

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of May 12, 2022

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference on May 12, 2022 at 10:00 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 and Diana Stares. Attending on behalf of the 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.

Rules Package 106-13:

Ms. Wesdock reported that Rules Package 106-13 has been delivered to IRRC and the legislative committees. The IRRC hearing is scheduled for June 16, 2022. Following IRRC approval, the rulemaking will be sent to the Attorney General's Office which has 30 days to review it. After that it will be published in the Pennsylvania Bulletin as final rulemaking.

Approval of Minutes:

On the motion of Mr. Clark, seconded by Ms. Mosites, the minutes of the March 23, 2022 meeting were approved. Mr. Clark and Mr. Wein expressed thanks for the minutes and stated that it is helpful to have a detailed history of the evolution of revisions to the Board's rules.

ESI Plan:

The Committee thanked Ms. Mosites for her efforts in developing a new model ESI Plan. A few minor corrections were recommended for paragraph 10(a)(v) (dealing with privilege logs): addition of a period and removal of "ESI" stated twice in the sentence. Mr. Wein also

recommended updating the date of revision stated on the document. Ms. Wesdock will send the model ESI Plan to Thomson Reuters, the Board's website contractor, for posting.

The Board noted that the renewal of its contract with Thomson Reuters goes through an annual review. Ms. Conner offered to assist with any security questions that might arise during the review process.

Ms. Mosites stated that she appreciates the Board's tweets announcing the issuance of Opinions and Adjudications. Ms. Wesdock suggested that the Board use Twitter to announce the posting of the new model ESI Plan.

Notice to Parties – Rule 1021.51

A number of changes to 25 Pa. Code § 1021.51 (Commencement, form and content of Notice of Appeal) were approved at the March 23, 2022 meeting. Other changes had also been proposed to § 1021.51, but it was not clear that all the changes had been voted on. Therefore, the Committee continued its discussion on this topic.

Ms. Stares raised a question regarding the proposed revision to the first sentence of § 1021.51(f)(1)(v): “**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).****” She asked whether it should refer to “(h)(2)-(4)” rather than simply “(h)(2)-(3).” Ms. Mosites pointed out that (h)(4) refers to potentially adversely affected parties “as ordered by the Board” which will occur after the filing of the notice of appeal. Therefore, at the time an appeal is filed, the appellant cannot provide notice to anyone who may ultimately fall under (h)(4).

Mr. Hinerman returned to an issue he had raised at the March 23, 2022 meeting regarding service of the notice of appeal on a permittee. Sections 1021.51(f)(1)(iv) and 1021.51(f)(2)(vi)(C)

require an appellant to serve the notice of appeal on the permittee either at the address listed in the Department action or “at the chief place of business in this Commonwealth” of the recipient. He felt that most third-party appellants were unlikely to know the chief place of business of the recipient in the Commonwealth. He suggested revising these sections as follows: “The service shall be made at the address in the document evidencing the action by the Department or **in accordance with the Pennsylvania Rules of Civil Procedure** ~~at the chief place of business in this Commonwealth of the recipient.~~” Mr. Clark was happy to report that he had no objection to Mr. Hinerman’s suggestion. On the motion of Mr. Hinerman, seconded by Mr. Clark, the Committee voted in favor of amending Sections 1021.51(f)(1)(iv) and 1021.51(f)(2)(vi)(C) as set forth above.

Mr. Delio reminded the Committee that a suggestion had been made to revise the Comment to 25 Pa. Code § 1021.81 (Intervention) as follows:

Comment: A ~~recipient of the action~~ **potentially adversely affected person**, as that term is defined in § 1021.51(h) (relating to commencement, form and content), who has been served with a notice of appeal, may automatically intervene in an appeal by simply filing an entry of appearance under § 1021.51(j).

On the motion of Ms. Mosites, seconded by Mr. Clark, the revision was approved.

Citation to EHB Cases:

Prior to the meeting, Ms. Wesdock circulated a draft of a proposed rule setting forth the proper format for citing Environmental Hearing Board decisions. Mr. Wein suggested revisions to the draft and his changes were circulated. Ms. Mosites recommended making the language of the proposed rule mandatory by changing “should” to “shall” in paragraphs (a) and (b).

