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William T. Phillipy IV
Secretary of the Environmental Hearing Board
2nd Fl., Rachel Carson State Office Building
P.O. Box 8457
Harrisburg, PA 17105-8457

Re: Proposed Amendments to Hearing Board Rules, Pennsylvania Bulletin, February 27, 1999

Dear Mr. Phillipy:

I am providing the following comments regarding the Proposed Rulemaking recently published by the Board:

§1021.17 (a) should be revised by deleting the following: [other than the notice of appeal,] Because the time for some appeals is not established by statute, but relies solely on the provisions of §1021.52, the Board has the authority to interpret its rules to allow for a motion for an extension of time for filing of appeals. This interpretation is consistent with the nunc pro tunc rule set forth in §1021.53. It is also consistent with new §1021.4.
(b) should be amended to delete the following: [and (b)].

§1021.22 (c) should be amended to read: **An attorney admitted to practice by the highest court of another jurisdiction in which attorneys licensed to practice in the Commonwealth of Pennsylvania are accorded similar privileges by that jurisdiction's equivalent of the EHB, may be permitted to represent a party in a specific matter before the EHB on motion pro hoc vice filed by an attorney licensed to practice in Pennsylvania. Said foreign attorney shall not be authorized to act as attorney of record however.**

This language is consistent with the provisions of Pa.B.A.R. 301 and 1 Pa. Code §31.22. To allow the foreign attorney to be the attorney of record violates Pa.B.A.R. 301 and is thus prohibited under the Westmoreland County case cited in the preamble.

§1021.30 (a) should be revised by adding the following phrase at the end of the section: **unless otherwise directed by the administrative law judge assigned to the matter.**
This amendment is suggested to deal with the situation where a judge sitting in Pittsburgh directs the parties to file a trial brief or other document directly to the judge during the pendency of a hearing, for example.

§1021.31 Subsection (a) was not proposed to be amended in your notice of proposed rulemaking, but a situation arose in a recent case suggesting a need for amendment. There are situations where the Board must serve a notice of its action on a party before that party has entered a notice of appearance. The rule should be amended by adding a phrase as follows: "... in the notice of appearance, **or, if no notice of appearance has been entered, upon the person upon whom the Complaint or Notice of Appeal was served for that party,** ..."

§1021.32 The deletion of subsection (d), when coupled with the new language in paragraph (a), causes confusion as to whether to serve a third party appeal on the permittee or on its attorney. Unfortunately the language retained at §1021.51(g) is not particularly helpful. I therefore urge retaining the provisions of §1021.32(d), perhaps as a new subsection (b). I also suggest that the language of the second sentence of new subsection (a) be revised as follows: "... by an attorney **in the matter before the Board** shall be made ..." It would be presumptuous to assume that a party would choose the same attorney for a matter placed in litigation as they chose for prior matters. Only after filing a notice of appearance does an attorney become attorney of record for that client. Service of a notice of appeal on a non-party lawyer would not constitute effective service.

§1021.35 There is a typographical error in the proposed rule as printed which is evident by comparing the language with the language in the preamble. The rule should read: "(2) ... and all motions, other **than** motions ..."

§1021.51 (f) should be revised to read: "... an assessment of a civil penalty [that] **for which the statute** requires an appellant ..." This change is necessary to assure that the Department does not seek to impose a jurisdictional prepayment

obligation, by the language of an assessment order, which is not authorized by statute. Compare 35 P.S.§6018.605 (no prepayment obligation) with 35 P.S.§6021.1307(b) (prepayment required).

Again there are several typographical errors in the text of revised §1021.51 which make it hard to follow. I assume that the "(f)" was not intended to be shown in bold, since it is retained. After the new paragraph (g) there needs to be an ellipsis to indicate that subsections (1) through (3) of former paragraph (f) are being retained.

§1021.57 Subsection (c) should be revised to read: "... deemed in default and, **upon motion made,** all relevant facts ..." This suggestion is consistent with the former rule §1021.66(c) which required a motion before a failure to answer could be deemed an admission. The rule as proposed would delete this due process.

I also urge retention of the language appearing at §1021.66(e) as a new subsection (d) to §1021.57. New matter and preliminary objections should be answered or the same "deemed admitted" rules should apply. The Complaint and Answer procedure is not the same as an Appeal. The Board should decide the preliminary objections filed with the answer before the pre-hearing provisions of §1021.81 (which new §1021.58 would make applicable to Complaints) are implemented.

