ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of July 8, 2021

Attendance:

The Environmental Hearing Board Rules Committee met by video conference on Thursday, July 8, 2021, at 10:00 a.m. Chairman Howard Wein presided. In attendance were the following members of the Committee: Vice Chair Phil Hinerman, Brian Clark, Gail Conner, Tom Duncan, Jean Mosites, Diana Stares and Matt Wolford. Attending on behalf of the Environmental Hearing Board (Board) were the following: Chief Judge and Chairman Tom Renwand, Judge Steve Beckman, Assistant Counsel Eric Delio, Board Secretary Christine Walker, Intern Megan Rulli, and Senior Counsel Maryanne Wesdock, who took the minutes.

Minutes of May 13, 2021 Meeting:

On the motion of Ms. Mosites, seconded by Mr. Wolford, the minutes of the May 13, 2021 meeting were approved.

Introduction of EHB Summer Intern:

Ms. Wesdock introduced the Environmental Hearing Board's Summer Intern, Megan Rulli. Ms. Rulli will be entering her third year of law school at Dickinson School of Law and is the recipient of the Pennsylvania Bar Association Environmental and Energy Law Section Summer Scholarship. She is working on the drafting of the Board's Citizens Guide, as well as a number of research projects.

Rules Package 106-13:

Ms. Wesdock reported that only one comment was received from IRRC on the Board's proposed rulemaking #106-13. No comments were received from the Legislature or the public. IRRC's comment pertained to the proposed comment to Rule 1021.32 (Filing) notifying efiling

registrants that if their registration is received during non-business hours, they will be unable to efile until the registration is accepted on the next business day. IRRC questioned why this language was placed in a comment rather than in the rule itself.

The Board prepared a response stating that the information was merely intended to be advisory, not mandatory. On the motion of Mr. Clark, seconded by Mr. Hinerman, the Board's response to IRRC was approved. Mr. Wein suggested including a similar notice in the Notice of Appeal form.

The next step in the rulemaking process is to submit the final rulemaking package, first to the Office of General Counsel (OGC), Governor's Policy Office and Governor's Budget Office for review, and then to IRRC and the legislative committees and, finally, to the Office of Attorney General. Ms. Wesdock expects completion of the final rulemaking process by the end of the year, depending on the length of the review by OGC.

Discovery of Electronically Stored Information (ESI):

During the discussion on ESI discovery at the May 13, 2021, Ms. Mosites posed a question to Ms. Stares regarding the Department's handling of ESI discovery. At the July 8, 2021 meeting, Ms. Mosites stated that the issue she raised had been partially resolved by the Board's revision to Prehearing Order No. 1.

Ms. Mosites clarified that her question is the following: Under what circumstances will the Department agree that ESI discovery is not necessary? Ms. Stares will look into this matter and report on it at the September meeting.

Amendment of Internal Operating Procedures:

At a previous meeting, there was discussion regarding amending the Board's Internal Operating Procedures to require full Board review of the following types of single-judge opinions:

denials of summary judgment motions and decisions on supersedeas petitions. This topic was tabled until the September meeting.

Ensuring Appropriate Notice and Participation in Appeals:

This issue is a continuation of a discussion from the March 11, 2021 Rules Committee meeting. Mr. Wolford explained that the topic involves two issues: 1) ensuring that entities who may be affected by the outcome of an appeal before the Board receive notice of the appeal and 2) ensuring that entities who should be part of the appeal are brought into the case (or, at a minimum, given notice of their right to participate).

Mr. Wolford provided an example: His client is one of several municipalities that utilize a common sewage treatment facility. His client is not the host municipality that owns and operates the plant. The host municipality sets the fee structure. Due to rising fees, his client submitted an Act 537 Plan to the Department of Environmental Protection (Department) so that it could build its own sewage treatment plant and disconnect from the common facility. The plan submission was denied, and his client appealed the denial to the Board. Based on the Board's regulations and notice of appeal form, he was not required to notify the host municipality of the appeal, even though a ruling by the Board sustaining the appeal could impact the host municipality.

He stated that notice to the host municipality and the opportunity to participate in the appeal before the Board was critical based on the reasoning set forth in a decision handed down by the Superior Court in *Grow v. Ohio Kentucky Oil Corp.*, 2014 Pa. Super. Unpub. LEXIS 935 (Pa. Super. Feb. 26, 2014). The case involved the payment of oil and gas royalties. A person who was owed gas royalties was not a party to the case. There was no question that he was owed the royalties or the amount; the only issue was who was required to pay the royalties. In an Opinion by Judge Wecht, the court held that the person owed the royalties should have been a party to the

case and, by virtue of the fact that he was not a party to the case, it deprived the court of subject matter jurisdiction. Judge Wecht remanded the matter to the trial court to dismiss the action unless the necessary party was added. Mr. Wolford pointed out that all the time and resources spent on the litigation to that point was wasted.

