

TITLE 315 OFFICE OF ENVIRONMENTAL ADJUDICATION

ARTICLE 1. ADJUDICATORY PROCEEDINGS BEFORE ENVIRONMENTAL LAW JUDGES

Rule 1. General Provisions

315 IAC 1-1-1 Applicability

Authority: IC 4-21.5-3-35; IC 4-21.5-7-7

Affected: IC 4-21.5-7-3; IC 13-11-2; IC 13-19; IC 14-10-2-2.5

Sec. 1. (a) The procedural requirements established by this rule shall apply to all proceedings governed by IC 4-21.5-7-3 for which an environmental law judge in the office of environmental adjudication is the ultimate authority, including adjudicatory hearings required to implement the following:

(1) Air pollution control laws, water pollution control laws, environmental management laws, solid waste and hazardous waste control laws, and financial assurance board laws.

(2) Rules of the following:

(A) The air pollution control board.

(B) The water pollution control board.

(C) The solid waste management board.

(D) The financial assurance board.

(3) Any other decision of the commissioner for which appeal under IC 4-21.5 is specifically provided.

In conjunction with 312 IAC 3-1, this rule also governs a proceeding consolidated with the natural resources commission, division of hearings under IC 14-10-2-2.5(b).

(b) Procedural questions arising at any stage of the proceeding that are not addressed in these rules shall be resolved at the discretion of the presiding environmental law judge. (*Office of Environmental Adjudication; 315 IAC 1-1-1; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3732; errata, 21 IR 4215; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Apr 3, 2009, 2:09 p.m.: 20090429-IR-315080689FRA*)

315 IAC 1-1-2 Applicable provisions of the code of judicial conduct to environmental law judges

Authority: IC 4-21.5-7

Affected: IC 4-21.5-7-6

Sec. 2. (a) The following definitions apply throughout this section:

(1) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through January 1, 2006).

(2) "Environmental law judge" means an environmental law judge for the office of environmental adjudication.

(b) This section is intended to assist with the implementation of IC 4-21.5-7-6(b)(3) applicable to environmental law judges, which requires their compliance with the applicable provisions of the code of judicial conduct.

(c) For purposes of this section, wherever in the code of judicial conduct the term:

(1) "court personnel" or a term of similar application is used, the term applies to an employee, other than an environmental law judge, of the office of environmental adjudication; and

(2) "judge" is used, the term applies to an environmental law judge.

(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an environmental law judge. These provisions shall be liberally construed to implement the intention of IC 4-21.5-7-6.

(e) The following provisions of the code of judicial conduct are inapplicable to an environmental law judge:

(1) Canon 3B(11) and 3B(13).

(2) Canon 4C.

(3) Canon 4G, to the extent that the practice of law in a representational capacity on a pro bono publico basis pursuant to the Indiana Rules of Professional Conduct, Rule 6.1 is prohibited. Such practice of law shall, however, be conducted subject to all applicable requirements of the code of judicial conduct.

(4) Canon 4H(2).

(5) Canon 5A(3), 5A(4), 5B(1), 5C, 5D, and 5F.

(*Office of Environmental Adjudication; 315 IAC 1-1-2; filed Jan 26, 2007, 10:53 a.m.: 20070214-IR-315060091FRA*)

Rule 2. Definitions

315 IAC 1-2-1 Definitions

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-1-4; IC 4-21.5-3-27; IC 13-11-2-51; IC 13-17-1; IC 13-18-1; IC 13-19-2; IC 13-23-11; IC 14-10-1; IC 14-10-2-2

Sec. 1. In addition to the definitions in IC 4-21.5-1, the definitions in this section apply throughout this title:

(1) "Administrative law judge" or "ALJ" means a person appointed by the natural resources commission under IC 14-10-2-2 to function as an administrative law judge under IC 4-21.5.

(2) "Board" means a board established or created under IC 13-17-1, IC 13-18-1, IC 13-19-2, or IC 13-23-11.

(3) "Commissioner" means the commissioner of the agency or the commissioner's designee.

(4) "Confidential information" means any information that:

(A) is entitled to treatment as; or

(B) has been determined to be;

confidential information under 326 IAC 17.1, 327 IAC 12.1, or 329 IAC 6.1 and includes any information submitted to the office under claim of confidentiality during the pendency of a final determination of the claim.

(5) "Decision" means an agency action as prescribed by IC 4-21.5-1-4 of the department.

(6) "Department" has the meaning set forth in IC 13-11-2-51.

(7) "Director" means the director of the office.

(8) "Division of hearings" means the division established by IC 14-10-2-2.