§1021.58 Following the discussion above, this section should be amended to read: "**After the preliminary objections are decided,** the prehearing procedures in §1021.81 (relating to prehearing procedure) shall be followed."

§1021.70 (e) should be revised to read as follows: "... Material facts set forth in **a motion, other than a motion for summary judgment or partial summary judgment,** that are not denied ..." This change is necessary to be consistent with §1021.70(f). Why should a failure to specifically deny be treated more harshly than a failure to respond at all? A motion for summary judgment should depend on facts of record, not allegations in the motion itself.

§1021.80 This section should not be changed. Previously this section supplemented 1 Pa. Code §35.45. The amendment proposes to have §1021.80 supersede the other rule. The reason that I suggest retaining the current language is that 1 Pa. Code §35.45 authorizes the Board in a consolidated case to "make orders concerning the conduct of the proceedings as may avoid unnecessary costs or delay." This is an important power, not otherwise expressed in the Hearing Board Rules, which

should be retained. In a consolidated matter, there may be multiple parties. Some form of case management order may be necessary to make the case manageable and to avoid repetitive depositions, motions, etc.

§1021.88 This section should be deleted. As drafted the language provides no "guidance to those individuals who appear before the EHB," as the preamble suggests it does. As worded, the provision implies that the Board must decide the evidentiary issue presented in any motion in limine. In fact, the judge can rule such motion out of order if presented at trial for the first time, or it could be dismissed on other grounds without "ruling on the evidentiary issues" presented therein.

§1021.104 This section should not be amended. It is rightfully characterized as supplementing rather than superseding the provisions of 1 Pa. Code §§35.131-133 which provide a procedure for post-hearing submissions and which allow for corrections in the transcript upon motion or upon agreement of the parties. These provisions are essential to assuring an accurate record and are not otherwise addressed by the EHB Rules.

§1021.117 This section, as reprinted in the March 6, 1999 Pennsylvania Bulletin, should not be adopted by the Board. A party which has sufficient interest in a proceeding before the Board to meet the standing test should be required to either intervene as a party if they want their legal position heard by the Board or not be heard at all. *See*, News & Sun-Sentinel Co. v. Cox, 700 F. Supp. 30 (S.D.Fla. 1988). Because the EHB is a fact finding tribunal and not an appellate court, the traditional role of an amicus in filing an appellate brief on the same schedule as the party whom the amicus represents is inapplicable in matters before the EHB (*See*, Pa.R.A.P. 531.) As a party, an intervenor is subject to the other rules of the Board pertaining to briefing, argument, etc. An amicus on the other hand can be a mere gadfly, requiring the parties to incur additional legal expense in responding to the issues they raise. Of course, if the interests of the amicus are already represented by one of the parties, they should not be granted amicus status at all. Am. College of Obstetricians & Gynecologists, Pa. Section v. Thornburg, 699 F.2d 644, 645 (3rd Cir. 1983). Without a legal standard to determine when a request for leave to file an amicus brief will be granted, litigants have no legal basis for opposing such request. If the Board decides to proceed with a rule allowing for the filing of amicus briefs, I urge it to incorporate the standards set forth in the cases cited above in order that the parties before the Board can have some concrete basis for opposing the request for amicus status.

§1021.125 The proposed amendment deletes critical language. The phrase "in compliance with an order" should be reinserted in the two places it was deleted. A party should not be sanctioned for failure to disclose evidence, unless there was an affirmative duty to disclose that evidence, either pursuant to the Prehearing Order or in response to a specific order of the Board. Without that legal compulsion, a party is free to introduce into evidence any relevant fact and cannot be precluded from doing so under the "Sanction" authority. Similarly, a party may present a rebuttal witness, unless an order directing specific disclosure of that witness was disobeyed. I also suggest that the phrase "other appropriate sanctions" is too vague. The previous reference to sanctions permitted by Pa.R.C.P. is a more appropriate limitation on the power of the judge.

