ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of March 11, 2021

Attendance:

The Environmental Hearing Board Rules Committee met by teleconference on March 11, 2021 at 10:00 a.m. Rules Committee Chairman Howard Wein presided. In attendance were the following members: Vice Chair Phil Hinerman, Gail Conner, Tom Duncan, Jean Mosites, Diana Stares and Matt Wolford. Attending on behalf of the Environmental Hearing Board (Board) were Chief Judge and Chairman Tom Renwand, Assistant Counsel Eric Delio, Board Secretary Christine Walker and Senior Counsel Maryanne Wesdock, who took the minutes.

Minutes of November 12, 2020 Meeting:

On the motion of Ms. Mosites, seconded by Mr. Hinerman, the minutes of the November 12, 2020 meeting were approved.

Amendment of Prehearing Order No. 1:

Mr. Wein followed up on a discussion held at the November 12, 2020 meeting in which the Board agreed to amend its Prehearing Order No. 1 form to clarify that discovery must be served at least 30 days prior to the end of the discovery period so that all discovery may be answered by the close of discovery. Ms. Wesdock stated that the change to the form has not yet been done. Ms. Mosites confirmed that instances are still occurring where discovery is not being served until less than 30 days before the close of discovery. Mr. Wein suggested putting the new language in bold and referencing Board Rule 1021.101(a).

Ms. Stares raised a concern that there are many cases in which it is nearly impossible for the parties to complete discovery within the 180-day timeframe set forth in Prehearing Order No. 1. She would like to have language in Prehearing Order No. 1 that permits a longer discovery

period when needed. Mr. Delio pointed out that paragraph 4 of the current form states that all discovery must be completed by a certain date "unless extended for good cause."

Mr. Hinerman raised an issue regarding expert discovery and expert reports. He stated that parties may need to complete discovery before they can prepare an expert report. Ms. Wesdock noted that the Board recently issued an opinion that discussed a party's duty to comply with expert discovery. In *Penn Township v. DEP*, EHB Docket No. 2019-152-C (Opinion and Order on Motion in Limine issued March 8, 2021), the Board set forth a long line of cases holding that when expert discovery is directed to a party, it must identify its experts and provide a summary of the experts' testimony or an expert report.

Judge Renwand explained that under an older version of the Board's rules, expert reports were due after the completion of discovery. That was at a time when the discovery period was only 60 days. The Board amended its rules to allow a longer discovery period and to require that expert discovery be conducted concurrently with fact discovery. This has resulted in the following issue: some attorneys make the argument that an expert report cannot be prepared until after discovery has been completed, whereas others argue that they cannot conduct expert discovery until they have received their opponent's expert report. As a possible solution, Judge Renwand pointed out that parties may develop their own case management order for the Board to sign.

Judge Renwand pointed out that Board Rule 1021.104(a)(5) requires the filing of expert reports with the prehearing memorandum, but this does not mean that the party is not obligated to produce its expert report in discovery when asked for it. The filing of the expert report with the prehearing memorandum is the first time the report is provided to the Board, but it should not be the first time that the report is provided to one's opponent if the parties have engaged in expert discovery.

Mr. Hinerman reported that in his case the parties were able to consent to the filing of expert reports after the close of discovery. But where attorneys are not able to agree on this process, it can present problems. Ms. Conner suggested a hybrid approach. She suggested requiring parties to produce their expert reports in discovery but provide them with the option of amending the reports after discovery has closed if new information becomes available.

Ms. Wesdock pointed out that the Board's rules and case law do not require parties to produce their expert reports in discovery; they can simply answer the expert interrogatories directed to them. Expert reports need only be produced in discovery if they are being provided in lieu of a response to expert interrogatories. She asked Mr. Hinerman whether this resolved his issue. He stated that it did not resolve the issue because a party may not be able to identify his expert until after conducting discovery. He stated that experts need the facts provided in discovery in order to prepare their reports.

