

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of September 14, 2023

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference at 10:00 a.m. on Thursday, September 14, 2023, with Committee Chairman Howard Wein presiding. The following Rules Committee members were in attendance: Brian Clark, Jean Mosites, Tom Duncan, Dawn Herb, Doug Moorhead, Gail Conner, Matt Wolford and Vice-Chair Phil Hinerman. Representing the Environmental Hearing Board (Board) were Chairman and Chief Judge Steve Beckman; Assistant Counsel Eric Delio, Maggie White and Alisha Hilfinger; Board Secretary Christine Walker; and Senior Counsel Maryanne Wesdock, who took the minutes. Attorney Lisa Johnson attended the meeting.

Minutes of May 11, 2023 Meeting:

On the motion of Mr. Clark, seconded by Ms. Mosites, the minutes of the May 11, 2023 meeting were approved. Ms. Herb abstained from the vote because she was not present at the May 11 meeting.

IRRC Comments to Proposed Rulemaking 106-14:

The Committee reviewed the comments of the Independent Regulatory Review Commission (IRRC) on Proposed Rulemaking 106-14. IRRC's comments related to the Board's proposed revisions to Section 1021.51 (Commencement, form and content of a notice of appeal) and specifically to subsections (f)(1)(iv), (f)(2)(vi)(C) and (j).

Proposed revisions to Sections 1021.51(f)(1)(iv) and (2)(vi)(C)

The proposed revisions to Sections 1021.51(f)(1)(iv) and (2)(vi)(C) are as follows:

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(f) An original notice of appeal shall be filed electronically, conventionally or by facsimile.

(1) *Electronic filing.*

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(iv) **[In a third-party appeal, the] The** appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on **[the recipient of the action] any potentially adversely affected persons as identified in subsection (h)(1)—(3).** The service shall be made at the address in the document evidencing the action by the Department or **[at the chief place of business in this Commonwealth of the recipient] in accordance with the Pennsylvania Rules of Civil Procedure.**

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(2) *Conventional filing.*

(vi) The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on each of the following in the same manner in which the notice of appeal is filed with the Board:

(A) The office of the Department issuing the Departmental action.

(B) The Office of Chief Counsel of the Department.

(C) **[In a third-party appeal, the recipient of the action.] A potentially adversely affected person as identified in (h)(1)—(3).** The service shall be made at the address in the document evidencing the action by the Department or **[at the chief place of business in this Commonwealth of the recipient] in accordance with the Pennsylvania Rules of Civil Procedure.**¹

¹ This rule change was made because the Committee felt that it was burdensome to require an appellant to determine what constitutes the “chief place of business in the Commonwealth” of a potentially adversely affected person. Therefore, a suggestion was made to simply require service in accordance with the Pennsylvania Rules of Civil Procedure.

IRRC commented that the general reference to “Pennsylvania Rules of Civil Procedure” was vague. It recommended including a citation to specific rules.

The Rules Committee reviewed the Pennsylvania Rules of Civil Procedure dealing with service – specifically, Rule 402 (Manner of Service), Rule 403 (Service by Mail) and Rule 440 (Service of Legal Papers Other than Original Process) - and concluded that none of the rules was an exact fit for the proposed amendment to Sections 1021.51(f)(1)(iv) and (2)(vi)(C). For example, Pa. R.C.P. 402 provides for service by hand delivery or the filing of a specific form in lieu of hand delivery, whereas the Board allows service by mail. Pa. R.C.P. 403 allows service by mail but requires a receipt signed by the defendant or his authorized agent; in contrast, the Board does not require a signature for delivery of a notice of appeal by mail nor is the person receiving the notice a “defendant.” Finally, Pa. R.C.P. 440 addresses service of legal papers other than original process; however, Section 1021.51(f) deals with service of original process.

Ms. Mosites and Mr. Duncan felt that Rule 402 most closely aligned with what the Board was trying to accomplish in Sections 1021.51(f)(1)(iv) and (2)(vi)(C) but they agreed that the exact language of Rule 402 did not fit squarely within the Board’s rule. Mr. Clark recommended saying “See generally Pa. R.C.P. 402” since Rule 402 captured the essence of what was intended in Sections 1021.51(f)(1)(iv) and (2)(vi)(C) but the language was not exactly on point.

