ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of March 14, 2024

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference on March 14, 2024. Committee Chairman Howard Wein presided. The following Rules Committee members were in attendance: Phil Hinerman, Tom Duncan, Matt Wolford, Jean Mosites, Dawn Herb and Doug Moorhead. Attending on behalf of the Environmental Hearing Board were Judges Bernie Labuskes and Maryanne Wesdock; Assistant Counsel Alisha Hilfinger, who took the minutes, and Maggie White; and Board Secretary Christine Walker.

Minutes of November 9, 2023 and January 11, 2024 Meetings:

On the motion of Ms. Herb, seconded by Ms. Mosites, the minutes of the November 9, 2023 and January 11, 2024 meetings were approved.

Recognition of Brian Clark and Judge Tom Renwand at ELF

Judge Wesdock recounted that at the previous Rules Committee meeting, there was discussion regarding the recognition of Brian Clark, the longest serving Rules Committee member, and of former Chief Judge and Chairman, Thomas Renwand. Judge Wesdock explained that she and Mr. Wein identified a Pittsburgh business that specialized in recognition gifts and decided to purchase engraved clocks for Mr. Clark and Judge Renwand in honor of their services. Judge Wesdock circulated the language to be engraved on the clocks to the Committee Members for feedback. The total of the two clocks would be approximately $300 and those in attendance could offer a donation towards the gifts. Judge Wesdock mentioned that at the last meeting, a bottle of wine was suggested for Mr. Clark and that Judge Clark had offered to select it. Judge Wesdock stated that it was her hope to present Mr. Clark with his recognition gift at the Environmental Law

Forum dinner. The Rules Committee members approved of the gifts and the proposed language to be included on the clocks.

Rules Package – Question from IRRC Commissioner and proposed response

An IRRC Commissioner presented the following question regarding the revision to 25 Pa. Code Section 1021.51(h)(4) (relating to commencement, form and content):

> Since the language has been broadened to "interested person," how would an interested person go about joining an appeal? In other words, if a person heard about an appeal and was interested, but hadn't been notified, how would the person alert the Board that he or she is an "interested person?"

Judge Wesdock circulated the Commissioner's question to the Committee Members along with a draft response. Judge Wesdock will present the Rules Package to IRRC next week and will send a written response in advance of the meeting with IRRC. A draft of the proposed response to IRRC is attached as Addendum A to the minutes. Judge Labuskes voiced his agreement with the proposed response. Ms. Mosites moved to approve the draft response to IRRC's question and Mr. Duncan seconded the motion. All were in favor.

Expert discovery and expert reports:

During the January 11, 2024 meeting, Mr. Moorhead moved to table a discussion pertaining to expert discovery, including proposed edits that he and Mr. Wein made to Rule 1021.101 and Rule 1021.102 until the present meeting. Mr. Hinerman provided three cases that were circulated to the Committee which he researched for the purpose of seeking instruction as to how courts treat an individual that is both a fact and expert witness during depositions. Mr. Hinerman sought this guidance because the Department often designates the individuals who conduct the investigations that underlie the basis for an appeal with the EHB as its expert witnesses. While Mr. Hinerman stated that he could not find caselaw that was squarely on point

with this issue, the most instructive case involved a medical malpractice case. Because this case involved a doctor involving issues of both fact and expert testimony, Mr. Hinerman stated that it was instructive on the issue as to whether Department employees who are designated as experts but who also possess relevant facts to the case, should be kept from being deposed. Mr. Hinerman felt the medical malpractice case informed the situation of when a witness has both fact and expert testimony, during the deposition of such a witness, the deposing attorney must parse out the difference between what questions go to the facts and what questions go to the expert opinions developed in anticipation of litigation. Mr. Hinerman explained that expert opinions are developed in anticipation of litigation and felt that when the Department conducts investigations, the investigations are not done in anticipation of litigation but rather to discern whether there is an environmental violation.

