

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of November 10, 2022

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, November 10, 2022, at 10:00 a.m. Chairman Howard Wein presided. The following Rules Committee members were in attendance: Matt Wolford, Diana Stares, Doug Moorhead, Jean Mosites, Phil Hinerman and Tom Duncan. Also in attendance was Dawn Herb, Southcentral Regional Counsel, Department of Environmental Protection. Attending on behalf of the Environmental Hearing Board (Board) were Chief Judge and Chairman Tom Renwand, Judge Steve Beckman, Assistant Counsel Eric Delio, Assistant Counsel Alisha Hilfinger and Senior Counsel Maryanne Wesdock, who took the minutes.

Approval of Minutes:

On the motion of Ms. Mosites, seconded by Mr. Hinerman, the minutes of the September 8, 2022 meeting were approved.

Rules Committee Membership Changes:

DEP Chief Counsel Diana Stares announced that she is retiring in January 2023. She will be stepping down from the Rules Committee effective January 1, 2023. Dawn Herb, Regional Counsel of DEP's Southcentral Regional Office, has been appointed to a two-year term beginning January 1, 2023. Chief Judge Renwand and Committee Chairman Howard Wein thanked Ms. Stares for her work on the Rules Committee and recognized her long-standing service to the Commonwealth of Pennsylvania. Judge Renwand, Mr. Wein and the members of the Rules Committee extended a warm welcome to Ms. Herb.

Rules Packages 106-13 and 106-14:

Ms. Wesdock reported that Final Form Rulemaking # 106-13 became effective upon publication in the Pennsylvania Bulletin on October 22, 2022. The rule revisions implemented by #106-13 are shown in Appendix A.

Ms. Wesdock also reported that Proposed Rulemaking #106-14 was voted on by the EHB Judges at a public meeting held on October 19, 2022. The Judges approved the changes recommended by the Rules Committee with the exception of the revisions to the rule on sanctions (25 Pa. Code § 1021.161). The Judges felt that additional changes should be made to the sanctions rule and they asked the Rules Committee to conduct further review and discussion. Proposed Rulemaking #106-14 will be sent to the Office of General Counsel and the Governor's Office of Policy for review and approval before beginning the trek through the regulatory process. The rule revisions covered by Proposed Rulemaking #106-14 are shown in Appendix B.

Mr. Wein asked whether revisions to the rule on sanctions could be put forth as its own rules package, and Ms. Wesdock confirmed that it could be handled in that manner.

Ms. Mosites asked when the changes covered by Final Form Rulemaking #106-13 will appear in the Pa. Code. Ms. Wesdock stated that the changes will not appear until the next time the Code is updated but no date had been provided to the Board at that time.¹ Until that occurs, Mr. Wein suggested providing a link in the minutes to the Pennsylvania Bulletin notice regarding Final Form Rulemaking #106-13:

http://www.pacodeandbulletin.gov/secure/pabulletin/data/vol52/52-43/52_43_rr.pdf

Signing:

At the September 8, 2022 meeting Mr. Wein asked for suggestions for future agenda items. Ms. Hilfinger suggested amending the Board's rules to clarify that electronic signatures are

¹ Subsequent to the meeting, Ms. Wesdock was advised by the PA Code and Bulletin that the updates will occur in January 2023.

permitted. It is the Board's practice to allow electronic signatures but it is not clearly stated in the rules. She related an incident where a petition to substitute a party was filed and it was not clear whether the verification could contain an electronic signature. She pointed out that electronic signatures are addressed in the rule on Filing at Rule 1021.32(c)(8) which states as follows:

(8) If an electronically filed document does not bear the actual signature of the registered user, the name of the registered user under whose log-in and password the document is submitted must be preceded by "s/" and typed in the space in the document's signature block where the signature would otherwise appear (for example, "s/ Jane Doe").

However, the rule on Signing, Rule 1021.31, contains no guidance regarding electronic signatures.

Ms. Wesdock presented a draft revision to the rule on Signing, Rule 1021.31 as follows:

§ 1021.31. Signing.

(a) Every document directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name or, if a party is not represented by an attorney, shall be signed by the party. Each document must state the signer's mailing address, e-mail address and telephone number.

(a.1) Except as provided in subsection (a.2), an electronic signature is permitted on electronic filings in the following form: /s/ John L. Doe.

