COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRACTICE AND PROCEDURE MANUAL

August 2023 Edition

August 2023 Edition of the Practice and Procedure Manual edited by Assistant Counsel Marguerite White and Senior Counsel Maryanne Wesdock. The Environmental Hearing Board wishes to recognize and thank Summer Intern Avery Naeger for her assistance in editing the Practice and Procedure Manual.

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A. Appealable Actions

1. The Board has subject matter jurisdiction "over final Department actions adversely affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." *Jake v. DEP*, 2014 EHB 38 (failure to show deprivation of procedural due process rights where appellant had actual notice of the correct address of a Department office at which he could review a mining permit); *see also Borough of Ford City v. DER*, 1991 EHB 169.

2. Statutory Authority:

a) The Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses, and decisions (collectively, "actions") of the Department of Environmental Protection. *See* 35 P.S. § 7514(a).

b) "[N]o action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action" in accordance with the regulations of Board. 35 P.S. § 7514(c); *see also* 35 P.S. § 7514(a) and (g) (jurisdiction of the Board).

3. RULES & REGS: Action – "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). 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 finality 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 Chesapeake Appalachia v. DEP*, 2013 EHB 447, *aff'd*, 89 A.3d 724 (Pa. Cmwlth. 2014); *Eljen Corp. v. DEP*, 2005 EHB 918; *Beaver v. DEP*, 2002 EHB 666.

4. The issuance of a civil penalty assessment is appealable. *See, e.g.*, *Thebes v. DEP*, 2010 EHB 370; *Wilbar Realty v. DEP*, 1994 EHB 999.

5. A consent order and agreement may constitute an appealable action of the Department. *Broad Top Twp. v. DEP*, 2006 EHB 164; *but see Chesapeake Appalachia v. DEP*, 2013 EHB 447 (interim decisions made pursuant to a consent order and agreement may not be appealable).

6. "With respect to Department communications, there is no bright line rule for what constitutes a final, appealable action [citing, *inter alia, Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot*., 89 A.3d 724, 726 (Pa. Cmwlth. 2014]…The appealability of Department decisions needs to be assessed on a case-by-case basis [citing, *inter alia, Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86]…In short, we ask whether a Department decision adversely affects a person [citing 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2]." *Carlisle Pike Self Storage v. DEP*, 2022 EHB 25, 28-29.

7. **NOTE**: Not all communications from the Department are appealable to the Board. *See, e.g., Sayerville Seaport Assocs. Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867 (Pa. Cmwlth. 2012) (communications that do not affect a party's personal or property rights, remedies, or avenues of redress are not appealable actions); *Borough of Glendon v. DEP*, 2014 EHB 201 (Department email providing interpretation of law that no permit would be required is not an appealable action); *Chesapeake Appalachia v. DEP*, 2013 EHB 447 (Department letter modifying and approving a corrective action plan established pursuant to a consent order and agreement did not constitute an appealable action.); *Consol Pa. Coal Co. v. DEP*, 2013 EHB 683; *Bucks Cnty. Water & Sewer Auth. v. DEP*, 2013 EHB 659 (the Board

will not review the many interim decisions made by the Department during the processing of a permit application). The appealability of Department actions must be decided on a case-by-case basis. *Hordis v. DEP*, 2020 EHB 383.

B. Timely Appeals

1. STATUTORY PROVISION: An appeal must be filed and perfected in accordance with the Board's regulations or the action of the Department becomes final. 35 P.S. § 7514(c); *see also Tanner v. DEP*, 2006 EHB 468; *Dep't of Envtl. Res. v. Williams*, 425 A.2d 871 (Pa. Cmwlth. 1981). Thus, if there is any doubt as to the appealability of a Department action, a notice of appeal should be filed as a protective measure. *See Russell Industries, Inc. v. DEP*, 1997 EHB 1048.

2. RULES & REGS: **Generally, an appellant must file an appeal within <u>thirty days</u> of receiving notice of the action unless a different period of time is provided by statute**. (See Section I.B.4 for examples of statutes that substantively address the appeal period.) The notice of appeal must be received by the Board either electronically or at its offices in Harrisburg within the 30-day appeal period. Please review the Board's Rules for more detail. *See generally* 25 Pa. Code § 1021.52.

3. RULES & REGS: The <u>start</u> of the 30-day period depends on how and to whom the Departmental action is noticed.

a) For the person to whom the Departmental action is directed or issued, the 30-day period starts when that person receives written notice of the action. 25 Pa. Code § 1021.52(a)(1); *see also West Pike Run Twp. Mun. Auth. v. DEP*, 2014 EHB 1071; *Doctorick v. DEP*, 2012 EHB 244 (dismissal of appeal filed 40 days after receipt of certified notice); *Laurel Land Dev. v. DEP*, 2003 EHB 500.

b) Any other persons aggrieved by a Departmental action must file their appeal within 30 days of one of the following, as applicable:

(1) After notice of the action is published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i); *see also Barton v. DEP*, 2012 EHB 441 (dismissal of untimely appeal of action published in the *Bulletin*).

NOTE: The Board has recognized that publication of notice of a general permit in the Pennsylvania Bulletin is not likely to trigger the 30 day appeal period: *See Army for a Clean Environment v. DEP,* 2006 EHB 698, 702 ("It is difficult to conclude that any

party is aggrieved by a general permit because such permits are by definition divorced from particular sites"); *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 *Bulletin*, the appellants were not aggrieved until they received notice that sludge would be applied to a specific parcel); *Solebury Twp. v. DEP*, 2003 EHB 208 (notice in the *Bulletin* was not reasonably calculated to provide notice of the Department action, therefore third party municipalities' appeals were not untimely). Additionally, official notice in the *Bulletin* may be insufficient to prevent an interested party from intervening and raising new issues where the interested party is entitled to personal notice by law. *Fontaine v. DEP*, 1996 EHB 1333, 1347; *see infra* Section VIII.C (Intervention). For a discussion of what it means to be "a person aggrieved by a Department action," see *Liddick v. DEP*, 2020 EHB 316.

(2) After receiving actual notice of a Departmental action which was not noticed in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2)(ii); *see also Palmer v. DEP*, 2012 EHB 220 (dismissal of third-party appeal filed 47 days after receiving actual notice of a Department order).

NOTE: Whether a person received actual notice of an appealable action is highly dependent upon the facts of the case. Some factors that the Board may consider for the purpose of determining if and when actual notice was received by an appellant include the form and content of the communication, *i.e.*, whether the information contained therein is sufficient for an ordinary member of the public to determine that they may be affected by an action of the Department.

- *See Hendryx v. DEP*, 2011 EHB 127 (no actual notice from an attached letter in an email from third-party to appellants which contained a footnoted hyperlink to the Department action); *Teleford Borough Auth. v. DEP*, 2009 EHB 333 (email from EPA that failed to state the Department's involvement in establishing TMDLs did not give the appellant actual notice of a Department action); *Emerald Coal Res. v. DEP*, 2008 EHB 312 (neither a handwritten Department note indicating a well is active

nor a Department database indicating that a well registration form was received constitute actual notice of approval of the registration).

- *See Harvilchuck v. Dep't of Env. Protection*, 117 A.3d 368 (Pa. Cmwlth. 2015) (eNOTICE and eFACTS webpage did not provide adequate notice).

4. Substantive statutes may also establish the 30-day appeal period. See, for example:

a) Section 1104(b) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1104(b) (setting 30-day appeal period to contest the fact of the violation or the civil penalty).

b) The Air Pollution Control Act, 35 P.S. § 4001 *et seq*., contains two statutory provisions that affect the general rule as to the time within which an appeal must be filed:

(1) Section 10.2 of the Air Pollution Control Act, 35 P.S. § 4010.2. *PennEnvironment v. DEP*, 2021 EHB 17 (Where an appellant receives actual notice of the issuance of an operating permit **prior** to publication of notice in the Pennsylvania Bulletin, the 30-day appeal period begins to run on the date of **actual notice** pursuant to Section 10.2 of the Air Pollution Control Act). See also *McCarthy v. DEP,* 2019 EHB 406, 407-08 (under the Air Pollution Control Act, appellant was entitled to appeal 30 days from actual notice); *Doctorick v. DEP*, 2012 EHB 244 (appeal untimely under both Board's rule and the APCA); *Soil Remediation Sys., Inc. v. Dep't of Envtl. Prot.*, 703 A.2d 1081 (Pa. Cmwlth. 1997) (must be final order; "advance notice" was not a final Department action).

(2) Section 6.1(e) of the Air Pollution Control Act, 35 P.S. § 4006.1.

5. If the appeal is not received within the 30-day period, the Board ordinarily is deprived of jurisdiction to hear the appeal. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761 (Pa. Cmwlth. 1976); *Ametek, Inc. v. DEP*, 2014 EHB 65; *Burnside Twp. v. DEP*, 2002 EHB 700; *Sweeney v. DER*, 1995 EHB 544. The 30-day appeal period is jurisdictional in nature and cannot be extended as a matter of grace. *Green Global Machine v. DEP*, 2017 EHB 1069 (citing *Ametek,* 2014 EHB at 68). (*But see infra* Section III.A., *Nunc pro tunc* appeals)

6. Additionally, the Board has authority to raise *sua sponte* questions concerning its jurisdiction to hear a matter, such as the timeliness of an appeal. *Rajkovich v. DEP*, 2014 EHB 287.

7. **NOTE**: STATUTORY PROVISION: 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. 35 P.S. § 7514(d)(1). *See infra* Section VI (Petitions for Supersedeas).

C. Filing of a Notice of Appeal

1. An original notice of appeal may be filed electronically, conventionally, or by facsimile. 25 Pa. Code § 1021.32(b).

2. Rules & Regs:

a) A notice of appeal filed by fax will be docketed as of the date of receipt of the telecopy transmission. The original must be sent to the Board via normal delivery channels. 25 Pa. Code § 1021.32(d). For notices of appeal more than ten pages long, the facsimile filed must consist of the certificate of service and the first five pages and last five pages of the notice of appeal, excluding exhibits. 25 Pa. Code 51(f)(3)(iii).

b) A notice of appeal filed electronically will be docketed as of the date when transmission is completed. 25 Pa. Code § 1021.51(f)(1)(ii).

3. **NOTE ON E-FILING**: Electronic filing can be performed only by registered users. It may take up to one full business day to confirm a user's registration; therefore, the Board suggests that individuals seeking to electronically file their notice of appeal should register for electronic filing at least two business days before the expiration of the 30-day appeal period. Information on e-filing can be found on the Board's website.

II. FORM AND CONTENT OF NOTICE OF APPEAL

A. Form of Appeal

1. The easiest way to ensure that an appeal contains the necessary content is to use the Board's Notice of Appeal Form and Instructions. Copies of the form and filing instructions are available from the Board's website at https://ehb.pa.gov

2. It is not necessary to use the form, however, so long as the information required by 25 Pa. Code § 1021.51 is provided to the Board.

3. A notice of appeal is not a pleading, *Range Resources-Appalachia, Inc. v. DEP*, 2020 EHB 364, 369, therefore, no response is permitted or required. *Sierra Club v. DEP*, 2016 EHB 114; *Pitikus v. DEP*, 2004 EHB 910. *See also* 25 Pa. Code § 1021.2 (definition of pleading).

B. Content of Appeal

1. RULES & REGS: A notice of appeal must set forth the name, mailing address, e-mail address, and telephone number of the appellant. If the appellant is represented by an attorney, the notice of appeal shall be signed by at least one attorney of record in the attorney's individual name or, if the party is not represented by an attorney, shall be signed by the party. 25 Pa. Code § 1021.51(c).

2. RULES & REGS: "If the appellant has received written notification of an action of the Department, the appellant shall attach a copy of that notification and any documents received with the notification to the notice of appeal. If the documents include a permit, the appellant only needs to attach the first page of the permit. In lieu of attaching a copy of the notification of the action or related documents, the appellant may provide a link to the publication of the action in the *Pennsylvania Bulletin*." 25 Pa. Code § 1021.51(d).

NOTE: Where the issuance of a permit is being appealed, it is only necessary to include the permit itself or the first page of the permit, not the attachments such as maps or portions of the application incorporated into the permit by reference. 25 Pa. Code § 1021.51(d). *See also Williams v. DEP*, 2018 EHB 856 (Board found that a *pro se* appellant's inclusion of a letter informing her of the issuance of a permit constituted an appeal of the permit and not merely an appeal of the letter).

3. RULES & REGS: The notice of appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. 25 Pa. Code § 1021.51(e).

4. RULES & REGS: 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. Where an appellant fails to supply all of the necessary information in her notice of appeal and ignores an order from the Board to do so, the appeal may be dismissed for failure to perfect. *Phelps v. DEP*, 2018 EHB 838.

C. Statement of Grounds for Appeal

1. The Board adopted a rule in 2006 providing for an easier standard for amendment of notices of appeal. See Section II.E (Amendments to Appeals).

2. A failure to file specific grounds for appeal within 30 days of the action is not a defect going to jurisdiction. *Stocki v. DEP*, 2019 EHB 51, 54. *But see Henry v. DEP*, 2012 EHB 324 (original notice of appeal should represent a good faith effort to state the grounds for objecting to the action of the Department.)

3. 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. *Fuller v. Dep't of Envtl. Res.*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Rhodes v. DEP*, 2009 EHB 325; *Stevens v. DEP*, 2006 EHB 729.

4. It may be sufficient to raise an issue in general terms. *Croner, Inc. v. Dep't of Envtl. Res.*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *Ainjar Trust v. DEP*, 2000 EHB 75. "So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, we will not readily conclude that there has been a waiver." *Rhodes v. DEP*, 2009 EHB 325, 327 cited in *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 207.

5. "It is a common and perhaps even well-advised practice to include a catch-all objection. . .in a notice of appeal. It is perfectly understandable that an appellant's case will require refinement as it progresses toward an adjudication. . . ." *Snyder v. DEP*, 2015 EHB 857, 885.

6. However, general objections, such as a statement saying simply that DEP's action was arbitrary and capricious or contrary to law, generally will not, *by themselves*, excuse a failure to include a more specific objection. *Chester Water Authority v. DEP*, 2016 EHB 280; *Sebastianelli v. DEP*, 2016 EHB 243, 248. *See also Williams v. DEP*, 1999 EHB 708, 716 (*Croner* held that an issue may be *raised* in general terms, not that a general statement in a notice of appeal may encompass

every issue) (citing *Newtown Land Ltd. Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995)).

7. An appellant is not required to cite specific regulations in a notice of appeal. *Goheen v. DEP*, 2003 EHB 92.

D. Service of Appeal

1. RULES & REGS: An appellant filing a notice of appeal via conventional means or facsimile must concurrently serve, in the same or comparable manner in which the notice was filed, the notice of appeal upon the following:

a) The office of the Department of Environmental Protection issuing the action being appealed;

b) The Office of Chief Counsel of the Department of Environmental Protection; and

c) In a third-party appeal, the recipient of the action.

