

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of January 12, 2023

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference on Thursday, January 12, 2023 at 9:30 a.m. Chairman Howard Wein presided. The following Rules Committee members were in attendance: Vice Chair Phil Hinerman, Brian Clark, Gail Conner, Matt Wolford, Doug Moorhead, Tom Duncan and Dawn Herb. Attending on behalf of the Environmental Hearing Board (Board) were Chief Judge and Chairman Tom Renwand; Judges Steve Beckman and Sarah Clark; and Board Counsel Eric Delio, Alisha Hilfinger and Maryanne Wesdock, who took the minutes. Mr. Wein welcomed Sarah Clark to the Board.

Approval of Minutes of Meeting of November 10, 2022:

Mr. Wein noted two corrections to the minutes of November 10, 2022. With those corrections the minutes were approved on the motion of Mr. Moorhead, seconded by Mr. Wolford.

March 9, 2023 Meeting Time Change:

Due to travel, Mr. Wein requested a change in the start time of the March 9, 2023 meeting. The Committee agreed to move the start time to **11:00 a.m.**

Rules Package 106-14:

Ms. Wesdock reported on edits to Proposed Rulemaking 106-14 by the Office of General Counsel (OGC).¹ After approval by OGC and the Governor's Policy Office, the rules package will be submitted to the Office of the Attorney General for review and approval. After those steps

¹ Proposed Rulemaking 106-14, containing edits by OGC, is included herein as Appendix A. The proposed rulemaking was sent back to OGC for further review on January 26, 2023 and was approved on February 21, 2023. The proposed rulemaking was sent to the Governor's Policy Office on February 21, 2023 and Ms. Wesdock spoke to a representative of the Policy Office on February 22, 2023.

are complete the rules package will be submitted as proposed rulemaking to the legislative committees and the Independent Regulatory Review Commission (IRRC) and to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

Service By a Party and By the Board:

Based on the discussion at the November 10, 2022 meeting regarding the Board’s rules on service, Mr. Duncan proposed the following revisions:

§ 1021.33. Service by the Board.

(a) The Board will serve the orders, notices and other documents it issues upon counsel designated on the docket. For any parties not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons 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 service by e-mail**.

(c) An order filed electronically without the original signature of an administrative law judge has the same force and effect as if the administrative law judge had affixed a signature to a paper copy of the order.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 1021.34. Service **of documents filed with the Board 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).

(b) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented

by an attorney in the matter before the Board shall be made by serving the attorney.

(c) Electronic service of documents to other registered users through the electronic filing provider shall be considered valid and effective service and have the same legal effect as serving an original paper document. Registered users who receive documents by electronic service shall access the documents using the electronic filing provider.

(d) Documents filed electronically shall be served by hand, mail, other personal delivery or facsimile upon parties who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing), **unless the party consents to service by e-mail.**

(e) Subpoenas and documents that must be conventionally filed with the Board under § 1021.32(b) shall be served by hand, mail or other personal delivery. Documents that are conventionally or facsimile filed with the Board under § 1021.32(a) shall be served by hand, mail, other personal delivery or facsimile.

(f) If a party does not receive electronic service in a matter involving a request for expedited disposition, service shall be made upon that party within 24 hours of filing the document with the Board. For purposes of this subsection, service means actual receipt by the party served.

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile by 4:30 p.m. on the business day following notification of the deficiency. The filer may also effect service by e-mail, provided the registered user consents to service in that manner.

(h) The filing of a registration statement constitutes a certification that the registered user will accept electronic service of documents permitted to be electronically filed.

(i) Subsections (a)—(h) supersede 1 Pa. Code § 33.32 (relating to service by a participant).

§ 1021.35. Date of service.

(a) For electronic service, the date of service of a document is the date that the electronic filing provider transmits the notice of electronic filing. For other types of service, the date of service is the date the document served is mailed, **e-mailed**, delivered in person or transmitted to the party's facsimile line.

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

(1) Documents served by electronic service shall be deemed served, for purposes of responding, when notice of the electronic filing is transmitted to registered users in the proceeding, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by electronic service shall be deemed served the next business day.