(a.2) A sworn affidavit must contain an actual signature.

(b) The signature to a document described in subsection (a) - **(a.2)** constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.

(c) The Board may impose an appropriate sanction in accordance with § 1021.161 (relating to sanctions) for a bad faith violation of subsection (b).

The language was adapted from Pa.R.C.P. 576.1 (Electronic Filing and Service of Legal Papers) and specifically subsection (F) dealing with signatures.

Mr. Wolford agreed with the proposed amendment. He noted that the ability to provide an electronic signature eliminates the extra step of printing a document, signing it, then scanning it. Mr. Moorhead also agreed it was a helpful clarification to the Board's rules. He suggested one change to the language prepared by Ms. Wesdock in subsection (a.2) as follows:

(a.2) A sworn affidavit ~~must contain~~ may not contain an actual electronic signature.

Mr. Wein agreed with the change proposed by Mr. Moorhead. He suggested placing the changes to the Signing rule on the Board's website as guidance until they become final rulemaking.

Mr. Delio recommended taking a look at the rule on Filing, Rule 1021.32, and specifically subsections (c)(8) and (c)(10) to ensure that they are consistent with the changes to Rule 1021.31.

Those subsections state as follows:

(8) If an electronically filed document does not bear the actual signature of the registered user, the name of the registered user under whose log-in and password the document is submitted must be preceded by "s/" and typed in the space in the document's signature block where the signature would otherwise appear (for example, "s/ Jane Doe").

* * * * *

(10) A document that is electronically filed and requires an original signature other than that of the registered user shall be maintained by counsel or, if the party is not represented, by the party itself, for 1 year after periods for appeals expire. Documents shall be maintained by the filer and produced at the request of the Board or other party within 14 days of the request.

Mr. Moorhead recommended dropping the word “actual” in (c)(8). The Committee agreed that no changes were needed to (c)(10).

Mr. Wolford felt that there was an inconsistency between Rule 1021.31 and 1021.32(c)(8). The language of 1021.32(c)(8) allows the use of “/s” where the person e-filing the document is not the actual filer, e.g. when the filer is an associate or secretary and not the attorney. He raised a question as to whether the language of Rule 1021.31 should maintain consistency with 1021.32(c)(8). Mr. Duncan read 1021.31 as applying to anyone who does not handwrite their signature, whereas 1021.32(c)(8) focuses on who is filing the document. He felt that Ms. Wesdock’s changes to 1021.31 apply to anyone who signs the document.

Mr. Wolford and Ms. Mosites recommended revising Ms. Wesdock’s language to “s/” rather than “/s/” in order to be consistent with 1021.32(c)(8). The Committee agreed.

On the motion of Mr. Moorhead, seconded by Ms. Mosites, the Committee voted in favor of the following changes to Rule 1021.31 (Signing) and Rule 1021.32 (Filing):

§ 1021.31. Signing.

(a) Every document directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name or, if a party is not represented by an attorney, shall be signed by the party. Each document must state the signer’s mailing address, e-mail address and telephone number.

(a.1) Except as provided in subsection (a.2), an electronic signature is permitted on electronic filings in the following form: *s/ John L. Doe.*

(a.2) A sworn affidavit may not contain an electronic signature.

(b) The signature to a document described in subsection (a) - **(a.2)** constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper

purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.

(c) The Board may impose an appropriate sanction in accordance with § 1021.161 (relating to sanctions) for a bad faith violation of subsection (b).

§ 1021.32. Filing.

* * * * *

(8) If an electronically filed document does not bear the **actual** signature of the registered user, the name of the registered user under whose log-in and password the document is submitted must be preceded by “s/” and typed in the space in the document’s signature block where the signature would otherwise appear (for example, “s/ Jane Doe”).

Service By a Party – Rule 1021.34:

Mr. Duncan raised an issue with Rule 1021.34 (Service by a Party) that comes up in the context of discovery. He stated that parties often choose to email written discovery to each other; however, the Board’s rules provide for electronic service only in the context of electronic filing. Since discovery is not filed with the Board, it is not covered by Rule 1021.34. He recommended adding a new subsection to Rule 1021.34 as follows:

The parties may consent to service by email for documents not filed with the Board including in the context of discovery.

