

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p>(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <h1>RECEIVED</h1> <p>JUN 06 2023</p> <p>Independent Regulatory Review Commission</p> <p>IRRC Number: 3377</p>	
<p>(1) Agency Environmental Hearing Board</p>			
<p>(2) Agency Number: 106 Identification Number: 14</p>			
<p>(3) PA Code Cite: 25 Pa. Code Chapter 1021</p>			
<p>(4) Short Title: Environmental Hearing Board Rules of Practice and Procedure</p>			
<p>(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Maryanne Wesdock, 412-565-5245, mwesdock@pa.gov Secondary Contact: Christine Walker, 814-871-2573, christiwal@pa.gov</p>			
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation <input type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General</p>	
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>The Environmental Hearing Board (Board) proposes to amend 25 Pa. Code Chapter 1021 (relating to practice and procedure) by revising existing rules and adding a new procedural rule.</p> <p>The proposed amendments will provide the regulated community, the Department of Environmental Protection (Department) and anyone who wishes to challenge an action of the Department with more specific guidance on how to represent their interests before the Board and will improve the rules of practice and procedure before the Board.</p> <p>The proposed amendments address the following topics: definitions; format for citing Board decisions; clarifying who must receive notice when a notice of appeal is filed; supersedeas hearings; intervention; procedural motions; reopening the record following a supersedeas hearing or merits hearing; circumstances affecting the grant or denial of a supersedeas; applications for recovering costs and fees; and correction of a typographical error.</p>			
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>The Board is authorized by subsection 5 (c) of the Environmental Hearing Board Act, 35 P.S. § 7515(c), to promulgate rules and regulations relating to practice and procedure. This subsection states, "Regulations under this subsection shall be promulgated by the board upon a majority affirmative vote on the</p>			

recommended regulations.”

Additionally, with regard to the proposed revisions to §§ 1021.181-1021.191, dealing with recovery of costs and attorney fees, certain statutes authorize the Board to award attorney fees and costs, including but not limited to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b); and the Costs for Mining Proceedings Law, 27 Pa.C.S. § 7708.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

§ 1021.2. Definitions:

The definitions of “Department [of Environmental Protection,]” “permittee” and “third-party appeal” have been revised to better define those terms.

1§ 1021.5. Citations to Board decisions:

A new procedural rule has been added at § 1021.5 to explain the proper format for citing Environmental Hearing Board (Board) decisions. Often, attorneys will cite to Lexis or Westlaw for Board decisions. The problem with this approach is that opposing parties may not have a subscription to Lexis or Westlaw. The Board’s preferred manner of citation is to the Environmental Hearing Board Reporter (volumes of the Board’s Adjudications and Opinions) which can be found online on the Board’s website or in hard copy at Board offices and the State Law Library.

§ 1021.51. Commencement, form and content [of notice of appeal]:

The genesis of the revisions to § 1021.51 (Commencement, form and content [of notice of appeal]) is the Commonwealth Court decision in *Department of Environmental Protection v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), in which the Court reversed a decision of the Board and held that persons who may be adversely affected by the Board’s adjudication of an appeal must be given the opportunity to participate in the appeal. Following the *Schneiderwind* decision, various revisions have been recommended and made to § 1021.51 to address the Court’s ruling in *Schneiderwind*. In 2022, the Board asked the Rules Committee to revisit those changes to the rules and to determine whether further clarification was needed. The Rules Committee determined that some of the terminology was confusing and recommended replacing “recipient of the action” with “potentially adversely affected person.” The Rules Committee also recommended clarifying who may be a potentially adversely affected person. The Board agreed with the recommendations of the Rules Committee. The proposed revisions replace “recipient of the action” with “potentially adversely affected person” and define who is a “potentially adversely affected person.”

§ 1021.61. General (Supersedeas):

This rule has been revised to clarify that the procedure for reopening the record after a supersedeas hearing is governed by § 1021.133 (Reopening of record).

§ 1021.63. Circumstances affecting grant or denial.

Section 1021.63(a)(3) has been revised to clarify that, in evaluating a petition for supersedeas, the Board must consider the likelihood of harm to the public and all parties in the case, not simply to the permittee in a third-party appeal.

§ 1021.81. Intervention:

A comment has been added to the rule on intervention to recognize that certain “potentially adversely affected persons” as set forth in the revisions to § 1021.51 (Commencement, form and content [of notice of appeal]) may intervene by simply filing an entry of appearance without the need to file a petition to intervene.

§ 1021.92. Procedural motions:

This rule has been revised to require that a proposed order accompany all procedural motions, not simply requests for extension or continuance.

§ 1021.94a. Summary judgment motions:

This rule has been revised to correct a typographical error.

§ 1021.133. Reopening of record:

The current rule deals only with reopening the record following a hearing on the merits. It was recognized that the record may need to be reopened following a hearing on a supersedeas petition. Therefore, both § 1021.61 (General [Supersedeas]) and § 1021.133 have been revised to allow for the reopening of the record following a hearing on a supersedeas petition before a ruling on the petition has been made.

