

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE
Minutes of Meeting of February 20, 2025

Attendance

The Environmental Hearing Board Rules Committee met by videoconference on February 20, 2025. The meeting was called to order at 10:35 a.m. Committee Chairman Howard Wein presided. The following Committee members were in attendance: Vice Chair Phil Hinerman; Dawn Herb; Doug Moorhead; Gail Conner; Matt Wolford; Jean Mosites; and Tom Duncan. Attendees from the Board included: Judge Maryanne Wesdock; Judge Sarah Clark; Senior Assistant Counsel Eric Delio; Assistant Counsel Alisha Hilfinger; Assistant Counsel Madison Hinkle, who took the minutes; Assistant Counsel Marguerite White; and Secretary Christine Walker.

Approval of November Meeting Minutes

Mr. Wein asked if there was a motion to approve the minutes from the November meeting. Ms. Herb noted that there was a misspelling of Bo Reiley's name on page 5. It provides "Reilly" and needs to be changed to "Reiley." Mr. Duncan also pointed out a correction on page 5 where the minutes say, "he thinks the Board could operate without regulations for the Act." Mr. Duncan's statement was that the Board could *temporarily* operate without regulations for the Act. He sent suggested revisions to the language to Ms. Hinkle for correction in the November minutes.

Mr. Wein also had a grammatical question regarding a word on page 8 of the minutes. He asked if there should be a hyphen after "re" and before "tailor" in the word "retailor." After discussion about the word "retailor," Judge Wesdock suggested changing the word to "revise." Everyone agreed with making the change from "retailor" to "revise."

Mr. Wein asked if there was a motion to approve the minutes with changes. Mr. Duncan moved to approve the minutes with changes, and Mr. Moorhead seconded. All were in favor.

Updated PHO1 and PHO2 for Consistency with Rules 1021.101 and 1021.104

Mr. Wein asked if the updated pre-hearing orders that were provided with the agenda for the meeting were the same as the pre-hearing orders currently on the Board's "Forms" page on its website. Judge Wesdock confirmed that they were. Mr. Wein then highlighted that in the updated Pre-Hearing Order No. 2, paragraph 2 provides that the Department's pre-hearing memorandum should contain a reply to the Department's pre-hearing memorandum, and that is contradictory. He believed that the second reference to "Department" should actually say "Appellant." Judge Wesdock agreed that that change needed to be made.

Ms. Mosites asked if that paragraph would be different based on who had the burden of proof in the case, the appellant or the Department, or if there were two discrete pre-hearing order forms that made that distinction. Mr. Delio responded that the Board edits the Pre-Hearing Order No. 2 based on who has the burden of proof.

Mr. Moorhead asked if there was an example form on the Board's website for Hazardous Sites Cleanup Act (HSCA) appeals. Mr. Delio indicated there is no form or unique document posted on the Board's website for HSCA appeals, but attorneys could find a pre-hearing order that has been issued in a different HSCA case using the Docket Search function on the Board's website. Mr. Delio noted that usually, HSCA cases are handled on a case-by-case basis. He mentioned that when a HSCA case comes in, Board personnel do not issue the standard pre-hearing orders. From his experience, the judge generally organizes a conference call in those cases to discuss the issues up front. In the conference call, the Board and parties try to agree what will comprise the record for purposes of review, while allowing some time for disputes that may need to be resolved, and then a date by which the DEP is to file the official record.

Judge Wesdock asked if the Board had the special pre-hearing order for complaints on its website. Mr. Delio said he did not think so, but the Board certainly could do that.

Judge Wesdock noted that the Board will fix the one error Mr. Wein noted in Pre-Hearing Order No. 2 and will consider uploading copies of all forms to the website. Mr. Wein also said that when the Board revises the Practice and Procedure Manual, it may want to address these issues therein. Judge Wesdock noted that the Manual was just updated, but it could easily be updated to reflect changes and updates in forms as well. Mr. Wein said that, based on what Mr. Delio had said about the pre-hearing orders for civil penalties being different, he believes it is worth adding mention of that in the Manual.