25 Pa. Code § 1021.51(f)(2)(vi), (3)(vi). **NOTE:** If a party's fax number is not available or operational, the notice of appeal shall be served by overnight delivery.

2. RULES & REGS: An appellant filing a notice of appeal electronically in a third-party appeal must concurrently serve the recipient of the Department's action via overnight mail or facsimile. 25 Pa. Code § 1021.51(f)(1)(iv). The Board's electronic filing provider will provide service of the notice of appeal to the Department. 25 Pa. Code § 1021.51(f)(1)(v).

3. RULES & REGS: 25 Pa. Code § 1021.51(h) describes "recipients of the Department's action" upon whom a notice of appeal must be served in a third-party appeal. This includes, among others, the recipient of a permit, license, approval, certification or order; municipalities in certain actions under the Sewage Facilities Act; a mining company, well operator, or owner or operator of a storage tank in matters involving a claim of subsidence damage, water loss or contamination; and "other interested parties as ordered by the Board." 25 Pa. Code § 1021.51(h).

NOTE: Although important, concurrent service on the recipient of the action is not a jurisdictional requirement. *White Twp. v. DEP*, 2005 EHB 611; *Thomas v. DEP*, 2000 EHB 598; *Ainjar Trust v. DEP*, 2000 EHB 505; *see also Clabbatz v. DEP*, 2005 EHB 370 (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); *see also* 25 Pa. Code § 1021.52(b).

E. Amendments to Appeals

1. RULES & REGS: The Board rules provide for amendments to appeals to allow for the addition of objections and grounds which could not have been reasonably included with the original appeal. There are two ways that amendment can occur:

a) An appeal may be amended as of right within 20 days after the filing and docketing of the appeal. 25 Pa. Code § 1021.53(a).

b) After the initial 20-day period, an appellant may move for the Board to grant him/her leave to amend the appeal. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment. 25 Pa. Code § 1021.53(b).

2. Amendment by Leave of the Board

a) **NOTE**: A request for leave to amend must be by motion, verified, and supported by affidavits. The procedures are outlined in the Board's rules. *See* 25 Pa. Code §§ 1021.53, 1021.91, and 1021.95.

b) The Board's standard for granting leave to amend an appeal under 25 Pa. Code § 1021.53(b) places a heavy emphasis on a determination of prejudice using (nonexclusively) such factors as:

(1) The time when amendment is requested relative to other developments in the litigation (*e.g.*, the hearing schedule);
(2) The scope and size of the amendment;
(3) Whether the opposing party had actual notice of the issue (*e.g.*, whether the issue was raised in other filings);
(4) The reason for the amendment; and
(5) The extent to which the amendment diverges from the original appeal.

Protect PT v. DEP, 2023 EHB 15; *Sokol v. DEP,* 2016 EHB 427, 428-29; *Rhodes v. DEP*, 2009 EHB 325; *see also Borough of St. Clair v. DEP*, 2013 EHB 171; *Upper Gwynedd Twp. v. DEP*, 2007 EHB 39; *Angela Cres Trust v. DEP*, 2007 EHB 595.

c) The Board has held that the right to amend should be liberally granted so that cases may be decided on their merits whenever possible, but not at the expense of undue prejudice to the other parties. *Center for Coalfield Justice v. DEP*, 2018 EHB 684; *Chester Water Authority v. DEP*, 2016 EHB 358, 362.

d) While the Board generally disfavors motions to amend filed close in time to the start of a hearing, where opposing parties have had notice of the issue and have been actively litigating the issue, allowing the amendment causes no undue prejudice. *Williams v. DEP*, 2020 EHB 277.

e) The underlying merits of new objections proposed to be amended to an appeal are not a factor in considering whether to allow an amendment. *Borough of St. Clair v. DEP*, 2013 EHB 171.

3. The Board has the discretion to permit additional discovery (limited to the issues raised by amendment) if so requested by the parties. 25 Pa. Code § 1021.53(d).

4. **NOTE:** The Board will not permit an amendment to include additional appellants after the 30-day appeal period has run. *Stedge v. DEP*, 2014 EHB 549; *Weaver v. DEP*, 2013 EHB 381. Similarly, the timely appeal of one Department action may not be amended to include an appeal of a separate Department action more than 30 days after notice was received of the separate action. *Robachele v. DEP*, 2006 EHB 373.

III. MORE COMPLEX LEGAL ISSUES

A. Late Appeals

1. RULES & REGS: An appellant may petition the Board to file an appeal *nunc pro tunc* (*i.e.*, after the 30-day deadline) under 25 Pa. Code § 1021.53a. The Board grants appellants leave to file an untimely appeal in very narrow circumstances and only for good cause. The standards applicable to what constitutes good cause are the common law standards applicable in analogous cases in the Pennsylvania courts of common pleas. 25 Pa. Code § 1021.53a.

2. Generally, appeals *nunc pro tunc* are granted only where fraud or breakdown in the Board's operation or unique and compelling factual circumstances establish a non-negligent failure to appeal. *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299 (Pa. Cmwlth. 1994); *see also Ametek, Inc. v. DEP*, 2014 EHB 65; *Barchik v. DEP*, 2010 EHB

739. The appellant must act promptly to remedy the untimely filing. *See Barchik, supra*; *Reading Anthracite Co. v. DEP*, 1998 EHB 602.

3. 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. Constr. v. DER*, 1987 EHB 643, or where the Board prematurely discharged a rule to show cause why an incomplete appeal should be dismissed, *Washington Twp. v. DER*, 1995 EHB 403. *See also Barber v. DEP*, 2013 EHB 725 (finding the second notice of appeal timely-filed where two notices of appeal were mailed to the Board in one envelope but, due to a mistake of the Board, only the first appeal was docketed during the 30-day period).

4. An example of unique and compelling circumstances where a petition to appeal *nunc pro tunc* was granted is *Fryer Excavating, LLC v. DEP*, 2020 EHB 270 (petition to appeal *nunc pro tunc* was granted where filing of appeal was delayed due to closure order issued in response to COVID-19 global pandemic).

5. Situations where appeals *nunc pro tunc* have **not** been permitted:

a) Attempts to negotiate 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*. *Cadogan Twp. Bd. of Supervisors v. Dep't of Envtl. Res.*, 549 A.2d 1363 (Pa. Cmwlth. 1988); *Ametek, Inc. v. DEP*, 2014 EHB 65; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 309; *Weaver v. DEP*, 2002 EHB 273; *Broscious Constr. 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. Dep't of Envtl. Res.*, 570 A.2d 129 (Pa. Cmwlth. 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. *Broscious Constr. Co. v. DEP*, 1999 EHB 383.

e) Mistake concerning the finality or ramification of a Department action. *Twp. of Robinson v. DEP*, 2007 EHB 139; *Eljen Corp. v. DEP*, 2005 EHB 918; *Maddock v. DEP*, 2001 EHB 1000; *Hopwood v. DEP*, 2001 EHB 1254; *see also Glanz v. DEP*, 2006 EHB 841.

f) Absence from the Commonwealth during the appeal period. *Pedler v. DEP*, 2004 EHB 852.

g) Pursuing action before another tribunal. *Feudale v. DEP*, 2016 EHB 774. Where appellant mistakenly filed appeal with the Third Circuit based on allegedly incorrect notice in *Pa. Bulletin* and failed to act promptly when the error was discovered, petition for leave to file *nunc pro tunc* with the Board was denied: *Delaware Riverkeeper Network v. DEP*, 2017 EHB 110.

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 Conf. v. Dep't of Envtl. Res.*, 645 A.2d 295 (Pa. Cmwlth. 1994); *but see Lobolito, Inc. v. DER*, 1993 EHB 477.

2. A Department determination of the applicability of an exception under a Sewage Facilities Act regulation which requires the revision of an official sewage facilities plan for new development is reviewable. *Winner v. DEP*, 2014 EHB 135.

3. 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.

4. Denial of funds pursuant to grant programs administered by the Department. *City of Harrisburg v. DER*, 1994 EHB 155 (and cases cited therein).

5. 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 Ref. Co. v. DEP*, 1995 EHB 1264.

6. 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.

7. 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.

8. Department's election not to process claims for subsidence damage under the Bituminous Mine Subsidence Act. *Love v. DEP*, 2010 EHB 523. "Both discretionary and mandatory actions of the Department are reviewable by the Board." *Id*. at 527

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. Dep't of Envtl. Res.*, 648 A.2d 767 (Pa. 1994), *modified*, 676 A.2d 199 (Pa. 1996); *Arsenal Coal Co. v. Dep't of Envtl. Res.*, 477 A.2d 1333 (Pa. 1984) (upholding Commonwealth Court jurisdiction under unusual circumstances); *Duquesne Light Co. v. Dep't of Envtl. Prot.*, 724 A.2d 413 (Pa. Cmwlth. 1999); *see also Smithtown Creek Watershed Ass'n v. DEP*, 2002 EHB 713 (EQB refusal to redesignate a stream); *Plumstead Twp. Civic Ass'n v. DEP*, 1995 EHB 1120, *aff'd*, 684 A.2d 667 (Pa. Cmwlth. 1996) (EQB unsuitability designations are not appealable to the Board).

a) **NOTE**: 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. *Concerned Citizens of Chestnut Hill Twp. v. Dep't of Envtl. Res.*, 632 A.2d 1 (Pa. Cmwlth. 1993); *see also Neshaminy Water Res. Auth. v. Dep't of Envtl. Res.*, 513 A.2d 979 (Pa. 1986).

2. Notices of violation are generally not appealable. *Perano v. DEP*, 2011 EHB 750; *Cnty. of Berks v. DEP*, 2003 EHB 77; *see also Fiore v. Dep't of Envtl. Res.*, 510 A.2d 880 (Pa. Cmwlth. 1986).

3. The following are further examples of actions which are **not appealable**:

a) Notice of possible future enforcement action. *Greyhound Aramingo Petroleum Co., Inc. v. DEP*, 2022 EHB 96 (proposed consent assessment of civil penalty); *Kelly v. DEP*, 2003 EHB 10 (proposed consent assessment of civil penalty); *Bituminous Processing Co. v. DEP*, 2000 EHB 13.

b) An inspection report which merely lists alleged violations. *Karnick v. DEP*, 2016 EHB 1; *Goetz v. DEP*, 2001 EHB 1127; *Goetz v. DEP*, 1999 EHB 824; *Malak v. DEP*, 1999 EHB 909.

c) The Department's decision not to pursue enforcement action. *Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 132 EAL 2005 (Pa. filed December 2, 2005); *Bernardi v. DEP*, 2016 EHB 580; *Westvaco Corp. v. DEP*, 1997 EHB 275; *Ridenour v. DEP*, 1996 EHB 928. **NOTE: However**, the Department's decision not to take action may constitute an appealable action in some circumstances: *See*, *e.g.*, *Kalinowski v. DEP*, 2016 EHB 402 (Department's denial of a third-party request for modification or revocation of a permit was deemed to be an appealable action); *Kiskadden v. DEP*, 2012 EHB 171 (Department's notification to landowner that his water well was not polluted by gas well activities constituted an appealable action); *Love v. DEP*, 2010 EHB 523 (Department's refusal to process claims for mine subsidence damage constituted an appealable action); See also Dissenting Opinion in *Ballas v. DEP*, 2009 EHB 652, at 658 (Renwand, C.J. and Krancer, J. dissenting to majority's reliance on prosecutorial discretion as a basis for dismissing a citizen complaint alleging damage to property from surface coal mining). Prosecutorial discretion is a Board-created exception to its mandated duty to review Department actions, *Law v. DEP*, 2008 EHB 213, 215; *People United to Save Homes v. DEP*, 1998 EHB 250. The principle does not shield Department actions that impact permitting decisions. *People United to Save Homes*, *supra*.

d) Provisional decisions made by the Department during permit review. *Corco Chemical Corp. v. DEP*, 2005 EHB 733 (letter evaluating a spill plan and reviewing compliance with regulations); *Cty. of Berks v. DEP*, 2003 EHB 77; *United Ref. 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 Cty. Sanitary Auth. v. DEP*, 1998 EHB 643 (a letter noting defect in NPDES permit application).

e) Letter from the Department declining to reconsider a prior action, *Franklin Twp. Mun. Sanitary Auth. v. DEP*, 1996 EHB 942, or suspending consideration of an application, *Cnty. of Dauphin v. DEP*, 1997 EHB 29.

f) The attempted appeal of a Department email to a third-party opining that the recipient of the email did not need to obtain a permit. *Borough of Glendon v. DEP*, 2014 EHB 201. *See also Clean Air Council v. DEP and Encino Development Group*, EHB Docket No. 2022-093-C, (Opinion and Order on Motion to Dismiss issued July 14, 2023) (Department letter informing company that it did not need a permit under the Solid Waste Management Act was not an appealable action.)

g) 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 Auth. v. DEP*, 1999 EHB 1.

h) 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 Env't & Children Everywhere v. DEP*, 2000 EHB 1.

i) Contractual rights or other disputes between private parties vis-a-vis each other. *Pond Reclamation Co. v. DEP*, 1997 EHB 468. *See also 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).

j) 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 Twp. Supervisors v. DEP*, 1999 EHB 837.

k) 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 Ass'n v. DEP*, 2000 EHB 409.

l) 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 Auth. v. DEP*, 2000 EHB 1071.

m) 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.

n) Letter from the Department requiring a bond in a certain amount before a permit application can be processed. *Mon Valley Transp. Ctr. v. DEP*, 2005 EHB 727; *Maple Creek Mining, Inc. v. DEP*, 2005 EHB 967.

o) An offer to settle in the form of a draft consent decree. *Kennedy v. DEP*, 2007 EHB 511.

p) An attempt to appeal from a certified copy of a judgment filed with a court of common pleas by the Department to collect an unpaid civil penalty. *Peckham v. DEP*, 2008 EHB 114.

q) Decisions made under consent order and agreements which, under the terms of the COA, are not final or appealable until such time that the COA is enforced by the Department. *Chesapeake Appalachia, LLC v. DEP*, 2013 EHB 447, *aff'd*, 89 A.3d 724 (Pa. Cmwlth. 2014); *see also Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465; *Consol Pa. Coal Co. v. DEP*, 2013 EHB 638.

r) A conference call with the Department. *Teska v. DEP*, 2016 EHB 500.