§ 1021.181. Scope [Attorney fees and costs]

§ 1021.182. Application for costs and fees

§ 1021.183. Response to application

§ 1021.184. Disposition of application

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

The Environmental Hearing Board asked its Procedural Rules Committee (Rules Committee) to review the Board’s existing rules on attorney fees and costs and to make a recommendation on whether the rules should be amended to provide further detail and clarification. The Board reported that it had received applications for attorney fees and costs that were inconsistent and varied in content. For example, some applications were accompanied by a brief; others were not. Some applications provided a great amount of detail as to how the requested fees and costs were calculated, whereas other applications provided only general information. Responses to applications also varied. Some were accompanied by a brief, even when the initial application contained no brief. Additionally, parties were unclear on the procedure after an application for attorney fees and costs was filed. In some cases, parties

expected to conduct discovery and/or hold an evidentiary hearing. In other cases, parties simply expected the Board to make a decision based on the parties' filings.

After a great deal of review, the Rules Committee recommended that the rules on attorney fees and costs be amended to provide greater detail and clarification. The Rules Committee agreed that the rules provided little in the way of detail for parties filing an application for fees and costs and for parties responding to such an application. The Rules Committee consists of nine experienced environmental practitioners who appear before the Board. The members of the Rules Committee are appointed by the Governor (2 appointments), the Secretary of the Department of Environmental Protection (2 appointments), the Majority Leader of the Pennsylvania Senate (1 appointment), the Minority Leader of the Senate (1 appointment), the Pennsylvania Speaker of the House (1 appointment), the Minority Leader of the House (1 appointment), and the Department of Environmental Protection Citizens Advisory Council (1 appointment).

The revisions were recommended in order to clarify the Board's rules on applying for attorney fees and costs and to improve practice before the Board. The proposed amendments will benefit all litigants who appear before the Board, including private practitioners, Commonwealth attorneys, and *pro se* appellants, by clarifying existing Board rules of practice.

The benefit of revising the Board's rules is to ensure that the rules are clear, helpful and understandable to all parties who practice before the Board.

There is no set number of litigants who appear before the Board. However, over 1,200 attorneys are registered to file electronically with the Board and all of those attorneys will benefit from having rules of procedure that are clear and understandable. Since electronic filing is mandatory in most instances, the number of attorneys registered for electronic filing provides an accurate estimate of the number of persons who will benefit from clear and detailed rules of practice and procedure.

The Board's rules are comparable to the Pennsylvania Rules of Civil Procedure. Just as there is no certain way to determine how many attorneys will benefit from the Pa. Rules of Civil Procedure, there is no certain way to determine how many attorneys will benefit from the Board's Rules of Practice and Procedure. However, there is certainty in saying that any attorney or *pro se* litigant who appears before the Board will benefit from having a set of procedural rules that explain and clarify the procedure to be followed throughout the proceeding.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

The Environmental Hearing Board and the Rules Committee have looked to the Pennsylvania Rules of Civil Procedure, General Rules of Practice and Procedure, and local rules of various courts of common pleas for guidance in drafting its rules. Examining the procedural rules of other Pennsylvania courts has been helpful in crafting procedural rules dealing with Pennsylvania practice. Where rules exist in other states, they are not relevant to Pennsylvania practice and may not be comparable. The Rules Committee has found that the Pennsylvania Rules of Civil Procedure provide the best guidance. In some cases, local rules of county common pleas courts and federal rules have provided a helpful model.

These revisions to the Board's rules will in no way place Pennsylvania at a competitive disadvantage with other states. The Board is the statutorily-created body for hearing appeals of actions of the Pennsylvania Department of Environmental Protection. The Board's jurisdiction is set forth in Section 7514 of the Environmental Hearing Board Act, 35 P.S. §§ 7511-7516, at § 7514, which states that the Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department of Environmental Protection (DEP). Most of the statutes enforced and administered by the DEP provide that the proper forum to hear appeals of DEP actions is the Environmental Hearing Board. The proposed rule revisions contained in this rules package serve to clarify practice before the Environmental Hearing Board.

The proposed rule revisions discussed herein place no additional burden on regulated industry or require any specific action on the part of the regulated community. Amendments to the Board's rules are enacted for the purpose of simplifying and clarifying the process of appearing before the Board. The rules generally come about as the result of someone identifying an area of the rules that needs clarification, including the Board judges or attorneys, a member of the Rules Committee, a member of the Pennsylvania environmental bar, or a member of the public.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulations do not affect the regulations of any other state agencies. Where the regulations affect other regulations of the Environmental Hearing Board, those regulations have been so revised and are contained in this rulemaking.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The proposed regulations are based on the recommendations of the Environmental Hearing Board Rules Committee, a nine-member advisory committee established by Section 5(a) of the Environmental Hearing Board Act, 35 P.S. § 7515(a). The Rules Committee is comprised of attorneys from both the public and private sectors appointed by the Governor, the majority and minority leadership of the House and Senate, the Secretary of the Department of Environmental Protection and the Citizens Advisory

Council. Public participation in the Rules Committee meetings is encouraged and the meetings receive sunshine notice according to law. The minutes of the Rules Committee meetings are found on the Board's website at <https://ehb.courtapps.com/public/rulesCommitteeMinutes.php>. The minutes are extremely detailed and contain extensive information for the environmental bar that practices before the Board, as well as the public. Discussion of the amendments to §§ 1021.181-1021.191, the rules on attorney fees and costs, took place at Rules Committee meetings from January 16, 2020 to November 12, 2020. Discussion of the amendments to § 1021.51, dealing with the commencement, form and content of a notice of appeal, took place at Rules Committee meetings from March 11, 2021 to May 12, 2022. Discussions regarding the remaining amendments also took place between March 11, 2021 to May 12, 2022.