(9) "Electronic facsimile transmission" or "fax" means a method of transmitting and receiving information in eight and one-half (8 1/2) inch by eleven (11) inch paper medium over telephone lines or other forms of electronic transmissions available to the office.

(10) "Environmental law judge" or "ELJ" means an individual acting in the capacity of an administrative law judge in a proceeding under IC 4-21.5.

(11) "Final order" means an order of the ELJ, acting as ultimate authority, disposing of the proceeding prescribed by IC 4-21.5-3-27.

(12) "Natural resources commission" means the commission established under IC 14-10-1.

(13) "Office" means the office of environmental adjudication.

(14) "Presiding environmental law judge" means the environmental law judge assigned by the director to preside over a particular proceeding.

(Office of Environmental Adjudication; 315 IAC 1-2-1; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3732; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 469; filed Apr 3, 2009, 2:09 p.m.: 20090429-IR-315080689FRA)

Rule 3. Rules of Practice

315 IAC 1-3-1 Powers and duties of the director, presiding environmental law judge, and office of environmental adjudication

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5; IC 5-14-3-8; IC 14-10-2-2.5

Sec. 1. (a) An ELJ shall do the following:

(1) Conduct a fair and impartial proceeding.

(2) Maintain an accurate and complete record.

(3) Adjudicate all issues necessary for resolution of the matter.

(4) Avoid delay.

(b) The ELJ shall have authority to do the following:

(1) Conduct administrative hearings under the following:

(A) IC 4-21.5.

- (B) This article.
- (2) Rule upon the following:
 - (A) Motions.
 - (B) Requests.
 - (C) Offers of proof.
- (3) Dispose of procedural requests.
- (4) Issue all necessary orders.
- (5) Administer oaths and affirmations.
- (6) Consider affidavits submitted by the parties.
- (7) Examine witnesses.
- (8) Admit:
 - (A) purported scientific evidence; and
 - (B) related opinions;into evidence in accordance with applicable Indiana trial rules on admissibility of testimony by experts.
- (9) Allocate among the parties appropriate costs under IC 5-14-3-8 for the office's production of documents.
- (10) Order the prefilings of testimony.
- (11) Solicit testimony in appropriate cases.
- (12) Receive documentary or other evidence.
- (13) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce:
 - (A) testimony;
 - (B) documents; or
 - (C) other nonprivileged evidence;and failing the production thereof without good cause being shown, draw an adverse inference against that party.
- (14) Admit, limit, or exclude evidence in accordance with IC 4-21.5.
- (15) Hear and decide questions of facts and law.
- (16) Issue:
 - (A) subpoenas;
 - (B) subpoenas duces tecum.
- (17) Require parties to:
 - (A) attend conferences for the settlement or simplification of the issues;
 - (B) expedite the proceedings; or
 - (C) participate in alternative dispute resolution.
- (18) Where not inconsistent with IC 4-21.5 and this title, the presiding environmental law judge may apply the Indiana Rules of Trial Procedure, except for those trial rules that provide for provisional and final remedies and special proceedings (TR 64 through 71), except as provided in section 2.1(c) of this rule.
- (19) In addition to the remedies provided in IC 4-21.5-3-24, to impose reasonable and appropriate sanctions under the following:
 - (A) IC 4-21.5-6-2.
 - (B) Indiana Trial Rules 26 through 37.
- (20) Do all other acts and take all measures necessary for the:
 - (A) maintenance of order; and
 - (B) efficient, fair, and impartial adjudication of issues arising;in proceedings governed by this article.
- (21) Determine whether mediation is an appropriate means of alternative dispute resolution for each type of administrative proceeding in accordance with IC 4-21.5-3.5.
- (22) Conduct consolidated proceedings under IC 14-10-2-2.5.
- (c) For failure to attend a prehearing conference, the presiding ELJ may do the following:
 - (1) Strike claims or defenses.
 - (2) Default or dismiss a party under IC 4-21.5-3-24.

(Office of Environmental Adjudication; 315 IAC 1-3-1; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3733; readopted, filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 469; filed Apr 3, 2009, 2:09 p.m.: 20090429-IR-315080689FRA)

315 IAC 1-3-2 Initiation of a proceeding for administrative review

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-7; IC 4-21.5-3-15; IC 4-21.5-4; IC 13-15-6-1

Sec. 2. (a) A proceeding before the office is initiated when a petition for administrative review, which may include a request for a stay, in writing, is filed with the Office of Environmental Adjudication.

(b) The petition for administrative review shall contain the following information:

(1) The:

- (A) name;
- (B) address;
- (C) telephone number;

of each person filing the petition.

