

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of May 11, 2023

Attendance:

The Environmental Hearing Board (Board) Rules Committee met by videoconference on May 11, 2023 at 10:00 a.m. Committee Chairman Howard Wein presided. The following Committee members were in attendance: Vice Chairman Phil Hinerman, Brian Clark, Matt Wolford, Gail Conner, Doug Moorhead, Jean Mosites and Tom Duncan. Attending on behalf of the Board were Chief Judge and Chairperson Steve Beckman; Judges Bernie Labuskes and Sarah Clark; Assistant Counsel Eric Delio, Alisha Hilfinger and Maggie White; and Senior Counsel Maryanne Wesdock, who took the minutes.

Approval of Minutes of March 9, 2023:

There was one correction to the minutes of the meeting of March 9, 2023: On page 8, the reference to 1021.121 was deleted. With that correction, the minutes of the March 9, 2023 meeting were approved on the motion of Ms. Mosites, seconded by Mr. Hinerman.

Proposed Rulemaking 106-14:

Ms. Wesdock reported on comments received from the Office of Attorney General (OAG) regarding the Board's Proposed Rulemaking 106-14. One comment questioned why the Board was revising the definition of "third-party appeal" while at the same time removing this term from Rule 1021.51. The Board's proposed response was that the term "third-party appeal" is frequently used in adjudications and opinions and in practice before the Board. Mr. Wein suggested including citations to a few adjudications and opinions where the term is used. Mr. Clark agreed that it was important to maintain the definition of "third-party appeal" in the rules since it is frequently used in case law. He envisioned the possibility of future rules referencing "third party appeal." In that

case, he felt that it was helpful to maintain the definition in the Board's rules rather than ask the Rules Committee to re-create it in the future.

The Committee reviewed the Board's proposed response to the OAG comments and, with the changes recommended by Mr. Clark and Mr. Wein, the response was approved on the motion of Ms. Mosites and seconded by Mr. Wolford.¹

Amendments to Rules 1021.33, 1021.34 and 1021.35:

Prior to the March 9, 2023 meeting, Mr. Duncan circulated proposed revisions to Rules 1021.33 (service by the Board), 1021.34 (service by a party) and 1021.35 (date of service) to allow service by email. Following discussion at the March 9 meeting, additional changes were suggested which Mr. Duncan circulated prior to the May 11, 2023 meeting.

On the motion of Mr. Clark, seconded by Mr. Wolford, the Committee unanimously approved the following revisions:

§ 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. Persons who consent to service by e-mail shall maintain an active e-mail address and properly update it in accordance with Section 1021.36a (related to e-mail addresses).**

¹ The proposed rulemaking was published in the *Pennsylvania Bulletin* on June 17, 2023. The Board received no comments from the public or the legislative committees. It did receive comments from IRRC which will be reviewed at the September 14, 2023 meeting.

(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. Persons who consent to service by e-mail shall maintain an active e-mail address and properly update it in accordance with Section 1021.36a (related to e-mail addresses).**

(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 **or e-mail** is complete, provided the transmission is complete before 4:30 p.m. Eastern Time on a business day. Otherwise, documents served by facsimile **or e-mail** 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).

Mr. Wolford advised the group that the 3rd Circuit is issuing a rule that would require electronic filings to be made by 3:00 p.m.

Senate Bills 198 and 199:

The Committee discussed Senate Bills 198 and 199 which were introduced before the Senate Environmental and Energy Committee on May 10, 2023.² SB 198 would amend the Environmental Hearing Board Act to change the standard of review from de novo review to review based on the Department’s record of decision in certain permit appeals.³ SB 199 would require the Governor either to renominate a judge or nominate a new judge at the end of a judge’s six-year term. Mr. Duncan reported that earlier versions of the bills were opposed by the Pennsylvania Bar Association’s Environmental and Energy Law Section.

Mr. Clark provided background on SB 198. He stated that it was discretionary on the Department as to when to create a record of decision and that it would most likely be used in complex permitting matters where a substantial number of comments are submitted.⁴ He explained that the purpose of the bill was to narrow the issues on appeal to those raised during the public comment period.

Mr. Wolford inquired as to the impetus of SB 198. He stated his opinion that a determination that the Department’s action is “arbitrary and capricious” is inconsistent with de

² SB 198 and 199 passed the Senate on June 21, 2023 and were referred to the House Environmental Resources and Energy Committee on June 22, 2023.

³ SB 198 was amended on June 20, 2023 to revise the definition of “record of decision.”

⁴ The June 20, 2023 amendment to SB 198 revised the definition of record of decision to include “the document issued by the Department to an applicant which conveys the Department’s approval or denial of a permit application” along with other documents and evidence created or relied upon during the permit review process.

novo review. He questioned how the Department's action can be ruled arbitrary and capricious when the Board's ruling can be based on evidence not available to the Department during its permit review.