The Rules Committee makes great efforts to communicate with and solicit input from the regulated community and the environmental bar. At the annual Pennsylvania Bar Institute Environmental Law Forum, the Judges of the Environmental Hearing Board and the Chairman of the Rules Committee discuss proposed regulations and solicit input from attendees, who consist of members of the Pennsylvania environmental bar and who represent all facets of parties who appear before the Board, individual appellants, citizen groups, businesses and the Department of Environmental Protection. The Board Judges and Rules Committee Chairman also present programs at various county bar associations where input on proposed rules is solicited. Additionally, input is solicited from the environmental bar by means of the Pennsylvania Bar Association Environmental and Energy Law Section (EELS), which holds monthly council meetings and biannual Section meetings, operates a listserv and publishes a newsletter. The Board's liaison to the Rules Committee participates in all of the EELS activities and events, and the Board Judges and Rules Committee Chairman and members are frequent participants. EELS members are notified of upcoming Rules Committee meetings.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

It is difficult to quantify the number of persons, businesses, small businesses and organizations that will be affected. Anyone who is a litigant before the Environmental Hearing Board will be affected by the regulations. This includes the Department of Environmental Protection, the regulated community and citizens groups, and any member of the public who appeals an action of the Department of Environmental Protection. Any Commonwealth agency that appeals or joins in an action taken by the Department of Environmental Protection will also be affected by the regulations.

In 2021, 127 appeals were filed with the Board. In 2020, 115 appeals were filed. In 2019, 161 appeals were filed, and in 2018, 128 appeals were filed. As of November 7, 2022, 95 appeals had been filed. In each appeal there is at least one appellant and the Department of Environmental Protection, which is always a party. In many cases, there is also a third party, who is the holder of a permit that is being challenged. In some cases, there may be intervenors.

All of these persons are affected by any revision to the Rules of Practice and Procedure, just as any litigant who appears before a Pennsylvania Court of Common Pleas is affected by revisions to the

Pennsylvania Rules of Civil Procedure.

Over 1,200 attorneys are registered for electronic filing with the Board. Since electronic filing is mandatory in most instances, this provides a good estimate of the number of attorneys who will be affected by revisions to the Board's rules of procedure.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

All parties listed in the response to question 15 will be required to comply with the Environmental Hearing Board's Rules of Practice and Procedure.

As explained in the response to question 15, this number cannot be quantified, but can only be based on the number of appeals filed with the Board each year and the number of attorneys who are registered for electronic filing. That said, it must be emphasized that these rules, like many of the Board's rules, may only be relevant in individual cases. For example, the rules on attorney fees and costs will only be relevant in cases where one or more parties file an application seeking attorney fees and cost. Generally, the Board receives less than five applications for attorney fees and costs each year. Therefore, these revisions will not affect the vast majority of cases filed with the Board.

Again, it should be emphasized that the revisions pertain to procedural rules; they do not cover substantive areas of law.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

The amendments will have no measurable financial, economic or social impact on individuals, small businesses, businesses, labor communities or other public and private organizations. Rather, the amendments should make practice before the Board clearer and less costly by avoiding the need for litigation over the interpretation of the Board's rules.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Clarifications to the Board's rules on attorney fees and costs will make the process more efficient and user-friendly for practitioners. Practitioners will not file needless paperwork (such as briefs that may not be required). Practitioners will also ensure that their applications receive consideration on the merits by containing all necessary information. There are no adverse effects of the proposed regulations.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There will be no costs or savings to the regulated community.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There will be no costs or savings to local governments.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There will be no costs or savings to state government.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

N/A – No legal, accounting or consulting procedures, reporting or recordkeeping is required.

(22a) Are forms required for implementation of the regulation?

No forms are required.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

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(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	Not measurable	Not measurable	Not measurable	Not measurable	Not measurable	Not measurable
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	None	None	None	None	None	None
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	None	None	None	None	None	None

(23a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

The proposed regulation will not have an adverse impact on small businesses.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

None.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

There were no alternative regulatory provisions considered and rejected.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The proposed regulations will not have an adverse impact on small businesses. Furthermore, the concept of conducting a regulatory flexibility analysis is not germane to procedural rules for adjudicatory proceedings, as their content is dictated by relevant statutory, regulatory and constitutional provisions, as well as judicial precedent.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Data was not the basis for this regulation.

(29) Include a schedule for review of the regulation including:

A. The length of the public comment period: 30 days

B. The date or dates on which any public meetings or hearings will be held: All Environmental

Hearing Board Rules Committee meetings to discuss the proposed rules were open to the public. The meetings were held on January 16, 2020; March 12, 2020; May 14, 2020; September 10, 2020; and November 12, 2020; March 11, 2021; May 13, 2021; July 8, 2021; September 9, 2021; November 10, 2021; January 13, 2022; March 23, 2022; and May 12, 2022. Additionally, the meeting of the Environmental Hearing Board Judges to vote on the final rules, held on October 19, 2022, was open to the public.

C. The expected date of delivery of the final-form regulation: Fall 2023 or Winter 2024

D. The expected effective date of the final-form regulation: Upon publication as a final form regulation in the Pa. Bulletin.

E. The expected date by which compliance with the final-form regulation will be required: Upon publication as a final form regulation in the Pa. Bulletin.

