

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE
MINUTES OF MEETING OF NOVEMBER 5, 2015**

Attendance:

The Environmental Hearing Board Rules Committee met on November 5, 2015 at 10:30 a.m. Committee Chairman Howard Wein presided. The following Rules Committee members attended: In Harrisburg – Alexandra Chiaruttini, Jim Bohan, Phil Hinerman, and Lisa Long; and by phone – Committee Chairman Howard Wein, Matt Wolford, Maxine Woelfling, and Brian Clark. Attending on behalf of the Board were the following: In Harrisburg – Judge Rick Mather, Judge Bernard Labuskes, Vince Gustitus, Eric Delio, and John Dixon, who took the minutes. The following Board personnel attended by phone: Chief Judge Tom Renwand, Judge Steve Beckman, Maryanne Wesdock, and Carl Ballard.

Approval of Minutes of September 10, 2015:

The minutes from the September 10, 2015 Rules Committee meeting were approved on the motion of Mr. Bohan, seconded by Mr. Clark.

Report on Rules Package 106-12

Mr. Dixon provided the Committee with an update on Rules Package 106-12. The package was completed on September 16, 2015. The Governor's Budget Office has signed off on the package. Mr. Dixon explained that the Governor's Policy Office has not yet signed off on the package and the Office of General Counsel is waiting for the Governor's Policy Office.¹

Mr. Wein asked whether we could add new rules to the package at this time. Ms. Wesdock explained that we cannot add rules to the existing package since it has been submitted to the Office of General Counsel, the Governor's Policy Office and Office of the Budget for review. If we were to add new rules at this point, we would need to start the review process over. It was agreed that any new rule revisions would be addressed in a new rules package.

Electronic Discovery

Mr. Wein stated that he, Judge Renwand, Mr. Bohan, and Ms. Wesdock had a conference call with Mr. Charlie Gibbons to discuss rules pertaining to discovery of electronically stored information. Mr. Gibbons was the former Chairman of the Pennsylvania Supreme Court Evidence Committee and a former member of the

¹ The Rules Package was subsequently approved by the Governor's Policy Office on November 6, 2015 and by the Office of General Counsel on November 10, 2015. The proposed rules were published in the Pennsylvania Bulletin on December 19, 2015.

original committee which drafted the Rules of Evidence for the Commonwealth. Mr. Bohan also noted that Mr. Gibbons authored the West texts on PA Discovery. During the call, Mr. Gibbons explained in federal court that e-discovery discussions are part of the general meet and confer process with the judge. Specifically, Mr. Gibbons mentioned that in Federal Court if the parties tell a judge that a case is going to involve discovery of electronically stored information, the parties and the judge meet at the beginning of a case to develop a protocol for conducting electronic discovery, better known as a “Federal Rule 26(f) Meeting.” This protocol is codified in the Federal Rules of Procedure.

Mr. Bohan explained that the PA rules make it clear that e-discovery is a part of discovery and should not be treated uniquely. Mr. Bohan echoed the conversation with Mr. Gibbons and underscored the notion of setting up a conference with the judge at the beginning of the process to evaluate whether this is a case where electronic discovery issues will be warranted, to what extent, and whether proportionality issues will come into play. Mr. Bohan thinks it is a good idea to adopt the Federal Rule 26(f) Conference practice. According to Mr. Bohan, this makes sense for the Department because sometimes the Department receives discovery requests that include electronic discovery that are inconsistent

with the rules of civil procedure, which explain that requests seeking electronically stored information should be as specific as possible.

Mr. Wein noted that requiring the parties to meet with the judge early in the case could minimize electronic discovery issues and narrow the scope of discovery. According to Mr. Wein, the question is to what extent the judges want to manage electronic discovery at the beginning of the case? Mr. Wolford requested general clarification as to whether the Committee was considering a total adoption of the federal approach or just adopting the federal approach as it pertains to electronic discovery.

