

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**MINUTES OF MEETING OF JANUARY 10, 2013**

**Attendance:**

The Environmental Hearing Board Rules Committee met on January 10, 2013. The meeting commenced at 10:35 a.m. In attendance in Harrisburg were the following: Environmental Hearing Board Judges Bernie Labuskes and Rick Mather; Rules Committee members Maxine Woelfling, Jim Bohan, Brian Clark, Representative Kate Harper, Phil Hinerman and Dave Raphael; and Board Assistant Counsel Kris Gazsi. Participating by teleconference in Pittsburgh were the following: Environmental Hearing Board Chairman and Chief Judge Tom Renwand, Rules Committee Chairman Howard Wein and Board Counsel Maryanne Wesdock, who took the minutes.

**Minutes of September 13, 2012 Meeting:**

On the motion of Representative Harper, seconded by Mr. Raphael, the minutes of the September 13, 2012 meeting were approved with no changes.

**Revision to Meeting Start Times:**

Mr. Wein suggested moving the start time for meetings to 10:00 a.m. (as opposed to the current time of 10:15 a.m.), unless otherwise scheduled. Mr. Wein's proposal was approved.

**Next Meeting:**

The next meeting of the Rules Committee will be **Thursday, March 14, 2013.**<sup>1</sup> Ms. Woelfling also informed the group that the Environmental Law Forum will be on April 10 and 11, 2013.

**Status of Rules Package 106-10:**

Prior to the meeting, Mr. Wein had requested that a revision be made to the Rules Package in order to clarify that the Department of Environmental Protection (Department) will be establishing an email account to allow for the electronic service of notices of appeal on the Office of Chief Counsel.<sup>2</sup> Judge Mather recommended adding the change prior to the final rulemaking in order to allow more time for the Department to develop the new email account and determine how it will work. Judge Mather explained that revisions can be made to a proposed rule prior to final rulemaking as long as it is not an enhancement of the rule. He did not feel that adding a reference regarding the establishment of a Department email account for the electronic service of notices of appeal was an enlargement of the rule.

Mr. Raphael explained that the new account will be monitored by Administrative Officer Glenda Davidson who will forward the notice of appeal to

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<sup>1</sup> At the request of Judge Renwand and Ms. Wesdock, who will be driving in from Pittsburgh, the start time of the March 14, 2013 meeting was moved to 10:30 a.m.

<sup>2</sup> EHB Rule 1021.51 requires that when a notice of appeal is filed with the Environmental Hearing Board, a copy must also be concurrently served on the Department's Office of Chief Counsel, the Department official who took the action being appealed and, where applicable, the permittee in a third party appeal. 25 Pa. Code § 1021.51(f)(1)(iv) and (2)(vi).

the appropriate Regional Office of the Office of Chief Counsel. Mr. Wein asked whether Ms. Davidson could also forward the notice of appeal to the Department official who took the action so that service of the notice of appeal could be conducted electronically without the need for mailing it. Mr. Raphael agreed to look into whether this is an option. One thing to consider is that Ms. Davidson would need to have a backup. Additionally, it was noted that the requirement of sending the notice of appeal to the official at the Department who took the action is part of perfecting the appeal, which is the responsibility of the appellant. Mr. Raphael raised the concern that requiring Ms. Davidson to forward the notice of appeal to the program office shifts the burden to the Department.

As an alternative, Mr. Wein asked if the Department's action could include the email address of the official taking the action so that the notice of appeal could be emailed to him/her. Ms. Woelfling stated that when she has requested email addresses she has been told in some instances that the information is private. Ms. Wesdock noted that Commonwealth employee email addresses are generally available to the public under the Right to Know Law and, therefore, there should be no reason to withhold them from the document in which the action is taken.

Mr. Clark voiced a concern as to whether the Department's spam filter system might block notices of appeal sent by email. Mr. Bohan and Mr. Raphael agreed to look into this issue.

### **Outreach of Rules Package:**

It was noted that Mr. Wein and Ms. Wesdock presented highlights of the rules package at the Pennsylvania Bar Association Environmental and Energy Law Section meeting in November 2012 and at the Allegheny County Bar Association Environmental Law Section program in December 2012. Judge Renwand felt that the presentation should also be a part of the Environmental Hearing Board Roundtable at the Environmental Law Forum in April 2013.

Mr. Raphael also noted that the rules package has been distributed to the Department's regional counsel.

