ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

MINUTES OF MEETING OF SEPTEMBER 19, 2019

Attendance:

The Environmental Hearing Board Rules Committee met on September 19, 2019 at 10:30 a.m. Committee Chairman Howard Wein presided. Committee members attending the meeting were as follows: Jim Bohan, Gail Conner, Phil Hinerman and Matt Wolford. Attending on behalf of the Board were the following: EHB Chairman and Chief Judge Tom Renwand; Judge Steve Beckman; Assistant Counsel Eric Delio, Alisha Hilfinger and Chris Minott; Board Secretary Christine Walker; and Senior Assistant Counsel Maryanne Wesdock who took the minutes.

Minutes:

On the motion of Mr. Bohan, seconded by Mr. Wolford, the minutes of the March 14, 2019 meeting were unanimously approved.

Introductions:

The Board introduced its two new Assistant Counsel: Alisha Hilfinger, Assistant Counsel to Judge Beckman, who is working in the Board's Erie office; and Chris Minott, Assistant Counsel to Judge Mather and Judge Coleman, working in the Board's Harrisburg office. The Rules Committee extended a warm welcome to Alisha and Chris.

Board Rule 1021.141 – Termination of Proceedings:

Mr. Wolford provided a recap of the Committee's discussion on this topic at the March 14, 2019 meeting. At the March 14 meeting, he raised a concern that when parties enter into a settlement agreement under Rule 1021.141(b), there is no mechanism for ensuring that the Findings of the original Department action are superseded by the Findings agreed to in the

settlement agreement of the parties. (For a review of the complete discussion, please see the minutes of the March 14, 2019 meeting.) At the March 14 meeting, Mr. Wein requested that Mr. Wolford prepare a comment to Rule 1021.141 to address this issue.

While preparing to draft language for a comment, Mr. Wolford determined that it would be more effective to address the issue in the rule itself. He proposed the following revision to Rule 1021.141(b) (in bold):

> **§ 1021.141. Termination of proceedings.**
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> (b) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of the settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. **Findings contained in a settlement agreement shall replace and supersede Findings set forth by the Department in the action that is the subject of the appeal.** If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following…

Mr. Bohan asked for clarification of what was meant by "replace and supersede." Mr. Wolford responded that he has used this language in settlement agreements with the Department but would not object to simply using the word "supersede." Mr. Bohan agreed with omitting the word "replace," but asked for what purpose the Findings of the settlement agreement would supersede those of the original action. For instance, are the original Findings superseded for purposes of reviewing compliance history and imposing a permit bar? Mr. Wein felt that those matters could be addressed in the settlement agreement if the parties wish to do so.

Mr. Bohan suggested further revising Mr. Wolford's proposed language as follows (in bold italics):

> (b) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of the settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. ***If the settlement agreement so provides,*** **findings contained in a settlement agreement shall replace and supersede Findings set forth by the Department in the action that is the subject of the appeal*, but only to the extent and for the purposes set forth in the settlement agreement.*** If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following…

He expressed the opinion that this language gives parties a choice as to what Findings are altered by the settlement agreement and for what purposes (e.g., compliance history, permit bars, violation dockets, etc.).

Mr. Wolford disagreed with the changes proposed by Mr. Bohan. He stated that one purpose of his proposal was to cover situations where the parties have not negotiated the effect of Findings agreed to in a settlement agreement on the Department's original Findings contained in the challenged action. He reiterated his original concern that if Findings contained in the underlying Department action are incorrect or inconsistent with Findings in a negotiated settlement agreement but are not superseded by the Findings in the settlement agreement, they may continue to have lasting effect and cannot be challenged under the rule of administrative finality. He also

noted that the Board in subsequent proceedings could be faced with the problem of two sets of inconsistent or contradictory Findings.

Mr. Bohan expressed his concern that Mr. Wolford's proposed language did not appear to allow the parties to limit which Findings in a settlement agreement supersede those in the action under appeal or for what purposes.

