 A.2d 827 (Pa. Cmwlth. 1988).
- d. Similarly, a pending appeal of a permit does not preserve objections to a subsequently issued amended permit. *Drummond v. DEP*, 2002 EHB 413; *Cf. Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion issued September 15, 2005).

#### D. Amendments to Appeals.

1. An appeal may be amended as of right within 20 days after the filing and docketing of the appeal. Rule 1021.53(a). *Guerrieri v. DEP*, 1998 EHB 1143; *Caernarvon Township Supervisors v. DEP*, 1997 EHB 60. This rule is not intended to permit “skeleton appeals” but allows for the addition of additional grounds which could not have been reasonably included with the original appeal.
2. The Board has recently amended its procedural rules to set a new more liberal standard for assessing requests for leave to amend appeals, to permit amendments where there is no undue prejudice to the opposing parties. Rule 1021.53(b) and Comment.

3. The Board will not grant a request for leave to amend a notice of appeal where the appellants fail to specifically indicate how they will amend the notice of appeal. *Bentley v. DEP*, 1999 EHB 71; *Abod v. DEP*, 1997 EHB 512.
4. The Board will allow an amendment which clarifies an objection raised in a notice of appeal where the opposing counsel had notice of the intended scope of the objection from the appellant's answers to interrogatories, a similar objection was raised in the notices of appeal of other appealing parties and the subject matter of the objection is a central issue in appeals of related permits. *Wallace Township v. DEP*, 2002 EHB 870. *See also Delaware Riverkeeper v. DEP*, 2003 EHB 603.

### III. MORE COMPLEX LEGAL ISSUES

#### A. Late Appeals.

1. Petitions for allowance of an appeal *nunc pro tunc* (filed after the required 30-day period) may be filed pursuant to Rule 1021.53a in very limited circumstances. They will only be granted where fraud or breakdown in the Board's operation or unique and compelling factual circumstances establish a non-negligent failure to appeal. *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Mon View Mining Corp. v. DEP*, 2004 EHB 542; *Weaver v. DEP*, 2002 EHB 273. The appellant must act promptly to remedy the untimely filing. *See Reading Anthracite Co. v. DEP*, 1998 EHB 602.
2. Examples of breakdowns in the Board's operation include situations where the Board did not adhere to its customary practice regarding then-permissible skeleton appeals, *J.E.K. Construction v. DER*, 1987 EHB 643, or where the Board prematurely discharged a rule to show cause why an incomplete appeal should be dismissed. *Washington Township v. DER*, 1995 EHB 403.
3. Situations where appeals *nunc pro tunc* will not be permitted:
  - a. Attempts to negotiate a settlement of a dispute with the Department are not grounds for allowance of an appeal *nunc pro tunc*. *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695; *Simons v. DEP*, 1998 EHB 1131.
  - b. Mailing the notice of appeal to an incorrect address for the Board, or to the Department instead of the Board, is not grounds for allowance of an appeal *nunc pro tunc*. *E.g., Cadogan Township Board of Supervisors v.*

*Department of Environmental Resources*, 549 A.2d 1363 (Pa. Cmwlth. 1988); *Greenridge Reclamation LLC v. DEP*, EHB Docket No. 2005-053-L (Opinion issued April 21, 2005); *Weaver v. DEP*, 2002 EHB 273; *Broschious Construction Co. v. DEP*, 1999 EHB 383. An appellant is charged with constructive knowledge of the applicable regulations. *C.W. Brown Coal Co. v. DER*, 1987 EHB 161.

- c. Negligence attributed to a secretary's emotional distress which led to a delay in filing a notice of appeal did not constitute unique and compelling circumstances sufficient to justify the allowance of an appeal *nunc pro tunc*. *Borough of Bellefonte v. Department of Environmental Resources*, 570 A.2d 129 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 577 A.2d 891 (Pa. 1990). *See also Mon View Mining Corp. v. DEP*, 2003 EHB 542.
- d. The Board's alleged failure to mail a notice of appeal form. *Broschious Construction Co. v. DEP*, 1999 EHB 383.
- e. Mistake concerning the finality or ramification of a Department action. *Eljen Corp. v. DEP*, EHB Docket No. 2005-257-K (Opinion issued December 2, 2005); *Maddock v. DEP*, 2001 EHB 1000; *Hopwood v. DEP*, 2001 EHB 1254.
- f. Absence from the Commonwealth during the appeal period. *Pedler v. DEP*, 2004 EHB 852.

B. Uncommon Appealable Actions. The following are uncommon situations which have provided grounds for appeal of a Department action:

- 1. Disapproval of planning modules for land development, where culmination of a series of Department actions extensively affects rights, privileges and immunities. *Middle Creek Bible Conference v. Department of Environmental Resources*, 645 A.2d 295 (Pa. Cmwlth. 1994); *but see Lobolito, Inc. v. DER*, 1993 EHB 477.
- 2. The Department's decision to enter into a consent order and agreement is not an exercise of prosecutorial discretion and is reviewable by the Board. *Burroughs v. DER*, 1992 EHB 134. *See also Lang v. DEP*, 2004 EHB 584.
- 3. Denial of funds pursuant to grant programs administered by the Department. *City of Harrisburg v. DER*, 1994 EHB 155 (and cases cited therein).

4. The Department's placement of violations of the Air Pollution Control Act on the Compliance Docket provided for by that Act. 35 P.S. § 4007.1(d); *United Refining Co. v. DEP*, 1995 EHB 1264.
5. Decisions of the Department involving reports and evaluations required by the Land Recycling and Environmental Remediation Standards Act. 35 P.S. § 6026.308. *Neville Chemical Co. v. DEP*, 2003 EHB 530.
6. Even though the Department had previously granted an exemption from requirements of the Sewage Facilities Act, a letter which again grants an exemption is an appealable action because the Department considered new facts and exercised its discretion anew. *Stern v. DEP*, 2001 EHB 861.

### C. Non-Appealable Actions.

1. The adoption of regulations by the Environmental Quality Board constitutes pre-enforcement review and is not appealable to the Board. *Machipongo Land & Coal Co. v. Department of Environmental Resources*, 648 A.2d 767 (Pa. 1994), *modified*, 676 A.2d 199 (Pa. 1996); *Arsenal Coal Co. v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984) (upholding Commonwealth Court jurisdiction under unusual circumstances); *Duquesne Light Co. v. Department of Environmental Protection*, 724 A.2d 413 (Pa. Cmwlth. 1999); *see also Smithtown Creek Watershed Association v. DEP*, 2002 EHB 713 (EQB refusal to redesignate a stream); *Plumstead Township Civic Association v. DEP*, 1995 EHB 1120, *aff'd*, 684 A.2d 667 (Pa. Cmwlth. 1996) (EQB unsuitability designations are not appealable to the Board). However, the Board does have jurisdiction to consider the validity of regulations in an appeal from a permit issuance or an enforcement action by the Department. *Neshaminy Water Resource Authority v. Department of Environmental Resources*, 513 A.2d 979 (Pa. 1986); *Concerned Citizens of Chestnut Hill Township v. Department of Environmental Resources*, 632 A.2d 1 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 642 A.2d 488 (Pa. 1994).
2. Notice of possible future enforcement action. *Bituminous Processing Co. v. DEP*, 2000 EHB 13; *K.M. & K. Coal Co. v. DER*, 1986 EHB 692 (proposed assessment of civil penalties). *See also Kelly v. DEP*, 2003 EHB 10 (proposed consent assessment of civil penalty).
3. An inspection report which merely lists alleged violations. *Goetz v. DEP*, 2001 EHB 1127; *Goetz v. DEP*, 1999 EHB 824; *Malak v. DEP*, 1999 EHB 909.

4. The Department's refusal to exercise enforcement discretion. *Department of Environmental Protection v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 132 EAL 2005 (Pa. filed December 2, 2005). *Westvaco Corp. v. DEP*, 1997 EHB 275; *Ridenour v. DEP*, 1996 EHB 928. However, prosecutorial discretion, a Board created exception to its mandated duty to review Department actions, may be narrowly construed and confined to prosecution area; the principle does not shield Department actions that impact permitting decisions. *People United To Save Homes v. DEP*, 1998 EHB 250.
5. Provisional decisions made by the Department during permit review. *Corco Chemical Corp. v. DEP*, EHB Docket No. 2005-116-MG (Opinion issued September 8, 2005)(letter evaluating a spill plan and reviewing compliance with regulations); *County of Berks v. DEP*, 2003 EHB 77; *United Refining Co. v. DEP*, 2000 EHB 132 (letter informing applicant that its application is incomplete because proposed expansion is subject to new source review); *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643 (a letter noting defect in NPDES permit application).
6. Letter from the Department declining to reconsider a prior action. *Franklin Township Municipal Sanitary Authority v. DEP*, 1996 EHB 942, or suspending consideration of an application. *County of Dauphin v. DEP*, 1997 EHB 29.
7. The Department's return of a permit application at the request of the applicant. *Westvaco Corp. v. DEP*, 1997 EHB 275; *but see Highridge Water Authority v. DEP*, 1999 EHB 1.
8. An action of the Department which does not pertain to an environmental issue, such as rejection of a bid, *Popple v. DEP*, 1997 EHB 152, or the advertisement of a request for proposals in the *Pennsylvania Bulletin*. *Protect the Environment and Children Everywhere v. DEP*, 2000 EHB 1.
9. Contractual rights or other disputes between private parties vis-a-vis each other. *Pond Reclamation Co. v. DEP*, 1997 EHB 468. *See Coolspring Store Supply, Inc. v. DEP*, 1998 EHB 209, *aff'd*, 1164 C.D. 1998 (Pa. Cmwlth. filed February 18, 1999) (Board has no jurisdiction to resolve property disputes.)

10. The Board has no jurisdiction over a municipality's appeal of an order directing implementation of a previously adopted and approved sewage facilities plan where the municipality contends that its plan is unsuitable but failed to appeal the Department's prior approval of the official plan or attempt to submit a revision. *Jefferson Township Supervisors v. DEP*, 1999 EHB 837.
11. A decision of the Department to remove a dam and the Department's executing a "notice of award" even as characterized as a "contract" is not appealable because the regulatory scheme governing dam safety and dam removal requires a further permitting action. *Felix Dam Preservation Association v. DEP*, 2000 EHB 409.
12. The Department's failure to act on a letter sent to it by a municipal authority seeking an order terminating a sewage agreement with another municipality. *Dallas Area Joint Sewer Authority v. DEP*, 2000 EHB 1071.
13. A letter to a township sewage enforcement officer noting the Department's belief that a proposed alternate sewage disposal system "may be" deficient. *Boggs v. DEP*, 2003 EHB 389.
14. Letter from the Department requiring a bond in a certain amount before a permit application can be processed. *Mon Valley Transportation Center, Inc. v. DEP*, EHB Docket No. 2005-049-R (Opinion issued August 12, 2005); *Maple Creek Mining, Inc. v. DEP*, EHB Docket No. 2005-038-R (Opinion issued December 22, 2005).

