

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Minutes of November 14, 2013 Meeting

Attendance:

The Environmental Hearing Board (Board) Rules Committee met on November 14, 2013 at 10:30 a.m. Attending in person were the following Rules Committee members: Chairman Howard Wein, Vice Chair Maxine Woelfling, Jim Bohan, Brian Clark, Gail Conner, Rep. Kate Harper and Phil Hinerman. Attending on behalf of the Environmental Hearing Board were Judge Rick Mather, Board Secretary Vince Gustitus, and Assistant Counsel Tom Duncan and Eric Delio. Attending by teleconference were Rules Committee member Matt Wolford, EHB Chief Judge Tom Renwand, Judge Steve Beckman, Assistant Counsel Tim Estep and Maryanne Wesdock, who took the minutes, and Paralegal Christine Walker. Also participating by phone was DEP Northcentral Regional Counsel Geoff Ayers.

Approval of Minutes of July 25, 2013 Conference Call:

On the motion of Rep. Harper, seconded by Mr. Bohan, the minutes of the July 25, 2013 conference were unanimously approved.

Revision to Rules Package 106-10: Documents that must be filed in hard copy:

Ms. Wesdock explained that the Board's electronic filing system is not set up to accept electronic filings from persons who are not parties to an appeal, such as petitions to intervene or entries of appearance filed pursuant to Section 1021.51(j) (regarding automatic intervention by recipients of an action). Mr. Bohan also noted this would include the filing of amicus briefs. The cost to revise the electronic filing system to allow filings by outside entities is \$16,000. The Board has not allotted sufficient funds in this year's or next year's budget to cover this

substantial cost. Therefore, it is necessary to revise proposed rule 1021.32(a) which would require the hard copy filing of only the following two types of documents: (1) a complaint that is original process naming a defendant or defendants and (2) a motion to be excused from the Board's mandatory electronic filing requirement.

Mr. Bohan proposed revising this section to include the following category of documents that must be filed in hard copy: "Documents filed on behalf of a person who is not a party to the proceeding at the time of the filing." This would cover petitions to intervene, amicus briefs, and any other similar documents filed by a person who is not a party to the case at the time of the filing. He felt that the filing of an entry of appearance for intervention purposes by a recipient of an action (rule 1021.51(j)) should still be listed separately in this subsection.

On the motion of Rep. Harper, seconded by Mr. Clark, the following language will be added to proposed rule 1021.32(a) as new subsection (3): "A document filed on behalf of a person who is not a party to the proceeding at the time of the filing." All voted in favor of the motion.

On the motion of Ms. Woelfling, seconded by Mr. Hinerman, the following language will be added to proposed rule 1021.32(a) as new subsection (4): "An entry of appearance filed pursuant to section 1021.51(j)." All voted in favor of the motion.

Relief Requested by Appellant:

Mr. Ayers and Mr. Bohan explained the basis for their proposal that appellants be required to state the relief requested in a notice of appeal. In some cases pro se appellants seek relief which the Board does not have the ability to grant. By requiring appellants to state the relief requested in their notice of appeal, it will help to identify early on those cases where the Board is not able to grant the relief requested. It may also help to determine whether an

appellant is entitled to attorneys' fees. Mr. Ayers and Mr. Bohan pointed to federal practice which has this requirement, and noted that many of the EHB rules parallel federal practice.

Mr. Clark asked how frequently the Board or Department encounters an appellant who is seeking relief that the Board cannot grant. Both Mr. Bohan and Mr. Ayers agreed it occurs approximately 2 to 3 times per year.

Mr. Hinerman pointed out that a problem with requiring an appellant to state the relief requested in the notice of appeal is that it may not be clear at the time the notice of appeal is filed; the relief sought by the appellant may not begin to crystallize until discovery is completed.

Ms. Woelfling suggested that this topic could be discussed in the mandatory settlement conference that is to be held within 45 days of the issuance of Pre-hearing Order No. 1. Judge Renwand also suggested this information could be requested in interrogatories. However, Mr. Bohan pointed out that sometimes appellants are not forthcoming about why they filed their appeals or what they hope to achieve by the litigation. Mr. Hinerman agreed with Mr. Bohan that clients are not always forthcoming about what it is they hope to accomplish by filing an appeal.

Mr. Bohan stated that if there were some mechanism for the Board to flag those appeals early in the process where an appellant is seeking relief that the Board cannot grant, it would save resources on all sides. He noted that responding to discovery and requests filed under the Right to Know Law can be a very onerous task. He stated that the Department's objective is not to halt litigation but to identify early in the process those cases in which the Board will not be able to grant effective relief.

