

PROPOSED RULEMAKING

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) proposes to amend Chapter 1021 (relating to practice and procedure) to read as set forth in Annex A.

The objectives of the proposed rulemaking are to: provide the regulated community, the Department of Environmental Protection (Department) and other potential litigants with more specific guidance on how to represent their interests before the Board; improve the rules of practice and procedure before the Board; and institute additional and modified rules of practice and procedure before the Board to require electronic filing and service in nearly all matters before the Board.

This proposed rulemaking was adopted by the Board at its meeting on July 8, 2015.

A. Effective Date

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact John Dixon, Assistant Counsel, Environmental Hearing Board, 400 Market Street, Second Floor, Harrisburg, PA 17101, (717) 787-7115, johdixon@pa.gov.

C. Statutory Authority

The Board has the authority under section 5 of the Environmental Hearing Board Act (act) (35 P. S. § 7515) to adopt regulations pertaining to practice and procedure before the Board.

D. Background and Purpose

The proposed amendments improve practice and procedure before the Board. The proposed amendments are based on the recommendations of the Environmental Hearing Board Rules Committee (Rules Committee), a nine-member advisory committee created by section 5 of the act to make recommendations to the Board on its rules of practice and procedure. The Board may promulgate proposed regulations based in whole or in part on the recommendations of the Rules Committee.

The Board has established an electronic filing system allowing parties appearing before the Board to file nearly any document in a proceeding on an electronic docket. This system is now the primary docketing system for the Board. Some of the proposed amendments clarify rules pertaining to electronic filing and service by the Board.

The Board currently does not have a rule that sets forth the format and time period for filing a request for certification of interlocutory orders for appeal under 42 Pa.C.S. § 702(b) (relating to interlocutory orders). The proposed amendments for interlocutory orders will create consistency with 210 Pa. Code (relating to Rules of Appellate Procedure). The proposed amendment will provide a clear set of guidelines for practitioners filing a request for certification of interlocutory orders for appeal.

The Board also does not have a rule on computation of time for purposes of determining the deadline for filing a

document or responding to a motion. Proposed § 1021.13 (relating to computation of time) fills that gap.

Other proposed amendments contain substantive or stylistic revisions to make the Board rules clearer and more concise.

E. Summary of Proposed Amendments

This summary provides a description of: the existing rules of practice and procedure when relevant to proposed amendments; the Board's proposed revisions; and how, if any, the proposed amendments differs from the Rules Committee's recommendations.

When the recommendations of the Rules Committee were not in proper style and format, they have been modified to conform to those requirements. Similarly, when recommendations did not contain proper cross-references to 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure), cross-references have been added.

The proposed rulemaking can be divided into three categories: adoption of new rules; substantive amendments to existing rules; and correction of typographical errors.

§ 1021.13. Computation of time

Proposed § 1021.13 explains that when a filing deadline falls on a Saturday, Sunday or legal holiday, the filing is not due until the next business day. This proposed rule corresponds with 1 Pa. Code § 31.12 (relating to computation of time).

§ 1021.21. Representation

The proposed amendment to § 1021.21 (relating to representation) corrects an omission and recognizes that an appeal can be instituted by the filing of a notice of appeal or complaint depending on the statute at issue. A proposed comment notifies out-of-State counsel that they are not subject to the Interest on Lawyers Trust Account fee when counsel appears pro hac vice in a Board proceeding.

§ 1021.32. Filing

The proposed amendment to § 1021.32 (relating to filing) clarifies rules pertaining to electronic filing registration to conform to the registration form that is provided on the Board's electronic filing site. With the adoption of electronic filing, requirements in the rules mandating that electronically filed documents must indicate in the caption that it was in fact electronically filed were removed from the rules. A caption is no longer necessary considering the adoption of electronic filing.

§ 1021.33. Service by the Board

The proposed amendment to § 1021.33 (relating to service by the Board) does not include a substantive change. The text is proposed to be reworded to make it clearer and more concise.

