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Mr. William T. Phillipy, IV, Secretary
Environmental Hearing Board
2nd Floor Rachel Carson State Office Building
400 Market Street, P.O. Box 8457
Harrisburg, PA 17105-8457

REVIEW COMMISSION

ENVIRONMENTAL
HEARING BOARD

2005 MAY -9 AM 10:24

RECEIVED

**Re: Environmental Hearing Board Rules of Practice and Procedure
Proposed Rulemaking, 35 Pa. Bull 2107 (April 9, 2005)**

Dear Mr. Phillipy:

Citizens for Pennsylvania's Future (PennFuture) appreciates the opportunity to present these comments on the proposed amendments to the Rules of Practice and Procedure of the Environmental Hearing Board (Board) published in the Pennsylvania Bulletin on April 9, 2005 (35 Pa. Bull. 2107).

1. The Proposed Change to Section 1021.34(b) Concerning Service on Opposing Parties is Unnecessary, Would Impose Wasteful Expenses on All Parties, Would be Particularly Burdensome on *Pro Se* Litigants, and Would Create a Disincentive to Using the Electronic Filing System.

The Board proposes to amend its rule governing service by a party, 25 Pa. Code § 1021.34, to require that service be made by overnight delivery if a document is filed by overnight delivery or in person. PennFuture believes the existing rules are adequate, and that the proposed change will unnecessarily create confusion and will be unduly expensive for some *pro se* litigants. We recommend that the Board not adopt the proposed change.

The notice of proposed rulemaking does not explain what problem or inadequacy of the Board's existing rules this change is designed to address. The minutes of the Environmental Hearing Board Rules Committee state that "[t]his issue came up because parties sometimes serve other parties in a different (i.e. slower) manner of service than they do the Board" (11/8/01, p. 9), and that the proposed amendment "avoids parties filing documents with the Board by overnight mail while serving other parties by regular mail." (1/17/02, p. 9) But avoids it to what end? The minutes are silent on that score.

Like certain court rules, e.g., Fed. R. Civ. P. 6(e), the Board's Rules of Practice and Procedure already provide that when a document is served by mail, three days are added to the time for responding to the document. 25 Pa. Code § 1021.35(a). For the vast majority of situations, this rule by itself sufficiently addresses the situation in which a party files a document in person or by overnight delivery and serves the other parties by ordinary mail.

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The Board presumably will not consider the filing before receiving the other parties' responses, and those other parties get as much (or more) time to respond as they would if they had been served in person or by overnight delivery. Thus, there is no tactical advantage gained by filing in person or by overnight delivery and serving by ordinary mail. As a result, in the vast majority of situations, there also is no reason to impose the additional expense of serving every other party to the proceeding (which in some appeals can be dozens of parties) by overnight delivery when a filing is made in person or by overnight delivery. Such expenses may be particularly burdensome for *pro se* litigants who are forced to file by overnight delivery or in person in order to meet a filing deadline, including the jurisdictional deadline for filing an appeal.¹ For a notice of appeal, the *pro se* litigant would have to serve the DEP official who took the appealed action, the Office of Chief Counsel, and the recipient(s) of the action by overnight delivery.

The Board's existing rule, which requires that a party ensure receipt of a document within 24 hours "[i]n matters involving requests for expedited disposition," 25 Pa. Code § 1021.34(b), appears sufficient to address the rare situation in which a party might gain a tactical advantage if expedited service were not required. The proposed rulemaking does explain why this existing rule, together with the general rule adding three days to respond to any document served by ordinary mail, is inadequate. In short, there appears to be no reason to adopt a blanket rule mandating an expensive and wasteful form of service when the Board's existing rules properly and adequately prevent parties from gaining any advantage through the methods of filing and service chosen. Unless there is some compelling reason to add this considerable cost to litigating appeals before the Board, the Board should allow Rule 1021.34(b) to remain as it stands.