F. The expected date by which required permits, licenses or other approvals must be obtained: Not applicable

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The regulations will continue to be evaluated by the Environmental Hearing Board Rules Committee at its meetings held every other month. Additionally, the Environmental Hearing Board receives feedback on its regulations at events held by the Pennsylvania Bar Association Environmental and Energy Law Section and county bar association environmental law sections.

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**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**

(Pursuant to Commonwealth Documents Law)

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JUN 06 2023

**Independent Regulatory
Review Commission**

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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>Amy M. Elliott BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p><small>Digitally signed by Amy M. Elliott DN: cn=Amy M. Elliott, o=Pennsylvania Office of Attorney General, ou=Chief Deputy Attorney General, email=ae Elliott@attorneygeneral.gov, c=US Date: 2023.05.24 11:03:06 -0400</small></p> <p><u>5/24/2023</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Environmental Hearing Board</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. 106-14 DATE OF ADOPTION: <u>October 19, 2022</u></p> <p><i>Thomas W. Remick</i> BY: _____</p> <p>TITLE: Chairman and Chief Judge (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p><i>[Signature]</i> BY: _____</p> <p><u>March 27, 2023</u> DATE OF APPROVAL</p> <p>(Deputy General Counsel) <u>(Chief Counsel, Independent Agency)</u> (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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**NOTICE OF PROPOSED REGULATION
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
25 PA CODE CHAPTER 1021
PRACTICE AND PROCEDURE**

TITLE 25 – ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) proposes to revise Chapter 1021 (relating to practice and procedure) by amending its procedural rules to read as set forth in Annex A.

The proposed procedural rules have the following objectives:

- (1) To provide the regulated community, the Department of Environmental Protection (Department) and persons challenging Department actions with more specific guidance on how to represent their interests before the Board.
- (2) To improve the rules of practice and procedure before the Board.

The Board considered the recommendations of the Rules Committee at its public meeting on October 19, 2022 and voted to adopt all but one recommendation as set forth in Section E below.

A. Effective Date

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

B. Contact Persons

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board, Suite 310, 301 Fifth Avenue, Pittsburgh, PA 15222, (412) 565-5245, mwesdock@pa.gov.

C. Statutory Authority

The Board has the authority under section 5(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516, at § 7515(c), to adopt regulations pertaining to practice and procedure before the Board.

Additionally, with regard to the proposed revisions to §§ 1021.181-1021.191, dealing with recovery of costs and attorney fees, certain statutes authorize the Board to award attorney fees and costs, including but not limited to Section 307(b) of the Clean

Streams Law, 35 P.S. § 691.307(b); and the Costs for Mining Proceedings Law, 27 Pa.C.S. § 7708.

D. Background and Purpose

The purpose of the proposed revisions is to improve practice and procedure before the Board. These proposed revisions are based on the recommendations of the Environmental Hearing Board Rules Committee, a nine-member advisory committee created by section 5 of the Environmental Hearing Board Act to make recommendations to the Board on its rules of practice and procedure. 35 P.S. § 7515(a) and (c). Under subsection 5(c), regulations “shall be promulgated by the Board upon a majority affirmative vote on the recommended regulations.” 35 P.S. § 7515(c).

E. Summary of Proposed Regulations

1. § 1021.2. Definitions

The definitions of “Department,” “permittee” and “third-party” have been amended to more accurately define these terms.

“Department” has been revised to replace “boards, commissions or agencies” with the more comprehensive and inclusive term “government entities.”

“Permittee” has been revised to clarify that anyone who has been issued a permit, license, approval or certification by the Department of Environmental Protection is a permittee regardless of whether they are involved in a third-party appeal.

“Third-party appeal” is a term that is frequently used in practice before the Board. It has been revised to delete the undefined term “recipient of the action” and to clarify that a third-party appeal is an appeal brought by a person to whom the action is not directed or issued.

2. § 1021.5. Citations to Board Decisions

The Board proposes to add this section to explain the proper format for citing Board decisions in briefs, legal memoranda and other documents filed with the Board.

3. § 1021.51. Commencement, form and content

The amendments to § 1021.51 clarify who should receive notice of the filing of a notice of appeal. The background and rationale for the proposed amendments are set forth in more detail below.

The revisions to § 1021.51 are intended to address the Commonwealth Court’s discussion regarding notice in *Department of Environmental Protection v. Schneiderwind*,

867 A.2d 724 (Pa. Cmwlth. 2005). In *Schneiderwind*, the underlying case before the Board involved a landowner, Mr. Schneiderwind, who had filed a complaint with the Department of Environmental Protection (Department) claiming that surface mining operations conducted by Delaware Valley Concrete Company (Delaware Valley) had diminished the water supply to his farm. The Department conducted an investigation and found no correlation between Delaware Valley's surface mining activities and the diminishment of Mr. Schneiderwind's water supply. Mr. Schneiderwind appealed the Department's decision to the Board and, after a hearing on the merits, the Board found in favor of Mr. Schneiderwind. The Department and Delaware Valley appealed the Board's decision to the Commonwealth Court. One of the arguments made by the Department and Delaware Valley was that Delaware Valley was an indispensable party to the action before the Board and, therefore, the Board could not grant relief to Mr. Schneiderwind without Delaware Valley being a party to the action. Despite the fact that Delaware Valley was aware of Mr. Schneiderwind's appeal before the Board and elected not to intervene, and despite the fact that representatives of Delaware Valley attended the hearing, the Commonwealth Court agreed with the Department and Delaware Valley and held, "That the Board proceeded to determine Delaware Valley's liability for the claimed water without the company's participation in the adjudication constitutes additional error. The Board's determination of liability in the absence of proof of notice and an opportunity for Delaware Valley to be heard ignores the rule stated in 2 Pa. C.S. § 504 [regarding hearing and record], which makes these elements essential to a valid agency adjudication. In addition, it offends basic principles of equity and due process." 864 A.2d at 727-28.