Ms. Herb pointed out that in some cases the adversely affected person may not be registered in Pennsylvania and, therefore, she agreed with revising the original language. She stated that the purpose of subsections (f)(1)(iv) and (f)(2)(vi)(C) was to ensure that a potentially adversely affected person has knowledge of the appeal and it is incumbent on an appellant to provide that notice. She did not feel that Pa.R.C.P. 402 was a precise fit. Ms. Mosites asked whether the

entities set forth in Sections 1021.51(h)(1)-(3) are all generally located within the Commonwealth of Pennsylvania. Mr. Delio identified one case where a permittee was served in Texas.

Mr. Delio felt that the focus of Pa. R.C.P. 402 was on delivery by hand and did not provide a good fit for Sections 1021.51(f)(1)(iv) and (2)(vi)(C) since the primary method of service of a notice of appeal on a potentially adversely affected person is by mail. He noted that the General Rules of Administrative Practice and Procedure include a rule on service but it is broad. Mr. Wolford stated that he would like to see service of a notice of appeal by certified mail as set forth in Pa. R.C.P. 403.

Mr. Duncan pointed out that Pa. R.C.P. 402 allows service at “any usual place of business” or at a person’s residence. This is broader than the original language of Sections 1021.51(f)(1)(iv) and (2)(vi)(C) which requires service at the “chief place of business.” Ms. Herb suggested replacing “chief place of business” with “any usual place of business in this Commonwealth or residence.” Mr. Delio agreed it was helpful to include service at a person’s residence for those cases in which the potentially adversely affected person is an individual.

Judge Beckman raised a concern that “usual place of business” broadens the language. He asked whether “usual place of business” could include a corner store owned by a permittee rather than its corporate headquarters. Mr. Hinerman shared Judge Beckman’s concern. For instance, he felt that if Sheetz is a potentially adversely affected person in a matter before the Board, the appellant should not be allowed to effect service by serving a copy of the notice of appeal at the local Sheetz store. Ms. Mosites disagreed that this scenario would occur. She felt that the entities covered by Sections 1021.51(h)(2) and (h)(3) were a narrow field. However, Mr. Hinerman stated that Sheetz could be a potentially adversely affected person under (h)(3) in a case involving a leaking storage tank.

Ms. Wesdock pointed out that the requirement to serve a copy of a notice of appeal on a potentially adversely affected person as identified in Sections 1021.51(h)(2) and (h)(3) was not jurisdictional. That is, if service was not properly effected it did not deprive the Board of jurisdiction over an appeal. The service requirement of Sections 1021.51(f)(1)(iv) and (2)(vi)(C) was simply to provide notice to a potentially adversely affected person that an appeal had been filed in which they might wish to intervene.

The Committee agreed with the following changes to Sections 1021.51(f)(1)(iv) and (2)(vi)(C): replace “chief place of business in this Commonwealth” with “regular place of business.” The Committee also agreed that subsection (f)(1)(iv) should allow service by email and therefore they agreed that the language limiting service to “overnight mail or facsimile” should be deleted.

The Committee agreed with the following revisions to Sections 1021.51(f)(1)(iv) and (2)(vi)(C):²

(f) An original notice of appeal shall be filed electronically, conventionally or by facsimile.

(1) *Electronic filing.*

* * * * *

(iv) **[In a third-party appeal, the] The** appellant shall, concurrent with or prior to the filing of a notice of appeal, serve ~~by facsimile or overnight mail~~ a copy on **[the recipient of the action] any potentially adversely affected persons as identified in subsections (h)(1)—(3).** The service shall be made at the address in the document evidencing the action by the Department or **[at the chief place of business in this Commonwealth of the recipient] in accordance with the Pennsylvania Rules of Civil Procedure AT ANY OFFICE OR USUAL PLACE OF BUSINESS OF ANY POTENTIALLY ADVERSELY AFFECTED PERSONS.**

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² Capital letters and strikethrough show changes from the proposed rule.

(2) *Conventional filing.*

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(vi) The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on each of the following in the same manner in which the notice of appeal is filed with the Board:

(A) The office of the Department issuing the Departmental action.

(B) The Office of Chief Counsel of the Department.

