

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**Minutes of January 12, 2012 Meeting**

**Attendance:**

The Environmental Hearing Board Rules Committee met on January 12, 2012 at 10:15 a.m. Representing the Rules Committee were: Chair Howard Wein, Jim Bohan, Brian Clark, Rep. Kate Harper (by phone), Phil Hinerman, David Raphael, Tom Scott. Representing the Environmental Hearing Board were: Chairman and Chief Judge Tom Renwand, Judge Michelle Coleman, Judge Bernie Labuskes, Judge Richard Mather, Board Counsel Kris Gazsi and Maryanne Wesdock, and new Board Secretary, Vince Gustitus.

Also participating by phone were representatives of the Board's website administrator, LT Court Tech: Judy Rankin, Jamie Sarno and Josh Shannon.

Judge Renwand introduced the Board's new Secretary, Vince Gustitus to the group.

**Approval of Minutes:**

On the motion of Phil Hinerman, seconded by Mr. Clark, the minutes of the July 14, 2011 meeting were approved.

**Electronic Filing:**

Judge Renwand explained why the Board would like to move toward mandatory electronic filing this year. There will be limited exceptions, e.g. for individuals who do not have a computer, but Judge Renwand noted that many pro se appellants are quite computer savvy and would have no problem with e-filing.

Mr. Wein noted that it takes at least a year to get a rule in place. He asked whether the Board could adopt interim measures for mandatory electronic filing. The judges agreed it could be done as part of Pre Hearing Order No. 1 or a stand alone order. Judge Renwand would like to have all parties filing electronically by June or July of this year (with limited exceptions.)

Mr. Clark asked what is the percentage of parties who currently e-file. The Board estimates 75%, but this is due to orders requiring parties to e-file in a number of cases. Where parties are not ordered to e-file, the percentage is much lower, perhaps 50%.

Mr. Clark asked if the current system is sufficient to handle protective orders. Judge Renwand explained that the Board seldom receives motions for protective orders. He feels that the issue of protective orders can be addressed without the need for a rule on this subject.

Mr. Wein noted that the PBA Environmental and Energy Law Section (Environmental Law Section) would like to be kept apprised of the Rules Committee agenda. Section Chair Matt Wolford intends to provide a link to Rules Committee agendas on the Section's website. Mr. Wein also felt that the issue of mandatory e-filing should be addressed at this year's Environmental Law Forum.

Judge Mather felt it would be helpful to have a rule in proposed form to review at the Environmental Law Forum. Since there is not sufficient time to get a proposed rule into the PA Bulletin by the time of the Forum (March 28 & 29), he felt it would be helpful to have a draft of a proposed rule available for review. He stated that the Rules Committee or EHB could have a working draft available through the PBA Environmental

Law Section website and encourage comments from the environmental bar before the rule is approved.

The Committee extended its thanks to Mr. Bohan for his hard work in preparing the first and second drafts of the rule. Mr. Bohan presented an explanation of his second draft. He took the comments from the previous Rules Committee meeting and made revisions to the first draft. He also made revisions based on a conference call with LT Court Tech, the Board's website and electronic filing provider. If another court had an existing rule in place dealing with a particular area of electronic filing, he tried to tailor the EHB rule to the existing rule.

In the definition section, Mr. Hinerman questioned the classification of what constitutes a "legal holiday," found within the definition of "business day." The Committee agreed with the following language: "Business day – . . . . ('Legal holiday' means . . .any ~~other~~ day that is designated as a holiday by the President or Congress of the United States or by the Commonwealth)" but will determine whether the word "President" needs to be deleted (in the event the President cannot unilaterally declare a national holiday.)

Mr. Hinerman questioned the definition of "electronic filing provider" which includes the word "vendor." He felt the term "vendor" was inappropriate since the Board could decide at some point in the future to administer the electronic filing system itself. It was agreed that the Board would never be its own website provider. Nonetheless, to cover all options Judge Mather recommended using a more general term such as "entity." The Committee agreed to change the word "vendor" to "entity."

In Rule 1021.31, dealing with “Signing,” Mr. Hinerman asked whether the Board might want to provide for electronic signatures. Mr. Bohan pointed out that Rule 1021.32(8) deals with electronic signatures and agreed it could be cross-referenced in Rule 1021.31.

This brought up a discussion of a problem discovered by the Board pertaining to signatures on Adjudications and Opinions. Mr. Gazsi explained that when the Board uploads an Adjudication or Opinion, it is faced with the choice of either uploading the document in Word format without the judge’s signature and without being on letterhead or scanning a signed copy of the Adjudication or Opinion to pdf before posting it. In the case of the latter, i.e., scanning to pdf before posting it, the document is no longer searchable on the website. So for example, if the Board issues an Opinion in the case of Smith v. DEP, and the document is uploaded to the website by first scanning it to pdf, the Opinion cannot be found by using the Board’s search engine. It was agreed that the Board should talk with LT Court Tech about this issue separately.

