

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Minutes of July 12, 2012 Meeting

Attendance:

The Environmental Hearing Board Rules Committee met in person and by conference call on July 12, 2012 at 10:30 a.m. Committee Chairman Howard Wein presided. Committee members taking part in the meeting were as follows: Maxine Woelfling, Jim Bohan, Brian Clark, Kate Harper, Phil Hinerman and Joe Manko. Representing the Environmental Hearing Board were Chairman and Chief Judge Tom Renwand, Judge Bernie Labuskes, Judge Rick Mather and Assistant Counsel Kris Gazsi and Maryanne Wesdock, who took the minutes.

Approval of Minutes:

The minutes of the March 15, 2012 meeting were approved with one correction: The minutes were revised to reflect that Mr. Clark had attended the March 15, 2012 meeting. Mr. Manko moved for the minutes' approval as revised, with Mr. Bohan seconding the motion. All were in favor.

Enhancements to EHB's Electronic Filing System:

In preparation for the adoption of rules that would make electronic filing mandatory, several enhancements to the Environmental Hearing Board's (EHB or Board) electronic filing system have been approved. Among those that have been developed are as follows:

Electronic Filing of Notice of Appeal:

Ms. Wesdock reported that the EHB's electronic filing system has been upgraded to allow the electronic filing of notices of appeal. However, there is no mechanism in place to allow for electronic *service* of the notice of appeal on the Department of Environmental Protection's (Department) Office of Chief Counsel and program office that took the action being appealed. Nor is there any mechanism for serving a copy of the notice of appeal on permittees in a third party appeal. Therefore, once the Board authorizes the electronic filing of notices of appeal, appellants will still need to serve copies of the notices of appeal traditionally. In the case of service on the Department's Office of Chief Counsel, an email address could be established for the receipt of electronically filed notices of appeal. No such mechanism could be set up for service on the Department's program area that took the action being appealed or, in the case of a third party appeal, the permittee.

The consensus of the Committee was that allowing notices of appeal to be electronically filed was a substantive change to the EHB's rules, and it should not go into effect until the EHB's rules had been revised to allow electronic filing. It was suggested that it might be addressed through emergency rulemaking. Judge Mather agreed to talk to the Board's liaisons at the Office of General Counsel and the Office of Attorney General and to the Chief Counsel of the Independent Regulatory Review Commission (IRRC) to get their views on whether this revision can be addressed through emergency rulemaking.

Electronic Filing Under Seal:

Mr. Gazsi and Ms. Wesdock reported that parties may now file documents under seal, which will allow the document to be viewed by the EHB and parties to the case but

not by the public. This is to be done only when a protective order has been entered in the case. The system puts the burden on the filing attorney to choose the option of filing the document under seal when a protective order is in place. If it is discovered that a document has been filed under seal without a protective order having been entered, the EHB staff will correct the error and the document will be made viewable to the public.

Notice of Appearance:

Notices of appearance may now be electronically filed.

Further Revisions to EHB Rules Regarding Mandatory Electronic Filing:

Mr. Bohan reported on additional minor changes to the mandatory electronic filing rule revisions. On the motion of Rep. Harper, seconded by Mr. Manko, the Committee voted to approve the revisions to the EHB rules of practice and procedure that deal with mandatory electronic filing. The vote covers all revisions made over the course of the last several meetings. The Committee again thanked Mr. Bohan for his extensive work on the revisions.

Dispositive Motions:

At the January 2012 meeting, Judge Mather had reported on the following problem: In a third-party appeal where the permittee has filed a motion for summary judgment, the other parties have 30 days to respond. Within the 30 day response period, the Department of Environmental Protection may join in the motion with additional facts to support the motion. Since the appellant's response is also due within the 30 day response period, his or her response is due without the benefit of seeing the additional facts contained in the Department's response. Judge Mather felt that the rule needs to be clarified to say that the Department (or other party) cannot add additional facts if it joins

in the permittee's motion OR if the Department does add additional facts, the appellant has an additional 30 days to respond.