(C) **[In a third-party appeal, the recipient of the action.] A potentially adversely affected person as identified in subsections (h)(1)—(3).** The service shall be made at the address in the document evidencing the action by the Department or **[at the chief place of business in this Commonwealth of the recipient] in accordance with the Pennsylvania Rules of Civil Procedure** **AT ANY OFFICE OR USUAL PLACE OF BUSINESS OF ANY POTENTIALLY ADVERSELY AFFECTED PERSONS.**

Proposed revision to Section 1021.51(j)

The proposed revision to Section 1021.51(j) is as follows:

(j) Other **[recipients of an action] potentially adversely affected persons** under **[subsection (h)(2), (3) or (4)] subsections (h)(2) or (h)(3)** may intervene as of **[course] right** in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81. **Intervention of persons identified under subsection (h)(4) shall be filed in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4).**

IRRC raised two questions: 1) Is an interested person identified by the Board under subsection (h)(4) required to file a petition to intervene or an entry of appearance, and 2) what intervention procedure is typically included in the order issued by the Board under such circumstances?

Ms. Wesdock provided the following analysis: In response to the first question, the proposed

amendment to Section 1021.51(j) would have required “an interested person as ordered by the Board” to file either a petition to intervene or an entry of appearance depending on what was ordered by the Board. Both options were provided in the rule in order to give the Board flexibility to allow intervention simply by the filing of an entry of appearance or to request further information regarding the person’s interest in the matter by filing a petition to intervene. In response to the second question, in almost all circumstance where a party is identified as an “interested person as ordered by the Board,” the Board allows the person to intervene by simply filing an entry of appearance.

IRRC asked the Board to consider clarifying Section 1021.51(j) so that it was consistent with the proposed comment to Section 1021.81 (Intervention) which states:

Section 1021.51(j) (relating to commencement, form and content), allows certain potentially adversely affected persons, as that term is defined in § 1021.51(h) to intervene in an appeal as of right by simply filing an entry of appearance.

Ms. Mosites felt that Section 1021.51(j) and the Comment to Section 1021.81 were not consistent. Mr. Moorhead asked for clarification on the types of orders the Board typically sends out under Section 1021.51(h)(4). Mr. Delio provided an example of an order that allowed a potentially adversely affected person to intervene in the appeal by filing an entry of appearance. Ms. Herb asked whether there were any circumstances under which the Board would want a potentially adversely affected person under (h)(4) to provide more information by filing a petition to intervene as opposed to simply allowing intervention by filing an entry of appearance. Ms. Wesdock felt that if the Board took the step of issuing an order to a potentially adversely affected person under (h)(4) it would likely allow intervention by the filing of an entry of appearance. Ms. Herb suggested the following response to IRRC’s question number 2: “We anticipate that most persons under (h)(4) will be allowed to intervene by filing an entry of appearance but we would

like to preserve the right to require a petition to intervene where further information is needed.”

Mr. Moorhead proposed the following revisions to Section 1021.51(j):

(j) Other [**recipients of an action**] **potentially adversely affected persons** under [**subsection (h)(2), (3) or (4)**] **subsection (h)(2) or (3)** may intervene as of [**course**] **right** in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81. **Intervention of persons identified under subsection (h)(4) shall be filed in accordance with § 1021.81 unless otherwise AS specified in the order of the Board under subsection (h)(4).**

The Committee agreed with the changes above. The Committee also agreed that no changes were needed to the Comment to Section 1021.81.

On the motion of Mr. Moorhead, seconded by Ms. Mosites, the revisions to Section 1021.51(f)(1)(iv), (f)(2)(vi)(C), and (j), set forth above, were unanimously approved by the Rules Committee.³

Discovery of Expert Witnesses:

At the May 11, 2023 meeting, Mr. Moorhead had proposed codifying the holdings of recent Board decisions addressing the discovery of expert witnesses, specifically *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, 2021 EHB 37 (*Range I*) and 2021 EHB 182 (*Range II*). Those opinions discuss when an expert witness may be deposed. The same issue was also addressed in *Angino v. DEP*, 2006 EHB 278. Mr. Moorhead stated that the question of when Department experts may be deposed comes up frequently and there is uncertainty on this

³ A new amendment to Section 1021.51(j) was recommended and approved subsequent to the September 14, 2023 meeting. See Appendix to the minutes.

topic even among seasoned practitioners. He felt that the incorporation of Board precedent into a rule would be helpful.

