

ARTICLE III. PRACTICE AND PROCEDURES

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(Editor’s Note: For the text of the rules of practice and procedures before the Environmental Hearing Board, see Chapter 1021 (relating to practice and procedures).)

Notes of Decisions

Exhaustion Requirement Inapplicable

For a regulatory taking action to be ripe, the final decision maker must have acted, not the entity with the final review powers. In this case, the requirement of exhaustion of administrative appeals was inapplicable because the appellants are in no way challenging the action of an administrative agency without allowing the administrative process the chance to correct the decision; instead, they are relying on the agency’s determination that there were no special circumstances entitling them to a variance. Gardner v. Department of Environmental Resources, 658 A.2d 440 (Pa. Cmwlth. 1995).

Jurisdiction

The appellant’s challenge to restrictions which the Environmental Quality Board promulgated under Federal law was a challenge to a state regulation and, therefore, the Environmental Hearing Board had jurisdiction. Croner, Inc. v. Department of Environmental Resources, 589 A.2d 1183 (Pa. Cmwlth. 1991).

CHAPTER 21. [Reserved]

§§ 21.1—21.3. [Reserved].

Source

The provisions of these §§ 21.1—21.3 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (169960), (158655) and (136169) to (136170).

Notes of Decisions

Action

Mere issuance of a notice of statutory violation to a municipal and industrial disposal company by Department of Environmental Resources did not constitute action or adjudication from which company could appeal. Fiore v. Department of Environmental Resources, 510 A.2d 880 (Pa. Cmwlth. 1986).

Final Appealable Action

A letter from the Commissioner of Mine Safety to a coal company which stated that the company’s plan for testing methane gas was contrary to law constituted a final appealable action within the meaning of this section. Gateway Coal Co. v. Department of Environmental Resources, 399 A.2d 802 (Pa. Cmwlth. 1979).

Party

Petitioner was not a party under § 21.2 but, instead, was an “interested person.” Since petitioner was not a party, it stands that § 21.36 applies. Thus, petitioner should receive notice of Department of Environmental Resources actions via publication of its actions in the Pennsylvania Bulletin. Accordingly, the Commonwealth Court concluded that the 30-day appeal period for such interested

persons runs from the publication of notice of the Department's issuance of the permit in the *Pennsylvania Bulletin*, and an appeal filed within 30 days of that publication by an interested party was timely. *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 538 A.2d 130 (Pa. Cmwlth. 1988), affirmed on reconsideration 546 A.2d 1330 (Pa. Cmwlth. 1988).

*Person*

Citizens group, who filed objections to an order issued by the Department of Environmental Resources, was considered a "person" and therefore had 30 days from the date of order in the *Pennsylvania Bulletin*, rather than 30 days from the date of the letter sent to the group prior to the publication, in which to file objections. *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 538 A.2d 130 (Pa. Cmwlth. 1988), affirmed on reconsideration 546 A.2d 1330 (Pa. Cmwlth. 1988).

**§ 21.11. [Reserved].**

**Source**

The provisions of this § 21.11 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (136170).

**§ 21.15. [Reserved].**

**Source**

The provisions of this § 21.15 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (136170).

**§ 21.17. [Reserved].**

**Source**

The provisions of this § 21.17 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136170) to (136171).

**§§ 21.21—21.23. [Reserved].**

**Source**

The provisions of these §§ 21.21—21.23 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (136171).

**§§ 21.31—21.36. [Reserved].**

**Source**

The provisions of these §§ 21.31—21.36 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136172) to (136173).

### Notes of Decisions

#### *Interested Person*

Petitioner was not a party under 25 Pa. Code § 21.2 but, instead, is an “interested person(s)” under this regulation and thus appellant should receive notice of the Department of Environmental Resources actions via publication of its actions in the *Pennsylvania Bulletin*. Accordingly, the Commonwealth Court concluded that the 30-day appeal period for such interested persons runs from the publication of notice of the Department’s issuance of the permit in the *Pennsylvania Bulletin*, and an appeal filed within 30 days of that publication by an interested party was timely. The Court reversed the Board’s dismissal of the appeal for lack of jurisdiction due to petitioner’s untimely appeal. *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 538 A.2d 130 (Pa. Cmwlth. 1988), affirmed on reconsideration at 546 A.2d 1330 (Pa. Cmwlth. 1988).