Returning to the issue of signatures on electronically filed documents, Mr. Raphael pointed out that attorneys who electronically file in federal court are used to using “/s/” for the signature. However, practitioners before the Board may be more likely to sign a document and submit it in pdf format. Judge Mather agreed that the Board gets very few documents signed with “/s/”; most documents are signed. There was unanimous agreement among the Committee that practitioners should have the option of signing with an actual signature or “/s/.”

Rule 1021.32 deals with “Filing.” The question was asked: Can notices of appeal and complaints be e-filed? Under the current system, no. LT Court Tech explained that

the current system assumes there is already a docket number in place when a document is e-filed. LT Court Tech can adjust the system to allow the e-filing of notices of appeal and complaints, but there is a cost associated with it. The Board will examine the quote provided by LT Court Tech to determine if they want to make this change.

Judge Renwand noted that the Board uploads notices of appeal and complaints to the electronic docket. The advantage of allowing the e-filing of those documents would be to save time for EHB staff. Mr. Wein noted that there would also be an advantage to practitioners since e-filing allows them to file up to 11:59 p.m.

Mr. Scott felt that section (f) of 1021.32, dealing with what documents must be filed conventionally or by facsimile, should be moved to the beginning of the rule. He felt that it was the most important piece of information that an attorney or appellant needs to know when filing a document.

Rep. Harper asked if the public ever comes to the Board's office to review files. Judge Labuskes answered in the affirmative. Judge Renwand noted that if a document is e-filed the person seeking the information could simply go to the Board's website.

Judge Renwand noted that most people have access to the internet; the exception would be someone who does not have a computer. In his experience, most citizens groups are very internet savvy. Rep. Harper asked the following question: If a person files conventionally, can he/she be served electronically? Under the Board's rules, no. Also, if a person cannot file electronically, he/she probably doesn't have the means of being served electronically. Judge Renwand agreed: if a person files conventionally, he/she is served conventionally. But if they have access to a computer and simply have

not registered for e-filing, they can still access the document quickly on the Board's website.

Judge Labuskes raised a question about the wording of Rule 1021.39(b) which states that the Board will maintain an official file "consisting of both electronic and hard copy filings." He felt that the use of the word "both" meant that the file must contain both a hard copy and the electronic version. He felt this placed a burden on the Board's clerical staff (consisting of one). It was agreed that the word "both" should be deleted from the rule.

Mr. Hinerman asked whether exhibits to an e-filed document should be filed electronically with the document or separately in hard copy. Some judges prefer electronic, some prefer hard copy, but would accept whatever version the exhibits were filed.

The same question was asked about documents exceeding 50 pages. Judge Mather prefers a hard copy. Judges Labuskes and Renwand prefer electronic. The judges agreed this could be dealt with by order. Mr. Gazsi pointed out that requiring parties to file exhibits electronically could pose technological problems. For example, if an attorney has documents only in hard copy, in order to file them electronically he would be required to scan them and then send them electronically. If his system does not have sufficient capacity to handle a document over a certain size, he would have difficulty e-filing it. LT Court responded that if a document is too large, the filer would need to break it up and file as two (or more) documents.

Mr. Wein stated that large documents pose a problem not only for the filer but also for those being served electronically if their systems cannot handle the document.

For example, maps are often exhibits in environmental cases. A map that is in color may be a very large file. LT Court Tech noted that documents consisting only of text are usually not a problem, but a document such as a map or any document in high resolution could pose a problem for some e-filers.

Mr. Wein noted that this type of issue doesn't come up in most court filings, but because of the types of documents that are often attached as exhibits in EHB cases, it is an issue. Judge Renwand stated that the Board recognized that the pro se public would not have the same technical capabilities as a law firm. Mr. Scott also expressed the concern that many attorneys and small firms may not have the technical capability to e-file large documents with the EHB.

LT Court Tech suggested that instead of sending a document as an attachment, the filer could provide a link to the document. The link would open to a web page, where the receiving party could log in to view the document. Mr. Wein felt that this approach required a level of sophistication that some filers don't have.

A question was raised as to whether the electronic notice that is sent to a party when a document has been e-filed constitutes "service." Mr. Scott stated that he would like to receive the document, not simply a notice that the document exists. LT Court Tech noted that the notice contains a link to the document.

