

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Minutes of September 13, 2012 Meeting

Attendance:

The Environmental Hearing Board Rules Committee met on September 13, 2012 at 10:15 a.m. Committee Chairman Howard Wein presided. The following Committee members were in attendance: Maxine Woelfling, Representative Kate Harper, Brian Clark and Jim Bohan. Phil Hinerman attended via teleconference. Attending on behalf of the Environmental Hearing Board were the following: Chairman and Chief Judge Tom Renwand, Judge Michelle Coleman, Judge Rick Mather, Board Secretary Vince Gustitus, Board Counsel Kris Gazsi and Board Counsel Maryanne Wesdock, who took the minutes.

Minutes:

Two sets of changes were suggested to the minutes of July 12, 2012. First, Ms. Woelfling suggested a clarification in the discussion of dispositive motions. On page 4, in the third sentence of the first full paragraph, she suggested the following language change: The responding party would then have 30 days to respond to the moving party's motion and the supporting party's memorandum.

Mr. Bohan suggested changes on page 6 of the discussion of dispositive motions as follows:

- 1) After each bullet point, the phrase "the Committee agreed with this provision" should be deleted since there was not unanimous agreement.

- 2) The introductory portion of the sentence prior to the bullet points should read:
“Mr. Wein noted that, based on the discussion, most of the Committee members and judges seemed to favor an approach with the following parameters. . .” (There was discussion over whether the word “most” should be replaced with “a majority,” but the final version of the sentence retained the word “most.”)

With these revisions, the minutes were approved on the motion of Rep. Harper, seconded by Mr. Bohan.

Rules Package:

Mr. Gazsi gave a report on the status of the current rules package. He has prepared the Preamble and Annex A and provided the Committee with a copy of these documents. Ms. Wesdock will prepare the Regulatory Analysis Form. Mr. Wein requested that the Committee members review Annex A and advise Mr. Gazsi of any errors. No substantive changes will be made by Committee members at this point; the only changes will be to correct any portion of Annex A that does not accurately state either what the Committee recommended or what the Board agreed to.

Judge Mather explained that once the rules package is finalized and voted on by the Board¹, it will be sent to the Office of General Counsel for approval and then begin its journey through the regulatory process, beginning with the Attorney General’s Office.

The Committee thanked Mr. Bohan for his work in drafting many of the rule revisions, particularly the extensive revisions necessitated by the proposed adoption of mandatory electronic filing. The Committee also thanked Mr. Gazsi for his work in

¹ The rules package was approved by the Board at a public meeting held on November 8, 2012.

preparing the rules package, particularly Annex A which shows all of the rule revisions recommended by the Committee since the last rules package.

Electronic Filing Revisions:

Mr. Bohan proposed an additional revision to the mandatory electronic filing amendments. He recommended adding the following language to Rule 1021.32(c)(15): “*Except in the case of notices of appeal*, if electronic filing or service does not occur or is made untimely because of a technical issue, the party or parties affected may seek appropriate relief from the Board.” (emphasis added) Ms. Woelfling questioned whether the phrase “[e]xcept in the case of notices of appeal” should be stricken since the new rules would allow the electronic filing of notices of appeal. The Committee members agreed that the phrase was appropriate so long as e-filers would receive notice promptly after filing that the system had received their e-filed appeal. Ms. Wesdock confirmed with LT Court Tech that they are working on enhancements that will allow e-filers to receive confirmations immediately after e-filing.² With that information, the Committee was comfortable with the inclusion of the phrase “[e]xcept in the case of notices of appeal” remaining in Rule 1021.32(c)(15).

On the motion of Mr. Clark, seconded by Mr. Bohan, the revisions to the EHB rules pertaining to mandatory electronic filing were approved.

Dispositive Motions and Responses in Support and Opposition:

At a previous meeting Judge Mather had presented an issue that has occurred in third party appeals when a dispositive motion is filed. The Board’s rules provide for 30 days to respond to a dispositive motion. In some cases, the Department has filed a response that contains additional facts in support of the motion. If the Department’s

² The electronic confirmations will be sent after all e-filings.

response is filed on or near the 30th day of the response period, the opposing party does not have an opportunity to respond to the additional facts set forth in the Department's response.

Various solutions were proposed at earlier meetings, and at the July 12, 2012 meeting Mr. Bohan presented a proposed change to the rules on dispositive motions that would provide a different timeframe for filing responses in support of a motion, as follows:

§ 1021.94. Dispositive motions other than summary judgment motions.

(a)

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file a memorandum of law within 15 days of service of the motion (notwithstanding the deadlines for filing dispositive motions in the Board's prehearing orders). 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 dispositive motion accompanies the supporting party's memorandum of law.

(c) A response to a dispositive motion [may] shall be filed within 30 days of service of the motion, or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law, [and] The response to a dispositive motion shall be accompanied by a supporting memorandum of law or brief.

(d) A moving party, or a supporting party that files a memorandum of law alone, may file a reply to a response to a dispositive motion within 15 days of the date of service of the response. The reply may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the presiding administrative law judge.

§ 1021.94a. Summary judgment motions.

(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 within 15 days of service of the motion (notwithstanding the deadlines for filing dispositive motions in the Board's prehearing orders). 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 [the date of] service of the motion, or, if a supporting party files a memorandum of law 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. . . .

Mr. Bohan's draft was discussed at the July 12, 2012 meeting. Some members of the Environmental Hearing Board and the Rules Committee were in favor of Mr. Bohan's proposal, while others raised certain issues. No vote was taken. At that meeting Mr. Gazsi agreed to work on a proposed comment to the rule that would address the issue.

