

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**Minutes of July 25, 2013 Conference Call**

**Attendance:**

The Environmental Hearing Board Rules Committee met by conference call at 10:00 a.m. on July 25, 2013. Participating on the call were the following members of the Rules Committee: Committee Chairman Howard Wein, Vice Chair Maxine Woelfling, Jim Bohan, Brian Clark, Gail Conner, Representative Kate Harper, Phil Hinerman, Dave Raphael and Matt Wolford. Participating from the Board were the following: Chairman and Chief Judge Tom Renwand, Judge Rick Mather, Judge Steve Beckman; Board Secretary Vince Gustitus; Assistant Counsel Tom Duncan, Tim Estep and Maryanne Wesdock; and Intern Pia Aklia.

**Comments Received by the Board on Rules Package 106-10:**

The purpose of the call was to address comments received on the Board's proposed Rules Package 106-10. Comments were submitted by the following: Department of Environmental Protection, Citizens for Pennsylvania's Future and the Independent Regulatory Review Commission.

**Department of Environmental Protection (Department) Comments:**

The Department's comments dealt with two subject areas: 1) proposed amendments to the Board's rules on dispositive motions at 25 Pa. Code §§ 1021.94 and 1021.94a, and 2) proposed amendments to the rule on service by parties at 25 Pa. Code § 1021.34.

*Dispositive Motions: Rules 1021.94 and 1021.94a*

At the Rules Committee meeting of September 13, 2012 where the proposed changes to the rules on dispositive motions were discussed, the Committee discussed two alternative amendments. Option A would prohibit responses in support of a dispositive motion from

containing legal and factual bases not in the original motion, unless the party seeking to file such a response obtained leave of the Board. Specifically, Option A would prohibit the filing of responses in support of a dispositive motion unless they simply agreed with the motion or the party seeking to file a more expanded response obtained leave of the Board to do so. Option B would allow responses in support of a dispositive motion to include legal and factual bases not in the original motion, and would give the opposing party additional time to respond to the supporting response. Although Option A was placed into Annex A of the Rules Package, it was agreed by the Committee and the Board that both options had equal merit and that the Board was soliciting comments on both approaches.

The Department filed comments in support of an approach similar to that set forth in Option B above. In addressing Option A (i.e., the option set forth in Annex A of the Rules Package), the Department stated as follows:

The Rules Committee minutes refer to only one supposed advantage that the Annex amendments would have over the alternatives: the Annex amendments might encourage aligned parties to cooperate and file joint dispositive motions [citing to the minutes of the July 12, 2012 Rules Committee meeting]. However, even where parties share some common interests, they may have entirely legitimate reasons for not wanting to join in one another's dispositive motions.

(Department Comments, submitted June 10, 2013, p. 2) The Department enumerated various reasons why a party might not want to simply join in another's dispositive motion. Additionally, Mr. Raphael stated that by allowing parties to file supporting responses the Board ensures that that it has a complete record on which to decide the motion.

The Department proposed an amendment to Rules 1021.94 and 1021.94a that would allow the filing of supporting responses within 15 days of service of the original motion or within 15 days of the deadline for filing dispositive motions, whichever comes first, and would

give opposing parties 30 days to respond to the supporting response. This approach ensures that even where a supporting response is filed it will not delay the proceedings by more than 15 days.

The Department's comments go on to state,

Under the Annex amendments, by contrast, the proceedings would likely be delayed at least that long, the procedure is unclear, and – because the Annex amendments will have a chilling effect on the filing of supporting responses – there is less chance that the Board would be able to dispose of issues or even entire matters without proceeding to a hearing on the merits.

(Department's Comments, p. 7)

The Environmental Hearing Board Judges participating on the conference call stated that they were in agreement with the Department's proposed revisions to Rules 1021.94 and 1021.94a.