LT Court Tech stated that it could increase the capacity of the Board's e-filing system. It is currently at 25 MB. They suggested increasing it to 50 or 100 MB.

[Rep. Harper left the meeting at this point in the discussion.]

Mr. Bohan explained that when a party e-files he is not emailing the Board. Rather, the document is being entered into the e-filing system.

Mr. Bohan suggested that filing only relevant portions of documents could alleviate some of the size issues. However, some of the Committee members stated that they would want to see the entire document.

Mr. Bohan stated that if a party cannot e-file a document because of its size, they can contact the Board to explain the problem, and the Board is likely to be flexible and allow filing in hard copy. He felt that many of the problems would work themselves out in practice. Returning to the discussion of whether the electronic notice advising parties that a document has been e-filed constitutes service, Mr. Bohan stated that under the mandatory e-filing amendments, service takes place via notice by the e-filing provider.

Judge Renwand stated that he and Ms. Wesdock had not been receiving notices of e-filings but the problem had been resolved. Mr. Gazsi explained that it was due to work being performed on the Commonwealth's Exchange Network.

It was again explained that e-filing involves the uploading of documents, not the emailing of documents. Mr. Clark suggested that this distinction be explained at the EHB Roundtable program at the Environmental Law Forum. He also suggested that the Board might want to include an instructional section on its website to educate pro se appellants or less savvy attorneys on e-filing.

Mr. Bohan noted that the issues being discussed were consistent with what happens in federal court which has lower filing limits, and the problems are not insurmountable. Judge Mather noted that the Board is operating under the system currently and is not having the problems being discussed; therefore, the issues may be theoretical. Mr. Gazsi said that the assistant counsel in Harrisburg do occasionally get

telephone calls from attorneys who are having difficulty e-filing a document. When that occurs, the attorney is simply advised to mail the document.

Mr. Wein posed the following question to LT Court Tech: If a filing contains several exhibits that are uploaded separately, can the email notice contain separate links to each of the exhibits? The answer is yes.

The discussion turned to section (a)(3) of Rule 1021.32. Mr. Bohan noted that there was a typo: the word “served” should be “filed.” Therefore, the section should read as follows: “With the exception of the documents specified under (2) above, documents that are electronically filed shall not also be *filed* by other means.”

Mr. Hinerman felt that the language should be “shall not also be *required to be filed* by other means.” Judge Labuskes disagreed that it should be optional. He felt that if the Board adopts mandatory e-filing there is no reason for the filing of a hard copy. Additionally, maintaining hard copy files places extra burden on the Board’s one staff person who has to do the filing. It was agreed that the language should remain as drafted by Mr. Bohan.

Mr. Hinerman then turned to the last sentence of Section (a)(1) of Rule 1021.32 and suggested the addition of the following language (in italics): “The Board will excuse persons from the mandatory electronic filing requirement if the *Board determines that* the requirement would impose an unreasonable burden on the potential filer.” The Committee agreed with the addition of the language.

The discussion returned to the topic of filing hard copies. Rule 1021.32(a)(2)(i), as stated in Mr. Bohan’s draft, requires parties to file documents of more than 50 pages in hard copy, even if they are also electronically filed. Mr. Hinerman stated that he prefers

hard copies of documents. Mr. Clark noted that any document that is e-filed could simply be printed. Mr. Raphael stated that he respected the fact that some might prefer having hard copies of documents, but felt that if the Board were moving in the direction of mandatory electronic filing, it should jump in with both feet and simply allow parties to file electronically. If a judge or parties also preferred to receive a hard copy of documents over a certain size, it could be addressed in a case management order. There was agreement with Mr. Raphael's position. It was agreed that subsections (2) (i) and (ii), requiring the filing of hard copies of documents over 50 pages in length and prehearing memoranda, should be eliminated. Therefore, the entire subsection (2) should be eliminated, and subsection (3) should be renumbered to (2). It was also agreed that the following revisions should be made to former subsection (3), now renumbered subsection (2): ~~“With the exception of the documents specified under (2) above,~~ Documents that are electronically filed shall not also be ~~serve~~ *filed* by other means *except as directed by the Board.* (New language shown in italics)

Mr. Hinerman then raised a question about the following language in subsection (13) of Rule 1021.32: “An electronic filing complete before midnight Eastern time shall be considered to be filed on that date, *so long as accepted by the Board upon review.*” Mr. Bohan noted that if no one is present at the Board to “accept” the document (e.g. after business hours), then it will not be accepted until the following business day. The procedure does not occur automatically. Mr. Gazsi explained the procedure for “accepting” a document. It simply requires an EHB staff person to click on the link to the document and open it. If the document can be opened, it is accepted. The only reason a document is not accepted is when the item says “document pending” and the

document cannot be opened. If the Board rejects an e-filing, the filer gets notice electronically and has the opportunity to submit the document in hard copy.