Mr. Moorhead stated that it can be difficult to determine which Department actions are done in the anticipation of litigation and that most Department attorneys would likely take the position that every inspection is in anticipation of litigation because every enforcement action has the potential to be appealed. Mr. Moorhead noted that the summary Mr. Hinerman provided of the cases highlighted the importance of the initial interrogatory process and that the Department has been working at identifying its experts early on in proceedings as it is critical to define the potential testimony that could be presented at a hearing.

Mr. Hinerman stated that it is difficult to find good caselaw on this situation because such issues are usually resolved prior to trial and therefore there are few opinions addressing the issue. Mr. Hinerman emphasized the importance of turning to the language of the rule that states that "expert opinion is developed in anticipation of litigation" and believed that when the Department investigates it is not to anticipate litigation but instead it investigates to discern whether a violation

has occurred. Mr. Hinerman described a hypothetical where someone is investigating whether wetlands are present through tests and utilizing checklists. He believed that such an investigation is not done in anticipation of litigation but for the purposes of determining whether wetlands are present and if there has been a violation.

When looking at the amount of publications on the PA Bulletin, Mr. Wein estimated that only a small percentage of Department actions are ultimately appealed to the EHB. Mr. Wein stated that the role of the Department's technical personnel is to evaluate facts in order to determine whether laws and regulations are being complied with or violated and whether to take enforcement actions. He believed that those actions and decisions made by the technical staff are not done "per se" in the anticipation of litigation.

Mr. Moorhead agreed that most Department actions are not appealed but disagreed that the testimony of technical staff does not qualify as expert testimony. Mr. Moorhead mentioned at a past meeting there was some discussion as to whether the Department could have designated experts for particular subject matters. Mr. Moorhead felt having someone, such as a program manager, as the Department's designated expert had the potential to prevent the Department from calling the best expert in a given case. Mr. Moorhead explained that the proposed changes to the rule were meant to clarify the rule for parties and that the changes were not intended to alter practice. Mr. Hinerman said that the logical extension of the Department designating the investigating personnel as experts is that the Department could prevent those people from being deposed about their investigation, and furthermore, the same rule that applies to the Department could also apply to the Appellants.

Ms. Herb felt like the proposed edits to the rules helped to clarify the sequence of discovering information from experts. She said that the rule should not be interpreted in a totalistic

manner and that the rule does not provide that parties cannot explore facts of certain witnesses if those witnesses were designated experts. Ms. Herb stressed the importance of identifying experts early and that after an opposing party receives the expert report or interrogatories, it should then be able to understand the opinion testimony that will be offered by a particular expert, which assists the party in identifying the areas that it seeks to explore via deposition of the expert.

Mr. Hinerman recalled that at a past meeting there was discussion that the rule was an "all or nothing" and that he was concerned how it may appear to an appellant if they are not permitted to depose a Department employee who was involved in the investigation because the Department designated the employee as an expert. Ms. Herb stated that the process that the rule provides for is first the receipt of an expert report/interrogatories that aids in the understanding of the experts opinion and the testimony that will likely be offered and that the next step allows for the opposing-party to request permission to explore an expert's factual testimony. Ms. Mosites felt that it was more than a sequencing issue as this process could delay the opportunity to depose a witness who is a combination of fact and expert and that it would be more efficient to allow for a deposition of that person as it related to the facts of the case earlier on in the process.

Mr. Wein asked Ms. Mosites if she had spoken to her colleagues about the proposed change to Rule 1021.102 and Rule 1021.101. Ms. Mosites said that she had spoken with several practitioners who regularly appear before the EHB. These practitioners did not see a need for the change because rule 1021.102(d) already provides for a process to address discovery disputes. Her colleagues did not feel that the changes advanced the clarity or the efficiency of the rule but she recognized that at times there is a delay in expert identification and that timing issues may need considered.

Judge Labuskes also did not feel that changes to the rule were necessary as Pa.R.C.P. 4003.5(a)(1) already provides for the process. Judge Wesdock pointed out that IRCC will often ask why a rule in the EHB's Rules of Practice and Procedure will only cite a Pennsylvania Rule of Civil Procedure as opposed to including the language itself.