Judge Renwand shared Mr. Wolford's concern. He pointed to the Commonwealth Court's decision in *Schneiderwind v. Department of Environmental Protection*, 867 A.2d 724 (Pa. Cmwlth. 2005), which involved a Department determination that a landowner's water loss was not caused by a quarry operator. The landowner appealed, and the quarry operator chose not to participate in the appeal. The Board ruled in favor of the landowner, and the quarry operator took an appeal to the Commonwealth Court. Despite the fact that the quarry operator was encouraged by the Board to take part in the appeal, and, in fact, sat through the entire hearing with counsel, the Board was chastised by the Commonwealth Court for the failure to include the quarry operator as a necessary party in the appeal. Judge Renwand felt that the *Schneiderwind* case demonstrates why the Board needs a mechanism for including parties whose rights may be affected by an appeal. He stated that the Board does not want to hold a hearing at great cost to the parties only to have it reversed on appeal, not on the merits but because an entity deemed necessary by the Commonwealth Court was not a party to the appeal.

He explained that the Board has tried to overcome the *Schneiderwind* problem by encouraging intervention by necessary parties. However, Mr. Wolford stated that intervention in an appeal may not be enough. He cited the case of *Forest Service Employees for Environmental Ethics v. United States Forest Service*, 2009 U.S. Dist. LEXIS 40055 (W.D. Pa. May 12, 2009), that stated that intervenors do not have the full rights of the parties to an action.

Ms. Stares stated that it was important to keep in mind that the Board is a statutorily created administrative tribunal, not a court, and in her opinion any rule change that broadens the Board's authority runs contrary to the Environmental Hearing Board Act. She felt that the cases discussed by Mr. Wolford did not affect the Board since they pertain to courts, not administrative tribunals. She also raised a concern that actions taken by the Department may affect multiple entities, and she did not feel that all of those entities should be made parties to the Board action. Nonetheless, she recognized that the *Schneiderwind* decision creates issues for the Board.

Mr. Wolford acknowledged Ms. Stares' concerns but felt that the reasoning in *Grow* applied by Judge Wecht, who now sits on the Pennsylvania Supreme Court, could be applied to administrative tribunals, in particular the holding that the failure to include all necessary parties deprives a tribunal of subject matter jurisdiction. Mr. Wolford acknowledged that there is nothing in the Environmental Hearing Board Act that speaks to this issue. However, he noted that there is case law that discusses the Board's powers. In *Consol Pennsylvania Coal Co. v. Department of Environmental Protection,* 129 A.3d 28 (Pa. Cmwlth. 2015), the Commonwealth Court stated as follows: "The Environmental Hearing Board is authorized only to exercise the powers which have been expressly conferred upon it by statute or provided by necessary implication." In Mr. Wolford's opinion, if the Board lacks subject matter jurisdiction to decide an appeal in the absence of a necessary or indispensable party, it has the implied authority to order participation.

Mr. Wein agreed. He stated that unless *Schneiderwind* is reversed or given another look by the courts, the Board is bound to follow it, and the Rules Committee is tasked with developing regulations to assist the Board in doing so. Judge Renwand agreed. He pointed out that the entities that need to be included in an appeal are, in fact, before the Department during the administrative process leading up to the Department's action. For example, they submit comments and participate

in public hearings. If the Department adopts their position, they take a backseat if the action is appealed. If the Board reverses the Department's action, then these entities become engaged and take an appeal to Commonwealth Court. He agreed, however, that perhaps it is sufficient simply to give these entities notice about the appeal before the Board and allow them to make their own decision on whether to participate.

Ms. Stares stated that even if all the necessary parties are not included in a case, it does not prevent the Board from going forward. She noted that a wide variety of people and organizations may be impacted by a Department action, but they should not all be brought into an appeal of that action. She felt that notice to necessary parties was sufficient until the Commonwealth Court states otherwise. However, Mr. Wein pointed out that the Board may not be aware of all the necessary parties; the appellant may be better aware of them than the Board.

Mr. Wolford stated that there is a difference between the terms "potentially interested party" and "necessary party." The latter is defined by caselaw. An example of a "necessary party" is someone who will be financially impacted by the decision. In the case of a "necessary party," the case law is clear that they must participate in the action. Mr. Hinerman pointed out that under federal law, there is a distinction between "indispensable party" and "necessary party." In the case of the former, the matter cannot be litigated without the presence of that party, whereas a "necessary party" is someone who is interested, but the matter may proceed without them. Mr. Hinerman recommended drafting a rule that allows the Board to make a determination that someone is an indispensable party. Mr. Wolford stated that he thought this area of the law may have changed and referred to Pa.R.C.P. 1032(b), which discusses "indispensable party."

