

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF SEPTEMBER 18, 2018

Attendance:

The Environmental Hearing Board Rules Committee met on September 18, 2018 at 10:30 a.m. Committee Chairman Howard Wein presided over the meeting from the Board's Pittsburgh office. Also in attendance were the following Committee members: Jim Bohan (in Harrisburg), Brian Clark (at the Board's Pittsburgh office) and by phone: Alexandra Chiaruttini, Gail Conner, Phil Hinerman and Matt Wolford. Attending on behalf of the Board were the following: Chief Judge and Chairman Tom Renwand and Maryanne Wesdock in Pittsburgh; Judge Rick Mather and Eric Delio in Harrisburg; and Judge Beckman, Nikolina Smith and Christine Walker in Erie. Ms. Wesdock took the minutes.

Approval of Minutes:

On the motion of Mr. Bohan, seconded by Mr. Clark, the minutes of the May 24, 2018 meeting were unanimously approved.

Nunc Pro Tunc Appeals:

At the November 9, 2017 Rules Committee meeting, Mr. Bohan raised the subject of revising the Board's rule on nunc pro tunc appeals in order to provide more guidance on the filing of petitions to appeal nunc pro tunc and responses. He agreed to take a closer look at the issue and report back at a later meeting, which he did at the September 18, 2018 meeting.

Prior to the September 18, 2018 meeting, Mr. Bohan circulated a proposed set of revisions to the Board's rule on nunc pro tunc appeals, 25 Pa. Code § 1021.53a. He explained his analysis in developing the draft rule. First, he looked at whether it made sense to revise the rule. Because

the Board has issued 21 opinions since 2010 dealing with the subject of nunc pro tunc appeals, he felt that guidelines would be helpful. Second, he looked at how other courts handle nunc pro tunc appeals. Although not many courts have written instructions on the filing of nunc pro tunc appeals, the Chester County Court of Common Pleas has a rule that Mr. Bohan thought provided a good model. His proposed changes to Rule 1021.53a closely track the Chester County rule. In preparing his proposed revisions to the rule, he was sensitive to Judge Beckman's statement at the November 2017 meeting that revisions to the nunc pro tunc rule should not result in a large increase in the filing of nunc pro tunc appeals.

In preparing the draft revisions, Mr. Bohan relied on the Chester County rule, the Board's rule on supersedeas petitions at 25 Pa. Code § 1021.61, and the Board's general rule on motions at 25 Pa. Code § 1021.91.

The revisions proposed by Mr. Bohan are shown in bold:

§ 1021.53a. Nunc pro tunc appeals.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(b) A person seeking to appeal nunc pro tunc shall file a notice of appeal in accordance with § 1021.51 and, contemporaneously, a petition to appeal nunc pro tunc.

(c) The petition to appeal nunc pro tunc shall comply with the requirements set forth for "motions" at § 1021.91, and, in addition, shall include the following:

(1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.

(2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

(3) Copies of all documents and a list of all witnesses that the potential appellant relies upon.

(4) Any legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.

(5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of such person or persons, that the facts are verified as true and correct subject to the penalties for Unsworn Falsification to Authorities, pursuant to 18 Pa.C.S.A. § 4904 of the Crimes Code.

(d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for “responses” at § 1021.91. Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.

(e) A memorandum of law in support of the petition or response shall be filed with the petition or response.

(f) The potential appellant may not file a reply unless the Board orders otherwise

(g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate. The Board may deny a petition to appeal nunc pro tunc, without a hearing, for one of the following reasons:

(1) Lack of particularity in the facts pleaded.

(2) Lack of particularity in the legal authority cited as the basis for the grant of nunc pro tunc relief.

(3) An inadequately explained failure to support factual allegations by affidavits, or to include copies of all documents and list of all witnesses relied upon.

(4) A failure to state ground sufficient for granting nunc pro tunc relief

(h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.

(i) If the petition to appeal nunc pro tunc is denied, the notice of appeal will be dismissed as untimely.

A discussion ensued regarding the proposed revisions. Judge Mather raised a concern that the proposed rule allows the filing of a petition for appeal nunc pro tunc only if the petition is filed contemporaneously with the filing of the notice of appeal. The language of subsection (b) precludes the filing of a petition to appeal nunc pro tunc after the filing of the notice of appeal. Judge Mather expressed concern that this is likely to preclude pro se appellants the ability to seek

leave to appeal nunc pro tunc because they are unlikely to understand the need for filing a petition to appeal nunc pro tunc at the time of the filing of their appeal.