(2) Identification of the interest of each petitioner in the subject of the petition.

(3) A statement demonstrating that the petitioner is:

- (A) a person to whom the order is directed;
- (B) aggrieved or adversely affected by the order; or
- (C) entitled to review under any law.

(4) State with particularity the legal issues proposed for consideration in the proceedings as follows:

(A) In a case involving an appeal of a permit, identify the following:

- (i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.
- (ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

(B) In a case involving any other appeal of an order of the commissioner, identify those:

- (i) facts;
- (ii) terms; or
- (iii) conditions;

for which the petitioner requests review.

(c) The petition for administrative review shall also contain the following information:

(1) Identification of any persons represented by the person making the request under IC 4-21.5-3-15.

(2) A statement identifying the person against whom administrative review is sought.

(3) A copy of the pertinent portions of the notice of the commissioner's action issued by the department that is the basis of the petition for administrative review. This shall, at a minimum, consist of that portion of the commissioner's action that identifies the following:

- (A) The person to whom the action is directed.
- (B) The identification number of the action.

(4) A statement indicating the identification of the petitioner's attorney or other representative.

(d) A petition for administrative review, filed under IC 4-21.5-3-7(a), may be amended as a matter of course at any time within thirty (30) days after the earlier of the following dates:

- (1) The initial prehearing conference.
- (2) The filing of a motion to dismiss.

Otherwise, a party may amend his or her petition only by leave of the presiding ELJ or by written consent of all parties.

(e) If the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(f) Copies of the petition for administrative review shall be sent to the following:

- (1) The department.
- (2) All persons to whom the order is directed.

(Office of Environmental Adjudication; 315 IAC 1-3-2; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3733; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 470; filed Jan 26, 2007, 10:53 a.m.: 20070214-IR-315060091FRA)

315 IAC 1-3-2.1 Stay

Authority: IC 4-21.5-3; IC 4-21.5-4; IC 4-21.5-7-7
Affected: IC 13-15-6-1; IC 13-30-3-5

Sec. 2.1. (a) A stay applies automatically upon the filing of a timely petition for review when a person petitions for review of an order of the commissioner directed to that person under IC 13-30-3-5.

(b) Except as provided in subsection (a), the party requesting a stay of effectiveness has the burden of demonstrating, by a preponderance of the evidence, the following:

- (1) The person will suffer irreparable harm pending the resolution of the case on the merits because its remedies at law are inadequate.
- (2) The person is likely to prevail on the merits.
- (3) The threatened injury to the person requesting the stay outweighs the threatened harm that the grant of the stay may inflict on the other party.
- (4) The public interest will be served by the grant of the stay.
- (c) A temporary emergency stay order may be granted without a hearing under the following circumstances:

- (1) Upon written notice to the other parties or their attorneys only if it clearly appears:
 - (A) from specific facts shown by affidavit;
 - (B) or by a verified motion;

that immediate and irreparable injury, loss, or damage will result to the applicant before the other parties can be heard in opposition.

- (2) The resulting order shall include a brief statement of the facts and the laws that justify the office's decision to issue the emergency order.
- (3) The matter shall be set for an evidentiary hearing as quickly as practicable.
- (4) An order issued under this section expires on the earliest of the following:
 - (A) The date set in the order.
 - (B) The date of the evidentiary hearing held under subsection (b).
 - (C) The lapse of sixty (60) days.

(Office of Environmental Adjudication; 315 IAC 1-3-2.1; filed Sep 16, 2005, 1:40 p.m.: 29 IR 471)

315 IAC 1-3-3 Filing and service of pleadings and documents

Authority: IC 4-21.5-2-1; IC 4-21.5-3-35; IC 4-21.5-7-7
Affected: IC 4-21.5-3-1; IC 4-21.5-3-2; IC 13-15-6-1

Sec. 3. (a) The requirements for the filing of pleadings and documents are as follows:

- (1) The burden of proof for the timely filing of pleadings and documents with the office is on the person so filing.
- (2) The computation of any period of time under these rules is prescribed by IC 4-21.5-3-2.
- (3) The filing of a petition for administrative review with an ELJ may be completed, under IC 4-21.5-3-1(f), by any of the following methods:
 - (A) Personal delivery.
 - (B) First class, priority, or express United States mail.
 - (C) Certified mail.
 - (D) Private carrier.
 - (E) Electronic fax transmission. All documents filed by fax must be accompanied by a descriptive cover sheet that states the following:
 - (i) The title of the document.
 - (ii) The number of pages.
 - (iii) The identity and voice telephone number of the sending party.