Mr. Clark stated that allowing new issues to be raised in an appeal that were not raised during the permit review can be used as a delay tactic, and SB 198 is intended to address that concern. He noted that the Board's standard of review under the Hazardous Sites Cleanup Act (HSCA) is based on the record of decision, so there is some precedent for SB 198. He also noted that the EPA Environmental Appeals Board bases decisions in permitting actions on the administrative record.

Judge Beckman voiced a concern that requiring the Department to create an administrative record could lead to further delay in issuing permits. He also explained that in many permitting appeals, evidence acquired after the permitting decision – such as sampling and test results – has proven to be helpful to parties in presenting their case, including the holder of the permit that is being challenged.

Mr. Hinerman agreed with Judge Beckman. He discussed his experience with the California Water Board which bases its decisions on the administrative record. He stated that facts may change during the course of a proceeding and it is very difficult to make an amendment to the record.

Mr. Wein asked whether the PBA Environmental and Energy Law Section will take a position on the bills. Mr. Duncan stated that it had not been discussed at the prior Section meeting. He felt that it would be helpful for the Section to state its position on the record since the language of SB 198 and 199 has been revised from earlier bills which the Section opposed. Mr. Wein

recommended submitting comments to the Section. Mr. Hinerman agreed to submit comments setting forth his experience with the California Water Board.

Expert Discovery/Expert Reports:

Mr. Moorhead proposed codifying recent Board decisions addressing the deposition of expert witnesses. In particular, he directed the Committee's attention to former Chief Judge Renwand's 2021 opinions in *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, 2021 EHB 37 (*Range I*) and 2021 EHB 182 (*Range II*). Those opinions discuss when an expert witness may be deposed. In the *Range* case, attorneys for the appellant filed two motions to depose Department expert witnesses which were denied by the Board. Mr. Moorhead stated that the question of when Department experts may be deposed comes up frequently and there is uncertainty on this topic among even seasoned practitioners. He felt that the incorporation of Board precedent into a rule would be helpful.

Mr. Moorhead summarized the holdings of the *Range* opinions as follows: Pursuant to Pa. R.C.P. 4003.5, if a Departmental employee is identified as an expert in response to interrogatories, she may not be deposed unless good cause is shown after answers to expert interrogatories have been served or an expert report has been filed. Ms. Mosites asked Mr. Moorhead whether he has had any experience with parties voluntarily agreeing to expert depositions. He stated he has had cases where the parties agree to expert depositions, but where there is no agreement among the parties, a showing of good cause has been required.

Mr. Moorhead directed the Committee's attention to pages 38 and 39 of *Range I*, where the Board, in discussing the application of Pa. R.C.P. 4003.5, quoted from the Department's memorandum of law as follows:

Accordingly, practice before the Board has evolved over the past 50 years, and throughout this history, the Board has established certain

general rules to ensure clarity for all litigants on Board Rules and practices regarding expert witness discovery. . . . As a result of this evolution, any individual who will be called as an expert witness in any hearing on the merits before the Board, including Department employees, are subject to both the requirements and the protections afforded by Pennsylvania Rule of Civil Procedure 4003.5 . . . *Borough of Edinboro v. DEP*, 2003 EHB 725, 771-772. *Solebury*, 2007 EHB at 248; *Primrose Creek Watershed v. DEP*, 2013 EHB 196, 200. . . . Because a Department employee who is properly identified as an expert witness is required to provide expert discovery under Rule 4003.5, that Department employee is also protected from a deposition absent an agreement of the parties or by Board order. *Solebury*, 2007 EHB at 248; *Primrose Creek*, 2013 EHB at 200; *Groce v. DEP*, 2005 EHB 951, 955.

2021 EHB at 38-39 (quoting Department's Memorandum of Law, p. 3-4).

Mr. Clark agreed with Mr. Moorhead's recommendation to incorporate the standard into the Board's rules of practice and procedure. Mr. Wolford also agreed; he felt that a practitioner should not have to read Board caselaw to know what the procedure is for deposing an expert witness.

Mr. Wolford raised the question of whether a Department witness who is both a fact witness and an expert witness can be deposed on the facts. Mr. Moorhead stated that this was an issue in *Range*. In that case, the appellant sought to depose three Department expert witnesses. The Department declined to produce the three experts absent an agreement by the appellant to restrict its examination to "factual knowledge that does not otherwise form the basis of [their] respective opinions." *Range I*, 2021 EHB at 38. The appellant refused to limit its questioning in accordance with the Department's request and filed a motion with the Board seeking leave to depose the experts. This led to the opinion discussed above.

Mr. Wein summarized the issue of Department witnesses testifying as expert witnesses as follows: In most situations an expert testifies based on facts that someone else has provided;

however, in the case of Department expert witnesses, the person who has created the facts is also the person providing an opinion on them.