Ms. Mosites asked whether Mr. Wolford, Mr. Wein or the Board had developed a mechanism for identifying who is a "necessary party." Mr. Wolford stated that he did not believe

it was necessary for the Rules Committee to develop a mechanism; in his opinion, the rules simply need to clarify that the Board has the authority to do so.

Mr. Wein suggested revising the Board's notice of appeal form to include a section in which the appellant can alert the Board that an entity may be a necessary party to the case. He felt that the best person to identify necessary parties was the person challenging the action.

Ms. Stares disagreed with using the term "necessary party." She noted that the EHB Act discusses a "party aggrieved by an action." In many actions taken by the Department, nearby homeowners might be deemed a "necessary party," but she felt they should not be required to be a party to the appeal. She noted that when Department actions are appealed, they are not final until adjudicated by the Board. Her concern is that the Board and parties may get mired in the task of deciding who is a "necessary party" and delay getting to the final adjudication of the matter. Ms. Wesdock recognized the concerns stated by Ms. Stares but felt that "party aggrieved by an action" could be interpreted more broadly than "necessary party."

Mr. Clark provided an historical perspective on the language of the EHB Act. As a drafter of the Act, he was familiar with why certain language was chosen or not included. He stated that the issue of the Board's authority, and the determination of who should be a party to an action before the Board, was discussed during the drafting of the Act. He noted that the Department took the same position then as now, i.e., that the statute should not be worded in such a way as to broaden the Board's authority. He stated that the initial drafting of the EHB Act included language that was much broader than "aggrieved party," but it was revised due to the Department's opposition. The Department took the position that the Board action should not include multiple parties, but only those parties "aggrieved by the action." Mr. Clark felt that if the Commonwealth

Court were to issue another opinion along the lines of *Schneiderwind,* the solution might require a revision to the statute.

Mr. Wolford expressed the opinion that if the Board does not implement a rule change, it is likely to get chastised again as it did in *Schneiderwind*. He felt that it was important to adopt a rule change that clarifies that the Board has the authority to bring necessary parties into an appeal. Ms. Stares reiterated her position that any rule change should not use the term "necessary party." She recommended using "party aggrieved by the action." Mr. Hinerman pointed out that the determination of who is "aggrieved" is dependent on the outcome of the appeal. Mr. Wolford felt it was important to use the language of the case law, which meant using either "necessary party" or "indispensable party." Moreover, in his opinion, the "aggrieved party" language in the statute was likely intended to address who has standing to appeal, not who must participate to ensure subject matter jurisdiction.

Ms. Wesdock felt that any rule change should use the language set forth in *Schneiderwind*. She explained that it is difficult to define who is a necessary or indispensable party, but the Board knows it when it sees it. For example, the quarry operator in the *Schneiderwind* case was clearly a necessary or indispensable party. Mr. Wein pointed out that *Schneiderwind* uses the terms "essential" and "due process." Ms. Wesdock felt that the Committee could craft a rule that meets the requirements of *Schneiderwind.*

Mr. Duncan suggested that one way to deal with the *Schneiderwind* problem would be for the Board to issue an order to an entity that it determines to be essential to the action, notifying it that it is a party to the action. For example, in a case similar to *Schneiderwind*, the order would be sent to the owner/operator of the facility notifying it that it is a party to the appeal. Mr. Wein agreed.

Mr. Wolford stated that his example case is likely to be settled, but if it is not amicably resolved it will be *Schneiderwind* all over again. Mr. Wein suggested providing notice to the "necessary party" and if they fail to exercise their right to due process, it's their choice. However, Ms. Wesdock felt that if the Board were to notify someone that failure to participate in an appeal could negate their appeal rights, it would lead to another harsh decision by the Commonwealth Court. Mr. Hinerman disagreed. He felt that all *Schneiderwind* required was for the Board to provide the right of due process to an affected entity. He felt that the right of due process was satisfied by the Board simply providing notice. He suggested that the Board's notice of appeal form contain a section where the appellant could list "other interested party." Ms. Wesdock noted that Rule 1021.51(h)(4) lists "other interested party" but it was not listed on the notice of appeal form.