Filing by fax shall be followed by the filing of the signed original and attachments with the office by one (1) of the methods specified in this subdivision within one (1) day after the document is filed by fax.

- (4) The filing of any other document or pleading with an ELJ may be completed, under IC 4-21.5-3-1(f), by any of the following methods:

- (A) Personal delivery.
- (B) First class, priority, or express United States mail.
- (C) Certified mail.
- (D) Private carrier.
- (E) Electronic facsimile transmission. All documents filed by fax must be accompanied by a descriptive cover sheet that states the following:
 - (i) The title of the document.
 - (ii) The case number.
 - (iii) The number of pages.
 - (iv) The identity and voice telephone number of the sending party.
 - (v) The instructions for filing.

(F) If all parties and the presiding ELJ consent, by any other means.

(5) Fax transmissions will be accepted for filing only during the regular business hours as set forth in subsection (d). Transmissions received by the office after close of business shall be filed effective the next regular business day.

(b) The requirements for service of pleadings and documents are as follows:

(1) All documents and pleadings filed with the presiding ELJ shall be served on all parties.

(2) If a party is represented by an attorney or another authorized representative, service of a document must be made upon the attorney or other authorized representative. If a party appears without separate representation, service must be made upon the party.

(3) A signed certificate of service, in substantially the following form, stating "I certify that on the ____ day of [month], [year], service of a true and complete copy of [document being forwarded] was made upon each party or attorney of record herein by [identifying any of the methods of service prescribed by subsection (a)(3) or (a)(4)]", shall accompany each document filed or served.

(4) When the presiding ELJ corresponds directly with the parties:

(A) the original of the correspondence shall be maintained by the presiding ELJ in the official file; and

(B) a copy shall be sent to all parties.

(c) The filing of a document with the office is complete on the earliest of the following:

(1) The date on which the document is delivered to the office.

(2) The date of the postmark on the envelope containing the document if the document is mailed to the office by United States mail.

(3) The date on which the document is deposited with a private carrier, as shown by a receipt issued by the carrier, if the document is sent to the office by private carrier.

(d) Where the date of filing or service is determined by the date of delivery to or receipt at the office, all filing or service deliveries received after 4:30 p.m., EST, will be deemed to have been received on the next following regular day. However, a document filed by fax shall be deemed to be filed on the date on which it is electronically submitted. (*Office of Environmental Adjudication*; 315 IAC 1-3-3; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3734; *readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323*; filed Sep 16, 2005, 1:40 p.m.: 29 IR 471)

315 IAC 1-3-4 Form of pleadings and documents

Authority: IC 4-21.5-2-1; IC 4-21.5-3-35; IC 4-21.5-7-7

Affected: IC 4-21.5-3; IC 13

Sec. 4. (a) The form of pleadings and documents shall be as follows:

(1) The petition for administrative review shall be in the form prescribed by section 2 of this rule.

(2) The first page of every pleading, letter, or other document filed thereafter shall contain a caption identifying the:

(A) action;

(B) the case number;

that has been assigned by the office.

(3) The original of any pleading, letter, or other document, excepting exhibits, shall be signed by the party filing or by the party's counsel. The signature constitutes a representation by the signer that:

(A) the signer has read the pleadings, letter, or other document;

(B) to the best of the signer's knowledge, information, and belief, the statements made therein are true; and
(C) it is not interposed for delay.

(4) Attachments to pleadings, including, but not limited to, the permit, may be submitted electronically as follows:

(A) In a compatible format to the office.

(B) To the other parties only with their consent.

(b) Any changes in name, mailing address, or telephone number occurring during the course of a proceeding shall be communicated promptly in writing to the presiding ELJ and all parties to the proceeding. Service of orders or correspondence from the office shall be made to the last known address on file.

(c) Nothing in this section shall be construed to modify the time in which a party is otherwise required to file under:

(1) IC 4-21.5;

(2) IC 13; or

(3) this article.

(Office of Environmental Adjudication; 315 IAC 1-3-4; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3734; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 472)

315 IAC 1-3-5 Request for extension of time for filing pleading, document, or motion

Authority: IC 4-21.5-2-1; IC 4-21.5-7-7

Affected: IC 4-21.5-3-34; IC 4-21.5-3-35

Sec. 5. Unless prohibited by statute, the presiding ELJ may grant an extension of time for the filing of any pleading, document, or motion as follows:

(1) Upon timely motion of a party to the proceeding.

(2) After notice to all other parties unless the moving party can show good cause why serving notice is impracticable.

(3) After consideration of prejudice to other parties.