D. Representation before the Board

1. RULES & REGS: Parties must be represented by an attorney in Board proceedings except individuals appearing on their own behalf. 25 Pa. Code § 1021.21(a).

a) Corporations must secure counsel. 25 Pa. Code § 1021.21(b); *United Environmental Group, Inc. v. DEP*, 2019 EHB 253; *KH Real Estate, LLC v. DEP*, 2012 EHB 319; *Falcon Coal & Constr. Co. v. DEP*, 2009 EHB 209; *RJ Rhoads Transit Inc. v. DEP*, 2007 EHB 260; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330. A limited partnership must be represented by counsel when its general partner is a corporation. *United Environmental Group, supra.*

b) An estate must be represented by an attorney in proceedings before the Board. *Gary Graham, Executor of the Estate of Robert B. Graham*, 2023 EHB 30.

c) If the Board determines that a group of individuals are not merely appearing on their own behalf, they may be required to appear through counsel. 25 Pa. Code § 1021.21(c).

2. Failure to secure counsel as required by the Board's rules will result in dismissal of an appeal. 25 Pa. Code §§ 1021.21(a), 1021.161; *Earth First Recycling, LLC v. DEP*, 2018 EHB 819; *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338; *Int'l Asbestos Testing Labs. v. DEP*, 2014 EHB 431; *KH Real Estate, LLC v. DEP*, 2012 EHB 319; *Falcon Coal & Constr. Co. v. DEP*, 2009 EHB 209.

3. Parties may be represented by an attorney in good standing admitted to practice before the highest court of another state on a motion *pro hac vice* filed by a Pennsylvania attorney. **NOTE**: Payment of the Interest on Lawyers Trust Account (IOLTA) fee under 204 Pa. Code § 81.505(a) is not required as a condition to *pro hac vice* admission in a proceeding before the Environmental Hearing Board.

4. 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; *Van Tassel v. DEP*, 2002 EHB 625. *See also Barber v. Tax Review Bd.*, 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).

5. The Pennsylvania Bar Association's Environmental and Energy Law Section administers a program aimed at providing *pro bono* (without charge) legal representation to financially-qualifying individuals and corporations. Contact information for the *pro bono* program may be found in the Instructions to the Notice of Appeal form on the Board's website.

6. 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. Whitemarsh 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*, 2005 EHB 959; *Greenview Dev. v. DEP*, 2000 EHB 448.

7. **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 required unless another attorney has entered an appearance and the change of attorneys does not delay any stage of the litigation. 25 Pa. Code § 1021.23, *see also Mann Realty Associates, Inc. v. DEP*, 2014 EHB 1040 (appellant's counsel permitted to withdraw where the client had a substantial unpaid bill, there was a complete deterioration of the attorney-client relationship, and postponing the hearing would not prejudice any party or impede the administration of justice); *DEP v. Allegheny Enterprises, Inc.*, 2015 EHB 40.

E. Standing

1. Standing is not a jurisdictional matter under Pennsylvania law and therefore a challenge to standing may be waived. *Jake v. DEP,* 2014 EHB 38.

2. When adequately and timely challenged by opposing parties, individuals must demonstrate they have standing upon a showing that they have been adversely affected by the Department action under appeal. 35 P.S. § 7415(c); *Borough of Roaring Spring v. DEP*, 2004 EHB 889.

3. An appellant need not demonstrate or even allege standing in the notice of appeal. *Winner v. DEP*, 2014 EHB 135; *Cooley v. DEP*, 2004 EHB 554; *Beaver Falls Mun. Auth. v. DEP*, 2000 EHB 1026; *Ziviello v. DEP*, 2000 EHB 999; *Valley Creek Coal. v. DEP*, 1999 EHB 935.

4. An appellant is not required to prove its case on the merits in order to have standing to appeal. *Food & Water Watch v. DEP*, 2020 EHB 229 (4-1 decision), *aff'd*, No. 565 C.D. 2020, No. 621 C.D. 2020 and No. 627 C.D. 2020 (Pa. Cmwlth. April 12, 2021); *Delaware Riverkeeper v. DEP*, 2004 EHB 599; *Giordano v. DEP*, 2000 EHB 1184; *Ziviello v. DEP*, 2000 EHB 999.

5. An appellant need not have issue-specific standing in proceedings before the Board. *Food and Water Watch v. DEP*, 2020 EHB 229 (4-1 decision), *aff'd*, No. 565 C.D. 2020, No. 621 C.D. 2020 and No. 627 C.D. 2020 (Pa. Cmwlth. April 12, 2021); *Citizen Advocates United to Safeguard the Envt. v. DEP*, 2007 EHB 632

("Standing is specific to each Departmental action, not whatever objections there may be to the action); *Borough of Roaring Spring v. DEP*, 2004 EHB 889.

6. A motion to dismiss may be granted for lack of standing. *Matthews Int'l Corp. v. DEP*, 2011 EHB 402. *Contrast Orenco Systems, Inc. v. DEP*, 2016 EHB 432, 434; *Mayer v. DEP*, 2012 EHB 400, 401(A motion to dismiss may not be the proper vehicle for raising a challenge to standing).

7. For purposes of standing questions raised in dispositive motions, the burden is on the moving party to show that there are no material facts in dispute 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).

8. When challenged in pre-hearing memoranda and in post-hearing briefs, the appellant must demonstrate by a preponderance of the evidence at the hearing on the merits that it has standing even where a motion for summary judgment by opposing parties has been denied. *Stedge v. DEP*, 2015 EHB 577. *See also Greenfield Good Neighbors v. DEP*, 2003 EHB 555; *Giordano v. DEP*, 2001 EHB 713; *Florence Twp. v. DEP*, 1997 EHB 616; *Twp. of Florence v. DEP*, 1997 EHB 763.

9. A person has standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128 (quoting *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)); *see also Fumo v. City of Phila.*, 972 A.2d 487 (Pa. 2009).

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 Mgmt. Co. v. DEP*, 2005 EHB 819.

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 Waste Industries Assn. v. DEP*, 2016 EHB 590; *Pa. 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 Twp. v. Dep't of Envtl. Res.*, 452 A.2d 718 (Pa. 1982); *Borough of Glendon v. Dep't of Envtl. Res.*, 603 A.2d 226 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992).

e) A municipality that 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 (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. Dep't of Envtl. Res.*, 327 A.2d 647 (Pa. 1975); *Berwick Area Joint Sewer Auth. 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 Auth. v. DEP*, 2002 EHB 75; *Highridge Water Auth. 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 held that it is a person's use of an area and a project's potential threat to that use that matters for purposes of standing, as opposed to mere proximity. *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251; *LTV Steel Co. v. DEP*, 2002 EHB 605; *Drummond v. DEP*, 2002 EHB 413. For purposes of standing, "use" is defined broadly. *Williams v. DEP*, 2019 EHB 764, 777.

j) The Board has recognized that certain activities of a recreational nature can confer standing. *See, e.g., Food & Water Watch v. DEP*, 2020 EHB 229 (4-1 decision), *aff'd,* No. 565 C.D. 2020, No. 621 C.D. 2020 and No. 627 C.D. 2020 (Pa. Cmwlth. April 12, 2021); *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *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.

k) "Appellants have standing if they credibly aver that they use the affected area and there is a realistic potential that their use of that area could be adversely affected by the challenged activity." *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228 (Pa Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017)).

l) 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; *see also, Dauphin Meadows, Inc. v. DEP*, 1999 EHB 928 (a senator may not intervene on behalf of his constituents). A legislator has no standing to bring an appeal on behalf of residents in the area of the proposed permit site; nor does the Environmental Rights Amendment, Article I, § 27 of the Pennsylvania Constitution grant special standing to a legislator to

appeal actions of the Department of Environmental Protection in her role as an elected official. *Muth v. DEP*, 2022 EHB 199.

m) The Board denied a motion to compel seeking discovery from the appellants regarding the "real parties in interest." *Logan v. DEP*, 2016 EHB 801.

10. Certain statutes contain special standing provisions. For example, under section 4010.2 of the Air Pollution Control Act, 35 P.S. § 4010.2, 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 authority to conduct hearings *de novo* to determine whether the Departmental action is a proper exercise of authority. It does not have the power to enter a declaratory judgment. *Empire Sanitary Landfill, Inc. v. Dep't of Envtl. Res.*, 684 A.2d 1047 (Pa. 1996); *Costanza v. Dep't of Envtl. Res.*, 606 A.2d 645 (Pa. Cmwlth. 1992); *Varos v. DER*, 1985 EHB 892. 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 rule on the constitutionality of regulations. *Protect PT v. DEP and Apex Energy (PA), LLC,* 2020 EHB 27, 34; *Empire Sanitary Landfill, Inc. v. Dep't of Envtl. Res.*, 684 A.2d 1047 (Pa. 1996); *see also Wean v. DEP*, 2014 EHB 219. However, the Board cannot decide the constitutionality or validity of a statute. *Babich v. DER*, 1994 EHB 1281.

3. The Board has the authority to rule on the constitutionality of actions. *Marshall v. DEP*, 2019 EHB 352, 354 ("It is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking.")

4. The Board has the authority to modify orders of the Department. *Carey v. DEP*, 2019 EHB 722 (the Board upheld an order of the Department requiring the permanent closure of storage tanks but

extended the date for compliance to one year from the date of the Adjudication; the Board also retained jurisdiction); *Becker v. DEP*, 2018 EHB 283.

5. The Board does not have the power to enforce settlement agreements or consent orders. *Dep't of Envtl. Res. v. Landmark Int'l, Ltd.*, 570 A.2d 140 (Pa. Cmwlth. 1990); *Empire Sanitary Landfill, Inc. v. DER*, 1990 EHB 1270.

6. The Board has the power to consider property issues when they are referenced in the regulations or considered by the Department. *Camp Rattlesnake v. DEP*, 2020 EHB 375 (Board denied a motion for summary judgment where there were disputed issues of material fact involving a right-of-way).

7. 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.

8. The Board has a comprehensive set of Rules of Practice and Procedure found at 25 Pa. Code, Chapter 1021. With the exception of discovery and certain other minor exceptions, the Pennsylvania Rules of Civil Procedure generally do not apply in Board proceedings. The default rules for any matter not addressed in the Board's rules are the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II. *Logan v. DEP*, 2016 EHB 801, 803-04.

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. *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. Dep't Envtl. Prot.*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003); *see also Clean Air Council et al. v. DEP*, EHB Docket No. 2021-055-L (Consolidated with 2022-101-L) (Opinion and Order on Motion to Compel issued March 22, 2023); *Lester v. DEP*, 2015 EHB 441; *Borough of St. Clair v. DEP*, 2014 EHB 76; *Natiello v. DEP*, 2008 EHB 640; *Smedley v. DEP*, 2001 EHB 131; *O'Reilly v. DEP*, 2001 EHB 19.

a) 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 Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Envtl. & Recycling Servs., Inc. v. DEP*, 2002 EHB 461; *Smedley v. DEP*, 2001 EHB 131, 155-60; *Conners 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. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

b) 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 Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Envtl. & Recycling Servs., Inc. v. DEP*, 2002 EHB 461; *People United to Save Homes v. DEP*, 1999 EHB 457.

c) 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 that of the Department. *Envtl. & Recycling Servs., Inc. v. DEP*, 2002 EHB 461; *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 1489; *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1458.

d) 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 Borough of St. Clair v. DEP*, 2014 EHB 76; *Thornhurst Twp. 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. 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. Dep't of Envtl. Res.*, 459 A.2d 1303 (Pa. Cmwlth. 1983).

3. The Board's *de novo* authority allows it to admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *Kiskadden v. DEP*, 2015 EHB 377; *Chimel v. DEP*, 2014 EHB 957; *Solebury School v. DEP*, 2014 EHB 482; *Rail Road Action & Advisory*

Comm. v. DEP, 2009 EHB 472. *Contra Delaware Riverkeeper Network v. DEP*, 2018 EHB 672 (Board's review under § 1113 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1113, is limited to the administrative record).

4. *See also, Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1165 ("Although we are not necessarily bound to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.")

H. Administrative Finality

1. Administrative finality generally requires that a party appeal a Department action close to the time the action actually occurs and not at a significantly later point in time. *Morrison v. DEP*, 2020 EHB 220, 222 (citing *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp*., 348 A.2d 765 (Pa. Cmwlth. 1975, *aff'd*, 375 A.2d 320 (Pa. 1977)).

2. 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. *Solebury School v. DEP*, 2014 EHB 482, 526-27; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube Co. 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. Dep't of Envtl. Res.*, 541 A.2d 827 (Pa. Cmwlth. 1988).

3. Administrative finality does not isolate from review permits that have been renewed. While the Department is not required to reexamine whether the initial permit issuance was proper, permit renewals must be based on up to date information and the continuation of the permitted activity must still be appropriate in light of that information. *Solebury School v. DEP*, 2014 EHB 482; *See also PQ Corp. v. DEP*, 2017 EHB 870; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Tinicum Twp. v. DEP*, 2002 EHB 822.

4. 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*, 2005 EHB 761.

5. Administrative finality does not necessarily act as a bar where a statute creates a special process for re-examining a prior decision. *Kalinowski v. DEP*, 2016 EHB 402, 406; *Love v. DEP*, 2010 EHB 523, 529; *Perano v. DEP*, 2010 EHB 439.

6. Administrative finality "may not apply where the facts that are relevant to assessing the propriety of the Department's later action are dramatically new and different from the facts that were relevant to assessing the propriety of the Department's earlier action." *Love v. DEP*, 2010 EHB 523, 528 (citing *Rural Area Concerned Citizens v. DEP*, 2010 EHB 500).

7. For a discussion of "administrative finality," see *PA Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 744-46; *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134; *Winegardner v. DEP*, 2002 EHB 790, 792-94.

IV. FILING AND SERVICE

A. RULES & REGS

1. The Board's rules concerning the filing and service of documents can be found at 25 Pa. Code Sections 1021.31–1021.39.

B. *Electronic Filing & Electronic Service*

1. The Board maintains an electronic docket for each of its cases on its website at https://ehb.pa.gov.

2. The Board's rules provide for **mandatory electronic filing** for attorneys through its website for most documents. All attorneys must register to file and receive service electronically unless excused from the requirement by the Board. *Pro se* appellants may file electronically. Information on registration and how to use the e-filing system can be found on the Board's website at https://ehb.pa.gov. *See also* 25 Pa. Code §§ 1021.31, 1021.32, 1021.34, 1021.35, 1021.37, 1021.39.

3. The following documents must be filed conventionally (by mail or personal service) or by facsimile pursuant to 25 Pa. Code § 1021.31(a):

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

b) A motion to be excused from the mandatory electronic filing requirement.

c) An entry of appearance filed under 25 Pa. Code § 1021.51(j).

d) A document filed on behalf of a person who is not a party to the proceeding at the time of the filing (e.g. a petition to intervene).

4. A notice of appeal may be filed electronically, conventionally or by facsimile. *See* 25 Pa. Code § 1021.32(b). Electronic filing of a notice of appeal automatically effects service on the Department of Environmental Protection (on both the Department's Office of Chief Counsel and the program office that took the action). 25 Pa. Code § 1021.51(f)(1)(v).