At the September 13, 2012 meeting, Mr. Gazsi presented a new set of proposed revisions and comments to the dispositive motion rules, as follows:

§ 1021.94. Dispositive motions other than summary judgment motions.

....

(c) A notification to the Board that a party joins in a dispositive motion shall be filed within 15 days of service of the motion. Non-moving parties shall not raise any additional legal or factual bases in support of the dispositive motion except as permitted by order of the Board.

Comment to 1021.94: The responses to a dispositive motion should be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for granting a dispositive motion should file a separate motion before the dispositive motion deadline, or seek leave from the Board to file a dispositive motion after the dispositive motion deadline.

§ 1021.94a. Summary judgment motions.

(f) Other parties supporting a motion for summary judgment. A notification to the Board that a party joins in a motion for summary judgment may be filed within 15 days of service of the motion. Non-moving parties shall not raise any additional legal or factual bases in support of the motion for summary judgment except as permitted by order of the Board.

Addition of the following language to the existing Comment to 1021.94a: The responses to a motion for summary judgment should ordinarily be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for summary judgment should file a separate motion before the dispositive motion deadline, or seek leave from the Board to file a motion for summary judgment after the dispositive motion deadline.

Judge Renwand and Ms. Wesdock expressed concern that by amending Rules 1021.94 and 1021.94a in this manner, it might prevent the Department from providing information that might be helpful in deciding the motion before the Board. They related the events of a recent case in which the appellant had filed a motion for summary judgment that was supported by a very limited affidavit. The Department filed a response in support of the motion which contained 95% of the facts in support of the motion, including an extensive affidavit in support of its response. The permittee had requested an extension to file a response to the motion; therefore, when the permittee responded, it was able to respond to both the motion and the Department's response. Ms. Wesdock expressed a concern that the proposed amendments would have prevented the Department's filing in that case, even though the permittee was at no disadvantage because it had an opportunity to respond to the Department's additional facts. Judge Renwand stated that he likes to hear from all of the parties in a case, even if it means that the Department's response is more expansive than the original motion. He was concerned

that the proposed amendments would have a chilling effect on parties who would otherwise like to file a response in support of a motion.

Extensive discussion was held on this topic. Some members of the Rules Committee supported the revisions proposed by Mr. Gazsi, whereas other members preferred the revisions proposed by Mr. Bohan at the July meeting. Similarly, there was no consensus among the EHB Judges: some supported Mr. Gazsi's revisions, whereas others were in favor of an approach similar to that taken by Mr. Bohan. No consensus was reached.

Judge Mather suggested that the Rules Committee proceed with voting on the revisions drafted by Mr. Gazsi and incorporating them into the rules package, but set forth in the Preamble that two approaches were discussed and had equal merit and that the Board was soliciting comments on both approaches.

Ms. Woelfling moved to recommend the proposed revisions drafted by Mr. Gazsi, and to include those revisions in Annex A of the rules package, but include both approaches in the Preamble. The motion was seconded by Mr. Hinerman. The motion also included the addition of the following language to Rule 1021.94 in order to make it consistent with 1021.94a:

(f) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

The Committee voted unanimously in favor of the motion.

Mr. Wein, Mr. Gazsi and Ms. Wesdock will give a presentation on the rules package at the PBA Environmental and Energy Law Section meeting on November 15, 2012 in Harrisburg.

Termination of Appeal:

At a previous meeting Mr. Hinerman had raised the following issue: He felt that the Board's rules on termination of appeals did not adequately address the situation of a third-party appellant who wished to terminate its appeal of a permit issuance due to the expiration of the permit. At previous meetings the Committee had not reached a consensus on how to address this issue. Mr. Hinerman felt that because this situation occurred so rarely, a rule change was not needed to address it.

Complaints and Answers to Complaints:

Mr. Bohan raised an issue that had been presented to him by a Department attorney: The Board's rule on answers to complaints (Rule 1021.74) does not require that an answer to a complaint be verified, whereas the Pa. Rules of Civil Procedure do require verification for answers to complaints. Judge Renwand pointed out that complaints also do not require verification under the Board's rules (Rule 1021.71). It was agreed that if answers to complaints must be verified, then complaints should also be similarly verified.

Mr. Gazsi suggested cross-referencing Pa.R.C.P. 1021 (requiring verification for complaints and answers), rather than quoting the exact language from the rule. In that case, the Board's rule would not need to be revised if there are any changes to Pa.R.C.P. 1024. Judge Mather proposed a rule saying that all pleadings under this particular subsection (Special Actions) require verification.

Mr. Bohan thought there might already be a rule that requires verification since some rules specifically state that certain types of documents need not be verified, such as Rule 1021.92 stating that procedural motions do not require verification. *See* 25 Pa. Code § 1021.92(b). However, an electronic search of the Board's rules by Mr. Hinerman revealed no rule requiring verification for certain types of pleadings.

The Committee agreed that a new rule should be added – Rule 1021.74a – that will state as follows: “Pleadings authorized under Sections 1021.71 – 1021.74 shall be verified in accordance with Pa.R.C.P. 1024.” On the motion of Ms. Woelfling, seconded by Mr. Bohan, the new rule was approved and added to the current rules package.

Next Meeting:

The November meeting is canceled. The next meeting will be January 10, 2013.

Adjournment:

On the motion of Rep. Harper, seconded by Mr. Clark, the meeting adjourned at 11:45 a.m.

2013 Rules Committee Meetings:

The 2013 Rules Committee Meetings are as follows (unless canceled or rescheduled). The start time of the meetings will be 10:15 a.m. unless changed prior to the meeting.

January 10, 2013

March 14, 2013

May 9, 2013

July 11, 2013

September 12, 2013

November 14, 2013