The Board has struggled to find a way to comply with the Commonwealth Court's holding in *Schneiderwind* since it does not have a rule that allows for mandatory joinder except for permittees in matters involving the Department's issuance of a permit, license or other approval pursuant to § 1021.51(h)(1) and (i). Therefore, the Board could not have compelled Delaware Valley to enter the case. Instead, the Board has focused on rule changes that ensure that entities such as Delaware Valley receive notice of actions that could affect their rights, and the Board strongly encourages them to join the action. In an attempt to make it easy for such entities to join an action where their rights may be affected, the Board allows them to intervene in the appeal by simply filing an entry of appearance and does not require a petition to intervene. The revisions to 25 Pa. Code § 1021.51 are an attempt to further comply with the Commonwealth Court's holding in *Schneiderwind* by ensuring that "potentially adversely affected persons" are notified of an action before the Board and are encouraged to participate in the action.

In an attempt to comply with the holding in *Schneiderwind*, the Board has proposed amending § 1021.51 as follows:

The amendments to § 1021.51(f) replace the term "recipient of the action" with "potentially adversely affected person" and clarify that a person filing a notice of appeal with the Board should serve a copy of the notice of appeal on "any potentially adversely affected person as identified in subsection (h)(1)-(3)." Subsection (h)(4) also authorizes the Board to order service after the filing of a notice of appeal where it determines that a

person may be affected by the adjudication of the appeal in a manner similar to that described above in the *Schneiderwind* case.

The term “third-party appeal” is being deleted from section 1021.51(f)(1)(iv) and (2)(vi)(C) because the requirement to serve potentially adversely affected persons applies to all appeals, not only third-party appeals.

Section 1021.51(h) has been revised to define “potentially adversely affected person.” Subsections (h)(1) through (h)(3) identify certain categories of persons or entities that may be impacted by an appeal. They include (1) the recipient of a permit, license, approval, certification or order; (2) certain affected entities in an appeal filed under Sections 5 or 7 of the Sewage Facilities Act; and (3) a mining company, well operator, or storage tank owner or operator in appeals claiming subsidence damage, water loss or contamination. Subsection (h)(2) has been amended to further clarify who may be a potentially adversely affected person in an appeal involving a decision under Sections 5 or 7 of the Sewage Facilities Act. Subsection (h)(4) has been amended to clarify that the Board may order service on an interested “person” (not a party).

Section 1021.51(j) has been revised to allow persons identified in subsections (h)(2) or (h)(3) to intervene in an appeal as of right by simply filing an entry of appearance. (This section does not address (h)(1) because persons identified in subsection (h)(1) are automatically parties to an appeal pursuant to § 1021.51(i), and, therefore, they do not need to intervene.) Section 1021.51(j) has also been amended to clarify that persons who are determined by the Board to be “interested persons” pursuant to (h)(4) may be permitted to intervene as of right at the discretion of the Board.

The Comment to § 1021.51 has been amended to replace “recipient of an action” with “potentially adversely affected person” as set forth in the revisions to the rule, and to correct the citation to the *Schneiderwind* decision.

4. § 1021.61. *General*

A reference has been added to § 1021.61 to clarify that when the record is reopened after a supersedeas hearing, it is governed by § 1021.133 (Reopening of record prior to adjudication).

5. § 1021.63. *Circumstances affecting grant or denial.*

Section 1021.61(a)(3) has been revised to delete the reference to “permittee in third-party appeals” since the Board must consider the likelihood of harm to all parties in a case when evaluating a petition for supersedeas, not simply the permittee in a third-party appeal.

6. *§ 1021.81. Intervention*

A comment has been added to § 1021.81 to explain that certain “potentially adversely affected persons,” as identified in § 1021.51(h), may intervene in an appeal by simply filing an entry of appearance pursuant to § 1021.51(j).

7. *§ 1021.92. Procedural motions*

This section has been amended to clarify that all procedural requests, not simply requests for extensions or continuances, must be accompanied by a proposed order.

8. *§ 1021.94a. Summary judgment motions*

This section has been amended to correct a typographical error.

9. *§ 1021.133. Reopening of record prior to adjudication*

This section deals with the reopening of the record. The current rule addresses only the reopening of the record after a hearing on the merits and prior to the issuance of an adjudication. It was recognized that a record may need to be opened after a hearing on a petition for supersedeas before a ruling has been made on the petition. Therefore, this section has been amended to delete “prior to adjudication” from the title and to add a reference to reopening the record after the conclusion of a supersedeas hearing.

10. *§ 1021.161. Sanctions*

A majority of the Rules Committee recommended revising § 1021.161 (Sanctions) to remove the reference to Pa.R.C.P. 4019 and to add language clarifying that the Board may impose sanctions “by motion or sua sponte.” At the public meeting of the Board held on October 19, 2022, the Judges voted not to approve the changes proposed by the Rules Committee. The Judges felt that additional changes to § 1021.161 were needed. They sent the matter back to the Rules Committee for additional consideration.