5. Documents filed electronically shall be served by conventional means (mail, personal delivery) or by facsimile upon parties who have been excused from electronic filing or *pro se* appellants who are not registered for electronic filing. 25 Pa. Code § 1021.34(d). Where a party does not receive electronic service in a matter involving a request for expedited disposition, service shall be made upon that party within 24 hours of filing the document with the Board. 25 Pa. Code § 1021.34(f)

6. Where permitted, exhibits to prehearing memoranda or dispositive motions may be filed by conventional means rather than electronically. If such exhibits are filed with the Board in an expedited manner (e.g., by overnight delivery), they must be served on opposing parties within the same timeframe or sooner. 25 Pa. Code § 1021.34(b).

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. 25 Pa. Code § 1021.51(i); *Thomas v. DEP*, 2000 EHB 728.

2. The Board's definition of "recipient of [a Department] action" includes 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. 25 Pa. Code § 1021.51(h)(1)–(4).

3. A failure to treat an interested party as a "recipient" of an action may affect the Board's ability to grant relief. *See Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), *petition for*

allowance of appeal denied, 132 EAL 2005 (Pa. filed December 2, 2005).

V. APPEAL OF DEPARTMENT ENFORCEMENT ORDERS

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*, *supra*, Section II.

A. 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. *Dep't of Envtl. Res. 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* 35 P.S. § 7514(d)(1). The recipient of the order must either seek a supersedeas of the order pursuant to Rules 1021.61–1021.64 or be prepared to comply with the order. The recipient of the order may be required 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. § 4010.1; Solid Waste Management Act, 35 P.S. § 6018.602; Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1309.

3. A Department order is not a pleading. *Range Resources-Appalachia, Inc. v. DEP*, 2020 EHB 364, 369.

4. For a discussion of corporate officer liability, see *B&R Resources, LLC v. Department of Environmental Protection*, 180 A.3d 812 (Pa Cmwlth. 2018) (it was error to hold an oil and gas exploration company's officer liable under a participation theory for failure to plug abandoned oil and gas wells pursuant to 58 Pa.C.S. §§ 3220(a) and 3253 because the company lacked the financial resources to plug all of the wells, and findings were not made regarding how many wells could have been plugged.)

B. Civil Penalty Proceedings.

1. Under most statutes, the Department assesses civil penalties by issuing an Assessment of Civil Penalty, which is subject to an appeal to

the Board. *E.g.*, Air Pollution Control Act, 35 P.S. § 4009.1(a); Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1307.

2. Under certain statutes, including the Clean Streams Law and the Dam Safety and Encroachments Act, the Department proceeds under the rules for "Special Actions" (*see infra* Section VII) by filing a Complaint for Civil Penalties with the Board. 25 Pa. Code §§ 1021.71–1021.76a.

3. 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. Dep't of Envtl. Res.*, 550 A.2d 279 (Pa. Cmwlth. 1988); *see also 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; *Herzog v. Dep't of Envtl. Res.*, 645 A.2d 1381 (Pa. Cmwlth. 1994) (Solid Waste Management Act).

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

    1) submit a check or appropriate bond securing payment of the penalty; or

    2) provide a verified statement that the appellant is unable to pay. 25 Pa. Code § 1021.54a.

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*, 2005 EHB 913; *American Iron Oxide Co. v. DEP*, 2005 EHB 748; *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 was found to have 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. Dep't of Envtl. Res.*, 544 A.2d 1075 (Pa. Cmwlth. 1988); *Boyle Land & Fuel Co. v. Envtl. Hearing Board*, 475 A.2d 928 (Pa. Cmwlth. 1984), *aff'd*, 488 A.2d 1109 (Pa. 1985) (per curiam).

d) If an appeal has been filed electronically, a copy of the bond or check must be included with the electronic filing. 25 Pa. Code § 1021.51(f)(1)(i).

e) 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. 25 Pa. Code § 1021.55. *See Twelve Vein Coal Co. v. Dep't of Envtl. Res.*, 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 also* Section XI.E below (Hearings on Inability to Pay Civil Penalties).

f) The burden lies with the appellant to prove it is unable to prepay the civil penalty or post an appeal bond. 25 Pa. Code § 54a(a); *Paul Lynch Investments, Inc. v. DEP*, 2016 EHB 385. A finding of inability to prepay a civil penalty or post an appeal bond will only be made where the prepayment or posting of the bond would result in undue financial hardship. *Id*. at 388.

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.

6. If an appeal of the civil penalty is sustained, the appellant is entitled to the return of the prepayment. This process may take several weeks.

7. For an example of the Board's analysis of the reasonableness of a civil penalty assessment, *see Schlafke v. DEP*, 2019 EHB 1 (civil penalty assessed under the Safe Drinking Water Act). For an example of the Board's analysis of a complaint for civil penalties, *see DEP v.*

Keck, 2019 EHB 322 (complaint for civil penalty filed under the Clean Streams Law).

VI. PETITIONS FOR SUPERSEDEAS

A. Generally

1. RULES & REGS: 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 close in time 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* 25 Pa. Code § 1021.34(b).

2. The form and content requirements of 25 Pa. Code § 1021.62 must be strictly followed or the Board may *sua sponte* deny the petition under 25 Pa. Code § 1021.62(c). *Goodman Grp., 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 may be dismissed *sua sponte* or upon motion. *Vanduzer v. DEP*, 2018 EHB 696; *Dougherty v. DEP*, 2014 EHB 9; *Guerin v. DEP*, 2014 EHB 18; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635; *King Drive Corp. v. DEP*, 2003 EHB 779.

b) A petition for supersedeas may 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.

3. 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, e.g., Dickinson Twp. v. DEP*, 2002 EHB 267.

4. Where the Department modifies, suspends or revokes a mine certification, an appeal of that action functions as an automatic petition for supersedeas. 52 P.S. § 690.510(b)(2); *Abercrombie v. DEP*, 2020 EHB 293.

B. Temporary Supersedeas

1. Under 25 Pa. Code § 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 25 Pa. Code § 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. 25 Pa. Code § 1021.64(e). *See Beaver v. DEP*, 2002 EHB 574; *Global Eco-Logical Servs., 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 Pa. 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. 25 Pa. Code § 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.

4. An affidavit from a witness in a supersedeas proceeding does not serve the same function as an expert report in a hearing on the merits in

terms of circumscribing the expert's testimony. *Clean Air Council v. DEP*, 2017 EHB 168.

D. Standards for Granting Petitions for Supersedeas

1. 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 25 Pa. Code § 1021.63(a). *See Liberty Township and CEASRA, Inc. v. DEP*, 2023 EHB 170; *Tinicum Twp. v. DEP*, 2002 EHB 822; *Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 93. The petitioner bears the burden of proof. *Tinicum Twp. v. DEP*, 2008 EHB 123.

2. Among the factors to be considered are: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a); *Erie Coke v. DEP*, 2019 EHB 481, 484-85.

3. When assessing the three factors set forth in 25 Pa. Code § 1021.63(a) the Board balances the factors and the interests of the parties and the public. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829. *See also Harriman Coal Corp. v. DEP*, 2001 EHB 234. *See also, Erie Coke v. DEP*, 2019 EHB 481, 485 ("Ultimately, it is up to the Board to consider the issues presented by the case in front of it, balance the factors it determines to be relevant, including, but not limited to, the three factors set out in the regulations, and based on that balancing, exercise its discretion to decide whether to grant, grant with conditions or deny a petition for supersedeas.")

4. Rulings on a petition for supersedeas are one-judge opinions issued by the judge hearing the case. Some of these holdings include the following:

a) In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the factors set forth in 25 Pa. Code § 1021.63, with a strong showing of a likelihood of success on the merits. *Teska v. DEP*, 2016 EHB 541, 544.

b) 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 Servs., Inc. v. DEP*, 2000 EHB 829.

c) The Board's ruling on a supersedeas petition is merely a prediction about who is likely to succeed at the hearing on the merits. *Weaver v. DEP*, 2013 EHB 486; *Pa. Supply, Inc. v. DEP*, 2008 EHB 411; *Tinicum Twp. v. DEP*, 2008 EHB 123.

d) Supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *Weaver v. DEP*, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829; *Svonavec v. DEP*, 1998 EHB 417; *Oley Twp. v. DEP*, 1996 EHB 1359.

e) A general, speculative concern is not enough to demonstrate irreparable harm. *Guerin v. DEP*, 2014 EHB 18.

f) 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 of balancing harm to the environment if a supersedeas is granted versus harm to the petitioner if a supersedeas is not granted.

g) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b); *Guerin v. DEP*, 2014 EHB 18. *But see Erie Coke v. DEP*, 2019 EHB 481, 489 ("[P]ollution and injury to the public health, safety or welfare are broad terms, subject to a certain degree of ambiguity and . . . the Board still retains some degree of discretion to grant or deny a petition for supersedeas under this statutory and regulatory language.")

h) 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 generally will not supersede the denial of an initial permit, *Id.*; *Neville Chemical Co. v. DER*, 1992 EHB 926; *Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 93, but may supersede the denial of a permit renewal, *Erie Coke v. DEP*, 2019 EHB 481.

i) A supersedeas is not the same as an injunction, which is an equitable remedy. *See Citizens Alert Regarding the Env't v. DEP*, 2003 EHB 191 (and cases cited therein). Accordingly, it cannot enjoin eminent

domain proceedings before another tribunal. *Grove v. DEP*, 2000 EHB 1212.

5. Recent Board decisions superseding a Department action include *Center for Coalfield Justice v. DEP*, 2017 EHB 38; *Weaver v. DEP*, 2013 EHB 486; *Delaware Riverkeeper Network v. DEP*, 2013 EHB 60; *Rausch Creek Land LP v. DEP*, 2011 EHB 708. *Erie Coke v. DEP*, 2019 EHB 481 and *Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 649, are instances where the Board has granted a conditional supersedeas. *See also Prizm Asset Mgmt. Co. v. DEP*, 2005 EHB 819; *Tire Jockey, Inc. v. DEP*, 2001 EHB 1141 (partial supersedeas).

VII. SPECIAL ACTIONS

A. Complaints and Petitions

1. 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. 25 Pa. Code § 1021.71(a). This procedure is used for proceedings where the Board assesses a civil penalty, rather than the Department. *See also* Section V.B (Civil Penalty Proceedings).

2. The Department is required to utilize the procedure in 25 Pa. Code § 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. *See Kaczor v. DER*, 1991 EHB 865.

3. The Department may also be required to commence actions pursuant to 25 Pa. Code § 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 adjudicate claims of an unconstitutional taking arising from the Department action under appeal. *Marshall v. DEP*, 2020 EHB 60; *M&M Stone Co. v. DEP*, 2008 EHB 24, 74, n. 9. The Board may also adjudicate takings claims referred to it by the courts. *Devailus v. DEP*, 2003 EHB 101; *Domiano v. Dep't of Envtl. Res.*, 713 A.2d 713 (Pa. Cmwlth. 1998); *cf. Machipongo Land & Coal Co. v. Dep't of Envtl. Res.*, 676 A.2d 199 (Pa. 1996). When regulatory takings cases are referred to the Board by the courts, the Board will generally 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. Complaints may be amended as of right within 20 days of filing. 25 Pa. Code § 1021.53(a). Thereafter a complaint may be amended upon leave of the Board where no undue prejudice to the opposing parties is shown. 25 Pa. Code § 1021.53(b).

D. Answers to Complaints

1. Unless otherwise prescribed by the Board, the defendant must file an answer within 30 days. 25 Pa. Code § 1021.74(a). Failure to file a timely answer may result in a judgment by default and the imposition of sanctions. 25 Pa. Code § 1021.74(d) and § 1021.76a(a); *DEP v. Barefoot*, 2003 EHB 667; *DEP v. J&G Trucking, Inc*, 2005 EHB 646; *DEP v. Breslin*, 2005 EHB 587; *DEP v. G&R Excavating & Demolition, Inc.*, 2005 EHB 427. 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. 25 Pa. Code § 1021.74(c).

2. Board rules do not allow the pleading of a new matter or preliminary objections. 25 Pa. Code § 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 25 Pa. Code § 1021.101 apply. *See* Section VIII (Pre-Hearing Procedures.)

E. Motions for Default Judgment

1. The Board may enter a default judgment against a party who fails to file an answer. 25 Pa. Code § 1021.76a; *see also DEP v. Froehlich*, 2022 EHB 309; *DEP v. Huntsman*, 2004 EHB 594; *DER v. Allegro Oil & Gas Co.*, 1991 EHB 34. The procedure for seeking a default judgment is found at 25 Pa. Code § 1021.76a.

2. The Board's rules provide that in the event of a default, the Board may assess civil penalties in the amount requested or hold a hearing on the amount of the civil penalty. 25 Pa. Code § 1021.76a(d); *DEP v. Turnbaugh*, 2014 EHB 124; *DEP v. Jackson Geothermal HVAC & Drilling, LLC*, 2016 EHB 397. *But see DEP v. Froehlich*, 2022 EHB 309 (Where there is an error in the Department's calculations, the Board may assess a penalty in the corrected amount.)

VIII. PRE-HEARING PROCEDURES

A. Administrative Matters

1. **Docketing**. The Board dockets the notice of appeal, complaint for assessment of civil penalties, or other special action upon its receipt. The matter is assigned to a judge for primary handling; the initial of the last name of the presiding 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 a Failure to Perfect Order directing that missing information be supplied. 25 Pa. Code § 1021.52. If the appellant fails to respond, the appeal may be dismissed pursuant to 25 Pa. Code § 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* 25 Pa. Code § 1021.101. Individual judges may issue other additional orders related to the procedure for proceeding with appeals or complaints.

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* 25 Pa. Code § 1021.101(a)(4) (proposed joint case management order).

3. The Board permits a motion for an expedited hearing. 25 Pa. Code § 1021.96a. However, these motions will only be granted in rare circumstances if not all parties consent to the expedited schedule. *See McPherson v. DEP*, 2014 EHB 460.

C. Intervention

1. STATUTE, RULES & REGS: "Any interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). 25 Pa. Code § 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. Dep't of Envtl. Res.*, 598 A.2d 1057 and 598 A.2d 1061 (Pa. Cmwlth. 1991). *See County of Allegheny, Dep't of Aviation v. DEP*, 2000 EHB 1177; *P.H. Glatfelter Co. v. DEP*, 2000 EHB 1204.

2. The Commonwealth Court has held that "in the context of intervention, the phrase 'any interested party'…means any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. Dep't of Envtl. Res*., 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991).

3. Because the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance, an intervenor must have standing. *Tri-County Landfill, Inc v. DEP*, 2014 EHB 128; *Wilson v. DEP*, 2014 EHB 1; *see, supra,* Section III.E.