Mr. Clark asked what the procedure is if a virus causes an inability to open the document. Ms. Wesdock explained that anytime there is a problem with a document being accepted by the EHB staff, the filer has been allowed to submit the document in hard copy. Judge Mather suggested deleting the words “upon review” from the first sentence of subsection (13). There was agreement with Judge Mather’s suggestion. Therefore, the first sentence of Rule 1021.32(a)(13) will now read: “An electronic filing complete before midnight Eastern time shall be considered to be filed on that date, so long as it is accepted by the Board ~~upon review.~~”

Technical failure is addressed in subsection (14) of 1021.32(a): “If electronic filing or service does not occur or is made untimely because of a technical failure, the party or parties affected may seek appropriate relief from the Board.” It was agreed to change “technical failure” to “technical issue.”

Subsection (15) of 1021.32(a) allows the submission of excerpts of documents. Mr. Wein stated that this could be a problem if there is a contradiction in a document, but counsel doesn’t have the entire document to see it. Judge Renwand stated that the rule does make sense for certain types of documents. For example, with a motion to compel, you only need to see the interrogatories and answers that are in dispute, not the entire set of interrogatories. Mr. Bohan stated that a solution to Mr. Wein’s concern was for counsel to ask for the entire document.

Under Rule 1021.33(b), the Board would no longer mail hard copies of orders when the orders have been issued electronically.

Rule 1021.32(b) addresses filing by fax. Mr. Scott suggested that it would be helpful to place each means of filing – hard copy, electronic, fax – in a more prominent place in the rules.

[Mr. Clark left the meeting at this point, 12:25 pm]

In response to Mr. Scott's concern, Mr. Wein suggested having a section entitled "Commencement of action" immediately following the definition section, which would deal with filings by fax, electronically, and conventionally. Mr. Bohan noted that the only rule between the definitions section and the filing rule was the signing rule. Judge Mather noted that section numbers that are reserved can no longer be used again. No numbers between 1021.5 – 1021.10 are reserved. Section 1021.30 is reserved. The Board will consult with the Legislative Reference Bureau before moving sections.

Mr. Hinerman questioned whether Rule 1021.32(a)(16) needed to contain all of the information currently in that section since most of it is contained in the electronic filing instructions on the Board's website. It was suggested that some of the information could be placed in a comment. Ms. Wesdock noted that in the past the Independent Regulatory Review Commission (IRRC) has questioned why information is contained in a comment instead of in the body of the rule.

Subsection (17) of 1021.32(a) states that if a registered user wants to withdraw from electronic filing, he or she can only do so with leave of the Board. Judge Renwand explained that the rationale for this rule is that sometimes attorneys simply stop e-filing and start filing conventionally.

Mr. Scott asked whether a conventional filing is considered to be filed on the date it is received by the Board or the date is placed in the mail. It is the date the document is

received by the Board. Mr. Bohan noted that former subsection (b), stating that the date of filing is the date of receipt, was inadvertently omitted from the draft rules. Mr. Hinerman questioned whether former subsection (g) (now subsection (c)(2)), stating that documents filed conventionally after 4:30 p.m. shall be deemed filed the next business day, was needed. Mr. Scott noted that all other types of filing were allowed after 4:30 p.m. What if an EHB staff person is in the office after 4:30 p.m. and a document is conventionally filed at that time? Since the document is received by the Board at that time, shouldn't it be considered filed on that date? Since the time of receipt is the determination for all other types of filing, shouldn't it be the same for conventional? It was agreed that this subsection should be eliminated (i.e., eliminate the 4:30 pm deadline for conventional filing.) In its place will be the language of old subsection (b), stating "the date of filing shall be the date the document is received by the Board."

It was recommended that the above sentence, i.e. "the date of filing shall be the date the document is received by the Board," should be placed at the beginning of each section dealing with the various types of filing, i.e., conventional, electronic, facsimile. In the alternative, Judge Labuskes suggested placing it once at the beginning of the rule in a subsection entitled "General Provisions."

The consensus of the Committee was to move subsection (f), regarding documents that must be conventionally filed or filed by facsimile, to the beginning of the section and make it subsection (a). Subsection (e), dealing with documents that must be conventionally filed only, shall also be moved to the beginning of the section as subsection (b). The current subsections (a) and (b) will simply be re-lettered.