#### *Timeliness*

Citizens group, who filed objections to an order issued by the Department, was considered a “person” and therefore had 30 days from the date of order in the *Pennsylvania Bulletin*, rather than 30 days from the date of the letter sent to citizens group prior to the publication, in which to file objections. *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 546 A.2d 1330 (Pa. Cmwlth. 1988).

### § 21.41. [Reserved].

#### Source

The provisions of this § 21.41 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136173) to (136174).

### §§ 21.51—21.53. [Reserved].

#### Source

The provisions of these §§ 21.51—21.53 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136176) and (191897) to (191899).

### Notes of Decisions

#### *Appeal Properly Denied*

Section 21.51 provides parties an opportunity to plead in a manner that permits amendment based on information gained later; but, when a party failed to take advantage of this opportunity, the Environmental Hearing Board did not err in denying leave to amend. *Newtown Land Ltd. Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995).

#### *Discovery as Appeal Basis*

Normally, the need for discovery to uncover additional grounds for an appeal before the Environmental Hearing Board does not constitute good cause unless such a requirement was pled in the original appeal. Otherwise, an issue not raised is waived unless good cause can be shown for not including it in the notice of appeal. *Wilbar Realty, Inc. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth. 1995); appeal denied 674 A.2d 1079 (Pa. 1996).

*General Comment*

This section constitutes the consolidation of former sections 21.21(a) and 21.23(b); under those sections timeliness of a nonparty appeal of a permit issuance was controlled by the date of publication of notice, not by the date of permit issuance or permit recording. *Toro Development Co. v. Department of Environmental Resources*, 425 A.2d 1163 (Pa. Cmwlth. 1981).

*Good Cause Required*

The notice of appeal form provided to the township solicitor clearly set forth the forum for appeals at the Environmental Hearing Board. The subsequent written instructions superseded oral instructions to the contrary allegedly provided by Environmental Hearing Board. The solicitor's failure to file an appeal before the Environmental Hearing Board based upon oral instruction was not a good cause shown upon which an appeal nunc pro tunc would be granted. *West Caln Township v. Department of Environmental Resources*, 595 A.2d 702 (Pa. Cmwlth. 1991).

Regardless of whether petition was termed a new set of specified grounds filed after the 30-day appeal period or an appeal *nunc pro tunc*, the Board need not grant the petition if there is no showing of good cause. *Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986); appeal granted 521 A.2d 934 (Pa. 1987); order affirmed 555 A.2d 812 (Pa. 1989).

*Jurisdiction*

The failure to file specific grounds for appeal within the 30-day period was a defect going to jurisdiction and the time period cannot be extended nunc pro tunc in the absence of a showing of fraud or breakdown in the court's operation. *Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986); appeal granted 521 A.2d 934 (Pa. 1987); affirmed 555 A.2d 812 (Pa. 1989).

A landowner failed to file a timely appeal after receipt of what was determined to be a properly noticed administrative agency action and as the prescribed time limits for appeals are jurisdictional, the Board lost the jurisdiction that it would have otherwise had and the landowner's petition for allowance of an appeal nunc pro tunc was denied. *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994).

*Objections Waived*

In a matter dealing with the forfeiture of reclamation bonds issued to a coal mining operator, the surety waived its objections under this section which provides that any objection to the Department's action not raised by appeal shall be deemed waived, unless, upon good cause shown, the EHB agrees to hear that objection. *Ohio Farmers Insurance Co. v. Department of Environmental Resources*, 457 A.2d 1004, n. 6. (Pa. Cmwlth. 1983).

*Publication Errors*

Failure of township board of supervisors to appeal an issuance of an encroachment permit by the Department based upon a reliance on an erroneous address published in the *Pennsylvania Bulletin* for a notice totally unrelated to the permit in which the township wished to appeal, did not constitute an extraordinary situation to permit an appeal nunc pro tunc. *Cadogan Township Board of Supervisors v. Department of Environmental Resources*, 549 A.2d 1363 (Pa. Cmwlth. 1988).

*Timeliness*

Citizens group, who filed objections to an order issued by the Department, was considered a "person" and therefore had 30 days from the date of order in *Pennsylvania Bulletin* rather than from the date a letter was sent to citizens group prior to the publication in which to file objections. *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 582 A.2d 130 (Pa. Cmwlth. 1988); affirmed on reconsideration, 546 A.2d 1330 (Pa. Cmwlth. 1988).

The appeal period is mandatory and not merely directory. *Lebanon County Sewage Co. v. Department of Environmental Resources*, 382 A.2d 1310 (Pa. Cmwlth. 1978).

