ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Minutes of Meeting of September 10, 2015

Attendance:

The Environmental Hearing Board Rules Committee met on September 10, 2015 at 10:30 a.m. Committee Chairman Howard Wein presided by teleconference from the Board's Office in Pittsburgh. The following Rules Committee members attended in Harrisburg: Vice Chair Maxine Woelfling, Jim Bohan, Gail Conner, Phil Hinerman, and Lisa Long. Matt Wolford participated by phone from Erie. Attending on behalf of the Board were the following: In Harrisburg – Judge Rick Mather and John Dixon; by teleconference from Pittsburgh: Chief Judge Tom Renwand and Maryanne Wesdock; and by teleconference from Erie: Judge Beckman, Eric Delio and Christine Walker. Mr. Dixon and Ms. Wesdock took the minutes.

Minutes of Meeting of May 14, 2015:

On the motion of Ms. Woelfling, seconded by Mr. Bohan, the minutes of the meeting of May 14, 2015 were approved with the following two corrections:

1) The "Attendance" section was amended to state that Ms. Wesdock presided over the meeting until Mr. Wein joined by teleconference.

2) On page 8, line 3, the word “duplicity” was corrected to “duplicability.”

Comment to Rule 1021.32 (Filing):

At the May 14, 2015 meeting it was recommended that Ms. Wesdock draft a comment to Rule 1021.32 (Filing) providing notice to attorneys and *pro se* appellants that if they register for electronic filing during non-business hours they will not be able to efile until their registration has been confirmed on the next business day. Ms. Wesdock circulated the following language:

> Attorneys and *pro se* appellants who register for electronic filing may not file electronically until they receive a confirmation email advising them that they have been approved for electronic filing. If registration occurs during non-business hours, the confirmation will not occur until the next business day. Until such confirmation occurs, a registrant must file by means other than electronic filing.

Ms. Conner moved to approve the language, seconded by Ms. Long. However, Mr. Wolford felt that the comment should contain stronger language advising people that if they have a deadline to meet, such as with a notice of appeal, they should consider an alternate means of filing. Judge Mather noted that the Legislative Reference Bureau could make changes to the language.

Ms. Woelfling suggested revising the last sentence as follows:

> Attorneys and *pro se* appellants who register for electronic filing may not file electronically until they

> receive a confirmation email advising them that they have been approved for electronic filing. If registration occurs during non-business hours, the confirmation will not occur until the next business day. Until such confirmation occurs, a registrant must file by means other than electronic filing **to ensure timely filing**.

With that change, the motion passed unanimously.

Table of Contents:

At the May 14, 2015 meeting, Ms. Wesdock recommended requiring a table of contents for lengthy post hearing briefs. It was also recommended that the same requirement apply to lengthy briefs in support of summary judgment motions. Ms. Wesdock drafted revisions to Rules 1021.131 (Post hearing briefs) and 1021.94a (Summary judgment motions) requiring a table of contents for briefs in excess of 25 pages.

It was pointed out that subsection (h) of Rule 1021.94a (Summary judgment) requires leave of court for briefs in excess of 30 pages. A discussion ensued as to whether a table of contents should be required for briefs in excess of 30 pages, rather than 25 pages, so that there is no confusion in the rules over which page limit applies in each circumstance. A discussion also ensued as to whether a table of contents was necessary for briefs in support of summary judgment motions. Judge Mather and Judge Beckman felt that it would be very worthwhile to have a table of contents for post hearing briefs; they did not feel as strongly for summary

judgment briefs. Judge Renwand felt that a table of contents would be helpful for both types of briefs. Judge Mather recommended keeping the rule simple by requiring both leave of the Board and a table of contents for summary judgment briefs exceeding 30 pages. Judge Beckman agreed. It was recommended that subsection (h) be revised to add the requirement of a table of contents.