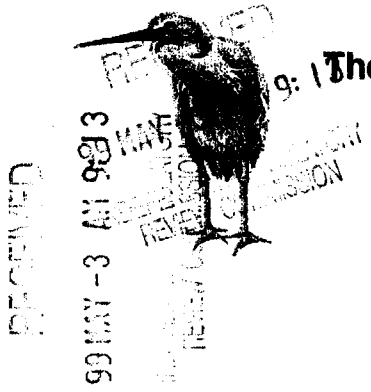
§1021.162 There is a typographical error here. The parenthetical description of the scope of §1021.51 is in error. It should read: "(relating to commencement, form and content of appeals)"

Thank you for the opportunity to comment on these rules. As a former member of the EHB Rules Committee I realize how much effort must have gone into this package. Despite my many comments, there are worthwhile changes in the proposed rule.

Sincerely,

John Carroll

John W. Carroll



The Community Environmental Legal Defense Fund

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April 17, 1999

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Comments on Proposed Rule Revisions to 25 Pa. Code Ch. 1021.21 and 1021.22
Dealing with Representation Before the Board for Unincorporated Associations

Dear Mr. Phillipy,

This communication contains comments pertaining to the proposed rule revisions for the Pennsylvania Environmental Hearing Board. Specifically, we are commenting solely on the revision proposed for defining who can be represented in front of the Board in the absence of counsel. We are writing to strenuously object to the proposed rule revision which would eliminate the ability of unincorporated associations to proceed *pro se*.

The average cost to a third party appellant to retain counsel with hired experts to pursue a permit appeal in the Environmental Hearing Board ranges from $60,000 to $100,000. These costs are prohibitive for most citizens of Pennsylvania and the proposed *pro bono* "trial" system being established by the Pennsylvania Bar Association does little or nothing to remedy this inability of most residents to retain hired counsel for the pendency of their appeal because the minimum indigency annual income requirements would exempt most individuals from the operation of the program. Even with an income of over $20,000, to expect a citizen to produce a retainer fee equal or greater than his annual salary is an illogical notion. This situation thus leads the Plaintiff or organization with a decision: either (1) to not file the third party permit appeal, or (2) to proceed *pro se*.

If the third party appellant decides to proceed *pro se*, he must then make a further decision, namely either (1) seek to join with others to travel down the *pro se* route with collective wisdom and shared burdens, or (2) seek to travel the path alone. If the appellant decides to travel the path alone, the entire weight and burden of the litigation rests upon him. Pursued jointly, there may be enough interested individuals within the organization who can share the burden and duties of the venture.

Revisions to the EHB rules which would eliminate these options are not supportive of an individual's right to access the courts and are not in the best interest of the Environmental Hearing Board, for the following reasons:

(1) By forcing individual third party appellants to venture forth solely on their own, it is inevitable that the administrative burden on the courts, and the burden on opposing counsel, will only increase. By forcing the work burden on an individual, the problems currently encountered with *pro se* litigants will inevitably increase exponentially.

(2) Barring unincorporated associations from proceeding *pro se* also eliminates an opportunity for *pro se* appellants to establish "standing" within the Environmental Hearing Board. Thus, even if the citizen organization has a valid claim on the permit issue, the merits of the case will never be reached due to the inability of the organization itself to file as a Plaintiff.

(3) Barring unincorporated associations from proceeding *pro se* will result in an unmanageable case caption, as individuals from those associations will seek to proceed in a *pro se* capacity by entering each individual as a separate *pro se* litigant. This causes a greater administrative burden both on the court and on opposing counsel, as discovery and other briefing schedules would become a logistical nightmare to all parties involved.

(4) Allowing unincorporated associations and incorporated entities to proceed *pro se* and selecting a spokesperson or representative individual from these organizations to participate in the proceedings does not constitute unauthorized practice of law, because there is no pecuniary benefit to the individual who becomes the representative. Specifically, and in addition, all attorneys have a duty under the ABA Model Rules of Professional Conduct to "counsel nonlawyers who wish to proceed *pro se*." *See* ABA Model Rule 5.5 "Unauthorized Practice of Law."

(5) Under established caselaw, both incorporated entities and unincorporated associations are considered "persons" for purposes of the Fourteenth Amendment to the U.S. Constitution. *See Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 384 (1886). These protections thus include Due Process and Equal Protection guarantees for these entities. To strand these organizations without the financial ability to hire counsel for litigation, while disallowing them to proceed *pro se*, effectively eliminates any judicial recourse and leaves them remediless.

