ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

MINUTES OF MEETING OF MARCH 13, 2014

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, March 13, 2014 at 10:30 a.m. Attending the meeting in person were the following Rules Committee members: Maxine Woelfling, Jim Bohan, Brian Clark, Gail Conner and Dennis Whitaker. Attending from the Environmental Hearing Board (Board) were Judge Rick Mather; counsel Tom Duncan and Eric Delio; and Board Secretary Vince Gustitus. Participating by phone were Rules Committee Chairman Howard Wein and members Rep. Kate Harper, Phil Hinerman and Matt Wolford; Environmental Hearing Board Judges Tom Renwand and Steve Beckman, and counsel Tim Estep, Christine Walker and Maryanne Wesdock, who took the minutes.

Approval of Minutes of January 9, 2014 Meeting:

On the motion of Ms. Woelfling, seconded by Ms. Conner, the minutes of the January 9, 2014 meeting were approved.

Status of Final Rules Package 106-10:

Ms. Wesdock reported that Final Rules Package 106-10 is still awaiting review by the Governor's Policy Office, where it has been pending since

December 19, 2013. Mr. Whitaker agreed to contact the Policy Office to check on the status of the rules package.

Section 1021.51(d) and related issues:

The Committee continued its previous discussion regarding the issue of whether Section 1021.51(d) of the Board's rules should be revised. Section 1021.51(d) reads as follows: "If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal." The Board's practice had been to require a copy of the action to be attached to every appeal, not simply those where the appellant had received written notification, and to issue a Failure to Perfect order whenever a copy of the action was not attached. That practice was corrected in November 2013 in order to conform to the rule. The discussion surrounding this issue involves two questions:

1) Should a copy of the action be required in every appeal, not simply those where the appellant has received written notification? This is the Department's position.
2) What constitutes "written notification" to an appellant?

At the previous Rules Committee meeting, the Department was asked to provide a list of the types of electronic notices it sends out. Mr. Bohan and Mr. Delio circulated copies of various types of electronic notice prior to the meeting.

Examples include notices regarding draft guidance documents, changes to permits, changes to regulations and Act 2 notices.

At the previous meeting, it was pointed out that there is no way to determine if the recipient of an electronic notice opens the link or reads the notice. Judge Renwand asked how this differed from someone who receives written notice by mail but doesn't open the letter. In the case of notice sent by mail, it is often sent by certified mail, which verifies receipt. For documents sent by first class mail, there is also a presumption of receipt if the letter is not returned.

The Board's rule on timeliness of appeal, at Section 1021.52(a) states as follows:

> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the Pennsylvania Bulletin.
>
> (ii) Thirty days after *actual notice* of the action if a notice of the action is not published in the Pennsylvania Bulletin.

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

Judge Mather expressed the opinion that there needs to be better instruction on what constitutes "actual notice" in Section (2)(ii).

Ms. Woelfling pointed out that in some cases the eNotice may not be accurate or may not involve a final action. Some eNotices may appear to be a final action but, instead, are simply notification that the Department has completed its review process. Mr. Whitaker agreed that navigating one's way through the eNotice system can be difficult.

Mr. Wolford offered the suggestion that the definition of what constitutes "actual notice" may be better developed through jurisprudence rather than by a rule. In the interim, however, Mr. Wein asked what would be the best method for notifying people what to attach to a notice of appeal. Judge Mather stated that the Board would soon be developing caselaw on the subject. Ms. Woelfling noted that appeals had recently been filed based on eNotices. Judge Mather felt that after some caselaw has developed, it might be prudent to request the Rules Committee to recommend rules addressing how the Department's new information systems provide notice.

The discussion then turned to the question of whether a third party appellant should be required to attach a copy of the action being appealed to his or her notice of appeal. As noted earlier, the Board's rule requires only a person who receives written notification to attach a copy of the action, but the Board's practice (until

November 2013) was to require all appellants to attach a copy of the action. The question is whether the Board should follow the language of Section 1021.51(d) of its rules or revise the rule to adopt its former practice of requiring all appellants to attach a copy of the action.

Judge Mather pointed out that Section 1021.52(a)(1) of the rules (Timeliness of appeal) includes the language "The person *to whom the action of the Department is directed or issued*…," whereas Section 1021.51(d) (Commencement, form and content of appeals) does not contain the language in italics. He suggested incorporating the language in italics into Section 1021.51(d). He stated that he understands the Department's viewpoint that by requiring an appellant to attach a copy of the action it is likely to improve the quality of the appeal, but felt that incorporating the language above was a way to clarify the rule. In other words, if an appellant is the recipient of the action, he or she must attach a copy of the action. If the appellant is not the recipient of the action, he or she does not have to attach a copy of it.