Mr. Wein recommended adding the word “those” before “documents.”

Ms. Mosites agreed that it is a common practice for parties to email discovery. However, she questioned whether it required a rule change. She asked whether there have been problems in exchanging discovery in this manner. Mr. Hinerman also questioned whether a rule change was necessary. If so, he suggested the following language: “Parties may effect service by email unless

the other party objects.” Mr. Moorhead raised a concern with Mr. Hinerman’s proposed language because it would allow service by email as a default without obtaining the other party’s authorization to do so. He acknowledged that it is the Department’s practice to engage in service by email; however, he felt that it was important to consent to it ahead of time. He raised a concern that an email may not make it through a party’s spam filter and the recipient would not be aware of it if the parties had not discussed the emailing of discovery ahead of time. Mr. Wein agreed. He pointed out that there could be a problem with a very large file not going through. Mr. Moorhead stated that he was not sure that a rule was needed, but if the Committee recommended a rule, he would prefer that service by email require the consent of the parties.

Judge Beckman pointed out a similar issue with Rule 1021.33, Service by the Board. Pursuant to that rule, the Board is required to serve parties by mail when they are not registered for efilings. This generally involves pro se appellants. As a practical matter, if the Board has the appellant’s email address, the Board will send orders to that party by email. However, pursuant to Rule 1021.33(b), the Board is still required to place a copy of the order in the mail. He felt that if the rule allowed electronic service, it would be more efficient for the Board.

Returning to the issue raised by Mr. Duncan, Ms. Herb noted that the Rules of Civil Procedure allow parties to modify procedures for the purpose of discovery. She recognized that the Board is not bound by the Rules of Civil Procedure but often refers to them. She felt that where all parties agree, it makes sense to modify the rule to allow service by email. As to the question of the Board serving orders, opinions or adjudications by email, she felt that in some cases a pro se appellant may want a hard copy of the document, especially if they do not have printing capability.

Mr. Duncan noted that his recommended rule change was reflective of what the Pa. Rules of Civil Procedure allow but the Board's rules do not.

With regard to the issue raised by Judge Beckman, Mr. Wolford recommended amending Rule 1021.33(b) to state as follows:

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

No one voiced an objection to the language proposed by Mr. Wolford. Judge Beckman stated that it was important for the Board to have the ability to email a pro se party when scheduling a conference call with short notice; in such a case there would be no time to serve the party by mail. Under the Board's current rules, the Board will often email the party as a practical matter and then also put a copy of the scheduling order in the mail even though it will arrive after the date of the call.

Turning to Rule 1021.34, Filing by a Party, Mr. Wolford stated his opinion that discovery responses were not covered by Rule 1021.34 – he felt that the rule only covered the service of documents filed with the Board. He recommended changing the name of that section to “Service of Documents Filed with the Board.” Mr. Duncan agreed that if Rule 1021.34 were renamed and its scope limited to documents filed with the Board, then it would not apply to the service of discovery.

Ms. Herb noted that “electronic service” is a term defined in Rule 1021.2 (Definitions) so any rule changes may need to take that definition into consideration. Mr. Duncan felt that there was a difference between “electronic service” and “service by email.” The former applies to the

electronic service that takes place with a document that is electronically filed, whereas the latter involves an exchange of emails between parties.

Mr. Duncan agreed to draft proposed language for the next meeting. Mr. Wein suggested incorporating any changes into Prehearing Order No. 1 until such time as a rule change can be effectuated.

Remote Proceedings:

Ms. Mosites asked whether the Board is continuing to hold proceedings remotely. Judge Renwand explained that over the past several months the Board has held both in-person and remote proceedings. Ms. Wesdock discussed a settlement conference held in Pittsburgh over the course of several days. The first two days of the conference was held in person at the Board's office. The following days were held by video on Teams. She felt that it was a good experience, and the ability to hold some days of the conference by video allowed for flexibility in scheduling. Mr. Moorhead was involved in that settlement conference. He agreed that the hybrid approach worked well. He felt that it was very helpful to hold the first day of the conference in person but agreed that holding additional days by videoconference allowed for flexibility.

