

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MARCH 12, 2020

Attendance:

The Environmental Hearing Board Rules Committee met by teleconference on Thursday, March 12, 2020 at 10:30 a.m. Chairman Howard Wein presided. The following committee members participated in the meeting: Vice Chair Phil Hinerman, Brian Clark, Gail Conner, Tom Duncan, Jean Mosites, Diana Stares and Matt Wolford. Attending on behalf of the Board were Chairman and Chief Judge Tom Renwand, Judge Bernie Labuskes and Judge Rick Mather; Assistant Counsel Eric Delio and Chris Minott; Board Secretary Christine Walker; and Senior Assistant Counsel, Maryanne Wesdock, who took the minutes.

New Committee Members:

On behalf of the Environmental Hearing Board and the Rules Committee, Judge Renwand and Mr. Wein extended a warm welcome to the Committee's newest members: Diana Stares, appointed by the DEP Secretary to replace Jim Bohan, effective February 1, 2020; Jean Mosites, appointed by the Pennsylvania Speaker of the House, effective February 28, 2020; and Tom Duncan, appointed by the Governor's Office, effective March 3, 2020. Ms. Stares, Ms. Mosites and Mr. Duncan bring a wealth of knowledge and experience to the Rules Committee, and Judge Renwand and Mr. Wein thanked them for their willingness to serve in this capacity.

Rules Committee Information on EHB Website:

Mr. Wein requested that the new Committee members provide their bios to Ms. Wesdock for posting on the Environmental Hearing Board's website. He also advised them that the minutes of all Rules Committee meetings are posted on the Board's website after they have been approved.

Publishing Agenda of Rules Committee Meetings:

Ms. Wesdock reported that PBA Environmental and Energy Law Section Chair, Bill Cluck, inquired as to whether the agenda of Rules Committee meetings could be posted on the Section's listserv. He also suggested posting the agenda on the Board's website. The difficulty of posting the agenda on the website is that the Board's website provider often requires a lead time of at least two weeks, and the agenda is generally not prepared until one week or less before the meeting. With regard to posting the agenda on the listserv, a concern was expressed that there needs to be a mechanism for the Board and the Committee to monitor who and how many people are participating on the call-in number.

Ms. Mosites suggested providing a schedule of the Rules Committee meetings in the Section's newsletter and referring people to the minutes of prior meetings posted on the Board's website. The minutes provide a summary of the topics being discussed by the Committee. If a Section member wants a more detailed agenda, they can contact Ms. Wesdock. The Committee members were in agreement with Ms. Mosites' suggestion.

Ms. Stares recommended that public participation in the meetings should be in-person, rather than by phone, in order to ensure the integrity of the meeting. Attendance can be at any of the Board's staffed offices (Harrisburg, Pittsburgh, Erie). The Committee members were in agreement with Ms. Stares' suggestion.

Minutes of January 16, 2020 Meeting:

On the motion of Mr. Clark, seconded by Mr. Wolford, the Committee approved the minutes of the January 16, 2020 meeting.

Proposed Rulemaking:

Ms. Wesdock provided an update on the status of the Board’s proposed rulemaking. The rules package was submitted to the Governor’s Office of Policy and Planning (Policy Office), the Governor’s Budget Office and the Office of General Counsel (OGC) on February 25, 2020. The Policy Office approved the package on March 4, 2020. The package is currently being reviewed by OGC. If the package is approved by OGC, the next step is submission to the Office of the Attorney General which has 30 days to review. If approved, the next step is submission of the package to the Independent Regulatory Review Commissions, the House and Senate environmental committees and the Legislative Reference Bureau for publication in the Pennsylvania Bulletin and 30-day public comment period.

Termination of Proceedings – EHB Rule 1021.141(b):

The following revision to Rule 1021.141(b) was recommended by the Rules Committee at its September 19, 2019 meeting:

§ 1021.141. Termination of proceedings.

* * * * *

(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...

At a meeting held on December 4, 2019, the judges voted (by a vote of 4-1) against adopting the proposed revision to Rule 1021.141(b). Several of the judges expressed concern that the proposed language was substantive, rather than procedural. They remanded the issue to the Rules Committee for further discussion.

