

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedure) to read as set forth in Annex A. The amendments to Chapter 1021 modify the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the final regulations at its meeting on August 3, 2021.

Effective Date

This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

Contact Person

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board at mwesdock@pa.gov, (412) 565-5245, or Suite 310, Piatt Place, 301 Fifth Avenue, Pittsburgh, PA 15222. If information concerning this notice is required in an alternative form, contact Christine Walker, Secretary to the Board, at christiwal@pa.gov or (814) 871-2573. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

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.

Comments and Revisions to Proposed Rulemaking

The proposed rulemaking amendments were adopted by the Board at its meeting of December 4, 2019, and published at 51 Pa.B. 2166 (April 17, 2021), with a 30-day public comment period. A comment was submitted by the Independent Regulatory Review Commission (IRRC). The comment and the Board's response were discussed at a public meeting of the Board's Rules Committee held by videoconference on July 8, 2021. In response to the comment received on the proposed rulemaking, a draft final-form rulemaking was prepared. A summary of the comment and Board's response is set forth as follows:

§ 1021.32. Filing

IRRC questioned the Board's decision to add a comment to § 1021.32 (relating to filing) notifying attorneys and pro se appellants who register for electronic filing (eFiling) that they may not eFile until their registration has been approved by the Board. IRRC noted that for the provision to be binding and enforceable, it was required to be part of the regulation, not a comment. IRRC suggested that the Board consider adding the provision to this final-form rulemaking or explain why it was unnecessary to do so. In response, the Board explained that the comment was meant to be explanatory, not directive, and was intended to notify eFiling registrants that if they register during non-business hours, they will be unable to access the eFiling system until the registration is ac-

cepted on the next business day. The Board agreed with IRRC that the comment, as drafted, appeared to provide a directive to registrants to abstain from eFiling until their registration is accepted. Therefore, it redrafted the comment to clarify that the comment was simply intended to notify registrants that they will not be able to access the eFiling system until their registration has been accepted; acceptance of the eFiling registration is a ministerial function performed by staff during business hours.

Sunset Date

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an ongoing basis by the Board and the Rules Committee.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 26, 2021, the Board submitted a copy of the notice of proposed rulemaking, published at 51 Pa.B. 2166, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board shall submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, no comments were received from either of the legislative committees or the public regarding the proposed regulations.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 15, 2021, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 16, 2022, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law, and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) These regulations are necessary and appropriate for administration of the act.

Order

(1) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.21, 1021.32, 1021.34, 1021.35, 1021.51, 1021.53a, 1021.94a, 1021.106 and 1021.131 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(2) The Chairperson of the Board shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel for review and approval as to legality and form, as required by law.

(3) The Chairperson of the Board shall submit this order and Annex A to the House Environmental Re-

sources and Energy Committee, the Senate Environmental Resources and Energy Committee, and IRRC, as required by law.

(4) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

THOMAS W. RENWAND,
Chairperson and Chief Judge

(Editor’s Note: See 52 Pa.B. 3740 (July 2, 2022) for IRRC’s approval order.)

Fiscal Note: Fiscal Note 106-13 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND PROCEDURE

PRELIMINARY PROVISIONS

REPRESENTATION BEFORE BOARD

§ 1021.21. Representation.

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(b) Corporations shall be represented by an 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.

(c.1) 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 an attorney in this Commonwealth.

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

Comment: Payment of the Interest on Lawyers Trust Account fee under 204 Pa. Code § 81.505(a) (relating to fees) is not required as a condition to pro hac vice admission in a proceeding before the Board.

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

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(c) *Electronic filing*

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(11) Documents may be electronically filed in 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.

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(f) *Format of filing.* Failure to comply with subsection (c)(5), (d)(5) or (e)(4) will not result in dismissal of a filing, but the Board may request that the party resubmit the document in proper form.

Comment: Attorneys and pro se appellants who register for electronic filing 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 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 (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).

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§ 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:

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

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FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

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(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 in the attorney’s individual name or by the appellant(s).

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§ 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” under § 1021.91 (relating to general), 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) 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 the person or persons, that the facts are verified as true and correct subject to the penalties for unsworn falsification to authorities, under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

(6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in paragraph (5), 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" under § 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.

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(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.

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PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.106. Voluntary mediation.

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(d) At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, 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.

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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.

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