Mr. Wein suggested putting together an outline for the next meeting setting forth the issues. He felt that Mr. Hinerman raised several good points, but he also noted that the language of the current rule is meant to keep the case moving. He suggested creating a subset of discovery dealing only with expert reports. Ms. Wesdock stated that she can raise the issue at the next meeting of the PBA Environmental and Energy Law Section to get feedback. This issue will be added to the agenda for the next meeting.

Rules Package 106-13:

Ms. Wesdock recently received specialized instructions for circulation of a rules package during the COVID-19 pandemic. The instructions are complex so she also discussed the procedure with DEP's regulatory coordinator to gain a better understanding of the process. Some offices must receive in person delivery and some must receive electronic delivery. For in person delivery,

appointments must be scheduled. All deliveries must be accomplished on the same day and require proof of service. The Board is hoping to circulate the rules package prior to the next meeting.[1]

Typographical Errors in Rule 1021.94a (Summary Judgment Motions):

Mr. Duncan noted two typographical errors in Rule 1021.94a(g)(2). The language should read as follows: "Any response must include **a** citation to the portion of the record ~~contraverting~~ **controverting** a material fact." On the motion of Mr. Duncan, seconded by Ms. Mosites, the correction was approved.

Mr. Wein asked if it was possible to "fast track" this change since it is simply the correction of a typographical error. Ms. Wesdock said she will check with the Legislative Reference Bureau but has been told in the past that typographical errors must go through the same vetting process as other changes. Mr. Wein suggested putting this correction through on its own so that it can be addressed quickly. Ms. Wesdock will begin the paperwork necessary for approval by OGC and the Attorney General's Office.

Reopening the Record After a Supersedeas Hearing:

The Board's rules have a procedure for reopening the record after a hearing on the merits (Rule 1021.133) but no procedure for reopening the record after a supersedeas hearing. Mr. Hinerman questioned why Rule 1021.133 would not apply to supersedeas hearings since, in his opinion, a ruling on a supersedeas petition constitutes an adjudication. Ms. Stares explained that the term "adjudication" is defined in the Administrative Agency Law and is required to contain findings of fact and conclusions of law. The Board issues adjudications only after a merits hearing. Decisions on supersedeas petitions do not meet this definition.

[1] On March 15, 2021 Ms. Wesdock learned that new instructions are being developed for circulation of rules packages during Covid.

Ms. Stares inquired as to the Board's procedure when a party files an Application to Reopen the Record: Does the Board take testimony and allow the opposing party to put on evidence? Mr. Hinerman stated that, in his experience, the Board looks at whether the new evidence could and should have been discovered before the record closed. Judge Renwand pointed out that a party may be less likely to have discovered the evidence before a supersedeas hearing since such hearings are generally scheduled soon after the petition is filed.

Judge Renwand expressed concern that supersedeas hearings have become more expansive over the last decade. In the early days of the Board, supersedeas hearings lasted ½ day to 1-2 days. Now they may last a week or longer. The Board often used to rule on a supersedeas petition from the bench; the hearings now involve expedited transcripts and the filing of briefs. In his opinion, parties would be better off scheduling expedited hearings on the merits rather than supersedeas hearings. He noted that a petitioner always has the burden in a supersedeas hearing, whereas in a merits hearing, depending on the subject matter, the burden may fall on the Department. For example, in the case of a compliance order, the petitioner has the burden in a supersedeas hearing, whereas the Department has the burden in the merits hearing. In most cases, the outcome of the supersedeas hearing determines whether the case goes forward: If a petitioner loses at the supersedeas level, he often withdraws the appeal. Judge Renwand raised a concern that if the Board allows the reopening of the record after a supersedeas hearing, it is likely to make the supersedeas process even longer than it now is.

Mr. Wein suggested linking Rule 1021.133 into the supersedeas rule. Mr. Wolford stated that the discussion seemed to be presenting two different issues: 1) simply reopening the supersedeas record to add a document or other evidence to support a party's brief; and 2) supersedeas hearings turning into mini-trials.