Judge Labuskes noted that the same principle was applied in *DEP v. Angino*, 2006 EHB 278, except that *Angino* involved an expert witness identified by the defendant, rather than a Department expert witness. The opinion in *Angino* quoted extensively from *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (June 23, 2004), and made it clear that once a witness has been designated as an expert, the rules governing expert witnesses apply. However, there is the potential for abuse: If a party designates a witness as an expert it shields that person from being deposed. In the case of a Department permit reviewer who has been designated as an expert, that person could have extensive factual information but would not be subject to deposition. Mr. Hinerman stated that this issue occurs frequently. He felt that if an expert has factual information he should be subject to being deposed.

Mr. Moorhead suggested two ways to address the potential for abuse:

- 1) An expert witness should be required to provide an expert report that includes facts, not simply expert opinion.
- 2) If something is not covered in the report, the opposing party can move to depose the expert.

Judge Labuskes felt that it would be difficult to articulate these principles in a rule. He noted that in a recent hearing a witness had been identified as an expert but 90% of his testimony had been factual.

Mr. Hinerman felt that the rule should allow the deposition of an expert to obtain factual information. He stated that he has deposed experts regarding factual information and has encountered no objection. Ms. Mosites agreed. Mr. Hinerman expressed the opinion that if a

witness cannot be deposed on facts, it raises a constitutional issue. Ms. Conner agreed with Mr. Hinerman and felt that it was a matter of due process. Judge Labuskes noted that parties are afforded due process by means of a hearing before the Board and this principle has been articulated extensively in case law. Mr. Duncan pointed out that in a criminal matter the defense has the right to exculpatory evidence, but there is no similar right in the civil context. Mr. Hinerman felt that the ability to depose Department witnesses was comparable to the right to confront one's accuser.

Mr. Duncan summarized the issue as follows: If a person designated as an expert witness is the only person who has personal knowledge of facts related to a particular matter, under the current standard followed by the Board there is no way to depose that person on the facts prior to the hearing. Ms. Mosites stated that in her experience the Department has agreed to the deposition of an employee designated as an expert witness when that witness possesses factual knowledge. Mr. Hinerman felt that a conflict arises when the witness who is asked to give an expert opinion on whether there has been a legal violation is the same person who has created the facts on which the action is based.

Mr. Moorhead offered to circulate the *Range* opinions and his proposed amendment to Rule 1021.102 prior to the next meeting. Judge Beckman stated that he was not sure if there was consensus among the current judges as to how to handle this issue. He did not want the Rules Committee to expend time coming up with a proposed rule until the Board has had an opportunity to further think about the issue. He offered to discuss the matter with the Board judges and attorneys.

Mr. Clark acknowledged that if there is a difference of opinion among the judges, the Committee would not be able to develop a rule. However, he felt that it would be helpful to develop a framework for parties to follow when they wish to depose an expert witness on facts.

He acknowledged it might be difficult to do so since facts and expert opinion often become intertwined especially with regard to the testimony of Department employees. Judge Labuskes agreed it would be difficult to develop a rule; he felt that a rule would need to say that experts may be deposed “at the judge’s discretion.”

Mr. Hinerman suggested looking at cases where a doctor has been sued and testifies both as to the facts and as an expert. Ms. Conner stated that she would like to be part of any discussion regarding the topic of expert depositions. Mr. Moorhead stated that he would share the relevant caselaw and his proposed amendment to Rule 1021.102 prior to the next meeting.

Remote Hearings:

At the March 9, 2023 meeting, the Rules Committee unanimously approved the following amendment to Rule 1021.114 (Venue) to include language authorizing the Board to hold hearings remotely at the judges’ discretion.

§ 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.**

At the Environmental Law Forum the Board discussed the proposed rule and asked for comments. Feedback from the audience was positive.

However, Judge Labuskes reported that he had a hearing recently in which he held one day of testimony remotely and there were numerous technical issues. The remote testimony was supposed to take place on WebEx but most people were unable to connect to it. The hearing switched over to Teams but there were additional technical issues (e.g., people kept dropping off). Ms. Wesdock stated that WebEx had not been used in a while and there were various technical

issues that needed to be tested. She recommended that Board Secretary Christine Walker conduct testing and run practice sessions before any future use of WebEx for remote testimony.

Judge Beckman agreed with Judge Labuskes that remote hearings present technical challenges, but he agreed to the proposed amendment to the rule as long as the option to conduct a hearing remotely remained within the judges' discretion. Judge Labuskes and Judge Clark had no objection to the proposed amendment.

Commemoration of Former Chief Judge Renwand's Service:

A subcommittee was formed to recommend a gift to commemorate the service of Former Chief Judge and Chairman Tom Renwand who retired February 3, 2023. The subcommittee consists of Mr. Clark, Mr. Wein, Mr. Hinerman, Mr. Wolford and Ms. Wesdock.

Next Meeting:

The July 13 meeting is canceled. The next meeting of the Rules Committee is Thursday, September 14, 2023 at 10:00 a.m.

Adjournment:

On the motion of Ms. Mosites, seconded by Mr. Clark, the meeting was adjourned.