Carbon Capture and Sequestration Act of 2024

Mr. Moorhead provided an update on the Carbon Capture and Sequestration Act of 2024 on behalf of the Department. He noted that there has been some internal discussion within DEP's oil and gas program as to how permitting would be dealt with under the statute, but the discussion has been preliminary in nature. He plans to ask again before the next Committee meeting.

Mr. Wein asked if anyone on the Committee was in the position to figure out what kind of discussion occurred in the legislature before the Act was passed that might give some indication as to why the duties prescribed therein were shifted to the Board. Mr. Moorhead responded that the Department did not have any further information regarding that. Judge Clark stated that she could try to get a better understanding of why the decision was made. Mr. Wolford offered to reach out to the Legislative and County Bar Services Coordinator with the Pennsylvania Bar Association. Judge Clark suggested that Mr. Wolford hold off on that conversation until she is able to speak with her contacts.

A question was raised regarding consideration of the statute with respect to the Board's budget. Judge Wesdock responded that the budget for 2025 has already been set but there is a re-budgeting that occurs, which Ms. Walker confirmed. It was noted that the statute provides for a

fee to be charged by the Board, and Ms. Walker agreed that the fee would need to be considered for the next budget.

Mr. Wein noted that the original reason that the Committee started discussing the statute was to determine whether a regulatory scheme would need to be established. He felt that the issues of fees and other things of that nature could be incorporated into proposed rules under the statute to a degree, but there would likely be parts of those issues that would not be. He also noted that whatever the fee will be set at will probably not be able to carry the entire expense of the hearing and of reviewing evidence.

Ms. Mosites pointed out that the statute provides for a hearing in which the Board is to make a determination of fair market value. She noted that it might make sense to have a third-party source for that information for the Board's consideration. Mr. Wein suggested that perhaps someone could be retained by the Board for that purpose.

Judge Wesdock recognized that the Board may not have answers to all of these questions by the time of ELF, but she feels it will be helpful to hear thoughts and questions from the audience. Mr. Wein suggested including a copy of the language of the statute in the ELF materials so that the audience members can have it in front of them.

Environmental Law Forum Program on Carbon Capture

Mr. Wolford noted that in looking at the current schedule for the Environmental Law Forum (ELF), on Thursday, April 10, 2025, there is a one-hour presentation on hydrogen and carbon capture and sequestration. Mr. Wolford asked the planners if that presentation would include discussion on the statute, and he was informed that it would not. As such, he noted that there is not anything in the schedule grid for ELF that addresses the Carbon Capture and Sequestration Act, the Board's responsibilities under the statute, or implementation of the statute.

Mr. Wolford indicated that a 10-minute update on the statute from Chief Judge and Chairman Beckman during the EHB roundtable at ELF would be beneficial for practitioners attending the program. Mr. Duncan agreed that it was worth discussing the statute at the Forum even if it was simply to say that the Board is aware of the statute, is aware of its unique role under the statute, is evaluating how the Board will act under it, and there may not be regulations right away. Mr. Wolford expressed his agreement and indicated that something along those lines is what he envisioned when he suggested Judge Beckman discuss it.

Bifurcation of Fact and Expert Discovery

A copy of Pre-Hearing Order No. 1 (PHO1) with proposed revisions to highlight the option of a joint proposed case management order for bifurcation was provided to the Committee members prior to the meeting. Red text was proposed to be added, and text that had been struck through was proposed to be removed. The paragraphs with proposed revisions were as follows:

4. All discovery in this matter shall be *completed* within **180** days of the date of this pre-hearing order, [], **2025**, unless extended for good cause upon written motion. 25 Pa. Code § 1021.101(a). All written discovery must be *served* no later than **30** days prior to the end of discovery, [], **2025**, unless extended for good cause upon written motion. **In the event that the parties wish to propose an alternative schedule or propose the bifurcation of fact and expert discovery, please refer to Paragraphs 5 and 7.** Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure unless otherwise provided in the Board's Rules. Subpoenas for discovery purposes may be issued by Counsel in accordance with the Pennsylvania Rules of Civil Procedure. The service of an expert report together with a statement of qualifications may be substituted for answers to expert interrogatories. Expert discovery shall be governed by Pa. R.C.P. 4003.5.
5. Within the first **45** days of the discovery period specified in Paragraph 4, the parties shall confer about **(1) settlement of some or all of the issues raised in this appeal and (2) the possibility of a Joint Proposed Case Management Order.** The parties shall file a joint statement within ~~the first 60 days of the discovery period~~ **date of this pre-hearing order, [], 2025**, certifying that they have conferred about settlement **and advising whether they will pursue a Joint**

Proposed Case Management Order and, if so, include a Joint Proposed Case Management Order with the joint statement required by this paragraph. The conference under this Paragraph may be combined with the conference pertaining to electronically stored information specified in Paragraph 11 and with discussions pertaining to Paragraph 7 that concern the submission of a proposed alternate schedule.

7. As an alternative to this schedule, the parties may, within **60** days of the date of this pre-hearing order, submit a Joint Proposed Case Management Order to the Board, which shall, among other things, propose alternate dates for the conclusion of discovery, the filing of dispositive motions. **If the parties wish to bifurcate fact and expert discovery or have a separate expert report deadline, they may propose to do so in the Joint Proposed Case Management Order.** At any time, parties may also submit a motion for an expedited hearing pursuant to 25 Pa. Code §§ 1021.96a – 1021.96d.

Mr. Wein noted that the last discussion on bifurcation established boundaries that the Committee members and judges found acceptable, and that discussion resulted in the language revision that was proposed for the meeting. He noted that per the Board judges at the last meeting, the Board does not want bifurcation to be mandated. Rather, the idea is to flag the option of a joint proposed case management order as an avenue for proposing bifurcation if the parties wish.

Mr. Moorhead stated that the Department is not in favor of bifurcation because it feels it will add time to the appeal process, at a minimum. He said that he struggled to picture a case where the Department would agree to bifurcation. He did note that it may happen under a certain set of circumstances, but it would likely be rare. As such, he feels that the addition of the language in PHO1, without more explanation, may present confusion to non-environmental practitioners or attorneys that do not appear before the Board often. Overall, he likes the language, except for the suggestion of bifurcation.

Mr. Wein highlighted the fact that ultimately, it is the Board's PHO1, and the Committee's job is to provide guidance and inform the conversation. Mr. Wein asked how one would address the possibility of bifurcation of fact and expert discovery without mentioning bifurcation? Mr.

Moorhead said he thinks it is up to the parties; generally, if the parties want an alternate schedule, it is up to the parties to propose that. He feels that mention of bifurcation in PHO1 creates confusion as to what the discovery itself could be or what is involved in the discovery period. He feels it is incumbent on the parties to get the case done as quickly as possible, and this lends confusion as to what the process is.

Judge Wesdock noted that the purpose of the revision was to say that parties can propose a joint proposed case management order that includes bifurcation, but if Mr. Moorhead is indicating that the Department is never going to agree to bifurcate, then it does not make much sense to have that language in there. She asked if the alternative would just be to say that if people wish to bifurcate, then they should file a motion with the Board. Ms. Mosites noted that if what Mr. Moorhead said about the DEP's unlikely agreement is true, then it begs the question of what the Board will do when one party says it feels bifurcation is appropriate.

Mr. Duncan said that when parties disagree over a discovery plan, one party generally identifies the differences that the parties want for each provision. He said that PHO1 does not currently mention that is an option, but he knows that it is something that happens in certain appeals.

Mr. Delio asked if it would make a difference to the Department if the language said something different and didn't use the word bifurcation. He noted that sometimes, parties use language to schedule discovery in stages in the orders proposed before Judge Labuskes, so maybe the language could say something along those lines.

Mr. Moorhead said that in looking at paragraph 7, he knows the Department has agreed to a separate expert report deadline in the past. Both Judge Wesdock and Mr. Delio indicated they have seen proposed orders with different deadlines for fact and expert discovery as well. Mr. Delio

thinks that in those cases, some of the discovery is happening concurrently. But he noted that there are definitely cases where parties propose different deadlines for fact and expert discovery.