Ms. Stares stated that she agreed with Judge Renwand that a supersedeas hearing should not turn into a mini-trial. A supersedeas constitutes extraordinary relief, whereas an adjudication is a thoughtful, measured analysis of the merits of the case.

Mr. Wolford questioned whether subsections (b) and (c) of the supersedeas rule (1021.61) are inconsistent. Subsection (b) states, "The Board will not issue a supersedeas without a hearing…," whereas subsection (c) states, "A hearing on a supersedeas, *if necessar*y, shall be held expeditiously…" (emphasis added.) Mr. Delio pointed out that the Board can deny a petition for supersedeas without a hearing if the petition is not supported properly.

Ms. Mosites supported the idea of having a mechanism for reopening the supersedeas record. She stated that a supersedeas can have significant consequences for a party, and having the ability to reopen the record to include a critical piece of information is important for allowing a party to make his or her case. She suggested using Rule 1021.95 (miscellaneous motions) as the vehicle for seeking to reopen the record. Mr. Duncan agreed. He felt that the rule should be clearer and should answer the following questions: 1) can you reopen the record after a supersedeas hearing?; 2) if so, what is the mechanism for doing so? He noted that, as Ms. Mosites stated, the default option seems to be to file a miscellaneous motion under Rule 1021.95, but this does not clarify what standard the Board will consider in evaluating the request.

Ms. Stares stated that she was not aware of requests being made to reopen the record in supersedeas cases. Mr. Duncan stated that it's a question of strategy. A party may not know how to request a reopening of the record and does not want to risk having his or her request denied. Ms. Wesdock and Judge Renwand confirmed that the Board has received requests to reopen the record after supersedeas hearings. Judge Renwand noted that in some cases the party simply attaches the new piece of information to his or her brief.

Judge Renwand stated that if the Board's rules are amended to allow a reopening of the record after a supersedeas hearing, it would need to provide a very short timeframe for making the request and giving the other side time to respond. He suggested three business days.

Mr. Wein volunteered that he and Ms. Wesdock will work on proposed language. Ms. Stares requested that the language include an opportunity for the opposing party to respond.

Ms. Stares also expressed the opinion that if new evidence is discovered after the close of the supersedeas hearing the party can simply file a new petition for supersedeas. Mr. Hinerman agreed with Ms. Stares. He felt that the record should be reopened only to allow evidence that relates to what has already been presented.

Ms. Mosites pointed out that subsection (d) of Rule 1021.61 states that supersedeas hearings may be limited in time and format "with restricted rights of discovery or of cross-examination." She suggested adding language stating that parties have a restricted right to reopen the record. Judge Renwand liked Ms. Mosites' suggestion and said that parties wishing to reopen the record could file a motion and cite this language. Ms. Mosites asked how the restrictions are generally applied and communicated. Mr. Wein stated that a conference call is generally held with the judge assigned to the case. Mr. Delio stated that the terms of discovery are generally memorialized in an order issued after the conference call, while limitations on cross-examination may occur at the hearing itself.

Ms. Stares disagreed with simply adding language to Rule 1021.61(d) without setting forth a response time and a standard for granting a request to reopen the record. She felt that if the Board were to allow parties to reopen the record, the language should be clear and straightforward.

Mr. Wein and Ms. Wesdock agreed to draft proposed language for the next meeting.[2]

[2] Following the meeting, Mr. Duncan was also recruited to work on this project.

Single Judge Decisions:

Single judge decisions generally are not circulated for review by all of the judges. Two areas where it has been suggested that there should be full Board review are rulings on petitions for supersedeas and denials of motions for summary judgment. Mr. Wein noted that the Board's Internal Operating Procedures, which are published on the Board's website, set forth the circumstances under which the judges are required to consult with each other on opinions and secure approval of a majority of the Board. Mr. Wein asked whether the Board would be amenable to modifying the Internal Operating Procedures to require consultation among all judges for supersedeas opinions and denials of summary judgment motions. Judge Renwand stated that he is open to modifying the Internal Operating Procedures in that manner, and he will talk with the other judges about it.