11. *Attorney Costs and Fees Authorized by Statute (§§ 1021.181 – 1021.184)*

At the January 16, 2020 meeting of the Environmental Hearing Board Rules Committee, the Board asked the Rules Committee for input on whether the rules on applications for costs and attorney fees should provide further detail. The Board noted that the cost and fee applications being filed with the Board were not consistent. For example, some applications included a brief in support of the application; others were filed with no brief. Some applications provided a great deal of detail about how the costs and fees were calculated, whereas other applications provided only general information. Some applications were signed by the applicant, whereas other applications were signed by the applicant’s attorney. The same was true of responses: Some responses were accompanied by a brief, in some cases even when the application itself did not include a brief. Finally, in some cases, parties wished to conduct discovery and hold an evidentiary hearing,

whereas in other cases parties did not wish to do so. The Board expressed a concern that the lack of detail in the rules was leading to inconsistent practices. The Rules Committee agreed that the Board's rules on costs and attorney fees did not provide sufficient detail or guidance to applicants or respondents. The Rules Committee agreed that the rules should be amended to provide more detail. Over the course of several meetings, from January 2020 to November 2020, the Committee developed proposed amendments to the rules.

The Board's rules on costs and attorney fees are being amended to clarify the process for seeking costs and fees and responding to applications for costs and fees. The amended rules provide clarification on what information must be contained in an application for costs and fees, the materials that must accompany an application for costs and fees, and who must sign the application. The amendments further specify what information must be provided in response to an application for costs and fees. Finally, the amendments clarify the process that the Board will follow when an application for costs and fees is filed.

The amendments make the following changes to the rules:

Section 1021.182 (Application for costs and fees) has been amended to revise the name of the filing from "request for costs and fees" to "fee application" and to clarify that a fee application may be filed where statutorily authorized. The section has been further revised to set forth consistent and specific requirements for a fee application that will be helpful to the Board in deciding the fee application. Under the current rules, there is insufficient detail for an applicant to know what information must be provided with its application. The amendments provide that detail as follows:

- The fee application shall include a statement of the basis upon which the applicant claims to be entitled to costs and attorney fees and must identify the legal issues upon which the applicant contends it prevailed.
- The fee application shall contain numbered paragraphs setting forth the facts in support of the application and the amount of costs and fees requested.
- The fee application shall not be accompanied by a brief or legal memorandum unless ordered by the Board.
- The fee application should be supported by an affidavit or affidavits signed by each of the applicant's attorneys and expert witnesses whose costs and fees the applicant seeks to recover in connection with the issues upon which the party prevailed.
- The Board may require an applicant to amend the fee application if further information is needed.
- A comment has been added to the rule discouraging the use of block billing for purposes of recovering costs and fees.

Section 1021.183 (Response to fee application) has been revised to provide consistent and specific requirements regarding the filing of a response to a fee application, as follows:

- The Board may designate a longer period of time for responding to a fee application (beyond the standard response time of 30 days currently set forth in § 1021.183.)
- The response shall contain correspondingly-numbered paragraphs setting forth 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 purpose of deciding the fee application.

Section 1021.184 (Disposition of fee application) sets forth the procedure following the filing of a fee application. The current rule contains little information on what is expected of an applicant or respondent when a fee application is filed. The proposed amendments to § 1021.184 provide that detail:

- Within seven days of receipt of an application for costs and attorney fees, the Board will hold a fee conference with the parties to determine the process and deadlines for filing responses and, if necessary, filing briefs, conducting discovery and holding an evidentiary hearing. Following the fee conference, the Board will issue a case management order concerning these matters and any other issues that may need to be addressed.
- The applicant has the burden of proving its entitlement to recovery of costs and fees.
- 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.

12. § 1021.191. Application for counsel fees under more than one statute

This section has been amended to be consistent with the previous section (Attorney Fees and Costs Authorized by Statute) and to clarify that applications for costs and attorney fees filed under more than one statute should comport with 25 Pa. Code § 1021.182 (Application for costs and fees).

Detailed discussions of the proposed amendments to §§ 1021.181-1021.191 can be found in the Rules Committee meeting minutes from January 2020 through November 2020 on the Board's website under "Rules Committee" at <https://ehb.courtapps.com>.

F. Benefits, Costs, Compliance and Paperwork

Benefits

The proposed amendments are likely to provide a benefit to parties appearing before the Board because they will further clarify the Board's rules of practice and procedure.

Costs

The proposed amendments will have no measurable fiscal impact on the Commonwealth, political subdivision or the private sector.

Compliance

The proposed amendments will have no impact on compliance costs for parties participating in matters before the Board.

Paperwork

The proposed revisions will require no additional paperwork.

H. Sunset Review

These regulations will be reviewed on an ongoing basis by the Environmental Hearing Board Rules Committee to determine whether the regulations effectively fulfill the goals for which they were intended. The Rules Committee meets six times a year in alternating months (January, March, May, July, September, November).

I. Public Meeting on Proposed Rules

In accordance with § 704 of the Sunshine Act, Act of October 15, 1998, P.L. 729, 65 Pa.C.S.A. §§ 701 – 716, a quorum of the Judges of the Environmental Hearing Board voted to adopt the above-described proposed rules at a public meeting held on October 19, 2022 at 2:30 p.m. via videoconference.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on June 6, 2023, 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 that 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 Regarding Proposed Revisions

The Board invites interested persons to submit written comments, suggestions or objections regarding the proposed revisions to Senior Counsel Maryanne Wesdock at

mwesdock@pa.gov or at the following address: Environmental Hearing Board, 2nd Floor, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, Attention: Maryanne Wesdock, within 30 days of the date of publication in the Pennsylvania Bulletin.