(6) Unincorporated Associations, proceeding *pro se*, have resulted in some of the most significant cases over the past two years. These include:

1. In 1998, Bill Belitskus initiated an appeal within the Environmental Hearing Board on behalf of the PROACT organization. Both Bill as an individual and PROACT as an unincorporated association proceeded through summary judgment. The ruling in that case - that the Department must analyze the compliance history of any applicant with all issued permits, rather than those within the specific program of the permit challenge - was ranked as one of the most significant cases in 1998 by the Department at the most recent Environmental Law Forum.

2. In 1999, several unincorporated associations, proceeding *pro se*, filed a permit appeal dealing with the sale of the municipally held Bethlehem landfill to a private owner. The permit transfer was granted without a thorough review of the ability of the permittee to meet statutory requirements governing operation of the landfill. Those plaintiffs included several environmental and citizen organizations.

3. In 1997, a *pro se* unincorporated association, Tri-State Concerned Citizens (TSCC) brought a third party permit appeal of a Department-issued permit against a waste facility that had engendered public opposition. One of the Appellants was the Township in which the facility was to be sited. After a settlement, the Township dropped from the Appeal and TSCC remained the only party to contest the permit issuance. Eventually, TSCC reached a settlement with the corporation, which achieved several of the goals established by the TSCC organization prior to litigation.

In fact, in that case, the corporation brought a motion to dismiss based on the fact that the unincorporated association was proceeding *pro se*. In that case, the Board ruled that the EHB rules "do not prevent an association from being represented by someone who is not an attorney", EHB Docket No. 96-204-R (November 12, 1997). This case was one of five *pro se* cases listed in the Significant Case Developments of 1997-98.

In addition, *pro se* litigants have raised issues and established significant case law in areas that would otherwise have been untouched by the private bar:

(1) In *Stilp v. Hafer*, 701 A.2d 1387 (Pa. Cmwlth. 1997), three *pro se* appellants contributed to the decision of the court on an issue of first impression - whether laches applies to a challenge to the procedural constitutionality of a statute. The appellants took an adverse decision up to the Supreme Court of Pennsylvania, where two Justices agreed with their argument. This case was also listed as a Significant Case Development in 1997-98 by Dennis Strain and the Department.

(2) Standing issues have also been explored by *pro se* appellants. Namely, in *Blose v. DEP*, EHB Docket No. 98-034-R (June 19, 1998), the appellant successfully extended standing law to include recreational interests in a given waterway. The *Belitskus* case also established such a right on behalf of third party appellants. Both cases were listed in the Significant Case Developments of 1998 at the most recent Environmental Law Forum.

(3) Although the *Lucchino* case - EHB Docket No. 96-144-R (October 16, 1998) - does not present an argument for the process that should be followed by *pro se* appellants, it is important for another reason - the role of *pro se* litigants in fleshing out the relevant caselaw and providing guidelines to other litigators concerning standards imposed by the Board. In addition, the *Lucchino* case, currently on appeal, will result in the Commonwealth Court's re-application or re-fashioning of the rules applicable to recovery of attorneys' fees - a facet relevant to the practices of the private bar.

Although assisted by counsel at various stages, both the *Alice Water Protection Association* and the *Chester Residents Concerned About Quality of Life* cases illustrate the importance of citizen group participation in the litigation process. Without *pro bono* counsel, neither of these cases would have been brought under the rule that unincorporated associations should not be allowed to participate *pro se*. Both of these cases resulted in extensive exploration of the governing caselaw, and the CRCQL litigation promised to place Pennsylvania at the cutting edge of law dealing with environmental racism.

Taken together, these examples (solely drawn from 1998 and 1999) offer a convincing picture that *pro se* litigation is an enabling tool for individuals and organizations unable to afford

the exorbitant cost of legal services.

It would be suggested that a better method of assisting those unable to afford counsel (instead of establishing a system where only a few litigants can be assisted) would be to provide "counsellors" to these individuals and organizations. The "counsellors" would assist the groups and individuals in litigating their case *pro se*. This would accomplish several goals; namely, (1) it would stretch the *pro bono* dollar by enabling a single attorney to assist numerous organizations and individuals, and (2) it would reduce the administrative burden on both the Board and opposing counsel, by eliminating erroneous filings, discovery disputes, and process questions. Indeed, this would be an excellent channel for the *pro bono* time that should be obligated by every environmental practitioner of environmental law in the Commonwealth.

We believe that the elimination of the option of proceeding in a *pro se* fashion is not a rationally related response to the goal of the Board, and that the above options may offer more reasonable solutions to the problems at hand.