#### D. Representation Before the Board.

1. All parties must be represented by an attorney at all stages of Board proceedings except individuals appearing on their own behalf. Rule 1021.21(a).
  - a. Corporations must secure counsel. Rule 1021.21(b); *Bucket Coal Co. v. DEP*, 1999 EHB 288; *Mountain Valley Management v. DEP*, 1999 EHB 283. *See also Potts Contracting Co. v. DEP*, 1999 EHB 958.
  - b. Unincorporated association must secure counsel. Rule 1021.21(c); *O'Reilly v. DEP*, 2000 EHB 17.
2. Failure to secure counsel as required by this Board's rules will result in dismissal of an appeal. Rule 1021.21(a).
3. Individuals may appear on their own behalf but are strongly encouraged to appear through counsel. *See Kleissler v. DEP*, 2002 EHB 737; *Goetz v. DEP*,

2002 EHB 976; and *Van Tassel v. DEP*, 2002 EHB 625. *See also, Barber v. Tax Review Board*, 850 A.2d 866, 868 (Pa. Cmwlth. 2004)(a layperson who represents himself in legal matters assumes the risk that his lack of expertise in legal training will prove his undoing.) If the Board determines individuals are acting in concert with or as a representative of a group of individuals, they may be required to obtain counsel. Rule 1021.21(d).

4. The Board has the authority to disqualify counsel in a particular case for the purpose of protecting the interests of the opposing party and ensuring the orderly and just conduct and disposition of proceedings that are before it. *DEP v. Angino*, 2003 EHB 434; *DEP v. Whitmarsh Disposal Corp.*, 1999 EHB 588. The Board will not disqualify counsel where there is no evidence that any party is prejudiced by counsel's representation or that it interferes with the Board's proceedings. *Hartstown Oil v. DEP*, EHB docket No. 2005-268-R (Opinion issued December 14, 2005); *Greenview Development v. DEP*, 2000 EHB 448.
5. Withdrawal of appearance. The Board's rules provide a procedure for an attorney's withdrawal of appearance. Paralleling Pa. R.C.P. No. 1012(b), leave of the Board is now required unless another attorney has entered an appearance and the change of attorneys does not delay any stage of the litigation. Rule 1021.23.

#### E. Standing.

1. As a prerequisite to obtaining the Board's resolution of a dispute, individuals must demonstrate they have standing upon a showing that they have been adversely affected by the Department action which has been challenged. 35 P.S. § 7415(c); *Borough of Roaring Spring v. DEP*, 2004 EHB 889.
2. An appellant need not demonstrate or even allege standing in the notice of appeal. *Cooley v. DEP*, 2004 EHB 554; *Beaver Falls Municipal Authority v. DEP*, 2000 EHB 1026; *Ziviello v. DEP*, 2000 EHB 999; *Valley Creek Coalition v. DEP*, 1999 EHB 935.
3. An appellant is not required to prove its case on the merits in order to have standing to appeal. *Delaware Riverkeeper v. DEP*, 2004 EHB 599; *Giordano v. DEP*, 2000 EHB 1184; *Ziviello v. DEP*, 2000 EHB 999.
4. For purposes of standing questions raised in dispositive motions, the burden is on the moving party to show that an opposing party lacks standing; the opposing party does not have a duty to show that it has standing in the first instance. *Drummond v. DEP*, 2002 EHB 413; *Seder v. DEP*, 1999 EHB 782. However, once adequately challenged, the appellants must come forward with

evidence which supports their standing. *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *Wurth v. DEP*, 2000 EHB 155 (where an appellant's standing is challenged in a motion for summary judgment filed after the close of discovery, that appellant must adduce admissible evidence from the record demonstrating the bases for its standing or the appeal will be dismissed); *Valley Creek Coalition v. DEP*, 1999 EHB 935 (where a party moves for summary judgment alleging that the appellant lacks standing, the appellant has an obligation to produce facts supporting its standing in response to the Department's motion).

5. The appellant must prove at hearing that it has standing on the issue contested even where a motion for summary judgment by opposing parties has been denied. See *Greenfield Good Neighbors v. DEP*, 2003 EHB 555; *Giordano v. DEP*, 2001 EHB 713; *Florence Township v. DEP*, 1997 EHB 616; *Township of Florence v. DEP*, 1997 EHB 763.
6. To establish standing individuals must show that: they have a "substantial" interest in the subject matter of the particular litigation, which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). See also *DeFazio v. Civil Service Commission.*, 756 A.2d 1103 (Pa. 2000); *South Whitehall Township Police Service v. South Whitehall Township*, 555 A.2d 793 (Pa. 1989); *Tessitor v. Department of Environmental Resources*, 682 A.2d 434 (Pa. Cmwlth. 1996) (*en banc*); *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 629 A.2d 1384 (Pa. 1993).
  - a. An appellant must allege that it has been harmed, or have an objectively reasonable concern that it will be harmed by an action of the Department. *Greenfield Good Neighbors v. DEP*, 2003 EHB 555; *Orix-Woodmont Deer Creek I Venture, L.P. v. DEP*, 2001 EHB 82; *Giordano v. DEP*, 2000 EHB 1184; *O'Reilly v. DEP*, 2000 EHB 723. See also *Prizm Asset Management Co. v. DEP*, EHB Docket No. 2005-279-K (Opinion issued October 24, 2005).
  - b. In a challenge to standing under the APCA, an appellant need not adduce expensive and complex air dispersion modeling and expert testimony in order to show that he is exposed and comes into contact with air emissions emanating from an air pollution source. *Smedley v. DEP*, 2001 EHB 131.

- c. An organization may have standing either in its own right or as a representative of its members if at least one of the individual members has a direct, immediate and substantial interest in the outcome of the litigation. *Pennsylvania Trout v. DEP*, 2004 EHB 310, *aff'd* 863 A.2d 93 (Pa. Cmwlth. 2004); *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *Greenfield Good Neighbors v. DEP*, 2003 EHB 555.
- d. Municipalities have standing to challenge the issuance of a permit to construct and operate a landfill located within the boundaries of the municipality because of its impact on the residents and the municipality's duty to protect and provide emergency services to its residents. *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718 (Pa. 1982); *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa.1992).
- e. A municipality which owns recreational areas in a watershed which it alleges will be impacted by a mining operation has standing to challenge the issuance of a non-coal mining permit. *Birdsboro v. DEP*, 2001 EHB 377.
- f. A municipality adjacent to a township which hosts a landfill has standing to challenge a proposed modification of the landfill because its residents have suffered increased malodors and noise as a result of the modification. *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148 (*en banc*) (Pa. Cmwlth. 2003).
- g. A municipality may not challenge an order or action under the Sewage Facilities Act on the basis that the challenged action will cause residents to pay higher rates. *Ramey Borough v. Department of Environmental Resources*, 327 A.2d 647 (Pa. 1975); *Berwick Area Joint Sewer Authority v. DEP*, 1998 EHB 150. However, where the municipality itself will pay higher fees or incur financial loss, the Board has held that it has standing to appeal. *Perkasie Borough Authority v. DEP*, 2002 EHB 75; *Highridge Water Authority v. DEP*, 1999 EHB 27.
- h. Contiguous property ownership by itself may not create standing, however it is certainly a factor to be considered and may provide a sufficient basis for a claim of standing. *Greenfield Good Neighbors, Inc. v. DEP*, 2002 EHB 861.

- i. The Board has recognized that certain activities of a recreational nature can confer standing. *See, e.g., Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82; *O'Reilly v. DEP*, 2000 EHB 723; *Ziviello v. DEP*, 2000 EHB 999; *Valley Creek Coalition v. DEP*, 1999 EHB 935; *Blose v. DEP*, 1998 EHB 635, *rev'd on other grounds*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999); *Belitskus v. DEP*, 1997 EHB 939; *Barshinger v. DEP*, 1996 EHB 949.
  - j. A legislator has no personal stake in the outcome of an appeal where he is seeking relief as the representative of his constituents. *Levdansky v. DEP*, 1998 EHB 571; *cf. Dauphin Meadows, Inc. v. DEP*, 1999 EHB 928 (a senator may not intervene on behalf of his constituents).
- 7. Standing is not a jurisdictional matter under Pennsylvania law, and is waivable. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *Mixon v. Commonwealth*, 759 A. 2d 442, 452 (Pa. Cmwlth. 2000), *aff'd*. 783 A.2d 763 (Pa. 2001); *In re Milton Hershey School*, 867 A.2d 674 (Pa. Cmwlth. 2005), *petition for allowance of appeal granted*, 182 and 183 MAL 2005 (Pa. filed December 1, 2005); *Bullock v. County of Lycoming*, 859 A.2d 518 (Pa. Cmwlth. 2004).
  - 8. Certain statutes provide special standing provisions. For example, under section 4010.2 of the Air Pollution Control Act an appellant may have standing where he commented in the public participation process leading to the plan approval and the record indicated that he had a reasonable real-world concern that he would be adversely affected. *Triggs v. DEP*, 2001 EHB 444.

#### F. The Board's Powers.

- 1. The Board is empowered to hold hearings and issue adjudications pursuant to the Environmental Hearing Board Act. That power includes the power to conduct hearings *de novo* to determine whether the departmental action is a proper exercise of authority. However, it cannot exercise general judicial powers in equity. *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989). It does not have the power to enter a declaratory judgment. *Empire Sanitary Landfill, Inc. v. Department of Environmental Resources*, 684 A.2d 1047 (Pa. 1996); *Costanza v. Department of Environmental Resources*, 606 A.2d 645 (Pa. Cmwlth. 1992); *Varos v. DER*, 1985 EHB 892. Nevertheless, the Commonwealth Court has ruled that it is inappropriate for that court to exercise its declaratory judgment jurisdiction where there is an exclusive administrative remedy

within the Board's jurisdiction. *Faldowski v. Eighty-Four Mining Co.*, 725 A.2d 842 (Pa. Cmwlth. 1998).

2. The Board has authority to decide constitutional issues raised about regulations in the exercise of its jurisdiction. *Empire Sanitary Landfill, Inc. v. Department of Environmental Resources*, 684 A.2d 1047 (Pa. 1996). However, the Board cannot decide the constitutionality or validity of a statutory scheme. *Babich v. DER*, 1994 EHB 1281.
3. It does not have the power to enforce settlement agreements or consent orders. *E.g.*, *Department of Environmental Resources v. Landmark International, Ltd.*, 570 A.2d 140 (Pa. Cmwlth. 1990); *Empire Sanitary Landfill, Inc. v. DER*, 1990 EHB 1270.
4. Matters involving claims in *quantum meruit* are to be heard by the Board of Claims and they will be transferred there pursuant to Section 5103 of the Judicial Code, 42 Pa. C.S. § 5103. *Approved Coal Corp. v. DER*, 1992 EHB 107.