In Rule 1021.32a, dealing with “Privacy issues,” Mr. Hinerman noted there is a subsection (a) but no (b). Therefore, there should be no “(a)” in front of the text. He suggested allowing the last four digits of social security numbers to be included in documents. Mr. Bohan explained that his first draft of the rule did permit the inclusion of the last four digits of social security numbers, and the consensus of the Committee was that this information should not be included.

Rule 1021.33 deals with “Service by the Board.” Subsection (b) states that the Board shall serve persons other than registered e-file users “by mail or in person.” Judge Labuskes questioned whether “in person” was needed since the Board did not serve parties in person. Mr. Wein noted that if a judge hands a copy of an order to a party at a hearing, it could constitute in person service.

Mr. Hinerman noted that in Rule 1021.34, dealing with “Service by a party,” cross references to other sections will need to be changed in light of the changes made at today’s meeting. Mr. Scott suggested making subsection (a) shorter and deleting the first sentence beginning “Except for notices of appeal.....” It was also suggested that a new subsection (b) should be created. Mr. Scott proposed the following changes to 1021.34:

- Subsection (a) should read: “Notices of appeal must be served as provided in section 1021.\_\_\_\_ (with the correct section filled in after renumbering) and complaints filed by the Department must be served as provided in section 1021.71(b)”.
- A new subsection (b) which should read: “Copies of each document conventionally filed or filed by facsimile with the Board shall be served

upon every party to the proceeding on or before that date, and in the same manner that the document is filed with the Board.”

- What is currently subsection (b) becomes (c).
- Remove the last sentence of old subsection (b) (new subsection (c)).
- Re-letter the remaining subsections.

Mr. Wein requested that forms be added to the Practice and Procedure Manual.

Mr. Wein noted that if subsections 1021.32(a)(2) and (3) are removed, then 1021.37 needs to be revised.

In 1021.37(a), it was agreed to remove the language after the word “document.” Subsection (b) deals with the number of copies needed for conventional filings. Ms. Wesdock noted that the Board will need to review this section internally. She felt that only an original was needed and that extra copies were not necessary. Now that the Board has the ability to scan and email documents, there is no need for extra hard copies to be filed. Mr. Bohan agreed to rework this section.

Mr. Wein asked whether there is a backup for the Board’s electronic docket, and LT Court Tech responded yes, they provide a backup. In Rule 1021.39(c), the word “both” will be deleted.

It was agreed that there was insufficient time before the Environmental Law Forum to have a proposed mandatory e-filing rule in the Pa. Bulletin; however, Judge Mather felt that the Board could present a Rules Committee-approved proposed rule at the Forum.

**Suspense Docket:**

The suggestion of creating a suspense docket was raised approximately six years ago. Attorney David Mandelbaum contacted Ms. Wesdock with the proposal and followed up by submitting a letter to the Rules Committee outlining the reasons for adopting a rule creating a suspense docket. It was proposed that a suspense docket would be helpful particularly with regard to the filing of protective appeals, where parties may wish to engage in a period of discussion before moving forward with litigating the appeal. It was also noted that the Federal Court system has a suspense docket. In 2006, two EHB judges were adamantly opposed to the creation of a suspense docket, while two judges who were on the Board in 2006 and who remain on the Board – Judges Renwand and Labuskes – felt the issue was worth discussing. The topic of a suspense docket will be included on the agenda for the next Rules Committee meeting.

**Other Issues:**

Mr. Gazsi raised another issue for discussion at the next Rules Committee meeting: how to handle dispositive motions where no response is filed. He noted that the summary judgment rule (1021.94a) allows the Board to enter summary judgment if the non-moving party fails to file a response (1021.94a(h)). The rule dealing with dispositive motions other than summary judgment motions, e.g. motions to dismiss, (1021.94) contains no such provision. It was agreed that language should be added to Rule 1021.94 similar to the language contained in 1021.94a. Ms. Wesdock recalled that this issue was discussed at a previous Rules Committee meeting. She will check the minutes to see if a proposed amendment to the rule was drafted and voted on.

Judge Mather raised an issue that has come up under the Board's summary judgment rule (1021.94a): 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 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 questioned whether the Department can add additional facts in a response; he felt that additional facts should be added in a separate motion. Judge Mather clarified that the Department didn't really add new facts; it simply buttressed the facts contained in the motion. Judge Mather felt that the rule should state that the Department (or other party) must either join the motion initially and cannot buttress the motion at a later time, or if the Board does allow the motion to be buttressed after it is initially filed, then the opposing party must get 30 days to respond. Discussion of this issue was deferred to the next meeting.

The meeting adjourned at 1:30 p.m.

**Next Meeting:**

The next meeting of the Rules Committee is scheduled for Thursday, March 8, 2012 at 10:15 a.m.