

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF JANUARY 9, 2014

Attendance:

The Environmental Hearing Board (EHB or Board) Rules Committee met on Thursday, January 9, 2014, at 10:30 a.m. Attending in person were the following: Rules Committee members Jim Bohan, Dennis Whitaker and Matt Wolford; EHB Judge Rick Mather and EHB counsel Tom Duncan and Eric Delio. Participating by phone were the following: Rules Committee Chair Howard Wein, Committee Vice-Chair Maxine Woelfling, Committee members Brian Clark, Gail Conner and Phil Hinerman; EHB Chairman and Chief Judge Tom Renwand, Judge Steve Beckman, and EHB counsel Tim Estep, Christine Walker and Maryanne Wesdock, who took the minutes.

The Committee extended a welcome to Dennis Whitaker, the newest member of the Rules Committee.

Approval of November 14, 2013 minutes:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the minutes of the November 14, 2013 meeting were approved.

Status of rules package 106-10:

Ms. Wesdock reported that the final rules package was sent to the Office of General Counsel, the Governor's Office of Policy and Governor's Office of the

Budget on December 19, 2013 for review. Once it is approved, it will begin the final stage of the regulatory review process with the House and Senate environmental committees, IRRC and the Attorney General.

Ms. Wesdock also advised the Committee that the Board will give the Department sufficient notice before the rulemaking is final so that testing can be conducted on the changes to the Board's e-filing system that will allow automatic service of an electronically filed notice of appeal on the Department.

Mr. Wein recommended that the Board discuss this new feature at the Environmental Law Forum, and notify attorneys that once the rules go into effect appellants who electronically file a notice of appeal will no longer have to serve a copy on the Department's Office of Chief Counsel or program office.

Attaching Written Copy of Action to Notice of Appeal:

Discussion continued from the November 14, 2013 meeting regarding the issue of whether a copy of the Department's action must be attached to a notice of appeal. The Board's rules at 25 Pa. Code § 1021.51(d) state as follows: "*If the appellant has received written notification* of an action of the Department, a copy of the action shall be attached to the appeal." (emphasis added) However, the Board's notice of appeal form simply states "attach a copy of the Department's action," and the Board's practice has been to require *all* appellants to attach a copy of the Department's action, regardless of whether they have received written

notification of the action. When an appellant fails to attach a copy of the Department action, the Board's practice has been to issue a Failure to Perfect order, directing the appellant to provide the Board with a copy of the action or face dismissal of the appeal. The question presented to the Rules Committee is whether Rule 1021.51(d) should be revised to eliminate or modify the requirement that an appellant must attach a copy of the Department action to its appeal.

Judge Beckman explained the problem as follows: The Board's current practice is to require appellants to perfect their appeal by providing the Board with a copy of the action being appealed regardless of whether they received written notice of the action. An appellant may have read about the action in the Pennsylvania Bulletin or otherwise heard about it without receiving an actual notice. Should the Board require those appellants to attach a copy of the action?

Judge Mather notified the Committee that the Board's practice was recently revised, and beginning in November 2013 the Board has only required appellants receiving written notice of the Department's action to provide a copy of it. However, Judge Mather noted that the Department now provides an e-notice service, whereby appellants can sign up to receive email notifications regarding certain actions taken by the Department, and this raises the following questions: 1) Does e-notice constitute "written notification" of an action? and 2) Can those appellants simply attach a copy of the e-notice, rather than a copy of the action?

Mr. Wolford and Mr. Wein stated that it can be time consuming and cumbersome for some appellants to track down and provide a copy of the action. Mr. Hinerman also noted that while it may be easy to obtain a copy of a permit, it may be difficult for a third party appellant to obtain a copy of a letter. Mr. Whitaker questioned how an appellant could specify his objections to the action being appealed if all he has looked at is the notice and not the action itself.

Judge Renwand asked how it helps the Department or Permittee to have a copy of the action attached since the Department and Permittee already have a copy of it. Mr. Bohan reported that he had solicited input on this matter from Department attorneys. Several Department attorneys stated that it is helpful, as a matter of clarity, to have the action attached to the notice of appeal in order to determine *what* is being appealed. In some cases, it is difficult to determine what action is being appealed by a third-party appellant, especially in the case of a appellant who is proceeding *pro se*. Discovery does not always provide the necessary information, particularly if an appellant is not very forthcoming; again, this is more common with *pro se* appellants. Department attorneys also felt that an appellant would be more likely to clearly frame his objections at the outset of the appeal if he had a copy of the action being appealed.

Judge Renwand and Judge Mather felt that an appellant would not get far in his appeal without clearly stating what his objections were. Judge Renwand stated

that he did not feel it would be particularly helpful to the Board or the Department to require an appellant to attach a copy of the action, especially a lengthy permit, to his notice of appeal.

Mr. Wolford agreed, and stated that as a solo practitioner he has had to spend time scanning lengthy documents (e.g., 120 page permit) simply to attach to a notice of appeal. He suggested making it discretionary with the Board as to whether a copy of the action needs to be attached.

Judge Renwand suggested that if the Department feels it is important for an appellant to provide a copy of the action, the Department can file a motion to produce. Mr. Whitaker questioned why the burden should be on the Department. He felt that it is to the Board's advantage to have an appellant file the most complete notice of appeal possible, which includes a copy of the action.

Mr. Whitaker then suggested that the appellant could attach a copy of the face sheet of the action being appealed, as opposed to the entire document. Mr. Wein and Judge Renwand agreed with this suggestion. Mr. Wolford proposed allowing an appellant to attach the first page of the action if the action exceeds five pages. Mr. Whitaker suggested that it could be handled in the same manner as lengthy faxes, where the Board permits a party to submit the first five and last five pages. Ms. Woelfling felt that the Committee was elevating form over substance

by ascribing greater worth to the attachment of the action than it was intended to be.

