

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**MINUTES OF MEETING OF JANUARY 6, 2016**

**Attendance:**

The Environmental Hearing Board Rules Committee met on January 6, 2016 at 10:30 a.m. Committee Chairman Howard Wein presided. The following Rules Committee members attended: In Harrisburg – Jim Bohan, Phil Hinerman, and Lisa Long; and by phone – Committee Chairman Howard Wein, Matt Wolford, Maxine Woelfling, Gail Conner and Brian Clark. Attending on behalf of the Board were the following: In Harrisburg – Chief Judge Tom Renwand, Judge Rick Mather, Judge Bernard Labuskes, Maryanne Wesdock, Vince Gustitus, Eric Delio, and John Dixon, who took the minutes. Christine Walker attended by phone.

**Approval of Minutes of November 5, 2015:**

The minutes from the November 5, 2015 Rules Committee meeting were approved on the motion of Ms. Woelfling, seconded by Mr. Bohan.

**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. 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 package was then published in the PA Bulletin on December 19, 2015 (45 Pa.B. 7166). The public comment period closes on January 19, 2016. The Announcements section of the Board's website contains information on the proposed rules package and a link to the corresponding bulletin volume in which the rules package is published.

## **Electronic Discovery Plans**

At the November 2015 Rules Committee meeting, the Committee continued its discussion of Board rules pertaining to electronic discovery, as well as an analysis of how the Pennsylvania Rules of Civil Procedure and Federal Rules of Civil Procedure address electronic discovery. The Committee agreed that if there is a need to get parties to submit discovery plans in a more timely fashion, the DEP could choose sample DEP electronic discovery plans and, upon consideration and approval by the Committee and the Board, post the plans on the Board's website as a guidance example for the parties. Such a guidance example would provide the parties with an electronic discovery plan starting point and the same could apply with joint discovery plans.

Mr. Bohan provided the Committee with two sample electronic discovery plans that could serve as guidance examples for parties conducting electronic discovery. According to Mr. Bohan, the first sample electronic discovery plan deals with a common electronic discovery case before the Board, where the parties produce most electronically stored information as hard copies or PDF files. The second electronic discovery plan, according to Mr. Bohan, involves a more complex electronic discovery situation involving searchability and metadata in which the parties are exchanging information in native format.

Mr. Hinerman was concerned that posting two sample electronic discovery plans on the Board's website would discourage parties from thinking critically about what should be put in their specific electronic discovery plans. In Mr. Hinerman's opinion, the Board should not be directing parties as to what should be included in an electronic discovery plan. Mr. Hinerman continued that the two proposed sample electronic discovery plans do not address many nuances

of electronic discovery and by posting the plans on the Board's website, parties will not fully consider many other electronic discovery issues that should be addressed.

Mr. Hinerman circulated a handout to the Committee containing electronic discovery issues that parties should be aware of when crafting electronic discovery plans. Mr. Hinerman detailed numerous sources of discoverable information, where that information can be held, technologies used to search that information, the format in which such information is displayed, and confidentiality issues. According to Mr. Hinerman, the two sample electronic discovery plans that Mr. Bohan provided cannot account for many of the considerations set forth in his information sheet. Mr. Hinerman explained that there are potential sources of information that the Department may not have access to but private sector parties may indeed have access to. In Mr. Hinerman's opinion, this places more of a burden on private parties than the Department. Therefore, he does not advise putting something on the Board website that places more of a burden on private parties than the Department.

Mr. Bohan agreed that 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. What is appropriate in one case may not necessarily be appropriate in others. However, even with that caveat, Mr. Bohan asserted that the two proposed plans will be very useful for identifying issues that parties should consider and discuss when conferring about electronic discovery. Mr. Bohan explained that dealing with electronically stored information is more burdensome, which 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 explained that the PA rules make it clear that e-discovery is a part of discovery and should not be treated uniquely. As noted in Section B. of the 2012 Explanatory Comment preceding Pa. R. Civ. P. 4009.1, a proportionality standard governs e-discovery (like other discovery), and tribunals must consider, among other things, the nature and scope of the litigation; the relevance and importance of ESI to the adjudication of the case; the cost, burden, and delay, that may result from requiring the parties to deal with ESI; and the ease of producing ESI compared to other forms of substantially similar information.