Mr. Delio discussed hearings held on WebEx. He explained that they are more challenging when there is a large number of exhibits but otherwise they have gone well. He noted that one advantage of hearings held on WebEx is the Board's ability to livestream them; this allows more people an opportunity to view the hearings. Judge Beckman stated that he has had a mixed experience with holding hearings remotely. He felt that remote hearings are more challenging when the hearing is document-intensive. He is open to holding hearings remotely, but he always discusses it with the parties. If the parties request a remote hearing, he is amenable to it. Judge Renwand agreed with Judge Beckman's approach – he is open to holding remote hearings when it

is agreed to by the parties. Judge Renwand noted that videoconferencing has allowed the Rules Committee to meet remotely without the need for travel. He expressed the sentiment that the more experience the Board has on Teams and WebEx, the better it works.

Judge Renwand pointed out that Mr. Delio and Judge Labuskes drafted a protocol for conducting remote hearings which is on the Board's website. Mr. Delio cautioned against putting the protocol into a rule since it contains references to technology that could change. It was agreed that more basic guidelines that do not refer to technology could be put into a rule. Mr. Hinerman reminded the group that when the Board first began to conduct remote proceedings he circulated examples of a protocol for conducting remote depositions. Ms. Wesdock stated that she would locate the materials that Mr. Hinerman provided and re-circulate them.

Ms. Mosites offered to prepare a draft rule for conducting remote proceedings. Ms. Herb directed the group to Rule 1021.114 which discusses "venue of hearings" and states as follows:

§ 1021.114. Venue of hearings.

At the discretion of the Board, hearings will be held at the Commonwealth facility nearest the location of the complaint sought to be remedied by the Department with consideration for the convenience of witnesses, the public and the parties in attending the hearings.

She felt that this might be a good place to start when incorporating any changes to the rules.

Summary Judgment:

Ms. Wesdock discussed two issues relating to summary judgment motions. First, she noted that, rather than citing to exhibits, some summary judgment briefs cite to the Statement of Undisputed Material Facts. She felt that it would be more helpful to the Board if briefs cited directly to the exhibit being relied on. Mr. Hinerman and Mr. Moorhead agreed that this change would be helpful since, in many cases, parties are not in agreement with each other's Statement of

Undisputed Material Facts. Ms. Wesdock proposed the following change to subsection (e) of Rule 1021.94a:

§ 1021.94a. Summary judgment.

(e) Brief in support of the motion for summary judgment. The motion for summary judgment shall be accompanied by a brief containing an introduction, summary of the case, ~~and~~ the legal argument supporting the motion **and citations to exhibits in the record.**

Mr. Moorhead suggested requiring the brief to cite to both exhibits in the record and the Statement of Undisputed Material Facts. Ms. Mosites agreed that the rule should be revised but she felt the proposed edits should be clearer. She felt additional editing of the rule would be helpful. She suggested that parties should be required to cite not simply to the exhibit but to the page of the exhibit upon which they are relying. Mr. Wolford recommending including a Table of Contents showing the page number of where each new exhibit begins. He explained that he attaches exhibits as an appendix to the Statement of Undisputed Material Facts and includes a Table of Contents with the appendix. Ms. Wesdock agreed with Mr. Wolford that a Table of Contents is extremely helpful when all of the exhibits are filed together as one filing; in that case, it can be cumbersome to determine where one exhibit ends and another begins. Mr. Moorhead suggested addressing this issue in subsection (i) of Rule 1021.94a which deals with “evidentiary materials.” Judge Renwand agreed with Mr. Wolford’s suggestion of a Table of Contents. He stated that in many instances parties do not follow the 30-page limit for briefs required by subsection (h) or the five-page limit for the Statement of Undisputed Material Facts required by subsection (d). He stated in some instances the Statements of Undisputed Material Facts have

been close to 20 pages and most of the “undisputed facts” are objected to. Ms. Wesdock agreed to work on new revisions for the January meeting.

Ms. Wesdock explained the second issue with Rule 1021.94a: Subsection (f) allows parties other than the moving party to support the moving party’s motion either with a letter or a memorandum of law. Where a supporting memorandum of law is filed, it gives the opposing party an additional 15 days to respond to both the motion and the supporting memorandum. However, in some instances parties file a document labeled a “memorandum” that is in actuality simply a statement that they agree with the other party’s motion for summary judgment. Mr. Delio stated that he has also seen the opposite occur: In some instances, parties file what is labeled a “letter” but it contains multiple paragraphs with citations to law. Mr. Delio and Ms. Wesdock agreed that the rule should clearly state that if a party is simply joining in another party’s motion, it should be done by letter, but if they are adding legal argument, it should be done by memorandum.