This amendment was first proposed before the advent of electronic filing with the Board. One procedural wrinkle the proposed rule does not address is how service must be effected if the party files a document electronically, but one or more parties are represented by counsel who have not registered for electronic service. Because filing electronically is as instantaneous as delivering a document to the Board in person, the proposed rule logically would require the attorney who files electronically to serve all non-registered opposing counsel by overnight delivery. Instead of saving the parties the expenses associated with service, which is one of the purposes of the electronic filing system, this requirement would considerably increase the costs of service, and thus would be a major disincentive to using electronic filing. (Although based on limited experience with the electronic filing system, I note in this regard that even when DEP's attorney is registered for electronic filing and has filed documents electronically in the same case, the electronic filing system sometimes instructs counsel for other parties that DEP's attorney must be served by other means.)

For all of these reasons, PennFuture urges the Board not to adopt the proposed amendment to 25 Pa. Code § 1021.34(b).

¹ Adoption of the rule also would require the Board to revise its Notice of Appeal form to alert appellants of the need to serve the document by overnight delivery if it is being filed in person or by overnight delivery.

2. Amendments to Appeals and Complaints; *Nunc Pro Tunc*

PennFuture supports the proposed amendments to 25 Pa. Code § 1021.53 concerning amendments to appeals and complaints, as well as the proposed codification of the standard for *nunc pro tunc* appeals in a separate section (25 Pa. Code § 1021.53a).

3. Summary Judgment Motions

With the caveat that the two sentences in the Comment should be relocated to appropriate places in the rule itself, PennFuture supports the adoption of the proposed rule governing summary judgment motions, 25 Pa. Code § 1021.94a. Because the Comment might be overlooked, PennFuture recommends that the first sentence of the Comment be added to subsection (c) of the rule as the second sentence of that subsection, and that the second sentence of the Comment be added to subsection (d) of the rule as the last sentence of that subsection.

4. The Board Should Not Require the Filing of Copies of Exhibits With the Prehearing Memorandum.

Section 1021.104(a)(7) of the Board's rules currently requires the pre-hearing memorandum to include a list of the exhibits the party seeks to introduce into evidence in the party's case-in-chief, along with a statement indicating whether any opposing party will object to their introduction. The proposed rule would amend section 1021.104(a)(7) to require that the party attach a copy of each exhibit to the prehearing memorandum. Because an original and one copy of the prehearing memorandum must be filed with the Board, 25 Pa. Code § 1021.37(a)(2)(ii), this amendment would require each party to file two sets of its proposed exhibits.²

It goes without saying that in many appeals before the Board, the exhibits are voluminous. By itself, a permit application may take up a dozen or more three-ring binders. In addition to the copies to be included with the official transcript of the hearing, the parties typically bring copies (or bound sets) of their exhibits to the hearing for the Board and the other parties. The preamble does not explain what has proven inadequate about the existing rule and practice, or why the Board believes it (or the other parties, which presumably have obtained documents through discovery) will benefit from receiving additional copies of the proposed exhibits in advance of the hearing. To the

² Most pre-hearing memoranda do not exceed 50 pages in length and therefore may be filed solely by using the electronic filing system. 25 Pa. Code § 1021.32(f). If exhibits must be attached to the prehearing memorandum, however, the 50 page threshold would be exceeded in most instances, requiring the party to file hard copies of the prehearing memorandum and exhibits with the Board in accordance with 25 Pa. Code § 1021.37(a)(2)(ii). See 25 Pa. Code § 1021.32(f). The requirement to file the document both ways would remove an incentive to using the electronic filing system.

extent any exhibits are at issue in motions in limine or other prehearing disputes, the parties should attach those particular exhibits to the relevant motion or response.

Because the proposed requirement to file copies of all exhibits along with the prehearing memorandum would impose unnecessary expenses and consume additional paper without any identified benefit for the Board or the parties, PennFuture recommends that the Board not adopt the proposed addition to section 1021.104(a)(7) of the Board's rules.

Please feel free to contact me at 717-214-7920 if you have any questions about these comments.

Sincerely,



Kurt J. Weist
Senior Attorney
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