

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of March 9, 2023

Attendance:

The Environmental Hearing Board Rules Committee met on March 9, 2023 at 11:00 a.m. Chairman Howard Wein presided. In attendance were the following members of the Rules Committee: Brian Clark, Phil Hinerman, Gail Conner, Doug Moorhead, Jean Mosites and Tom Duncan. Attending on behalf of the Environmental Hearing Board (Board) were Assistant Counsel Eric Delio and Maggie White; Judge Sarah Clark; and Senior Counsel Maryanne Wesdock, who took the minutes. The Committee extended a warm welcome to Maggie White, who joined the Board as an Assistant Counsel in January 2023.

Recognition of Former Chief Judge and Chairman Tom Renwand:

The Rules Committee recognized the long-standing service of Chief Judge and Chairman Thomas W. Renwand, who retired from the Board on February 3, 2023. Chief Judge Renwand served on the Board for 27 years and was Chief Judge and Chairman since 2009. He was the longest-serving Chief Judge and Chairman in the Board's history. The Committee recommended presenting Judge Renwand with a gift to acknowledge his service to the Commonwealth. A suggestion was also made to obtain a citation from the Legislature and Governor's Office recognizing Judge Renwand's years of service.

Approval of January 12, 2023 Minutes:

On the motion of Mr. Duncan, seconded by Mr. Moorhead, the minutes of the January 12, 2023 meeting were approved.

Electronic Service:

Mr. Duncan proposed the following revisions (**shown in green highlight**) to Rules 1021.33 (service by the Board), 1021.34 (service by a party) and 1021.35 (date of service) that would allow service by email:

§ 1021.33. Service by the Board.

(a) The Board will serve the orders, notices and other documents it issues upon counsel designated on the docket. For any parties not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing) by mail or in person **unless the person consents to service by e-mail**.

(c) An order filed electronically without the original signature of an administrative law judge has the same force and effect as if the administrative law judge had affixed a signature to a paper copy of the order.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 1021.34. Service **of documents filed with the Board by a party.**

(a) Notices of appeal shall be served as provided in § 1021.51(h) (relating to commencement, form and content). Complaints filed by the Department will be served as provided in § 1021.71(b) (relating to complaints filed by the Department).

(b) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

(c) Electronic service of documents to other registered users through the electronic filing provider shall be considered valid and effective service and have the same legal effect as serving an original paper document. Registered users who receive documents by electronic service shall access the documents using the electronic filing provider.

(d) Documents filed electronically shall be served by hand, mail, other personal delivery or facsimile upon parties who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing), **unless the party consents to service by e-mail.**

(e) Subpoenas and documents that must be conventionally filed with the Board under § 1021.32(b) shall be served by hand, mail or other personal delivery. Documents that are conventionally or facsimile filed with the Board under § 1021.32(a) shall be served by hand, mail, other personal delivery or facsimile.

(f) If a party does not receive electronic service in a matter involving a request for expedited disposition, service shall be made upon that party within 24 hours of filing the document with the Board. For purposes of this subsection, service means actual receipt by the party served.

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile by 4:30 p.m. on the business day following notification of the deficiency. The filer may also effect service by e-mail, provided the registered user consents to service in that manner.

(h) The filing of a registration statement constitutes a certification that the registered user will accept electronic service of documents permitted to be electronically filed.

(i) Subsections (a)—(h) supersede 1 Pa. Code § 33.32 (relating to service by a participant).

§ 1021.35. Date of service.

(a) For electronic service, the date of service of a document is the date that the electronic filing provider transmits the notice of electronic filing. For other types of service, the date of service is the

date the document served is mailed, **e-mailed**, delivered in person or transmitted to the party's facsimile line.

(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 **or e-mail** 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 calendar days after the date of actual service.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.34 (relating to date of service).

Ms. Conner felt that service by email should require confirmation that the intended recipient actually receives the document being served. Mr. Duncan pointed out that the current rules do not require confirmation of receipt. Ms. Conner felt that there could be issues with emails going to spam, especially for government employees. Mr. Wolford agreed that it is an issue; he discussed a case in Federal District Court where he did not receive email notices being sent by the court. Ms. Wesdock stated that Board staff occasionally experience an issue with e-filing notices being quarantined. Mr. Delio noted that the email circulated by Ms. Mosites prior to the meeting, containing proposed changes to the rule on venue of hearings, went to quarantine. Mr. Delio also pointed out that the Commonwealth has limits on the size of email attachments. Mr. Moorhead felt that whenever someone signs up for electronic service, they assume the risk.