Ms. Stares suggested dividing subsection (f) into two parts: subsection (f)(1) dealing with letters, for which the opposing party receives no extension of time to respond, and subsection (f)(2), dealing with legal memoranda, for which the opposing party receives an extension of time to respond. Ms. Herb pointed out there should also be an “in-between option” in which a party does not agree with everything in the motion but does not object to the relief requested, or where a party agrees with the facts stated in support of the motion but does not agree with the consequence of those facts. Mr. Wein felt that the addition of new facts should trigger the 15-day extension. He suggested three subparts to subsection (f) – the two subparts described above by Ms. Stares plus the following: (f)(3) Where a party agrees with the relief requested but adds new facts in support of the motion, it triggers the extension of time for the opposing party to respond. Ms. Stares suggested streamlining it as follows: Subsection (f)(1) - A party may file a letter supporting

the motion or agreeing with the relief requested, which results in no extension of time to respond to the motion, and Subsection (f)(2) - A party may file a letter, memorandum of law or other filing that adds new facts or legal argument, which triggers a 15-day extension of time to respond to the motion.

Ms. Wesdock will prepare the new revisions to Rule 1021.94a, as discussed at the meeting, and circulate them prior to the January 12, 2023 meeting.

Expert Discovery and Expert Reports:

At the September 8, 2022 meeting, Mr. Moorhead stated that he would like to discuss issues pertaining to expert discovery and expert reports. Following the September 8 meeting, Ms. Wesdock sent him links to prior meeting minutes where those topics were discussed. Mr. Moorhead said that some of the issues he intended to raise had been addressed in prior meetings or in Board opinions. He planned to spend additional time reviewing prior meeting minutes and suggested tabling this discussion until the January 12, 2023 meeting.

Adjournment:

On the motion of Mr. Wolford, seconded by Ms. Stares, the meeting adjourned at 12:05 p.m. The next meeting will be held by videoconference on January 12, 2023.

Appendix A

EHB Final Form Rulemaking effective October 22, 2022

§ 1021.21. Representation.

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

(c) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel if the Board determines that they are not merely appearing on their own behalf.

(d) Parties may be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion *pro hac vice* filed by a Pennsylvania attorney.

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

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

(c) *Electronic filing*

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

Comment: Attorneys and *pro se* appellants who register for electronic filing may not WILL BE UNABLE TO file electronically until they receive a confirmation email advising them

that they have been approved for electronic filing. If registration occurs during non-business hours, the confirmation will not occur until the next business day. Until such confirmation occurs, a registrant ~~must file~~ HAS THE OPTION OF FILING by means other than electronic filing to ensure timely filing.

§ 1021.34. Service by a party.

(a) Notices of appeal shall be served as provided in § 1021.51[(h)] (relating to commencement, form and content). Complaints filed by the Department will be served as provided in § 1021.71(b) (relating to complaints filed by the Department).

§ 1021.35. Date of service.

(b) For the sole purpose of computing the deadlines under this chapter for responding to documents:

(3) Documents served by mail shall be deemed served 3 **calendar** days after the date of actual service.

**FORMAL PROCEEDINGS
APPEALS**

§ 1021.51. Commencement, form and content.

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

§ 1021.53a. Nunc pro tunc appeals.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(b) A person seeking to appeal nunc pro tunc shall file a petition to appeal nunc pro tunc. If filed after a dispositive motion that seeks to dismiss an appeal as untimely, the filing of the petition stays the deadlines for filing a response or reply concerning the motion. The Board will issue deadlines for filing a response and reply if the Board grants the petition and the dispositive motion addresses issues in addition to untimeliness.

(c) The petition to appeal nunc pro tunc shall comply with the requirements set forth for “motions” at § 1021.91, and, in addition, shall include the following:

(1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.

(2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

(3) Copies of all documents and a list of all witnesses that the potential appellant relies upon in support of the petition to appeal nunc pro tunc.

(4) Any legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.

