

PROPOSED RULEMAKING

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) proposes to amend Chapter 1021 (relating to practice and procedure) 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 Environmental Hearing Board Rules Committee (Rules Committee) at its public meeting on October 19, 2022, and voted to adopt all but one recommendation as set forth in section E of this preamble.

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) (35 P.S. § 7515(c)) to adopt regulations pertaining to practice and procedure before the Board.

Additionally, with regard to the proposed amendments 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 27 Pa.C.S. § 7708 (relating to costs for mining proceedings).

D. *Background and Purpose*

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

E. *Summary of Proposed Regulations*

§ 1021.2. *Definitions*

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

“Department” is proposed to be amended to replace “boards, commissions or agencies” with the more comprehensive and inclusive term “government entities.”

“Permittee” is proposed to be amended to clarify that anyone who has been issued a permit, license, approval or certification by the Department 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 is proposed to be amended 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.

§ 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.

§ 1021.51. *Commencement, form and content*

The amendments to § 1021.51 (relating to commencement, form and content) 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 as follows.

The amendments 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, Walter Schneiderwind, who had filed a complaint with the 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 Walter Schneiderwind’s water supply. Walter Schneiderwind appealed the Department’s decision to the Board and, after a hearing on the merits, the Board found in favor of Walter 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 Walter Schneiderwind without Delaware Valley being a party to the action. Despite the fact that Delaware Valley was aware of Walter 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 under § 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 these 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 amendments to § 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 proposes to amend § 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 previously described in the *Schneiderwind* case.

The term "third-party appeal" is proposed to be deleted from § 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) is proposed to be amended to define "potentially adversely affected person." Subsections (h)(1)—(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 Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 or 750.7); 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) is proposed to be 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 Pennsylvania Sewage Facilities Act. Subsection (h)(4) is proposed to be amended to clarify that the Board may order service on an interested "person" (not a party).

Section 1021.51(j) is proposed to be amended 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 under § 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" under (h)(4) may be permitted to intervene as of right at the discretion of the Board.

The Comment to § 1021.51 is proposed to be 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.

§ 1021.61. General

A reference is proposed to be added to § 1021.61 (relating to general) to clarify that when the record is reopened after a supersedeas hearing, it is governed by § 1021.133 (relating to reopening of record prior to adjudication).

§ 1021.63. Circumstances affecting grant or denial

Section 1021.63(a)(3) is proposed to be amended 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.

§ 1021.81. Intervention

A comment is proposed to be added to § 1021.81 (relating to intervention) 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 under § 1021.51(j).

§ 1021.92. Procedural motions

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

§ 1021.94a. Summary judgment motions

This section is proposed to be amended to correct a typographical error.

§ 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 is proposed to be 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.

§ 1021.161. Sanctions

A majority of the Rules Committee recommended amending § 1021.161 (relating to 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.

Attorney costs and fees authorized by statute (§§ 1021.181—1021.184)

At the January 16, 2020, meeting of the 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 proposed to be amended to clarify the process for seeking costs and fees and responding to applications for costs and fees. The proposed amendments to the 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 proposed amendments further specify what information must be provided in response to an application for costs and fees. Finally, the proposed amendments clarify the process that the Board will follow when an application for fees and costs is filed.

The proposed amendments make the following changes to the rules:

Section 1021.182 (relating to application for costs and fees) is proposed to be 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 is proposed to be further amended 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 proposed 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 (relating to response to fee application) is proposed to be 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 (relating to 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 7 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.

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

This section is proposed to be amended to be consistent with previous §§ 1021.181—1021.184 and to clarify that applications for costs and attorney fees filed under more than one statute should comport specifically with § 1021.182.

Detailed discussions of the proposed amendments to §§ 1021.181—1021.184 and 1021.191 can be found in the Rules Committee meeting minutes from January 2020 through November 2020 on the Board's web site under "EHB 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 amendments will require no additional paperwork.

H. *Sunset Review*

These regulations will be reviewed on an ongoing basis by the 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 65 Pa.C.S. § 704 (relating to open meetings) a quorum of the Judges of the Board voted to adopt the previously-described proposed rules at a public meeting held on October 19, 2022, at 2:30 p.m. by 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 comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor.

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

STEVEN C. BECKMAN,
Chairperson

Fiscal Note: 106-14. No fiscal impact; recommends adoption.

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.

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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.

* * * * *

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.

(Editor’s Note: Section 1021.5 is proposed to be added and is printed in regular type to enhance readability.)

§ 1021.5. Citations to Board decisions.

(a) Citations to 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 web site. 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 on the Board’s web site. The citation shall include the names of the parties, the docket number, the type of decision being issued (that is, 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.

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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.

(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.] A potentially adversely affected person 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.

(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 or 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)] subsection (h)(2) or (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 subsection (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 (relating to reopening of record prior to adjudication).

§ 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).] Section 1021.51(j) (relating to commencement, form and content) allows certain potentially adversely affected persons, as that term is defined in § 1021.51(h), 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] 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.

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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] COSTS AND FEES** 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, 1021.183, 1021.184 and 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 purpose of establishing the number of hours an attorney or consultant/expert witness worked under subsection (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 under § 1021.184(c) (relating to disposition of fee application).** **[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 7 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 [FEES AND COSTS] 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 (relating to application for costs and fees).

[Pa.B. Doc. No. 23-789. Filed for public inspection June 16, 2023, 9:00 a.m.]