We would also suggest that the Board implement rule revisions that traverse the opposite landscape. Currently, corporations and unincorporated associations are distinguished within the rules, with different requirements adhering to their participation in front of the Board. This categorization itself is not consistent, as there is little difference between the organizational structure of either group. We would propose allowing both the corporate entity and the unincorporated association to be able to exercise the choice of representing themselves in a *pro se* fashion.

Pennsylvania Rule of Civil Procedure 2152 already allows a Trustee Ad Litem to be appointed by an unincorporated association for the purposes of designating a representative of that association. If rules were promulgated by the Board that recognized a similar process for *pro se* representation of both corporations and unincorporated associations, a full range of problems presented by *pro se* litigants could be eliminated.

Finally, the jurisprudence on representation in the courts of unincorporated associations and corporations is currently being challenged in several cases before the Commonwealth Court of Pennsylvania. In those appeals, brought by an unincorporated association in McKean County and an unincorporated association in Perry County, the appellants are arguing that elimination of *pro se* rights to pursue litigation violate the constitutional rights of both the entities themselves and the individual members of those organizations. Another unincorporated association from Allegheny County, litigated a similar issue on appeal in federal court for the Western District of Pennsylvania in 1992.

Of course, these examples examine the situation from the angle of an unincorporated association in the category of plaintiff. However, an unincorporated association or nonprofit corporation may become the focus of a suit which would place those entities in the category of defendant. In those situations, the courts would be forcing those organizations to retain counsel. If economically unable to do so, these entities would *de facto* forfeit their right to defend themselves in those courts. Such a result, at best, could be described as inequitable; and, at most, a clear violation of the basic constitutional rights of participating members and the overall entities. Such a situation has already

occurred in the Commonwealth. In a case brought in the U.S. District Court for the Western District of Pennsylvania, an unincorporated association served as a Plaintiff in a case brought to challenge the Environmental Impact Statement prepared for the Mon-Fayette Expressway. In the District Court, this organization had retained counsel from a law firm in Pittsburgh. After the suit was lost in the District Court, the unincorporated association wished to appeal the ruling. However, their counsel decided not to pursue the appeal and the association was economically unable to hire replacement counsel. After filing their Notice of Appeal in the Third Circuit Court of Appeals, the Court rejected their Appeal because of the lack of counsel. This scenario offers a practical effect of the application of the requirement of counsel to unincorporated associations.

We urge the Environmental Hearing Board (EHB) to either (1) leave the rule "as is", or (2) to change the rule to recognize *pro se* appearances by both unincorporated associations and corporations. Another option would be to allow the courts to deal with this issue via a challenge by opposing counsel to *pro se* representation by an unincorporated association. If the issues of the practice of law and the potential constitutional violations are decided by the courts, then the EHB can follow their lead by revising Board rules at that time.

We believe that final promulgation of the rule eliminating *pro se* representation by unincorporated associations has the potential to (1) further complicate *pro se* representation in front of the Board, (2) remove constitutional protections from these entities, and (3) continue to exacerbate the problem of lack of adequate representation for those entities and individuals financially unable to retain counsel for their appeals.

We thank you for reviewing these comments.

Sincerely,

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Re: Proposed Revisions to the Rules of Practice and Procedure
29 Pa. Bulletin 1074 (February 27, 1999)

Dear Mr. Phillipy:

On behalf of the Environmental Law Practice Group of Kirkpatrick & Lockhart LLP ("K&L"), we appreciate this opportunity to comment on the Proposed Revisions to the Environmental Hearing Board's Rules of Practice and Procedure as published in the February 27, 1999 *Pennsylvania Bulletin.*

At the outset, we commend the Board for its continual efforts to refine its rules of practice and procedure based on the Board's experience managing matters before it. As active members of the bar practicing before the Board, we look forward to ongoing efforts toward improving the effectiveness and efficiency of the Board's adjudicatory and dispute resolution processes.

We have comments on several elements of the Board's proposal, which are summarized below.

Representation of Unincorporated Associations by Counsel – §§1021.21-1021.22

Over the past 25 or more years of practice, our firm has represented numerous individuals, companies and governmental entities before the Board in both first party and third party appeals. In particular, our experiences with third party appeals have included multiple proceedings where citizen groups without counsel have been "represented" by their officers or other non-attorney individuals. Based on that experience, we heartily endorse the directions now being taken by the Board.