Mr. Hinerman responded that the federal rules have narrowed the scope of electronic discovery and that many courts are moving away from a broader scope of electronic discovery. Mr. Hinerman requested that the Committee consider the 2012 amendments to the Pennsylvania Rules of Civil Procedure which specifically recognize and permit the discovery of electronically stored information. In addition, a note accompanying the 2012 amendments to the Pennsylvania Rules of Civil Procedure suggests that parties seeking electronically stored information should be as specific as possible and that “Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.” In response, Mr. Bohan explained that the PA rules state that there is no intent to incorporate federal jurisprudence surrounding the discovery of electronically stored information despite the fact that the term “electronically stored information” is used in the rules.

Judge Mather questioned whether the Board should provide parties with more than just a sample electronic discovery plan document. Judge Labuskes added that at one point, the Board had a more detailed pre-hearing order pertaining to electronic discovery. Judge Labuskes attempted to steer the Committee’s intention to the original issue at hand, which was whether to put sample electronic discovery plans on the website and not whether to include additional

discovery information. Ms. Wesdock noted that the original purpose of providing sample discovery plans was to facilitate dialogue amongst parties about electronic discovery issues unique to that specific appeal.

Mr. Hinerman stated that along with the samples, there should be some sort of document with additional dialogue on what issues should be considered when crafting electronic discovery plans. Chief Judge Renwand cautioned that such an approach might lean towards advising parties on trial strategy and that he is against putting such information on the website. He continued that the Board's role is not to educate parties on potential sources of electronically discoverable information. Judge Mather added that attaching a disclaimer to the sample electronic discovery plans may be more appropriate than providing information on discovery practice. Mr. Bohan agreed that a document more along the lines of a disclaimer would be sufficient. Chairman Wein asked Mr. Bohan and Mr. Hinerman if they could collaborate to work on such a document. Both gentlemen agreed, to which Chairman Wein concluded that the Committee will not put the sample electronic discovery plans on the website until Mr. Bohan and Mr. Hinerman hash out the additional disclaimer document.

#### **Automatic service of an electronically filed notice of appeal**

At the November 2015 Rules Committee meeting, the Committee considered whether it was necessary to revise 25 Pa. Code § 1021.51(f)((1)(v) to reflect automatic service on the State Conservation Commission in case automatic electronic service of the notice of appeal on the DEP does not in fact constitute service on the State Conservation Commission in cases where an appeal is filed from an action of the State Conservation Commission. The Committee considered the definition of "Department" and service

upon other boards, commissions, and agencies. “Department” is defined in the Board’s Rules at 25 Pa. Code § 1021.2(a) to include other boards, commissions, or agencies.

Mr. Bohan continued the discussion by cautioning that all sorts of agencies, boards, or commissions unrelated to the Department could be covered by the Board’s rules, and that automatic service upon the Department via the Board’s electronic filing system would not necessarily effect service upon those agencies, boards or commissions. Although other agencies could be caught up in the definition of “department” it is important to ensure that service upon the DEP is not imputed to those other agencies.

Judge Mather responded that the State Conservation Commission is different since it is represented by the Department in actions before the Environmental Hearing Board. The Committee agreed that no changes would be made to 25 Pa. Code § 1021.51(f)(1)(v) and that the Board should be aware that in any case involving an appeal of an action by a state agency, board or commission other than the Department or State Conservation Commission, it may be necessary to ensure that the agency, board or commission receives appropriate service of the notice of appeal and should not simply assume that automatic service on the Department will constitute service on the agency, board or commission.

**Rule 1021.51, Service on Landowner**

At the November 2015 Rules Committee meeting, Ms. Wesdock proposed to the Committee the question of whether the Board Rules should be revised to ensure that the landowner must be served with 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), but there is no similar requirement for service upon landowners.