Mr. Whitaker expressed the opinion that this presented an approach similar to that set out by the Commonwealth Court in *Lower Allen Citizens Action Group, Inc. v. Commonwealth, Department of Environmental Resources*, 538 A.2d 130 (Pa. Commw. 1988). Judge Mather agreed, but stated that while *Lower Allen* referred only to notices that appear in the Pa Bulletin, there may be other types of

notices as well. Mr. Whitaker stated that he reads *Lower Paxton* as saying there are two types of notice: 1) notice the Department sends you or 2) the notice that appears in the Pa Bulletin, and, in the case of #2, even if someone finds out about an action before the notice appears in the Pa Bulletin, the clock does not start running until the notice appears in the Pa Bulletin.

Mr. Bohan asked what language the Board recommends adding to Section 1021.51(d). Judge Mather suggested revising Section 1021.51(d) to read as follows: "If the appellant *to whom the action is directed or issued* has received written notification of an action of the Department, a copy of the action shall be attached to the appeal." (proposed language in italics).

Mr. Bohan noted that up to November 2013, the Board had been requiring all appellants to provide a copy of the action being appealed and by ending that practice, it gives rise to the following problems: 1) it is more difficult to determine what is being appealed, and 2) there is a benefit to the appellant having a copy of the action being appealed when preparing the notice of appeal. With respect to problem #1, he feels the Board should maintain the requirement of having all appellants attach a copy of the action. If scanning and filing an action that is more than 10 pages is a concern, the Board could require that only the first and last 5 pages be attached. If the Board does not want to require all appellants to attach a copy of the action, he felt that the Board should still specify the information

required of the appellant in the notice of appeal. The problem with the latter, however, is that it assumes the appellant will know what information to provide. Mr. Bohan felt that the Department needed the following information in an appeal: 1) date of the action being appealed; 2) permit or license number where a permit or license is being appealed; 3) name of the official who took the action; 4) location of the action; 5) subject of the appeal.

Ms. Conner asked whether this information is contained in an eNotice. Mr. Bohan stated that some of the information may be contained in the eNotice, but not necessarily all of it. In that case, Ms. Conner asked where an appellant could obtain the information. Mr. Bohan stated that some information may be contained in the Pa Bulletin notice. However, it was pointed out that not all actions are published in the Pa Bulletin.

Ms. Conner pointed out that an appellant may already be scrambling to get his or her appeal filed within the very short 30 day appeal period, and requiring this additional information to be placed in the notice of appeal makes it even more difficult to file a timely appeal. She suggested allowing the appellant to obtain and produce the information after the filing of the appeal. She noted that if a Right to Know request is filed with the Department, it often takes at least 30 days to get the information requested. Mr. Bohan agreed that the notice of appeal could be filed without the information and then could be provided within the 20 day period in

which an appellant can amend his or her appeal as of right. If the information cannot be obtained within the 20 day period, the Board is likely to grant an extension to the appellant to amend his or her appeal at a later date.

Mr. Wein asked whether the Legislative Reference Bureau could provide a hyperlink to the action in the Pa Bulletin. This would not resolve the issue, however, since not all actions are published in the Pa Bulletin.

Judge Renwand asked why the Department could not obtain the information it needs through discovery. Mr. Bohan responded that it is not an efficient way to obtain the information, particularly when a pro se appellant is involved. Judge Renwand stated that the Board could order the appellant to provide the information if it is refused in discovery. Mr. Whitaker also felt this was not an efficient way of obtaining the information. Additionally, Mr. Bohan noted that, by requiring the Department to file a motion to compel the production of the information, it shifts the burden to the Department, when it is the appellant who should be providing the information. Mr. Bohan also pointed out that the reason the Board may not be aware of the problems of obtaining the information is because the Board only recently changed its practice of requiring a copy of the action with the appeal in the case of third party appeals.

Mr. Whitaker stated that the original reason put forth for not requiring a copy of the action to be attached to the notice of appeal was because the Board is

moving toward mandatory electronic filing and copies of actions may be cumbersome to include with an electronic filing. He felt that this was no longer the issue being put forth. In his opinion, the focus should be on what information is needed by the person who has to defend an appeal.

Judge Beckman stated that in his cases where there is confusion over what is being appealed on the face of the notice of appeal, he has issued an order requiring an appellant to clarify what is being appealed. In some cases where the appellant did not comply with the order, the appeal was dismissed. Judge Beckman would support a rule requiring an appellant to attach any document that he receives and, if it's a permit, attaching only the first few pages of the document. He felt any other information should be required only at the discretion of the Board.

Judge Renwand stated that he felt the Department has plenty of time to obtain the necessary information prior to the case getting to a hearing. He also pointed out that the Board has never required the Department or a permittee to respond to a notice of appeal. The argument could be made that without that information, the Board and the appellant don't know what the Department's or permittee's defenses are. He proposed requiring responses to notices of appeal. Mr. Wolford agreed with this suggestion, stating that if the Department feels it needs more information to understand what is being appealed, the appellant needs more information to understand the Department's defenses. Mr. Bohan pointed

out, however, that the Board has been requiring this information from appellants for the last 20 years, so it is not a new requirement.