#### G. *De Novo* Review.

1. The Board conducts hearings *de novo* to determine whether the departmental action in dispute is supported by the evidence, and a proper exercise of authority. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003); *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. filed June 23, 2004); *Smedley v. DEP*, 2001 EHB 131; *Leeward Construction, Inc. v. DEP*, 2000 EHB 742, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003); *see O'Reilly v. DEP*, 2001 EHB 19. Upon appeal of discretionary departmental actions, the Board may substitute its own discretion for that of the Department and make its own conclusions, rather than relying on the facts which were before the Department. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461; *Connors v. DEP*, 1999 EHB 669. The Board is not required to substitute its discretion. *DEP v. City of Philadelphia*, 692 A.2d 598 (Pa. Cmwlth. 1997); *Warren Sand & Gravel v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). *See Western Hickory Coal Co. v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth. 1984); *Harbison-Walker Refractories v. DEP*, 1996 EHB 116. When the Department acts under a statutory or regulatory mandate, the Board only considers whether to uphold or vacate the Department's action. *Warren Sand & Gravel v. DEP*, 341 A.2d

556 (Pa. Cmwlth. 1975); *see Morcoal v. Department of Environmental Resources*, 459 A.2d 1303 (Pa. Cmwlth. 1983).

- a. The Board's power to substitute its discretion for that of the Department includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461; *People United to Save Homes v. DEP*, 1999 EHB 457.
  - b. Even if the Board finds that the Department improperly failed to approve a permit or modification, the appellant must still show that it is clearly entitled to such approval before the Board will substitute its discretion for the Department's. *Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461; *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 1489; *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1458.
  - c. The Board may remand a matter for the Department's decision on technical issues or consideration of alternatives that had not been open for the Department's consideration at the time the action was taken. *See Thornhurst Township v. DEP*, 1996 EHB 258. The Board has the authority to retain jurisdiction incident to the Department. *Dauphin Meadows, Inc. v. DEP*, 2001 EHB 116.
2. The Board's *de novo* authority allows it to admit evidence that was not before the Department when it made its initial decision. *O'Reilly v. DEP*, 2001 EHB 19; *Grand Central Sanitary Landfill, Inc. v. DER*, 1993 EHB 357; *Hrivnak Motor Co. v. DER*, 1993 EHB 432. *See also Connors v. DEP*, 1999 EHB 669.

#### **IV. FILING AND SERVICE**

- A. The Board's rules concerning the filing and service of documents and the number of copies necessary for various filings can be found at Rules 1021.31 – 1021.39.
- B. Electronic Filing. The Board's rules allow electronic filing through its website of legal documents, other than original process, such as a notice of appeal. Attorneys must register to file and receive service electronically. Information on registration and how to use the e-filing system can be found on the Board's website at <http://ehb.courtapps.com>. *See also* Rules 1021.31, 1021.32, 1021.34, 1021.35, 1021.37, 1021.39.

C. Automatic Party Status.

1. In third-party appeals, service on the recipient of a Department permit, license, certification, or approval subjects the recipient to the jurisdiction of the Board as a party-appellee. Rule 1021.51(h); *Thomas v. DEP*, 2000 EHB 728; *see also* Rule 1021.51(g)(3).
2. Recent amendments to the Board's rules have broadened the definition of "recipient of [a Department] action" to include any affected municipality in appeals under the Sewage Facilities Act, a mining company involved in certain subsidence or water loss claims, certain well operators and storage tank owners or operators in appeals involving pollution or water supplies or "other interested parties" as ordered by the Board. Rule 1021.51(h)(1)-(6).
3. A failure to treat an interested party as a "recipient" of an action may deprive the Board of jurisdiction to grant relief. *See Department of Environmental Protection v. Schneiderwind*, 867A.2d 724 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 132 EAL 2005 (Pa. filed December 2, 2005).

D. Where a party desires prompt action from the Board, the other litigants should be served within 24 hours of receipt by the Board.

**V. APPEAL OF DEPARTMENT ENFORCEMENT ORDERS**

A. The Department is authorized by the various environmental statutes that it administers to institute enforcement actions which may be brought before the Board or enforced in the Commonwealth Court. Any appeal from a Department action must be filed within 30 days. See Section II.

B. Enforcement by Orders.

1. An enforcement action may be instituted by order. An appeal must be taken to the Board from the order if the order is to be contested. *Department of Environmental Resources v. Wheeling Pittsburgh Steel Corp.*, 375 A.2d 320 (Pa. 1977) (failure to appeal a grant of a variance precludes a defense against an enforcement action brought in the Commonwealth Court contesting the validity of the variance or of the underlying regulations).
2. An order of the Department under most statutes takes effect on notice and is not stayed by the institution of an appeal. *See* Environmental Hearing Board Act, 35 P.S. § 7514(d)(1). The target of the order must either seek a supersedeas of the order pursuant to Rules 1021.61 - 1021.64, or be prepared to pay a penalty for failure to comply with the order if an appeal from the order is unsuccessful. *See, e.g.*, Air Pollution Control Act, 35 P.S. §

691.610; Solid Waste Management Act, 35 P.S. § 6018.602; Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1309. *See also* Environmental Hearing Board Act, 35 P.S. § 7514(d).

### C. Civil Penalty Proceedings.

1. Under most statutes it is the Department that assesses the penalty subject to an appeal to the Board. Air Pollution Control Act, 35 P.S. § 4009.1(a); Solid Waste Management Act, 35 P.S. § 6021.1307.
2. Under certain statutes, the failure to appeal an enforcement order does not bar a subsequent appeal from the Department's penalty assessment for failing to comply with the order. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). *See White Glove, Inc. v. DEP*, 1998 EHB 372 (Air Pollution Control Act); *Sky Haven Coal, Inc. v. DEP*, 1996 EHB 33; *Shay v. DER*, 1993 EHB 800, *aff'd sub nom*; *Herzog v. Department of Environmental Resources*, 645 A.2d 1381 (Pa. Cmwlth. 1994) (Solid Waste Management Act).
3. If the Board must assess the penalty under the Clean Streams Law or the Dam Safety and Encroachments Act, then the Department proceeds under the rules for "Special Actions" described below. Rules 1021.71 – 1021.75.
4. Pre-payment of Penalty Assessments.
  - a. Under many statutes, a condition of appeal is an escrow deposit or a surety bond for the full amount of the assessment penalty. *See* Air Pollution Control Act, 35 P.S. § 4009.1(b); Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.17(f); the Clean Streams Law, 35 P.S. § 691.605(b)(1); the Coal Refuse Disposal Control Act, 52 P.S. § 30.61; the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3321; the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.22; the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000-1704; the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1307(b).
  - b. Where a statute requires such pre-payment, concurrent with the filing of a notice of appeal an appellant must either
    - (i) submit a check or appropriate bond securing payment of the penalty;

or

- (ii) provide a verified statement that the appellant is unable to pay.

Rule 1021.51(f).

- c. The failure to meet this condition within the 30-day appeal period may result in the dismissal of the appeal. *E.g.*, *Lucas v. DEP*, EHB Docket No. 2005-058-L (Opinion issued November 30, 2005); *American Iron Oxide Co. v. DEP*, EHB Docket No. 2004-219-R (Opinion issued September 12, 2005); *MGS General Contracting, Inc. v. DEP*, 1999 EHB 829 (where the appellant promised to make payment, but failed to do so on two occasions, and requested cancellation of a hearing on its ability to pre-pay, the appellant has waived its original claim of financial inability to pre-pay the penalty); *She-Nat, Inc. v. DEP*, 1996 EHB 544. For a discussion of the constitutionality of these provisions, see *Tracey Mining Co. v. Department of Environmental Resources*, 544 A.2d 1075 (Pa.Cmwlth. 1988); *Boyle Land and Fuel Co. v. Environmental Hearing Board*, 475 A.2d 928 (Pa. Cmwlth. 1984), *aff'd*, 488 A.2d 1109 (Pa. 1985) (*per curiam*).
  - d. If the appellant alleges that it is unable to pre-pay the assessment, a hearing must be conducted if the issue of ability to pay is contested. See *Twelve Vein Coal Co. v. Department of Environmental Resources*, 561 A.2d 1317 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 578 A.2d 416 (Pa. 1990); *Carl L. Kresge & Sons v. DEP*, 2001 EHB 511. See Section XI.E below (Hearings on Inability to Pay Civil Penalties.)
5. Where the Board affirms the assessment of a civil penalty, the adjudication may be sent to the prothonotary of the court of common pleas in the appropriate county with direction to enter the penalty as a judgment against the violator. If a violator intends to file an appeal with the Commonwealth Court, a courtesy copy of the petition for review should be sent to the Board. Where an appeal is filed, the Board will not send the adjudication to the court of common pleas.
6. If an appeal of the civil penalty is sustained, the appellant is entitled to the return of the prepayment. This process may take some time – usually about six to eight weeks.

## VI. PETITIONS FOR SUPERSEDEAS

A. Petitions for supersedeas of a Department action pending final hearing are governed by Rules 1021.61 - 1021.64. Although they may be filed at any time during the pendency of an appeal, they most often are filed simultaneously with the notice of appeal. A party should see that a copy of its request for supersedeas is received by the other parties within 24 hours of the time of filing with the Board. See Rule 1021.34(b).

1. The form and content requirements of Rule 1021.62 must be strictly followed or the Board may *sua sponte* deny the petition under Rule 1021.62(c). *Goodman Group, Ltd. v. DEP*, 1997 EHB 697.

a. A petition for supersedeas which cites no legal authority or fails to include affidavits supporting the facts averred without explaining the absence of affidavits will be dismissed *sua sponte* or upon motion. *King Drive Corp. v. DEP*, 2003 EHB 779.

b. A petition for supersedeas will be dismissed where the affidavits in support of the petition do not show that the affiant has personal knowledge of the facts averred. *Thomas v. DEP*, 1998 EHB 778. See also *Hrivnak Motor Co. v. DEP*, 1999 EHB 155.

2. The Board may deny a petition without hearing, but it cannot grant the petition without hearing unless the parties agree to the issuance of a supersedeas. See for example, *Dickinson Township v. DEP*, 2002 EHB 267.

B. Temporary Supersedeas.

1. Under Rule 1021.64 an application for temporary supersedeas may be filed when a party will suffer immediate and irreparable injury before the Board can conduct a hearing on the petition for supersedeas.

2. The application must be accompanied by a petition for supersedeas which comports with Rule 1021.62, relating to the contents of a petition for supersedeas.

3. The relevant considerations are (1) the immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held, (2) the likelihood that injury to the public will occur while the supersedeas is in effect, and (3) the length of time that will pass before a supersedeas hearing can be held. Rule 1021.64(e). See *Beaver v. DEP*, 2002 EHB 574; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93; *A&M Composting, Inc. v. DEP*, 1997 EHB 965.

- a. An appellant must show that it would suffer irreparable injury if forced to comply with the Department's act until the supersedeas hearing; not merely that it would suffer until the Board resolves its appeal. *Ponderosa Fibres of Pennsylvania Partnership v. DEP*, 1998 EHB 1004.
  4. Unless the Board orders otherwise, a temporary supersedeas will automatically terminate six business days after the date of issuance. Rule 1021.64(f).
- C. Supersedeas Hearings.
1. Provided the petition for supersedeas is legally sufficient, a hearing on it will be scheduled as soon as possible, normally within two weeks. A ruling may be made on the record at the close of the hearing, but most frequently, it is issued after the hearing and is accompanied by an explanatory opinion.
  2. The scheduling of a hearing will be facilitated if the petitioner simultaneously serves a copy of the petition on the Department's Office of Chief Counsel Regional Office responsible for the county in which the appealed-from action occurred.
  3. The party opposing the grant of a supersedeas can either file a response as quickly as possible or request the opportunity to do so after the hearing.
- D. The standards for granting petitions for supersedeas are set forth in Section 4(d)(1) and (2) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) and (2), and Rule 1021.63(a). *See Tinicum Township v. DEP*, 2002 EHB 822; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93. The petitioner bears the burden of proof. *Pennsylvania Fish & Boat Commission. v. DEP*, 2004 EHB 473.
1. When assessing the three factors set forth in Rule 1021.63(a) the Board balances the factors collectively and interests of the parties and the public. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829; *see also Harriman Coal Corp. v. DEP*, 2001 EHB 234.
    - a. A movant's chance of success on the merits must be more than speculative, but it need not establish the claim absolutely. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829.
    - b. Supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *Global Eco-Logical Services,*

*Inc. v. DEP; Svonavec v. DEP*, 1998 EHB 417; *Oley Township v. DEP*, 1996 EHB 1359.