Mr. Bohan circulated proposed language to § 1021.51 stating that “recipient of the action” includes “the landowner in appeals involving orders to correct or remediate conditions on land owned by a person not appealing the order.” In Mr. Bohan’s opinion, a “landowner” is easier to identify and the rules should reflect this. Ms. Woelfling noted that the person most directly impacted is the landowner or tenant. Mr. Wein was not sure that the Department would necessarily have information on who the tenant is on a property. Mr. Hinerman suggested the language should be revised to include the “landowner or tenant.”

Mr. Bohan was not sure how we should expect the appellant to know who to serve in a tenant situation. Ms. Connor agreed and noted that small practitioners will have a difficult time figuring out who they have to serve.

Judge Labuskes agreed that the landowner should receive notice, but expressed concern that the proposed language may go too far. He reminded the Committee that they were simply trying to achieve parity with paragraph (h)4 of the rule. The judges concluded that the best way to address this situation was to simply issue Orders requiring service pursuant to 25 Pa. Code § 1021.51 (h)(4), “other interested parties as ordered by the Board.”

### **Motions for Expedited Consideration of a Motion**

Judge Labuskes explained that the Board has recently received a number of motions for expedited consideration of a motion. The Board’s Rules currently do not address this issue, including whether the Board permits the filing of motions for

expedited consideration and, if so, what time period should be provided for responding to such a motion.

Chief Judge Renwand proposed the question of whether the Board should consider adopting a rule that sets specific time limits for a Motion for Expedited Consideration of a Motion. Judge Labuskes expressed hesitancy to the idea of adopting a rule because practitioners will use the motion quite often. Ms. Woelfling echoed Judge Labuskes' concern that a rule will encourage attempts to ask for expedited consideration.

Mr. Clark explained the common purpose of motions for expedited consideration. Mr. Clark explained that often lenders will not want to close on land deals until a legal issue is resolved, such as a Motion to Dismiss. In Mr. Clark's opinion, the Board should consider Motions for Expedited Consideration in special circumstances. Chief Judge Renwand was troubled by the idea of deciding someone's rights on the merits if we add a rule for expedited motions. Judge Labuskes expressed additional concerns over what the time period should be for responses to motions for expedited consideration. The final consensus amongst the Committee was to leave it as a case by case determination.

**Proposed revision to Rule 1021.21 (Representation)**

Mr. Dixon explained that in reviewing the Board's current rules package, the Governor's Office of Policy has asked the Board to consider the possibility of revising subsection (b) of Rule 1021.21 to allow small businesses to proceed without an attorney in EHB appeals. The Board's Rules at 25 Pa. Code § 1021.21(b) require corporations to be represented by legal counsel. According to Mr. Dixon, the current proposed rules package does not include any revisions to § 1021.21(b). Mr. Dixon explained to the Office of Policy that such a change must first be deliberated by the Committee before any further action is taken. The issue has come up before

the Board in which a small corporation, often a sole shareholder, attempts to represent themselves *pro se* due to financial concerns for retaining counsel. A review of other agency jurisprudence, such as the PA Public Utility Commission, requires that corporations be represented by counsel at all stages of Commission proceedings when the proceeding becomes adversarial. No other representation at a hearing before the Commission is permitted.

Judge Labuskes questioned why the Board should be policing and enforcing unauthorized practice of law issues in the first place. Judge Mather responded that the Board should not be ignoring unauthorized practice of law issues and explained that the Board touches upon practice of law issues on some levels already. For example, the Board has practice of law rules on pro hac vice representation— such individuals must be licensed and authorized to practice law in Pennsylvania. Chief Judge Renwand stated that there is indeed a tension between unauthorized practice of law issues and deciding cases on the merits.

Judge Mather stated that the Board should do research on how other agencies approach corporate representation. For example, the unemployment compensation board allows individuals to appear on behalf of a corporation at some level. Judge Labuskes agreed that it may be helpful to know how other agencies approach the issue as well. In addition to this research, Chief Judge Renwand agreed to speak with the Office of General Counsel regarding the issue.

**Next Meeting:**

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

**Adjournment:**

On the motion of Ms. Conner, seconded by Mr. Bohan, the meeting was adjourned at 12:35 p.m.