Judge Renwand stated that an electronic discovery conference would not be necessary in every case. Judge Renwand cautioned that requiring the parties and judges to confer to discuss electronic discovery could potentially hinder the entire discovery process and delay discovery in a vast number of cases. Judge Renwand further explained that there are numerous requests for extending the discovery deadlines and the Board should consider having more conferences either by telephone or in person which could address some of the problems. However, Judge Renwand thought a rule change was not necessary at this time. Ms. Wesdock suggested that parties could put together a proposed joint case management order making that request, or the Board could revise its PHO-1 to

explain that if parties feel a case will involve electronic discovery, the Board will then have a conference with the parties.

Judge Mather stated that there is no need to make a rule change, specifically a rule change that has mandatory calls. Judge Mather has numerous calls with the parties in his appeals and does not think the judges should be involved with discovery unless there is an issue. Judge Mather explained that if the parties want a conference call with a judge, the parties must simply alert the judge through his or her assistant counsel and they are unlikely to be denied a request for a conference call.

Mr. Hinerman proposed that if there is a need to get parties to submit discovery plans in a more timely fashion, perhaps the DEP could take a sample DEP electronic discovery plan and post it on the DEP website as a guidance example for the parties. In Mr. Hinerman's opinion, such a sample would provide the parties with a starting point and the same could apply with a joint discovery plan. Mr. Bohan responded that Mr. Hinerman's proposal may not be sufficient because there is no single electronic discovery order that could apply to every case because what is proportional to one case may differ from another case. Despite his reservation, Mr. Bohan agreed that Mr. Hinerman's proposal is worth

considering. Judge Renwand added this is could be something that is done at the Board level as well.

Judge Labuskes opined that it seems forced to have rules for electronic discovery because the long term trend is that all materials will be electronic. Judge Labuskes is not in favor of special rules for electronic discovery versus regular discovery. Judge Beckman agreed with Judge Labuskes and added that he is always open to a conference call if the parties desire, but does not think it should be mandatory.

Mr. Bohan further explained that electronically stored information is stored differently than hard information – it is easily altered and very duplicable. Dealing with electronically stored information is more burdensome. This is something that is contemplated by the rules of civil procedure. The issue that brought this to a head was parties requesting electronically stored information that appeared to be broader than what the rules contemplate. Mr. Bohan thinks it is not a good idea that the parties can proceed with discovering electronically stored information before the parties have conferred about that issue.

Mr. Hinerman and Judge Mather responded that if the Department is having a problem with someone aggressively seeking out electronically stored information, the Department can contact the Board and schedule a call to discuss

the issue. Ms. Chiaruttini proposed that the Department could speak with the regional counsel to discuss the issue further. Mr. Wolford agreed that posting a discovery example on the website is the best idea going forward.

Ms. Wesdock recapped the discussion and stated that there appears to be no consensus amongst the Committee on making an electronic discovery rule change at this time. In light of this, Ms. Wesdock questioned whether it would make sense to put language in the Board's PHO-1 that if the parties are having an issue with their electronic discovery plan, they can request a conference call with the judge? All judges agreed with this idea; Judge Renwand noted that the Board is very receptive to conference calls.

Judge Mather asked if it was worthwhile to add a model electronic discovery plan to the Board's website as a starting point. Ms. Chiaruttini stated that the Department would have to discuss the issue internally first. Mr. Delio was concerned with the Board having a Department model plan on the website in light of the Board maintaining independence and impartiality. Mr. Hinerman and Mr. Bohan agreed and responded that a joint effort should be made in drafting a model. Judge Labuskes stated that the model should be submitted to the Committee first before it is put on the website. Both the Board and the

Department will look for sample electronic discovery plans and circulate them to the Committee before the next meeting.

Responses to Dispositive Motions Under Rules 1021.94(c) and 1021.94a(g)

Ms. Wesdock stated that a question has been raised with regard to the following scenario under 25 Pa. Code §1021.94(c) and 1021.94a(g): If a dispositive motion raises 10 issues, and DEP files a supporting memorandum that addresses 5 of those issues, does the responding party have 30 days from the filing of the DEP's memorandum to address ALL of the issues raised or only the five issues raised in DEP's memorandum? Stated another way, does the responding party have 30 days from the filing of the dispositive motion to address the five issues not raised in DEP's memorandum and then an additional 15 days to respond to the five issues raised in DEP's memorandum? In light of this scenario, Ms. Wesdock asked the committee if Rules 1021.94(c) and 1021.94a(g) be clarified?