§ 1021.34. Service by a party

With the adoption of mandatory electronic filing and electronic service, the proposed amendment to § 1021.34 (relating to service by a party) explains that the Board will only serve copies of orders by mail to parties who have been excused from electronic filing. All other parties will be served electronically.

§ 1021.39. *Docket*

The proposed amendment to § 1021.39 (relating to docket) clarifies the Board's electronic filing rules. The proposed amendment clarifies when the date and time of the filing will appear by the electronic filing provider. The Board's electronic docket does not contain the time of filing, yet the transmission notice that is received by all electronic filers does in fact contain the date and time of filing. It was recommended that the requirement that the docket will register the time of the filings be deleted. It was also recommended that because the transmission notice that is received by electronic filers does contain the date and time of filing, the language should be amended to make clear that the electronic filing provider will transmit a notice to registered users that includes the date and time of filing.

§ 1021.51. *Commencement, form and content*

The proposed amendment to § 1021.51(d) (relating to commencement, form and content) explains what the appellant shall attach to a notice of appeal. The reasoning behind this amendment is to provide clarification of what is being appealed.

The proposed amendment to § 1021.51(f) clarifies that the rule applies to notices of appeal. Because a party to a case might not have a fax machine or fax number readily available, the proposed amendment allows other methods of service for appeals.

§ 1021.52. *Timeliness of appeal*

The proposed amendment to § 1021.52(b) (relating to timeliness of appeal) corrects a typographical error.

§ 1021.103. *Subpoenas, notices to attend and notices to produce*

"Notices to attend and notices to produce" is proposed to be added to the heading of § 1021.103 (relating to subpoenas, notices to attend and notices to produce) to indicate that these notices are subject to the rules to this section. It was recommended that this section not only include subpoenas but also notices to attend and notices to produce because the rules in 231 Pa. Code (relating to Rules of Civil Procedure) cited in this section address not only subpoenas but also notices to attend and notices to produce.

§ 1021.141. *Termination of proceedings*

The proposed amendment to § 1021.141 (relating to termination of proceedings) makes a stylistic change to explain that any appeal from a consent adjudication shall be with the Commonwealth Court. A proposed amendment to the comment clarifies that the Board makes the determination of a dismissal with or without prejudice on a case-by-case basis.

§ 1021.151. *Reconsideration of interlocutory orders*

§ 1021.152. *Reconsideration of final orders*

The proposed amendments to §§ 1021.151 and 1021.152 (relating to reconsideration of interlocutory orders; and reconsideration of final orders) changes "motion" to "petition" to clarify that the rule deals with petitions for reconsideration.

§ 1021.153. *Amendment of interlocutory orders*

Proposed § 1021.153 (relating to amendment of interlocutory orders) explains the procedure for filing an application for interlocutory appeal.

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

The proposed amendment to § 1021.201 (relating to composition of the certified record on appeal to Commonwealth Court) corresponds to the appellate rules on filing petitions for review with the Commonwealth Court. The amendment eliminates the 20-day time frame for filing a petition for review with the Commonwealth Court because 210 Pa. Code provides a 40-day time frame.

The Board concurred with the previously stated recommendations.

F. *Benefits, Costs, Compliance and Paperwork*

Benefits

Since mandatory electronic filing for most parties before the Board has been implemented, there has been a measurable benefit to the Commonwealth, the public and parties appearing before the Board. The Board has experienced a reduction in the administrative burden posed by service by mail, paper recordkeeping, and consumption of paper and other supplies. Several proposed amendments revise and clarify existing electronic filing rules. The proposed amendments clarify electronic filing rules regarding filing, service, registration, docketing and appeals. With these amendments in place, parties appearing before the Board will have a better understanding of how to navigate through the Board's electronic filing system and enjoy greater access to docket materials.

The Board currently does not have a rule for amendment of interlocutory orders. A rule that sets forth the format and time period for filing a request for certification of interlocutory orders for appeal under 42 Pa.C.S. § 702(b) will create consistency with 210 Pa. Code. Proposed § 1021.153 will give practitioners a clear set of guidelines when filing a request for certification of interlocutory orders for appeal.