Mr. Wolford summarized his reasons for recommending the proposed language to rule 1021.141(b): When the Department issues an order or assessment, it contains findings, some of which are set forth in support of the order or assessment. If the order or assessment is appealed and the parties settle the matter by means of entering into a Consent Order and Agreement, they generally negotiate new findings in place of the ones set forth in the Department's action. However, if the Consent Order and Agreement fails to state that the findings therein replace the findings set forth in the Department's action, the result is two sets of findings that may be inconsistent and in conflict. If the Department uses the original set of findings in a future enforcement or civil penalty action, the appellant has no means of challenging them because they have become administratively final. Mr. Wolford's recommendation was to place language in Rule 1021.141(b) specifically stating that the findings set forth in the Department's original action are replaced and superseded by the findings set forth in the Consent Order and Agreement.

Ms. Stares stated that she raised the issue with Department staff but did not have a formal position at this time. She asked Mr. Wolford whether he was aware of the Department ever using the findings of its original action in the manner he described. He responded that he was familiar with at least one instance where it had occurred, and he provided some of the details.

Ms. Stares expressed her belief that the proposed revision to Rule 1021.141(b) was substantive, and not procedural, and that the Rules Committee was not the proper mechanism for addressing the issue. Mr. Wolford suggested that the model Consent Order and Agreement form

used by the Department be revised to contain language stating that the findings in the agreement supersede and replace those in the original Departmental action. Mr. Wein agreed. Ms. Stares agreed to discuss this suggestion with her colleagues at the Department.

Attorney Fees and Costs – Rules 1021.181 - 1021.184:

At the January 16, 2020 meeting, Judge Labuskes asked the Rules Committee to provide feedback on whether the Board's rules on attorney fees and costs should be amended to provide a more detailed procedure. He explained that in nearly every instance where the Board receives a fee application, the procedure followed by the parties varies. One reason for the inconsistency is that the rules do not contain much instruction. At the January meeting, Mr. Clark had raised the possibility that the rules may have been intentionally drafted in that manner in order to provide the Board with more flexibility. Ms. Wesdock agreed to review the minutes of meetings from that time period and report back to the Committee.

Judge Labuskes summarized the different procedures the Board often sees when it receives a fee application. In some cases a brief is filed with both the fee application and the response, while in other cases a brief is only filed with the response. In some cases discovery is conducted on the fee application. Finally, there is confusion as to whether the party or the attorney should sign the affidavit accompanying the fee petition. He also noted that the procedure often differs depending on whether the Board has issued a final decision in the matter. Where an adjudication has been issued, parties generally do not want to hold a hearing on the fee application. However, where there has been no adjudication, and the Board is asked to determine whether fees are appropriate under the catalyst theory, the parties may request a hearing.

Ms. Stares reported on her research regarding federal fee petitions and federal and state rules dealing with fee petitions. An intern in her office is developing a matrix which she expects

to be available for the May meeting. Based on the research completed thus far, her observations are as follows: 1) The Board's rules on attorney fee applications are far more specific than those of other tribunals, and she surmised that the lack of detail in other tribunals was to allow for more flexibility, and 2) Fee agreements are quite common in other tribunals but do not appear to be helpful in Board proceedings.

Ms. Stares explained what she sees as defects in many of the attorney fee applications filed with the Board: 1) They do not provide sufficient explanation as to why the party feels it is entitled to attorney fees and costs (e.g., on what claims does the party believe it was successful?), and 2) They do not provide sufficient information on the attorney's or consultant's hourly rate or number of hours or detailed explanation of the work conducted. She felt it would be helpful to revise the Board's rules to address those two issues. She also felt that Rule 1021.182(d), which states that "the Board may deny an application *sua sponte* if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested" was not being enforced. She felt that an inadequate fee application should be denied without prejudice. Ms. Stares stated that it is not the Department's policy to challenge every fee petition. If the Department believes that a fee petition has merit, the Department will generally not challenge it. However, in order for the Department to make that determination, the fee petition must contain sufficient information.

