

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MAY 8, 2014

Attendance:

The Environmental Hearing Board Rules Committee met by conference call on Thursday, May 8, 2014 at 10:30 a.m. Committee Chairman Howard Wein presided by conference call from the Board's Pittsburgh Office. Committee members included the following: Maxine Woelfling, Jim Bohan, Brian Clark, Gail Conner, Rep. Kate Harper, Phil Hinerman, Matt Wolford and Dennis Whitaker. Attending on behalf of the Board were the following: Chief Judge Tom Renwand and Maryanne Wesdock, from the Pittsburgh office; Judge Rick Mather, Board Secretary Vince Gustitus, and Assistant Counsel Tom Duncan from the Harrisburg office; and Judge Steve Beckman, Assistant Counsel Tim Estep and Law Clerk Christine Walker from the Erie office. Ms. Wesdock took the minutes.

Approval of Minutes:

Mr. Bohan had two corrections to the minutes of the March 13, 2014 meeting as follows:

- 1) The reference to the *Lower Paxton* case on page 6 should instead be to *Lower Allen*.
- 2) The word "discussed" at the beginning of the third paragraph on page 13 should be "discussion."

With those corrections, the minutes were approved on the motion of Ms. Woelfling and seconded by Rep. Harper.

Status of Rules Package 106-10:

Ms. Wesdock reported that Final Rules Package 106-10 is with IRRC and the legislative committees. The IRRC meeting to approve the rules is scheduled for June 19, 2014 at 10:00 a.m. If approved by IRRC, the rules package will then go

the Attorney General's Office, which has 30 days to review it. Upon approval by the Attorney General's Office, the rules will be published as final rulemaking. All rules will go into effect upon publication, except the rule eliminating the need for filers to serve a copy of their appeal on the Department, which will go into effect 30 days after publication in order to give the Board and the Department time to work out any glitches that may occur with the automatic notice feature of the Board's e-filing system.

Mr. Wein requested that the Board post a notice and link to the new rules on the Board's website once they are final.

Correction to Section 1021.52(b):

Ms. Wesdock reported on an issue that had been raised at a prior Rules Committee meeting, namely an error in Section 1021.52(b) of the rules. Section 1021.52(b) currently reads as follows:

§ 1021.52. Timeliness of Appeal

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required by § 1021.51(c), (d) and (i) (relating to commencement, form and content) or suffer dismissal of the appeal.

25 Pa. Code § 1021.52(b) (emphasis added).

It was noted that whereas subsections (c) and (d) of 1021.51 addressed information that must be contained in a notice of appeal, subsection (i) does not. Rather, subsection (i) discusses recipients of an action. The committee determined that due to several sets of revisions having been made to Section 1021.51 in previous rules packages, the information that used to be contained in subsection (i) must have been moved to another subsection.

Ms. Wesdock reported that the language that had been previously contained in subsection (i) had been relocated to subsection (k) during a previous set of changes to the rule. Subsection (k) requires that an appellant provide proof

that service of the notice of appeal has been made on the Department and, where applicable, the permittee. It was agreed that the reference to 1021.51 (i) in 1021.52 (b) should be changed to 1021.51(k).

Ms. Wesdock pointed out that subsection (e) of 1021.51 also contains a requirement for the type of information that must be provided in a notice of appeal. It requires that a notice of appeal “set forth in separate numbered paragraphs the specific objections to the action of the Department.” The question presented to the Committee was whether Section 1021.52(b) should also include a reference to this particular subsection.

The Committee and Board agreed that a reference to (e) should not be added because, whereas the other subsections referenced in 1021.52(b) – i.e., 1021.51 (c), (d) and (k) (formerly (i)) – deal with ministerial requirements, including name, address, telephone number, copy of the action appealed, and certification of service, subsection (e) deals with a more substantive requirement. Subsection (e) requires specific objections set forth in numbered paragraphs. Judge Mather checked with Kathy Berwager, the Board’s Administrative Officer, and reported that the Board may send a Failure to Perfect Order if an appeal contains *no* objections, but the Board does not do a qualitative analysis to determine if the objections are specific. Moreover, Mr. Bohan pointed out that a failure to set forth one’s objections in *numbered* paragraphs is not the same as an appeal that is missing information, which is the focus of 1021.52(b).

Mr. Wolford also noted that an appellant has a 20 day period in which to amend his appeal as of right, and if a Failure to Perfect Order is issued by the Board, it may create confusion as to when the 20 day period expires.