(Office of Environmental Adjudication; 315 IAC 1-3-5; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3735; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 473)

315 IAC 1-3-6 Answers and affirmative defenses

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-23

Sec. 6. (a) Except as provided in subsection (b), the matters contained in a pleading described in section 4(a) of this rule are deemed automatically denied by any other party.

(b) A party wishing to assert an affirmative defense, counterclaim, or cross-claim shall do so in a writing filed and served not later than the prehearing conference or a subsequent date as ordered by the presiding environmental law judge.

(c) Every defense listed below, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted by motion:

(1) Lack of jurisdiction over the subject matter.

(2) Lack of jurisdiction over the person.

(3) Incorrect venue.

(4) Insufficiency of process.

(5) Insufficiency of service of process.

(6) Failure to state a claim upon which relief can be granted.

(7) Failure to join a party needed for just adjudication.

(Office of Environmental Adjudication; 315 IAC 1-3-6; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3735; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323)

315 IAC 1-3-7 Defaults and dismissals

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-24

Sec. 7. (a) An ELJ may enter a final order of dismissal if the person who initiated administrative review requests the proceeding be dismissed.

(b) An ELJ may, sua sponte or upon the motion of a party, enter and serve upon all parties a proposed order of default or dismissal under IC 4-21.5-3-24 if at least one (1) of the following applies:

(1) A party fails to:

(A) file a responsive pleading required by statute or rule; or

(B) attend or participate in a prehearing conference, hearing, or other stage of the proceeding.

(2) The party responsible for taking action does not take action on a matter for a period of at least sixty (60) days.

(3) The party seeking administrative review does not qualify for review under IC 4-21.5.

(c) Within seven (7) days after service of a proposed order of default or dismissal, a party may file a written motion:

(1) requesting the order not be imposed; and

(2) stating the grounds relied upon.

(d) During the time within which a party may file a written motion under subsection (c), the presiding ELJ may:

(1) adjourn the proceedings; or

(2) conduct them without participation of the party against whom a proposed default order was issued;

having due regard for the interest of justice and the orderly and prompt conduct of the proceeding.

(e) If the party fails to file a written motion under subsection (c), the presiding ELJ shall issue an order of default or dismissal.

If the party has filed a written motion under subsection (c), the presiding ELJ may either enter or refuse to enter the order of default or dismissal.

(f) After issuing an order of default, but before issuing a final order or disposition, the presiding ELJ shall:

(1) conduct any action necessary to complete the proceeding without the participation of the party in default; and

(2) determine all issues in the adjudication, including those affecting the defaulted party.

(Office of Environmental Adjudication; 315 IAC 1-3-7; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3735; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 473)

315 IAC 1-3-8 Informal settlement; alternative dispute resolution

Authority: IC 4-21.5-2-1; IC 4-21.5-3-35; IC 4-21.5-3.5-1; IC 4-21.5-7-7

Affected: IC 4-21.5-3.5-2; IC 4-21.5-5-5; IC 13-30-3-5; IC 13-30-3-6

Sec. 8. (a) Settlement among and between the parties is encouraged at any time when the settlement is:

(1) within the legal authority of the department; and

(2) consistent with the prescriptions and objectives of:

(A) IC 4-21.5;

(B) IC 13; and

(C) applicable environmental regulations.

(b) In the event the parties reach a settlement resolving all issues in controversy regarding the appeal of a permit, resolving all issues in controversy, the party who initiated administrative review shall submit a written motion requesting that the proceeding be dismissed. The parties need not file the settlement document or agreement with the presiding ELJ. The presiding ELJ shall then enter a final order of dismissal.

(c) In the event the parties reach a settlement resolving all issues in controversy regarding the appeal of a commissioner's order as prescribed by IC 13-30-3-5, before the:

(1) presiding ELJ issues a final order; and

(2) commissioner approves an agreed order based on the settlement as provided by IC 13-30-3-6;

the parties shall notify the presiding ELJ who shall then enter a final order of dismissal.

(d) For each type of administrative proceeding, the presiding ELJ shall determine whether mediation is an appropriate means of alternative dispute resolution under IC 4-21.5-3.5.

(e) In the event the presiding environmental law judge determines mediation is an appropriate means of alternative dispute resolution, the parties to the mediation shall comply with IC 4-21.5-3.5. *(Office of Environmental Adjudication; 315 IAC 1-3-8; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3736; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 474)*

315 IAC 1-3-9 Conduct of prehearing conference

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-19; IC 4-21.5-3-35

Sec. 9. (a) In addition to IC 4-21.5-3-19, for prehearing conferences, the parties could be required to do the following:

(1) Set a date to exchange the following:

(A) Witness lists that shall contain the names and addresses of all witnesses expected to be relied upon at the hearing, other than witnesses intended to be used solely for the purpose of impeachment or rebuttal as follows:

(i) The names and addresses of witnesses discovered after the exchange of lists shall be furnished to the opposing party at once upon such discovery.