(2) Documents served by facsimile shall be deemed served, for purposes of responding, when transmission of the facsimile is complete, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by facsimile shall be deemed served the next business day.

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

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.34 (relating to date of service).

Mr. Duncan pointed to Pa.R.C.P. 205.4 which authorizes the electronic filing and service of legal papers. Subsection (g) of the rule states that legal papers may be served by electronic transmission, including by email. See Pa.R.C.P. 205.4(g)(1)(ii) and (g)(2)(i). The Note to the rule states as follows:

Upon the electronic filing of a legal paper other than original process, the electronic filing system may automatically send notice of the filing to all parties who have agreed to service by electronic transmission *or whose e-mail address is included on an appearance or prior legal paper filed in connection with the action.*

Note, Pa.R.C.P. 205.4 (emphasis added).

Mr. Delio noted that Board Rule 1021.35(b) outlines service by various means. He recommended adding “service by email” to the list. Ms. Herb suggested placement of that language in subsection (b)(2). Mr. Duncan agreed and suggested the following revision:

§ 1021.35. Date of service.

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

(1) Documents served by electronic service shall be deemed served, for purposes of responding, when notice of the electronic filing is transmitted to registered users in the proceeding, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by electronic service shall be deemed served the next business day.

(2) Documents served by facsimile **or email** shall be deemed served, for purposes of responding, when transmission of the facsimile is complete, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by facsimile shall be deemed served the next business day.

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With regard to the proposed revision to Board Rule 1021.33 (Service by the Board), Judge Beckman stated that he would like to have a statement on the record evidencing that a party has agreed to service of Board orders, opinions and other documents by email. He suggested the issuance of an order acknowledging that the Board has received a party’s consent for service by email.

Mr. Duncan will finalize the proposed revisions for a vote at the March 9, 2023 meeting.

Summary Judgment:

At the November 10, 2022 meeting, Ms. Wesdock raised two issues regarding the Board’s rule on summary judgment - Rule 1021.94a:

- 1) Some summary judgment briefs cite only to the Statement of Undisputed Material Facts, rather than to exhibits upon which the party is relying.
- 2) There has been confusion about the filing of a memorandum of law in support of another party's summary judgment motion pursuant to Rule 1021.94a(f).

Based on the discussion of this topic at the November 10, 2022 meeting, Ms. Wesdock proposed the following revisions:

§ 1021.94a. Summary judgment motions.

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Pa.R.C.P. Rules 1035.1—1035.5.

(b) *Summary judgment motion record.*

(1) A summary judgment motion record must contain the following separate items:

- (i) A motion prepared in accordance with subsection (c).
- (ii) A statement of undisputed material facts in accordance with subsection (d).
- (iii) A supporting brief prepared in accordance with subsection (e).
- (iv) The evidentiary materials relied upon by the movant.
- (v) A proposed order.

(2) Motions and responses must be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service by a party).

(c) *Motion.* A motion for summary judgment must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(d) *Statement of undisputed material facts.* A statement of undisputed material facts must consist of numbered paragraphs and contain only those material facts to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation must identify the document and specify

the paragraphs and pages or lines thereof or the specific portions of exhibits relied on. The statement of undisputed material facts, absent the portions of exhibits and affidavits relied upon, may not exceed five pages in length unless leave of the Board is granted.

(e) *Brief in support of the motion for summary judgment.* The motion for summary judgment shall be accompanied by a brief containing ~~an introduction,~~ a summary of the case and the legal argument supporting the motion. **The brief shall contain citations to the statement of undisputed material facts and to specific pages of exhibits in the record that are relied upon in support of the motion.**

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file **a memorandum of law one of the following** within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first:

(1) A letter supporting the motion and/or agreeing with the relief requested in the motion, or

(2) A letter, memorandum of law or other filing that adds new legal argument. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(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 **pursuant to section (f)(2) 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 citation to the portion of the record 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.

(3) A brief containing the legal argument in opposition to the motion **and citations to both the statement of undisputed material facts and to specific pages of exhibits in the record on which the opposing party relies.**

(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.