According to Ms. Wesdock, her understanding is that you can respond to everything, not just new materials raised in DEP's supporting memorandum. Mr. Bohan thought the rule was clear that if a supporting memorandum of law is filed with respect to any issues, then the responding party gets the full 30 days from that memorandum of law to respond to all

issues. The Committee unanimously agreed with Ms. Wesdock and Mr. Bohan that the rule is clear and does not need to be changed.

Rule 1021.51

Judge Labuskes started the discussion by explaining a hypothetical situation in which the legal issue involves whether an entity has contaminated a water supply. In this situation, if the Department determines that the entity did not contaminate the water supply, the landowner often appeals the Department's determination and the landowner has an obligation to serve the entity with its notice of appeal. If the Department makes the opposite determination that the entity did in fact contaminate the water supply, the Board does not have rules stating that the landowner must receive a copy of any notice of appeal on the DEP's determination. This particular situation arises when an appeal is taken from an order of the DEP requiring remediation or restoration on the property of a third party (e.g. replacement or remediation of a water supply). Judge Labuskes thinks the rules should be amended so that either way, the landowner gets a copy of the notice of appeal.

Ms. Wesdock proposed to the Committee whether the Board Rules should be revised to ensure that the landowner always gets a copy of the

notice of appeal? At present, in a third party appeal, 25 Pa. Code § 1021.51 requires that a copy of the notice of appeal be served on a “recipient of the action” as defined in 25 Pa. Code § 1021.51(h). Mr. Wein proposed that in the interim, the Board could utilize subsection (4) of the rule which serves “interested parties.” Judge Labuskes agreed, but thinks it should be automatic that the landowner receives notice. Ms. Chiaruttini concurred with Judge Labuskes. Mr. Clark thinks that there should be a separate subsection in the Board Rules and that the committee should contemplate whether or not “landowners” is sufficient or if the committee should consider something broader than just landowners, such as equity interest holders, for example. Judge Mather agreed that the language should be broader than “landowner,” but cautioned that the word “occupier” is an open-ended concept. Ms. Wesdock proposed adding the words “landowners” and “occupiers” to subsection (3), and then determining on a case by case basis what other types of cases may need to be considered within the rule.

Mr. Bohan questioned if there is a downside to serving landowners as interested parties under subsection (h) because they become automatic parties under subsection (i)? The Committee responded that this is not the

case and the landowner in fact has the choice to enter an appearance under that subsection. Judge Mather suggested that it may be best to draft language and then circulate it to the Committee before the next meeting as opposed to drafting language at this time. The Committee unanimously agreed with Judge Mather. Upon the suggestion of Mr. Wein, Judge Mather stated that the Board could consider amending PHO-1 to address the situation as a temporary solution until the rule is fixed.

Automatic Service of an Electronically Filed Notice of Appeal

Ms. Wesdock explained that the Board's electronic filing system is set up so that an electronically filed notice of appeal is automatically served electronically on the Department of Environmental Protection. Ms. Wesdock questioned if automatic electronic service of the notice of appeal on the Department of Environmental Protection constitutes service on the State Conservation Commission in cases where an appeal is filed from an action of the State Conservation Commission? If this is not the case, according to Ms. Wesdock, it may be necessary to revise 25 Pa. Code § 1021.51(f)((1)(v) to reflect automatic service on the Commission

By way of background, Judge Mather asked the Committee if the Department is delegating representation of the Conservation Commission

for all appeals before the Board? Judge Mather recalled something in the law that says the Department is *available* to provide legal services to the Commission. Ms. Chiaruttini said she will check internally to see if that counts as service. Judge Mather stated that if Department lawyers are delegated to represent the Conservation Commission in all matters before the Board, the answer is likely that electronic service of the Notice of Appeal on the Department is sufficient to constitute service on the Commission. Mr. Delio noted that “Department” is defined in the Board’s rules to include “other Boards, Commissions, or agencies.” In light of the way “Department” is defined in the rules, the Committee was satisfied that electronic service of the Notice of Appeal on the Department is sufficient to constitute service on the Commission.