- c. A petitioner need not demonstrate that the harm it will suffer is “immediate irreparable harm” but that the petitioner will suffer irreparable harm at some defined point in time pending final disposition of the appeal. *Borough of Roaring Spring v. DEP*, 2003 EHB 825. See *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, for a thorough discussion balancing harm to the environment if a supersedeas is granted versus harm to the petitioner if a supersedeas is not.
2. The Board will not issue a supersedeas where it would alter the last lawful *status quo ante*. *Solomon v. DEP*, 1996 EHB 989. The Board will not supersede the denial of a permit. *Id.*; *Neville Chemical Co. v. DER*, 1992 EHB 926; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93.
3. A supersedeas is not the same as an injunction, which is an equitable remedy. See *Citizens Alert Regarding the Environment v. DEP*, 2003 EHB 191, and cases cited therein. Accordingly, it can not enjoin eminent domain proceedings before another tribunal. *Grove v. DEP*, 2000 EHB 1212.
4. Recent Board decisions superseding a Department order include *Tinicum Township v. DEP*, 2002 EHB 822; *Wagner v. DEP*, 1999 EHB 52 and 1998 EHB 1056. *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, is an example of a conditional supersedeas. See also *Prizm Asset Management Co. v. DEP*, EHB Docket No. 2005-279-K (Opinion issued October 24, 2005); *Tire Jockey, Inc. v. DEP*, 2001 EHB 1141 (partial supersedeas).

## VII. SPECIAL ACTIONS

- A. Under some statutes, the Department or a private party may initiate an action before the Board by filing a complaint or petition together with a certificate of service and a notice of a right to respond. Rule 1021.71(a). This procedure is used for proceedings where the Board assesses the penalty rather than the Department. (See Section V.C (Civil Penalty Proceedings)).
  1. The Department is required to utilize the procedure in Rule 1021.71 when suspending or revoking certificates under the Pennsylvania Bituminous Coal Mine Act, 52 P.S. §§ 701-101 - 701-706; and the Pennsylvania Anthracite Coal Mine Act, 52 P.S. §§ 70-101 - 70-1405. *Kaczor v. DER*, 1991 EHB 865.

2. The Department may also be required to commence actions pursuant to Rule 1021.71 to:
  - a. Recover response costs and damages to natural resources under the Hazardous Sites Cleanup Act, 35 P.S. §§ 6020.507 and 6020.508. *See* 35 P.S. § 6020.1301.
  - b. Suspend or revoke certificates under the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 - 6021.2104.

B. Private Party Actions.

1. Under some statutes a private party may proceed to recover funds or to require Department action. *See, e.g.*, Section 505(f) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.505(f). Such actions are commenced with the filing of a complaint. 25 Pa. Code § 1021.72.
2. Citizens suits. Several statutes authorize citizens suits against the Department which are commenced before the Board. *E.g.*, Section 508 of the Low-Level Radioactive Waste Disposal Act, 35 P.S. § 7130.508(b-d); Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.1711(b).
3. The Board may also adjudicate regulatory taking claims when these matters are referred to it by the courts. *Domiano v. Department of Environmental Resources*, 713 A.2d 713 (Pa. Cmwlth. 1998); *cf. Machipongo Land & Coal Co. v. Department of Environmental Resources*, 676 A.2d 199 (Pa. 1996). When regulatory takings cases are referred to the Board by the courts, the Board will require the appellant to file a complaint stating the facts and circumstances upon which a request for relief is based. 25 Pa. Code § 1021.73.

C. Amendments to complaints.

1. A new rule of the Board explicitly allows for the amendment of a complaint as of right within 20 days of filing. Rule 1021.53(a).
2. Thereafter a complaint may be amended upon leave of the Board where no undue prejudice to the opposing parties is shown. Rule 1021.53(b).

D. Answers to complaints.

1. Unless otherwise prescribed by the Board, the defendant must file an answer within 30 days. Rule 1021.74(a). Failure to file a timely answer may result in a judgment by default and the imposition of sanctions. Rule 1021.74(d); *see DEP v. Barefoot*, 2003 EHB 667; *DEP v. J&G Trucking, Inc.*, EHB Docket No.

2005-072-CP-L (Opinion issued August 9, 2005); *DEP v. Breslin*, EHB Docket No. 2005-069-L (Opinion issued July 1, 2005); *G&R Excavating & Demolition, Inc.*, EHB Docket No. 2005-022-MG (Opinion issued May 9, 2005). The answer must admit or deny specifically each material allegation of the complaint and state clearly and concisely the facts and matters of law relied upon. Any defenses, including affirmative defenses, must be specifically pled. Rule 1021.74(c).

2. Board rules do not allow the pleading of a new matter or preliminary objections. Rule 1021.74(e). The sufficiency of a claim or defense set forth in the answer may be contested by motion.
3. After an answer is filed the pre-hearing procedures set forth in Rule 1021.101 apply. See Section VIII (Pre-Hearing Procedures.)

E. Motions for Default Judgment. The Board may enter a default judgment as to liability against a party who fails to file an answer. *E.g.*, *DEP v. Huntsman*, 2004 EHB 594; *DER v. Allegro Oil & Gas Co.*, 1991 EHB 34.

## **VIII. PRE-HEARING PROCEDURES**

### **A. Administrative Matters.**

1. Docketing. The Board docketes the notice of appeal, complaint for assessment of civil penalties, or other special action upon its receipt. The matter is assigned to an Administrative Law Judge for primary handling; the initial of the Administrative Law Judge appears after the docket number. Matters are assigned on the basis of caseload, the existence of related appeals, possible conflicts and geographic location.
2. If an appeal fails to comply with Rules 1021.51 and 1021.52 the Board will issue an Order directing that this information be supplied. Rule 1021.52. If the appellant fails to respond, the appeal may be dismissed pursuant to Rule 1021.52(b).

### **B. Issuance of Pre-Hearing Orders.**

1. Generally Pre-Hearing Order No. 1 is issued to the parties after docketing the appeal. It provides a schedule for discovery and matters relating to motion practice. See Rule 1021.101. Individual judges may issue other additional orders related to the procedure for proceeding with appeals or complaint.
2. Either or both parties may request that alternate pre-hearing schedules and procedures be established in accordance with a proposed joint case

management order. See Rule 1021.101(a)(4) (proposed joint case management order).

3. Rule 1021.101(a)(2) now provides for the exchange of expert reports a substitute for answers to expert interrogatories.

### C. Intervention.

1. “Any interested party may intervene in any matter pending before the Board.” 35 P.S. § 7514(e). Rule 1021.81 permits any interested person to petition the Board to intervene in any pending matter prior to the initial presentation of evidence. This conforms to the Commonwealth Court’s interpretation of the Environmental Hearing Board Act in *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057 and 598 A.2d 1061 (Pa. Cmwlth. 1991). See *County of Allegheny, Department of Aviation v. DEP*, 2000 EHB 1177; *P.H. Glatfelter Co. v. DEP*, 2000 EHB 1204.
  - a. An intervening party must be “interested” in the sense that it has a “substantial, direct and immediate” interest in the matter. *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth.) *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Conners v. DEP*, 1999 EHB 669; *Tortorice v. DEP*, 1998 EHB 1169; *Wurth v. DEP*, 1998 EHB 1319.
    - (i) Averment of ownership of an adjoining property, without more, may not be sufficient. *P.A.S.S., Inc. v. DEP*, 1995 EHB 940.
    - (ii) Neighboring township may intervene in an appeal of a major modification permit for a landfill. *Giordano v. DEP*, 2000 EHB 1163.
    - (iii) A citizens group has a right to intervene if at least one of its members has a sufficient interest in the proceeding to have a right to intervene. *Consolidated Pennsylvania Coal Co. v. DEP*, 2002 EHB 879.
    - (iv) A steel manufacturer may not intervene in an appeal of a landfill from a notice of deficiency where it does not use the landfill for disposal or have any other direct connection to it. *Joseph J. Brunner, Inc. v. DEP*, 2003 EHB 186.

- (v) A concern regarding the legal precedent that may be established is insufficient for the purposes of intervention. *TJS Mining, Inc. v. DEP*, 2003 EHB 507.
- b. Absent extraordinary circumstances, intervention will not be permitted by a person who is subject to a Department order in a third-party appeal and failed to file a notice of appeal during the appeal period. *See Jefferson Township Supervisors v. DEP*, 1999 EHB 693; *but see Pennsylvania Game Commission v. DEP*, 2000 EHB 823.
2. Rule 1021.81(b) requires the petition to be verified and to contain sufficient factual averments and legal assertions establishing petitioner's reasons, basis, interests and specific issues upon which it seeks to intervene. Otherwise the Board will deny the petition. Rule 1021.81(e); *Consolidated Pennsylvania Coal Co. v. DEP*, 2002 EHB 879.
  3. Pursuant to Rule 1021.81(d), a party may file an answer to the petition. An answer must be verified and filed within 15 days of service.
  4. The Board may or may not limit the issues which may be raised by an intervenor. *See P.H. Glatfelter Co. v. DEP*, 2000 EHB 1204; *Connors v. DEP*, 1999 EHB 669; *Heidelberg Township v. DEP*, 1999 EHB 791.
  5. An order granting the petition allows the intervening party to participate in the proceedings that remain at the time of the order granting intervention. Rule 1021.81(f). *Pennsylvania Game Commission v. DEP*, 2000 EHB 823. *See also Consolidated Pennsylvania Coal Co. v. DEP*, 2002 EHB 879.
  6. The Board denied the request of a school district to intervene where the hearing was scheduled to begin in one month and the other parties would be prejudiced. *Pennsylvania Trout v. DEP*, 2003 EHB 590.
- D. Consolidation. The Board may consolidate cases involving common questions of law or fact either on its own motion or upon the motion of any party. 25 Pa. Code § 1021.81.
  - E. Substitution. The Board's rules permit the substitution of a successor-in-interest to a party in an appeal. 25 Pa. Code § 1021.83.
  - F. *Amicus Curiae*. The Board's rules specifically permit anyone interested in the legal issues in any matter before the Board to request leave to file a brief or memorandum of law. Rule 1021.25.