Ms. Wesdock raised the following question: If an appellant is required to state in his notice of appeal the relief he is seeking and the Department believes the relief requested is not

appropriate, how would the Department respond to this? Would the Department file a motion to dismiss the appeal? Mr. Ayers stated that if the notice of appeal identified relief that the Board cannot grant, the Department would likely file a motion to dismiss.

Judge Renwand suggested holding a status conference early in the appeal and then allowing a limited time for discovery and proceeding to an expedited hearing.

Most of the cases where an appellant is seeking relief that cannot be provided by the Board involve pro se appellants. Ms. Conner felt that pro bono representation would be helpful in these cases. She noted that Widener Law School operates a law clinic that could provide pro bono representation in cases in eastern Pa.¹

Mr. Clark felt that education was essential *before* an appeal is filed. He suggested that it would be helpful to have some mechanism for public outreach in order to educate communities about the appeal process. Ms. Woelfling noted that the Pennsylvania Bar Association's Environmental Law Section had prepared materials for public outreach but had never begun the process. Ms. Conner stated that there is a platform at the Department for public outreach and noted that there is a new public participation website. Ms. Wesdock suggested the Department's Office of Environmental Advocate, but Ms. Conner stated that this office gets involved after an action is taken, not prior to it.

Mr. Ayers agreed that public outreach would be helpful, but felt that it would need to be done on a periodic basis as new groups of individuals become interested in filing appeals (e.g., if a permit is issued for an activity in a particular community, those individuals may be interested in filing an appeal even though they had no interest in the process prior to this).

¹ The University of Pittsburgh School of Law also operates an environmental law clinic that provides pro bono representation in cases in western Pa.

As part of the education process, Mr. Hinerman suggested revamping the Board's website to make it more explanatory to members of the public. Mr. Wolford agreed that a change to the website would be more helpful than changes to the Board's rules of practice and procedure. He felt that it would not be helpful to focus on changes to the Board's rules to make them more understandable to pro se appellants since it is primarily attorneys who use the rules.

Mr. Wolford suggested that the Board might want to have a status conference early on in all of its appeals. Judge Beckman stated that he has conducted telephone status conferences early on in pro se cases and plans to continue doing so. Judge Mather also felt this would be helpful. Judge Renwand agreed that such status conferences are helpful, but pointed out that the Board now has such limited staff it is more difficult to do so. Judge Renwand pointed out that when he joined the Board, there were a total of 23 employees, including judges. Now, there are 13 full time employees, including judges.

Ms. Conner suggested adding a page to the EHB website containing information that would be useful and understandable to pro se appellants. But, she recommended not entitling it "pro se appellants" since that is a legal term that pro se appellants are not going to be familiar with. Representative Harper agreed with Ms. Conner's recommendation, and suggested that the page explain EHB practice and procedure in non-legal terms. She recommended that the page be labeled "For Citizens" like the pa.gov website. Mr. Bohan agreed that it would be helpful for the Department to refer individuals with questions to the Board's website.

It was agreed that an EHB staff person will be assigned the task of working on this page.²

Rule 1021.81 – Intervention:

² Christine Walker and Tim Estep agreed to work on this project.

The Board's rule on intervention, at 25 Pa. Code § 1021.81, discusses only traditional intervention and makes no reference to automatic intervention by a recipient of an action by submitting an entry of appearance, as discussed in Rule 1021.51(j). Mr. Bohan suggested addressing this matter in a comment to Rule 1021.81. Ms. Woelfling and Mr. Wolford expressed their agreement with this approach.

As to the question of whether this change could be added to the current rules package, Judge Mather responded that comments do not need to go through the regulatory review process. The Board simply needs to contact the Legislative Reference Bureau and have the comment added to the rule.

On the motion of Mr. Bohan, seconded by Ms. Conner, it was unanimously agreed that a comment should be added to Rule 1021.81 advising parties that a recipient of an action, as that term is defined in Rule 1021.51, may automatically intervene in an appeal simply by filing an entry of appearance.

Attaching Written Copies of the Department's Action to a Notice of Appeal:

Board Rule 1021.51(d) states, "If the appellant has received written notification of an action of the Department, a copy of the *action* shall be attached to the appeal." The Notice of Appeal form goes one step further, saying "You must attach a copy of the action to this form."