(5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of such person or persons, that the facts are verified as true and correct subject to the penalties for Unsworn Falsification to Authorities, pursuant to 18 Pa.C.S.A. § 4904 of the Crimes Code.

(6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in (5), above, an explanation of why the affidavit or verification was omitted.

(d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for “responses” at § 1021.91. Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.

(e) A memorandum of law in support of the petition or response may be filed with the petition or response.

(f) The potential appellant may not file a reply unless the Board orders otherwise.

(g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate.

(h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.

(i) If the petition to appeal nunc pro tunc is denied, the notice of appeal will be dismissed as untimely.

MOTIONS

§ 1021.94a. Summary judgment motions.

(h) *Length of brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion may not exceed 30 pages. **If the Board grants leave to file a brief in excess of 30 pages, the brief shall contain a table of contents.**

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.106. Voluntary mediation.

(d) At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, [which sets forth the history of mediation activities conducted] **setting forth whether the mediation has been successful or has a likelihood of success if the mediation process continues to proceed.** The parties may request an additional stay if necessary to complete the mediation process.

POSTHEARING PROCEDURES

§ 1021.131. Posthearing briefs.

(a) The initial posthearing brief of each party shall contain **a table of contents,** proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law.

Appendix B

EHB Proposed Rulemaking 106-14

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:

Department - The Department of Environmental Protection or other ~~boards, commissions or agencies~~ **governmental entities** whose decisions are appealable to the Board.

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

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.**

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§ 1021.5 Citations to Board Decisions

(a) Citations to Environmental Hearing Board decisions in briefs, legal memoanda, 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. For example: *Name of Appellant v. DEP*, 2021 EHB 43. Pincites should be in the following format: *Name of Appellant v. DEP*, 2021 EHB 43, 45.

(b) Only where the Environmental Hearing Board Reporter has not yet been published for a particular year, the citation shall be to the slip opinion which can be found at the Board's website, and includes the names of the parties, the docket number, the type of decision being issued (i.e., Adjudication or Opinion) and the date of issuance. For example: *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 Lexis/Nexis and Westlaw are permissible.

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FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content [of Notice of Appeal]

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

(1) *Electronic filing.*

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(iv) ~~In a third party appeal,~~ 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, a **“potentially adversely affected person”** recipient of the action includes the following:

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

(2) ~~Any affected municipality, its municipal authority and the proponent of the decision, 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),~~ **any affected municipality, its municipal authority, the proponent of the request, when applicable, and any municipality or municipal authority whose official plan may be affected by the decision or a decision of the Board in the appeal.** [approved at meeting of March 23, 2022]

(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 **persons** parties as ordered by the Board. [approved at meeting of March 23, 2022]

(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). [approved at meeting of March 23, 2022]

(j) Other ~~potentially adversely affected~~ **persons** recipients of an action under subsection (h)(2) ~~or (3) or (h)(4)~~ may intervene as of **right** course 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 (h)(4), above, shall be in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4).** [approved at meeting of March 23, 2022]

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).

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SUPERSEDEAS

§ 1021.61. General (Supersedeas)

(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 of reopening the record in accordance with § 1021.133.**

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CONSOLIDATION, INTERVENTION AND SUBSTITUTION OF PARTIES

§ 1021.81. Intervention

* * * * *

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.

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MOTIONS

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§ 1021.92. Procedural Motions

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

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§ 1021.94a. Summary judgment motions.

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(g)(2) Any response must include a citation to the portion of the record [controverting] **controverting** a material fact.

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POSTHEARING PROCEDURES

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§ 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.

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ATTORNEY FEES AND COSTS AUTHORIZED BY STATUTE

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§ 1021.182. Application for costs and fees.

(a) **If statutorily authorized, a party may initiate a request for costs and fees by filing a fee application with the Board.** [A request for costs and fees] **The fee application** shall conform to any requirements set forth in the statute under which costs **and fees** are being sought **and §§ 1021.181-1021.191.**

(b) [A request for costs and fees] **A fee application** shall be [by] verified [application] **by the applicant**, [setting] **and shall set** forth sufficient grounds to justify the award, including the following:

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

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

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

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

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

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

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

ATTORNEY COSTS AND FEES UNDER MORE THAN ONE STATUTE

§ 1021.191. Application for [counsel] 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 [application] **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.**