Mr. Wein recalled that Judge Labuskes did not believe the rules should compel a conference with the EHB which was a procedure that was added in the proposed change. Mr. Wein explained that he and Mr. Moorhead thought that compelling a conference would help to expedite the discovery process and would save the parties resources and time in trying to decide the type of information they are seeking. Mr. Moorhead agreed that the main purpose of compelling a conference was to help streamline the process of these disputes.

Mr. Wein stated that he and Judge Wesdock believed this would be a good issue to raise at the Environmental Law Forum and that it would be helpful to receive feedback from practitioners other than the EHB judges and the Rules Committee members. Mr. Wein also thought that raising this topic at ELF was positive for transparency sake and could show others who practice before the EHB one of the main issues the Committee is currently grappling with.

Ms. Mosites stated that it was a good idea to get more input but that she would not be able to attend the EHB Roundtable at ELF because she would be a panelist at the Oil and Gas Law Update which is occurring at the same time as the Roundtable. Mr. Wolford also agreed that it was a good idea to bring this discussion to ELF.

Judge Wesdock included the topic of expert discovery in the summary of what the Roundtable would discuss and also included the proposed rule changes in the materials. She offered to post a notice on the PBA Environmental and Energy Law Section's listserv in advance of ELF indicating that the Roundtable would discuss those particular changes and to encourage

people to look the changes over in advance to provide comments at the session. Mr. Wein suggested that the statement should also encourage those who are not able to attend the roundtable but still wish to provide feedback on the proposed changes, to direct those comments to him.

Judge Wesdock advised that the committee should refrain from making a final decision until all of the comments from other practitioners at ELF are heard and also hoped that Ms. Herb and Ms. Moorhead could explain at the session why they were proposing the changes to the rules. Ms. Herb agreed it was good to have the conversation at ELF, even if the discussion did not result in a rule change, as it would allow for transparency and the exchange of knowledge and ideas, all of which are valuable.

Mr. Hinerman recommended that the ELF discussion should also include the topic of timing of expert reports. He recalled that recently he had been asked where in the EHB's scheduling order were expert reports due and Mr. Hinerman relayed that submitting expert reports is part of the discovery period**.** Mr. Wein felt that the timing of expert reports was an important topic of discussion and posed the question that if someone does not know what the facts are, how are they supposed to know what sort of expert they will need? Mr. Moorhead explained that when the Department thinks a case will involve expert testimony, it is its practice to reach out to opposing counsel to agree on a schedule.

Judge Wesdock provided the background behind the current version of Rule 1021.101 and recalled when she first came to the Board there was a bifurcated discovery process. There was a push for a single discovery period and in response the rule was revised in the early 2000's to allow both fact and expert discovery to occur simultaneously.[1] She has observed that in recent years, there is a renewed interest in bifurcated discovery. Judge Wesdock has seen cases where attorneys

[1] For a discussion of the history behind the rule change ending bifurcation of discovery, see the Rules Committee minutes beginning with the meeting of January 13, 2000.

will propose a case management schedule that includes separate deadlines for fact and expert discovery. She noted that past Rules Committee minutes provide a detailed discussion as to why the EHB did away with the bifurcated discovery.

Mr. Wein suggested that if the time for filing expert reports would be a topic at ELF, then background materials should be provided.[2] Mr. Wein stated that the EHB has recognized in numerous opinions over the years that it is difficult for an appellant to prevail when they do not have experts. Ms. Herb noted that aside from open burning cases, there are very few cases where experts are not needed. Judge Wesdock pointed out that there was no expert testimony at Judge Bruder's recent hearing but agreed that was a rare occurrence. Mr. Hinerman remarked that one of the goals of the Committee is to reconcile the differing standpoints into one rule that works for everyone. He emphasized that it would be in everyone's best interest to avoid a situation where an expert report has been written before depositions were completed and, therefore, deprived that expert of certain facts when they wrote their report.

Revisions to Rule 1021.94 re: filing a supporting memorandum

Judge Wesdock recounted that several meetings ago the Committee made changes to the rule on motions for summary judgment to address the issue that can arise when, in a third-party appeal, a party files a memorandum in support of another party's motion. The change was made to differentiate between situations where a party simply files a letter in support of a summary judgment motion as opposed to when a party files an actual memorandum of law in support. Mr. Delio noticed that the same situation arises for the other types of dispositive motions and he proposed making those same changes to Rule 1021.94 that were made to the rule on summary judgment. Additionally, Judge Wesdock explained that she changed the title of the rule after Mr.