Mr. Bohan circulated proposed changes to the Board's rules on dispositive motions and summary judgment (25 Pa. Code § 1021.94 and § 1021.94a) to address the problem articulated by Judge Mather.¹ Under the changes proposed by Mr. Bohan, if a party wished to support the moving party's motion, it could file a supporting memorandum within 15 days of the motion. The responding party would then have 30 days to respond to the moving party's motion and the supporting party's memorandum. The scope of facts in the supporting memorandum would be limited to those of the original motion, unless the memorandum were accompanied by a separate dispositive motion.

Mr. Clark and Judge Labuskes expressed concern that the proposed changes could be subject to abuse. If Party A files a dispositive motion, and Party B wishes to respond to the motion with new facts, Party B would need to file a new motion, and then if Party A wishes to respond to that motion with new facts, he would need to file yet another new motion, etc. Mr. Clark stated that the rule needed to contain language that clearly cuts off the ability to respond at some point.

A question was raised as to why the Department might want to file its own response after the filing of the permittee's motion. Mr. Bohan explained that there are two situations in which this might occur: 1) the Department might disagree with the legal interpretation of the regulations advocated in the permittee's motion, or 2) the

¹ A copy of Mr. Bohan's proposed rule changes to §§ 1021.94 and 1021.94a that were discussed at the July 12, 2012 meeting are included with these minutes.

Department might agree with most of the facts set forth in the permittee's motion but believes there are additional facts in support of the motion.

Judge Mather did not want to adopt a rule that would discourage the Department or other parties from filing responses in support of a dispositive motion. Ms. Woelfling suggested that if the Board wants to hear the Department's viewpoint on a particular issue, it could order the Department to file a brief. Whereas previous rule changes were an attempt to more closely align the Board's rules with the Pa. Rules of Civil Procedure, Ms. Woelfling expressed concern that these revisions would create a hybrid and could create more problems than they solve.

Mr. Gazsi suggested that if the Department wished to file a response to a dispositive motion that relied on additional facts, it could seek leave of the Board to do so.

Judge Mather commented that if parties are permitted only to file responses in opposition to dispositive motions, it might encourage parties on the same side to work more closely together before one or both of them files a dispositive motion. Mr. Clark expressed concern that this is rarely done.

Ms. Wesdock raised the following question: What if the Department's response raises new facts that none of the other parties agree with, i.e., neither the responding party nor the moving party agrees?

Mr. Bohan suggested that even if the Committee did not adopt the proposed changes to Rules 1021.94 and 1021.94a, some revision to the rules may still be needed to let parties know how to proceed. Judge Mather agreed that the rules need some revision because the current language does not address how to deal with responses in support of a

motion. Subsection (f) of Rule 1021.94a specifically states that it addresses responses in *opposition* to a motion. However, Judge Mather stated that in some of his cases, the Department attorney did not read this provision as prohibiting a response in *support* of the motion.

Mr. Manko left the meeting at this point of the discussion.

Mr. Wein noted that, based on the discussion, most of the Committee members and judges seemed to favor an approach with the following parameters:

- 1) If a party wants to join in a motion for summary judgment, it should do so within 15 days of the motion.
- 2) If a party wants to file its own motion for summary judgment, it must do so within the time for filing dispositive motions, or request leave of the Board to file outside the dispositive motion deadline.
- 3) Any document that purports to provide additional facts cannot be in the form of a joinder to the motion.
- 4) Any document that puts forth new legal positions cannot be in the form of a joinder to the motion. If a responding party wants to advance new legal theories outside the time for filing dispositive motions, it must request leave of the Board.
- 5) The rules need to be revised to clarify that only responses in opposition are covered under subsection (f) of 1021.94a.
- 6) Any revisions to the rules should occur in both Rule 1021.94 and 1021.94a so that the rules parallel each other.

Some Committee members felt that if a joining party were taking any action other than saying they agree with the motion, they should seek leave of the Board before filing their response.

Mr. Bohan suggested that this problem might be better addressed in a comment to the rules. Mr. Gazsi offered to work with Mr. Bohan in drafting new revisions to the rules and/or a comment to the rules.