### §§ 21.56 and 21.57. [Reserved].

#### Source

The provisions of these §§ 21.56 and 21.57 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (191899) and (136179).

### §§ 21.61 and 21.62. [Reserved].

#### Source

The provisions of these §§ 21.61 and 21.62 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136179) to (136180).

#### Notes of Decisions

*Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), established a standard of fraud or breakdown of the Environmental Hearing Board's operations where the party had not reserved a right to amend a petition based on facts learned through discovery. *Newtown Land Ltd. Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995).

### §§ 21.64—21.66. [Reserved].

#### Source

The provisions of these §§ 21.64—21.66 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (180615) to (180616).

#### Notes of Decisions

#### *Joinder*

The Environmental Hearing Board, in its own view, does not have compulsory joinder powers. This regulation refers only to pleadings before the Board as being governed by the Pennsylvania Rules of Civil Procedure and Rules 2227 and 2229 are not incorporated into Board practice by this regulation. *Ferri v. Department of Environmental Resources*, 506 A.2d 981 (Pa. Cmwlth. 1986).

### § 21.75. [Reserved].

#### Source

The provisions of this § 21.75 adopted August 22, 1986, effective August 23, 1986, 16 Pa.B. 3108; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (180616).

**§§ 21.76—21.78. [Reserved].****Source**

The provisions of these §§ 21.76—21.78 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; amended August 22, 1986, effective August 23, 1986, 16 Pa.B. 3108; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (180616) and (145099).

**Notes of Decisions***Dismissal Appropriate*

Section 21.78 regarding the circumstances affecting a grant or denial of a supersedeas is valid because it was not violative of legislative intent nor was it considered unwise. *Chambers Development Co., Inc. v. Department of Environmental Resources*, 545 A.2d 404 (Pa. Cmwlth. 1988).

**§§ 21.80 and 21.82. [Reserved].****Source**

The provisions of these §§ 21.80 and 21.82 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (162155) to (162156).

**Notes of Decisions**

A private solid waste disposal company had the right to petition the Environmental Hearing Board for a supersedeas, and a hearing on that supersedeas petition should be held within 2 weeks. *Chambers Development Co., Inc. v. Department of Environmental Resources*, 532 A.2d 928 (Pa. Cmwlth. 1987).

**§§ 21.84 and 21.86. [Reserved].****Source**

The provisions of these §§ 21.84 and 21.86 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (162156).

**Notes of Decisions***Draft Requirements*

A draft is only required when the hearing examiner is not a member of the Environmental Hearing Board. The draft adjudication does not affect personal or property rights or duties and is not a public record within the meaning of Pennsylvania's Right-to-Know Act (65 P. S. §§ 66.1—66.4). *Pennsylvania Coal Ass'n v. Environmental Hearing Board*, 654 A.2d 122 (Pa. Cmwlth. 1995).

*Written Decision*

If the decision is written by someone other than the hearing examiner and it is alleged that there is nothing in the record which indicates that the hearing examiner prepared or submitted a proposed adjudication, such allegation is insufficient to overcome the *prima facie* presumption of the regularity of the acts of public administration officials. *Mignatti Construction Co., Inc., v. Environmental Hearing Board*, 411 A.2d 860 (Pa. Cmwlth. 1980).

**§§ 21.88 and 21.90. [Reserved].****Source**

The provisions of these §§ 21.88 and 21.90 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (162157) and (136187).

**Notes of Decisions***Exclusion of Evidence*

Environmental Hearing Board (EHB) did not abuse its discretion in excluding the testimony of seven witnesses since there was substantial evidence to support EHB's conclusion that the proffered testimony was either cumulative, speculative or irrelevant. *Del-Aware Unlimited, Inc. v. Department of Environmental Resources*, 508 A.2d 348 (Pa. Cmwlth. 1986); appeal denied 523 A.2d 1132 (Pa. 1986).

**§§ 21.92 and 21.94. [Reserved].****Source**

The provisions of these §§ 21.92 and 21.94 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (136187).

**§§ 21.96 and 21.98. [Reserved].****Source**

The provisions of these §§ 21.96 and 21.98 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (136187).

**§§ 21.101 and 21.104. [Reserved].****Source**

The provisions of these §§ 21.101 and 21.104 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (136188) and (191901) to (191902).

**Notes of Decisions***Burden of Proof*

The Court determined that it was the environmental group's and county's burden to show on the record presented before the Environmental Hearing Board, that the issuance of a solid waste disposal permit to an industrial waste processor amounted to an abuse of discretion. *Concerned Citizens of Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265 (Pa. Cmwlth. 1994).