Ms. Woelfling noted that most post hearing briefs exceed 25 pages. Therefore, she recommended that all post hearing briefs contain a table of contents, not merely those in excess of a certain page limit. Ms. Wesdock suggested adding the requirement of table of contents to subsection (a) of Rule 1021.131. On the motion of Ms. Woelfling, seconded by Mr. Bohan, this recommendation was approved.

The Committee then continued its discussion of whether a table of contents should be required for briefs in support of a motion for summary judgment that exceed a certain page limit and whether that limit should be 25 pages or 30 pages. Ms. Woelfling asked whether the focus was on keeping summary judgment briefs within a certain length or on the necessity for a table of contents. Mr. Wolford recommended setting a 30 page limit for the requirement of both a table of contents and leave of the Board. The Committee agreed that this requirement should be added to subsection (h) as follows:

> (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. **If the Board grants leave to file a brief in excess of 30 pages, the brief shall contain a table of contents.**

On the motion of Mr. Wolford, seconded by Ms. Woelfling, the revision was approved.

Status of Rules Package 106-12:

Mr. Dixon reported on the status of the pending rules package. He is completing the Regulatory Analysis Form and then expects to send the rules package to the Office of General Counsel (OGC) for review. Mr. Wein asked Mr. Bohan to check into whether OGC's procedures or estimated review time have changed under the new administration.[1]

Requiring *Pro Se* Appellants to Sign Notice of Appeal:

Mr. Delio reported that there is no provision in the Board's rules that requires an appellant to sign the notice of appeal form. Subsection (c) of Rule 1021.51, which deals with the commencement and content of an appeal, states as follows:

[1] Following the meeting, Mr. Bohan reported that the procedures and estimated review time have remained the same.

> (c) The notice of appeal must set forth the name, mailing address, e-mail address and telephone number of the appellant. If the appellant is represented by an attorney, the notice of appeal shall be signed by at least one attorney of record in the attorney's individual name.

Mr. Wolford reported on a *pro se* case in which he represented a permittee. The *pro se* appellant did not sign the Notice of Appeal and he moved to dismiss the appeal. The motion was denied.

Mr. Hinerman suggested revising the last sentence of subsection (c) to state as follows: "[If the appellant is represented by an attorney,] [t]The notice of appeal shall be signed by at least one attorney of record in the attorney's individual name **or by the appellant**."

Mr. Delio noted that some notices of appeal are filed by multiple *pro se* appellants but only contain the signature of one of the appellants. He suggested that each appellant should be required to sign. Ms. Conner pointed out that if there are multiple lawyers on a case, only one of them has to sign, and she felt the same requirement should apply to appellants. She felt that it might be burdensome to obtain the signature of all appellants on the notice of appeal, especially if they are facing an imminent filing deadline. Judge Mather stated that he encountered a similar situation in one of his cases where only one appellant signed a notice of appeal, even though there were multiple appellants on the case. He issued a

Failure to Perfect Order and gave the other appellants 30 days to sign. He noted that failure to sign would not be jurisdictional and would not prevent the appeal from being docketed.

Mr. Hinerman renewed his suggestion that the language be revised to read as follows: "[If the appellant is represented by an attorney,] [t]The notice of appeal shall be signed by at least one attorney of record in the attorney's individual name **or by the appellant**." Mr. Wolford took issue with the language "attorney of record" since an attorney would not be "of record" when filing the notice of appeal.

Ms. Conner renewed her objection to requiring all appellants to sign the notice of appeal. Judge Mather felt that it was not burdensome since failure to sign did not prevent the Board from accepting the appeal; the Board would simply follow up with a Failure to Perfect Order and provide the appellants with an opportunity to sign if they had not done so initially. He also pointed out that by requiring all appellants to sign the notice of appeal, it prevents one appellant from representing all of the appellants.

Judge Beckman agreed with Judge Mather and said he has had a similar experience. In one of his cases, an appeal listed several appellants. However, when the Board followed up with them, at least some of the named appellants had not

agreed to be part of the process. He felt that by requiring the signature of all appellants it ensures that everyone has agreed to be part of the appeal.