## G. Discovery Proceedings.

1. Under Rule 1021.102, discovery proceedings are to conform to the Pennsylvania Rules of Civil Procedure. *See* Pa. R.C.P. Nos. 4001 - 4020.
2. Counsel are encouraged by Pre-hearing Order No. 1 to agree on a case management order to be submitted to the Board for approval so that they can make the discovery process fit the needs of the case. *See* Rule 1021.101.
3. Copies of discovery requests and responses are **not** to be filed with the Board unless necessary to resolve a discovery dispute or a motion. *See Lentz v. DEP*, 2001 EHB 1028 (the Board will not rule on the adequacy of interrogatory responses where the interrogatories were not provided as an exhibit); *Throop Property Owner's Assoc. v. DEP*, 1998 EHB 46 (a notice for protective order is denied where the movant failed to attach copies of the interrogatories).
4. Discovery disputes are sometimes dealt with by the presiding Administrative Law Judge in an oral ruling during a conference call which may later be memorialized in written orders.
5. In a case involving expert witnesses, the exchange of expert reports or answers to expert interrogatories that are prepared is required. Rule 1021.101(a)(2).
6. Any party, including the Department, who wishes to present expert testimony must identify the expert and submit either an expert report or answers to expert interrogatories, even if not required to do so by Pa. R.C.P. No. 4003.5. *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. filed June 23, 2004); *Kleissler v. DEP*, 2002 EHB 617.
7. Subpoenas are governed by Pa. R.C.P. Nos. 234.1 – 234.4, 234.6 – 234.9. Rule 1021.103. Forms are available on the Board's website or they may be requested by contacting the Board Secretary. The party requesting the subpoena is responsible for filling in the appropriate information, serving it and properly compensating the individual upon whom it is served. Counsel may wish to include proof of service with a subpoena, but such proof need not be filed with the Board.
  - a. The Board will not compel testimony of expert witnesses originally retained by another party if those witnesses choose not to testify. *Weiss v. DEP*, 1997 EHB 39.

- b. When issuing a subpoena for the production of documents and things from a non-party, a party must comply with the procedural requirements of Pa. R.C.P. Nos. 4009.21 - 4009.27 by filing a Certificate Prerequisite to Service of a Subpoena along with the proper forms unless those requirements are waived by the parties.
  - c. When issuing a subpoena for a non-party to attend and testify at a deposition, and to produce documents and things at the deposition, the requesting party must comply with the procedural requirements of Pa. R.C.P. No. 4007.1(d)(2). *See also* Pa. R.C.P. Nos. 4009.21 - 4009.27 (production of documents and things from a non-party).
  - d. The Board has a form petition for the use of private parties who wish to attempt to enforce a Board subpoena before the Commonwealth Court rather than seeking relief before a court of common pleas.
8. Extensions. The Board's rules require every motion to be accompanied by a proposed order. Rule 1021.91(b). If a request for an extension of time is unopposed by all of the other parties, the request may be embodied in a letter representing that all parties consent to the extension. A motion must be filed if a request is opposed. In any event, mere agreement of counsel does not operate to extend deadlines set by the Board; a Board order is necessary to modify any deadline. Rule 1021.92(d) and (e). *Shenango Incorporated v. DEP*, EHB Docket No. 2002-259-L (Opinion issued December 2, 2005). *See also* Rule 1021.12.

## **IX. MOTION PRACTICE**

- A. Motion practice is governed by Rules 1021.91 - 1021.95. Pre-hearing motions may be categorized as:
1. Procedural Motions are motions such as motions for continuance, for expedited consideration, for extensions of time or for a stay of proceedings. Such requests must include a specific date for the extension or continuance and include a proposed order. Rule 1021.92.
  2. Discovery Motions are motions filed to resolve disputes arising from the conduct of discovery. Rule 1021.93.
  3. Dispositive Motions are motions to dismiss, for summary judgment, and some motions to limit issues. Rule 1021.94. The Board has recently promulgated new rules governing dispositive motions, changing the required form of such motions. Recent amendments to the Board's rules have also

created a separate rule for motions for summary judgment. Rule 1021.94a. (See below.)

- a. Motion to Limit Issues – motions to limit issues, some of which are thinly disguised and misnamed motions to dismiss, or for summary judgment, are frequently filed with the Board. To the extent they are motions to dismiss or for summary judgment, they are dealt with in accordance with the rules applicable to those motions. *See Perkasio Borough Authority v. DEP*, 2002 EHB 75. *But see* Section IX.D.
  - b. Motion for Judgment on the Pleadings - although some Board decisions in the past have included a notice of appeal as a pleading, the Board’s rules have been amended to exclude a notice of appeal from the definition of pleading. Rule 1021.2. *See also Milco Industries, Inc. v. DEP*, 2001 EHB 995; *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790. Hence, a motion for judgment on the pleadings is only appropriate in special action proceedings.
4. Miscellaneous Motions are motions not otherwise addressed, including motions to amend appeals, motions in limine, motions to strike, motions for a view or motions for recusal. Rule 1021.95.
- B. Motions to Dismiss. Motions to dismiss are normally filed for lack of jurisdiction as soon as possible after the filing of the notice of appeal. Untimeliness or unappealable actions are most often the basis for the motion, but a motion to dismiss may be used for any purpose to challenge the legal ground for the appeal.
1. The Board has noted that “as a matter of practice, the Board has authorized motions to dismiss as a “dispositive motion” and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board’s jurisdiction, . . . is in issue.” *Felix Dam Preservation Association. v. DEP*, 2000 EHB 409 (quoting *Florence Township v. DEP*, 1996 EHB 282, 302).
  2. The Board will dismiss an appeal only where there are no material factual disputes and the law is clear so that the moving party is entitled to judgment as a matter of law. *Eljen Corp. v. DEP*, EHB Docket No. 2005-257-K (Opinion issued December 2, 2005); *Neville Chemical v. DEP*, 2003 EHB 530.
  3. The Board may deem properly pleaded facts admitted where an opposing party fails to respond to a motion to dismiss. *Burnside Township v. DEP*, 2002 EHB 700.

### C. Motions for Summary Judgment.

The Board has the power to enter summary judgment. The filing of such motions may sometimes narrow the issues or resolve matters without hearing. The Board has recently promulgated a new rule specific to motions for summary judgment which includes requirements for form and content of the motion and responses. Rule 1021.94a.

1. A motion for summary judgment shall include a motion, a supporting brief, evidentiary materials relied upon and a proposed order. Rule 1021.94a(a).
  - a. A motion for summary judgment consists only of a concise statement of the relief requested and the reason for granting relief. It should not include any recitation of the facts. Rule 1021.94a(b).
  - b. Under the Board's new rule the brief accompanying the motion must include an introduction and summary of the case; a statement of material facts in separately numbered paragraphs; and a discussion of the legal argument supporting the motion. Rule 1021.94a(c).
  - c. Evidentiary materials shall be separately bound and labeled as "Exhibits." Rule 1021.94a(d).
2. Factual matters must be supported by evidence in the record. *See* Pa. R.C.P. No. 1035.1. *Jackson v. DEP*, EHB Docket No. 2004-032-MG (Opinion issued May 20, 2005).
  - a. Affidavits filed in support of or in opposition to a motion for summary judgment must be based upon personal knowledge, set forth facts that would be admissible into evidence and affirmatively show that the signer is competent to testify concerning the matters stated in the document. Rule 1021.94a(d). Pa. R.C.P. No. 1035.4; *Heidelberg Township v. DEP*, 1999 EHB 800; *Yourshaw v. DEP*, 1998 EHB 819.
  - b. The Board will not consider an affidavit which is unsworn and will not consider exhibits, which are not otherwise part of the record, attached to a response which are not verified or certified and lack supporting affidavits. *Farmer v. DEP*, 1998 EHB 1291. *See* Pa. R.C.P. No. 1035.4.
  - c. The Board will **not** strike exhibits which were not supported by a properly verified affidavit, but are items from the record as defined by Rule 1035.1 of the Pennsylvania Rules of Civil Procedure. *Heidelberg Township v. DEP*, 1999 EHB 791.

- d. Because the *Nanty-Glo* rule (*Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932)) generally does not apply to administrative proceedings, the Board may enter summary judgment where evidence depends upon uncontradicted affidavits. *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991). The Board must still determine upon examination of the whole record whether the movant has satisfied its burden to establish that there are no material issues of fact and it is entitled to judgment as a matter of law. *Id.*
3. The Board can not enter summary judgment on behalf of a party who did not move for summary judgment. *Exeter Township v. DEP*, 2000 EHB 630.
4. The Board may grant summary judgment against the appellant for failing to respond to a motion for summary judgment. Rule 1021.94a(h); *Lucas v. DEP*, EHB Docket No. 2005-058-L (Opinion issued November 30, 2005); *Earthmovers Unlimited, Inc. v. DEP*, 2004 EHB 165; *Kochems v. DEP*, 1997 EHB 428 *aff'd*, 701 A.2d 281 (Pa. Cmwlth. 1997)(where the appellant had a history of failing to respond which seemed to betray a lack of interest in prosecuting the appeal).
5. When a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of his pleading. Rather, his response, by affidavit or as otherwise provided in Rule 1021.94a, must set forth specific facts arising from evidence in the record showing that there is a genuine issue for hearing. Rule 1021.94a(h). *Jackson v. DEP*, EHB Docket No. 2004-032-MG (Opinion issued May 20, 2005); *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *Drummond v. DEP*, 2002 EHB 413; *Riddle v. DEP*, 2002 EHB 321.

#### D. Motions in limine.

3. Motions in limine may not be used on the eve of hearing to obtain a ruling on the merits.
  - a. *Dauphin Meadows v. DEP*, 2002 EHB 235 (declining to decide an issue of administrative finality).
  - b. *Clearview Land Development Co. v. DEP*, 2002 EHB 506 (declining to decide a claim of collateral estoppel).
4. It is appropriate to use a motion in limine to challenge contentions in a pre-hearing memorandum on the basis that they go beyond the objections in a notice of appeal. *Goheen v. DEP*, 2003 EHB 92.

E. Rules Generally Applicable to All Non-Dispositive Motions.

1. The motion must set forth in numbered paragraphs the facts in support of it and the relief requested. Rule 1021.91(d).
2. Different rules apply for the various motions as to time for response and reply, verification and the filing of briefs. *See* Rule 1021.36 (number of copies); Rules 1021.91 – 1021.95.
3. A party's failure to respond to the motion may be deemed to be an admission of all properly pleaded facts contained in the motion. Rule 1021.91(f). *Beaver Falls Municipal Authority v. DEP*, 2000 EHB 1026; *Buddies Nursery, Inc. v. DEP*, 1999 EHB 885; *Enterprise Tire Recycling v. DEP*, 1999 EHB 900; *Concerned Citizens v. DEP*, 1999 EHB 167; *Smedley v. DEP*, 1998 EHB 1281.
  - a. Failure to respond to a dispositive motion may be deemed a sign of the non-moving party's lack of interest in pursuing the appeal and result in dismissal of the appeal. *Pirolli v. DEP*, 2003 EHB 514.
  - b. An untimely response may be considered a failure to respond. *Berwick Township v. DEP*, 1998 EHB 487; *Duquesne Light Co. v. DEP*, 1998 EHB 381. However, where a response to a motion for summary judgment is only one day late and there is no prejudice alleged, striking the response is too harsh a sanction. *People United To Save Homes v. DEP*, 1998 EHB 194; *see also Goetz v. DEP*, 1998 EHB 785.
4. Except for dispositive motions, the non-moving party is required to file a response to a motion setting forth in correspondingly numbered paragraphs "all factual disputes and the reason the opposing party objects to the motion." Rule 1021.91(e). *See Thomas v. DEP*, 1998 EHB 93; *Power Operating Co. v. DEP*, 1998 EHB 466; *Heidelberg Heights Sewerage Co. v. DEP*, 1998 EHB 538. Except in motions for summary judgment, failure to respond to a motion in correspondingly numbered paragraphs may result in the sanction of the Board deeming admitted the well-pleaded facts in the motion particularly where the Board cannot ascertain the factual disputes between the parties. Rule 1021.91(f). *RJM Manufacturing, Inc. v. DEP*, 1998 EHB 436; *Heidelberg Heights Sewerage Co. v. DEP*, 1998 EHB 538; *but see Wayne v. DEP*, 1999 EHB 395 (although respondent fails to set forth objections in correspondingly-numbered paragraphs, the Board found the error to be *de minimus* and declined to deem the moving party's allegations as admitted).