Mr. Duncan offered a question to Mr. Moorhead: If the Department does not want solely fact and solely expert discovery periods, would it be potentially acceptable to have a fact discovery deadline and then have expert reports due at a different deadline? Mr. Moorhead responded that yes, the parties can propose alternate schedules, but he does not want PHO1 to suggest that there is a separate fact and separate expert discovery period. In his opinion, generally it works better to do them together. He noted the example: if a requesting party provides interrogatories and the responding party says that it will provide an expert report in response, that response will trigger a discussion of when the responding party is required to provide the expert report, without a deadline needing to be specifically set out by the Board. He believes that the parties coming to a determination based on the specifics of the case is preferable to an indication that there is a bifurcated, separate period in all cases.

Mr. Duncan responded that he thought Mr. Delio's suggestion would potentially address that issue, and Mr. Wein agreed. Judge Wesdock asked if PHO1 simply should not use the word "bifurcate." She noted that alternatively, it could say "parties can propose separate deadlines for fact and expert discovery."

Mr. Moorhead suggested that the language in paragraph 7 be shortened to "if the parties wish to have a separate expert report deadline, they may propose to do so." He felt that it would accomplish the goals of the Department if the words "bifurcate fact and expert discovery" were deleted.¹ Judge Wesdock asked if that would satisfy the concerns that Mr. Hinerman raised at the

¹ Mr. Duncan pulled up a copy of the proposed revisions to Pre-Hearing Order No. 1 using the "share screen" tool in the videoconference app. He used track changes to insert the proposed revision suggested by Mr. Moorhead and continued to insert the proposed revisions discussed in the minutes as they came up.

last meeting. Mr. Hinerman indicated that he thought the proposed language was fine the way it was written, but he is also fine with the language as proposed by Mr. Moorhead.

Mr. Moorhead indicated he would want a similar change to be made in paragraph 4. Ms. Herb suggested the language could say “if parties wish to propose an alternate schedule,” and cut off the language after that until the comma. She agreed that if PHO1 uses the word bifurcation, it might make it seem like bifurcation is a normal part of the process. Judge Wesdock agreed that she does not want people to think it is a part of the process if the Department is unlikely to agree. Mr. Moorhead reminded the Committee that there may be times where the Department might agree; it would just depend on the circumstances and be rare.

Mr. Hinerman asked if a person does not practice in front of the Board often, does that person assume there is a separate deadline for fact discovery already? When talking about the term discovery, do people assume expert reports are included in that too?

Judge Wesdock noted that after talking to Ms. Bovender around the time of the November meeting, Ms. Bovender thought the same thing and was surprised to see that discovery was not bifurcated. Judge Wesdock asked whether members of the Committee felt practitioners would understand from the language in the revised PHO1 that if you want separate deadlines, you need to propose it because it is not coming from the Board. Or, alternatively, she noted PHO1 could have in parentheses after the word “discovery,” the phrase “including expert reports” to address the concern of what is encompassed in discovery. Mr. Moorhead agreed with the latter idea.

Mr. Moorhead suggested that in paragraph 4, at the very beginning, it could say, “All discovery, including the exchange of expert reports, if any,” to address that concern. Mr. Hinerman indicated that he liked that idea. With that revision in place, Mr. Moorhead stated that everything he brought up had been addressed.

Mr. Wein indicated it may be appropriate to have an identifier in the new pre-hearing orders that indicates the form is “as revised” by a certain date. He feels this would be helpful, as then people will not assume it is the same document they have been reading for years. Judge Wesdock responded that the revision date is normally included at the bottom but noted it may be helpful to have it at the top. Mr. Wein said he thinks it may be helpful to highlight it more. Judge Wesdock agreed that people probably assume newly issued pre-hearing orders are the same as pre-hearing orders they have received in cases before.