Mr. Bohan stated that if there was a concern that a would-be appellant would not be able to obtain a copy of the action within the timeframe for filing the appeal, the appellant would have 20 days after filing the appeal in which to amend it, and the judges would likely allow further amendment after that time period. He also felt that if the rules were different for various types of actions – i.e., that some actions must be attached, others need not be attached, actions over a certain length only need to have the first five and last five pages attached, etc – the process would become cumbersome.

Mr. Hinerman questioned why it was not okay to simply ask “what action is being appealed?” Mr. Bohan cited to a case in which a mining permit was issued at the same time as an NPDES permit, and the appellant was not able to distinguish between the two. Mr. Bohan felt that more information is needed in order to determine exactly *what* is being appealed.

Mr. Hinerman stated that one of the reasons the Board had proposed revising its electronic filing rules was to make the filing of an appeal easier; he felt that this purpose was defeated by requiring an appellant to attach a copy of the action, particularly in those situations where the document was lengthy.

Judge Mather reiterated that the Board needs to deal with the additional question of whether the Department's e-notice system constitutes "notice" under the Board's rules. Ms. Woelfling suggested that it would be helpful to understand the different types of notices issued with regard to various types of actions.

Mr. Bohan volunteered to work on a draft rule. He asked whether the primary objection to requiring an appellant to attach a copy of the action is the length of the document. Mr. Wolford stated that another problem is that an appellant may not know where to obtain a copy of the action.

Mr. Hinerman asked why it was important to physically see a copy of the action. Mr. Whitaker stated that it gives the Department the assurance that the appellant has actually seen what he is appealing. Mr. Bohan added that it helps the Department understand exactly what is being appealed. He noted that if all appellants drafted clear objections, it would not be a problem, but this is not always the case. Ms. Woelfling noted, however, that even if a copy of the action is attached, it may still be difficult to decipher what part of the action is being objected to. Ms. Woelfling also emphasized that the EHB rules are procedural rules and, therefore, should not be addressing the question of whether the appellant has actually reviewed the Department's action.

Mr. Clark commented that a disproportionate amount of time was spent in Rules Committee discussions trying to develop rules to accommodate pro se

appeals. On the question of whether a copy of the action should be attached, he felt that a compromise might move the process forward. He agreed with the earlier suggestion of requiring an appellant to attach the first several pages of the action being appealed.

The Committee next turned to the question posed by Judge Mather regarding whether the Department's e-notice system constitutes "written notice." The e-notice simply provides a link to a notice about the action. Mr. Whitaker noted that simply because a person signs up for the e-notices, it doesn't necessarily mean that the link is opened or the notice read. Mr. Wolford agreed, and noted that there is no way to determine if or when the individual receiving the e-notice opens the link.

Mr. Wolford asked whether the Department has ever taken the position that an e-notice constitutes notice for purposes of determining the appeal period. Mr. Whitaker and Mr. Bohan responded that they were not aware of the Department ever having taken this position. Mr. Bohan stated that an advantage of revising Rule 1021.51(d) to require that all appellants attach a copy of the action, and not simply those appellants who received written notice, would be to eliminate the need for defining what constitutes a "written notice." However, Judge Beckman stated that he prefers having the appellant attach a copy of the action only if he did, in fact, receive written notice of it. Judge Mather agreed, and felt that if the Board were to require all appellants to attach a copy of the action regardless of whether

they had received written notice, it would be expanding the rule, which he was not in favor of doing. It was also noted that the notice of appeal form needs to be brought into compliance with the rule.¹

Mr. Whitaker felt it was important that the appellant clearly identify how he or she got notice of the action in order to determine if the appeal is timely. Mr. Whitaker also felt that the rule should not be dependent on Department practice since Department practices can change over time.

A discussion ensued as to whether an appellant should be required to attach a copy of the action itself or simply the notice of the action. Judge Renwand stated that when a Department order is the subject of an appeal, it is helpful to have a copy of the order. Mr. Bohan also felt it would be helpful to have a copy of the action when a supersedeas petition has been filed. Judge Renwand agreed. Ms. Wesdock noted that it would be helpful for Judge Renwand to have a copy of the action being appealed in order to make a determination on where to assign the appeal. Mr. Wolford reiterated his earlier opinion that the Board should have discretion in determining whether the appellant should attach a copy of the action.

It was agreed that the Department and the Board should compile the following information for the March 13, 2014 meeting: The Department will identify 1) the types of notice given for various types of actions and 2) what

¹The notice of appeal form was revised following the Rules Committee meeting to bring it into compliance with Rule 1021.51(d).

information they feel is needed in a notice of appeal. The Board will determine what type of information it requires in a notice of appeal.

Mr. Wein noted that this exercise might tie in with development of the citizens guide. Mr. Wolford recommended that the citizens guide be vetted by the Rules Committee before it goes into effect.

Subpoenas:

The issue raised by PennFuture regarding the Board's rule on subpoenas was deferred to the March meeting.

Congratulations on New Position:

The Committee and Board extended congratulations to Mr. Bohan who will assume the position of Director of the Department's General Law Division, effective January 27, 2014.

Agenda for March 13, 2014 Meeting:

The agenda for the March 13, 2014 meeting will include 1) the question regarding the Board's subpoena rule raised by PennFuture in its comments to the rules package, and 2) the Office of General Counsel's mediation program and how it may be incorporated into the Board's practice.

Adjournment:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the meeting was adjourned at approximately 12:30.