**X. SCHEDULING THE HEARING, PRE-HEARING MEMORANDA AND PRE-HEARING CONFERENCES**

- A. Generally, after discovery has been completed, including the exchange of expert reports, and provision has been made for the filing of dispositive motions, if any, the Board will set a hearing date for the remaining issues and schedule the filing of pre-hearing memoranda pursuant to the provisions of Rules 1021.101 and 1021.104 by issuing Pre-hearing Order No. 2.
1. The detailed required contents of the pre-hearing memoranda are set forth in Rule 1021.104.
  2. The usual rules apply with regard to the imposition of sanctions when a party fails to comply with these requirements respecting pre-hearing memoranda. Rule 1021.104. The failure to include a factual or legal contention in the pre-hearing memorandum may result in a waiver of that contention. *See Maddock v. DEP*, 2002 EHB 1; *Smedley v. DEP*, 2000 EHB 90.
- B. Generally, pre-hearing memoranda will be filed at least 20 days before the scheduled hearing date. Rule 1021.101(d).
1. Pre-hearing Order No. 2 ordinarily will require the appellant to file a pre-hearing memorandum first and permit the Department and other appellees 15 days to respond. The Department most likely will be required to file first in those cases where it bears the burden of proof as to the principal issues of the case.
  2. However, to facilitate the prompt holding of a hearing, the Board may require the simultaneous filing of pre-hearing memoranda.
- C. The Board may require that the parties meet prior to the hearing to stipulate to all facts not in dispute. The factual stipulation must be filed with the Board five days before the commencement of the hearing. 25 Pa. Code § 1021.101(c).
- D. The Board may require, and any party may request, a pre-hearing conference under Rule 1021.105, to expedite the hearing or a settlement of the matter.
- E. Motions in limine. A party may obtain a ruling on evidentiary issues by filing a motion in limine. Rule 1021.121. Ordinarily such a motion will be decided in advance of the hearing. However, the presiding administrative law judge may decide that the decision should be reserved until the evidence is offered. See Section IX.D.

## XI. HEARINGS

- A. Venue of Hearing. Hearings are normally conducted in the hearing rooms in the Board's Harrisburg, Pittsburgh or Norristown offices, but the Board will entertain requests to conduct hearings in Commonwealth facilities at other locations. Rule 1021.114. The requests must be substantiated and counsel should be prepared to suggest suitable alternate locations.
- B. View of Premises.
1. Under Rule 1021.115 the Board is authorized to conduct a view of real estate premises at issue in an appeal upon reasonable notice and at reasonable times when the viewing would have probative value. The request for a view can be made by separate motion or in the pre-hearing memorandum. The view will generally be scheduled prior to the hearing on the merits.
  2. Ordinarily a view does not serve as a substitute for evidence of record. Rather it is a secondary tool designed to assist the factfinder to better understand the record evidence. *Giordano v. DEP*, 2000 EHB 1163. *See also UMCO, Inc. v. DEP*, 2004 EHB 797.
- C. Continuances. Requests for continuances of hearings, except in emergency situations, should be made at least two weeks prior to the hearing to enable the Board to schedule other matters. *See* Rule 1021.113. If the parties wish to continue a hearing because of settlement, they should be prepared to submit the settlement within 30 days of the scheduled hearing dates.
- D. Conduct of Hearings. Hearings before the Board are not substantially different than those before the courts. The proceedings are transcribed by a court reporter, and the transcripts are heavily relied upon in preparing adjudications.
1. Burden of proof and burden of proceeding is governed by Rule 1021.122 and the substantive law of Pennsylvania.
    - a. While the burden of proof never leaves the party on whom it is originally placed, the burden of producing evidence may shift during the course of a hearing. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Riddle v. DEP*, 2001 EHB 221; *Easton Area Joint Sewer Authority v. DER*, 1990 EHB 1307, 1319. *Cf. Ainjar Trust v. DEP*, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002).
  2. While the Board is not bound by technical rules of evidence at hearings, the Pennsylvania Rules of Evidence (P.R.E.) are generally adhered to and must

be complied with when proving essential elements of a party's case. Rule 1021.123. The Board has broad discretion to admit or reject evidence, and may receive all relevant reasonably probative evidence. 2 Pa. C.S. § 505.

3. Expert testimony from engineers, hydrogeologists and other scientists is generally critical in matters which come to hearing. An expert must testify with a "reasonable degree of scientific certainty" that his opinion is correct, in the sense that what he has said is more probable than not based upon accepted scientific knowledge and methods. *See Al Hamilton Contracting Co. v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995).
  - a. An expert's opinion may be based on reports or tests performed by others and not in evidence, or on information the expert gains from the testimony of other witnesses. P.R.E. 703; *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995); *Commonwealth v. Al Hamilton Contracting Co.*, 557 A.2d 15 (Pa. Super. 1989), *petition for allowance of appeal denied*, 565 A.2d 1165 (Pa. 1989).
4. Scientific evidence is admissible if the scientific principle or discovery forming the basis for the evidence presented at hearing has been "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also McKenzie v. Westinghouse Electric Co.*, 674 A.2d 1167 (Pa. Cmwlth. 1996), and the method used by the expert to reach her conclusion is generally accepted. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003); *Blum v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314 (Pa. Super. 1997).
5. Parties may use written testimony as a means to present direct testimony of a witness. Unless otherwise directed, such testimony must be submitted with a party's pre-hearing memorandum. Rule 1021.124.
  - a. The opposing party may object in writing at least five days in advance of the hearing. Rule 1021.124(b).
  - b. A witness whose direct testimony is presented in writing must be available for cross-examination. Rule 1021.124(a).

#### E. Hearings on Inability to Pay Civil Penalties.

1. Ordinarily when the Board receives an appeal which includes a verified statement of the appellant's inability to pre-pay, the administrative law judge

assigned to the case will issue an appropriate order requiring the appellant to supply appropriate financial information and scheduling a prompt hearing. *See* Section V.C (Civil Penalty Proceedings).

2. However, in an appeal under the Air Pollution Control Act the Board is required to conduct a hearing to consider the appellant's alleged inability to pay and decide the issue within 30 days of the date of the appeal. 35 P.S. § 4009.1(b).
  - a. An order will be issued requiring the appellant to file with the Board, and serve the Department, with copies of all financial documentation related to the appellant's inability to pre-pay within 15 days.
  - b. A hearing will be scheduled within 30 days of filing the appeal. Any such hearing may be scheduled for a later time if the Department elects to waive this requirement.
  - c. The Board will issue an order within 30 days of a hearing either ordering the appellant to pre-pay or post a bond within 30 days or less before continuing the matter further or waiving the requirement to pre-pay if the appellant demonstrates it is financially unable to pay. 35 P.S. § 4009.1.
3. The burden of demonstrating an inability to pre-pay a penalty typically falls upon the appellant. *Heston S. Swartley Transportation Co., Inc. v. DEP*, 1999 EHB 88. The Board will consider, among other things, recent financial statements and income tax returns. *Goetz v. DEP*, 1998 EHB 955.
4. In *Hrivnak Motor Co. v. DEP*, 1999 EHB 437, the Board excused the appellants from pre-payment of a civil penalty emphasizing the difficulty in liquidating assets in time to meet the 30-day appeal deadline in response to a Board order to pay.
5. The Board will dismiss an appeal of a civil penalty assessment where the appellant fails to attend a hearing on his inability to pre-pay the penalty, *Lykens v. DEP*, 1997 EHB 383, or fails to pre-pay the penalty when ordered by the Board to do so after finding the appellant is able to pre-pay. *Heston S. Swartley Transportation Co. v. DEP*, 1999 EHB 177; *Goetz v. DEP*, 1998 EHB 955.

## **XII. POST-HEARING PROCEDURE**

- A. Post-Hearing Briefs. At the conclusion of the hearing or after the Board has received all transcripts from a hearing on the merits, an order establishing a schedule for submission of post-hearing briefs is issued to the parties. The party with the burden of proof is generally required to file the opening brief.
1. Post-hearing briefs must conform to Rule 1021.131(a), which requires that briefs contain proposed findings of fact with references to the transcripts and exhibits, an argument with citation to supporting legal authority, and proposed conclusions of law. The Board may order a party to conform its brief to that regulation.
  2. Failure to file a brief or to raise specific arguments in a post-hearing brief results in a waiver of those arguments. Rule 1021.131(c); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., filed October 28, 2004); *see also Lucky Strike Coal Co. v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Riddle v. DEP*, 2002 EHB 283; *Patti v. DEP*, 1999 EHB 610.
  3. Documents not offered or entered into evidence may not be included with post-hearing briefs. *Gasbarro v. DEP*, 1998 EHB 670.
  4. To preserve objections to evidentiary rulings made during the hearing, a party may not simply make a general reference to those rulings, but must provide specific citations to the transcript and to any legal precedent on which it bases its objections. *People United To Save Homes v. DEP*, 1999 EHB 914.
- B. Dispositions.
1. Orders. Interlocutory orders may be issued by the administrative law judge assigned to the appeal. Final orders, including those granting motions to dismiss or motions for summary judgment, must be concurred with by a majority of the administrative law judges. Rule 1021.116(a).
  2. Adjudications. Proposed adjudications are generally prepared by the administrative law judge who heard the appeal and submitted to the other administrative law judges for review and approval. An adjudication contains findings of fact, a discussion of the evidence and relevant law, conclusions of law and an order.
    - a. An adjudication must be concurred in by a majority of the administrative law judges. Rule 1021.116(a).

- b. While a motion for a directed adjudication or for nonsuit may be made at the close of a party's case, a single administrative law judge does not have the power to grant the motion and, for that reason, will usually deny it. When referred by a presiding judge, the Board will accept a motion for a directed adjudication; such motions are rarely granted. As a rare exception, *see Decker v. DEP*, 2002 EHB 610. Rather, the Board most often will proceed directly to the adjudication on the merits. For a detailed discussion of the different standards for granting a directed adjudication versus ruling upon the merits, *see Charles E. Brake Co. v. DEP*, 1999 EHB 965.
- c. Adjudications are sent by first class mail to the parties and posted on the Board's website. The period for filing a petition for review of the adjudication in the Commonwealth Court runs from the date of the Board's issuance of the adjudication, not the date the party receives it.

