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De Novo Review in the Environmental Hearing Board

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The EHB hears appeals from all final actions of the Department of Environmental Protection. It does so on a new evidentiary record, not on the administrative record considered by the department, and does so with a deferential standard of review. Pennsylvania environmental practitioners will find these concepts and the puzzles they present familiar. However, the department seems to be taking a large number of final actions in connection with oil and gas development now, and that field has attracted more than a few who (if accents at conferences are a guide) are not from Pennsylvania, and may not have wrestled with the Environmental Hearing Board Act in the past.

Renwand's opinion in *Consol* offers an opportunity to revisit these issues.

In 1988, the General Assembly adopted the Environmental Hearing Board Act, reorganizing and reauthorizing the EHB, a board of five administrative law judges. The board hears appeals from final department actions. Under Section 1021.52(1) of the Environmental Hearing Board Act, an appellant has 30 days to file a notice of appeal with the board from the time the appellant receives written notice of the department's final action, not from the time of the action itself. In most cases, publication of notice of the DEP action in the *Pennsylvania Bulletin* will start the appeal clock, if nothing else has done so previously. That 30-day period is jurisdictional; it cannot be extended by agreement of the parties, and only in limited

circumstances by the board.

A notice of appeal of an action by the department to the EHB is a fact pleading. Section 1021.51(e) of the Environment Hearing Board Act requires the appellant to identify the action to which it objects and to set forth its objections in separate, numbered paragraphs. A notice of appeal must meet requirements much like those for a complaint filed in a court of common pleas; an EHB notice of appeal is not like a conventional "notice of appeal," which is just that — a notice. The objections contained in the notice may contain factual or legal assertions, but, in any event, must be specific. An appellant may find itself precluded from raising an objection to a department action if the notice of appeal does not plead that reason for appeal with adequate specificity.

The board acts de novo; it decides cases on the basis of the evidence before it, not limited to the evidence before the department when taking its action. In 2001, the board explained in *Smedley v. Department of Environmental Protection* that it is not bound by prior department determinations, but instead, must redecide the case based on its scope of review. If the Environmental Hearing Board concludes that the department abused its discretion, it has the authority to substitute its own discretion. In fact, before the board, "de novo review involves full consideration of the case anew."

In 1991, the Commonwealth Court held in *Young v. Department of Environmental Resources* that "the board, as reviewing body, is substituted for the prior decision maker, the department, and re-decides the case."

Renwand applied this principle in *Consol* to conclude that once Consol had appealed an order of the department, a letter from the department withdrawing the order did not moot the appeal until the board had decided that the underlying order had been withdrawn. In that case, the department disputed that the letter constituted withdrawal of the order.

As Renwand pointed out, the department does not hold a due process hearing before making decisions; the board does afterward. The board, therefore, does not depend on a record developed by the department, but takes evidence from the parties during a hearing akin to a non-jury civil trial before the court of common pleas. The Commonwealth Court discussed these concepts in 1975 in *Warren Sand & Gravel Co. v. Department of Environmental Resources*.

As stated by Renwand in the *Consol* opinion, the EHB considers all relevant, admissible evidence during a hearing and its responsibility and duty is to determine what legal effect the actions of the appellant, the department or any other party has on the proceedings before it. In fact, upon appeal of a board decision, the Commonwealth Court is not required to even review the department's decision because the board conducts a de novo hearing and the department does not conduct any such hearing or provide due process.

Warren Sand also explains that the board is "not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's fact finding hearing. The board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the board." It acts as a separate and independent body, not as a traditional appellate court. A conventional appellate court bases its decisions on the record before the original "fact finder," but the EHB makes its own record.

The principle that the board substitutes its discretion for the discretion of the department creates some administrative problems. For example, in a typical case, a permittee or a third party appeals the unacceptable terms of a permit. The parties then try the terms of the permit on new evidence, and the board issues adjudication. Is that the permit, or does the department have to issue a new piece of paper labeled "permit?" If the department does not issue a new permit, then one cannot readily keep track of the permit and its terms. Accordingly, in most cases, the board will remand a permit to the department for revision.

When the department reconsiders a permit, it may be required by the underlying regulations governing the program to issue public notice that it is doing so, and it may have to provide opportunities for public comment. If the department is issuing the permit in whole or in part under a delegated or approved federal

program (that is, if the permit is an air emission permit, a water pollution permit, a hazardous waste permit or the like), then the memorandum of understanding between the department and the U.S. Environmental Protection Agency will require that the EPA have an opportunity to review the permit if it wants to do so. What discretion does the department have if the board has already ruled? If the department has no discretion when reconsidering a permit, does all of this process even make sense?

As discussed above, *Warren Sand* explains that the board has the discretion to uphold or to vacate the department's action if the department acts pursuant to a mandatory rule. If the department acts with discretionary authority, the board may substitute its discretion for the department's discretion. Where the department has discretionary authority to include terms and conditions in a permit, for example, the board may properly substitute its discretion regarding those terms and conditions.

If the board substitutes its discretion for the department's discretion and orders a permit to be reconsidered and reissued, the department has lost all discretion in reissuing the permit, so it is not clear that the permit issuing process ought to apply, even though the EPA, for example, believes that it does. The board hears appeals de novo, but does so under a deferential standard of review. Notice the inherent inconsistency there.

The board hears evidence that the department never heard or saw. Indeed, the department can support its original decision before the board with evidence and rationales that it did not originally use to make that decision. The department may consult with new experts and present evidence by those new experts. It may decide that it was right the first time, but for a different reason. The department will only be reversed by the board, though, if the action the department took was arbitrary or contrary to law in the first instance. The board will make that determination on a record that the department did not have. So, the meaning of "arbitrary" is a potential subject of litigation in each appeal.

Because review is de novo, albeit deferential, the board allows full discovery as if it were a court of common pleas. This offers important tactical opportunities. One is not limited to memoranda that may have been put into a file. One can discover all of the back-and-forth conversation and e-mails that underlay a decision. One can depose decision makers about their decisions. A good deposition can focus that decision maker on weaknesses that he or she might otherwise ignore, and may lead to settlement.

But all that process takes time and costs money. An appeal can take many months or even years. Fees resemble fees for trial court litigation. For the party defending department action, that time and those fees provide an advantage.

The board may, on motion, grant a "supersedeas" of an appealed department action. A supersedeas is more akin to a preliminary injunction granted after a hearing than a supersedeas in a federal court of appeals.

Most appeals, of course, settle. The board's rules of practice allow that settlement to take several forms. Among them is submission of the settlement to the board for entry as a consent adjudication, much like a consent decree in a federal case. Again, if the underlying regulatory statute requires notice and an opportunity for public comment on modification to an appealed permit, for example, and the consent adjudication purports to modify the permit or to require the department to modify the permit, some take the position that the resulting modification violates the underlying statute.

At least one federal court has disregarded such a permit modification by consent adjudication in a citizen suit. In most cases, the department avoids that problem by entering into a settlement agreement that the board does not enter as an adjudication. The agreement will allow the department to exercise discretion over whether to issue the agreed, modified permit term, and thereby avoids running afoul of the Clean Air Act or the Clean Water Act, although perhaps not running into a subsequent appeal. •

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