Mr. Duncan felt that requiring confirmation of email receipt defeats the purpose of allowing service by email – which is to allow for more speedy service. This is particularly true for Rule 1021.33 dealing with service by the Board. At the last meeting Judge Beckman explained that when a pro se appellant has not signed up for electronic filing and service, the Board must mail them a copy of orders. This is true even where the Board has the pro se party’s email address because Rule 1021.33 does not provide for email service by the Board. Mr. Wein agreed that the goal of the proposed changes to Rule 1021.33 was so the Board could avoid having to mail time-sensitive orders.

Ms. Mosites directed the Committee’s attention to Rules 1021.34(g) and 1021.36(a). They state as follows:

1021.34. Service by a party.

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile by 4:30 p.m. on the business day following notification of the deficiency. The filer may also effect service by e-mail, provided the registered user consents to service in that manner.

1021.36. Certificate of service.

(a) Each document filed with the Board must include a certificate of service which certifies the date and manner of service and the name and mailing address of the person served, except as provided in subsection (b).

Ms. Mosites pointed out that both provisions put the obligation on the filing party to ensure that service is complete. She felt that if the Board were to require additional obligations for the filing party to ensure service by email, they should be placed in Rule 1021.36(a). Ms. Wesdock suggested having parties include a “read receipt” with their email service, but Ms. Mosites pointed

out that a recipient can ignore a “read receipt” request. Ms. Herb felt that if a person has consented to service by email, the requirement of Rule 1021.36(a) has been met. Mr. Wein and Mr. Wolford agreed with Ms. Herb and suggesting adding a cross reference to Rule 1021.36(a) in Rule 1021.33. Ms. Herb suggested the following additional language be added to Rule 1021.33(b) (shown in yellow highlight):¹

§ 1021.33. Service by the Board.

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing) by mail or in person, **unless the person consents to service by e-mail.** A person who consents to service by email shall maintain an active email address and properly update it in accordance with Section 1021.36(a) (related to certificate of service).

Mr. Duncan agreed with the language except he recommended “Persons who consent...” rather than “A person who consents...”

Ms. Herb asked whether Rule 1021.35(b)(2) should be revised as follows (shown in yellow highlight):

1021.35. Date of service.

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

¹ Revisions shown in green highlight are revisions proposed by Mr. Duncan and circulated prior to the meeting. Revisions shown in yellow highlight are revisions proposed during the meeting.

Mr. Duncan did not agree with these revisions. He did not believe the 4:30 pm deadline was intended for emails. In his opinion, a 4:30 pm deadline makes sense for service by facsimile since it requires someone to be in the office to pull the document off the fax machine, but no such limitation needs to be in place for service by email. However, Mr. Delio explained that the purpose of the 4:30 pm deadline was to provide an adequate response time for the recipient of the document; the rule is intended to ensure that calculation of service time does not begin until the next business day when a document is served after 4:30 pm. He provided the following example: If a motion is served on a Friday after 4:30 pm, the 30-day response time for the opposing party does not begin until the following business day (i.e., the following Monday, or Tuesday if the Monday is a holiday). Based on Mr. Delio's explanation, several members of the Committee agreed with adding "or email" after "facsimile" as set forth in Ms. Herb's proposed revisions above.

Mr. Wein suggested that Mr. Duncan incorporate the changes discussed at the meeting and circulate them prior to the next meeting. He also recommended that if anyone has further revisions, after reviewing the rules, they should send them to Ms. Wesdock to circulate to the Committee members.

Venue of Hearings:

In response to the COVID-19 outbreak, beginning in 2020 the Board adopted a protocol for remote proceedings. During the past 3 years, the Board has held hearings and other proceedings by videoconference. Although the Board is moving back to primarily in-person hearings, based on discussion at the November Rules Committee meeting and input from the Board and the environmental bar, it appears that many parties find it helpful to have remote proceedings in certain

instances. Based on this discussion, Ms. Mosites proposed revisions to Board Rule 1021.114, dealing with venue of hearings. The revisions are shown in **green highlight** below:

§ 1021.114. Venue of hearings.