(i) *Evidentiary materials.* Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment or response must accompany the motion or response and be separately bound and labeled as exhibits. Affidavits must conform to Pa.R.C.P. 76 and 1035.4 (relating to definitions; and affidavits). **If the exhibits are filed as one document, the document shall be Bates stamped and include a table of contents.**

(j) *Proposed order.* The motion must be accompanied by a proposed order.

(k) *Reply brief.* Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file a reply brief. The reply brief may not exceed 15 pages unless leave of the Board is granted. Additional briefing may be permitted at the discretion of the Board.

(l) *Summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(m) *Judgment rendered.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.

The Committee first reviewed the proposed changes to subsections (e), (g)(3) and (i) regarding the requirement of citing to exhibits in the record. In subsection (i), Mr. Moorhead proposed replacing “Bates stamped” with “numbered” since the term “Bates stamped” may be unfamiliar to pro se appellants.

A general discussion ensued regarding the Statement of Undisputed Material Facts. A number of committee members raised a concern that such statements often include facts that are, in fact, disputed. Judge Renwand provided the background of the rule. He stated that the purpose of requiring parties to include a Statement of Undisputed Material Facts with the filing of a summary judgment motion was to ensure that the matter was appropriate for summary judgment consideration. Where material facts are in dispute, summary judgment cannot be granted. It was believed that requiring a Statement of Undisputed Material Facts would cut down on the number of frivolous summary judgment motions filed.

Mr. Hinerman observed that, rather than cutting down on the number of frivolous summary judgment motions filed, parties often file Statements of Undisputed Material Facts that include facts that are clearly in dispute. He felt that it is unethical to represent that a material fact is undisputed when a party is aware that it is disputed. He suggested that sanctions should be imposed in such instances. Mr. Moorhead felt that the 5-page limit for a Statement of Undisputed Material Facts should act as a check on ensuring that only undisputed facts are included. Where a Statement

of Undisputed Material Facts is over the 5-page limit, he stated that the Department considers filing a motion to strike. Mr. Hinerman pointed out that the only way to dispute facts set forth in a party's Statement of Undisputed Material Facts is to file one's own Statement of Undisputed Material Facts. Mr. Moorhead suggested requiring consultation with opposing parties before filing a Statement of Undisputed Material Facts, similar to the procedure for filing stipulated facts in a prehearing memorandum. Mr. Hinerman agreed with Mr. Moorhead's suggestion. Judge Renwand expressed concern that a party may unreasonably refuse to agree to the undisputed facts put forth by a moving party, which would then limit the moving party's ability to file for summary judgment. Ms. Herb agreed with Mr. Moorhead's suggestion and pointed out that the rule should require consultation, not necessarily consent. She felt that requiring consultation among the parties would limit the Statement of Undisputed Material Facts to only those facts that a moving party feels are likely to be undisputed. Mr. Clark agreed with the issues set forth by Mr. Hinerman and stated that he has experienced similar issues in his practice.

Mr. Hinerman suggested the following language: "Parties shall consult and attempt to agree on a Statement of Undisputed Material Facts." Until a rule change can be adopted, Mr. Moorhead suggested including this language in Pre-Hearing Order No. 1.

Judge Beckman stated that he has received Statements of Undisputed Material Facts that go beyond the 5-page limit; in those situations, the opposing party's response often admits to certain stated facts and denies the rest. When he reviews a motion for summary judgment and responses, he cross references the Statement of Undisputed Material Facts and responses thereto and determines whether there are a sufficient number of undisputed material facts to decide the motion. He stated that he would like to see fewer frivolous motions for summary judgment but would like to think about the mechanism for achieving it. He would like to see parties focus on

the facts in the Statement of Undisputed Material Facts and save the advocacy for their briefs. Mr. Wein felt that the revisions proposed by Ms. Wesdock could help achieve that goal because it would require parties to cite to the record when relying on facts in support of their argument.