Mr. Whitaker said that the list provided by the Department was not simply information that would be nice to have, but information that is needed. He asked what information is needed by a permittee. Ms. Woelfling responded that in a third party appeal, you know what is being challenged. The problem of what is being appealed pertains only in pro se appeals. She questioned whether the Board should adopt rules simply to address the issue of pro se appeals, or whether it might be better to allow the Board to deal with it on an individual basis. As Mr. Clark noted at the previous meeting, a disproportionate amount of the Rules Committee's time is spent trying to develop rules to deal with pro se situations. With regard to the issue at hand, Mr. Clark felt that it was not necessary to create a rule but felt it was best addressed on a case by case basis. He stated that if a trend were noted, then perhaps it should be addressed in a rule at that time.

It was agreed that the question of what constitutes "written notice" should be left to Board caselaw.

On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee agreed to Judge Beckman's proposed revision to Section 1021.51(d). The rule, as amended by Rules Package 106-10, currently reads as follows:

> (d) If the appellant has received written notification of an action of the Department, a copy of the action must be attached to the notice of appeal.

With Judge Beckman's proposed revision it will read as follows:

> (d) If the appellant has received written notification of an action of the Department, the appellant shall attach a copy of that notification and any documents received with the notification to the notice of appeal. If the documents include a permit, the appellant only needs to attach the first page of the permit.

All voted in favor of the new language.

Section 1021.103 (Subpoenas):

The Board's rule on subpoenas at Section 1021.103(a) currently reads in relevant part as follows:

> (a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas shall be governed by Pa. R.C.P. 234.1-234.4 and 234.6-234.9. . . .

Rules package 106-10 proposes to amend this section by adding references to Pa. R.C.P. 4009.21 through 4009.27, as follows:

> (a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas shall be governed by Pa. R.C.P. 234.1-234.4 [and]**,** 234.6-234.9 **and 4009.21-4009.27**. . . .

Citizens for Pennsylvania's Future (PennFuture) submitted comments to proposed Rules package 106-10, including the proposed revision to Section

1021.103. PennFuture commented that the proposed amendment would carry forward an unnecessary ambiguity that exists in the current version of section 1021.103: Although Section 1021.103 refers exclusively to "subpoenas," the Rules of Civil Procedure that it currently incorporates (and would continue to incorporate under the proposed amendment), Pa.R.C.P. 234.1—234.4 and 234.6—234.9, are not limited to subpoenas alone. They also cover "notices to attend" and "notices to produce." PennFuture felt that the Board should take advantage of the pending rulemaking to eliminate this ambiguity, and to do so in favor of authorizing the use of all of the mechanisms available under the Rules of Civil Procedure – subpoenas, notices to attend, and notices to produce. PennFuture recommended changing the title of the section to "Subpoenas, notices to attend, notices to produce," and including a reference to all three in the rule itself.

All of the comments to Rules package 106-10 were discussed by the Rules Committee and the Board on a conference call held on July 25, 2013. At that time, Mr. Hinerman raised a concern that that "notices to attend" under Pa.R.C.P. 234.1-234.4 and 234.6-234.9 apply only to officers and agents, not to employees. Therefore, he felt those rules would not apply to Department employees. He suggested it might be necessary to have a separate rule on notices to attend dealing with Department employees.

It was agreed, as a matter of policy, that the Committee should address Mr. Hinerman's comments before acting on the proposal suggested by PennFuture. That discussion took place at the March 13, 2014 meeting. Mr. Hinerman circulated copies of Goodrich-Amram's discussion of notices to attend. He noted that notices to attend apply to companies and officers but not to employees.

Ms. Woelfling stated that she understood PennFuture's comment as being much simpler, i.e., that since the rule already references the provisions of the Pa. Rules of Civil Procedure, shouldn't the title of the rule reflect it? Mr. Hinerman stated that since the discovery rules in question would not apply to Department employees, he felt that the revision proposed by PennFuture was not necessary.

Further discussed ensued. Ms. Woelfling moved to adopt PennFuture's recommendation. The motion was seconded by Mr. Wolford. A vote was taken and the motion was unanimously approved.

The changes approved to Section 1021.103 are as follows:

1) The title will change to "Subpoenas, notices to attend and notices to produce."

2) The language of subsection (a) shall be revised to read as follows:

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas **[and],** subpoenas**, notices to attend and notices to produce** shall be governed by Pa. R.C.P. 234.1-234.4 **[and],** 234.6-234.9 **and 4009.21-4009.27**. . . .

Adjournment:

On the motion of Mr. Whitaker, seconded by Ms. Conner, the meeting was adjourned at 12:00 p.m.

Next Meeting:

The next meeting is scheduled for Thursday, May 8, at 10:30 a.m.