

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MARCH 8, 2018

Attendance:

The Environmental Hearing Board Rules Committee met on March 8, 2018 at 10:30 a.m. The following Committee members participated in the meeting: Committee Chairman Howard Wein (Pittsburgh), Alex Chiaruttini (Harrisburg), Jim Bohan (Harrisburg), and by phone: Committee Vice Chair Maxine Woelfling, Brian Clark, Gail Conner, Phil Hinerman and Matt Wolford. Attending on behalf of the Board were EHB Chairman Tom Renwand (Pittsburgh), Judge Rick Mather (Harrisburg), Board Secretary Christine Walker (Erie) and Assistant Counsel Eric Delio (Harrisburg), Mica Iddings (Norristown), Nikolina Smith (Erie) and Maryanne Wesdock (Pittsburgh), who took the minutes. Lee Ann Murray, Executive Director of the DEP Citizens Advisory Council, also attended in Harrisburg.

Approval of Minutes of January 25, 2018 Conference Call:

On the motion of Mr. Bohan, seconded by Mr. Clark, the minutes of the January 25, 2018 conference call were approved.

Mediation:

At several previous meetings, the Joint Subcommittee on Mediation¹ (Mediation Subcommittee) discussed a proposal for a mediation program with the Environmental Hearing Board. Prior to the January 25, 2018 conference call, Mr. Wein and Mr. Hinerman circulated the following documents:

- Proposed Statement on EHB's Program for Early Resolution Mediation

¹ The Joint Subcommittee on Mediation consists of members from the EHB Rules Committee, the PBA Environmental and Energy Law Section, and the PBA Committee on Unauthorized Practice of Law.

- Proposed revision to Pre-Hearing Order No. 1
- Proposed Agreement to Mediate

Prior to the March 8, 2018 Rules Committee meeting, Judge Renwand and Judge Beckman met with Mr. Wein and Mr. Hinerman to discuss the Board's position on the proposed mediation program.

Judge Renwand thanked Mr. Wein and Mr. Hinerman for their exceptional work in preparing the proposal. He agreed that mediation has a place in Environmental Hearing Board proceedings. However, he stated that the Board was not in favor of the changes proposed by the Mediation Subcommittee because they would dramatically change the current practice before the Board by essentially creating a lengthy stay at the beginning of an appeal while the parties decide whether to pursue mediation and/or take part in mediation. The Board believes that only a small number of cases would participate in mediation, resulting in only two to three cases per year being resolved by mediation. The judges do not feel that it makes sense to change the Board's rules and dramatically change the Board's practice for a small number of cases, particularly where the proposed changes to the Board's current prehearing schedule would result in a much more drawn out prehearing schedule. The Board also expressed concern that in third-party appeals, it is likely that only one of the parties (the permittee) would be paying the mediator's fee.

Judge Renwand pointed out that the Board currently has a rule on mediation at 25 Pa. Code § 1021.106 which is rarely used. Judge Mather echoed this statement and noted that during his nine-year tenure on the Board he has never had a party request mediation. He agreed that the program developed by the Mediation Subcommittee might generate more interest in mediation but not to the extent justifying a dramatic overhaul of the Board's prehearing schedule.

Ms. Wesdock asked if the program could be operated out of the PBA in a manner similar to the Pro Bono program. Mr. Wein stated that the program can be operated in conjunction with the PBA Environmental and Energy Law Section, and he asked the judges to consider including information about the mediation program in the Board's Prehearing Order No. 1 to make parties aware that the program exists. He will follow up with the Section to implement the mediation program in a manner similar to the Pro Bono program.

Mr. Hinerman stated that he understood the judges' concerns. Based on the survey conducted at last year's Environmental Law Forum, he felt that there is significant interest among environmental practitioners to become qualified to act as mediators in EHB cases, and it would be disappointing if attorneys go through the effort of becoming mediators and there are few or no cases to mediate. He noted that the original intent of the mediation proposal was to look at whether there is a way to accommodate small corporations so they do not have to secure counsel at the beginning of an appeal. Ms. Chiaruttini stated that before the Department moves to unilateral action or litigation, it makes every effort to resolve matters. Mr. Hinerman explained that the genesis of the mediation discussion was a question from the Governor's Policy Office regarding whether small businesses could appear before the EHB without having to be represented by counsel. Ms. Chiaruttini indicated that the Committee was going in a slightly different direction with the current mediation discussion/program than how it originally began. The new direction for the mediation program is fine with the Department as conceived, but it should be recognized that it is a departure from the original request.

In cases involving a *pro se* appellant, Ms. Woelfling stated that her practice as a judge on the Board had been to hold a conference with the parties early in an appeal in order to learn what issues the appellant had and potentially resolve some appeals in this manner. Ms. Chiaruttini stated

that the Department acts in a similar manner to try to resolve matters with *pro se* parties. Mr. Wein asked whether the Department was in favor of a mediation process, and Ms. Chiaruttini stated that it depends on the case. If the Department determines there is significant risk to public health and safety, it might not be willing to go through mediation, but that concern is addressed by a requirement that all parties must agree to mediate for it to occur.