Therefore, it was agreed that a reference to subsection (e) of 1021.51 should not be added to Section 1021.52(b).

On the motion of Mr. Whitaker, seconded by Mr. Clark, the Committee recommended the following revision to Section 1021.52(b):

§ 1021.52. Timeliness of appeal

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required by § 1021.51(c), (d) and ~~[(i)]~~ (k) (relating to commencement, form and content) or suffer dismissal of the appeal.

Citizens Guide:

During a previous meeting of the Rules Committee it was recommended that the Board add a “citizens guide” to its website as a way of explaining Board practice and procedure to non-lawyers. The reason for this is because a number of issues addressed by the Rules Committee are issues pertaining to pro se appellants. Christine Walker prepared a draft of the Citizens Guide, which was circulated to the Rules Committee and to the Board.

Mr. Hinerman and Board Assistant Counsel Eric Delio had provided comments to the Guide prior to the meeting. Both pointed out that the Guide appears to be targeted to pro se individuals who are appellants, but Mr. Delio pointed out that in cases of the Department having filed a complaint for civil penalties, a pro se individual could be a defendant, and Mr. Hinerman pointed out there may be instances where a pro se individual is a permittee. It was agreed that the discussion in the Guide should be broadened to address these types of situations. Mr. Whitaker suggested using the term “party” rather than “appellant.”

Mr. Wein felt that “order” should be added to the discussion on page 3 of the Guide regarding Question No. 2 in the Board’s notice of appeal form (dealing with subject of appeal).

Mr. Bohan felt that the Guide should make it clear that the Department is a separate agency from the Environmental Hearing Board. He provided proposed language to Ms. Wesdock and Ms. Walker to address this issue.

Mr. Hinerman also felt that a disclaimer should be included stating that the Guide presents informal information and does not constitute the official position of the Board.

Mr. Bohan suggested that the following language on page 3 of the Guide should be revised as follows: “You have 30 days from the date you became aware of the Department’s action to file a notice of appeal. If you do not file it within those 30 days, the action [is] **may** no longer **be** appealable.”

Ms. Wesdock noted that footnote 1 on page 3 had been revised as follows: “If notice of the Department’s action is published in the *Pennsylvania Bulletin*, the 30 day appeal period **may** begin[s] to run from the date of the publication.”

Ms. Conner stated that she thought the Citizens Guide would be extremely helpful. She suggested providing a more generic statement in footnote 1 as follows: “Publication of the Department’s action in the *Pennsylvania Bulletin* may impact your appeal period.” She also recommended including a link to the *Pennsylvania Bulletin* since most non-lawyers are not familiar with it.

Judge Mather suggested including a reference to the Board’s rule at 25 Pa. Code § 1021.52(a) and including a summary of when the 30 day appeal period begins to run, as follows:

- 1) If you are the recipient of the action – you must appeal within 30 days of receiving written notice of the action.
- 2) If you are not the recipient of the action, and notice of the action is published in the *Pennsylvania Bulletin* – you must appeal within 30 days of publication in the *Pennsylvania Bulletin*.
- 3) If you are not the recipient of the action, and notice of the action is not published in the *Pennsylvania Bulletin* – you must appeal within 30 days of actual notice of the action.

Ms. Conner suggested putting this information in a box in order to emphasize it.

Ms. Woelfling stated that it was difficult to tell who the audience is since some areas of the Guide are very technical, whereas others are simplified. Some areas appear to be aimed at non-lawyers whereas others appear aimed at lawyers who are not familiar with the Board’s practice. Mr. Bohan asked the question,

what is the object of the Guide? Ms. Wesdock explained that the goals of the Guide are to explain the Board's process to those unfamiliar with it and to provide guidance to individuals who choose to appear pro se.

Ms. Conner stated that although she understood the reasons for encouraging pro se appellants to obtain an attorney, she felt that perhaps the Guide placed too much emphasis on it. She also recommended conducting a readability analysis. Mr. Hinerman agreed that a readability analysis might be helpful because some words, e.g. "discovery," will mean something different to a non-lawyer. However, he also felt that the Guide should make it clear that litigating an appeal before the Board is a complicated process.

Judge Beckman suggested that written comments should be sent to Ms. Wesdock who will then forward and discuss them with Ms. Walker. The Committee agreed on a deadline of May 23, 2014 for submitting comments.

Next meeting:

The next meeting of the Rules Committee is scheduled for Thursday, July 10, 2014. However, if there are no items on the agenda, the Committee will not meet until September 11, 2014 at 10:30 a.m.