STEVEN C. BECKMAN
Chairperson and Chief Judge

Annex A

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

PRELIMINARY PROVISIONS

GENERAL

§ 1021.2. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

* * * * *

Business day—A day that is not a Saturday, Sunday or a legal holiday.

Conventional filing—Presenting documents to the Board by hand, mail or other personal delivery services, for purposes of filing.

Department—The Department of Environmental Protection or other [boards, commissions or agencies] governmental entities whose decisions are appealable to the Board.

Dispositive motion—A motion that seeks to resolve the issues in an appeal without the need for hearing or further hearing. The term includes a motion to quash appeal, a motion to dismiss, a motion for summary judgment, and a motion for partial summary judgment, but not a motion in limine.

* * * * *

Pa.R.C.P.—Pennsylvania Rules of Civil Procedure, 42 Pa.C.S.; 231 Pa. Code.

Party—An appellant, appellee, plaintiff, defendant, permittee or intervenor.

Permittee—The recipient of a permit, license, approval or certification [in a third-party appeal] issued by the Department.

* * * * *

Registration statement—A completed application to use the electronic filing provider for electronic filing and electronic service in Board proceedings.

Supersedes—A suspension of the effect of an action of the Department pending proceedings before the Board.

Third-party appeal—The appeal of an action by a person [who is not the recipient of the action] **to whom the action is not directed or issued.**

(b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions) except for “pleading” which supersedes the definition of “pleading” in 1 Pa. Code § 31.3.

§ 1021.5 Citations to Board Decisions.

(a) Citations to Environmental Hearing Board decisions in briefs, legal memoranda, and other documents filed with the Board shall contain the names of the parties, and the year and page number of the Environmental Hearing Board Reporter (Opinion and Adjudication volumes) located on the Board’s website. The citation shall be provided using the following format: *Name of Appellant v. DEP*, 2021 EHB 43. Pinpoint citations shall be preceded with a comma and a space, in the following format: *Name of Appellant v. DEP*, 2021 EHB 43, 45.

(b) If the Environmental Hearing Board Reporter has not been published for a particular year, the citation shall be to the slip opinion which can be found at the Board’s website. The citation shall include the names of the parties, the docket number, the type of decision being issued (i.e., Adjudication or Opinion) and the date of issuance, using the following format: *Name of Appellant v. DEP*, EHB Docket No. 2022-000-R (Opinion and Order on Motion to Dismiss issued January 1, 2022).

Comment: Additional citations to legal research databases such as LexisNexis and Westlaw are permissible.

FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

(a) An appeal from an action of the Department shall commence with the filing of a notice of appeal with the Board.

* * * * *

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

(1) *Electronic filing.*

* * * * *

(iv) [In a third-party appeal, the] **The** appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on [the recipient of the action] **any potentially adversely affected persons as identified in subsection (h)(1)-(3).** The service shall be made at the address in the document evidencing the action by the Department or [at the chief place of business in this Commonwealth of the recipient] **in accordance with the Pennsylvania Rules of Civil Procedure.**

* * * * *

(2) *Conventional filing.*

* * * * *

(vi) The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on each of the following in the same manner in which the notice of appeal is filed with the Board:

(A) The office of the Department issuing the Departmental action.

(B) The Office of Chief Counsel of the Department.

(C) [In a third-party appeal, the recipient of the action.] **Any potentially adversely affected person as identified in (h)(1)-(3).** The service shall be made at the address in the document evidencing the action by the Department or [at the chief place of business in this Commonwealth of the recipient] **in accordance with the Pennsylvania Rules of Civil Procedure.**

* * * * *

(h) For purposes of this section, [“recipient of the action”] **a “potentially adversely affected person”** includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) [Any] In appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 and 750.7), any affected municipality, its municipal authority, [and] the proponent of the [decision] request, when applicable, [in appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. § § 750.5 and 750.7)] and any municipality or municipal authority whose official plan may be affected by the decision or a decision of the Board in the appeal.

(3) A mining company, well operator, or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested [parties] persons as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval, certification or order, as required under subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the [third party] appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention). The recipient of a permit, license, approval, certification or order who is added to an appeal under this section shall still comply with § § 1021.21 and 1021.22 (relating to representation; and notice of appearance).

(j) Other [recipients of an action] potentially adversely affected persons under [subsection (h)(2), (3) or (4)] subsections (h)(2) or (h)(3) may intervene as of [course] right in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81. Intervention of persons identified under subsection (h)(4) shall be filed in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4).

Comment: If a [recipient of an action] potentially adversely affected person under subsection (h)(2), (3) or (4) elects not to intervene following service of notice of an appeal or notice by the Board that the [recipient's] person's rights may be affected by an appeal, the [recipient's] person's right to appeal from the Board's adjudication in the matter may be adversely affected. This comment is added in response to the Commonwealth Court's ruling in [*Schneiderwind v. DEP*] DEP v. Schneiderwind, 867 A.2d 724 (Pa. Cmwlth. 2005).