(ii) Witnesses, whose names and addresses have not been exchanged, shall not be allowed to testify without permission of the presiding ELJ.

(iii) The names of any witnesses to testify as experts shall be accompanied with a brief narrative summary of the witnesses' expected testimony.

(B) Set a date for exchange of items intended to be offered as exhibits as follows:

(i) Copies of exhibits discovered after such exchange shall be furnished to the opposing party forthwith upon such discovery.

(ii) Documents and exhibits that have not been exchanged shall not be introduced into evidence without the permission of the presiding ELJ.

(iii) The presiding ELJ shall allow the parties reasonable opportunity to review and respond to new evidence.

(2) Set a date for stipulations to be entered with parties stipulating to the fullest extent possible the following:

(A) Issues.

(B) Undisputed facts.

(C) Authenticity and admissibility of exhibits.

(D) Any and all other matters that will expedite the hearing by reducing formal proof.

(3) File a statement with the presiding ELJ as to all existing disputed issues of fact and law of the cause of action.

(4) Be prepared to discuss any presently contemplated or pending preliminary motions.

(b) No transcript of any prehearing conferences shall be made by the office unless:

(1) requested upon timely motion by a party; and

(2) ordered by the presiding ELJ.

(c) If no transcript is required, the parties have the option of conducting the prehearing conference by telephone. The party wishing to conduct the prehearing conference telephonically shall:

(1) contact the other parties;

(2) secure their agreement to conduct the prehearing conference by telephone; and

(3) notify the office at least one (1) business day in advance of the scheduled prehearing conference.

The party requesting the telephonic prehearing conference has the obligation of initiating the necessary phone calls. The party should have all the other parties on the telephone before contacting the ELJ. (*Office of Environmental Adjudication; 315 IAC 1-3-9; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3736; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 474*)

315 IAC 1-3-10 Conduct of hearing; separation of witnesses

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-34; IC 4-21.5-3-35

Sec. 10. (a) The presiding ELJ shall govern the:

(1) conduct of a hearing; and

(2) the order of proof.

(b) The office's review of a department decision is de novo.

(c) On a motion by a party, the presiding ELJ may provide for a separation of witnesses. (*Office of Environmental Adjudication; 315 IAC 1-3-10; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3736; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 475*)

315 IAC 1-3-11 Evidence

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-25; IC 4-21.5-3-26; IC 5-14-3-4

Sec. 11. (a) In addition to IC 4-21.5-3-25, IC 4-21.5-3-26, and IC 5-14-3-4, the following shall apply:

(1) Trade secrets; confidential, commercial, and financial information.

(A) In the presentation, admission, disposition, and use of evidence, the presiding environmental law judge shall preserve the confidentiality of trade secrets and other commercial and financial information to the extent required by statute.

(B) The confidential or trade secret status of any information shall not preclude its being introduced into evidence.

(C) The presiding environmental law judge may make such protective or other orders as may be necessary to consider such evidence in camera, including the preparation of a reviewable order to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(2) Verified statements.

(A) The presiding environmental law judge may admit into the record as evidence, in lieu of oral testimony, verified statements of fact or opinion prepared by a witness or his attorney.

(B) The admissibility of a verified statement shall be subject to the same procedural requirements as if the testimony were produced under oral examination.

(C) The verified statement of a witness, whether or not a party, may be used by any party if the presiding environmental law judge finds:

(i) that the witness is dead; or

(ii) that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the statement; or

(iii) that, despite due diligence, the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the statement has been unable to procure the attendance of the witness by subpoena; or

(v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of due process and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(vi) upon agreement of the parties.

(D) If only part of a statement is offered into evidence by a party, an adverse party may require the offering party to introduce any other part which ought in context to be considered with the part introduced, and any party may introduce any other parts.

(E) The presiding environmental law judge shall allow reasonable opportunity to review such statement.

(3) Exhibits.

(A) An original and one (1) copy of each exhibit shall be filed with the presiding environmental law judge for the record; and

(B) A copy of each exhibit shall be furnished to each party or their counsel.

(C) A certified copy of any exhibit may be substituted for the original once admitted into the record.

(b) Objections concerning the conduct of the hearing shall be stated orally during the hearing.

(1) The party raising the objection shall supply a short statement of the grounds.