Ms. Mosites also noted that at the last meeting she had asked whether it would be permissible to include a parallel citation (e.g. to Lexis or Westlaw) in addition to citing to the

Board's Reporters, and Judge Renwand had agreed with that suggestion. A discussion ensued as to whether to add the statement about parallel citations to the rule itself or to a comment. It was agreed that it should be included in a comment rather than in the rule itself. Mr. Hinerman raised a concern that by stating that parallel citations may be included, parties may think it is permissible to include only the parallel citation. The Committee debated the issue, and a majority of the Committee felt that it was appropriate to state in a comment that parallel citations were permissible.

Mr. Wein recommended including a statement in the rule regarding where the EHB Reporters could be found on the Board's website. Mr. Duncan raised a concern with including that information in the rule. He noted that the Board had reorganized its website a few years ago, and he pointed out that additional reorganization of the website could result in the rule containing incorrect information. Since it takes approximately two years to revise a rule, he was concerned that the rule could contain incorrect information for a lengthy period of time. Ms. Wesdock agreed that further reorganization of the website could occur as the Board moves toward a pa.gov domain. Mr. Hinerman suggested adding language to the comment notifying parties that the EHB Reporters are available electronically on the Board's website. Mr. Duncan agreed with notifying parties that the Reporters are on the Board's website but advised against directing parties to a specific tab on the website in case the information is relocated. He also advised against including the address of the Board's website in the rule or comment in the event that the website address changes. He recommended including this specific information in the Board's Practice and Procedure Manual, which can be easily updated under the Board's direction.

A discussion ensued regarding how long it takes to revise a comment to a rule. Ms. Wesdock stated that it is not necessary to go through the rulemaking process to revise a comment to a rule, but the timing of the revision depends on the Legislative Reference Bureau's publication

schedule. The change cannot be made instantaneously.

Mr. Wein recommended stating that slip opinions can be found on the Board's website. Judge Renwand cautioned that he does not want parties to cite to a slip opinion except for the current year's opinions where the Adjudication and Opinion volumes have not yet been published. Mr. Wein recommended adding "only" to the beginning of the sentence to indicate that slip opinions may only be cited when there is no Reporter citation available.

Mr. Duncan recommended the following revision:

Citations to Environmental Hearing Board decisions in briefs, legal memoranda, and other documents filed with the Board shall contain the names of the parties; **and** the year and page number of the Environmental Hearing Board Reporter (Opinion and Adjudication volumes) located on the Board's website.

The consensus of the Committee was to place the new rule under "General" at § 1021.5.

Mr. Wein suggested circulating the revised draft rule following the meeting. He recommended taking a vote on the language and, barring no objection upon reviewing the draft after the meeting, recommending it to the Board. On the motion of Ms. Stares, seconded by Ms. Mosites, the Committee voted to approve the following new rule on Citations to Board Decisions:¹

1021.5 Citations to Board Decisions

a. Citations to Environmental Hearing Board decisions in briefs, legal memoranda, and other documents filed with the Board shall contain the names of the parties and the year and page number of the Environmental Hearing Board Reporter (Opinion and Adjudication volumes) located on the Board's website. For example: *Name of Appellant v. DEP, 2021 EHB 43*. Pincites should be in the following format: *Name of Appellant v. DEP, 2021 EHB 43, 45*.

b. Only where the Environmental Hearing Board Reporter has not yet been published for a particular year, the citation shall be to the slip opinion which can be found at the Board's website, and includes the names of the parties, the docket number, the type of decision being issued (i.e., Adjudication or Opinion) and the date of issuance. For

¹ Mr. Hinerman left the meeting at 11:00 and did not participate in the vote.

example: *Name of Appellant v. DEP*, EHB Docket No. 2022-000-R (Opinion and Order on Motion to Dismiss issued January 1, 2022).

Comment: Parallel citations are permissible.

Rules Package 106-14:

Prior to the meeting, Ms. Wesdock circulated the rule revisions that had been approved by the Rules Committee since the last rules package. The new revisions will be compiled and submitted as proposed rulemaking in a new rules package (106-14). The revisions voted on at today's meeting will be included. Mr. Duncan noted a correction to the rules package.

Mr. Wein suggested including guidance on the Board's website regarding the proper citation to EHB decisions until such time as the rule becomes final.

Adjournment:

On the motion of Ms. Mosites, seconded by Mr. Duncan, the meeting adjourned at 11:06 a.m.

Next Meeting:

The next meeting of the Rules Committee is scheduled for July 14, 2022 at 10:00 a.m.²

²The July 14, 2022 meeting was canceled.