

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of September 11, 2008

Attendance:

The Environmental Hearing Board Rules Committee met by telephone on September 11, 2008 at 10:15 a.m. Committee Chair Howard Wein presided. Attending the meeting were Vice Chair Maxine Woelfling, Jim Bohan, Brian Clark, Stan Geary, Tom Scott. Representing the Board were Judge George Miller, Andy Bockis and Maryanne Wesdock who took the minutes. Phil Hinerman joined the call at approximately 10:45.

Rules Package 106-9:

The rules package is currently at the Governor's Policy Office for review and approval. They are expected to complete their review during the week of September 15. After that approval, the package will be submitted to the Independent Regulatory Review Committee, the House and Senate Environmental Committees and the Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

Because the proposed rules have been discussed at both the Environmental Law Forum and the Spring 2008 Section Day meeting, it was determined that a 30-day comment period should be sufficient. In addition, Ms. Wesdock will circulate the proposed rules on the PBA Environmental, Mineral and Natural Resources Law Section listserv and the Allegheny County Bar Association Environmental Law Section listserv, as well as submit them to Mr. Hinerman for distribution to the Philadelphia County Environmental Law Section.

Future Topics:

The discussion turned to future topics that should be addressed by the Rules Committee:

1. Rule 1021.52(a)(2) – Timeliness of an appeal – The rule currently states that an appeal by a third party shall be filed within 30 days of publication of notice of the action in the Pennsylvania Bulletin *or* within 30 days of actual notice *where there is no publication in the Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2). The Rules Committee will consider whether this rule should be revised, particularly in the case of the issuance of a general permit. Judge Miller reported on an issue regarding the timeliness of an appeal in cases involving general permits.

Mr. Bohan explained that a general permit is generally a two step process, whereby the Department first issues a statewide general permit and then issues a site-specific determination of applicability to individual applicants. The Board has ruled that until the Department approves a location for the activity covered by the general permit, there is no reason for a landowner to appeal, and indeed, it is questionable whether a landowner would have standing to appeal a general permit where no location has been specified. *See Stevens v. DEP*, 2000 EHB 438. (Finding that any attempt by the appellant landowners to have appealed at the time of publication of the general permit would have failed for lack of standing since the appellants were not aggrieved at that time.)

However, in the case of a general permit notice that does specify a location, a question has been raised as to whether publication of that notice in the Pennsylvania Bulletin constitutes proper notice to neighboring landowners since they are unlikely to read the Pennsylvania Bulletin.

Mr. Clark suggested that Mr. Bohan research the Department's policy regarding general permits and provide a report to the Committee at its next meeting.

2. Marcellus shale – Ms. Woelfling asked if the Board has seen an increase in the number of cases dealing with drilling in the Marcellus shale and asked whether it has resulted in the need for expedited proceedings. Mr. Bockis and Ms. Wesdock responded that the Board has seen some cases involving this subject and would likely follow the Board’s proposed rules on expedited proceedings where necessary.

3. Serving of subpoena – Mr. Bohan noted that Rule 1021.103 does not refer to the Pa. Rule of Civil Procedure dealing with serving a subpoena on a non-party where the request is only for documents and things. He will prepare a revised draft of the rule incorporating the Pa. R.C.P.

4. Format of documents – Mr. Bohan asked whether the Board would consider a rule requiring some uniformity of filings, e.g. numbering of pages, requiring documents to be on 8 ½ x 11 inch paper. Ms. Wesdock noted that the Board had considered adopting Pa. R.C.P. 204.1 and, in fact, had included notice of such on its website. However, two of the requirements of the rule, namely requiring a three inch margin and requiring that documents be bound, were causing confusion among practitioners, particularly since the Board’s notice of appeal form did not comply with rule. Additionally, the three inch margin requirement was unnecessary since the Board does not date stamp parties’ copies of the filing. Therefore, the Board had decided not to reference Pa. R.C.P. 204.1 in its rules. However, after discussion, it was decided that some filing uniformity would be helpful, particularly the requirements noted by Mr. Bohan, in addition to requiring that documents be typed and double spaced, except for quotes and footnotes. It was agreed that a handwritten notice of appeal would be excused, but all future filings would need to be typed.

Mr. Geary noted that the General Rules of Administrative Practice and Procedure contain a filing uniformity rule. Ms. Wesdock will prepare a draft EHB rule, using the GRAPP rule as a guide.

5. Electronic filing – Judge Miller raised the issue of whether the Board should make electronic filing mandatory. Along the same lines, Ms. Woelfling suggested the Board might want to consider allowing notices of appeal to be electronically filed. Mr. Wein pointed out that to allow the e-filing of notices of appeal would require a change in the Board’s e-filing system since it is currently set up to accept only documents that already have a docket number. He suggested the possibility of “indirect” e-filing, which would involve emailing a copy of the appeal to someone at the Board, such as Board Secretary Bill Phillipy. This would also require a response from Mr. Phillipy acknowledging receipt of the appeal. Judge Miller noted that documents that are currently e-filed must be reviewed by Board personnel before they are uploaded to the system and that person could easily send an email acknowledging notice of receipt.

Judge Miller expressed a concern about notices of appeal e-filed on the 30th day and questioned whether non-receipt would constitute a breakdown in the Board’s operation. Mr. Bohan stated he would take the approach that ultimately it is the responsibility of the filing party to ensure that the document is filed.

Mr. Hinerman noted that the timeliness of a notice of appeal is more important than any other document and, for this reason, federal court does not allow the e-filing of initial complaints.

One other e-filing issue was noted by Ms. Woelfling, who stated there are problems with the system’s ability to accept lengthy documents.

Discussion of e-filing will be resumed at the next meeting. In the interim, Ms. Wesdock will talk to LT Court Tech to determine how much expense the Board would incur were it to allow the filing of notices of appeal.

PBA Environmental, Mineral and Natural Resources Law Section:

The PBA Environmental, Mineral and Natural Resources Law Section will meet on October 29, 2008 at 11:00 a.m. at the Radisson in Camp Hill. Ms. Wesdock will ask Section members whether there are any areas of the Board's practice and procedure that they feel should be addressed.

Next Meeting:

Due to Judge Renwand and Ms. Wesdock's involvement in a hearing the second Thursday of November, the next Rules Committee meeting will be moved to **December 4, 2008 at 10:15 a.m.**