### **Department Feedback on Board's Electronic Filing System:**

Mr. Bohan discussed feedback he has received from Department attorneys regarding the Board's electronic filing (e-filing) system:

- 1. It would be helpful to have additional information on the confirmation page that is displayed when a document is e-filed.**

Currently, the confirmation page displays only the confirmation number for the e-filed document. Mr. Bohan explained that the confirmation page does not provide any information that would allow users to determine which e-filing the confirmation relates to. He feels it would be helpful for the confirmation page to contain the following information: case name, docket number, date and time of the filing, name of the

registered user on whose behalf the document is being filed and the name of the document (e.g., notice of appeal). Ms. Wesdock will talk to LT Court Tech to see if this information can be included in the confirmation.

**2. Add the time of filing to the e-filing receipt emailed to e-filers.**

Currently, the e-filing receipt includes only the date of e-filing, not the time. Section 1021.32(c) of the proposed rules states that the e-filing receipt shall include the time of the filing. Additionally, Section 1021.39(b) requires the Board's docket to list the time of the electronic filing. Ms. Wesdock stated that it was her belief that LT Court Tech had already been notified that the time of e-filings will need to be documented in some way. She will follow up with them.

**3. Issues with electronic service in cases that are marked 'closed.'**

Filings may still be made in a closed case, such as where there is a petition for attorney's fees or an appeal to the Commonwealth Court. In those cases, even where the case is marked "closed" the Board's electronic filing system still allows documents to be e-filed. However, Mr. Bohan reported that at least one Department attorney has experienced a problem with electronic *service* in a case that has been marked "closed." In that case, when the Department attorney e-filed a document he received a notice stating that electronic service could not be

effected on opposing counsel, even though opposing counsel was registered to receive electronic filing. Ms. Woelfling reported that she too has experienced this problem. Prior to the meeting, Ms. Wesdock had asked EHB Administrative Officer, Kathy Berwager, about the procedure for closing cases. Ms. Berwager reported to her that after adjudications are issued, the case is closed after 30 days. This allows a period of time to see if any filings may still come in, such as a petition for attorney's fees or an appeal to Commonwealth Court. However, where a case is dismissed by means of an Opinion or an Order, the case is closed immediately. Mr. Gazsi noted that when the Board issues an "Order to Dismiss" it automatically acts to close the case. Representative Harper suggested having the system set up so that it closes a case only if no other document is filed within a certain number of days. It was proposed that the Board set up a new procedure to keep all cases open for 30 days even after they are dismissed or otherwise adjudicated. Additionally, Ms. Wesdock will discuss the problem with LT Court Tech.

4. **Hyperlinks to e-filed documents.** Mr. Bohan reported that some e-filing notices do not contain hyperlinks to the e-filed document. Judge Labuskes noted that it only appears to happen when the e-filed document

is a notice of appearance. Specifically, the problem seems to occur when an attorney enters his or her appearance but does not file an entry of appearance. Mr. Gazsi agreed to look into the problem.

5. Ms. Woelfling reported having a problem opening hyperlinks on the Board's electronic docket. Mr. Gazsi explained that LT Court Tech has made recent changes to the Board's electronic docket in order to allow the e-filing of multiple documents. In order to open a document on the electronic docket, it is necessary to hover over the icon which then brings up a blue box containing a hyperlink to the document. It was suggested that the Board include instructions on its webpage on how to open documents shown on the electronic docket. Mr. Bohan stated that he would send Ms. Wesdock instructions that he recently drafted for the Department. Mr. Gazsi also suggested that the Board check with LT Court Tech on whether they can make the command more user-friendly.

**LT Court Tech Feedback on Proposed Changes to Electronic Filing:**

LT Court Tech, the Board's website provider and the developer of the Board's electronic filing system, is making enhancements to the e-filing system to accommodate the changes set forth in the Board's proposed rule revisions on electronic filing. This includes opening the system to non-attorneys. In a conference call with Mr. Gazsi, Ms. Wesdock and Board Secretary Vince Gustitus,

representatives of LT Court Tech raised an issue regarding electronic filing by non-attorneys. LT Court Tech has proposed developing the system so that non-attorneys must enter a docket number in order to electronically file a document. This will work for documents other than a notice of appeal. However, because a notice of appeal starts the case, no docket number is assigned until after the notice of appeal is filed.

The reasons that LT Court Tech feels that a *pro se* appellant should be required to enter a docket number for the case is twofold:

1. Security and spam – There is nothing currently implemented in the system that would stop a user from creating many illegitimate cases. Mr. Gazsi provided an example of how this could occur: If the Board issues a ruling in a very high profile case that is not well received by members of the public or a community or organization, there is nothing currently in place in the Board’s e-filing system to prevent individuals from clogging the Board’s e-filing system with spam or other non-legitimate filings.
2. New and existing case merging – If a *pro se* appellant files a notice of appeal and the case already exists in the system, there would be no way of merging the case information or docket entries.