Other proposed amendments add clarity to the initial appeal process before the Board, termination of proceedings and timeliness of appeals. Proposed § 1021.13 will help the Board and practitioners determine the deadlines for filing a document or responding to a motion, particularly when a deadline falls on a Saturday, Sunday or legal holiday.

Costs

The proposed amendments regarding electronic filing will have a favorable economic impact on the Commonwealth and private parties in that it will greatly reduce the amount of paper used by the Board, other Commonwealth agencies appearing before the Board and the private bar filing documents with the Board. The remaining proposed amendments will either have no measurable fiscal impact on the Commonwealth, political subdivisions or the private sector or may have a favorable economic impact in that they may eliminate potential litigation over existing uncertainties in Board procedures, authority and requirements.

Compliance

The proposed rulemaking will have a minimal impact on compliance costs for parties participating in matters before the Board. Under most circumstances the ability to conduct nearly all aspects of appeal procedure electronically through the Board's electronic filing system will result in a reduction of the administrative burden for parties who will no longer have to provide the Board with paper records or conduct service by mail. Parties who face

an undue burden by the proposed rulemaking will be able to seek relief from the Board from the electronic filing requirements.

Paperwork

The proposed rulemaking may require only minor changes to the Board's standard orders.

H. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Board to determine whether the regulations effectively fulfill the goals for which they were intended.

I. Public Meeting on Proposed Rules

In accordance with 65 Pa.C.S. § 704 (relating to open meetings), a quorum of the members of the Board voted to adopt the proposed rules at a public meeting on July 8, 2015, in Hearing Room 2, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on December 9, 2015, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P. S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

K. Public Comment

The Board invites interested persons to submit written comments, suggestions or objections regarding the proposed rulemaking to John R. Dixon, Assistant Counsel, Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, P. O. Box 8457, Harrisburg, PA 17105-8457, johdixon@pa.gov within 30 days of the date of publication in the *Pennsylvania Bulletin*.

THOMAS W. RENWAND,
Chairperson and Chief Judge

Fiscal Note: 106-12. No fiscal impact; (8) recommends adoption.

Annex A

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

(Editor's Note: The following section is new and printed in regular type to enhance readability.)

§ 1021.13. Computation of time.

(a) Except as otherwise provided by law, in computing a period of time prescribed or allowed by the rules of the Board or another provision of law, time shall be computed to exclude the first day of the action, event or filing. Time

shall be computed to include the last day unless it falls on a Saturday, Sunday or legal holiday in which event the day will be omitted from the computation and the period shall run until the end of the next business day. Intervening Saturdays, Sundays and legal holidays shall be included in the computation.

(b) Subsection (a) supersedes 1 Pa. Code § 31.12 (relating to computation of time).

REPRESENTATION BEFORE BOARD

§ 1021.21. Representation.

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

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

[(c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.

(d)] (c) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel [under subsection (c)] if the Board determines [they are acting in concert with or as a representative of a group of individuals] that they are not merely appearing on their own behalf.

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

Comment: Payment of the Interest on Lawyers Trust Account fee under 204 Pa. Code § 81.505(a) (relating to fees) is not required as a condition to pro hac vice admission in a proceeding before the Board.

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

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(c) *Electronic filing.*

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(3) Electronic filing can be performed only by registered users. Individuals who are not registered users can become registered users by submitting a registration statement to the Board and receiving **[a password authorizing electronic filing and service] authorization for electronic filing and service from the electronic filing provider. [The registration statement must be on a form prepared by the Board and include the user's name and mailing address, e-mail address, attorney identification number (if the reg-**

istered user is an attorney), a request for authorization to participate in electronic filing and electronic service, and consent to accept electronic service of documents permitted to be electronically filed.] The registration statement consists of an electronic form prepared by the Board and accessed on its electronic filing web site. The prospective registered user must provide a name, mailing address, e-mail address, telephone number and attorney identification number (if the registered user is an attorney).

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

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

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

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

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

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

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§ 1021.33. Service by the Board.

