

# **PROCEDURES FOR APPEALING USER FEE ASSESSMENTS OF EAST CHICAGO WATERWAY MANAGEMENT DISTRICT BOARD**

## **Rule 1.Applicability**

- (a) The procedures established by this rule shall apply to all appeals of User Fee Assessments issued by the East Chicago Waterway Management District pursuant to I.C. 8-10-9-8.
- (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 Official.

## **Rule 2.Definitions**

- (a) "Appeals Officer" means an individual appointed by the Board to hear appeals of User Fee Assessments and who shall issue an Interim Decision.
- (b) "Appeals Panel" means a group of three individuals, including the Appeals Officer, who shall review the record of an appeal taken pursuant to the procedures established by this rule, and who shall issue the Ultimate Decision of the Board.
- (c) "Board" means the board of directors of the East Chicago Waterway Management District, established pursuant to I.C. 8-10-9-6.
- (d) "Interim Decision" means the conclusion of the Appeals Officer making one of the following determinations:
  - 1. Denying the appeal; or
  - 2. Granting the appeal, and either:
    - a. Setting an amended user fee consistent with the evidence presented by the User to the Appeals Officer; or
    - b. Withdrawing the assessment of the user fee as applied to the appealing User.
- (e) A "Presiding Official" shall mean, in a proceeding before an Appeals Officer, the Appeals Officer; and in a proceeding before an Appeals Panel, the individual appointed by the Panel as the Presiding Official.
- (f) "Ultimate Decision" shall mean the final decision of the Appeals Panel, after review of the record and after hearing, if applicable.
- (g) "User" shall mean an owner of property adjacent to the waterways or a user of the waterways within the jurisdiction of the East Chicago Waterway Management District.

## **Rule 3.Powers and Duties of the Appeals Officer and the Appeals Panel**

- (a) An Appeals Officer 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 Appeals Officer shall have authority to do the following:
1. Conduct administrative hearings
  2. Rule upon the following:
    - a. Motions.
    - b. Requests.
    - c. Offers of proof.
  3. Administer oaths and affirmations.
  4. Consider affidavits submitted by the parties.
  5. Examine witnesses.
  6. Admit:
    - a. purported scientific evidence; and
    - b. related opinions; into evidence in accordance with applicable Indiana trial rules on admissibility of testimony by experts.
  7. Solicit testimony in appropriate cases.
  8. Receive documentary or other evidence.
  9. 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.
  10. Admit, limit, or exclude evidence in accordance with IC 4-21.5.
  11. Hear and decide questions of facts and law.
  12. Issue:
    - a. subpoenas;
    - b. subpoenas duces tecum.
  13. 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.

#### **Rule 4. Initiation of a Proceeding for Administrative Review**

- (a) An appeal of a User Fee Assessment is initiated when a User who has been issued a User Fee Assessment files a completed Appeal Form [UFAF-2010] with the District. The Form must include all of the information requested and describe, with specificity, the reason for the appeal.
- (b) The appeal shall also contain the following information, if applicable:
  1. Identification of any persons represented by the person making the appeal.
  2. A statement indicating the identification of the petitioner's attorney or other representative.
- (c) An appeal on the proper Appeal Form UFAF-2010 may be amended at any time prior to the hearing with the Appeals Officer.

#### **Rule 5. Filing and Service of Pleadings and Documents**

- (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 an appeal or other documents or pleadings may be completed 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.
      - A. 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.
      - B. 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.

- C. 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.

- 4. The filing of a document with the office is complete on the earliest of the following:
  - a. The date on which the document is delivered to the office.
  - b. The date of the postmark on the envelope containing the document if the document is mailed to the office by United States mail.
  - c. 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.

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

- 1. All documents and pleadings filed with the Presiding Official 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.
- 3. If a party appears without separate representation, service must be made upon the party.
- 4. 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.

(c) When the presiding Appeals Official corresponds directly with the parties:

- 1. the original of the correspondence shall be maintained by the presiding official in the official file; and
- 2. a copy shall be sent to all parties.