Mr. Moorhead circulated a proposed amendment to Section 1021.102 aimed at codifying the holdings of *Range I* and *Range II*:

§ 1021.102. Discovery.

(a) Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by the Pa.R.C.P. When the term “court” is used in the Pa.R.C.P., “Board” is to be understood; when the terms “prothonotary” or “clerk of court” are used in the Pa.R.C.P., “Secretary to the Board” is to be understood.

(b) Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

(c) If a person or party is to be deposed by oral examination more than 100 miles from his or its residence or principal place of business, the Board may, upon motion, order the payment of reasonable expenses, including attorney’s fees, as the Board deems proper.

(d) Discovery disputes shall be resolved pursuant to a motion filed in accordance with § 1021.93 (relating to discovery motions), except that to facilitate the prompt completion of discovery, the Board may hear argument on discovery disputes by telephone conference call at the time the dispute arises and may issue oral rulings which will be later memorialized in written orders.

(e) Absent an agreement of the parties or an order of the Board, a person who has been identified as an expert witness expected to testify at a hearing before the Board, including Department employees, shall not be deposed. If after the service of expert reports or answers to expert interrogatories a party seeks further discovery of a person identified an expert witness, the party seeking further discovery shall file a motion in accordance § 1021.93 (relating to discovery motions) showing why the information set forth in the expert reports or answers to expert interrogatories is not sufficient, or showing other cause for the discovery it seeks.

[(e)] (f) Subsections (a) – [(d)] (e) supersede 1 Pa. Code
§ § 35.145—35.152 (relating to depositions).

Mr. Hinerman stated that he did not agree with the proposed amendment. He felt that it is necessary to be able to depose experts who have factual information. Mr. Wolford felt that Mr. Moorhead had accurately captured the holding that came out of the *Range* decisions but shared a similar concern to that voiced by Mr. Hinerman. Mr. Hinerman voiced a concern for potential abuse, i.e., a party may name someone as an expert witness in order to shield them from being deposed. Mr. Moorhead stated that he has not seen that occur in practice before the Board.

At the May 11, 2023 meeting, Judge Beckman had stated that he felt it would be helpful for the Board to have an internal discussion about this subject before having the Rules Committee proceed with adopting a rule. He committed to having that discussion prior to the November Rules Committee meeting. The Committee agreed to table this topic until the November meeting.

Next Meeting:

The next meeting of the Rules Committee will be held by videoconference on November 9, 2023 at 10 a.m.

Adjournment:

On the motion of Mr. Wolford, seconded by Mr. Clark, the meeting was adjourned at 11:40.

Appendix to Minutes of September 14, 2023 Meeting:

On October 16, 2023, Ms. Wesdock recommended new language for Section 1021.51(j) that differed from the language voted on by the Rules Committee at the September 14, 2023 meeting. The new language is as follows:

(j) ~~Other~~—[recipients of an action] **Potentially adversely affected persons** under [subsection (h)(2), (3) or (4)] **subsections (h)(2) or (h)(3)** may intervene as of [course] **right** in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81. ~~Intervention of persons identified~~

~~under subsection (h)(4) shall be filed in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4).~~
POTENTIALLY ADVERSELY AFFECTED PERSONS UNDER SUBSECTION (h)(4) MAY SEEK LEAVE TO INTERVENE BY FILING A PETITION TO INTERVENE PURSUANT TO § 1021.81 (RELATING TO INTERVENTION), OR MAY INTERVENE AS OF RIGHT BY FILING AN ENTRY OF APPEARANCE WHERE PERMITTED TO DO SO BY ORDER OF THE BOARD.

Ms. Wesdock felt that the new language more accurately provided the clarification that IRRC had requested in its comments. The Rules Committee voted on the new language by email, on the motion of Mr. Wolford, seconded by Ms. Herb. The motion carried unanimously. The new language was also unanimously approved by the Judges of the Board at a public meeting held on October 24, 2023 at 1:00 p.m. At that meeting, the Judges of the Board voted in favor of the final revisions to Rules Package 106-14, as discussed in these Minutes and Appendix.