The Environmental Hearing Board proposes to revise 25 Pa. Code §§ 1021.21-.22 to require that unincorporated associations be represented by counsel. As the Board explained in the preamble to the proposed rule:

> This change is mandated by the statute prohibiting the unauthorized practice of law, 42 Pa.C.S. § 2524 (relating to penalty for unauthorized practice of law), and is in accordance with the General Rules of Administrative Practice and Procedure applicable to adversarial proceedings before all State agencies, 1 Pa. Code §§ 31.21-- 31.23 (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings).
>
> The EHB recognizes that citizen groups have made great contributions to the development of environmental law. However, those contributions have been made, for the most part, by groups represented by counsel dedicated to innovation in these types of proceedings and who have the capacity to select the types of expert witnesses necessary to provide the factual backdrop for these legal developments. The EHB's experience with unrepresented citizen groups as appellants has been that these groups are rarely successful with lay representation. In addition, the EHB's efforts to administer appeals by large numbers of citizens by appointing a lay spokesperson for the group invariably leads to the unauthorized practice of law by persons who are not bound by the restrictions placed on attorneys by the Rules of Professional Conduct. While associations may employ persons who are not attorneys, that person may not render legal services unless admitted to practice law. 42 Pa.C.S.A. § 2524. Representation before the EHB in discovery proceedings and in the hearing on the merits clearly is the rendering of legal services.

20 Pa. Bull. 1074, 1075 (Feb. 27, 1999).

K&L wholeheartedly supports the proposal to require that unincorporated associations be represented by counsel before the Board, and further concurs in the Board's rational for this change. Our own experiences illustrate that the Board's concerns regarding unrepresented citizens groups are well founded.

As one example, this firm recently represented a permittee in a third party appeal prosecuted by a citizens group which was represented before the Board by its secretary. A lengthy, rambling, and unstructured notice of appeal (absent numbered averments) raised numerous vague, duplicative and irrelevant objections. This resulting litigation dragged on for 17 months as the permittee and Department attempted to ascertain the nature of the real objections, and the evidence behind those objections. That process included numerous depositions, protracted discovery, submission of dispositive motions with extensive briefs in support thereof, responses and replies thereto, and pre-hearing memoranda. While the Board's ruling on dispositive motions was pending, and less than three weeks before the scheduled hearing on the merits, the citizens group-appellant voluntarily withdrew its appeal with prejudice, without extracting a single concession from the permittee.

This litigation imposed needless expenses on our client, and required an inordinate expenditure of resources on the part of the Board and the Department. The following examples

illustrate how this time and expense was directly attributable to the fact that the appellant was not represented by counsel:

- Because of the citizen group's unstructured approach, efforts to focus on and respond to underlying concerns were frustrated; and overtures to find a non-litigious approach to resolution were spurned. Had the citizens group been represented by counsel, K&L is confident that a competent attorney would have recognized the weaknesses the group's case early on, an opted for a prompt settlement.

- Appellant's representative failed to appreciate that discovery disputes are a common feature of litigation. K&L responded to appellant's overly broad requests for documents with routine objections to producing those documents which were irrelevant or privileged. Appellant responded with a motion for sanctions against counsel for permittee for "hiding" documents. Although the motion was meritless, it required preparation of a serious response, and the Board to hold a conference on the issue and rule on the motion.

- Appellant's representative failed to understand that the permittee's obligation in response to a document request is only to produce documents already in existence. Appellant's representative continued to demand that the permittee develop documents presenting information in a format as dictated by Appellant. This resulted in an unnecessary discovery dispute, and again required intervention by the Board.

- Appellant's representative misconstrued her permission to represent her citizens group before the Board as if she we de-facto counsel to the group. This misconception was stretched to the point were appellant's representative asserted attorney-client privilege over all discussions at the group's meetings because "counsel" (i.e., herself) was always present.

- Our client was subjected to the painful experience of being deposed by appellant's non-lawyer representative. Appellant's representative was unable to confine the questioning to matters relevant to the notice of appeal and matters raised in the deposition notice, and also had difficulty formulating proper questions. This resulted in continual, but justified, objections by counsel for permittee, which lengthened the deposition (consuming time and resources of both the permittee and the Department), precipitating yet another unnecessary discovery dispute requiring intervention by the Board.