#### C. Official Notice.

- 1. The Board may take official notice of: (1) matters which may be judicially noticed by the Courts of the Commonwealth; (2) facts which are not in dispute; and (3) record of facts reflected in the official docket of the Board. 25 Pa. Code § 1021.125(a).
- 2. A party may, on timely request, be afforded an opportunity to show why the Board should not take official notice. 25 Pa. Code § 1021.125(b).
- 3. A party requesting the taking of official notice after the conclusion of the hearing shall do so in accordance with Rule 1021.133 (relating to reopening of record prior to adjudication). Rule 1021.125 (c).

### **XIII. REHEARING OR RECONSIDERATION OF BOARD ORDERS OR ADJUDICATIONS**

- A. Reopening of Record Prior to Adjudication. Rule 1021.133 permits a party to petition the Board to reopen the record after the conclusion of a hearing but before the Board issues an adjudication only upon the basis of recently discovered evidence or evidence that has become material as a result of a change in relevant legal authority.
  - 1. Recently discovered evidence must: (1) have been discovered after the close of the record and, in exercising due diligence, could not have been discovered earlier; (2) must not be cumulative; and (3) must either conclusively establish a material fact of the case or contradict a material fact

which had been assumed or stipulated by the parties to be true. Rule 1021.133(b)(1)-(b)(3).

2. The Board will not permit the record to be reopened to remedy a perceived error in trial strategy. *Noll v. DEP*, EHB Docket No. 2003-131-K (Opinion issued January 10, 2005); *Exeter Citizens' Action Committee v. DEP*, 2004 EHB 179.
3. A petition based upon evidence which has become material as a result of a change in legal authority occurring after the record is closed must specify the legal authority involved and demonstrate how it applies to the matter pending before the Board. Rule 1021.133(c).
4. The petition must also conform to the requirements set forth in Rule 1021.133(d), and be served upon the parties to the proceedings. Rule 1021.133(d) and (e).
5. An answer may be filed within 15 days and must be verified if it includes factual assertions which are not of record. Rule 1021.133(e). *See Gasbarro v. DEP*, 1998 EHB 688.

B. Reconsideration of Interlocutory Orders. The petition for reconsideration must be filed within 10 days of the interlocutory order or ruling and must demonstrate that extraordinary circumstances justify consideration of the matter by the Board and also must meet the criteria enumerated for reconsideration of final orders. *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23. Parties requesting reconsideration of an interlocutory order must meet the same criteria as for reconsideration of final orders with the additional requirement that special circumstances exist which warrant the Board taking the extraordinary step of revisiting an interlocutory order. *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577; *Conrail, Inc. v. DEP*, 1999 EHB 773.

1. The Board has reconsidered interlocutory orders where the Board failed to consider a memorandum which was filed in support of a motion to dismiss but not listed on the docket. *Thomas v. DEP*, 2000 EHB 728.
2. The following situations do **not** constitute extraordinary circumstances:
  - a. A mere allegation of Board error, without more, does not warrant reconsideration of an interlocutory order. *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577. *See also Lower Salford Township V. DEP*, EHB Docket No. 2005-100-K (Opinion issued November 17, 2005); *DEP v. Angino*, EHB Docket No. 2003-004-CP-C (Opinion issued November 29, 2005).

- b. Failure to respond to a motion because of an administrative oversight. *Borough of Berwick v. DEP*, 1998 EHB 199.
    - c. A defect in a motion for summary judgment cannot be cured through a petition for reconsideration. *Harriman Coal Corp. v. DEP*, 2001 EHB 1; *Reading Anthracite Co. v. DEP*, 1998 EHB 164 (failure to include an exhibit); *Adams Sanitation Co., Inc. v. DER*, 1994 EHB 1482 (failure to explicitly address all issues in motion). *See also Lee v. DEP*, 1998 EHB 566 (motion to dismiss).
  - 3. An answer may be filed within 10 days of service. Rule 1021.152(b).
  - 4. The failure of a party to file a petition under this rule will not result in the waiver of any issue. Rule 1021.151(c).
- C. Reconsideration of Final Orders. Under Rule 1021.152 a petition for reconsideration of a final order must be filed within 10 days of the final order and will only be granted for compelling and persuasive reasons. *Potts Contracting Co. v. DEP*, 2000 EHB 145. The petition must be simultaneously served on the other parties. Parties are encouraged, but are not required, to include a memorandum of law.
  - 1. Compelling and persuasive reasons may include: (1) the final order rests on a legal ground or a factual finding which has not been proposed by any party; or (2) crucial facts set forth in the petition are inconsistent with the Board's findings, justify reversal of the Board's decision, and could not have been presented earlier with the exercise of due diligence. Rule 1021.152(a).
    - a. A mistake made by the Board is such a reason. *Miller v. DEP*, 1997 EHB 335 (applying criteria to interlocutory order); *Hawbaker, Inc. v. DEP*, 1996 EHB 230; *Adams Sanitation Co., Inc. v. DEP*, 1995 EHB 1279.
    - b. An intervenor's desire to contest the Department's withdrawal of certain permit conditions after the Board granted appellant's withdrawal of appeal is not such a reason. *Commonwealth Environmental Systems, L.P. v. DEP*, 1996 EHB 340.
    - c. Failure to attach an exhibit which should have been presented in the motion for summary judgment does not provide a basis for reconsideration. *Svonavec, Inc. v. DEP*, 1998 EHB 346; *Marwell, Inc. v. DEP*, 1998 EHB 7.
  - 2. If an answer is to be filed, it must be done within 10 days of service. Rule 1021.152(b).

3. If the Board grants reconsideration within 30 days of the Board's order, any intervening petition for review of that order filed in the Commonwealth Court shall be rendered inoperative, and the time for filing such an appeal will begin anew after the Board enters a decision on the reconsideration. Pennsylvania Rules of Appellate Procedure (Pa. R.A.P.) 1701. If the Board does not act within the 30-day period, an intervening appeal deprives the Board of jurisdiction.

#### **XIV. TERMINATION OF PROCEEDINGS BEFORE THE BOARD**

The Board's rules provide several options for the termination of proceedings before the Board.

##### **A. Settlements.**

1. An appeal that has been settled by a settlement agreement may simply be withdrawn without the necessity of seeking Board approval of the settlement agreement. In that case, the parties may:
  - a. notify the Board that the case has been settled and request that the docket be marked settled;
  - b. notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, and request that the docket be marked settled; or
  - c. notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, request the notice of the settlement be published in the *Pennsylvania Bulletin*, and request that the case be marked settled. Rule 1021.141(b).
    - (i) The notice of settlement should conform to the format provided in Rule 1021.141(b)(3) and include identification of the township and county where the matter took place. A diskette version of the notice should also be provided. 1 Pa. Code § 13.11.
2. Third parties may object to the terms and conditions of a settlement in the manner provided by law. Rule 1021.141(c). Failure to object in a timely manner divests the Board of authority to grant relief. *United States Environmental Protection Agency, Region III v. DEP*, 1997 EHB 164.

3. Parties who want explicit Board approval of a settlement agreement rather than withdrawing the appeal must use the procedure applicable to consent adjudications. See below.

#### B. Consent Adjudication.

1. When the parties seek to terminate a proceeding pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. The Board will not approve a proposed consent adjudication if (1) all parties do not agree to the action; (2) the provisions are contrary to law; or (3) the provisions constitute overreaching or bad faith by any party. Rule 1021.141(c).
  - a. Prior to approval, the Board will publish notice of the consent adjudication in the *Pennsylvania Bulletin*. The notice shall provide a 30-day period for public comments. The parties shall respond to any comments. The Board may schedule a hearing before ruling on the consent adjudication based on the record supplemented by comments from the public and the parties' response.
  - b. A third party may appeal from a consent adjudication to the Commonwealth Court within 30 days of the Board's action.
2. Some statutes contain additional notice requirements.
  - a. Settlements under the Solid Waste Management Act. If a settlement is proposed in any equity action under 35 P.S. § 6018.604 to restrain a violation of law or a nuisance, or if a settlement is proposed in any assessment of civil penalty under 35 P.S. § 6018.605, the terms of the settlement shall be published in a newspaper of general circulation in the area where the violations are alleged to have occurred. The publication shall occur at least 30 days prior to the effective date of settlement and shall contain a solicitation for public comments directed to the government agency bringing the action. 35 P.S. § 6018.616.



- B. “Collateral” orders, orders that are separable from and collateral to the case, may also be appealable as prescribed by Pa. R.A.P. 313. If the Commonwealth Court determines that an order is collateral, no certification of the issue is required. *See Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 25, 2005).
- C. Final decisions of the Board are reviewable by the Commonwealth Court. 42 Pa. C.S. § 763(a). A petition for review of a Board decision must be filed with the Commonwealth Court within 30 days after the entry of the Board’s decision. Pa. R.A.P. 1512.
1. A party seeking a stay of a Board decision pending review by the Commonwealth Court on petition for review must present it, in the first instance, to the Board. Pa. R.A.P. 1781(a). The Board evaluates the application for stay in light of the criteria enunciated in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). *See City of Harrisburg v. DER*, 1990 EHB 676; *Novak v. DER*, 1987 EHB 965.
  2. A petition for supersedeas based solely upon the pendency of an appeal to the Commonwealth Court will be treated as an application for a stay pursuant to Pa. R.A.P. 1781. *Heston S. Swartley Transportation Co. v. DEP*, 1999 EHB 160.
- D. Certification of Record on Appeal.
1. Rule 1021.201 states that, unless the parties file a stipulation with the Board providing otherwise, the Board will certify the record within 20 days of the filing of the petition for review in accordance with Pa. R.A.P. 1951. The record shall include a list of the docket entries, the notice of appeal, and the Department action, or, if the proceedings were initiated by the filing of a complaint, then the record shall include a list of the docket entries and the complaint.
    - a. The certified record in an appeal from a Board adjudication shall also consist of: (1) the adjudication; (2) notes of testimony and exhibits admitted into evidence; (3) post-hearing briefs; (4) petitions for reconsideration or to reopen the record, answers and exhibits; and (5) other documents which formed the basis for the Board’s adjudication.
    - b. The certified record in an appeal from a Board Opinion and Order shall also consist of: (1) the Opinion and Order; (2) the relevant motion or petition, with responses, answers, replies and exhibits; (3) petitions for reconsideration, responses, answers, replies and exhibits;

and (4) other documents which formed the basis of the Board's Opinion and Order.

2. Counsel are encouraged to check the original record certified to the Commonwealth Court since items not included will not be considered by the court as part of the record on appeal. *McKeeta v. Duquesne School District*, 708 A.2d 1311, 1313 n. 4 (Pa. Cmwlth. 1998); *see also Salameh v. Spossey*, 731 A.2d 649 (Pa. Cmwlth. 1999). Additional materials may be certified and added to a record if requested promptly.