Proposed Revisions to Pa. Rules of Appellate Procedure

Ms. Wesdock solicited responses from the Committee as to whether recent changes in the Pennsylvania Rules of Appellate Procedure impact the Board in any way. Mr. Delio researched the issue and provided a memorandum to Ms. Wesdock with his analysis. Mr. Dixon also prepared a memorandum on the issue which was circulated to the Committee. Mr. Wein explained that the Committee is seeking input primarily on the

concept of reorganization of Chapter 15 and the creation of a new Chapter 16 rather than the form or content of individual rules. The proposed reorganization of Chapter 15 and the adoption of new Chapter 16 are not intended to alter existing procedures.

Mr. Dixon explained that as presently structured, Chapter 15 provides the procedure for obtaining judicial review of action or inaction of a “government unit.” Because the definition of “government unit” is broad and encompasses every government actor, including the courts, Chapter 15 presently applies to a variety of matters including traditional agency appeals and original jurisdiction acts against the Commonwealth. Certain types of petitions for review often involve appellate review that is more limited than a traditional appeal.² Mr. Dixon’s memorandum stated that the proposed reorganization of Chapter 15 limits the scope of the chapter and applies only to traditional administrative agency appeals, certain other enumerated appeals from adjudications or other actions, and original jurisdiction actions against the Commonwealth. Judicial review of all other government unit actions or inactions not otherwise permitted under Chapters 9, 11, 13 or 15, including those enumerated in Pa.R.A.P. 1601, is

² For example, petitions for review under Pa.R.A.P. 341(c), 1311(Note), and 1573 present only the question of whether to permit an appeal from an interlocutory order and are more similar to a petition for allowance of appeal than an appeal. Other petitions for review involve appellate review using specialized procedures that depart from standard appeal procedures, such as review of bail orders under Pa.R.A.P. 1762, review of special prosecution orders under Pa.R.A.P. 3331, and review of out of home placement of minors under Pa.R.A.P. 1770.

available under Chapter 16; the Committee proposed that the document that initiates the case under Chapter 16 shall be named a petition for limited review.

In Mr. Dixon's opinion, the proposed reorganization concept likely does not impact the Board in any way. As an administrative agency, the EHB still falls under the purview of 1501(a)(1), which would keep the Board out of the new Chapter 16. At this point, the Appellate Court Rules Committee is soliciting preliminary input on the concept of reorganizing Chapter 15 and adding chapter 16 and determining whether to pursue these proposed changes. If the Committee decides to move forward, they will republish and open up the proposal for comment again.

204 Pa. Code, Rule 302 – Limited In-House Corporate Counsel License

204 Pa. Code, Rule 302(b)(1)(c) allows attorneys who have been issued a Limited In-House Corporate Counsel License to “represent the business organization in its dealings with any administrative agency or commission if authorized by the rules of the agency or commission.” Ms. Wesdock questioned whether this rule contemplates an administrative agency such as the Board and if so, should the Committee adopt rules to allow this limited representation?

Judge Mather noted that the Board rules provide for it in the rules for Pro Hac Vice representation. Judge Renwand felt that the limited representation

applies to the counsel's dealings with administrative agencies such as DEP, and noted that it does not apply to court proceedings. Mr. Wein and Ms. Wesdock recommended adding a comment to the Board's rules on representation to flag the fact that out of state practitioners must still file a motion Pro Hac Vice.

Next Meeting:

The next meeting of the Rules Committee will be on January 6, 2016 at 10:30 a.m.

Adjournment:

On the motion of Ms. Chiaruttini, seconded by Mr. Bohan, the meeting was adjourned at 12:00 p.m.