- Appellant's representative repeatedly and routinely failed to meet Board-established deadlines, canceled depositions with less than a day's notice, failed to show up for depositions with no notice, and otherwise caused unnecessary delay in the litigation and increased expense to both the permittee and the Department. An attorney, who is bound by the Rules of Professional Conduct and has a professional reputation to protect, would be much less likely to display such blatant disregard for the Board, its rules and lack of professional courtesy.

The examples provided above are by no means unique to this particular case. Over the years, we have been involved in a number of cases where groups not represented by counsel have (knowingly or unknowingly) disregarded Board rules and procedures. Each year, the Board's decisions document multiple instances of such groups' failures to respond to discovery requests, failures to timely respond to dispositive motions, failures to file pre-hearing memoranda, and awkward protraction of the hearing process. For these reasons, we urge the Board to promulgate §§ 1021.21-.22 as proposed. Both citizen groups and the Board will benefit from having competent counsel help to focus, manage, and guide cases to a proper adjudication or alternative resolution.

Service by a Party and Date of Service – §§ 1021.32-1021.33

We endorse the clarifications being made in §1021.33, and particular the provision of a three day addition to the time for response when service is by mail. In several recent matters, we have seen situations where mailed service was delayed, resulting in very short response times when the document finally arrived.

We would also encourage the Board to consider providing a special manner of service for those matters where a party is requesting "expedited" consideration of a particular motion or matter. In a few cases, we have observed parties who filed motions requesting special relief (such as an expedited discovery order), where notice to opposing counsel was sent by ordinary mail timed to arrive after the Board's decision. A procedure for expedited service (via telecopy or messenger service) would be appropriate to assure proper notice and opportunity for response in these situations.

Motions Practice – § 1021.70

Proposed §1021.70(e) seeks to establish an admission for the purposes of deciding a motion upon the failure by a party to respond to all factual averments contained in the motion. We have serious reservations regarding this proposal.

The existing rule, 25 Pa. Code § 1021.70, does not require a party to verify any of the facts contained in a motion or to submit any affidavit in support of that motion. Consequently, the "facts" contained in an unverified motion are only the "facts" as presented by the lawyer making the motion. Indeed, in many cases, where averments are stated in general broadsides, it is difficult to ascertain just what "facts" are being averred, and need to be denied, versus those elements that are simply argument or legal conclusion.

Even though the scope of the admission, for the purpose of the proposed rule, is limited to deciding the motion, nevertheless, this proposed rule may have a profound impact upon the respondent. If a party is to aver facts in a motion and if those facts may be dispositive of the matter, then at the very least the moving party should be required to specifically allege facts, and attach a verification or affidavit supporting each of those facts. If there is no verification or affidavit, then no presumption should be attached to the averments.

Presentation of Evidence Via Written Testimony - § 1021.108

We note the Board's proposals in §1021.108 governing the potential use of written testimony as means of a party to present direct testimony, subject to cross-examination by the opposing party. From our experience in other forums, including the Pennsylvania Public Utility Commission, we are cognizant of both the advantages, and sometimes drawbacks, of reliance on written testimony. On the one hand, presentation of some evidence via written questions and answers may expedite the hearing process, and help parties to prepare and focus cross-examination. Conversely, use of written methods to present direct testimony reduces the Board's opportunity, as a trier of fact, to observe the witness an important aspect of his or her testimony, namely when that witness proffers direct testimony and explains their observations or conclusions. This cautions for careful use of this method of procuring evidence, and suggests that the Board should explicitly reserve the power, upon objection from other parties, to require that witnesses present their direct testimony in person and on the stand.

Timing for Filing of Written Testimony– § 1021.108(c)

Proposed §1021.108(b) generally requires written testimony to be presented at the time of filing of the prehearing memorandum. In proposed §1021.108(c), the Board indicates that a party may file a motion to allow introduction of written testimony at a later date, but the rule is silent on how much later. As written, this might be misconstrued to allow for the filing of supplemental written testimony in the middle of the hearing, or even following the close of a hearing. We would suggest that if written testimony is to be allowed at all, there be a clear requirement that it be filed a certain number of days *before the start of the hearing*, so that all parties have clear notice of the nature and content of the testimony, and an opportunity to prepare meaningful response.

We again appreciate the opportunity to provide these comments, and look forward to working with the Board in its continuing efforts to improve the Board's practice and procedure.

Very truly yours,

R. Timothy Weston