[2] The EHB Roundtable did not include a discussion regarding bifurcation of discovery due to a lack of time.

Wolford explained at the last meeting that the title of the rule caused some confusion amongst practitioners. The Rules of Practice and Procedure currently include one rule that addresses summary judgment motions and another rule that provides for dispositive motions.

Mr. Duncan recommended striking the word "to" prior to "specific pages" in Rule 1021.94a(g)(3).

In 1021.94(b)(1) Mr. Duncan suggested replacing the word "supporting" with the phrase "in support of" explaining that the word "supporting" implies that a party filing a letter should add more to the motion which is not the purpose of filing a letter. Judge Wesdock agreed with the change remarking that the change helps to clarify the purpose of the rule.

Mr. Duncan pointed out that a dispositive motion often sets forth various arguments in an effort to dispose multiple claims and that a party who files a letter in support of the motion may only wish to support a portion of the moving party's arguments. He proposed changing the language to "in support of all or a portion of the motion and or agreeing with all or a portion of the relief." Ms. Mosites stated she thought Mr. Duncan's language would be very helpful in clarifying the rule. Mr. Duncan also suggested that his proposed changes could be carried over to Rule 1021.94a(f) for parties that wish to support a summary judgment motion. Mr. Duncan moved to approve his changes and Ms. Mosites seconded the motion. All were in favor. The revisions to Rules 1021.94 and 1021.94a, as approved at the meeting, are shown in Addendum B.

Rules Committee Vacancy

In light of Mr. Clark's retirement, there is a vacancy on the Rules Committee. The appointing authority for this position is Senate President Pro Tempore Kim Ward.

Adjournment:

On the motion of Ms. Mosites, seconded by Mr. Moorhead, the meeting was adjourned.

Next Meeting:

The next meeting will be held on May 2, 2024 at 10:00 a.m. Agenda items will include a discussion regarding the timing of discovery and whether discovery should be bifurcated.

Addendum A

MEMORANDUM

TO: **Michelle L. Elliot, Regulatory Analyst, Independent Regulatory Review Commission**

FROM: **Maryanne Wesdock, Environmental Hearing Board**

DATE: **March 14, 2024**

RE: **Response to Question of the Independent Regulatory Review Commission on Environmental Hearing Board Final Form Rulemaking No. 106-14 Rules of Practice and Procedure**

QUESTION (regarding revision to 25 Pa. Code Section 1021.51(h)(4) (relating to commencement, form and content)):

Since the language has been broadened to "interested person," how would an interested person go about joining an appeal? In other words, if a person heard about an appeal and was interested, but hadn't been notified, how would the person alert the Board that he or she is an "interested person?"

RESPONSE:

Section 1021.51(h)(4) has been revised to refer to "interested **persons**" rather than "interested **parties**" as shown below:

APPEALS

§ 1021.51. Commencement, form and content.

* * * * *

(h) For purposes of this section, **[''recipient of the action''] a "potentially adversely affected person"** includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) **[Any]** **In appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 or 750.7), any** affected municipality, its municipal authority **[and],** the proponent of the **[decision]** **request**, when applicable, **[in appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 and 750.7)]** **and any municipality or municipal authority whose official plan may be affected by the decision or a decision of the Board in the appeal**.

(3) A mining company, well operator, or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested **[parties]** **persons** as ordered by the Board.

This change was made because it was recognized that the term "parties" refers to entities that are already in the case, whereas subsection (h) was intended to provide a list of entities that may enter the case due to their special status as a "potentially adversely affected person."

In response to the question "how would an interested person go about joining an appeal?" this question is answered in subsection (j) as follows:

(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 specified in the order of the Board under subsection (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.**

In other words, where a person is notified of their “potentially adversely affected” status by order of the Board pursuant to (h)(4), the order will advise the person if they may intervene by simply filing an entry of appearance. If they are not permitted to intervene by simply filing an entry of appearance, they may seek to intervene by filing a petition to intervene pursuant to 25 Pa. Code § 1021.81 (intervention).