4. An intervening party must have a "substantial, direct and immediate" interest in the matter. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128; *Borough of Glendon v. Dep't of Envtl. Res.*, 603 A.2d 226 (Pa. Cmwlth. 1992), *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. The Commonwealth Court has held that a person seeking to intervene must have an interest that "will either gain or lose by direct operation of the Board's ultimate determination." *Browning Ferris, Inc. v. Dep't of Envtl. Res.*, 598 A.2d 1057, 1061 (Pa. Cmwlth. 1991) (cited in *Friends of Lackawanna v. DEP*, 2022 EHB 11).

5. Averment of ownership of an adjoining property, without more, may not be sufficient. *P.A.S.S., Inc. v. DEP*, 1995 EHB 940. *But see Giordano v. DEP*, 2000 EHB 1163 (neighboring township may intervene in an appeal of a major modification permit for a landfill); *Barr Farms, LLC v. DEP*, 2022 EHB 74 (proximal land ownership is a factor the Board may consider when analyzing standing for intervention).

6. 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. *Consol. Pa. Coal Co. v. DEP*, 2002 EHB 879. However, if the citizens group fails to present sufficient factual information to convince the Board that it is entitled to organizational standing, its petition will be denied. *Lawson v. DEP*, 2018 EHB 265.

7. An organization may have standing to intervene in its own right. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284.

8. The Board has permitted intervention by businesses for the limited purpose of protecting their confidential business information. *Clean Air Council v. DEP and Shell Chemical Appalachia, LLC,* 2017 EHB 184.

9. The Pennsylvania Fish and Boat Commission may intervene where its statutory duty to protect and manage fish is impacted. *Hanson Aggregates PMA v. DEP*, 2006 EHB 711. *See also University Area Joint Authority v. DEP*, 2019 EHB 750 (citing and discussing *Hanson, supra*.)

10. An "immediate" interest may be shown "'where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.'" *Longenecker v. DEP*, 2016 EHB 552, 536 (quoting *Funk v. Wolf*, 144 A.3d 228, *aff'd*, 158 A.3d 642 (Pa. 2017) (quoting *Unified Sportsmen of Pa. v. Pa Game Comm'n*, 903 A.2d 117, 123 (Pa. Cmwlth. 2006)).

11. 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.

12. 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. *Coyne v. DEP,* 2020 EHB 118; *Jefferson Twp. Supervisors v.*

DEP, 1999 EHB 693; *but see Pa. Game Comm'n. v. DEP*, 2000 EHB 823.

13. 25 Pa. Code Section 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. *See Consol. Pa. Coal Co. v. DEP*, 2002 EHB 879.

14. Pursuant to 25 Pa. Code § 1021.81(d), a party may file an answer to the petition. An answer must be verified and filed within 15 days of service.

15. The Board may limit the issues which may be raised by an intervenor. *See Sludge Free UMBT v. DEP*, 2014 EHB 933; *Wilson v. DEP*, 2014 EHB 1; *P.H. Glatfelter Co. v. DEP*, 2000 EHB 1204; *Conners v. DEP*, 1999 EHB 669; *Heidelberg Twp. v. DEP*, 1999 EHB 791.

16. An order granting the petition allows the intervening party to participate in the proceedings that remain at the time of the order granting intervention. 25 Pa. Code § 1021.81(f). *Pa. Game Comm'n. v. DEP*, 2000 EHB 823; *see also Consol. Pa. Coal Co. v. DEP*, 2002 EHB 879.

17. 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. *Pa. Trout v. DEP*, 2003 EHB 590.

18. The Board granted intervention by a host municipality in an appeal of the Department's rescission of a permit authorizing injection of oil and gas waste fluids. *Pennsylvania General Energy Co. v. DEP*, 2021 EHB 7.

D. Consolidation

1. 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 § 1021.82.

2. Multiple appeals from the same Department action will generally be consolidated. *See Bucks County Water & Sewage Auth. v. DEP*, 2013 EHB 203.

E. Substitution

1. The Board's rules permit the substitution of a successor-in-interest to a party in an appeal. 25 Pa. Code § 1021.83. *See also Seder v. DEP*, 1999 EHB 782 (discussing substitution of parties prior to the adoption of Rule 1021.83).

2. Where an appeal was filed by an employee of a company and it was clear that the intent was to file on behalf of the company, the Board denied the Department's motion to dismiss and allowed the caption to be modified. *Homet v. DEP*, 2018 EHB 130.

F. Amicus Curiae

1. 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. 25 Pa. Code § 1021.25. *See Foundation Coal Res. Corp. v. DEP*, 2006 EHB 482.

G. Discovery Proceedings

1. Under 25 Pa. Code § 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* 25 Pa. Code §§ 1021.101(a)(4) and 1021.101(b). Counsel are also encouraged to develop a plan for the discovery of electronically stored information if they believe that such information is likely to occur in a case.

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 Ass'n v. DEP*, 1998 EHB 46 (a notice for protective order was denied where the movant failed to attach copies of the interrogatories).

4. Discovery disputes are generally resolved pursuant to a motion filed in accordance with 25 Pa. Code § 1021.93. A discovery motion must contain a certification that the parties have conferred or attempted to confer in an effort to secure the requested discovery without Board action. 25 Pa. Code § 1021.93(b).

5. In a case involving expert witnesses, the exchange of expert reports or answers to expert interrogatories is required. 25 Pa. Code § 1021.101(a)(2*); Hickory Hill Group LLC v. DEP*, 2019 EHB 377, 382-83 (citing *DEP v. EQT Production Co*., 2016 EHB 489, 493).

6. An expert may rely on hearsay facts or data if they are of a type reasonably relied upon by experts in the field. *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 84.

7. 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. *See generally* the series of opinions in *Kiskadden v. DEP*, 2014 EHB 626; 2014 EHB 642; 2014 EHB 648; 2014 EHB 658. *See also Rural Area Concerned Citizens v. DEP*, 2014 EHB 211; *DEP v. Angino*, 2006 EHB 905; *Borough of Edinboro v. DEP*, 2003 EHB 725. In *Penn Township Municipal Authority v. DEP*, 2021 EHB 72, 77, the Board granted an appellant's motion precluding the Department from introducing the testimony and reports of experts it failed to disclose in discovery ("Where expert discovery has been directed to a party, including the Department, not only must the expert be identified but interrogatories concerning the expert's opinion must be answered or an expert report must be provided…[I]t is not acceptable to wait until the prehearing memorandum to provide this information.") This also applies to experts that may be called in rebuttal. *DEP v. EQT*, 2016 EHB 489, 493 ("[T]here is no carve out in the Rules [of Civil Procedure] for. . .rebuttal expert testimony; there is one set of discovery rules for all experts.")

8. Any party that wishes to introduce expert testimony must identify the expert and summarize their testimony in its prehearing memorandum or risk being precluded from offering that testimony, even if expert discovery was not conducted and the offered expert is listed as a fact witness in the prehearing memorandum. *Williams v. DEP*, 2021 EHB 232, 251-54.

9. For a discussion regarding the deposition of expert witnesses, see *Range Resources – Appalachia, LLC v. DEP* at 2021 EHB 37 (Board denied appellant's motion to depose Department employees designated as expert witnesses, stating, "Expert witnesses may not be deposed absent an agreement of counsel or an order of the Board. The Board will rarely grant such a motion prior to the production of expert

reports.") See additional discussion at *Range Resources – Appalachia, LLC v. DEP*, 2021 EHB 182 (Board denied second motion to depose, stating, "Appellant failed to show good cause pursuant to Pennsylvania Rule of Civil Procedure 4003.5 as to why such depositions are necessary") and 2022 EHB 60 (Board denied motion to preclude factual testimony of experts who had not been deposed.)

10. When a party is requested to identify witnesses in discovery, it may not wait until the filing of its prehearing memorandum to identify those witnesses. *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 170.

11. A party has a duty to seasonably supplement its discovery responses as to witnesses who may be called to testify, including as rebuttal witnesses. Including this information in one's prehearing memorandum is not a proper way to supplement discovery responses. *DEP v. EQT*, 2016 EHB 489, 492 (citing *Envtl. & Recycling Servs., Inc.v. DEP*, 2001 EHB 824, 829).

12. When assessing a motion to reopen discovery, the Board generally looks at the justification provided by the moving party and whether there is a demonstration of good cause for further discovery. *M.C. Resource Development Co. v. DEP*, 2017 EHB 330.

13. Subpoenas are governed by Pa.R.C.P. Nos. 234.1–234.4 and 234.6–234.9. 25 Pa. Code § 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) A party seeking to quash a subpoena bears a heavy burden of proving that the witness will suffer unreasonable annoyance, embarrassment, oppression, burden or expense. *Robachele, Inc. v. DEP*, 2006 EHB 296. But see, *Stanley v. DEP*, 2021 EHB 203 (Board granted intervenor's motion to quash subpoenas directed at intervenor's counsel and president/CEO.)

b) 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. The Board will not compel an employee of a party to attend an "informal meeting" where such

meeting is not governed by the rules of discovery. *Benner Township v. DEP*, 2017 EHB 10.

c) 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.

d) 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).

14. **Extensions**. The Board's rules require every motion to be accompanied by a proposed order. 25 Pa. Code § 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, including extension of the discovery deadline. 25 Pa. Code § 1021.92(d) & (e). *Shenango Incorporated v. DEP*, 2005 EHB 941. *See also* 25 Pa. Code § 1021.12.

15. **Relevancy**. For a discussion of relevancy, see *PQ Corp. v. DEP*, 2017 EHB 707, and *City of Allentown v. DEP*, 2017 EHB 315. The Board does not need to determine whether the information sought will ultimately be admissible at the discovery stage of the proceedings, but it does need to make an assessment of relevancy. It is the responsibility of the moving party to explain the relevancy or lack thereof of information sought in discovery. *Pileggi v. DEP*, EHB Docket No. 2022-068-L (Opinion and Order on Motion to Compel issued June 27, 2023).

16. **Proportionality**. Discovery is governed by the proportionality standard. *Clean Air Council et al. v. DEP*, EHB Docket No. 2021-055-L (Consolidated with 2022-101-L) (Opinion and Order on Motion to Compel issued March 22, 2023); *Tri-Realty Co. v. DEP*, 2015 EHB 517, 525 (citing 2012 Explanatory Comment Prec. Rule 4009.1, Part B); *Friends of Lackawanna v. DEP*, 2015 EHB 785, 787.

17. **Confidential Business Information**. For a discussion of the test that must be met in order for information to qualify as confidential business information, see *MarkWest Liberty Midstream & Resources, LLC v. Clean Air Council*, 71 A.3d 337, 344 (Pa. Cmwlth. 2013).

18. **Social Media.** For a discussion of discovery and social media, see *Sludge Free UMBT v. DEP*, 2014 EHB 939.

19. In an appeal of an air quality plan approval, the Board allowed discovery into prior unappealed plan approvals, noting that "merely because a prior Department action was not appealed and is now final does not mean that it is forever off limits for purposes of discovery. What is generally discoverable and what actions can be challenged on appeal are distinct concepts." *Clean Air Council v. DEP*, 2016 EHB 567, 573.

20. The starting point for producing discovery of electronically stored information in an appeal of a plan approval is not necessarily limited to the date on which the permittee began working on the plan approval application. *Clean Air Council v. DEP*, 2016 EHB, 567, 577.

21. The Board generally allows discovery on jurisdictional issues in advance of a motion to dismiss based on jurisdiction. *City of Allentown v. DEP*, 2017 EHB 176.

IX. MOTION PRACTICE

A. Pre-hearing Motions

1. Motion practice is governed by Rules 1021.91–1021.96d.

2. 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. 25 Pa. Code § 1021.92.

3. Discovery Motions are motions filed to resolve disputes arising from the conduct of discovery. 25 Pa. Code § 1021.93.

4. Dispositive Motions are motions to dismiss, for summary judgment, and some motions to limit issues. 25 Pa. Code §§ 1021.94 and 1021.94a.

5. Motion to Limit Issues (also known as motion *in limine)* — motions to limit issues are frequently filed with the Board. To the extent a motion *in limine* is in fact a motion to dismiss or for summary

judgment, it is decided in accordance with the rules applicable to those motions. *See Perkasie Borough Auth. v. DEP*, 2002 EHB 75; *but see* Section IX.D.

6. 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. 25 Pa. Code § 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.

7. 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. 25 Pa. Code § 1021.95.

B. Motions to Dismiss, 25 Pa. Code § 1021.94

1. 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.

2. Generally, a motion to dismiss "is ordinarily decided based solely upon the facts stated or otherwise apparent in the notice of appeal itself." *Mayer v. DEP*, 2012 EHB 400, 401. However, the Board has permitted a motion to dismiss to be determined on facts outside of those stated in the appeal when the Board's jurisdiction is in issue. *See Winner v. DEP*, 2014 EHB 135, 140-41; *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409 (quoting *Florence Twp. v. DEP*, 1996 EHB 282).

3. The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Winner v. DEP*, 2014 EHB 135, 136-37; *Eljen Corp. v. DEP*, 2005 EHB 918; *Neville Chemical v. DEP*, 2003 EHB 530.

a) "Rather than comb through the parties' filings for factual disputes, for purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true." *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015).

b) Thus, "[a]s a practical matter, whether or not there are 'factual disputes' on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the nonmoving party states is true, can—or should—the Board hear the appeal?" *Id.* *See also, Bonne Natale South v. DEP*, 2015 EHB 203; *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338.

c) Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Twp. v. DEP*, 2008 EHB 563; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611; *Kennedy v. DEP*, 2007 EHB 511.

4. The Board may deem properly pleaded facts admitted where an opposing party fails to respond to a motion to dismiss. *Popovich v. DEP*, EHB Docket No. 2021-082-B (Opinion and Order on Motion to Dismiss Certain of Appellants' Objections issued March 22, 2023), *Tanner v. DEP*, 2006 EHB 468; *Burnside Twp. v. DEP*, 2002 EHB 700. Failure to respond may result in the motion to dismiss being granted. 25 Pa. Code § 1021.94(f); *Paul E. Thomas v. DEP*, 2019 EHB 347 (motion to dismiss filed by intervenor and supported by the Department was granted by the Board when the Appellant failed to file a response). *But see Rohanna v. DEP*, 2017 EHB 287, 290 (Board declined to dismiss appeal even though appellant did not respond to a motion to dismiss, finding that there was a genuine issue of material fact: "Board precedent supports the use of discretion in such matters and emphasizes that Board decisions should be made on the merits and not based on procedural nuances"); *Ackerman v. DEP*, 2020 EHB 208 (citing *Rohanna, supra*); *Fletcher v. DEP*, 2020 EHB 214 (citing *Rohanna, supra*).