Mr. Delio noted that a party seeking reconsideration of an interlocutory order can ask for reconsideration en banc. He raised the question of whether the reconsideration rules cover this topic without having to amend the Internal Operating Procedures. It was decided that the reconsideration rules do not address this topic because the request is for review of a decision before issuance, not after. Additionally, Ms. Wesdock stated that the standard for reconsideration is quite high: the party requesting it must demonstrate extraordinary circumstances. Mr. Wolford noted petitions for supersedeas and denials of summary judgment motions do not present the same considerations. He felt that parties should follow the rules on reconsideration of an interlocutory decision when a motion for summary judgment is denied.

Mr. Delio noted that the Board's decisions make it clear that a ruling on a supersedeas petition is a snapshot at a particular point in time and not a final decision on the merits. He raised a concern that by requiring all of the judges to sign off on a supersedeas ruling, it gives the decision

more finality. Ms. Wesdock stated that even though a supersedeas ruling is not a final ruling on the merits it often ends up that way. Parties who are not successful on a supersedeas petition often withdraw their case. Judge Renwand stated that, in many cases, there is consultation among the judges on a supersedeas decision; it is not uncommon for the judges to discuss it before the decision is issued, and often there is agreement among all the judges on a supersedeas decision even if it does not carry the signature of all the judges. A denial of a summary judgment motion, on the other hand, rarely is discussed by all the judges.

Mr. Wolford agreed with the sentiment that many cases do end at the supersedeas level. He gave an example of one of his cases where it was clear that if the client were not successful on the supersedeas petition, there was no use going forward. He expressed the opinion that a supersedeas ruling should always qualify for interlocutory reconsideration en banc.

Judge Renwand will discuss the matter with the other judges to determine if the Internal Operating Procedures can be modified.

Board Rule 1021.51(h): Recipient of the Action and Notice:

Board Rule 1021.51 requires that notice of an appeal be provided to the Department of Environmental Protection and, in certain circumstances, the "recipient of the action." For example, in the case of a third-party challenge to a permit approval, a copy of the notice of appeal must be served on the permittee. Subsection (h) states that "recipient of the action" includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) Any affected municipality, its municipal authority and the proponent of the decision, when applicable, in appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 or 750.7).

(3) A mining company, well operator, or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested parties as ordered by the Board.

The same language appears in the Board's notice of appeal form on its website. Mr. Wolford expressed a concern that this list is not exhaustive, and there are other instances where a person or entity should receive notice of an appeal.

Mr. Wolford also raised a question regarding page 2 of the notice of appeal form, which constitutes the proof of service. This page provides a checklist of the persons or entities who must receive a copy of the notice of appeal. It includes (1) the Board, (2) the Department's Office of Chief Counsel and (3) the program office of the Department that took the action.[3] The proof of service also contains the following language: "Additionally, if your appeal is from the [Department's] issuance of a permit, license, approval, or certification to another person, you must serve the following as applicable:…." (the prefatory language). Directly below that language appears the following: "(4) The entity to whom the permit, license, approval, or certification was issued." Directly below that language appears the following: "(5) Where applicable, any of the following…" followed by a listing of the entities named in 1021.51(h)(2)-(3) as noted above. Mr. Wolford questioned if the prefatory language is intended to apply only to item (4) that follows, or to both items (4) and (5).[4] In addition, the language limits the notice requirement to the *issuance* of a permit, license, approval, or certification, but not a *denial*. However, Mr. Wolford felt that a

[3] Electronic filing automatically confers service on both the Department's Office of Chief Counsel and program office.