Party protesting the issuance of a permit has the burden of proceeding and of proof before the Environmental Hearing Board. *Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986); appeal granted 521 A.2d 934 (Pa. 1987); affirmed 555 A.2d 812 (Pa. 1989).

The burden of proof imposed by § 21.101(c)(3) is upon the protesting party to show, on the record produced before the Board, that the issuance of the permit was arbitrary or amounted to an abuse of discretion. Upon credible evidence being presented by the protesting party, the burden of going forward with the evidence to justify the issuance of the permit shifts to the permit holder and Department of Environmental Resources. *Marcon Inc. v. Department of Environmental Resources*, 462 A.2d 969 (Pa. Cmwlth. 1983).

When an applicant for an industrial waste permit appeals a Department of Environmental Resources order imposing unique effluent standards, the Department of Environmental Resources bears the burden of justifying the basis for the standards employed and explaining the link between such standards, other factors considered, and the parameters it wishes to establish. *Lucas v. Department of Environmental Resources*, 420 A.2d 1 (Pa. Cmwlth. 1980).

#### *Illustrative Cases*

Gas company failed to overcome, by clear and convincing evidence, the rebuttable presumption of section 1311(a) of the Storage Tank Act (35 P.S. § 6021.1311(a)), that is, that the gas station contributed to the contamination; thus, the order of the Environmental Hearing Board dismissing the company's appeal was affirmed. *Lehigh Gas & Oil Co. v. Department of Environmental Resources*, 671 A.2d 241 (Pa. Cmwlth. 1995).

#### *Regulation Inapplicable*

Coal mine elevator which did not operate properly presented an alleged "work-place hazard" not an "environmental hazard" and the burden of proof did not shift from the Department of Environmental Resources to the coal mine operator. *Department of Environmental Resources v. Pennsylvania Mines Corp.*, 519 A.2d 522 (Pa. Cmwlth. 1986).

#### *Setting Standards*

An Environmental Hearing Board order permitting the Department of Environmental Resources to set unique effluent discharge standards in relation to an application for an industrial waste permit was proper, since the Department of Environmental Resources has the authority to develop specific limitations on industrial effluent discharges on an individual case-by-case basis when such limitations were based on reliable and ascertainable factual information. *Lucas v. Department of Environmental Resources*, 420 A.2d 1 (Pa. Cmwlth. 1980).

#### *Standard of Proof*

Section 21.101(a) establishes a preponderance of the evidence standard in hearings before the Environmental Hearing Board as the standard of proof. *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995).

## **§§ 21.107 and 21.109. [Reserved].**

#### **Source**

The provisions of these §§ 21.107 and 21.109 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (191902).

**§§ 21.111 and 21.114. [Reserved].****Source**

The provisions of these §§ 21.111 and 21.114 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (191902) to (191903).

**Notes of Decisions**

Discovery requests are within the discretion of the Board. *Haycock Township v. Department of Environmental Resources*, 530 A.2d 514 (Pa. Cmwlth. 1987); appeal denied 544 A.2d 1343 (Pa. 1988).

**§§ 21.116 and 21.118. [Reserved].****Source**

The provisions of these §§ 21.116 and 21.118 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial page (191904).

**§ 21.120. [Reserved].****Source**

The provisions of this § 21.120 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; amended August 22, 1986, effective August 23, 1986, 16 Pa.B. 3108; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (191904) to (191905).

**§§ 21.122 and 21.124. [Reserved].****Source**

The provisions of these §§ 21.122 and 21.124 adopted June 29, 1979, effective August 1, 1979, 9 Pa.B. 2149; reserved September 8, 1995, effective September 9, 1995, 25 Pa.B. 3823. Immediately preceding text appears at serial pages (191905) to (191906).

**Notes of Decisions***Proper Sanctions*

The Environmental Hearing Board did not violate the appellant's right to due process of law by dismissing his appeal for repeatedly failing to file a prehearing memorandum. *Goetz v. Department of Environmental Resources*, 613 A.2d 65 (Pa. Cmwlth. 1992).

*Regulation Inapplicable*

The petitioner's request to reopen the record to introduce additional evidence after the conclusion of the hearing but before the Environmental Hearing Board made an adjudication was not governed by this section because it applies only to a post-decision request for relief. *Spang & Co. v. Department of Environmental Resources*, 592 A.2d 815 (Pa. Cmwlth. 1991); appeal denied 600 A.2d 543 (Pa. 1991).

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