5. 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. *Miles v. DEP*, 2015 EHB 344; *Pirolli v. DEP*, 2003 EHB 514. *But see Rohanna v. DEP*, 2017 EHB 287.

6. Motion to dismiss for mootness: The Board will deny a motion to dismiss for mootness where it finds that the matter falls into an exception to the mootness doctrine – e.g., capable of repetition, yet evading review. *Klesic v. DEP*, 2016 EHB 142 (citing *Consol Pa. Coal Co. v. Department of Environmental Protection*, 129 A.3d 28 (Pa. Cmwlth. 2015) (quoting *Phila. Pub. Sch. Notebook v. Sch. Dist. Of Phila.*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012)).

7. Motion to dismiss based on standing: The Board has held that a motion to dismiss is not the proper vehicle for raising a challenge based on standing; rather, a challenge to standing should be raised in a motion for summary judgment. *See Orenco Systems, Inc. v. DEP*, 2016 EHB 432, 434-35 (the additional requirements set forth in the Board's rules on summary judgment "enable the Board to better address standing challenges in the context of [a] motion for summary judgment."); *see also Mayer v. DEP*, 2012 EHB 400 (declined to address motion to dismiss based on standing because the moving party had "picked the wrong vehicle" for raising its claims). *But see Matthews International Corp. v. DEP*, 2011 EHB 402 (Board granted motion to dismiss based on standing where the material facts were not in dispute and the sole question was a legal one).

8. For a discussion of the difference in how the Board views a motion to dismiss and a motion for summary judgment, see *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54-55. *See also Kinsey v. DEP*, 2020 EHB 105.

C. Motions for Summary Judgment, 25 Pa. Code § 1021.94a

1. A motion for summary judgment shall include a motion, a statement of undisputed material facts, a supporting brief, evidentiary materials relied upon and a proposed order. 25 Pa. Code § 1021.94a(b).

a) The motion consists of a concise statement of the relief requested and the reason for granting relief. It should not include any recitation of the facts and should not exceed two pages in length. 25 Pa. Code § 1021.94a(c).

b) The statement of undisputed material facts must consist of numbered paragraphs and contain only those material facts to which there is no genuine issue, together with a citation to the portion of the record establishing the fact or demonstrating that it is uncontroverted. It should not exceed five pages in length unless leave of the Board is granted. 25 Pa. Code § 1021.94a(d).

c) The brief accompanying the motion must include an introduction, summary of the case and a discussion of the legal argument supporting the motion. 25 Pa. Code § 1021.94a(e). *Foundation Coal Resources Corp. v. DEP*, 2007 EHB 237.

d) Evidentiary materials shall be separately bound and labeled as "Exhibits." 25 Pa. Code § 1021.94a(i).

2. Factual matters must be supported by evidence in the record. *See* Pa. R.C.P. No. 1035.1; *Jackson v. DEP*, 2005 EHB 496.

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. 25 Pa. Code § 1021.94a(i); Pa.R.C.P. No. 1035.4; *Heidelberg Twp. 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 also* 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 Twp. v. DEP*, 1999 EHB 791.

d) There have been differing views on whether the Board should apply the so-called *Nanty-Glo* rule (*Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932)) which prevents the entry of summary judgment where the moving party relies solely on affidavits or deposition testimony. *Snyder v. Dep't of Envtl. Res.*, 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed*, 632 A.2d 308 (Pa. 1993), has been interpreted as saying that *Nanty-Glo* does not apply to proceedings before the Board. *Solomon v. DEP*, 2000 EHB 227, 272-73 (Coleman, J., dissenting); *Gambler v. DEP*, 1997 EHB 914, 918; *Envyrobale v. DER*, 1994 EHB 1842, 1845. *But see Kalinowski v. DEP*, 2016 EHB 402, 408; *Veolia ES Greentree Landfill, LLC v. DEP*, 2007 EHB 163, 171-72, n.1; and *Solomon v. DEP*, 2000 EHB 227 (Krancer, C.J., dissenting) (*Snyder* does not prohibit the Board from applying *Nanty-Glo*).

3. The Board cannot enter summary judgment on behalf of a party who did not move for summary judgment. *DEP v. Pecora*, 2007 EHB 533; *Exeter Twp. v. DEP*, 2000 EHB 630.

4. The Board may grant summary judgment where the adverse party fails to respond to a motion for summary judgment. 25 Pa. Code § 1021.94a(l); *Kilmer v. DEP*, 2008 EHB 395; *Lucas v. DEP*, 2005

EHB 913; *Kochems v. DEP*, 1997 EHB 428 *aff'd*, 701 A.2d 281 (Pa. Cmwlth. 1997) (appellant had a history of failing to respond which seemed to betray a lack of interest in prosecuting the appeal).

5. An untimely response may be considered a failure to respond. *Berwick Twp. 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

6. 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 25 Pa. Code § 1021.94a, must set forth specific facts arising from evidence in the record showing that there is a genuine issue for hearing. 25 Pa. Code § 1021.94a(l). *Jackson v. DEP*, 2005 EHB 496; *Borough of Roaring Spring v. DEP*, 2004 EHB 889; *Drummond v. DEP*, 2002 EHB 413; *Riddle v. DEP*, 2002 EHB 321; *see also Botkin v. Metropolitan Life Ins. Co.*, 907 A. 2d 641 (Pa. Super. 2006) (unverified, repetitive and generic answers to interrogatories did not establish a genuine issue of material fact.)

7. The Board rarely permits a sur-reply brief to be filed; the reply brief is intended as the "last word." *Williams v. DEP*, 2019 EHB 764.

8. There are two ways to obtain summary judgment on the substance of a motion for summary judgment: 1) Summary judgment may be available if the record shows that there are no genuine issues of material fact as to a necessary element of the case, and the moving party is entitled to prevail as a matter of law; or 2) Summary judgment may be available if, after the completion of discovery relevant to the motion, the party who bears the burden of proof has failed to produce evidence to make out a prima facie case. *Morrison v. DEP*, 2016 EHB 717, 720; *Longenecker v. DEP*, 2016 EHB 552, 553-54; *Merck Sharp & Dohme Corp. v. DEP*, 2016 EHB 411, 415.

9. When a case involves the Department's exercise of discretion, summary judgment may not be an appropriate vehicle for deciding the case. *PQ Corp. v. DEP*, 2016 EHB 826, 838; *Snyder v. DEP*, 2015 EHB 857, 875; *Tri-County Landfill v. DEP*, 2015 EHB 324, 333.

10. Cases that involve complex issues of fact and law may not be appropriate for summary judgment; such matters may require a fully

developed record. *Three Rivers Waterkeeper v. DEP,* 2020 EHB 87; *Protect PT v. DEP and Apex Energy (PA), LLC*, 2020 EHB 27; *Center for Coalfield Justice v. DEP and Consol PA Coal Co.*, 2016 EHB 341, 347; *Clean Air Council v. DEP*, 2013 EHB 404, 410-11.

11. For a discussion of the difference in how the Board views a motion for summary judgment and a motion to dismiss, see *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54-55: "[A] motion for summary judgment requests that the Board make a ruling specifically regarding the merits of the appeal and will be granted where the 'record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"

12. The Board's rules do not provide for cross-motions for summary judgment. Any so-called cross-motions must generally be filed before the deadline for filing a dispositive motion, or else the cross-movant must seek leave to file an untimely motion. However, the Board may permit a cross-motion if it merely seeks judgment in its favor on the same issues raised in the original motion for summary judgment. *See Joshi v. DEP*, 2018 EHB 717 (Opinion on Motion to Strike Cross-Motion); *Joshi v. DEP*, 2018 EHB 824 (Opinion on Cross-Motions for Summary Judgment). *See also Hickory Hill Group, LLC v. DEP*, 2019 EHB 713 (citing *Joshi, supra*, extensively).

D. Motions in limine

1. A motion *in limine* is the proper vehicle for addressing evidentiary matters in advance of a hearing. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161.

2. A motion *in limine* may not be used on the eve of hearing to obtain a ruling on the merits.

a) *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 84 (denying a motion *in limine* that contained "sweeping claims aimed at eliminating an opposing party's case").

b) *Dauphin Meadows v. DEP*, 2002 EHB 235 (declining to decide an issue of administrative finality).

c) *Clearview Land Dev. Co. v. DEP*, 2002 EHB 506 (declining to decide a claim of collateral estoppel).

3. 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.

4. In at least one case, the Board denied a motion *in limine* seeking to exclude expert witnesses and documents not identified in discovery where no motion to compel was filed and the moving parties failed to show they were prejudiced. *See Wetzel v. DEP*, 2016 EHB 230.

5. In at least one case, the Board granted a motion *in limine* excluding expert witnesses based on conflict of interest. *Carlisle Pike Self Storage and Regency South Mobile Home Park v. DEP*, 2022 EHB 214.

6. A motion *in limine* may be deemed to be premature, and the Board may determine that it needs testimony in which to assess any allegation of prejudice. *Benner Township v. DEP*, 2017 EHB 1228.

7. For a discussion of the difficulty of applying *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) in the context of a motion *in limine, see Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 68

8. For a series of Board decisions on motions *in limine*, see the *Kiskadden v. DEP* opinions. 2014 EHB 598 (motion to exclude testimony); 634 (same); 658 (same); 2014 EHB 610 (motion to strike); 626 (same); 2014 EHB 634 (motion to exclude evidence); 667 (same); 667 (same); 727 (same); 732 (same); 2014 EHB 605 (motion to exclude expert testimony); 642 (same); 648 (same). For a discussion regarding the exclusion of witness testimony see *McCauley v. DEP*, 2020 EHB 448.

E. Discovery Motions

1. Discovery motions, such as motions to compel and motions for a protective order, are governed by 25 Pa. Code § 1021.93. Before filing a discovery motion, a party must attempt to resolve the dispute with the opposing party. 25 Pa. Code § 1021.93(b). Discovery motions must be supported by exhibits of the discovery requests and answers giving rise to the dispute. *Id.*

2. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or

expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011.

3. A party has a duty to seasonably supplement its discovery responses, including the identity of rebuttal witnesses. *DEP v. EQT*, 2016 EHB 489, 492 (citing *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824, 829).

4. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to ensure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

a) This charge is the same with respect to discovery sought from non-parties. *Tri-Realty Co. v. DEP*, 2015 EHB 184.

5. Discovery before the Board is governed by the proportionality standard outlined by the factors listed in the 2012 Explanatory Comment preceding Pa.R.C.P No. 4009.1, Part B. *Tri-Realty Co. v. DEP*, 2015 EHB 517; *Friends of Lackawanna v. DEP*, 2015 EHB 785; *Whitehall Twp. v. DEP*, 2016 EHB 764.

6. A protective order may be granted where the discovery sought is not relevant to the action under appeal, not proportional or pertains to issues that are barred, *New Hope Crushed Stone & Lime Co*., 2016 EHB 666, or for good cause where necessary to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden or expense, *Cabot Oil & Gas Corp v. DEP*, 2016 EHB 20, 25.

7. The Board may entertain a motion to compel even after the close of discovery when the motion is filed soon enough that it will not delay a hearing and where there is no undue delay in filing the motion. *DEP v. EQT Production Co*., 2016 EHB 369, 371. Where a motion to compel was filed two months after the close of discovery and the objections to discovery were known for six months to one year prior to filing the motion, the Board denied the motion as untimely. *Id.*

8. For a discussion regarding discovery of confidential business information and trade secrets, *see MarkWest Liberty Midstream & Resources, LLC v. Clean Air Council*, 71 A.3d 337, 344 (Pa. Cmwlth. 2013), and *Clean Air Council v. DEP*, 2016 EHB 861.

9. For a discussion of the policy considerations involved in evaluating a motion for protective order, see *Sunoco Pipeline L.P. v. DEP*, 2020 EHB 392.

F. Rules Generally Applicable to All Motions (except those seeking Summary Judgment)

1. The motion must set forth in numbered paragraphs the facts in support of it and the relief requested. 25 Pa. Code § 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* 25 Pa. Code §§ 1021.91–1021.93 and §§ 1021.95-1021.96c.

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. 25 Pa. Code § 1021.91(f). *Beaver Falls Mun. Auth. 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.

4. 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." 25 Pa. Code § 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. 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. 25 Pa. Code § 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 failed to set forth objections in correspondingly-numbered paragraphs, the Board found the error to be *de minimis* and declined to deem the moving party's allegations as admitted).

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

A. Scheduling Hearings

1. 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 Rules 1021.101 and 1021.104 by issuing Pre-hearing Order No. 2.

2. The detailed required contents of the pre-hearing memoranda are set forth in 25 Pa. Code § 1021.104.

3. The usual rules apply with regard to the imposition of sanctions when a party fails to comply with these requirements respecting pre-hearing memoranda. 25 Pa. Code § 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 DEP v. Seligman*, 2014 EHB 755; *Maddock v. DEP*, 2002 EHB 1; *Smedley v. DEP*, 2000 EHB 90.

B. Pre-hearing Memoranda

1. Generally, pre-hearing memoranda will be filed at least 20 days before the scheduled hearing date. 25 Pa. Code § 1021.101(d).

2. Pre-hearing Order No. 2 ordinarily requires the party with the burden of proof to file its pre-hearing memorandum first and provides the opposing party(ies) with a specified time to respond. However, to facilitate the prompt holding of a hearing, the Board may require the simultaneous filing of pre-hearing memoranda.

3. Where exhibits to a party's pre-hearing memorandum are filed with the Board in an expedited manner, they should be similarly filed with the opposing parties. 25 Pa. Code § 1021.34(b).

C. Stipulations and Pre-hearing Conferences

1. The Board may require that the parties meet prior to the hearing to stipulate to all facts not in dispute. 25 Pa. Code § 1021.101(c).

2. The Board may require, and any party may request, a pre-hearing conference under 25 Pa. Code § 1021.105, to expedite the hearing or a settlement of the matter. As scheduled by Pre-hearing Order No. 2, the Board frequently holds a pre-hearing conference via telephone shortly before the start of the hearing on the merits.

D. Motions in limine

1. A party may obtain a ruling on evidentiary issues by filing a motion *in limine*. 25 Pa. Code § 1021.121. Ordinarily such a motion will be decided in advance of the hearing. However, the presiding judge may decide that the decision should be reserved until the evidence is offered. *See* Section IX.D.

XI. HEARINGS

A. Venue of Hearing

1. Hearings are normally conducted in the courtrooms in the Board's Harrisburg, Pittsburgh, Norristown, or Erie offices. Under rare circumstances, the Board may entertain requests to conduct hearings in Commonwealth facilities at other locations. 25 Pa. Code § 1021.114.

The Board has developed a protocol for conducting remote hearings if necessary. The protocol is available upon request.

