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June 10, 2013

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**Re: Environmental Hearing Board
Rules of Practice and Procedure, 25 Pa. Code Chapter 1021
Proposed Rulemaking, 43 Pa. Bull. 2591 (May 11, 2013)**

Dear Ms. Wesdock:

On behalf of Citizens for Pennsylvania's Future (PennFuture) and its members, I submit these comments on the proposed rulemaking published at 43 Pa. Bull. 2591 (May 11, 2013), which would amend the Rules of Practice and Procedure of the Environmental Hearing Board (Board or EHB) codified at 25 Pa. Code Chapter 1021.

1. 25 Pa. Code § 1021.32 – heading of subsection (a).

Under the proposed revisions to this rule, subsections (a) and (e) would have the same heading: "*Conventional filing.*" 43 Pa. Bull. at 2595 (col. 2), 2596 (col. 2). In addition, contrary to its heading, subsection (a) of the rule is not limited to conventional filing, but instead identifies documents that "shall be conventionally filed *or facsimile filed.*" *Id.* at 2595 (col. 2) (emphasis added). PennFuture therefore recommends that the heading of subsection (a) be changed to "*Exceptions to electronic filing.*"

2. Completion and acceptance of electronic filings under proposed 25 Pa. Code §§ 1021.32(c)(14), (15), 1021.51(f)(1)(ii).

Proposed subsection 1021.32(c)(14) provides, with respect to electronic filing in general, that "[a]n electronic filing complete before midnight Eastern Time will be considered to be filed on that date so long as it is accepted by the Board." 43 Pa. Bull. at 2596 (col. 1). This same language (with the addition of a comma after the word "date") appears in proposed subsection

1021.51(f)(1)(ii) governing the commencement of an appeal through the electronic filing of a notice of appeal. 43 Pa. Bull. at 2599 (col. 1). Proposed subsection 1021.32(c)(14) goes on to further distinguish *completion* of a filing from *acceptance or rejection* of the filing by the Board. It provides that “[u]pon completion of the filing,” the Board’s filing system “will issue a transaction receipt including the date and time the document was received,” but that “[i]f the Board rejects the submitted documents following review,” the filer will be notified and may have to refile the rejected documents. 43 Pa. Bull. at 2596 (col. 1).

Given the jurisdictional nature of the 30-day deadline for commencement of an appeal before the Board, the application of proposed subsection 1021.51(f)(1)(ii), and related provisions of proposed subsection 1021.32(c), may determine whether an appeal is dismissed for lack of jurisdiction.

A. The amended rules should not preclude a party from seeking *nunc pro tunc* relief where electronic filing of a notice of appeal is untimely because of a technical issue.

Under proposed subsection 1021.32(c)(14), the time and date on the transaction receipt appear to be definitive on the question of when the electronic filing of a notice of appeal (or any other document) is “complete.” See 43 Pa. Bull. at 2596 (col. 1). Relying on the transaction receipt in this manner generally makes sense, assuming that the Board’s electronic filing system issues a transaction receipt more or less more or less instantaneously after a filer hits the “Submit” button. There remains, however, an issue concern with respect to the “completion” requirement, namely whether that requirement may be satisfied when a filer timely hits the “Submit” button, but the Board does not timely receive the filing because of some technical glitch?

Proposed subsection 1021.32(c)(15) would provide that “[e]xcept in the case of notices of appeal, if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected *may seek appropriate relief* from the Board.” 43 Pa. Bull. at 2596 (col. 2) (emphasis added). By negative implication, the exception stated at the beginning of this new provision would appear to preclude the filer from even *seeking* relief under section 1021.53a (Nunc pro tunc appeals). In contrast, proposed section 1021.32(d), governing facsimile filing, contains no similar provision barring a party from seeking *nunc pro tunc* relief where (for example) a problem with the Board’s fax machine, or a disruption in telecommunications service, disrupts or delays the filing of a notice of appeal that otherwise would have been timely. See 43 Pa. Bull. at 2596 (col. 2)

Thought it might be difficult to *satisfy* the common law standards for obtaining *nunc pro tunc* relief that are incorporated into section 1021.53a, at least where the technical glitch is in the Board’s electronic filing system, there appears to be no reason why the rules should absolutely *preclude* a party from seeking such relief. PennFuture therefore recommends that the Board delete the clause “Except in the case of notices of appeal,” from the beginning of proposed section 1021.51(c)(15) and capitalize the word “if” following that clause.

B. The rules should specify the grounds on which the Board may reject the electronic filing of a notice of appeal or other document.