Mr. Wein raised a concern that if an appellant is already working on a response to a permittee's dispositive motion and the Department files a response in support of the motion that contains new legal or factual material, the appellant has to change course in the preparation of its response. Mr. Bohan stated that the appellant is no worse off than if the Department filed its own dispositive motion at the same time as the permittee. In that case the appellant would have only 30 days to respond to both motions, whereas under the Department's approach the appellant would have 30 days to respond to the Department's filing and between 30 and 45 days to respond to the original motion, depending on how long after the original motion the Department filed its response in support.

Mr. Hinerman raised a concern that the supporting response could really be a belated dispositive motion. In other words, a party may realize it missed the deadline for filing a dispositive motion so, instead, it files a response in support of another party's dispositive motion that raises a legal argument or facts that it could have raised in its own dispositive motion. The

Department acknowledged that this situation could occur, but the additional burden was outweighed by the fact that the Board receives a more complete record. Additionally, as noted earlier, it adds only an additional 15 days to the dispositive motion process.

The Committee and Board agreed with the proposed amendments submitted by the Department. On the motion of Ms. Woelfling, seconded by Mr. Clark, the Committee unanimously voted in favor of the amendments proposed by the Department, subject to a final review of the language circulated by email.<sup>1</sup>

*Service by email: Rule 1021.34*

The Department suggested adding a provision to Rule 1021.34(g) to allow parties to effect service by email when there is a problem with electronic service using the Board's electronic filing system. The Department proposed adding the following sentence at the end of Rule 1021.34(g): "The filer may also effect service by electronic mail, provided the registered user consents to service in that manner."

On the motion of Mr. Bohan, seconded by Mr. Hinerman, the Committee voted unanimously in favor of this proposal.

**Citizens for Pennsylvania's Future (PennFuture) Comments:**

PennFuture's comments covered the following topics and rules: 1) the heading of Rule 1021.32(a); 2) completion and acceptance of electronic filings under Rules 1021.32(c)(14) and (15) and 1021.51(f)(1)(ii); 3) electronic service of notices of appeal on the Department's Office of Chief Counsel and program office under Rule 1021.51(f)(1) (iv); 4) the filing of responses in support of a dispositive motion under Rules 1021.94 and 1021.94a; and 5) the scope of coverage of Rule 1021.103, entitled "Subpoenas."

*Heading of Rule 1021.32(a)*

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<sup>1</sup> Revisions appear in the revised Annex A.

PennFuture points out that both subsection (a) and (e) of proposed Rule 1021.32(a) have the same heading of “Conventional filing.” PennFuture further points out that subsection (a) of the rule is not limited to conventional filing but, rather, identifies documents that shall be conventionally filed or facsimile filed.

Subsection (a) was given the heading “Conventional filing” by the Legislative Reference Bureau. Ms. Woelfling suggested renaming subsection (a) “General filing requirements.” On the motion of Mr. Bohan, seconded by Mr. Hinerman, this revision was unanimously adopted.

*Completion and acceptance of electronic filings under proposed Rules 1021.32(c)(14) and 1021.51(f)(1)(ii)*

PennFuture expressed a concern about the language in Rule 1021.32(c)(14) that states “[u]pon the completion of the filing,” the Board’s filing system “will issue a transaction receipt including the date and time the document was received” but “[i]f the Board *rejects* the submitted documents following review,” the filer will be notified and asked to refile. (emphasis added). PennFuture’s concern is that if a notice of appeal is electronically filed after the close of business on the last day of the appeal period, the filer runs the risk of having the document rejected by the Board after the appeal period has expired.

Judge Mather clarified that the “rejection” of an electronically filed notice of appeal is the equivalent of the Board mailing a notice to perfect after the filing of a hard copy or facsimile copy of a notice of appeal. It does not deprive the Board of jurisdiction over the appeal. It merely acts to inform the appellant of information that is missing from the notice of appeal and which must be submitted in order to perfect the appeal.

