

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of May 14, 2009

Attendance:

The Environmental Hearing Board Rules Committee met on May 14, 2009 at 10:15 a.m. Attending on behalf of the Environmental Hearing Board were Acting Chairman and Chief Judge Tom Renwand and (by phone) Judge George Miller. The following members of the Rules Committee were in attendance: Committee Chair Howard Wein, Vice chair Maxine Woelfling, Susan Shinkman, Jim Bohan, Tom Scott and Representative Kate Harper. Senior Board Assistant Counsel Maryanne Wesdock attended and took the minutes.

Welcome:

A warm welcome was extended to the Rules Committee's newest member, Representative Kate Harper.

Approval of Minutes:

Two changes were made to the minutes of January 8, 2009: 1) addition of Ms. Shinkman to the list of attendees and 2) correction of "single spaced" to "double spaced" on page 7 of the minutes. With those corrections, the minutes were approved on the motion of Ms. Woelfling, seconded by Ms. Shinkman.

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the minutes of the March 18, 2009 meeting were approved with no correction.

Status of Rules Package 106-9:

Mr. Wein and Ms. Wesdock reported on their conference call with Leslie Johnson and Heather Emery at IRRC regarding IRRC's concerns with proposed revisions to Rule 1021.

52(h)(1) and (i). IRRC agreed to the addition of the word “order” to these sections. Ms. Wesdock reported that the final rulemaking package would be sent to the following offices that day: General Counsel, Budget and Policy.

General Permits:

Mr. Bohan summarized his report on general permits. This discussion came as a result of a question raised at a previous meeting regarding whether EHB Rule 1021.52(a) (Timeliness of Appeal) should be amended in order to address the issue of when an appeal may be taken from activities authorized by general permits. Mr. Bohan provided background on what constitutes a “general permit” and noted that general permits and permits-by-rule are issued under various statutes and programs and, therefore, it is difficult to make generalizations about them. In some cases, approval must first be obtained from the Department of Environmental Protection (Department) before one may operate under a general permit. In other cases, one must simply register to operate under a general permit. General permits may have their own procedural requirements with respect to what type of notice must be given.

Environmental Hearing Board decisions addressing the question of timeliness with regard to the appeal of a general permit include *Army for a Clean Environment, Inc. v. DEP and Lehigh Coal and Navigation*, 2006 EHB 698, and *Stevens v. DEP and Washington Twp. Municipal Authority*, 2000 EHB 438. Mr. Bohan noted that three issues came into play in the *Army for a Clean Environment* case: 1) administrative finality, i.e. getting one bite at the apple; 2) standing, i.e. when is a person “affected” by the permit; and 3) ripeness, i.e., can the permit be appealed before one is directly affected. He suggested that two possible rules could be drafted to deal with the timing of appeals from general permits:

1) A rule that would require the filing of an appeal as soon as the general permit is issued. Two problems exist with this approach: First, it will result in many more appeals because anyone who thinks they may be affected by the issuance of the general permit will appeal in order to protect their rights. Second, anyone who does not appeal the issuance of the general permit may be barred from challenging its application in the future under the doctrine of administrative finality.

2) A rule that would preserve the right to file an appeal until such time as the person is affected by the activity authorized by the general permit.

Judge Miller advocated a rule that accomplishes the second alternative above. He proposed adding the following language to Rule 1021.52(a):

(2) Any person aggrieved by an activity or proposed activity said to be lawful under the provisions of a general permit or permit-by-rule issued by the Department shall file its appeal within 30 days of the following, whichever is earlier:

- (i) actual notice of the activity or proposed activity;
- (ii) actual notice of the issuance of the general permit or permit-by-rule;
- (iii) actual notice of any action taken by the sponsor of the activity to qualify for coverage of the activity under the general rule or permit-by-rule.

A question arose as to why the above could not be accomplished through the Board's case law. That is the approach favored by Judge Labuskes. Judge Miller stated that someone who simply reads the Board's rules, as currently written, may feel that they have lost their right to appeal if they learn of the activity more than 30 days after issuance of the general permit. He felt that the rule needs to be clarified to address the unique situation presented by general permits.

Ms. Woelfling stated that she was concerned about the Board trying to fix a "problem" that wasn't created by the Board. Because of the lack of consistency in general permits and

permits-by-rule, she felt that this area needed to be addressed on a case-by-case basis. Judge Miller felt that there needed to be some way to alert people that their appeal rights may not necessarily be triggered by publication of the general permit in the Pennsylvania Bulletin. Mr. Bohan suggested including a reference to the *Army for Concerned Citizens* case in the comment to the rule.

Representative Harper raised the question of when is the proper time to appeal a general permit that has been issued to one's neighbor. Mr. Bohan answered that if one doesn't know about the permit until the neighbor receives site specific approval (i.e. approval to apply the permit to his specific site), it is okay to challenge the permit at the time when the neighbor receives site specific approval. Mr. Wein also referenced the Board's decision in *CAUSE v. DEP* 2007 EHB 632.

Ms. Wesdock asked when the appeal period would be triggered in the case of a general permit which simply required the applicant to register but which required no approval from the Department. Mr. Bohan stated that notice of the registration must be provided, and that would trigger the appeal period.

Representative Harper asked why a case-by-case solution to the problem was better than having a rule. Ms. Woelfling felt that it would be impossible to cover every possible scenario described in Mr. Bohan's report by a rule. Additionally, Mr. Bohan noted that if a party seeks to have an appeal dismissed on the basis that the appellant should have appealed earlier, the party seeking to dismiss has the burden of trying to demonstrate that the appeal is untimely, and the Board has shown an inclination not to dismiss on those grounds in the case of a general permit.