Mr. Clark noted that it is the 30th anniversary of the passage of the Environmental Hearing Board Act. As one of the drafters of the Act, he felt that mediation is an option that should be available to parties in Board proceedings, and he noted that Section 4(h) of the Act provides for voluntary mediation, 35 P.S. § 7514(h). He feels that it would be helpful to educate parties about the benefits of mediation, including the ability of a neutral third-party to streamline the issues involved in a case. Ms. Chiaruttini agreed with the recommendation that it would be helpful to educate parties regarding the benefits of mediation.

Ms. Woelfling discussed how the Board's current rule on mediation was developed. She stated that the Board worked with outside groups to develop the rule. However, she noted that in her 11 years on the Board, there was never an instance of parties taking part in voluntary mediation.

Judge Mather advised the Committee that mediation will be one of the topics discussed during the EHB Roundtable at the Environmental Law Forum.

Judge Renwand reiterated Mr. Clark's statement that the Environmental Hearing Board Act includes a provision for mediation, but he noted that the Act provides no mechanism for funding the mediation. He feels that if only one party pays for the mediator it can result in problems. He stated that the Board has no problem with encouraging mediation and he has, in fact, done so in some of his cases. There is a provision for mediation in the Board's rules, and many attorneys are familiar with it due to mandatory ADR in the federal courts. Judge Renwand

also advised the Rules Committee that the Board is not in favor of recommending or endorsing any specific mediation program. The current rule allows the parties to select a mediator of their choice and the Board sees no need to change the rule in that regard. Ms. Chiaruttini let the group know that the Department discussed mediation at its most recent OCC annual meeting and reminded its staff that it is available and that it can be used effectively and efficiently.

Mr. Wein stated that he would like to send a copy of the minutes to the Mediation Joint Subcommittee and the Environmental and Energy Law Section. There were no objections.

Mr. Wein also proposed a change to the Board's current mediation rule, 1021.106. He suggested either deleting subsection (d) or modifying subsection (d) as follows:

(d) At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, [which sets forth the history of mediation activities conducted] **setting forth whether the mediation has been successful or has a likelihood of success if the mediation process continues to proceed.** The parties may request an additional stay if necessary to complete the mediation process.

The Committee favored modifying (d) rather than deleting it. On the motion of Ms. Woelfling, seconded by Mr. Clark, the Committee voted unanimously to recommend Mr. Wein's proposed modification to 1021.106(d).

Until the rule becomes final, Mr. Wein recommended referring mediators to the recommended rule change.

Withdrawal of Appeal:

Mr. Wolford raised an issue concerning whether Rule 1021.141 (Termination of Proceedings) should be revised to allow an appellant to withdraw his/her appeal without accepting the findings of the Department action. He explained that an appellant may wish to comply with a Department order and withdraw his/her appeal in order to avoid the time and expense of a hearing, but does not wish to accept the findings of the Department order which could subject the appellant

to a civil penalty action (or other enforcement action) in the future. Mr. Wolford explained that a Homes of Distinction settlement allows an appellant to withdraw an appeal without accepting the Department's findings, but not all Department attorneys are willing to enter into a Homes of Distinction settlement. Ms. Chiaruttini explained that the Department's findings may provide the basis for future actions, such as when the Department examines an applicant's compliance history. Mr. Bohan added that since the Department's findings become administratively final if an action is not appealed, they must in turn be considered final if an action is appealed and the appeal is withdrawn.

Mr. Wolford pointed to the Commonwealth Court's decision in *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988), that allows an appellant to challenge the basis for a civil penalty assessment issued under the Surface Mining Act even when the underlying action was not appealed. He felt that this reasoning should apply to all Department actions, not simply those taken under the Surface Mining Act. He noted that there is no statute of limitations on when the Department can bring a civil penalty action. Judge Mather suggested that what Mr. Wolford was requesting was the right of an appellant to withdraw an appeal without finality. Mr. Wolford explained that the lack of finality would only apply to the findings, not the underlying Department action (such as an order). He added that an appellant should not be compelled to proceed to a hearing merely to challenge Department findings if the appellant no longer believes there is a need to challenge the Department's action itself. He felt that such a result is a waste of judicial and other resources.

Judge Renwand suggested that if an appellant is seeking to settle a case with a Homes of Distinction type of settlement but is not able to get the Department to agree, the appellant can request a settlement conference with the Board. Judge Mather added that if an appellant is

concerned about getting extensions from the Board while the parties are waiting for certain action to occur before the case can be settled, the parties can request a conference call with the Board.

Mr. Wein stated that he was willing to discuss the situation with Mr. Wolford in order to determine if there was a way to resolve this issue. He also suggested that Mr. Hinerman and Ms. Chiaruttini may wish to be part of the discussion.