Mr. Wolford expressed a concern with section (c)(2), which requires that the following information must be set forth in the petition: “The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.” He noted that in Judge Labuskes’ decision in *Delaware Riverkeeper Network v. DEP and PennEast Pipeline Co., LLC*, 2017 EHB 1100, the Board denied a petition by the Delaware Riverkeeper to file its appeal nunc pro tunc on the basis that it was untimely. Mr. Wolford questioned whether a prospective appellant could comply with (c)(2) and still file its petition in a timely manner. Mr. Wolford also felt that section (g) should not list the reasons why the Board may deny a petition to appeal nunc pro tunc without a hearing. He felt that it should be left to the Board’s discretion. Mr. Bohan explained that he relied on the Board’s supersedeas rule, 25 Pa. Code § 1021.61(c), which sets forth reasons that the Board may deny a supersedeas petition without a hearing. As to Mr. Wolford’s first concern, regarding section (c)(2), Mr. Bohan opined that the Board would determine whether the petition was timely in light of the particular circumstances of the case. Mr. Wolford stated that he felt it would be difficult to act promptly when one has to obtain an affidavit from someone who may not be willing to cooperate. Mr. Bohan stated that he understood Mr. Wolford’s point, but also pointed out that the appellant in the *Delaware Riverkeeper* case had delayed six months after publication of the action in the Pa Bulletin before filing its petition.

Judge Renwand commended Mr. Bohan on the excellent job he did in preparing the rule revisions. As to Mr. Wolford’s point, he noted that the Board does not require affidavits or verifications for most of the documents filed with the Board. Affidavits and verifications are required for pleadings, but Board proceedings generally do not involve the filing of pleadings.

Therefore, he questioned whether affidavits should be required for the filing of a petition to appeal nunc pro tunc. Mr. Bohan pointed out that the Board does require affidavits to be filed in support of a petition for supersedeas. Judge Mather noted that the supersedeas rule allows the petitioner to provide an explanation as to why no affidavit has been provided if the petition is not supported by affidavits. He felt that adding similar language to the nunc pro tunc rule could address the timing issue raised by Mr. Wolford. Mr. Bohan agreed with Judge Mather's suggestion.

Judge Renwand stated that in many cases a late-filed appeal is due to negligence: In the case of attorneys, it generally involves filing the appeal with the Department rather than the Board, and in the case of pro se appellants, the appellant usually isn't aware of the 30-day appeal period. He agreed with Mr. Wolford that the requirement of an affidavit is likely to be a stumbling block for pro se appellants. Mr. Wolford suggested allowing a prospective appellant to file his or her nunc pro tunc petition without an affidavit, and if the Board wishes to see an affidavit it can request that the appellant file it within 30 days. Mr. Bohan explained that the reason he included the requirement of an affidavit was to address Judge Beckman's concern that any revisions to the rule should not result in an increase in the number of petitions to appeal nunc pro tunc.

Mr. Wein noted that in the *Delaware Riverkeeper* case, the Department's notice included the wrong venue for filing an appeal. Judge Renwand pointed out that the Board has caselaw holding that incorrect information in the Department's notice of appeal rights is not grounds for allowing an appeal nunc pro tunc.

Mr. Wein suggested deleting the requirement of an affidavit and clarifying subsection (c)(3) requiring copies of all documents and a list of witnesses that the potential appellant relies on. Mr. Clark asked Mr. Bohan why he had not tracked the language of the Board's rule on supersedeas petitions in drafting the rule on petitions to appeal nunc pro tunc. Mr. Bohan explained

that he had consulted the Chester County rule on nunc pro tunc petitions before deciding to look at the Board's supersedeas rule. Mr. Clark felt there was merit to looking to the Board's supersedeas rule in drafting the rule on nunc pro tunc petitions since there is a higher bar that must be met to succeed on both types of petitions. Mr. Wein stated that the Committee had expressed a concern that the draft revisions to the nunc pro tunc rule present a high burden for pro se appellants, and tracking the language to the supersedeas rule would raise the bar even higher. Mr. Clark, however, felt that a higher standard was necessary in order to balance it with the judges' request that the nunc pro tunc rule should not generate a large increase in the number of petitions filed.