It should be noted that (h)(4) does not allow everyone who is simply “interested” in an appeal to intervene. Paragraph (h)(4) is one category of “potentially adversely affected persons” designated in subsection (h). It is meant as a “catchall” for any potentially adversely affected person who does not specifically fall under the other categories in subsection (h), i.e., (h)(1), (2) and (3). Persons who are “interested” in an appeal still must meet the requirements of standing to intervene and must demonstrate that their interest “is greater than that of the general public” and the “manner in which that interest will be affected by the Board’s adjudication.” 25 Pa. Code § 1021.81(b)(2) and (3) (relating to intervention).

In response to the question, “if a person heard about an appeal and was interested, but hadn't been notified, how would the person alert the Board that he or she is an "interested person?" that person would notify the Board that they are interested in intervening by filing a petition to intervene pursuant to 25 Pa. Code § 1021.81 (relating to intervention).

Addendum B

Changes to Rules 1021.94 and 1021.94a Approved at March 14, 2024 Meeting:[3]

§ 1021.94. Non-summary judgment [D]dispositive motions [other than summary judgment motions].

(a) Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party in accordance with § 1021.34 (relating to service by a party). Dispositive motions shall be accompanied by a supporting memorandum of law or brief. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file [a memorandum of law] **one of the following** within 15 days of service of the motion or within 15 days of the deadline for filing dispositive motions, whichever comes first[.]**:** [The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate dispositive motion accompanies the supporting party's memorandum of law.]

> (1) **A letter [supporting] in support of all or a portion of the motion and/or agreeing with all or a portion of the relief requested in the motion, or**
>
> (2) **A memorandum of law that contains new legal argument. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.**

(c) A response to a dispositive motion shall be filed within 30 days of service of the motion or, if a supporting party files a memorandum of law **[alone] pursuant to (b)(2)**, within 30 days of service of that memorandum of law. The response to a dispositive motion must be accompanied by a supporting memorandum of law or brief.

(d) A moving party, or a supporting party that files a memorandum of law alone, may file a reply to a response to a dispositive motion within 15 days of the date of service of the response. The reply may be accompanied by a supporting memorandum of law or brief. Reply briefs or

[3] All changes to Rule 1021.94 were approved at the March 14, 2024 meeting. Changes to Rule 1021.94a shown in red were approved at the March 14, 2024 meeting. All other changes to Rule 1021.94a were approved at the meeting of March 9, 2023.

memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the Board.

(e) An affidavit or other document relied upon in support of a dispositive motion or response, that is not already a part of the record, shall be filed at the same time as the motion or response or it will not be considered by the Board in ruling thereon.

(f) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

(g) Subsection (a) supersedes 1 Pa. Code § 35.177 (relating to scope and contents of motions). Subsection (b) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

§ 1021.94a. Summary judgment motions.

*****

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file ~~**a memorandum of law**~~ **one of the following** within 15 days of service of the motion or within 15 days of the deadline for dispositive motions, whichever comes first:

(1) **A letter [supporting] in support of all or a portion of the motion and/or agreeing with all or a portion of the relief requested in the motion, or**

(2) **A memorandum of law that contains new legal argument.** The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(g) *Opposition to motion for summary judgment.* Within 30 days of service of the motion or, if a supporting party files a memorandum of law **pursuant to section (f)(2)** ~~**alone**~~, within 30 days of service of the memorandum of law, a party opposing the motion shall file the following:

(1) A response to the motion for summary judgment which includes a concise statement, not to exceed two pages in length, as to why the motion should not be granted.

(2) A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant's statement. Any response must include citation to the portion of the record controverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted. **Where leave of the Board has not been granted, a responsive statement of material facts exceeding five pages may be stricken.**

(3) A brief containing the legal argument in opposition to the motion **and citations to both the statement of undisputed material facts and [to] specific pages of exhibits in the record on which the opposing party relies**.