Mr. Bohan agreed and pointed out that jurisdiction attaches when the electronic filing of the notice of appeal is “complete” not when the document is “accepted” by the Board. Because

the terms have resulted in confusion, Mr. Bohan suggested removing any references to “reject” and “accept” in the rules pertaining to electronically filed notices of appeal. He suggested that instead of saying “[i]f the Board rejects the submitted documents following review...” and replacing it with language such as “if the document does not comply with the Board’s filing requirements...”

In 1021.32(c)(14), the Committee agreed to the following changes:

- 1) Strike “so long as it is accepted by the Board” at the end of the first sentence.
- 2) Strike the sentence beginning, “If the Board rejects the submitted documents...”
- 3) In the last sentence, replace “refile” with “filed amended versions of.”

With these changes, Section 1021.32(c)(14) will now read:

An electronic filing complete before midnight Eastern Time will be considered to be filed on that date. Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt serves as proof of the filing. Filers may be required to file amended versions of the documents to meet the necessary filing requirements.

It was noted that some provisions of Section 1021.51 also contain the word “rejected” or similar language. Similar changes will be made in those sections. Mr. Bohan agreed to provide a list of the sections where this language occurs.<sup>2</sup>

Mr. Raphael moved to adopt the changes suggested by Mr. Bohan above and to authorize Ms. Wesdock to make similar changes in any other provisions needing to be revised in this manner, subject to the Committee’s review of the other changes by email. Ms. Woelfling seconded. All were in favor. Based on these changes, it was not necessary to address PennFuture’s comments that 1) the Board should allow parties to seek *nunc pro tunc* relief if a notice of appeal is rejected due to a technical issue and 2) the rules should specify the grounds on

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<sup>2</sup> Those changes appear in the revised Annex A.

which a notice of appeal or other document can be rejected. As noted above, the “rejection” of a document does not affect the document’s timeliness or the Board’s jurisdiction over the appeal.

Completion and acceptance of electronic filings under Rule 1021.32(c)(15)

Rule 1021.32(c)(15) reads as follows:

*Except in the case of notices of appeal, if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.*

(emphasis added).

PennFuture recommended deleting the clause “except in the case of notices of appeal” from the beginning of this provision, arguing that there appears to be no reason why the rules should absolutely preclude a party from seeking such relief, at least where the technical glitch is in the Board’s electronic filing system.

Mr. Bohan felt that PennFuture’s recommendation was overly broad because it would also cover breakdowns in the filer’s system, not just the Board’s. He suggested that a filer could file by fax if he/she runs into efilings problems. Mr. Wein pointed out that not everyone has a fax machine. Mr. Bohan stated that it would be difficult to prove whether the breakdown was in the Board’s efilings system or in the filer’s own system. He questioned how one would prove it, e.g. would a party need to subpoena LT Court Tech? Mr. Wein raised the question of whether the Board could allow an appeal *nunc pro tunc* if the breakdown in operations occurred outside the system of the entity receiving the filing.

Mr. Wolford felt that current rule 1021.53a (*nunc pro tunc* appeals) adequately addresses the problem by allowing the Board to look at the issue on a case by case basis. He felt it would be difficult to craft a rule to address every possible situation involving a breakdown in operations. Mr. Bohan suggested that Rule 1021.32(c)(15) contain a reference to Rule 1021.53a.

He recommended that Rule 1021.32(c)(15) be revised to add the following language: “Except in the case of a filing of a notice of appeal, *which shall be governed by Section 1021.53a, ...*” He also suggested adding a new subsection (6) to Rule 1021.32(d) stating as follows: “Except in the case of a filing of a notice of appeal, which shall be governed by Section 1021.53a, if facsimile filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.”

On the motion of Ms. Woelfling, seconded by Mr. Bohan, the Committee unanimously voted to adopt the aforesaid revision to 1021.32(c)(15) and new language to 1021.32(d)(6), subject to review of the language by email.<sup>3</sup>

*Electronic service of notices of appeal on Department’s Office of Chief Counsel and program office*

PennFuture recommended amending proposed Rule 1021.51(f)(1)(iv) to allow for the electronic service of notices of appeal on the Department’s Office of Chief Counsel (OCC) and the program office that took the action. PennFuture suggested that this could be done by establishing a standard service address for the OCC and a list of standard service addresses for each Department program office with hyperlinks to the addresses included in the filing instructions on the Board’s website.