(2) Both the objection and any ruling by the presiding environmental law judge on an objection shall be part of the record.

(3) An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(c) Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record.

(1) The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded.

(2) The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded and may include a brief statement describing the nature of the evidence excluded.

(Office of Environmental Adjudication; 315 IAC 1-3-11; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3737; readopted filed Aug 11, 2004,

12:04 p.m.: 28 IR 323)

315 IAC 1-3-12 Continuances of prehearing conference, status conference, stay hearing, and hearing

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3-34; IC 4-21.5-3-35

Sec. 12. (a) Unless prohibited by statute, the presiding ELJ may grant a continuance of a prehearing conference, status conference, stay hearing, or hearing as follows:

(1) Upon the motion of a party to the proceeding:

(A) at least five (5) days in advance of the date of the prehearing conference, status conference, stay hearing, or hearing;
or

(B) for a showing of good cause for a shorter time period.

(2) After notice to all other parties.

(3) After consideration of prejudice to other parties.

The party requesting the continuance shall state in the motion what efforts were made to contact the other parties and whether any other party objects to the motion.

(b) A motion to continue a hearing because of the absence of evidence must be made upon affidavit and must show the following:

(1) The materiality of the evidence expected to be obtained.

(2) That due diligence has been used to obtain the evidence.

(3) The possible location of the evidence.

(4) If based on the absence of a witness, the following:

(A) The name and address of the witness, if known.

(B) The probability of procuring the testimony in a reasonable time.

(C) That absence of the witness was not procured by:

(i) the party; or

(ii) others at the request, knowledge, or consent of the party.

(D) What facts the party believes to be true.

(E) That the party is unable to prove the facts by another witness whose testimony can be readily procured.

(c) If, upon the receipt of a continuance motion under subsection (b), the adverse party stipulates to the truth of the facts the party seeking the continuance indicated could not be presented, the hearing shall not be continued. (*Office of Environmental Adjudication; 315 IAC 1-3-12; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3737; errata, 21 IR 4215; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 475*)

315 IAC 1-3-13 Proposed findings of fact, conclusions of law and final order; petitions for rehearing

Authority: IC 4-21.5-3-35; IC 4-21.5-7-7

Affected: IC 4-21.5-3-28; IC 4-21.5-5

Sec. 13. (a) At such time as may be fixed by the presiding environmental law judge, a party may submit for the consideration of the presiding environmental law judge an original and one (1) copy of proposed findings of fact, conclusions of law, and proposed order.

(1) The presiding environmental law judge may require briefs when proposed findings of fact, conclusions of law, and proposed orders are submitted.

(2) The presiding environmental law judge may set a time by which reply briefs and response briefs must be submitted.

(3) All submissions shall be:

(A) in writing;

(B) served upon all parties; and

(C) contain references to the record and relied upon authorities.

(b) In addition to IC 4-21.5-3-28, the following shall apply to final orders:

(1) When the presiding environmental law judge issues an order that fully disposes of the issues, the order shall be denominated specifically as a final order.

(2) When either:

- (A) a party withdraws his petition for review; or
- (B) the case has been dismissed for any other reason;

the presiding environmental law judge shall issue a final order signifying that the case has been disposed.

(c) Clerical mistakes and other errors resulting from oversight or omission in a final order or other part of the record of a proceeding may be corrected on the motion of any party or on the presiding environmental law judge's own motion.

(d) An action of a petitioning party under this section does not toll the period in which a party may petition for judicial review under IC 4-21.5-5. However, if a rehearing is granted, this period is tolled and a new period begins on the date that a new final order is served. (*Office of Environmental Adjudication; 315 IAC 1-3-13; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3738; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323*)

315 IAC 1-3-14 Petition for judicial review

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-5-1; IC 4-21.5-5-8

Sec. 14. (a) A party who wishes to take judicial review of a final order entered under this article shall serve copies of the petition for judicial review upon the persons described in IC 4-21.5-5.

(b) The copy of the petition required under IC 4-21.5-5-8(a)(1) to be served upon the ultimate authority shall be served upon the ELJ issuing the order being appealed at the office of environmental adjudication. (*Office of Environmental Adjudication; 315 IAC 1-3-14; filed Jun 2, 1998, 3:47 p.m.: 21 IR 3738; readopted filed Aug 11, 2004, 12:04 p.m.: 28 IR 323; filed Sep 16, 2005, 1:40 p.m.: 29 IR 475; filed Apr 3, 2009, 2:09 p.m.: 20090429-IR-315080689FRA*)

315 IAC 1-3-15 Representatives and attorneys; eligibility to practice

Authority: IC 4-21.5-7-7

Affected: IC 4-21.5-3

Sec. 15. (a) All attorneys who appear in a representative capacity on behalf of a party must file written notice of appearance setting forth the following:

(1) The:

- (A) name;
- (B) address;
- (C) telephone number;
- (D) fax number; and
- (E) electronic mail address;

of the attorney.