Board Rule 1021.51(h)(2)-(4) lists a number of entities that may be aggrieved by an appeal of a Department action, and (j) allows them to intervene by simply filing a notice of appearance. Based on the *Forest Service Employees* decision referenced earlier by Mr. Wolford, Mr. Wein felt it was important to make it clear that the Board has the power to bring those entities into the case as intervenors with the same rights as a party.

Mr. Wolford reiterated his belief that simply providing "necessary parties" with notice of the right to intervene would not survive the holding of the *Grow* decision since it goes to subject matter jurisdiction. Ms. Wesdock agreed. However, Mr. Wein agreed with Ms. Stares' earlier statement that the *Grow* holding regarding subject matter jurisdiction may not be applicable to an administrative tribunal which has a more limited role.

Ms. Stares stated that the sewage treatment case discussed by Mr. Wolford involved a number of issues, many of which should not be in front of the Board, and she expressed a concern

that those issues might get intermingled in the appeal before the Board. Mr. Wolford agreed but pointed out that one of the reasons his client's Act 537 Plan was denied was because the host municipality stated it would lose money. Even though financial or contractual decisions are not normally part of the Board's jurisdiction, in that case they were part of the Department's decision. Mr. Wein agreed with Mr. Wolford and referenced another case in which the Department's decision was influenced by whether it would bankrupt the host municipality. Ms. Stares agreed that if financial issues were part of the Department's decision-making then they would properly be part of an appeal before the Board. However, she emphasized that cases may involve a number of issues that should not be part of the appeal before the Board, and she was concerned that if the Board started adding parties to its appeals those issues might improperly become part of the appeal. She agreed that there should be a mechanism for the Board to bring in parties that are necessary to an action, such as permit holders.

Ms. Mosites asked how often this issue arises before the Board. Ms. Wesdock said that it does not happen often, perhaps a few times a year, but when it does occur, the Board is placed in a difficult position on how to proceed, in light of *Schneiderwind*.[1] In those cases, Judge Beckman and Judge Renwand send a letter to the "necessary party" advising it that an appeal has been filed that may impact its rights and it may intervene in the case pursuant to 25 Pa. Code § 1021.51(h) and (j). In about half the cases, the entity intervenes. Mr. Delio reported that Judges Labuskes and Coleman do not send a notification letter. They add the entity to the caption of the appeal and

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[1] Following the meeting, Judge Beckman stated that he receives 1-2 cases a year in which the question of bringing in a "necessary party" arises. Ms. Wesdock stated that the same is true of cases before Judge Renwand. The issue of "necessary parties" appears to arise most frequently in mining cases involving an appeal by a landowner where the Department has made a determination affecting the landowner's rights in relation to mining conducted in the area (such as the *Schneiderwind* case).

serve them with all of the filings in the case. If they do not have an attorney enter an appearance on their behalf, the Board serves them with the filings by mail.

Mr. Wein suggested adding "holder of a permit," in addition to "recipient of a permit," to Rule 1021.51(h)(1). He noted that subsection (j) allows all other affected entities (i.e., those listed in (h)(2) through (h)(4)) to intervene as of right. However, he cautioned that the language may need to be modified to ensure that intervenors have the same rights as a party, in order to avoid the problem that occurred in *Forest Service Employees*. Mr. Wolford suggested revising subsection (h)(2) to "any potentially affected municipality." Mr. Wein suggested deleting subsection (j) or revising it to clarify that the role of the entities listed in (h)(2) through (h)(4) is more than that of intervenor.

Mr. Duncan noted that under the Pa. Rules of Civil Procedure, the rights of an intervenor are the same as the other parties in the case, whereas the Board's rules limit the rights of intervenors. Judge Renwand stated that an intervenor's rights depend on when they come into the case. For example, if they come into the case shortly before the hearing, their intervention cannot expand the appeal or affect already-established deadlines. Additionally, if they should have appealed the action but missed the deadline, as an intervenor they cannot add new issues to the appeal. Judge Renwand agreed that the rule on intervention could be tweaked in order to address the problem raised by Mr. Duncan and Mr. Wein.

Mr. Wolford pointed out that the status of "recipient of the action," as set forth in Board Rule 1021.51(f)(2)(vi)(c), only gets triggered in third-party appeals. In the sewage treatment case referenced earlier, his client was not a third-party appellant, but a direct appellant. Under the current language of Rule 1021.51(f)(2)(vi)(c), the host municipality could not enter the case as a "recipient of the action." Nor did the language of the rule require him to put the host municipality

on notice of the appeal. Therefore, he recommended revising the language of this rule. He recommended a reference to 2 Pa.C.S. § 504 (the Administrative Procedure Act) cited in footnote 3 of the *Schneiderwind* opinion. Ms. Wesdock suggested allowing the entities listed in Board Rule 1021.51(h)(2) through (h)(4) to come in as parties. Mr. Wolford did not feel that the Board needed to go that far (in deference to the Department's position) but suggested tweaking the language. He felt that intervention should not be limited to third-party appeals.