Mr. Bohan pointed out a practical problem that can arise from withdrawing an appeal without finality; if the Department's findings need to be litigated, it is best to do so when the Department personnel who took the action are employed at the Department and while the matter is fresh in everyone's mind. Ms. Chiaruttini suggested that the appellant's attorney can ask the Department attorney to agree that the Department will not take any future enforcement action. Mr. Wolford responded that this is not always an option.

Mr. Wolford noted that disagreements over findings supporting a Department action in the context of an appeal are not unlike disagreements which arise over findings in consent documents. Mr. Wein urged the Department to consider the approach taken by the EPA which does not require an admission of the findings. Mr. Wein suggested that this topic should be raised during the EHB Roundtable at the Environmental Law Forum.

Adding EHB Website to DEP Appeal Language:

Mr. Delio suggested that because the Environmental Hearing Board's website is not an easy address to identify (<http://ehb.courtapps.com>), it would be helpful if the address were included in the standard appeal language that the Department includes with its actions and in Pa. Bulletin notices. The Department agreed to consider Mr. Delio's suggestion. Ms. Chiaruttini felt that the change could be readily adopted but might take time to disseminate to the regional offices. Mr. Bohan felt that it would not be a problem to incorporate the website into the standard appeal

language of Department letters, orders, permits, etc, but might be more problematic with Pa. Bulletin notices since those notices are sometimes prepared by the client.

Mr. Delio proposed the following revision to the Department's standard appeal language:

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717.787.3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800.654.5984, Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time-period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained [from the Board] **through the Board's website at <http://ehb.courtapps.com> or by contacting the Board at 717.787.3483. . . .**

Ms. Chiaruttini will provide an update at the next Rules Committee meeting.

List of Exhibits and Witnesses in Prehearing Memorandum:

Mr. Delio and Ms. Wesdock advised the Committee that objections often arise at hearings regarding exhibits (and sometimes witnesses) presented during cross examination or rebuttal that have not been listed in a party's prehearing memorandum. The Board's rule at 1021.104, which specifies what must be included in a prehearing memorandum, states that the rule applies only to a party's case-in-chief. 25 Pa. Code § 1021.104(c). They suggested deleting subsection (c) or modifying it to say that Rule 1021.104 applies to exhibits or witnesses that a party "reasonably expects" to present at the hearing.

Ms. Chiaruttini and Mr. Hinerman cautioned that the proposed change to the rule would result in the Board being inundated with thousands of documents as potential exhibits. Mr. Hinerman stated that because attorneys must come to a hearing prepared for any possibility they must be overzealous with the documents they bring to a hearing. Ms. Chiaruttini expressed

concern that the phrase “reasonably expect to present” is very ambiguous and could result in a party listing thousands of documents in its prehearing memorandum. She suggested limiting it to “documents produced in discovery.” However, she cautioned that even this narrower language will result in the Board receiving many more documents than it desires in every case.

Judge Renwand explained that what the Board is trying to prevent is the situation where an attorney knows he or she will be using a particular document as an exhibit but wants to maintain the element of surprise. He feels that Board proceedings should be as transparent as possible. He would like to avoid having lengthy discovery disputes occur in the middle of a hearing. Ms. Chiaruttini renewed her objection, stating that parties cannot litigate what documents will “possibly” or “reasonably” be used at trial. She again emphasized that if the Board requires exhibits other than those a party intends to present in his or her case-in-chief, it will end up with hundreds of thousands of documents. Judge Renwand explained that he has had permittees’ attorneys state that because their entire case is “rebuttal” they do not have to list any documents or witnesses in their prehearing memorandum. Mr. Bohan raised a question as to how the Board would enforce a rule requiring parties to produce exhibits they “reasonably expect” to use at trial, and he questioned whether this requirement would result in parties being more scrupulous in determining which exhibits to list in their prehearing memorandum.

It was recommended that the Board address this issue with attorneys during prehearing conferences in order to make them aware of the Board’s expectations. It was also suggested that this issue should be addressed by the judges during the EHB Roundtable at the Environmental Law Forum.

Future Agenda Items:

Agenda items for the May 10, 2018 meeting include the following:

- A. **Nunc Pro Tunc** – Revision of Rule 1021.53a to provide guidance on what information should be included in a petition for leave to appeal *nunc pro tunc*, timeframe for responding, etc. (Mr. Bohan)

- B. **Filing and service of exhibits by means other than the Board’s electronic filing system** – (Mr. Delio)

- C. Possibly **Media in the Courtroom** – follow up by EHB judges on earlier discussions

Next Meeting:

The next meeting of the Rules Committee is Thursday, May 10, 2018 at 10:30 a.m.

Adjournment:

On the motion of Ms. Woelfling, seconded by Mr. Bohan, the meeting was adjourned at 12:16 p.m.