There was a great deal of discussion regarding the first issue, i.e. the issue of security. Mr. Raphael questioned whether it would help to put a size limit on the

documents being filed. However, as Mr. Gazsi noted, in complex cases with maps, etc, the filing size may be quite large.

Representative Harper suggesting creating a folder to hold electronic filings with the same subject line. Mr. Gazsi stated that the Board's system is not set up to do this.

Mr. Bohan suggested installing a mechanism to ensure that the generator of the e-filing is not a computer; it would eliminate some problems, but would not resolve the issue where the generator of the inappropriate e-filing is a person.

Judge Renwand stated that he could contact Roger Leasure at the Western District Court to see how this problem is avoided with the federal court e-filing system. Mr. Gazsi explained that the federal system uses Pacer, which involves a difficult registration process and requests a credit card number. Representative Harper noted that a filing fee would avoid much of the problem.

Ms. Wesdock suggested allowing only attorneys to e-file notices of appeal and to require *pro se* appellants to file notices of appeal by conventional means. However, Judge Renwand felt that *pro se* appellants are greatly benefited by allowing them to file electronically since most people have access to email and the internet, but less access to a fax machine.

Judge Mather recommended having e-filers include their contact information and check a box that says the contact information is correct and true to the best of

their knowledge. Mr. Wein suggested also including a citation to 18 Pa.C.S. § 4904, regarding unsworn falsification. The Committee agreed with these recommendations. Ms. Wesdock will advise LT Court Tech.

**Electronic Discovery:**

Several years ago, Mr. Hinerman and then-Director of Litigation at the Department, Dennis Strain, looked into the issue of electronic discovery for the Rules Committee. The Board subsequently decided to adopt a pilot program on electronic discovery. Mr. Wein requested that the subject again be taken up by the Committee in order to determine whether any rule revisions are required. Mr. Wein distributed a copy of the new revisions to Pa.R.C.P. 4009.1, 4009.11, 4009.12, 4009.21, 4009, 23 and 4011, dealing with electronic discovery.

Mr. Raphael and Mr. Bohan explained some of the challenges at the Department regarding electronic discovery. Mr. Raphael noted that attorneys at the Department spend a significant amount of time responding to electronic discovery and requests filed pursuant to Pennsylvania's Right to Know Law. Mr. Wein also noted that when the issue of electronic discovery was first addressed by the Rules Committee several years ago, Mr. Strain had explained that each regional office and each program area had a different retention system.

Mr. Wein pointed out that one of the reasons electronic discovery is critical is because Department actions may now be found in an email or in a letter attached

to an email. Communications, both inter-office and with outside parties, are now done more frequently by electronic means.

Mr. Raphael explained that it is extremely expensive and time-consuming to produce metadata, and in his opinion, a case is never won or lost on this type of information. Mr. Bohan set forth additional issues facing the Department with regard to electronic discovery. He explained that the Department's system is quite complicated, involving both physical servers and virtual servers. Additionally Department mailboxes are stored on servers maintained by the Office of Administration. This presents a challenge since Department mailboxes are commingled with those of other agencies, including the Environmental Hearing Board.

Judge Renwand stated that he feels the Board's pilot program on electronic discovery is working well. The pilot program requires that the parties first meet and confer and then draft a plan for conducting electronic discovery. Judge Renwand stated that the Board does not hear many disputes over electronic discovery, and when such disputes are brought to the Board the parties spell out the issues clearly and the Board is able to craft an order to address the issues. Judge Mather concurred. Judge Renwand stated that he was not convinced that the Rules Committee needed to draft a new set of rules since what is currently in place is working well.

Judge Renwand felt that the new electronic discovery rules in the Pa. Rules of Civil Procedure give the Board an additional tool with which to work. Judge Labuskes agreed that the Board's rules should not be revised and that the Board should utilize the Rules of Civil Procedure to resolve electronic discovery disputes. Mr. Wein asked whether the new Rules of Civil Procedure should be incorporated into the Board's rules. Judge Renwand noted that the Board's discovery rules already incorporate the Pa. Rules of Civil Procedure. Mr. Wein suggested that the Board's orders on electronic discovery reference the Pa. rules.

Mr. Wein suggested that the Board include an explanation of the Board's electronic discovery pilot program on its website, as well as a reference to the Pa. R.C.P. rules on electronic discovery. Ms. Woelfling also recommended discussing it at the EHB Roundtable program at the Environmental Law Forum on April 11, 2013 at 8:30 a.m. When the Board publishes a new Practice and Procedure Manual, it should also include a discussion of the Board's pilot program on electronic discovery.

**Adjournment:**

The meeting was adjourned. The Committee will meet again on March 14, 2013 (Note: The time of the March 14 meeting was moved to **10:30 a.m.**)