Termination of Appeal:

At a prior meeting, Mr. Hinerman had raised the following issue: There is no provision in the Board's rules at § 1021.141 for terminating a third-party appeal of a permit when the permit has expired. He explained that in such a case, the appellant would want the appeal terminated but not dismissed. Ms. Wesdock recounted that a similar situation had occurred in the case of *Chestnut Ridge Conservancy v. DEP and Tasman Resources*, in which the Board had granted the appellant's motion to sustain the appeal after it became apparent that the permit was no longer valid. *Chestnut Ridge Conservancy v. DEP and Tasman Resources*, EHB Docket No. 1996-022-R (Opinion and Order on Motion to Sustain Appeal issued 3-26-98)

Judge Renwand questioned why a motion for summary judgment could not be filed in such a case. Mr. Hinerman felt that there should be some procedure for terminating an appeal without having to move for summary judgment. In other words, he felt there should be some method of withdrawing an appeal without calling it a "withdrawal of appeal." Mr. Clark agreed with Mr. Hinerman.

Ms. Wesdock questioned why the Board could not simply issue a rule to show cause. Judge Labuskes noted that the Pa. Supreme Court does not have a favorable view of dismissing cases for *non pros* based on Mr. Gazsi's research.

Mr. Bohan noted that § 1021.141 states that "a proceeding *may* be terminated" by one of the methods listed in the rule. 25 Pa.Code § 1021.141(a) (emphasis added). Therefore, in his view, § 1021.141 did not preclude other methods for terminating an appeal.

The Committee agreed to table the issue at this time.

Attorneys' Fees:

The Committee has already voted to eliminate Sections 1021.171 through 1021.174 of the Board's rules. Those sections deal with applications for costs and attorneys' fees under the Costs Act, which has expired.

Sections 1021.181 through 1021.191 deal with applications for costs and attorneys' fees filed under statutes other than the Costs Act. One of the Department's attorneys, Marty Siegel, had suggested to Mr. Bohan that the Rules Committee might want to flesh out the procedure for seeking attorneys' fees, particularly with regard to the following topics: burden of proof, discovery, hearing procedure.

Judge Mather stated that he generally addresses these issues in a telephone conference with the parties after receiving an application for attorneys' fees. Judge Labuskes noted that the Board's rules at § 1021.182 already specify the information that needs to be contained in the application for attorneys' fees. He and Judges Mather and Renwand also expressed a concern about setting forth a specific amount of time for discovery since it may vary with each case. For example, not every application for

attorneys' fees will require discovery. Judge Labuskes expressed a concern that if the Board's rules specify a certain amount of time for conducting discovery, attorneys will think they need to do it in every case. The judges agreed that they want to avoid having parties engage in excessive proceedings related to attorneys' fees petitions. The judges felt that these issues were best handled in a conference call and would propose no change.

Ms. Wesdock noted that § 1021.184(b) already allows discovery and the taking of testimony if necessary. Mr. Wein suggested amending the Board's Internal Operating Procedures (IOP) to clarify the procedure for attorneys' fee applications. For example, the IOP could state that when an attorneys' fees application is filed it triggers a status conference. Judge Labuskes did not agree that every application for attorneys' fees warranted a status conference since some applications have no merit. Mr. Hinerman stated that the problem is that when a client files an application for attorneys' fees and asks his or her attorney what is the next step, the attorney doesn't have an answer based on the current wording of the rules. Judge Renwand disagreed, stating that the attorney has some input into the next step, such as requesting a status conference or engaging in discovery.

Rules Package:

The Board is currently in the process of preparing a rules package. Once it is prepared, the judges will vote on the proposed rule revisions and then it will be sent to the Office of General Counsel (OGC) for review. Judge Mather thought that the rules package could be prepared and sent to OGC prior to the Committee's next meeting on September 13.

Mr. Wein noted that two rules will be ready for voting at the September meeting: 1) efilng notices of appeal and 2) revisions to the rules on dispositive motions and summary judgment. He asked whether they could be included in the rules package if they are approved at the September meeting. Judge Mather noted that it would be easier to add the rules prior to sending the package to OGC. Therefore, the Board will hold off on submitting the rules package to OGC until after the September meeting.

Judge Renwand suggesting allowing the efilng of notices of appeals through a pilot program until an actual rule can be adopted.

Next Meeting:

The next meeting of the Rules Committee will be Thursday, September 13, 2012, at 10:15 a.m.

Adjournment of Meeting:

On the motion of Mr. Clark, seconded by Ms. Woelfling, the meeting was adjourned at 12:54 p.m.