Mr. Hinerman stated that he did not understand the Department's concern since the Department would not lose its ability to require that certain Findings be made part of the settlement agreement. Mr. Wein further added that it was his opinion that the Department lawyer negotiating the settlement agreement would be more likely to require that certain Findings be included in the agreement. In his opinion, the Department attorney is likely to be more knowledgeable about the process since the Department is a party in every case before the Board, whereas many private practitioners may be much less familiar with the process. Mr. Wolford added that the Findings in the Department's original action are unilaterally drafted to support the action in question, whether it is a compliance order or a civil penalty assessment and, thus, are intended to serve only the Department's purpose. For that reason, Mr. Wolford felt that the Findings of the original action should be superseded if the parties agree to Findings as part of a settlement. In his opinion, after the parties settle there should be only one set of Findings related to the matter. Mr. Wein polled the Committee, and Mr. Hinerman and Ms. Conner expressed support for Mr. Wolford's language.

Mr. Delio raised the following questions: Will the new Findings of the settlement agreement be confined to Environmental Hearing Board matters? Does the Board have the authority, by province of its rules, to limit the use of findings in other proceedings or before other tribunals? Mr. Wolford felt that this matter was best addressed by the parties if raised in other proceedings or before other tribunals.

Mr. Wolford moved for the following language to be added to subsection (b) of Board Rule 1021.141: "Findings contained in a settlement agreement shall supersede Findings set forth by the Department in the action that is the subject of the appeal." The motion was seconded by Mr. Hinerman. Ms. Conner voted in favor of the motion. Mr. Bohan opposed.

Update on Rules Package 106-13:

Ms. Wesdock and Mr. Minott will be working on preparing the next rules package. The first step is to schedule a public meeting where the judges vote on the rules recommended for adoption by the Rules Committee. Mr. Wein suggested that Ms. Wesdock advise the Rules Committee members of the date and time of the judges' meeting so that they may participate in the meeting.

Revision to Board Rule 1021.32(c)(11) – Filing:

Board Rule 1021.32(c)(11) states that documents may be electronically filed in various formats, including WordPerfect. Mr. Delio reported that WordPerfect will no longer be supported by the Board's website provider. Therefore, on the motion of Mr. Hinerman, seconded by Mr. Bohan, the Committee approved the following revision to Rule 1021.32(c)(11): "Documents may be electronically filed in ~~WordPerfect format,~~ Microsoft Word format, PDF format or other formats as the Board may provide. . . ."

Comparison of Board Rules 1021.13 (Computation of Time) and 1021.35 (Date of Service):

Mr. Delio posed the question of whether there was a conflict between the time computation language of Rule 1021.13 (Computation of Time) and Rule 1021.35 (Date of Service). Rule 1021.35(b)(3) states, "Documents served by mail shall be deemed served 3 days after the date of actual service." Rule 1021.13 states in relevant part as follows: "Time shall be computed to include the last day unless it falls on a Saturday, Sunday or legal holiday in which event the day will be

omitted from the computation and the period shall run until the end of the next business day." He raised the question of whether Rule 1021.13 necessitates the following addition to Rule 1021.35(b)(3): "Documents served by mail shall be deemed served 3 **calendar** days after the date of actual service."

Mr. Hinerman stated that he agreed with Mr. Delio's proposal. Mr. Wein raised the question of whether the language should state "3 **business** days." Judge Renwand felt that the issue would rarely come up since electronic filing is mandatory for most documents. Mr. Bohan felt that including "3 **calendar** days" clears up any ambiguity and fulfills the original purpose of the rule.

On the motion of Mr. Bohan, seconded by Mr. Hinerman, the following revision to Rule 1021.35(b)(3) was approved: "Documents served by mail shall be deemed served 3 **calendar** days after the date of actual service."

Next Rules Committee Meeting:

The next Rules Committee meeting would normally be held on November 14, 2019. However, Judge Renwand noted that PBA Section Day is also on November 14. Therefore, he proposed canceling the November meeting. All were in favor. The next meeting of the Rules Committee will be held on January 9, 2020.

Ms. Wesdock will circulate a list of the 2020 meeting dates.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Hinerman, the meeting was adjourned at 11:26 a.m.