SUPERSEDEAS

§ 1021.61. General.

* * * * *

(d) At the discretion of the Board, if necessary to ensure prompt disposition, supersedeas hearings may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery, [or of] cross-examination, or reopening the record in accordance with § 1021.133.

§ 1021.63. Circumstances affecting grant or denial.

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties[, such as the permittee in third party appeals] in the case.

* * * * *

CONSOLIDATION, INTERVENTION AND SUBSTITUTION OF PARTIES

§ 1021.81. Intervention.

* * * * *

[Comment: A recipient of an action, as that term is defined in § 1021.51(h) (relating to commencement, form and content), may automatically intervene in an appeal by simply filing an entry of appearance under § 1021.51(j).]

Comment: Section 1021.51(j) allows certain potentially adversely affected persons, as that term is defined in § 1021.51(h) (relating to commencement, form and content), to intervene in an appeal as of right by simply filing an entry of appearance.

MOTIONS

§ 1021.92. Procedural Motions.

* * * * *

(e) [Requests for extensions or continuances,] All procedural requests, whether in letter or motion, shall be accompanied by a proposed order.

* * * * *

§ 1021.94a. Summary judgment motions.

* * * * *

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

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

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

* * * * *

POSTHEARING PROCEDURES

§ 1021.133. Reopening of record [prior to adjudication].

(a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, or after the conclusion of a hearing on a supersedeas and before the Board issues an order granting or denying a supersedeas, the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.

* * * * *

ATTORNEY FEES AND COSTS AUTHORIZED BY STATUTE

§ 1021.182. Application for costs and fees.

(a) **[A request for costs and fees] 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 shall also conform to any requirements set forth in §§ 1021.181-1021.191.**

(b) **[A request for costs and fees shall be by verified application, setting] 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, setting forth in numbered paragraphs the facts in support of the fee application and the amount of costs and fees requested. The statement must identify 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 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 [the party's participation in the proceeding, including receipts or other evidence of such costs and fees] 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 **[the] each** party from whom costs and fees are sought.

(c) An applicant shall file **[an application] 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 **[an application] a fee application** sua sponte **or require an applicant to amend its fee application within a specified time frame** if **[it] the applicant** fails to provide all the information required by this section in sufficient detail to enable the Board to **[grant the relief requested] fully evaluate the request for relief.**

Comment: For the purposes 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 **[an application] 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(c).** **[A factual basis] The factual bases** for the response shall be **[verified] supported**

by [affidavit] 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) Each party may file a brief in accordance with a schedule established by the Board.] (Reserved).

[(b) The Board may allow discovery and the taking of testimony in order to resolve any factual issues raised by the application and response.] (Reserved).

(c) 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.

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

(e) 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] costs and fees under more than one statute.

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



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

June 6, 2023

Honorable Gene Yaw
Chair, Senate Committee on
Environmental Resources & Energy
Room 362 Main Capitol
Harrisburg, PA 17120-3023

Honorable Carolyn T. Comitta
Minority Chair, Senate Committee on
Environmental Resources & Energy
Room 457 Main Capitol
Harrisburg, PA 17120-3019

Honorable Greg Vitali
Chair, House Committee on
Environmental Resources & Energy
30 East Wing, Capitol
Harrisburg, PA 17120-2166

Honorable Martin Causer
Minority Chair, House Committee on
Environmental Resources & Energy
47 East Wing, Capitol
Harrisburg, PA 17120-2067

✓ David Sumner
Executive Director
Independent Regulatory Review Commn.
333 Market Street, 14th Floor
Harrisburg, PA 17101

Legislative Reference Bureau
Pa. Code and Bulletin
647 Main Capitol
Harrisburg, PA 17120-0033

Re: Environmental Hearing Board Proposed Rulemaking 106-14

Dear Sir or Madam:

Pursuant to Section 5(a) of the Regulatory Review Act, please find enclosed a copy of Environmental Hearing Board (Board) Proposed Rulemaking 106-14. This proposed rulemaking amends and clarifies the Board's Rules of Practice and Procedure. It was proposed and drafted by the Board's Rules Committee and adopted by the Board at its public meeting on October 19, 2022. The proposed rulemaking provides for a 30-day public comment period.

Should you have any questions please do not hesitate to contact me at mwesdock@pa.gov or 412-565-5245.

Sincerely,

s/Maryanne Wesdock

Maryanne Wesdock
Senior Assistant Counsel
Environmental Hearing Board

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 106-14
 SUBJECT: RULES OF PRACTICE AND PROCEDURE
 AGENCY: ENVIRONMENTAL HEARING BOARD

TYPE OF REGULATION

RECEIVED

JUN 06 2023

Independent Regulatory
Review Commission

Proposed Regulation

Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions

b.

Without Revisions

FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY

6/6/23



MAJORITY CHAIR Greg Vitali

6/6/23 

MINORITY CHAIR Martin Causer

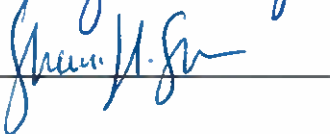
SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY

6/6/23 

MAJORITY CHAIR Gene Yaw

6/6/23 

MINORITY CHAIR Carolyn Comitta

6/6/23 

INDEPENDENT REGULATORY REVIEW COMMISSION

ATTORNEY GENERAL (for Final Omitted only)

6/6/23



LEGISLATIVE REFERENCE BUREAU (for Proposed only)