Of potentially greater concern is the issue of (post-completion) acceptance or rejection¹ of a filing by the Board, and specifically the lack of definitive standards for determining which defects rise to the level of requiring, or allowing, the rejection of an electronically-filed document. By delaying the electronic filing of a notice of appeal until after the close of business on the last day of the appeal period, a party runs the risk of having the notice of appeal rejected by the Board after the appeal period has expired. Obviously, the party may avoid that risk simply by filing earlier. Nevertheless, the Board's rules should make that risk – and more generally, the risk that *any* electronically filed document will be not be accepted by the Board – as clear as possible by specifying which defects will, or may, result in the Board's rejection of a filing.

Proposed subsection 1021.51(f)(1)(iii) suggests that the Board may not reject an electronically filed notice of appeal for failure to format the document in accordance with proposed subsection 1021.51(f)(2)(v). Even on that score, however, proposed subsection 1021.51(f)(1)(iii) is somewhat unclear, because instead of stating that the “filing” itself will not be “rejected,” it refers to “dismissal” of the “notice of the filing”: “Failure to comply with [the formatting] requirement *will not result in dismissal of the notice of the filing.*” 43 Pa. Bull. at 2599 (col. 1) (emphasis added). We suspect that the words “notice of the filing” at the end of the quoted sentence were supposed to read “notice of appeal.” In any event, we recommend that change, which would make the quoted sentence consistent with the next sentence of that same subsection: “The Board may request that the appellant resubmit the *notice of appeal* in proper form.” 43 Pa. Bull. at 2599 (col. 1) (emphasis added).

Beyond this single provision, however, neither section 1021.32(c) with respect to electronic filings generally, nor section 1021.51(f)(1) with respect to electronically filed notices of appeal specifically, identifies which defects must, or may, result in the Board rejecting a filing. It is unclear, for example, whether the omission of a typographical signature (“s/ Jane Doe”) required by proposed section 1021.32(c)(8), *see* 43 Pa. Bull. at 2596 (col. 1), might result in an otherwise timely-filed notice of appeal (or other filing) not being “accepted by the Board,” and thus requiring the re-filing of document, perhaps after a jurisdictional or other preclusive deadline.

The first declared purpose of the proposed rulemaking is “to provide the regulated community, the Department of Environmental Protection (Department) and other potential litigants with more specific guidance on how to represent their interest before the board_[.]” 43 Pa. Bull. at 2591 (col. 2). In general, the Board's rules should provide clear guidance to both litigants and the Board itself about which defects must result in an electronic filing not being

¹ The proposed rules use variants of “accept” and “reject” to express the two possible (and opposite) results for an electronic filing. Thus, for example, the first sentence of proposed section 1021.32(c)(14) conditions the date of a filing on the filing being “*accepted* by the Board,” while the fourth sentence addresses what happens “[i]f the Board *rejects* the submitted documents following review_[.]” 43 Pa. Bull. at 2596 (col. 1) (emphasis added).

“accepted by the Board,” and (to the extent there is any discretion), which defects may result in such a rejection. The proposed addition of electronic filing of notices of appeal to the Board’s rules makes such guidance especially important, because the Board lacks jurisdiction over an appeal unless it is timely filed.

3. The rules should authorize electronic service of notices of appeal on the Department’s Office of Chief Counsel and program office, and if possible automatic electronic service on the Department should be built into the Board’s electronic filing system.

Another declared objective of the proposed rulemaking is to expand the use of electronic filing and service by “requir[ing] electronic filing and service in nearly all matters before the Board.” 43 Pa. Bull. at 2591 (col. 2). In light of that purpose, and in order to reduce both expenses and the amount of data carried to its destination on paper rather than transmitted electronically, the Board should: a) revise Section 1021.51(f)(1)(iv) to allow service of a notice of appeal on the Department electronically; and, b) if possible, make such service automatic by building it into the Board’s electronic filing system.

For a notice of appeal filed electronically, proposed section 1021.32(f)(1)(iv) would provide that “[t]he appellant shall, concurrent with or prior to the filing . . . serve by facsimile or overnight mail a copy on . . . (A) The office of the Department issuing the notice of Departmental action of a notice of appeal. (B) The Office of Chief counsel of the Department or agency taking the action appealed. (C) In a third-party appeal, the recipient of the action.” 43 Pa. Bull. at 2599 (col. 1). As an initial matter, even if this rule is not changed in substance, we suggest a few changes in the language. First, it is unclear why subsection (f)(1)(iv)(A) refers to the office “issuing the *notice* of Departmental action,” and how that office might differ from the office that took the proposed *action* itself (or more accurately, the office to which the Department *official* who took the action is assigned). We suggest replacing the language of the proposed subsection (f)(1)(iv)(A) with “The office to which the Department official who took the action is assigned.” Second, although certain actions appealable to the Board are taken by non-Department entities (e.g. the State Conservation Commission), PennFuture is not aware of any such entities that have their own “Office of Chief Counsel.” Given that Department attorneys represent the Office of General Counsel in EHB proceedings, we recommend that subsection (f)(1)(iv)(B) be changed to read: “The Office of Chief Counsel of the Department.”