[4] Following a discussion between Ms. Wesdock and Mr. Wolford following the meeting, it was determined that the prefatory language is intended to apply only to subsection (4), and the notice of appeal form will be revised so that it is clear.

third party may have an interest in an appeal of a denial, especially because the Board can decide the case differently than the Department.

Ms. Mosites agreed that the prefatory language appears to be directed to third-party appeals challenging the Department's *issuance* of a permit, license, whereas Mr. Wolford's issue concerns appeals where the Department has *denied* a permit, license, etc. If the applicant appeals the denial, Mr. Wolford believes that notice should be provided to the persons or entities who could be affected by a decision overturning the Department's denial. In that case, Ms. Mosites felt that interested parties had the option of intervening.

Mr. Wolford provided an example of a case where this issue arose: *Cranberry Township and Cranberry-Venango County General Authority v. DEP*, EHB Docket No. 2020-063-R, which involved an Act 537 Plan disapproval. In that case, a third party municipality was not affected by the disapproval. However, if the disapproval were overturned by the Board and the Act 537 Plan were approved, the municipality could be affected and therefore should have received notice of the appeal so that it could determine whether to intervene.

Mr. Wein suggested revising subsection (4) to read: "Other interested parties as ordered by the Board or as identified by the appellant." Mr. Wolford raised a concern that this language would place the onus on the appellant to identify other entities that should be notified about an appeal. Mr. Wein disagreed that revising the language placed a burden on the appellant. The revision would simply provide the appellant with an opportunity to serve notice on anyone it believes may be impacted by the appeal. A failure to notify does not deprive the appellant of its appeal rights. Ms. Mosites, however, felt that the proposed revision would create a slippery slope. Ms. Stares agreed. She raised the following question: How much obligation can we put on a party to make sure that everyone impacted gets notice? She pointed out that notice of many Department actions

is provided by the *Pennsylvania Bulletin*. She felt that if someone is interested in a particular matter being considered by the Board, it has a responsibility to stay informed. Mr. Wein did not disagree but stated the rule change was simply a means to ensure that any entities who might be impacted by the outcome of an appeal receive notice about it. He felt that two categories should be created: one that covers the "recipient of the action" and another that includes other entities who are not recipients of the action being challenged but who may, nonetheless, be impacted by an appeal of the Department's action. Mr. Wolford agreed that notice is important. He also noted that the Commonwealth Court can vacate a Board adjudication if a necessary party is not a part of the case. Ms. Stares expressed the opinion that the Board has no obligation to join a party because it is an administrative proceeding. A discussion ensued regarding *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

Mr. Wolford also expressed concern that a person or entity may not have standing to participate in an appeal as a party (as opposed to an intervenor) because the Department's action being reviewed by the Board was favorable but could later be adversely impacted if the Board's decision is unfavorable as to the person or entity. The anomalous result is that a third party may at first lack standing because it is not aggrieved, but the Board's decision renders the party a necessary (or indispensable) party. In such a case, the Commonwealth Court could vacate the Board's proceeding for lack of subject matter jurisdiction because a necessary party did not participate.

It was determined that this issue should be placed on the agenda for the next meeting.

Creating Rules for WebEx Hearings:

Ms. Wesdock reported that she has received positive feedback from attorneys who have participated in WebEx hearings. She has received inquiries as to whether the Board would

consider holding video hearings in some cases after the pandemic has ended. Judge Renwand stated that the Board is open to this suggestion. There are two options: develop new rules or amend the Board's operating procedures. Mr. Hinerman suggested using the remote deposition protocol that he provided at the last meeting as a guide.

The Board will draft guidelines for holding video hearings and present them at the next meeting.

Adjournment:

On the motion of Ms. Mosites, seconded by Ms. Conner, the meeting adjourned at 12:21 pm.

Next Meeting:

The next meeting is scheduled for **Thursday, May 13, 2021, at 10:00 a.m.** It will be held by video or telephone.