Ms. Stares stated that even though she previously advocated for requiring a brief with the fee application, she now believes that it is more important for the fee application itself to contain more complete information. Ms. Mosites raised the question of whether some of the concerns could be addressed in a comment to the rules, rather than requiring a rule change. Judge Labuskes agreed that some of the concerns would be better addressed in a comment. However, he also felt

that some changes to the rules may be required. For instance, he noted that Rules 1021.182 and 1021.183 refer to a “verified application” and “affidavit,” but they do not state who must verify the application or sign the affidavit. Ms. Stares noted that the same terms are used with regard to fee applications in other tribunals but are not explained.

Mr. Hinerman expressed his opinion that a verification and affidavit should be signed by the client, based on Pa.R.C.P. 1024(c) which states that a verification shall be made by one or more of the parties, with certain exceptions. He stated that because it is the client who pays the bill, he or she should have actual knowledge of the details surrounding the bill. Judge Labuskes stated that the problem with relying on Pa.R.C.P. 1024 is that the Board’s case law states that the Pennsylvania Rules of Civil Procedure do not apply to the Board, except when it comes to discovery. Additionally, Mr. Wolford noted that Pa.R.C.P. 1024 applies to pleadings, and the Board has stated that most of the documents filed in a Board proceeding do not constitute pleadings. Judge Renwand stated that Pa.R.C.P.1024 was adopted because it was common for an attorney to sign on behalf of his or her client. He felt that Mr. Hinerman raised a good point that because the client pays the bill he or she should be able to verify its accuracy, but he noted that some bills submitted with a fee application are very cursory and provide little detail. Mr. Hinerman agreed, noting that he has served as a witness in cases involving a dispute over attorney fees.

Mr. Wein suggested that there should be a mandatory conference with the judge immediately after the filing of a fee petition. Judge Labuskes agreed with this recommendation and felt that a brief should not be submitted with the fee application; rather, the judge, after consultation with the parties, should establish a briefing schedule. In other words, the process should be more streamlined as follows: 1) Filing of fee application; 2) Conference with parties and judge; 3) Establishment of a briefing schedule, as needed.

Mr. Delio related the process that occurred in the Board's recent *Friends of Lackawanna* case which involved competing fee applications. In connection with the filing of the fee applications, parties also filed briefs, replies and sur-replies. The original fee application did not include a brief, but the Department's response included an extensive brief. The submission of briefs and replies went on for several months.

The discussion returned to Ms. Mosites' suggestion about adding a comment to the rules. She stated that she found the comments in the federal rules very helpful. She felt that, while some of the issues raised by the Committee might require a rule change, others could be more easily addressed in a comment. Ms. Wesdock agreed, but noted that the Independent Regulatory Review Commission (IRRC), which is one of the agencies that must review and approve any regulatory rule changes, sometimes pushes back on matters that are addressed in comments rather than rules. Where the language is informational, IRRC generally allows it to be set forth in a comment. However, if IRRC finds the language to be directive, it will often require it to be set forth in the rule itself. Ms. Mosites also noted that Rule 1021.182(b) does not address "partial success." She felt that this was a matter that should be addressed either in the rule itself or in a comment.

Ms. Stares volunteered to prepare a draft of the proposed rule changes and/or comments. The revisions will include a change to the language in Rule 1021.84(a) which currently states that "parties may file a brief in accordance with a schedule established by the Board." The procedure to be incorporated into the rules may be summarized as follows: 1) Application for fees is filed; 2) A response is filed; 3) A conference with the judge is scheduled; and 4) No briefs shall be filed unless ordered by the judge.

The discussion returned to the topic of whether the affidavit and/or verification should be signed by the client or by the attorney and the consultant. Mr. Wein felt that the attorney and

consultant are in a better position to verify the accuracy of their bills. He also felt that the onus should be on the attorney and the consultant to articulate the work covered by the bill.

Environmental Law Forum:

The PBI Environmental Law Forum, which had been scheduled for April 1-2, 2020, has been postponed due to the implementation of efforts to contain the coronavirus. Mr. Wein reported that there has been some discussion of extending the April CLE deadline.

Next Meeting:

The next meeting of the Rules Committee will be held on Thursday, May 14, 2020, at 10:30 a.m.

Adjournment:

On the motion of Ms. Mosites, seconded by Ms. Conner, the meeting was adjourned at 11:46 a.m.