When the rules were initially being amended, the Rules Committee discussed the creation of an email account by which the Department’s OCC could be served electronically. The Department discussed this matter with LT Court Tech and determined that the Board’s electronic filing system can be set up to automatically serve a copy of an electronically filed notice of appeal on the Department’s OCC. LT Court will need some lead time before putting this mechanism into effect.

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<sup>3</sup> The language appears in revised Annex A.

The following question was raised: Can the OCC also ensure service upon the program office, thereby fulfilling PennFuture's request to allow electronic service on the program office? Mr. Raphael stated that he would like to discuss this matter first with the OCC attorneys and would report back to the Committee.

Mr. Bohan explained how electronic service on the OCC will take place: When a notice of appeal is filed electronically, a notice containing a link to the document will automatically go to an email address created for the OCC. Additionally, the electronic service provider will automatically generate a notice to the filer notifying them that a copy of the notice of appeal has been served upon the Department's OCC. Mr. Bohan suggested adding a new subsection (v) to proposed Rule 1021.51(f)(1): "The Board, through the electronic filing provider, will provide prompt notice of, and access to, all notices of appeal electronically filed to the Office of Chief Counsel of the Department of Environmental Protection at an email address designated by the Office of Chief Counsel."

Judge Mather raised a concern that this language puts a burden on the Board. However, it was pointed out that the electronic filing provider already generates a service notice to the parties in the case when other documents are efiled. A discussion ensued. Judge Mather stated he did not object to the change proposed by the Department but wanted to point out that this new language lessens the burden on the appellant and increases the risk to the Board in the event a problem arises with the electronic filing system fails and it fails to effect electronic service.

In light of this revision, Mr. Wein pointed out that sections (g)(1) and (2) of the existing rule at 1021.51 need to be deleted. Those subsections require an appellant to serve a copy of the notice of appeal on the OCC and program office. If service can be effected on the OCC through the electronic service provider, and on the program office by OCC, then subsection (g) of the

existing rule (which is subsection (f) of the proposed rule) needs to be changed in order to reflect that only the permittee (in third party appeals) has to be served when an appeal is electronically filed.

Mr. Bohan also suggested changing 1021.51(i) of the proposed rules to read, “the recipient of the *Department’s* action.” A discussion ensued, and it was pointed out that the Board can also hear appeals of actions taken by entities other than the Department, e.g., the State Conservation Commission and sewage enforcement officers. In most instances, however, even though it is not a Department action, it is related to the Department in some manner. For those rare instances where an appeal involves a non-Department related action, Ms. Wesdock suggested that the Board could ensure that the entity taking the action was served with a copy of the notice of appeal. The Committee and Board agreed.

On the motion of Mr. Bohan, seconded by Mr. Clark, the Committee approved the changes discussed above, subject to a final review by email.<sup>4</sup>

#### *Dispositive Motions*

PennFuture supported Option A of the alternative proposals discussed earlier. However, even with this option, PennFuture felt that additional time should be given to the opposing party to address all of the arguments and authorities presented by the moving party and the supporting party. PennFuture recommended giving the opposing party 30 days after service of the motion or supporting response, whichever is filed later. The Department’s proposal, which is supported by both the Rules Committee and the Board, comports with this request.

#### *Rule 1021.103, Subpoenas*

Rule 1021.103, entitled “Subpoenas,” provides that “requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1-234.4 and 234.6-234.9.” Under the proposed

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<sup>4</sup> The proposed changes to rule 1021.51 can be seen in revised Annex A.

amendments to this rule, the title would remain “Subpoenas.” The only change would be the addition of citations to Pa.R.C.P. 4009.21-4009.27. PennFuture points out that Pa.R.C.P. 234.1-234.4 and 234.6-234.9 are not limited to subpoenas but also cover “notice to attend” and “notice to produce.” PennFuture recommends changing the title of Board Rule 1021.103 to “Subpoenas, notices to attend, notices to produce” and changing the text to read, “Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas, *notices to attend, and notices to produce* shall be governed by Pa.R.C.P. 234.1-234.4, 234.6-234.9 and 4009.21-4009.27....”