Mr. Wein asked whether the Board has ever held a hearing on a petition to appeal nunc pro tunc. Judges Renwand, Mather and Beckman stated that they had not held such a hearing and were not aware of such a hearing ever having been held. In light of this, Mr. Wein questioned whether it was necessary for the rule to discuss the holding of a hearing in subsection (g). Judge Renwand stated that he could envision a situation where a factual issue necessitates a hearing. He gave as an example a situation where there is a dispute over when the appellant received notice of the action on appeal.

Mr. Hinerman suggested keeping subsection (c)(4) (dealing with legal authority) and removing subsections (c)(1) - (3) (dealing with facts relied upon and copies of documents and witnesses relied upon). Judge Renwand felt that this change would be helpful for attorneys but not pro se appellants. He stated that he would prefer to see the facts that a party is relying upon in seeking leave to file his or her appeal nunc pro tunc.

Judge Renwand asked Mr. Bohan what he relied on to draft subsection (d) dealing with responses. Mr. Bohan replied that he based it on Board rule 1021.95(c), dealing with responses to

miscellaneous motions. He explained that he did not provide for the filing of replies unless ordered by the Board in the interest of keeping the process moving.

Mr. Wein questioned whether it was necessary to file a memorandum of law in support of a petition to appeal nunc pro tunc. Judge Renwand stated that it was his preference to receive a memorandum of law. Mr. Wein suggested changing “shall” to “may” with regard to the filing of a memorandum of law. Ms. Conner and Judge Mather agreed with Mr. Wein’s suggestion.

Judge Mather also suggested changing “shall” in subsection (b) to “may” since the issue of timeliness often does not arise until after the appeal has been filed and the Department or Permittee files a motion to dismiss based on untimeliness. Ms. Conner echoed Judge Mather’s recommendation. Mr. Bohan expressed a concern with dealing with the untimeliness issue in a motion to dismiss rather than in a petition to appeal nunc pro tunc: With a petition to appeal nunc pro tunc, the burden is on the petitioner to demonstrate why his or her appeal should be allowed to proceed; with a motion to dismiss, the burden is on the moving party to demonstrate why the appeal should not be allowed to proceed, and all doubts must be resolved against the moving party. Judge Mather agreed that the burden should be on the appellant to demonstrate that he or she is entitled to appeal nunc pro tunc, but he felt that the appellant should be given the opportunity to do so even after filing the notice of appeal. He did not think the nunc pro tunc petition needed to be filed contemporaneously with the filing of the notice of appeal. Judge Renwand agreed with Judge Mather’s position. He stated that in the vast majority of cases, a nunc pro tunc appeal is dealt with in a motion to dismiss. He agreed that the burden should not be on the Department or Permittee to demonstrate why a late-filed appeal should not be allowed to go forward, but he did not agree that the appellant should not have an opportunity after the filing of the notice of appeal to make his or her case. Ms. Conner felt that it was a matter of due process to allow an appellant the

opportunity to seek leave to appeal nunc pro tunc if the issue of untimeliness were raised after the filing of the notice of appeal.

Mr. Wein suggested adding a provision to the rule on dispositive motions (rule 1021.94) stating that if a motion to dismiss is based on the failure to file a timely appeal, the parties should follow the process set forth in the nunc pro tunc rule. Rather than changing the dispositive motion rule, Judge Mather suggested adding a sentence to subsection (b) of Mr. Bohan's draft rule stating that an appellant may file a petition to appeal nunc pro tunc when the issue of untimeliness is raised in a motion to dismiss. A cross reference could be added to the dispositive motion rule referring to the nunc pro tunc rule. (It was later decided that a cross reference was not needed.)

Judge Beckman stated that he agreed with the suggestion to change subsection (e) to state that a petitioner seeking leave to appeal nunc pro tunc "may" file a memorandum of law in support of the petition.

Mr. Bohan cautioned that any revisions to the rule should be compatible with the caselaw requiring nunc pro tunc petitions to be filed promptly.

Ms. Wesdock stated that she has frequently received telephone calls from attorneys pointing out that an appeal was filed past the 30-day appeal period and asking if the Board were going to dismiss the appeal sua sponte. She felt that it would be helpful to have a rule to which she could refer such questions.