Judge Wesdock asked if Mr. Delio, Ms. White, or Ms. Hinkle saw any issues with putting the revision date in the header, and none of them did. Mr. Wein said it could be at the top in parentheses, (as revised and then the date). Ms. Herb noted it was a good idea to have it on the left side because of the eFile stamp. Ms. Mosites indicated she liked it being in the header more than footer. Judge Wesdock agreed that it draws a person’s attention more, which Mr. Wein said he felt was important. Mr. Wein also suggested that the revision date be put in bold font and capitalized as well to help get people’s attention better.

Judge Wesdock agreed that some of the changes are substantive, so it is important for people to know about them. Mr. Wein asked if Judges Wesdock and Clark could take the proposed revisions to PHO1 to the other judges and if they all agree, then it will be on the Board’s website.

Ms. Herb asked if the revision date should say “PHO Form.” She noted that if an appellant is seeing the revision date and it says it was revised in 2025, but the appellant didn’t file the appeal until 2026, people might get confused. Judge Clark agreed the Board should make it clear that the form itself was updated. She noted that sometimes the judges issue a “revised” PHO1 with updated dates, and she does not want people to be confused on that. Judge Wesdock agreed.

Mr. Moorhead asked Mr. Wein whether the Committee should vote to recommend the set of revisions to the pre-hearing orders. Mr. Wein said that no, if it is not a proposed rule that the Committee is recommending, then there is no need to vote on it. However, he noted that the minutes will have the discussions the Committee had regarding these items included.

Judge Wesdock noted that there is an all-Board call scheduled for Monday the 24th, so the judges could bring these issues up for discussion then.

Ms. Herb noted that this provides another item for discussion at ELF, as well. Mr. Wein agreed and felt that the revised documents should be included in any ELF materials. He noted that way, the Board can actually show the changes in the revised documents, even if you cannot see the actual changes on the website.

Judge Wesdock asked if Mr. Duncan could send the proposed revisions that he had been working on while sharing his screen. Mr. Duncan agreed to do so. Mr. Wein asked if that document would be what Judges Wesdock and Clark would present to the rest of the judges on Monday, and Judge Wesdock responded yes.

Mr. Wein noted that the Board may want to include any revisions made to the pre-hearing orders in the Practice and Procedure Manual. Judge Wesdock said she thought bifurcation through a joint proposed case management order was addressed in the newest edition of the Practice and Procedure Manual per the suggestion of Ms. Herb at the November meeting. Ms. Hinkle indicated that she thought it had been included, but she would double check to be sure.

Potential Topics for the Board's Environmental Law Forum Presentation

Mr. Wolford noted that on the current schedule for the Environmental Law Forum (ELF), there is an EHB roundtable about expert discovery on Thursday, April 10, 2025 from 1:30 p.m. to 3:00 p.m. Additionally on Thursday the 10th, there is a one-hour CLE scheduled for carbon markets. Mr. Wolford noted that this carbon markets program was not related to the carbon capture

topic the Committee has been discussing for ELF. The carbon markets program will likely have a technical component, and the Committee has been discussing implementation of the new statute.

Mr. Moorhead indicated he had a suggestion for a topic that the Board could address. He mentioned that the Department has seen a number of cases over the last year or year and a half that has focused on a third-party appellant's burden in challenging a permit. From his recollection, in many cases, the third-party has not met that burden in the Board's opinion. As such, Mr. Moorhead suggested a discussion of what that burden is that third-party appellants must meet, as well as how the Board sees a third-party appellant meeting that burden to challenge a permit successfully.

Mr. Wolford said that he thought that was a great idea. Judge Wesdock said she thinks it is a great idea, and there has been confusion in recent cases as to what is needed to meet their burden, so it would be helpful to discuss the topic. Mr. Wein asked Mr. Moorhead how many of those third-party appellant appeals were pro se appeals? Mr. Moorhead responded that not many of them were pro se; they are often represented by counsel and often it is the same counsel.