The problem is twofold. The first problem relates to the wording of the Notice of Appeal form. In some cases an appellant does not receive a copy of the action being appealed or written notification of it, e.g., in a third party appeal of a Departmental action.³ The second problem relates to the requirement of Rule 1021.51(d). Even where an appellant may receive written

³ Another related problem involves appellants who do receive a copy of the action but fail to attach it. In that case, the Board issues a Failure to Perfect notice. Mr. Duncan suggested that when the Board issues the notice, it should require the appellant either to provide a copy of the action being appealed or affirm that he/she did not receive a copy of it.

notification of an action, either directly from the Department or via some other means such as signing up for email notice, they will not necessarily have a copy of the action itself. For example, although a citizen may receive notice of a permit issuance, they will not have a copy of the permit.

Judge Mather pointed out that the rule clearly is not working. Individuals appealing permit actions should not have to provide a copy of the permit with their appeal.

Mr. Bohan stated that he would like to get input on this issue from Department attorneys. By requiring an appellant to provide a copy of the action being appealed, it clarifies exactly what is being appealed.

Ms. Woelfling noted that some statutes require that notice is to be sent to individuals who have commented on a permit application or to surrounding landowners. However, not all statutes require such notice. Judge Mather thought it would be helpful to review each of the regulatory programs in order to determine which ones require written notification. Mr. Delio explained that when an individual signs up for electronic notices of actions taken by the Department, it comes in the form of an email with a hyperlink. A question was raised as to whether a hyperlink constitutes written notification.

The Committee agreed to continue discussion of this issue at the next meeting.

Docketing of Filings Submitted on Weekends and Holidays:

Ms. Wesdock addressed a question raised by the EHB administrative staff: If a document is faxed or electronically filed on a weekend or a state holiday, should the date on the Board's electronic docket be the date the item was submitted to the Board or the next business day (i.e., the date on which the staff would upload the document to the docket)?

The Board's current rules on filing appear at Rule 1021.32. The following subsections address the date upon which a document is considered to be filed:

Rule 1021.32(b): "The date of filing shall be the date the document is received by the Board."

Rule 1021.32(g): "Documents filed by United States mail, hand or other delivery services after the close of the business day at 4:30 p.m. Eastern Time shall be deemed to be filed on the following business day. *Documents filed electronically, including by facsimile, shall be deemed filed on the day received by the Board.*" (emphasis added)

A problem arises when a document is filed on a weekend or holiday. For example, if a document is electronically filed or faxed to the Board at 11:59 pm on a Friday, under the current rules the document is deemed to be filed on Friday and the time period for responding to the document by the other parties to the case begins on Friday. However, the other parties may not see the document until the next business day, i.e., the following Monday. The problem is compounded when there is a state holiday on a Monday. This problem is addressed in the proposed changes to the rules by adding the following to Rule 1021.35 (Date of service):

(b) For the sole purpose of computing the deadlines under this chapter for responding to documents:

(1) Documents served by electronic service shall be deemed served, for purposes of responding, when notice of the electronic filing is transmitted to registered users in the proceeding, *provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by electronic service shall be deemed served the next business day.*

(2) Documents served by facsimile shall be deemed served, for purposes of responding, when transmission of the facsimile is complete, *provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by facsimile shall be deemed served the next business day.*

(3) Documents served by mail shall be deemed served 3 days after the date of actual service.

Proposed Rulemaking 106-10 (emphasis added).

In order to rectify this problem until the new rules go into effect, whenever a document is electronically filed or faxed to the Board on a weekend or holiday the Board will deem the filing date to be the next business day, and the Board's docket will reflect it as such.

EELS PLUS Program:

Mr. Hinerman explained that the Environmental and Energy Law Section is planning to present an annual award to a firm or organization that exemplifies the goals of the Section's PLUS program. The PLUS (Pennsylvania Lawyers United for Sustainability) Program provides Pennsylvania attorneys, law firms, organizations and government entities an opportunity to demonstrate their commitment to environmental sustainability in their professional practices and includes a list of guidelines to assist them in their efforts. The award will be presented annually at the Environmental Law Forum. One can sign up for the program on the Section's webpage.

Adjournment:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the meeting was adjourned at 12:29 p.m.

2014 Meeting Dates:

The Rules Committee will meet on the following dates in 2014 at 10:30 a.m. unless the meeting date/time is changed or the meeting canceled:

January 9, 2014
March 13, 2014
May 8, 2014
July 10, 2014
September 11, 2014
November 13, 2014