Mr. Wolford suggested striking a proposed fact where there is no citation to the record. He felt that where parties cannot agree on the facts set forth in a Statement of Undisputed Material Facts then the matter is not appropriate for summary judgment. Mr. Hinerman agreed with Mr. Wolford. He agreed with the language proposed by Ms. Wesdock but felt that the rule should go further. He felt that the rule should provide for sanctions, including striking a party's Statement of Undisputed Material Facts, where the Statement contains disputed facts. Mr. Clark agreed with Ms. Wesdock's proposed language and Mr. Hinerman's suggested revision. He felt that Mr. Hinerman's proposal highlights the requirement that a Statement of Undisputed Material Facts should contain only undisputed facts and provides the Board with a means of ensuring compliance.

Ms. Wesdock went on to explain the proposed revisions to subsections (f) and (g). Since the type of document that is filed in support of another party's motion for summary judgment affects the timeframe for responding to the motion, the Board wants to ensure that the document is correctly labeled.

In (f)(2), Judge Beckman suggested deleting "a letter." In that same section, Mr. Moorhead asked what was meant by "other filing." Ms. Wesdock stated that no other filing than a memorandum of law was contemplated and, therefore, the Committee agreed that (f)(2) should simply state "memorandum of law that contains new legal argument."

Mr. Wein suggested holding off on voting on the proposed changes until the Committee had an opportunity to further discuss the issue raised by Mr. Hinerman regarding sanctions for filing a Statement of Undisputed Material Facts containing disputed facts.

Ms. Wesdock will make the revisions discussed at the meeting and circulate the language prior to the next meeting.

Remote Proceedings:

At the November 10, 2022 meeting, 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 suggested making changes to that rule. Because Ms. Mosites was unable to attend the January 12, 2023 meeting, this topic was tabled until the March 9, 2023 meeting.

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 re-circulated the materials prior to the meeting. Mr. Hinerman asked the group whether they thought it would be helpful to post guidance on the Board’s website regarding remote depositions. He felt that guidance would be more appropriate than revising the Board’s rules. Mr. Wolford agreed that a guidance document was more appropriate than a rule change.

Judge Renwand stated that a significant percentage of practitioners before the Board are interested in holding remote hearings or adopting a hybrid approach that allows some live testimony and some testimony by video. He felt that the topic of remote hearings should be addressed in a rule rather than simply in a guidance document. He acknowledged that for witnesses who will testify for only a short period of time, it makes sense to schedule their testimony by video. As for Mr. Hinerman’s question of whether guidance is needed for remote depositions, Judge Renwand felt that the issue could be placed on hold and revisited if there appears to be a need for it.

The Committee reviewed a draft of a rule change prepared by Ms. Mosites. In an email prior to the meeting, Ms. Mosites asked whether the rule could refer to the protocol on remote

hearings currently posted on the Board's website. Ms. Wesdock checked with the Office of General Counsel who said that IRRC would not approve a rule that refers to an outside document since that document could be changed without any oversight. Ms. Herb pointed out that even if the protocol on remote hearings could not be referenced in a rule, it could nonetheless be referenced in a Board Order.

Next Meeting:

The next meeting of the Rules Committee will take place on March 9, 2023 beginning at 11:00 a.m. The Committee will continue its discussion of the following topics: 1) changes to the Board's rules on service (Mr. Duncan); 2) changes to the Board's rule on summary judgment (Ms. Wesdock and Mr. Hinerman); 3) remote proceedings (Ms. Mosites and Mr. Hinerman).

Adjournment:

On the motion of Mr. Wolford, seconded by Mr. Hinerman, the meeting adjourned at 11:15 a.m.

Appendix A
EHB Proposed Rulemaking 106-14

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:

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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.

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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.**

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

Supersedeas—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.

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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] 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.**

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(2) *Conventional filing.*

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(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.**

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(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 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] 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.

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(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.**

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CONSOLIDATION, INTERVENTION AND SUBSTITUTION OF PARTIES

§ 1021.81. Intervention.

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[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.

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(e) **[Requests for extensions or continuances,] All procedural 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) *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.

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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.

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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(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.] (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.