(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., CST, 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.

## **Rule 6. Form of Pleadings and Documents**

- (a) The form of pleadings and documents shall be as follows:
  - 1. The initial appeal shall be on the form provided to the User along with the User Fee Assessment (Form UFAF-2010)
  - 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.
- (b) 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:
  - 1. the signer has read the pleadings, letter, or other document;
  - 2. to the best of the signer's knowledge, information, and belief, the statements made therein are true; and
  - 3. it is not interposed for delay.
- (c) Attachments to pleadings, including, but not limited to, the permit, may be submitted electronically as follows:
  - 1. In a compatible format to the office.
  - 2. To the other parties only with their consent.
- (d) 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 official and all parties to the proceeding. Service of orders or correspondence from the office shall be made to the last known address on file.

#### **Rule 7.Defaults and Dismissals**

- (a) A Presiding Official may enter a final order of dismissal if the person who initiated an appeal requests the proceeding be dismissed.
- (b) A Presiding Official may, sua sponte or upon the motion of a party, enter and serve upon all parties a proposed order of default or dismissal 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 Official 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 Official shall issue an order of default or dismissal.
- (f) If the party has filed a written motion under subsection (c), the Presiding Official may either enter or refuse to enter the order of default or dismissal.
- (g) After issuing an order of default, but before issuing a final order or disposition, the Presiding Official 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.

**Rule 8. Informal Settlement; Alternative Dispute Resolution**

- (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 IC 4-21.5.
- (b) In the event the parties reach a settlement resolving all issues in controversy regarding the appeal of the Assessment, the party who initiated the appeal shall submit a written motion requesting that the proceeding be dismissed. The parties need not file the settlement document or agreement with the Presiding Official shall then enter a final order of dismissal.
- (c) In each appeal proceeding, the Presiding Official shall determine whether mediation is an appropriate means of alternative dispute resolution under I C 4-21.5-3.5.
- (d) In the event the Presiding Official determines mediation is an appropriate means of alternative dispute resolution, the parties to the mediation shall comply with IC 4-21.5-3.5.

## **Rule 9. Conduct of Hearing**

- (a) The Presiding Official shall govern the:
  - 1. conduct of a hearing; and
  - 2. the order of proof.
- (b) The review of a User Fee Assessment is de novo.

## **Rule 10. Evidence**

- (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 Official 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 Official 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 Official 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 Official 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 Official 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 Official 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 Official 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.



**Rule 11. Continuances of Proceedings**

- (a) Unless prohibited by statute, the Presiding Official 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.
    - a. A motion to continue a hearing because of the absence of evidence must be made upon affidavit and must show the following:
      - A. The materiality of the evidence expected to be obtained.
      - B. That due diligence has been used to obtain the evidence.
      - C. The possible location of the evidence.
      - D. If based on the absence of a witness, the following:
        - i. The name and address of the witness, if known.
        - ii. The probability of procuring the testimony in a reasonable time.
        - iii. That absence of the witness was not procured by:
          - (A) the party; or
          - (B) others at the request, knowledge, or consent of the party.
      - E. What facts the party believes to be true.
      - F. That the party is unable to prove the facts by another witness whose testimony can be readily procured.
- (b) 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.

**Rule 12. Proposed Findings of Fact, Conclusions of Law and Final Order; Petitions for Rehearing**

- (a) At such time as may be fixed by the Presiding Official, a party may submit for the consideration of the Presiding Official an original and one (1) copy of proposed findings of fact, conclusions of law, and proposed order.
  - 1. The Presiding Official may require briefs when proposed findings of fact, conclusions of law, and proposed orders are submitted.
  - 2. The Presiding Official 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 Official 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 Official 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 Official'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.

**Rule 13. Petition for Judicial Review**

- (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 I C 4-21. 5-5-8( a)( 1) to be served upon the ultimate authority shall be served upon the Presiding Official issuing the order being appealed at the office of environmental adjudication.

**Rule 14. Representatives and Attorneys; Eligibility to Practice**

- (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
    - d. 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 Official 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 Official.