Site View

2. Under 25 Pa. Code § 1021.115 the Board is authorized to conduct a view of the premises at issue upon reasonable notice and at reasonable times when the viewing would have probative value. The request for a view can be made in a motion. The view will generally be scheduled prior to the hearing on the merits, but in some cases may be held during or after the hearing.

3. 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 evidence of record. *Kiskadden v. DEP*, 2014 EHB 578; *UMCO, Inc. v. DEP*, 2004 EHB 797; *Giordano v. DEP*, 2000 EHB 1163.

B. Continuances

1. Hearings are generally not continued except for compelling reasons. Requests for continuances of hearings, except in emergency situations, should be made in writing in advance of the hearing. 25 Pa. Code § 1021.113.

C. Conduct of Hearings

1. 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.

2. Burden of proof and burden of proceeding is governed by 25 Pa. Code § 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. *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d

93 (Pa. Cmwlth. 2004); *Riddle v. DEP*, 2001 EHB 221; *Easton Area Joint Sewer Auth. v. DER*, 1990 EHB 1307. *Cf. Ainjar Trust v. DEP*, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002).

3. While the Board is not bound by technical rules of evidence at hearings, the Pennsylvania Rules of Evidence (Pa.R.E.) are generally adhered to and must be complied with when proving essential elements of a party's case. 25 Pa. Code § 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.

4. 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. Dep't of Envtl. Res.*, 659 A.2d 31 (Pa. Cmwlth. 1995).

a) Weighing competing expert testimony from parties is one of the Board's core functions. *EQT Production Co. v. Dep't of Envtl. Prot*., 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018), *aff'g*, *DEP v. EQT Production Co*., 2017 EHB 439, 497.

b) Although expert testimony is not required for a party to prosecute its appeal, the absence of expert testimony in highly technical cases often makes it more difficult to meet one's burden of proof. *Marshall v. DEP*, 2020 EHB 60, 83.

c) 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. Pa.R.E. 703; *Al Hamilton Contracting Co. v. Dep't of Envtl. Res.*, 659 A.2d 31 (Pa. Cmwlth. 1995); *Cmwlth. v. Al Hamilton Contracting Co.*, 557 A.2d 15 (Pa. Super. 1989), *petition for allowance of appeal denied*, 565 A.2d 1165 (Pa. 1989).

d) Pennsylvania follows the *Frye* standard with regard to the admission of expert evidence. 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);

Pine Creek Valley Watershed v. DEP, 2011 EHB 90, 92, 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).

e) For a detailed discussion of when expert reports are required, see the following: *Kiskadden v. DEP*, 2014 EHB 648, 653; *DEP v. Angino*, 2006 EHB 278, 281-83; *Borough of Edinboro v. DEP*, 2003 EHB 725, 771-76, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. June 23, 2004).

D. Hearings on Inability to Pay Civil Penalties

1. When the Board receives an appeal that includes a verified statement of the appellant's inability to prepay, the judge assigned to the case may issue an order requiring the appellant to supply appropriate financial information and scheduling a prompt hearing in accordance with 25 Pa. Code § 1021.55. *See also* Section V.B (Civil Penalty Proceedings). If the Board determines that the appellant is in fact able to prepay the assessed penalty or post a bond, the Board will order the appellant to do so within 30 days. 25 Pa. Code § 1021.55(b).

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. 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. 35 P.S. § 4009.1.

b) 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 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. *Paul Lynch*

Investments, Inc. v. DEP, 2016 EHB 385; *Paul Lynch Investments, Inc. v. DEP*, 2011 EHB 8, 10; *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. *See also Goetz v. DEP*, 1998 EHB 955.

XII. POST-HEARING PROCEDURE

A. Post-Hearing Briefs

1. At the conclusion of the hearing, and after the receipt of all of the transcripts, an order is issued to the parties establishing a schedule for the submission of post-hearing briefs. The party with the burden of proof is generally required to file the opening brief.

2. Post-hearing briefs must conform to 25 Pa. Code § 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.

3. Failure to file a brief or to raise specific arguments in a post-hearing brief results in a waiver of those arguments. 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246; *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. Dep't of Envtl. Res.*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Riddle v. DEP*, 2002 EHB 283; *Patti v. DEP*, 1999 EHB 610.

4. Documents not offered or entered into evidence may not be included with post-hearing briefs. *Gasbarro v. DEP*, 1998 EHB 670. A party may petition to reopen the record prior to the issuance of an adjudication pursuant to 25 Pa. Code § 1021.133. *See* Section XIII.A (Reopening of Record Prior to Adjudication).

B. Dispositions

1. **Orders**. Interlocutory orders may be issued by the judge assigned to the appeal. Final orders, including those granting motions to dismiss or motions for summary judgment in whole or in part, must be concurred in by a majority of the administrative law judges. 25 Pa. Code § 1021.116(a).

2. **Adjudications**. Proposed adjudications are generally prepared by the judge who heard the appeal and circulated to the other 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 judges. 25 Pa. Code § 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 judge does not have the power to grant the motion and, for that reason, will usually deny it. *See Winner v. DEP*, 2014 EHB 1023. When referred by a presiding judge, the Board will accept a motion for a directed adjudication or nonsuit for review, but such motions are rarely granted. As rare exceptions, *see DEP v. Schultz*, 2015 EHB 1 and *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) **NOTE**: 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 25 Pa. Code §

1021.133 (relating to reopening of record prior to adjudication). 25 Pa. Code § 1021.125(c).

XIII. REHEARING OR RECONSIDERATION OF BOARD ORDERS OR ADJUDICATIONS

A. Reopening of Record Prior to Adjudication

1. 25 Pa. Code § 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.

2. Recently discovered evidence: (1) must 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. 25 Pa. Code §§ 1021.133(b)(1)–(3). *Perano v. DEP*, 2011 EHB 275; *Angela Cres Trust v. DEP*, 2009 EHB 446; *Wheeling-Pittsburgh Steel Corp. v. DEP*, 2008 EHB 374; *Lang v. DEP*, 2006 EHB 7 (motion denied because evidence was cumulative).

3. The Board will not permit the record to be reopened to remedy a perceived error in trial strategy. *Noll v. DEP*, 2005 EHB 24; *Exeter Citizens' Action Comm. v. DEP*, 2004 EHB 179. Nor will the Board reopen the record to admit a letter that contains non-relevant or cumulative evidence. *Friends of Lackawanna v. DEP*, 2017 EHB 664.

4. 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. 25 Pa. Code § 1021.133(c).

5. The petition must also conform to the requirements set forth in 25 Pa. Code § 1021.133(d) and be served upon the parties to the proceedings. 25 Pa. Code § 1021.133(d) and (e).

6. An answer may be filed within 15 days and must be verified if it includes factual assertions which are not of record. 25 Pa. Code § 1021.133(e); *see also Gasbarro v. DEP*, 1998 EHB 688.

B. Reconsideration of Interlocutory Orders

1. Under 25 Pa. Code § 1021.151, a petition for reconsideration of an interlocutory order 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. Filing deadlines will generally be strictly enforced absent a compelling excuse for delay. *DEP v. Pecora*, 2007 EHB 33. 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. *Kiskadden v. DEP*, 2014 EHB 737; *DEP v. American Fuel Harvesters, Inc.*, 2006 EHB 121; *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577; *Conrail, Inc. v. DEP*, 1999 EHB 773.

2. An opinion and order granting or denying a petition for supersedeas is an interlocutory order; therefore, a request for reconsideration of a supersedeas order must meet the requirements of 25 Pa. § 1021.151 (reconsideration of interlocutory orders). *Erie Coke Corp. v. DEP*, 2019 EHB 574, 575-77.

3. 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.

4. 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 Twp. v. DEP*, 2005 EHB 893; *DEP v. Angino*, 2005 EHB 905. Mere disagreement is not an appropriate basis for reconsideration. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118; *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 741.

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 DEP v. Pecora*, 2007 EHB 156 (failure to respond to a motion); *Lee v. DEP*, 1998 EHB 566 (motion to dismiss).

d) Making the same argument in a motion for reconsideration that a party has previously made in an earlier motion or response does not meet the standard for granting reconsideration. *Clean Air Council v. DEP and Sunoco Partners Marketing & Terminals*, 2019 EHB 685. *See also Starr v. DEP*, 2002 EHB 799, 808 ("Appellants have done little more than contend that the Board mistakenly applied the law. If reconsideration were available whenever a party disagreed with the Board's application of the law, reconsideration would cease to be an extraordinary remedy and would be granted as a matter of course.")

5. An answer may be filed within 10 days of service. 25 Pa. Code § 1021.151(b).

6. The failure of a party to file a petition under this rule will not result in the waiver of any issue. 25 Pa. Code § 1021.151(c).

C. Reconsideration of Final Orders

1. Under 25 Pa. Code § 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. *Lancaster Against Pipelines v. DEP*, 2019 EHB 163 and 2019 EHB 171; *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.

2. 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. 25 Pa. Code § 1021.152(a).

a) A mistake made by the Board is such a reason. *Miller v. DEP*, 1997 EHB 335; *Hawbaker, Inc. v. DEP*, 1996 EHB 230; *Adams Sanitation Co., Inc. v. DEP*, 1995 EHB 1279. Reconsideration may be appropriate if the Board misses a key legal or factual point. *B&R*

Resources v. DEP, 2020 EHB 92, 94 (citing *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118).

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. *Cmwlth. Envtl. 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.

3. Mere disagreement is not a basis for reconsideration. *B&R Resources, LLC v. DEP*, 2020 EHB 92, 94 (citing *New Hope Stone & Lime Co. v. DEP*, 2016 EHB 741, 745, citing *Consol Pa. Coal Co. v. DEP*, 2018 EHB 117). Nor is reconsideration a vehicle to be used for raising issues that should have been raised previously. *B&R, supra*.

4. If an answer is to be filed, it must be done within 10 days of service. 25 Pa. Code § 1021.152(b).

5. 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. 25 Pa. Code § 1021.141.

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; or

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 that notice of the settlement be published in the *Pennsylvania Bulletin*, and request that the case be marked settled. 25 Pa. Code § 1021.141(b). In such case, the notice of settlement should conform to the format provided in 25 Pa. Code § 1021.141(b)(3) and include identification of the township and county where the matter took place.

2. Third parties may object to the terms and conditions of a settlement in the manner provided by law. 25 Pa. Code § 1021.141(c). Failure to object in a timely manner divests the Board of authority to grant relief. *United States Envtl. Prot. 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.

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. 25 Pa. Code § 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) Settlements under the Hazardous Sites Cleanup Act. When a settlement is proposed in any proceeding under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the *Pennsylvania Bulletin* and in a newspaper of general circulation in the area of the release. This notice shall include the terms of settlement and the manner for submitting written comments during a 60-day public comment period. The settlement shall become final upon the Department's filing of its response to any significant written comments. 35 P.S. § 6020.1113.

C. Withdrawals

1. An appellant may voluntarily withdraw its appeal at any time prior to hearing. *See* 1 Pa. Code § 35.51; 25 Pa. Code § 1021.141(a)(1); *Columbia Gas of Pa. v. DEP*, 1996 EHB 1067.

2. A withdrawal of an appeal will be without prejudice unless otherwise ordered by the Board. However, a withdrawal may affect the ability to litigate issues in a subsequent appeal that might have been resolved in the first appeal under the substantive laws of administrative finality. *See Upper Gwynedd Twp. v. DEP*, 2008 EHB 510.

3. A motion to "withdraw" a withdrawal of an appeal will be treated as a motion to reconsider and is unlikely to be granted absent compelling circumstances. *Citizens Alert Regarding the Env't v. DEP*, 2002 EHB 501.

XV. APPELLATE COURT REVIEW

A. Interlocutory Orders

1. Interlocutory Orders of the Board may be reviewable by the Commonwealth Court in certain circumstances. Pa.R.A.P. 1311. Requests for certification of an issue for appellate review must be made

within 10 days of entry of the Board's order for which certification is sought. 25 Pa. Code § 1021.153(a). Requests shall follow the procedure set forth at 25 Pa. Code § 1021.153. If the Board does not act within 30 days, the motion shall be deemed denied.

2. Certification can be provided if the Board's order (1) involved a controlling question of law (2) on which there must be a substantial ground for difference of opinion and (3) an immediate appeal would materially advance the ultimate disposition of the matter. 42 Pa. C.S. § 702(b). *Rausch Creek Land, LP v. DEP*, 2013 EHB 851; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832; *Throop Property Owner's Assoc. v. DEP*, 1998 EHB 701; *The Carbon/Graphite Grp., Inc. v. DER*, 1991 EHB 461; *City of Harrisburg v. DER*, 1990 EHB 585.

3. Certification will be denied where the legal issue is only potentially controlling and there are factual rather than legal disputes. *CNG Transmission Corp. v. DEP*, 1998 EHB 548. *See also Borough of Danville v. DEP*, 2008 EHB 399 (interlocutory appeals are primarily designed to allow the Commonwealth Court to consider pure questions of law).

4. In deciding whether to amend an interlocutory order to allow an appeal to the Commonwealth Court, "we are tasked with giving an honest appraisal of whether we believe that an immediate appeal to the Commonwealth Court would be worthwhile." *Clean Air Council v. DEP*, 2018 EHB 120, 122 (citing *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836).

B. "Collateral" Orders

1. "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 Mgmt. Disposal Servs. of Pa., Inc. v. DEP*, 2005 EHB 164.

C. Appeals from Final Decisions of the Board

1. 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.

2. 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 *Pa. Public Utility Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805 (Pa. 1983). *See DEP v. Angino*, 2007 EHB 286; *Lang v. DEP*, 2007 EHB 116.

3. When a petition for review is filed with the Commonwealth Court, only the petitioner and Department of Environmental Protection are parties to the action. Any other party involved in the EHB proceeding, including a non-petitioning permittee, must file a notice of intervention pursuant to Pa. R.A.P. 1531 within 30 days of notice of the petition for review being filed (or subsequently file a petition to intervene). *See also* Explanatory Comment to Pa. R.A.P. 1531.

4. 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. When an appeal is taken to Commonwealth Court, the Board will certify the record in accordance with the applicable Rules of Appellate Procedure. 25 Pa. Code § 1021.201. 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. 25 Pa. Code § 1021.201(a) and (b).

b) The certified record in an appeal from a Board Opinion and Order shall 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. 25 Pa. Code § 1021.201(a) and (c).

2. The Board will notify parties of the contents of the record it certifies to the Commonwealth Court in accordance with Pa.R.A.P.

1952(c). Any requests to correct or supplement the certified record should be made to the Commonwealth Court in accordance with Pa.R.A.P. 1951(b).