(2) The name and address of the party.

(3) The Indiana attorney number.

(4) If not licensed in Indiana, the following:

- (A) A verified statement that the attorney is in good standing.
- (B) A designation of the jurisdiction in which the attorney is currently licensed to practice law.
- (C) The attorney registration number.

(5) If an attorney files a petition for review of behalf of his or her client that contains the information required by subdivisions (1) through (4), the petition shall serve as a written notice of appearance.

(b) A representative that is not an attorney of a party must file written notice of the representation. Nothing in this subsection relieves a person from compliance with Rule 5.5 of the Indiana Rules of Professional Conduct. The written notice shall include the following:

(1) The information requested in subsection (a)(1) and (a)(2).

(2) The written consent of each party whom the representative purports to represent.

(c) The presiding ELJ may require an attorney or representative appearing before the office to:

- (1) disclose the identity of the person the attorney or representative represents; and
- (2) present proof that the attorney or representative is authorized to act on the client's behalf.

(d) An attorney may only withdraw his or her appearance upon written notice to the presiding ELJ. (*Office of Environmental Adjudication; 315 IAC 1-3-15; filed Sep 16, 2005, 1:40 p.m.: 29 IR 476*)

315 IAC 1-3-16 Consolidated proceedings with natural resources commission's division of hearings

Authority: IC 4-21.5-7-5; IC 4-21.5-7-5.5; IC 14-10-2-2.5

Affected: IC 4-21.5-3; IC 14; IC 25

Sec. 16. (a) This section controls the conduct of a proceeding presided over by an administrative law judge that is consolidated under IC 14-10-2-2.5 with a proceeding presided over by an environmental law judge of the office of environmental adjudication.

(b) Before acting on a motion for consolidation under IC 14-10-2-2.5(b), an administrative law judge or environmental law judge may do any of the following:

(1) Consult with any administrative law judge or environmental law judge that presides over a proceeding sought to be consolidated.

(2) Request documents, briefs, or oral arguments from the parties to the following:

(A) The proceeding pending before the administrative law judge or environmental law judge.

(B) The proceeding sought to be consolidated.

(c) If an administrative law judge or an environmental law judge enters an order for consolidation under IC 14-10-2-2.5(b), the order shall establish a panel that complies with IC 14-10-2-2.5(c).

(d) Unless otherwise agreed by the panel, the administrative law judge or environmental law judge that entered the order under subsection (c) shall perform the following functions:

(1) Open and maintain a new adjudicatory file that includes in its caption the phrase "In the Matter of Consolidated Proceeding under IC 14-10-2-2.5".

(2) Include true and authentic copies of all pleadings and documents previously filed and orders previously entered in the proceedings that have been consolidated.

(3) Rule upon routine motions and requests by the parties, including objections at hearing. This subdivision does not prohibit the administrative law judge or environmental law judge from consulting with another panel member or members before ruling.

(e) The panel may make any orders concerning a consolidated proceeding that are necessary and appropriate.

(f) The panel, in furtherance of convenience and to avoid prejudice, or when separate hearings may be conducive to expedition and economy, may order a separate hearing of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(g) In furtherance of convenience and to avoid prejudice, the panel may certify a disposition of fewer than all issues as being ripe for judicial review where:

(1) a dismissal is granted with prejudice;

(2) a summary judgment is granted under IC 4-21.5-3-23; or

(3) a separate hearing is conducted under subsection (f).

(h) On a party's motion or on the panel's motion, the panel may terminate a consolidated proceeding in furtherance of convenience and to avoid prejudice. If a party moves to terminate a consolidated proceeding because all issues of the department of natural resources or of the department of environmental management have been settled or adjudicated, the panel shall terminate the consolidated proceeding. An order for termination shall include any provisions that may reasonably support the convenience of the parties and the expeditious disposition by an administrative law judge or environmental law judge of the remaining proceeding.

(i) A final disposition of a consolidated proceeding shall be included both by the natural resources commission and by the office of environmental adjudication in their respective implementations of IC 4-21.5-3-32 and IC 4-21.5-3-27(c). (*Office of Environmental Adjudication; 315 IAC 1-3-16; filed Apr 3, 2009, 2:09 p.m.: 20090429-IR-315080689FRA*)

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