(a) [Orders, notices and other documents entered or issued by the Board will be served upon the person designated in the notice of appearance or, if no notice of appearance has been entered, upon the person upon whom the notice of appeal or complaint was served.] The Board will serve the orders, notices and other documents it issues upon counsel designated on the docket. For any parties

not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons [other than registered users] who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing) by mail or in person.

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§ 1021.34. Service by a party.

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(d) Documents filed electronically shall be served by hand, mail, other personal delivery or facsimile upon parties [not represented by registered users or, for parties representing themselves, upon parties who are not registered users] who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing).

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§ 1021.39. Docket.

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

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FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

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(c) The notice of appeal must set forth the name, mailing address, e-mail address and telephone number of the appellant. [If the appellant is represented by an attorney, the notice of appeal shall be signed by at least one attorney of record in the attorney's individual name.] The notice of appeal shall be signed by at least one attorney of record in the attorney's individual name or, if a party is not represented by an attorney, shall be signed by the party.

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

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

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

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(3) *Facsimile filing.*

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

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

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

(vi) The appellant shall, concurrent with or prior to the facsimile filing of a notice of appeal, serve a copy by facsimile on the individuals and entities listed in paragraph (2)(vi). **If a party's fax number is not available or operational, the notice of appeal shall be served to that party by overnight delivery.**

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§ 1021.52. **Timeliness of appeal.**

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

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PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.101. **Prehearing procedure.**

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

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date. **The Board may issue an order scheduling specific dates on which each party is to file its prehearing memorandum, deadlines for filing motions in limine and a prehearing conference.**

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

§ 1021.103. **Subpoenas, notices to attend and notices to produce.**

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas [and], subpoenas, **notices to attend and notices to produce** shall be governed by Pa.R.C.P. 234.1—234.4, 234.6—234.9 and 4009.21—4009.27. When the term "court" is used in

Pa.R.C.P. "Board" is to be understood; when the terms "Prothonotary" or "clerk of court" are used in Pa.R.C.P. "Secretary to the Board" is to be understood.

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TERMINATION OF PROCEEDINGS

§ 1021.141. **Termination of proceedings.**

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(c) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection (b)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall [lie to] **be with** the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

Comment: The prior rule at § 1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter [**by case law**] **on a case-by-case basis** rather than by rule.

RECONSIDERATION

§ 1021.151. **Reconsideration of interlocutory orders.**

(a) A petition for reconsideration of an interlocutory order or ruling shall be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board. A party may file a memorandum of law at the time the [**motion**] **petition** or response is filed.

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§ 1021.152. **Reconsideration of final orders.**

(a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. A party may file a memorandum of law at the time the [**motion**] **petition** or response is filed. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:

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(Editor's Note: The following section is new and printed in regular type to enhance readability.)

§ 1021.153. **Amendment of interlocutory orders.**

(a) Requests to amend an interlocutory order to certify one or more issues for appeal in accordance with 42 Pa.C.S. § 702(b) (relating to interlocutory orders) shall be filed within 10 days of service of the order and shall take the form of a motion under § 1021.91 (relating to general).

(b) Motions filed under subsection (a) must be accompanied by a memorandum of law setting forth the reasons why the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

(c) Responses to motions filed under this section shall be filed within 10 days of service of the motion and shall be consistent with § 1021.91.

(d) Unless the Board acts on the motion within 30 days of it being filed, the motion shall be deemed denied.

(e) The filing of a motion under this section or the amendment of an interlocutory order containing the requested finding will not stay a proceeding unless otherwise ordered by the Board or by Commonwealth Court.

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.225 (relating to interlocutory orders).

APPELLATE MATTERS

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

(a) Unless the parties file a stipulation with the Board **[providing otherwise, within 20 days of the filing of the petition for review] or the Commonwealth Court requires otherwise**, the Board shall certify the record in accordance with **[Pa.R.A.P. 1951 (relating to record below in proceedings on petition for review) and]** the **applicable Rules of Appellate Procedure**. **The** record shall consist of:

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[Pa.B. Doc. No. 15-2218. Filed for public inspection December 18, 2015, 9:00 a.m.]