XVI. MISCELLANEOUS

A. Sanctions

1. The Board has broad powers under 25 Pa. Code § 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. Consequently, the deadlines and obligations imposed by the Board's orders should be taken seriously by counsel. *Webcraft, LLC v. DEP*, 2008 EHB 1; *see also Snyder Memorial v. Dept. of Public Welfare*, 898 A.2d 1227 (Pa. Cmwlth. 2006) (approving deadline imposed by the agency's procedural rules).

2. Examples of sanctions imposed by the Board include:

a) Preclusion of witnesses and documents not disclosed in a prehearing memorandum. *See, e.g.*, *Schlafke v. DEP*, 2013 EHB 678.

b) Precluding the introduction of a party's case-in-chief for failure to file a pre-hearing memorandum. *Wharton Twp. v. DER*, 1989 EHB 1364.

c) Sanctions in the form of legal fees for fees incurred in responding to a motion filed in bad faith and for the purpose of delay. *Stanley v. DEP*, 2022 EHB 224, appeals pending at 688 C.D. 2022 and 781 C.D. 2022.

d) Exclusion at hearing of documents appended to a pre-hearing memorandum which were not identified during discovery. *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824.

e) Dismissing an appeal where:

   1) the appellant failed to file its pre-hearing memorandum. *Casey v. DEP*, 2014 EHB 908; *Schlafke v. DEP*, 2013 EHB 733; *Hollobaugh v. DEP*, 2003 EHB 720; *Potts Contracting Co. v. DEP*, 1999 EHB 958; *Yourshaw v. DEP*, 1998 EHB 1063.

   2) the appellant failed to comply with numerous orders of the Board signifying an intent not to pursue his appeal. *Miles v. DEP*, 2015 EHB 344; *Sri Venkateswara Temple v. DEP*, 2005

EHB 54; *Light v. DEP*, 2002 EHB 645. *See also RJ Rhoads Transit v. DEP*, 2007 EHB 260.

3) the appellant failed to perfect its appeal after two orders of the Board directed it to do so. *Blackwood v. DEP*, 2020 EHB 442; *Monview Mining v. DEP*, 2005 EHB 937; *see also Tanner v. DEP*, 2006 EHB 468 (dismissing an apparently untimely appeal where appellant neither responded to the motion to dismiss nor obeyed orders by the Board requiring the perfection of his appeal).

f) Dismissal for failure to file answers to interrogatories or respond to discovery requests. *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477 (appellant was also ordered to reimburse the Department for the costs of the court reporter); *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).

g) Judgment entered on liability in a civil penalty action where the defendant failed to properly respond to discovery and disobeyed orders of the Board. *DEP v. D.B. Enterprise Developers & Builders, Inc*., 2009 EHB 467; *DEP v. Quaker Homes, Inc.*, 2009 EHB 283. *See also Schieberl v. DEP*, 2009 EHB 44 (entering judgment on liability for a civil penalty where the appellant failed to answer a motion for summary judgment).

h) Sustaining an appeal where the Department has violated Board orders. *Miller's Disposal & Truck Serv. v. DER*, 1990 EHB 1239.

i) Barring testimony by an expert witness where the witness is not identified during the course of discovery, *Midway Sewerage Auth. v. DER*, 1990 EHB 1554, or expert reports were not served in a timely basis, *Kiskadden v. DEP*, 2014 EHB 626; *Achenbach v. DEP*, 2006 EHB 218. *But see, Kleissler v. DEP*, 2002 EHB 617 (preclusion of a late-filed expert report was too harsh a sanction).

j) Barring the offering of testimony for failure to respond properly to a party's interrogatories. *Hickory Hill Group v. DEP*, 2019 EHB 450; *Dotan v. DEP*, 2005 EHB 416; *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133; *County Comm'rs of Somerset County v. DEP*, 1995 EHB 1015. *But see Twp. 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).

k) 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.

l) Shifting the burden of proceeding, precluding a party from calling any expert witnesses, and limiting a party to calling the fact witnesses listed in their discovery responses. *Stocki v. DEP*, 2019 EHB 410.

m) Granting a motion to strike a late-filed affidavit which was filed subsequent to the filing of a motion for partial summary judgment in violation of the Board's rules and order. *Three Rivers Waterkeeper v. DEP*, 2019 EHB 443, 447 (citing *Petchulis v. DEP*, 2001 EHB 673, 678 ("As for litigation obligations, these have to be followed in order to maintain the integrity of and respect for our legal process.")).

3. The Board denied a motion for sanctions based on alleged past violations of a prior supersedeas order. *Simon v. DEP*, 2017 EHB 1196.

4. The Board declined to exclude witnesses and exhibits not disclosed by a permittee in response to appellants' discovery requests where the appellants had failed to file a motion to compel. *Wetzel v. DEP*, 2016 EHB 230.

B. Attorney Fees and Costs

1. The Board has submitted proposed rulemaking to revise its rules on attorney fees and costs (25 Pa. §§ 1021.181-1021.191) to clarify the procedure for filing an application for attorney fees and costs and for filing responses to such applications. The proposed rules, as recommended by the Board's Rules Committee, are set forth in Appendix A and should be followed as interim guidance until promulgated as final rulemaking.

2. *See Raymond Proffit Foundation v. DEP*, 1999 EHB 124 for a discussion of when fees are "incurred."

3. **Coal Mining**: Act 138, 27 Pa.C.S. § 7708, 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.

a) For purposes of determining timeliness of a fee petition under Act 138, adjudications are treated as final when issued, even when the adjudication remands the matter to the Department. *Telegraphis v. DEP*, 2022 EHB 292.

b) 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).

c) Where the appellants in a mining action incorrectly filed their petition for attorney's fees under Section 307(b) of the Clean Streams Law, they were permitted to amend their petition to add a claim under 27 Pa.C.S. § 7708 where the amendment resulted in no prejudice to the opposing parties. *Center for Coalfield Justice v. DEP*, 2018 EHB 531.

4. **Clean Streams Law**:

a) Section 307(b) of the Clean Streams Law grants the Board broad discretion to award fees and costs to a prevailing party. *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1003 (Pa. 2007); *Hatfield Twp. v. DEP*, 2013 EHB 764, *aff'd,* 105 A.3d 856 (unpublished), *petition for allowance of appeal denied*, No. 69 MAL 2015 *et al*. (Pa. Aug. 31, 2015) (unpublished); *Crum Creek Neighbors v. DEP*, 2013 EHB 835.

b) The Board generally employs a three-prong analysis in deciding an award of costs and fees under Section 307(b): (1) whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law; (2) whether the applicant has satisfied the threshold criteria for an award; and (3) if those two prongs are satisfied, the Board then determines the amount of the award. *Sierra Club et al. v. DEP*, 2018 EHB 297, 301, *aff'd*, 211 A.3d 919 (Pa. Cmwlth. 2019); *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764, 774-75, *aff'd*, 105 A.3d 856 (Pa. Cmwlth. 2014), *petition for allowance of appeal denied*, 125 A.3d 778 (Pa. 2015); *Angela Cres Trust v. DEP*, 2013 EHB 130, 134.

c) For a discussion of what constitutes "a proceeding pursuant to the Clean Streams Law," see *Gerhart v. DEP and Sunoco Pipeline, L.P.*, 2020 EHB 1, *aff'd Cmwlth. v. Gerhart*, No. 107 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 97 (Pa. Cmwlth. Feb. 16, 2021), *rev'd on other grounds Clean Air Council v. Cmwlth.*, 289 A.3d 928 (Pa. 2023); *Friends of Lackawanna v. DEP*, 2018 EHB 401, 405; *Borough of Kutztown v. DEP*, 2016 EHB 189, 191-92 (citing *Angela Cres Trust v. DEP*, 2013 EHB 130, 135-36 and *Wilson v. DEP*, 2010 EHB 911, 914-15).

d) If there is a final ruling on the merits, the Board looks to the criteria established in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990). Where there is no final ruling on the merits, the Board looks to the catalyst test. *Sierra Club et al. v. DEP*, 2018 EHB 297, 301, *aff'd*, 211 A.3d 919 (Pa. Cmwlth. 2019); *Hatfield Twp. Mun. Auth.*, 2013 EHB 764, 776-77, *aff'd*, 105 A.3d 856 (Pa. Cmwlth. 2014), *petition for allowance of appeal denied*, 125 A.3d 778 (Pa. 2015); *Citizens for Pennsylvania's Future v. DEP*, 2013 EHB 739, 748. *See also Solebury Twp.*, 928 A.2d 990 (Pa. 2007); *Upper Gwynedd Towamencin Mun. Auth., supra*, 9 A.3d 255, 263-65 (Pa. Cmwlth. 2010).

e) Where a permit was issued under the Solid Waste Management Act, but the appeal involved at least some issues raised under the Clean Streams Law, the Board determined that the appellant was eligible for an award of costs and fees under Section 307(b) of the Clean Streams Law. *Friends of Lackawanna v. DEP*, 2018 EHB 401.

f) In *Clean Air Council et al. v. Cmwlth.*, 289 A.3d 928 (Pa. 2023), the Pennsylvania Supreme Court rejected the Board's holding that a showing of bad faith or vexatious conduct was required for an award of attorney fees and costs against a permittee. The underlying decision may be found at 2019 EHB 228 (4-1 decision with Chief Judge Renwand concurring in part and dissenting in part), *aff'd*, No. 309 C.D. 2019 (Pa. Cmwlth. Feb. 16, 2021) and No. 313 C.D. 2019 (Pa. Cmwlth. Feb. 16, 2021), *rev'd* 289 A.3d 928 (Pa. 2023).

5. Recovery under more than one statute is addressed by 25 Pa. Code § 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 does not have 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. Fees incurred on appeal to the Commonwealth Court are recoverable. *Rausch Creek Land, L.P. v. DEP*, 2017 EHB 1089. Additionally, where the Board has remanded a matter to the Department, a majority of the Board has held that the pending attorney's fee application should be stayed. *Williams v. DEP*, 2022 EHB 185 (3-1 decision).

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 Comm'n*, 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.

Sechan Limestone Industries, Inc. v. DEP, 2004 EHB 185; *Ziviello v. State Conservation Comm'n*, 1998 EHB 1138.

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 pending the outcome of parallel criminal proceedings where it found that a stay would not harm the environment nor prejudice the Department. *Niebauer v. DEP*, 2004 EHB 678. However, the Board declined to grant a stay where the appellant filed a writ in the court of common pleas. *Stout v. DEP*, 2007 EHB 482.

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

A. Statutory and Regulatory Provisions

1. The Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530, as amended, 35 P.S. §§ 7511–7516.

2. The Rules of Practice and Procedure before the Board are set forth at 25 Pa. Code §§ 1021.1 to 1021.201.

3. 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.

B. Decisions of the Board

1. Website – The Board's regulations, docket, hearing schedule, opinions and adjudications, and general information about the Board are available on the Board's website at https://ehb.pa.gov.

2. Bound volumes of the Board's decisions (the Environmental Hearing Board Reporter), 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.

3. Scanned PDF files of all Environmental Hearing Board Reporters are available on the Board's website.

4. Citations to Environmental Hearing Board decisions in briefs, legal memoranda, and other documents filed with the Board should be to the year and page number of the Environmental Hearing Board Reporter. For example: *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43. Where the Environmental Hearing Board Reporter has not yet been published for a particular year, the citation should be to the slip opinion, which includes the name of the parties, the docket number, the type of decision being issued (i.e., Adjudication or Opinion) and the date of issuance. For example: *Smith v. DEP*, EHB Docket No. 2022-000-R (Opinion and Order on Motion to Dismiss issued January 1, 2022).

5. LEXIS and WESTLAW - These computerized legal research systems contain all of the Board's decisions.

C. Other Resources

1. *Pennsylvania Environmental Law and Practice*, available in book format or on thumb drive through the Pennsylvania Bar Institute, includes a chapter on "Litigation with DEP" that provides useful guidance on practicing before the Environmental Hearing Board.

2. *Citizens Guide*, A Citizens Guide to Practice and Procedure Before the Environmental Hearing Board, available on the Board's website.

Appendix A: Proposed Revised Rules on Attorney Fees and Costs – Interim Guidance

ATTORNEY COSTS AND FEES AUTHORIZED BY STATUTE

§ 1021.181. Scope.

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

§ 1021.182. Application for costs and fees.

(a) If statutorily authorized, a party may initiate a request for costs and fees by filing a Fee Application with the Board. The Fee Application shall conform to any requirements set forth in the statute under which costs and fees are being sought and §§ 1021.181 – 1021.191.

(b) A Fee Application shall be verified by the applicant, and shall set forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees, which identifies all legal issues upon which the applicant contends it prevailed and the degree to which the relief sought in the appeal was granted. The Fee Application shall set forth in numbered paragraphs the facts in support of the Fee Application and the amount of fees and costs requested. The Fee Application may not be accompanied by a supporting memorandum of law unless otherwise ordered by the Board.

(3) An affidavit, or affidavits, signed by each of the applicant's lawyers and each consultant or expert witness whose costs and fees the applicant seeks to recover, setting forth in detail all reasonable costs and fees incurred for or in connection with issues in which the party prevailed.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation, and ability of the individual or individuals performing the services.

(5) The name of each party from whom costs and fees are sought.

(c) An applicant shall file a Fee Application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the Fee Application upon the other parties to the proceeding.

(d) The Board may deny a Fee Application sua sponte or require an applicant to amend its Fee Application within a specified time frame if the applicant fails to provide all the information required by this section in sufficient detail to enable the Board to fully evaluate the request for relief.

Comment: For the purpose of establishing the number of hours an attorney or consultant/expert witness worked under § 1021.182(b)(4), the Board encourages the submission of records that avoid grouping multiple tasks into a single time entry.

§ 1021.183. Response to Fee Application.

A response to a Fee Application shall be filed within 30 days of service, unless a longer period of time is ordered by the Board following a Fees Conference pursuant to §1021.184(a). The factual bases for the response shall be supported by affidavits signed by the parties from whom the fees are sought or others with relevant knowledge. A response to a Fee Application shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the Fee Application. Material facts set forth in a Fee Application that are not denied may be deemed admitted for the purposes of deciding the Fee Application.

§ 1021.184. Disposition of Fee Application.

(a) Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fees Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery, and evidentiary hearings, if any. Following the Fees Conference, the Board will issue a Fees Conference Order establishing case management procedures for these and any other issues that the Board may address.

(b) The applicant has the burden of proving its entitlement to the recovery of costs and fees.

(c) The Fee Application process will be stayed if one of the parties files an appeal from the Board's final order in the underlying appeal.

ATTORNEY COSTS AND FEES UNDER MORE THAN ONE STATUTE

§ 1021.191. Application for counsel fees under more than one statute.

An applicant seeking to recover costs and fees under more than one statute shall file a single Fee Application which sets forth, in separate counts, the basis upon which costs and fees are claimed under each statute. The Fee Application shall comport with the requirements at § 1021.182.