## XVI. MISCELLANEOUS

### A. Sanctions.

The Board has broad powers under Rule 1021.161 and 1 Pa. Code §§ 31.27 and 31.28 to impose sanctions on parties for failure to comply with Board orders and violations of the Board's Rules of Practice and Procedure. *RJM Manufacturing, Inc. v. DEP*, 1998 EHB 436. The rule specifically includes sanctions permitted under Pa. R.C.P. No. 4019 relating to discovery matters. *See Environmental & Recycling Services v. DEP*, 2001 EHB 824. Consequently, the deadlines and obligations imposed by the Board's orders should be taken seriously by counsel. Examples of sanctions imposed by the Board include:

1. Precluding the introduction of a party's case-in-chief for failure to file a pre-hearing memorandum. *Wharton Township v. DER*, 1989 EHB 1364.
2. Exclusion at hearing of documents appended to a pre-hearing memorandum which were not identified during discovery. *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824.
3. Dismissing an appeal where:
  - (i) appellant failed to file its pre-hearing memorandum. *Hollobaugh v. DEP*, 2003 EHB 720; *Potts Contracting Co. v. DEP*, 1999 EHB 958; *Yourshaw v. DEP*, 1998 EHB 1063.
  - (ii) appellant failed to comply in the numerous orders of the Board signifying an intent not to pursue his appeal. *Sri Venkateswara Temple v. DEP*, EHB Docket No. 2003-385-R (Opinion issued February 2, 2005); *Light v. DEP*, 2002 EHB 645.
  - (iii) appellant failed to perfect its appeal after two orders of the Board directed it to do so. *Monview Mining v. DEP*, EHB Docket No. 2005-112-R (Opinion issued December 2, 2005).

4. Dismissal for failure to file answers to interrogatories or respond to discovery requests. *Potts Contracting v. DEP*, 1999 EHB 958; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697; *Shaulis v. DEP*, 1998 EHB 503. *But see Tri-State Asphalt Corp. v. Department of Transportation*, 875 A.2d 1199 (Pa. Cmwlth. 2005) (holding that it was inappropriate to dismiss a complaint one day after the discovery deadline).
5. Sustaining an appeal where the Department has violated Board orders. *Miller's Disposal and Truck Service v. DER*, 1990 EHB 1239.
6. Barring testimony by an expert witness where the witness is not identified during the course of discovery, *Midway Sewerage Authority v. DER*, 1990 EHB 1554, or expert reports were not served on a timely basis. *Kleissler v. DEP*, 2002 EHB 617 (preclusion of a late-filed expert report was too harsh a sanction); *Maddock v. DEP*, 2001 EHB 834; *Schneiderwind v. DEP*, 2001 EHB 861. *But see UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (Opinion issued June 15, 2005) (Although the Board could have precluded expert testimony because the appellant failed to file a timely response to expert discovery, the Board determined that the better course was to delay the hearing in the interest of creating a full and complete factual record on the merits.)
7. Barring the offering of testimony for failure to respond properly to a party's interrogatories. *Dotan v. DEP*, EHB Docket No. 2004-155-CP-MG (Opinion issued May 2, 2005); *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133; *County Commissioners, Somerset County v. DEP*, 1995 EHB 1015. *But see Township of Paradise v. DEP*, 2001 EHB 1005 (the sanction of barring witness testimony was too harsh where no motion to compel had been filed, the appellant had not violated any orders and it was too early in the proceeding to judge the prejudice to the permittee caused by the appellant's vague answers to interrogatories.)
8. Striking a motion for summary judgment filed long after the deadline set for the filing of dispositive motions. *Leatherwood, Inc. v. DEP*, 2001 EHB 13.

B. Counsel Fees and Expenses.

1. The Costs Act, Act of December 13, 1982, P.L. 1127, *as amended*, 71 P.S. §§ 2031-2035, authorizes the Board to award counsel fees and expenses incurred by a party in connection with a proceeding in which it prevailed. 71 P.S. § 2033(a). Rules 1021.171 to 1021.174, set forth the filing requirements for an application for fees and expenses under the Costs Act.

- a. The application for counsel fees and expenses must be filed within 30 days after the final disposition, 71 P.S. § 2033(a), and simultaneously served upon counsel of record for the Department. *Svonavec, Inc. v. DEP*, 1998 EHB 813. The application must be accompanied with a brief, be verified, set forth sufficient grounds to justify an award, and contain the information set forth in 4 Pa. Code Chapter 2, Subchapter A. Rule 1021.172(a) details the information that must be included in the application. The application may be denied *sua sponte* for failure to provide the required information.
  - b. The Department and any interested party shall file a response within 15 days of the filing of the application accompanied with a brief. The response must raise any challenge to the sufficiency of the application and satisfy the specific requirements provided by Rule 1021.173.
  - c. Rule 1021.174(b) allows the Board to award fees and expenses against the Department if it finds (1) the applicant is a “prevailing party;” (2) the application presents sufficient justification for the award; (3) the Department’s action lacked reasonable basis in law or in fact, such that it was not substantially justified; and (4) no special circumstances make the award unjust or unreasonable. *See Swistock Associates Coal Corp. v. DEP*, 1990 EHB 1212.
    - (i) A third party appeal of a water quality certification is not an “adversarial adjudication” under the Cost Act. *Solebury Township v. DEP*, 2004 EHB 82, *rev’d on other grounds, Solebury Township v. Department of Environmental Protection*, 863 A.2d 607 (Pa. Cmwlth. 2004) (Board decision on Costs Act not appealed, issue on appeal concerned recovery of fees and costs under Section 307(b) of The Clean Streams Law), *petition for allowance of appeal granted*, 880 A.2d 502 (Pa. 2005) and 880 A.2d 503 (Pa. 2005).
2. Act 138, 27 Pa. C.S. § 7708, also authorizes the Board to award counsel fees and expenses in proceedings involving certain coal mining activities. *United Mine Workers of America v. DEP*, 2003 EHB 256. Rules 1021.181 to 1021.184 provide for the procedure for requesting counsel fees and costs pursuant to statutes other than the Costs Act. *See Raymond Proffit Foundation v. DEP*, 1999 EHB 124 (discussing when fees are “incurred.”)
- a. Rule 1021.182(c) requires an applicant seeking counsel fees and costs to file an application within 30 days after the entry of the Board’s final order and to simultaneously serve the application upon the other parties. *Svonavec, Inc. v. DEP*, 1998 EHB 813; *Stambaugh v. DEP*,

1997 EHB 377. The application must be verified and set forth sufficient grounds to justify the award in accordance with the requirements provided by Rule 1021.182(b), and may be denied *sua sponte* for failure to do so. The filing of briefs and taking of discovery are left to the discretion of the parties. Rule 1021.184.

- b. A response must be filed within 30 days of service. Any factual basis for the response must be verified by affidavit. Rule 1021.183.
3. Section 307(b) of the Clean Streams Law also grants the Board broad discretion to award fees and costs to a prevailing party. *Solebury Township v. Dept. of Environmental Protection*, 863 A. 2d 607 (Pa. Cmwlth. 2004), *petition for allowance of appeal granted*, 863 A.2d 503 (Pa. 2005).
  4. Bad Faith.
    - a. A permittee may recover fees if it meets the test of Section 7708(c)(4), which includes a showing that the opposing party brought the action in bad faith or for purpose of harassment. Act 138, 27 Pa. C.S. § 7708; *Lucchino v. DEP*, 809 A.2d 264 (Pa. 2002).
    - b. Where authorized by other statutes, fees and costs may be recovered from an appellant who has filed an appeal in bad faith. *Lucchino v. DEP*, 809 A.2d 264 (Pa. 2002).
  5. Recovery under more than one statute is addressed by Rule 1021.191. It requires applicants to file a single application for counsel fees and costs that sets forth, in separate counts, the basis upon which fees and costs are claimed under each statute.
  6. The Board has no authority to award counsel fees under Section 2503(6) of the Judicial Code, 42 Pa. C.S. § 2503(6). *S.T.O.P., Inc. v. DER*, 1991 EHB 207.
  7. The Board will generally stay an application of costs and fees where a matter has been appealed to the Commonwealth Court. *Blose v. DEP*, 2000 EHB 737. *See also United Mine Workers v. DEP*, 2003 EHB 256.

#### C. Stay of Proceedings

1. A stay is an extraordinary measure and therefore the movant must offer compelling reasons showing that a stay is warranted. *Ziviello v. State Conservation Commission*, 1998 EHB 1138.

2. The Board will consider the following factors:
  - a. the appellant's interest and potential prejudice;
  - b. the burden on the agency, the permittee, and the Board;
  - c. the public interest; and
  - d. the time and effort of counsel and litigants with a view toward avoiding piecemeal litigation.

*Ziviello v. State Conservation Commission*, 1998 EHB 1138. *See also Sechan. Limestone Industries, Inc. v. DEP*, 2004 EHB 185.

3. Although the Board strongly encourages settlement discussions, the Board will only accommodate inactivity for a reasonable amount of time. *Kocher Coal Co. v. DEP*, 1999 EHB 49 (inactivity for eleven years while parties pursue settlement may be too long to avoid dismissal for lack of prosecution).
4. The Board granted a stay where a stay pending the outcome of parallel criminal proceedings will not harm the environment and will not prejudice the Department. *Niebauer v. DEP*, 2004 EHB 678.
5. The Board desires that nearly all matters before it be heard and an adjudication issued within two years of initiation of the proceeding.

## **XVII. REFERENCE MATERIALS**

The following materials are useful in gaining an understanding of the duties and responsibilities of the Environmental Hearing Board (Board) or researching the Board's precedents.

- A. The Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516.
- B. The rules of practice and procedure before the Board are set forth at 25 Pa. Code §§ 1021.1 to 1021.201.
- C. Decisions of the Board are available from the following sources:
  1. Website – The Board's regulations, docket, hearing schedule, opinions and adjudications from January 1997 to the present and general information

about the Board are available on the Board's website at: <http://ehb.courtapps.com>.

2. Bound volumes of the Board's decisions, 1972 to the present, are available from the Commonwealth Bookstore, Keystone Building, Plaza Level, 400 North Street, Harrisburg, PA 17120, (717) 787-5109. The price of the volumes varies by the number of pages. Adjudications may also be received by subscription.
  3. LEXIS and WESTLAW - These computerized legal research systems contain all the Board's decisions.
  4. Newsletter of the Environmental, Mineral and Natural Resources Law Section of the Pennsylvania Bar Association is published quarterly and is sent to all section members. It contains summaries of recent Board adjudications, opinions and settlements. Summaries and links to all Board decisions are sent electronically to all Section members monthly.
- D. The General Rules of Administrative Practice and Procedure, 1 Pa. Code, Chapters 31, 33 and 35, are applicable to the Board unless explicitly superseded by the Board's rules.
- E. The Pennsylvania Journal of Environmental Litigation is published bi-weekly by McGuire Publications, P.O. Box 315, Springfield, PA 19064. It contains summaries of Board opinions and adjudications, as well as the full text of significant decisions.
- F. Former Board Chairperson, Maxine M. Woelfling's "A Practical Guide to Litigation Before the Environmental Hearing Board," in *Pennsylvania Environmental Law and Practice* (Terry R. Bossert, Joel R. Burcat eds., 2d ed. 1998), provides useful guidance.

Dated: February 11, 2006