Judge Wesdock highlighted that there is also a program on how to appeal an action to the EHB on the current schedule for ELF that will be hosted by Mr. Delio. She asked if Mr. Delio's program planned to cover the burden of proof issue. Mr. Delio responded that he planned to have a fairly general program that would cover the trajectory of an appeal from the notice of appeal through to adjudication, and the program might go into more depth for some of the topics. However, he noted that he did not plan to offer practice pointers or suggestions as to how parties would win an appeal.

Mr. Wolford mentioned that he thought the brief discussion on the Carbon Capture and

Sequestration Act by Judge Beckman would fit nicely into the roundtable.² He also mentioned including a statistics update regarding EHB appeals.

Ms. Herb suggested that the EHB roundtable include a discussion of what the current website looks like, so long as Mr. Delio's program did not plan on covering that. Ms. Herb noted that it might be nice for the Board to highlight which features people might be missing on the website, as well as hear from practitioners what features they might like to see added. For example, she noted that she would like to see a wider scroll bar on the website. Ms. Herb wondered if new people engaging with the platform might see what is on the docket as all that is on the website, and she wants to make sure that people are not missing other important information contained on the website. Judge Wesdock indicated that she thought Mr. Delio would talk about the website a bit and give updates.

Judge Wesdock also noted that the Board is adding back the search function that used to exist on the old version of the website. She indicated that development of that function is going slower than hoped, but the Board is hoping to provide an update on that at ELF as well. Mr. Delio wanted to clarify that the search function is a word search feature for searching past opinions. Ms. Walker said that the Board is hoping to have the search function finalized by the end of the fiscal year. Mr. Wein asked if the function would be discussed at the roundtable program, as he feels those programs get a larger audience. Judge Wesdock confirmed that it would.

Judge Wesdock mentioned that during ELF last year, the Board had a new website coming out, as well as a rules package. She said that those two items covered a lot of the roundtable, so she appreciated the suggestions for more substantive issues.

² Please refer to the "Environmental Law Forum Program on Carbon Capture" section of the minutes for further information on the brief discussion on the Carbon Capture and Sequestration Act by Judge Beckman.

Question Regarding Closure of Erie Office

Ms. Herb asked if there were any updates regarding the closure of the Erie office. Judge Wesdock reported that the building where the Board's Erie office is located is closing, although the Board had not officially received notice. Ms. Hilfinger noted that originally, the Board thought that the Erie office would be closing in March, but since the required notice has still not been received, the Erie staff will likely be there until at least June.

Ms. Walker indicated that she is working on getting the furniture moved to the Pittsburgh office and some is going into surplus. She noted that the owners of the Renaissance building sold it, and it is being made into a hotel. The Board has been waiting to receive notice because once it receives notice, there are 90 days to vacate the premises. Ms. Walker states that since notice had not yet been received, it extends the 90-day timeframe to vacate. As such, the Board is good to stay there through June. However, Ms. Walker also noted that the Board gave notice that it is not renewing its contract with the building after June, even if the deal does not go through. As such, by the end of June, the Erie office will be closed.

Mr. Wein asked where the staff based in that part of the state would be working? Ms. Walker said that Judge Beckman has talked about working out of the Pittsburgh office. She also noted that the Board could still make arrangements to have a hearing in Erie with alternate hearing room space, if desired. Ms. Herb thanked the Committee for the update and noted that the Board does have a rule that allows for alternate hearing spaces.

Upcoming Meetings

Judge Wesdock noted that the next meeting of the Rules Committee is scheduled for March 13, 2025, and asked if the Committee wanted to skip that meeting since it is only three weeks away. Mr. Wein stated that he thought it would be a good idea to skip the March meeting. In looking at a date for the next meeting, the Committee members discussed a variety of dates in relation to

ELF so that at the next meeting, the Committee could discuss items that came up during ELF and see if any of them require the Rules Committee's attention. After this discussion, the Committee members concluded that Wednesday, April 23, 2025 at 10:30 a.m. would be the best time for the most Committee members.³

Adjournment

Ms. Mosites moved to adjourn, and Mr. Wolford seconded. All were in favor and the meeting was adjourned at 11:58 a.m.

³ The meeting was subsequently moved to May 15, 2025 at 10:30 a.m.