In its substance, section 1021.51(f)(1)(iv) should be amended to allow for service of every notice of appeal on the Department electronically. One way to do this would be to establish: a) a standard service address for the Office of Chief Counsel analogous to the agency Right-to-Know submission address of EP-DEP-RTK@pa.gov; and b) a list of standard service addresses for each Department program office (e.g., the six regional offices; each district mining office (or all of them collectively through a single address for the Bureau of District Mining Operations)). A list of these service addresses (with hyperlinks) would be included in the filing instructions posted on the Board’s web page.

Better yet, however, would be making automatic service on the Department a feature of the Board's electronic filing system, which would send email messages containing links to the newly-docketed notice of appeal to specified email addresses for the Office of Chief Counsel and the relevant Department program office. Essentially, the idea would be to take the standard service addresses described in the preceding paragraph and build them into the Board's electronic filing system. For every notice of appeal filed electronically, the system would send a link to the specified email address for the Office of Chief Counsel. For the program offices, a special submission window for notices of appeal in the Board's electronic filing system would provide a drop-down menu requiring the filer to choose at least one program office in order to complete the filing (with the instructions directing the filer to choose the program office to which the Department official taking the action is assigned). The service email address specified for that program office would receive the same message containing a link to the notice of appeal that is sent to the email address specified for the Office of Chief Counsel.

One way or the other, however, in 2013, there should be no need to serve the Department of Environmental Protection with paper copies of a notice of appeal. PennFuture recommends making such service an automated feature of the electronic filing system, with the rules amended to require the filer to choose the appropriate program office from the drop down menu (or other menu format) provided by the filing system. If the Board's filing system cannot be configured to send links to notices of appeal in the manner described above, however, section 1021.51(f)(1)(iv) should be revised to allow service of the notice of appeal on the Department electronically, with the Board's filing instructions providing a list of the specified email service addresses for the Department's Office of Chief Counsel and program offices.

4. Supportive responses to summary judgment motions and other dispositive motions under 25 Pa. Code §§ 1021.94, 1021.94a.

A. "Notification" of joining a motion.

The proposed amendments to sections 1021.94(c) and 1021.94a(f) of the Board's rules would require a party joining a summary judgment motion or other dispositive motion to file "[a] notification to the Board that a party joins in [the] motion . . . within 15 days of service of the motion." 43 Pa. Bull. at 2600 (col. 1) (§ 1094(c)); *id.* at 2600 (col. 2) (§ 1094a(f)). It is unclear, however, what the "notification" must or may include, what must or may accompany it (such as a supporting memorandum of law or brief), and what other effect it might have (for example, whether it entitles the notifying party to file a reply to a response in opposition to the motion). The proposed rule should resolve all of those issues definitively. PennFuture recommends that the rule make clear that any supporting memorandum of law or brief must accompany the notification, and that only parties who file such a memorandum or brief may file a reply to the non-moving party's response in opposition to the motion.

In the remainder of this comment, PennFuture assumes that the "notification" could be accompanied by a supporting memorandum of law or brief that is limited to the factual and legal bases presented in the motion.

B. Scope of supportive responses and time for opposing them.

The proposed amendments to sections 1021.94(c) and 1021.94a(f) of the Board's rules generally would limit responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. *See* 43 Pa. Bull. at 2600 (col. 1-2). The new proposed comment explains, "The responses to a dispositive motion should be limited to the legal and factual bases contained in the motion; a party wishing to raise other grounds for granting a dispositive motion should file a separate motion before the dispositive motion deadline or seek leave from the Board to file a dispositive motion after the dispositive motion deadline." *Id.* at 2600 (col. 2) (proposed comment to § 1021.94). *See also id.* at 2601 (col. 1) (substantially identical comment to § 1021.94a). The preamble to the proposed rule further explains that "[t]he alternative option would be to allow responses in support of a dispositive motion to include legal and factual bases not in the original motion, but would provide a different time period for the filing of responses to allow the opposing party ample time to address both the dispositive motion and the response in support of the dispositive motion." 43 Pa. Bull. 2592 (col. 2) – 2593 (col. 1).

PennFuture supports the option chosen by the Board of limiting of responses supporting a motion for summary judgment or other dispositive motion to the legal and factual bases raised in the motion. This approach, however, does not by itself eliminate the need for the party opposing the motion to be given additional time "to address both the dispositive motion and the response in support of the dispositive motion." 43 Pa. Bull. 2593 (col. 1). That is to say, additional time beyond the usual 30-day deadline for opposing the motion under §§ 1021.94(b) and 1021.94a(g) (currently (f)) may be warranted, even when a response in support of a summary judgment or other dispositive motion is limited to the legal and factual bases presented in the motion. One example would be where a party files a motion raising a single issue and relying on a single case that, through dispositive if on point, is clearly distinguishable. The supportive response is limited to the exact same legal issue, but extensively addresses a line of cases more directly on point. Indeed, allied parties might coordinate their filings in this calculated manner – an innocuous "set" followed by the real "kill" – in order to effectively cut in half the amount of time the party opposing the motion has to address the true argument.