Mr. Hinerman moved to adopt the following revisions to the last sentence of 1021.51(c): "[If the appellant is represented by an attorney,] [t]The notice of appeal shall be signed by at least one attorney [of record] in the attorney's individual name **or by the appellant(s)**." Ms. Long seconded the motion. The vote was 6 to 1 to adopt the revision, with Ms. Conner voting against the revision.

Timing of When to Begin Electronic Discovery:

Mr. Bohan raised an issue pertaining to electronic discovery. He stated that some attorneys have served electronic discovery before the electronic discovery plan has been submitted and before the parties have met to discuss electronic discovery as required by Pre-Hearing Order No. 1. He recommended revising Pre-Hearing Order No. 1 to clarify that electronic discovery should not begin until the parties have met and agreed on how to proceed and a proposed order has been adopted by the Board.

A copy of the Board's current Pre-Hearing Order No. 1 was circulated among the group for review. Mr. Bohan suggested adding language to the order stating that the parties should not engage in electronic discovery until after the Board has issued an order approving the parties' electronic discovery plan.

Judge Mather suggested that instead of prohibiting the parties from sending out electronic discovery prior to the parties submitting an electronic discovery plan, the Board could provide additional time for responding to the electronic discovery until after the plan has been submitted by the parties and approved by the Board. Mr. Bohan felt that extending the deadline did not resolve the problem since the same discovery request could apply to both electronic discovery and non-electronic discovery. Mr. Hinerman suggested responding to an early electronic discovery request by stating "a response will be provided according to the Board's order."

Judge Renwand and Judge Beckman were not in favor of granting additional time for responding to discovery. They felt that being served with electronic discovery early in the process would motivate the parties to meet sooner to discuss electronic discovery. Judge Mather noted that parties never ask for an extension of time to respond to discovery within the discovery period; parties generally work this out themselves.

Mr. Bohan felt that having the opportunity for the parties to meet and agree to a discovery plan before having to respond to electronic discovery allows the parties to address many of the issues associated with electronic discovery, such as search terms and the breadth of what must be preserved. He described a case that he was involved in where the appellant's attorneys served electronic discovery

before the parties had an opportunity to meet and agree to an electronic discovery plan. The result was that it turned into a very complicated and time-consuming process, much of which could have been avoided if the parties had simply met first.

Judge Beckman stated that 90% of his cases do not submit electronic discovery plans. Judge Renwand agreed. Mr. Bohan stated that is because the Board's Pre-Hearing Order requires the filing of an electronic discovery plan only if a party is likely to request discovery of electronically stored information. In the vast majority of cases before the Board, the parties do not request the discovery of electronically stored information. However, in those cases where electronic discovery is going to take place, it is much more efficient for the parties to meet first and agree to a plan before serving electronic discovery, rather than serving electronic discovery first and conferring about it later.

Mr. Hinerman noted that he and Dennis Strain drafted the Board's electronic discovery procedure at a time when the Pennsylvania Rules of Civil Procedure (Pa. R.C.P.) did not address electronic discovery. The Pa. R.C.P. now clarify that the discovery rules apply to electronic discovery and include a comment on proportionality, and in light of this, Mr. Hinerman felt that the Board's procedure should be revisited. Judge Mather volunteered Mr. Dixon to research the issue. Mr. Wein suggested talking with Charlie Gibbons at his firm since he is very familiar

with the adoption of the rule revisions. Mr. Wein will ask Mr. Gibbons to contact Mr. Dixon and Ms. Wesdock. This topic will be included on the agenda for the next Rules Committee meeting.

Adjournment and Next Meeting:

On the motion of Ms. Conner, seconded by Ms. Woelfling, the meeting was adjourned.

The next meeting is scheduled for November 12, 2015 at 10:30 a.m.