Ms. Wesdock recommended appointing a subcommittee to look at EHB Rule 1021.51, the issue of notice and *Schneiderwind*, and develop modifications to Rule 1021.51 or a new rule. Mr. Wolford also felt that the subcommittee should revise the Board's notice of appeal form since he does not believe that the notice of appeal form conforms to the requirements of 25 Pa. Code § 1021.51(h). Ms. Wesdock stated that the Board's summer intern, Megan Rulli, was working on that issue and had recommended some changes to the notice of appeal form.

Mr. Wein agreed with the creation of a subcommittee and noted that it needed to be mindful of Ms. Stares' comments about not expanding the number of parties or issues beyond what should properly be before the Board. Mr. Delio agreed and noted that in some pro se appeals, the appellant serves a host of people, including the Governor and the Attorney General. He cautioned that the decision of who becomes a party to the appeal should not simply be based on who is served a copy of the appeal by the appellant. Mr. Clark agreed with the caution stated by Mr. Delio. He also noted that the Board's rules cannot address all situations that may come before the Board, especially those that may be rare. Mr. Wolford and Mr. Wein agreed that the appellant's service list should not provide the only basis for determining who becomes a party to the appeal. Mr. Wein stated that the appellant should simply advise the Board of entities that could be affected by

the outcome of the appeal and leave it to the Board's discretion as to whether they should become parties to the action.

The subcommittee to review and revise the language of Board Rule 1021.51 and the notice of appeal form will consist of Mr. Wein, Mr. Wolford, Mr. Delio and Ms. Wesdock.

Sanctions:

Prior to the meeting, Mr. Wein provided a copy of the following: Board Rules 1021.161 (sanctions) and 1021.31 (signing), Pa.R.C.P. 4019, and an article regarding Fed. R.C.P. 11 and the comparable state rule. He pointed out that the language of Board Rule 1021.161 appears to limit its application to discovery violations. In his opinion, the rule does not appear to address incorrect statements made in filings where a party has not done its due diligence.

Mr. Wolford recommended placing a period after "sanctions" in Rule 1021.161 and not referencing the discovery rules. In the alternative, he suggested adding "or other appropriate sanctions." Mr. Duncan noted that Fed. R.C.P. 11 allows the awarding of attorney fees. The Board's rule does not appear to allow the awarding of attorney fees as a sanction. However, many of the statutes involved in cases before the Board contain their own attorney fees provisions. Mr. Duncan noted that both the Board and the Commonwealth Court have weighed in on awarding attorney fees based on bad faith. However, in the case of the Board, the awarding of attorney fees is based on the violation of a statute, not simply on common law standards of bad faith.

Ms. Conner stated that she would like more time to review the materials in order to determine how a rule change might affect pro se appellants who may include an incorrect statement in a filing, not due to bad faith, but simply due to inexperience and lack of knowledge. She noted that pro se appellants do not have the resources of a large law firm or the Department and may have to rely on the best information they can obtain. She also noted that the timeframe for filing

an appeal with the Board is quite short, and pro se appellants may have a difficult time reviewing all the necessary information before the filing deadline. Mr. Wein felt that the development of a Citizens Guide by the Board will be helpful in this situation. He also noted that since there is an automatic right to amend one's appeal within 20 days after its filing, the timeframe for reviewing material is essentially 50 days, rather than 30.

Mr. Wolford noted that the Board's rule contains no reference to financial sanctions. He felt there should be monetary sanctions for acts of bad faith. He clarified that he was not referring to an award of attorney fees but, rather, monetary sanctions. Mr. Wein questioned where such funds would be deposited. Mr. Delio noted that Board Rule 1021.61(e)[2] allows the Board to impose sanctions for frivolous grounds. Mr. Wein recommended inserting similar language in Rule 1021.161.

Next Meeting:

The next meeting of the Board will be held on Thursday, September 9, 2021, at 10:00 a.m. The agenda will include the following: 1) Department handling of ESI discovery; 2) amendment of Internal Operating Procedures to require full Board review of certain one-judge decisions; 3) continuation of the discussion regarding notice and essential parties and a report by the subcommittee; and 4) sanctions.

Adjournment:

On the motion of Mr. Wolford, seconded by Mr. Conner, the meeting was adjourned at 11:56 a.m.

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[2] An earlier version of the minutes incorrectly referred to the rule as 1021.161(c).