At the discretion of the Board, hearings will be held **either: 1)** at the Commonwealth facility nearest the location of the **complaint sought to be remedied by the Department** with consideration for the convenience of witnesses, the public and the parties in attending the hearings, **or 2) by videoconference or hybrid combinations of in person and video conference hearing as determined by the Board after consultation with the parties.**

In addition to the proposed revisions shown in green highlight, Ms. Mosites felt that the language in red print should be addressed.

A discussion ensued regarding the Commonwealth Court's newly revised protocol for oral arguments. The protocol provides for all oral arguments to be held in person; parties may request a remote proceeding for certain limited reasons by filing an affidavit stating the reason for the request. The consensus of the Committee was that the Board should allow more flexibility in the scheduling of remote proceedings or hybrid proceedings.

Ms. Mosites asked whether Rule 1021.114 could include a reference to the Board's protocol on remote proceedings. Ms. Wesdock stated that she conferred with the Board's liaison at the Office of General Counsel and was advised that a rule cannot refer to a protocol or guidance document that does not have regulatory oversight.

A suggestion was made to consider including a cross-reference to Rule 1021.111(a).

Mr. Wolford questioned whether Rule 1021.114 was the proper location for discussing remote proceedings. In his opinion, "venue" did not encompass videoconferencing. Ms. Mosites and Ms. Wesdock felt that the word "venue" in the title had a broader meaning and could include video proceedings.

With regard to the language set forth in red, Ms. Mosites felt that this language should be revised. Mr. Duncan agreed that the language was antiquated and should be revised. Mr. Wein proposed “matter before the Board.” Mr. Moorhead suggested “nearest the location of the Department office responsible for the action.” Ms. Mosites recommended “the facts underlying the matter before the Board.” In the alternative, she recommended simply stating “at a Commonwealth facility” and deleting “nearest the location of the complaint sought to be remedied by the Department.”

Mr. Duncan recommended changing “will” to “may” in the first sentence. Mr. Moorhead recommended dividing subsection (2) into two subsections as follows: “(2) by videoconference, or (3) hybrid combinations of in-person and videoconference hearing as determined by the Board after consultation with the parties.”

Ms. Wesdock provided feedback from Judge Labuskes: He stated that he did not agree with a hybrid approach that allowed one party to present its entire case remotely while another party appeared in person. He agreed that a “hybrid” proceeding could allow certain witnesses to appear remotely as necessary. Ms. Mosites felt that the proposed revisions to the rule provide flexibility to the judges.

Ms. Mosites asked the group whether they felt the words “in-person” and/or “remote” should be added to Rule 1021.111(a) which states as follows:

§ 1021.111. Initiation of hearings.

(a) If the proceedings are at issue and a hearing is required, a formal evidentiary hearing shall be scheduled and a notice of hearing shall be sent to all parties to the proceedings

Ms. Herb did not feel it was necessary to add “in-person” or “remote.” She felt the rule already allows discretion by the Board. Mr. Clark explained that Rule 1021.111 was drafted with protective appeals in mind, recognizing that in such cases a hearing may not be necessary.

Mr. Wein asked whether the title of Rule 1021.114 should be revised to include “oral arguments.” Ms. Mosites pointed out that “hearings” is not defined. Mr. Wolford felt that “hearings” was broad enough to cover “oral arguments” and, therefore, no change to the title of the rule was required.

On the motion of Mr. Wolford, seconded by Mr. Hinerman, the Committee voted in favor of the following revisions to Rule 1021.114:

§ 1021.114. Venue of hearings.

At the discretion of the Board **and after consultation with the parties,** hearings **will may** be held: **1) at a the** Commonwealth facility **nearest the location of the complaint sought to be remedied by the Department** with consideration for the convenience of witnesses, the public and the parties in attending the hearings, **2) by videoconference, or 3) with a combination of in person and videoconference hearing.**

Summary Judgment:

Proposed revisions to Rule 1021.94a, dealing with summary judgment, were discussed at the previous meeting. Additionally, Mr. Hinerman suggested adding language to subsection (d)(1) requiring a verification that the moving party consulted with the opposing party on the statement of undisputed material facts and a reasonable effort was made to include only facts on which the parties agree. Mr. Moorhead suggested requiring a “certification” rather than “verification” since “certification” is used in Rule 1021.93. Ms. Herb agreed with Mr. Moorhead’s suggestion. Mr. Hinerman also recommended adding language to subsection (d)(4) stating that if the statement of

undisputed material facts exceeds five pages without leave of the Board, it may be stricken. The Committee also discussed other suggested revisions.