Mr. Wein asked whether the revisions to the nunc pro tunc rule could be added to the next rules package if a vote is taken at the November Rules Committee meeting, and Ms. Wesdock informed him that they could be added.

Mr. Clark asked the Committee whether they agreed with eliminating the criteria set forth in subsections (g)(1) through (4) for denying a petition without a hearing. There was no objection

to eliminating subsections (1)-(4). Mr. Wein asked the Committee whether they agreed with deleting subsection (c)(5) regarding the requirement of a sworn affidavit. Instead of deleting it, Judge Mather suggested adding language similar to the language in the supersedeas rule allowing the petitioner to provide an explanation of why he or she is unable to provide an affidavit. Mr. Bohan agreed to add the language from the supersedeas rule.

The Committee also agreed to replace “shall” with “may” in subsection (b). Judge Mather agreed to provide revised language. Mr. Clark suggested holding a vote at the November meeting once the Committee has had an opportunity to review the revised language provided by Mr. Bohan and Judge Mather. Judge Mather agreed to provide his revisions to Mr. Bohan and Ms. Wesdock. Mr. Bohan will incorporate Judge Mather’s revisions into the revised draft of the rule and circulate it to the Committee members and judges.¹

Rules Committee Vice Chair:

Mr. Wein informed the Rules Committee and Board that Maxine Woelfling, the Vice Chair and longtime member of the Environmental Hearing Board Rules Committee, had retired from the Committee. He suggested sending a letter to Ms. Woelfling thanking her for her service to the Board and the Committee. The letter will be signed by Mr. Wein as Chair of the Committee and Chief Judge Renwand. Mr. Clark noted that Ms. Woelfling had likely attended more Rules Committee meetings than anyone other than perhaps himself since she had served as Vice Chair of the Committee and, prior to that, as Chair of the Environmental Hearing Board.

Mr. Wein stated that the Committee would need to vote on a new Vice Chair at the November meeting.

¹ Mr. Bohan circulated the revised version of the rule by email on September 19, 2018. The text of the revised rule is set forth in Appendix A attached to the minutes.

Vacancies:

There are currently two vacancies on the Committee: one is an appointment by the Governor, the other an appointment by Speaker of the House. A number of people have expressed interest, and Ms. Wesdock has been working with them regarding the process for seeking an appointment to the Committee.

Media in the Courtroom:

This topic has been removed from consideration by the Rules Committee as the judges have been unable to reach a consensus on it.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Wolford, the meeting adjourned at 11:43 a.m.

Next Meeting:

The next meeting is scheduled for November 8, 2018 at 10:30 a.m.

Appendix A: Revised Nunc Pro Tunc Rule incorporating changes recommended at the September 18, 2018 Rules Committee meeting (revisions shown in bold)

§ 1021.53a. Nunc pro tunc appeals.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(b) **A person seeking to appeal nunc pro tunc may file a petition to appeal nunc pro tunc when the person files a notice of appeal in accordance with § 1021.51. A person may also file a petition to appeal nunc pro tunc in conjunction with a response to a dispositive motion to dismiss an appeal as untimely filed under §§ 1021.94 and 1021.94a. The petition to appeal nunc pro tunc and any response to it is subject to the requirements in this section, and the response to the dispositive motion is subject to the respective requirements in §§ 1021.94 and 1021.94a.**

(c) **The petition to appeal nunc pro tunc shall comply with the requirements set forth for “motions” at [§ 1021.91](#), and, in addition, shall the include the following:**

(1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.

(2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

(3) Copies of all documents and a list of all witnesses that the potential appellant relies upon in support of the petition to appeal nunc pro tunc.

(4) Any legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.

(5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of such person or persons, that the facts are verified as true and correct subject to the penalties for Unsworn Falsification to Authorities, pursuant to 18 Pa.C.S.A. § 4904 of the Crimes Code.

(6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in (5), above, an explanation of why the affidavit or verification was not included.

(d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for “responses” at [§ 1021.91](#). Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.

(e) A memorandum of law in support of the petition or response may be filed with the petition or response.

- (f) The potential appellant may not file a reply unless the Board orders otherwise.**
- (g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate.**
- (h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.**
- (i) If the petition to appeal nunc pro tunc is denied, the notice of appeal will be dismissed as untimely.**