Mr. Hinerman stated that “notices to attend” under Pa.R.C.P. 234.1-234.4 and 234.6-234.9 apply only to officers and agents, not to employees. Therefore, he felt those rules would not apply to Department employees. He questioned whether it might be necessary to have a separate rule on notices to attend dealing with Department employees.

A question was raised as to whether the Board, in the context of addressing comments to proposed rulemaking, could expand Rule 1021.103 to the extent suggested by PennFuture. Judge Mather explained that because the Board has proposed revisions to 1021.103, thereby putting the rule out to the public for comment, the rule can be amended in any manner addressed in the comments. However, Judge Mather felt that, as a matter of policy, the Committee should address Mr. Hinerman’s comments before acting on the proposal suggested by PennFuture. Mr. Clark agreed, and stated that he felt that PennFuture’s proposal went beyond the scope of what the Rules Committee was trying to address with its proposed amendment to 1021.103.

The Committee agreed not to incorporate PennFuture’s suggestion at this time but to address it at the next Rules Committee meeting so that it could be fully vetted by the Committee.

**Independent Regulatory Review Commission (IRRC) Comments:**

IRRC's comments addressed many of the substantive issues raised by PennFuture or the Department. Where IRRC's comments differed from those raised by the Department or PennFuture, they are addressed separately below:

Rule 1021.32 (Filing)

IRRC raised the same questions as did PennFuture. They have been addressed in the discussion above.

Rule 1021.34 (Service by a party)

IRRC asked whether the Board considered including a specific time period, such as 24 hours, for correcting any deficiencies encountered during electronic filing. On the motion of Ms. Woelfling, seconded by Mr. Bohan, the Committee agreed that a party would be given until "the close of the next business day" to correct any deficiencies encountered upon electronic filing. In preparing the revisions to Annex A, Mr. Bohan subsequently recommended providing a cut off of 4:30 p.m., rather than the less specific "close of the next business day" in order to accommodate IRRC's request that the rule be more specific.

Rule 1021.51 ( Commencement, form and content of notice of appeal)

Rule 1021.51(f)(1)(iii) uses the terms "notice of appeal" and "notice of filing." IRRC asked if there was any difference between the two terms and, if not, suggested using "notice of appeal." The Committee agreed there was no difference between the two terms and, upon the motion of Ms. Woelfling, seconded by Mr. Bohan, agreed to replace "notice of filing" with "notice of appeal" in this section of the rules.

All of the revisions voted on at the meeting appear in the revised Annex A, prepared by Mr. Bohan, which appears at the end of the minutes.

**Next Meeting:**

The next meeting would normally be held on September 12, 2013. However, Mr. Bohan pointed out that OGC University will take place on that date. The Committee agreed to skip the September meeting. Therefore, the next meeting will be **November 14, 2013 at 10:30 a.m.**<sup>5</sup>

**Process for Rules Package:**

The process for completing the rules package is as follows:

1. Ms. Wesdock will circulate the changes to the Committee and the judges of the Board. The Board will schedule a meeting that will be sunshined, and they will vote on the changes to the proposed rules.
2. Ms. Wesdock will provide responses to the comments submitted by IRRC, PennFuture and the Department.
3. The proposed rules, as revised by the changes recommended at this meeting, will be circulated to the various committees and agencies involved in the final rulemaking process.

**Conclusion of Meeting:**

The Rules Committee conference call concluded at 12:05 pm.

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<sup>5</sup> It was noted that PBA Section Day is November 21, and it was suggested that the Rules Committee move its meeting to that date. However, some members of the Committee had a conflict on November 21.