Ms. Wesdock suggested language in Rule 1021.52(a) stating that "in the case of a general permit, an appeal must be filed within 30 days after actual notice." She also questioned why

actual notice could not be given to affected parties. Ms. Woelfling pointed out that there are different types of notice and also questioned how to define “the action” being appealed.

Judge Renwand agreed with Ms. Woelfling. He stated that when the Board tries to craft a broad rule to deal with a specific problem, it usually creates other problems that the Board had not envisioned. He noted that a rule requiring actual notice might work in the case of sewage sludge application but would be impossible in the case of a statewide permit. He felt that addressing the issue on a case-by-case basis allowed for more specificity in addressing the nuances of each case, as opposed to trying to do it in a general rule.

Judge Miller expressed a concern that if the Board simply deals with this issue on a case-by-case basis, as opposed to in its rules, the general public might not be aware of it. Mr. Scott noted that not just the public, but attorneys too could be affected. For instance, in the case of local counsel who may not routinely appear in front of the Board, that counsel is simply going to consult the rules and believe that an appeal filed more than 30 days after a general permit was published in the Pa. Bulletin is going to be too late. Mr. Bohan stated the problem could be resolved by referencing the *Army* case in the comment to the rule. Ms. Woelfling questioned whether the *Army* case would apply to every general permit situation.

Mr. Scott and Judge Renwand also questioned whether a Board requirement stating that an applicant for a general permit must provide actual notice to affected parties might be running afoul of a statute or regulation that does not require actual notice. Additionally, Judge Renwand reiterated that in some cases it would be difficult to provide actual notice to everyone who could potentially be affected by a general permit.

Mr. Bohan also provided a caveat about the *Army* case: While it provides a good summary of the issues with respect to general permits for residual waste, one should not make the same generalizations with regard to all types of general permits.

Mr. Scott raised a concern that a rule requiring actual notice could be used to block a project from going forward. He gave the following example: A landowner/developer gets financing to develop a site. Eighteen months later the construction equipment shows up to bulldoze the site, and a neighbor who did not receive actual notice now sees an appeal as a way to roadblock the project. Judge Miller stated this could be resolved by giving actual notice to any neighbors who are affected by the project. Mr. Scott felt it might not be an easy task to define who is affected. For instance, a downstream landowner, not necessarily an adjacent landowner, could be affected. Ms. Woelfling pointed out that a person who canoes downstream of the project could be affected, and it would be difficult or impossible to provide notice to anyone falling into that category.

Judge Miller pointed out that he simply wanted to address the issue of timing, not standing. Mr. Bohan expressed a concern that by requiring notice, is the Board, in effect, conferring standing on someone who might not otherwise have standing?

Judge Renwand suggested discussing it among the judges at the next Board conference call. Ms. Shinkman said that she would also like to get comments on Judge Miller's proposed rule from Department attorneys.

Ms. Woelfling stated that if the Board creates a special category requiring actual notice for persons affected by a general permit, how would that be different than requiring actual notice for persons affected by an individual permit? Mr. Bohan also noted that the discussion had

pertained only to general permits and had not addressed permits-by-rule, which would also have to be considered if changing the rule for general permits.

It was recommended that the general permit issue be addressed in the Practice and Procedure Manual. Mr. Bohan noted that if the issue is explained in the Practice and Procedure Manual, it is not rulemaking and therefore not subject to the IRRC review process. Ms. Shinkman agreed, stating that the Practice and Procedure Manual simply advises people as to what cases to look at with respect to certain issues. Ms. Wesdock will see that the necessary revisions are made to the Manual.

Mr. Scott asked whether the problem could be addressed by the Department. Ms. Shinkman felt that approach was not feasible since each program at the Department has its own types of general permits with different issues and characteristics. She did note that it might be possible for the residual waste program to address general permits at this time since the residual waste regulations are currently up for review/revision. However, since the other Department programs have no regulations being revised at the current time, they would not put together a rules package simply to address the general permit issue.

In conclusion, Judge Renwand and Judge Miller agreed to discuss the issue with the other Environmental Hearing Board judges on their next conference call, and Ms. Shinkman will ask for input on Judge Miller's proposed rule from Department attorneys.

Miscellaneous Motions (1021.95)

Ms. Wesdock stated that she had received a telephone call from an attorney asking if a memorandum of law needed to be filed with a motion to amend an appeal when the motion to amend was consented to by all of the parties. She told him that Judge Renwand would not

require it, but it was suggested that the Board might want to amend Rule 1021.95 dealing with miscellaneous motions.

Mr. Wein recommended that instead of amending the rule, the Board could simply make a revision to Pre Hearing Order No. 1, stating that miscellaneous motions need not be accompanied by a memorandum of law if they are consented to.

Ms. Wesdock will make the change to the Board's Pre Hearing Order No. 1.

Location of Future Meetings:

Mr. Wein offered the use of his firm's videoconferencing equipment for future Rules Committee meetings in consideration of the Commonwealth's budgetary travel restrictions. A question was raised as to whether it would be a violation of the State Ethics Act to hold the meetings at offices of Buchanan Ingersoll. Judge Renwand stated a preference for holding the meetings at Board locations.

Electronic Discovery:

Judge Renwand reported that the Board's pilot project on electronic discovery is going quite well and has been in place for approximately one year.

Schedule of Future Meetings:

Future meetings in 2009 are as follows:

Thursday, July 9, 10:15 a.m.

Thursday, September 10, 10:15 a.m.

November meeting TBD

The normally scheduled November meeting (November 12) is the same date as the Pa. Resources Council board meeting and dinner and, therefore, needs to be rescheduled. Ms. Wesdock will send out a calendar to find out Committee members' availability in November.

Adjournment:

On the motion of Ms. Shinkman, seconded by Ms. Woelfling, the meeting was adjourned.