On the motion of Mr. Hinerman, seconded by Mr. Clark, the Committee voted in favor of the following revisions to Rule 1021.94a:

§ 1021.94a. Summary judgment motions.

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Pa.R.C.P. Rules 1035.1—1035.5.

(b) *Summary judgment motion record.*

(1) A summary judgment motion record must contain the following separate items:

(i) A motion prepared in accordance with subsection (c).

(ii) A statement of undisputed material facts in accordance with subsection (d).

(iii) A supporting brief prepared in accordance with subsection (e).

(iv) The evidentiary materials relied upon by the movant.

(v) A proposed order.

(2) Motions and responses must be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service by a party).

(c) *Motion.* A motion for summary judgment must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(d) *Statement of undisputed material facts.* A statement of undisputed material facts **shall comply with the following:**

(1) **The statement of undisputed material facts shall include a certification that the moving party has consulted with the opposing party or parties and a reasonable effort was made to agree on the undisputed material facts.**

(2) **The statement of undisputed material facts shall** ~~must~~ consist of numbered paragraphs and contain only those material facts to which the movant contends there is no genuine issue

together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted.

(3) The citation **to the record shall** ~~must~~ identify the document and specify the paragraphs and pages or lines thereof or the specific portions of exhibits relied on.

(4) The statement of undisputed material facts, absent the portions of exhibits and affidavits relied upon, may not exceed five pages in length unless leave of the Board is granted. **Where leave of the Board has not been granted, a statement of undisputed material facts that exceeds five pages may be stricken.**

(e) *Brief in support of the motion for summary judgment.* The motion for summary judgment shall be accompanied by a brief containing ~~an introduction,~~ a summary of the case and the legal argument supporting the motion. **The brief shall contain citations to the statement of undisputed material facts and to specific pages of exhibits in the record upon which the party relies in support of the motion.**

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file ~~a memorandum of law~~ **one of the following** within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first:

(1) **A letter supporting the motion and/or agreeing with the relief requested in the motion, or**

(2) **A memorandum of law that contains new legal argument.** The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(g) *Opposition to motion for summary judgment.* Within 30 days of service of the motion or, if a supporting party files a memorandum of law **pursuant to section (f)(2) alone,** within 30 days of service of the memorandum of law, a party opposing the motion shall file the following:

(1) A response to the motion for summary judgment which includes a concise statement, not to exceed two pages in length, as to why the motion should not be granted.

(2) A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant's statement. Any response must include citation to the portion of the record controverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted. **Where leave of the Board has not been granted, a responsive statement of material facts exceeding five pages may be stricken.**

(3) A brief containing the legal argument in opposition to the motion **and citations to both the statement of undisputed material facts and to specific pages of exhibits in the record on which the opposing party relies.**

(h) *Length of brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion may not exceed 30 pages.

(i) *Evidentiary materials.* Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment or response must accompany the motion or response and be separately bound and labeled as exhibits. Affidavits must conform to Pa.R.C.P. 76 and 1035.4 (relating to definitions; and affidavits). **If the exhibits are filed as one document, the pages of the document shall be numbered and the document shall include a table of contents listing each exhibit.**

(j) *Proposed order.* The motion must be accompanied by a proposed order.

(k) *Reply brief.* Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file a reply brief. The reply brief may not exceed 15 pages unless leave of the Board is granted. Additional briefing may be permitted at the discretion of the Board.

(l) *Summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's

pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(m) *Judgment rendered.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Adjournment:

On the motion of Ms. Conner, seconded by Mr. Moorhead, the meeting adjourned at 12:57 p.m.

Next Meeting:

The next meeting of the Rules Committee will be held via Teams on **May 11, 2023 at 10:00 a.m.**