To avoid this sort of situation (whether coordinated or not), and to ensure that the party opposing a motion for summary judgment or other dispositive motion has sufficient time to address all of the arguments and authorities presented by the moving party and any supporting parties, the deadline for filing a response in opposition to a the motion under §§ 1021.94(b) and 1021.94a(g) (currently (f)) should be 30 days after service of the *later* of: a) the motion of b) the last timely-filed notification of joining the motion that is accompanied by a supporting memorandum of law or brief.

5. Section 1021.103, governing subpoenas, should expressly authorize the use of the other mechanisms covered by the incorporated Rules of Civil Procedure: the “notice to attend” and “notice to produce.”

Section 1021.103 of the Board’s current rules, titled “Subpoenas,” provides that “requests for subpoenas and subpoenas shall be governed by Pa.R.C.P. 234.1—234.4 and 234.6—234.9.” 25 Pa. Code § 1021.103(a). Under the proposed amendments to section 1021.103, the title of the section would remain “Subpoenas.” The only change to this section would be the addition of citations to additional Rules of Civil Procedure governing subpoenas, specifically the rules governing the use of subpoenas in discovery found at Pa.R.C.P. 4009.21—4009.27. 43 Pa. Bull at 2601 (col. 1). As explained in the preamble, the proposed amendments to section 1021.103 simply makes clear that Pa.R.C.P. 4009.21—4009.27 also are incorporated into the Board’s rules. 43 Pa. Bull. at 2601 (col. 1). This clarifying addition of the citation to Pa.R.C.P. 4009.21—4009.27 is a good idea.

The proposed amendment would carry forward, however, an unnecessary ambiguity that exists in the current version of section 1021.103. The Board should take this opportunity to eliminate that ambiguity.

Although section 1021.103 refers exclusively to “subpoenas,” the Rules of Civil Procedure that it currently incorporates (and would continue to incorporate under the proposed amendment), Pa.R.C.P. 234.1—234.4 and 234.6—234.9, are *not* limited to subpoenas alone. They also cover similar devices, the “notice to attend” and “notice to produce.” A notice to attend may be used to “compel the attendance of another party of an officer or managing agent thereof for trial or hearing.” Pa.R.C.P. 234.3(a). *See also* Pa.R.C.P. 234.7 (Form of Notice to Attend). A notice to produce may be used to “compel the production of documents or things by the other party” at a trial or hearing. Pa.R.C.P. 234.3(b). *See also* Pa.R.C.P. 234.8 (Form of Notice to Produce). Although these mechanisms are similar to subpoenas in their effect, they are *not* subpoenas. *Cf.* Pa.R.C.P. 234.1, 234.2, 234.4(a) (“The party serving a subpoena or notice to attend or notice to produce may excuse compliance therewith.”), 234.6 (Form of Subpoena).

One possible reading of section 1021.103 of the Board’s rules is that, by incorporating a range of Rules of Civil Procedure that includes the specific rules governing the notice to attend and notice to produce, Pa.R.C.P. 234.3, 234.7, 234.8, it likewise authorizes the use of those non-subpoena devices. The contrary reading, however, finds support in the failure of Section 1021.103 to mention either the notice to attend or the notice to produce. The argument on that side of the ledger is that because the Board’s rule only refers to “subpoenas,” it only incorporates those Rules of Civil Procedure within the cited range that apply to *subpoenas*, and *not* the rules or portions thereof that apply to notices to attend and notices to produce.

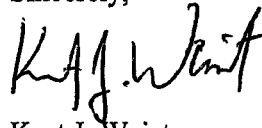
The Board should take advantage of the pending rulemaking to eliminate this ambiguity, and to do so in favor of authorizing the use of *all* of the mechanisms available under the Rules of Civil Procedure – subpoenas, notices of attend, and notices to produce. PennFuture recommends that the final rule read as follows:

§ 1021.103. Subpoenas, notices to attend, notices to produce.

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas and subpoenas, notices to attend, and notices to produce shall be governed by Pa.R.C.P. 234.1—234.4, 234.6—234.9 and 4009.21—4009.27. When the term “court” is used in Pa.R.C.P., “Board” is to be understood; when the terms “Prothonotary” or “clerk of court” are used in Pa.R.C.P., “Secretary to the Board” is to be understood.

Thank you for your consideration of these comments. Please feel free to contact me at 717-214-7920 if you have any questions about PennFuture’s comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Kurt J. Weist". The signature is written in a cursive style with a large, prominent "K" and "W".

Kurt J. Weist
Senior Attorney