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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 3, 2000

George J. Miller, Chairman
Environmental Hearing Board
Rachel Carson State Office Building
400 Market Street, 2nd Floor
Harrisburg, PA 17105

Re: Regulation #106-5 (IRRC #2121)
Environmental Hearing Board
Practice and Procedure

Dear Chairman Miller:

Enclosed are our Comments. They are also available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director

cae

Enclosure

cc: Honorable Arthur D. Hershey, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee
Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Mary Anne Wesdock

Comments of the Independent Regulatory Review Commission

on

Environmental Hearing Board Regulation No. 106-5

Practice and Procedure

August 3, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which has not been met. The Environmental Hearing Board (Board) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by July 3, 2002, the regulation will be deemed withdrawn.

1. Section 1021.24. Referral of pro se parties to pro bono counsel. – Reasonableness and Clarity.

Determining need.

Subsection (a) authorizes the Secretary of the Board (Secretary) to refer parties to pro bono counsel “who claim not to be able to afford a lawyer....” How the Secretary will verify a party’s claim that they are unable to pay for legal services is unclear. Therefore, the Board should include criteria and a process for verifying a party’s financial need for pro bono representation in the final-form regulation.

Subsection (a)(3).

Subsection (a)(3) allows the Secretary to refer parties to “[A]n individual attorney, law firm or organization...who have volunteered to take on *the* representation.” (Emphasis added.) The phrase “the representation” is unclear. The article “the” preceding “representation” denotes that the individual attorney, law firm or organization have agreed to accept a specific case, instead of simply making their services available for pro bono services. The Board should amend this phrase to denote that an individual attorney, law firm or organization are available to provide pro bono services, generally.

Subsection (b).

We have a number of concerns with Subsection (b). First, this subsection lists the requirements to participate on the Board’s register of attorneys. Included in this list is that the attorney “must have indicated a willingness and commitment not to charge any fee for his or her services.” The phrase “willingness and commitment” is vague. The Board should clarify this requirement to reflect that any individual attorney, law firm or organization that wishes to register for pro bono

work must agree not to charge for their services, but are able to charge the reasonable expenses for the litigation.

Second, the process for registering with the Secretary is unclear. Do interested parties need to fill out an application? Will the Board conduct interviews with prospective registrants? The Board should outline the process for registering with the Secretary in the final-form regulation.

Finally, we question whether there is a mechanism in place for purging attorneys, law firms and organizations that may no longer want to participate in the Secretary's register. The final-form regulation should include a process for maintaining this list.

2. Section 1021.54. Substitution of parties. – Clarity.

Election.

Subsection (a) allows a person to succeed to “the interests of a party to an appeal by operation of law, election, appointment or transfer of interest . . .” The term “election” as used in this phrase is unclear. We understand that, in this instance, “election” pertains to “election to public office.” For clarity, the Board should add “to public office” after “election.”