ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of September 9, 2021

Attendance:

The Environmental Hearing Board Rules Committee met by WebEx videoconference at 10:00 a.m. on September 9, 2021. Chairman Howard Wein presided. In attendance were the following Committee members: Vice Chair Phil Hinerman, Brian Clark, Gail Conner, Jean Mosites, Diana Stares and Matt Wolford. Attending from the Environmental Hearing Board (Board) were the following: Chairman and Chief Judge Tom Renwand, Assistant Counsel Eric Delio, Board Secretary Christine Walker, and Senior Counsel Maryanne Wesdock, who took the minutes.

DEP Northwest Regional Counsel, Doug Moorhead, also attended the meeting to address questions regarding the Department's handling of discovery of electronically stored information. Mr. Moorhead is being appointed to the Rules Committee to fill one of two slots held by the Department which is currently vacant. Ms. Stares noted that Mr. Moorhead serves as Regional Counsel for an office that handles an extensive amount of litigation and he has a rich experience practicing before the Board. The Committee members and Board personnel extended a warm welcome to him.

Minutes of July 8, 2021 Meeting:

On the motion of Mr. Clark, seconded by Ms. Mosites, the minutes of the July 8, 2021 meeting were approved. Mr. Wein explained that the topics of "notice to interested parties" and "essential parties to an action" have been tabled to the November meeting in order to give the subcommittee tasked with reviewing this issue time to meet. At the July 8, 2021 meeting, Mr. Wein, Mr. Wolford, Mr. Delio and Ms. Wesdock were appointed to serve on the subcommittee.

Ms. Stares and Mr. Moorhead also volunteered to serve on the subcommittee. Ms. Stares will provide Ms. Wesdock with dates when she is available for a meeting and Ms. Wesdock will circulate the dates to the rest of the subcommittee.

Update on Rules Package:

Ms. Wesdock provided an update on Rules Package 106-13, which is now in the final rulemaking stage. The rulemaking was approved by the Office of General Counsel on August 30, 2021, and the Board is awaiting approval from the Governor's Office of Policy. Once that occurs, the rulemaking will begin its trek through the legislative committees, IRRC, the Attorney General's Office and, finally, publication as final rulemaking in the Pennsylvania Bulletin.

Ms. Wesdock also reported that she is nearing completion of proposed Rules Package 106-14, which consists of revisions to the Board's rules on attorney fees, as well as the correction of a typographical error in Rule 1021.94a. Ms. Mosites pointed out a typographical error in the correction to Rule 1021.94a. Mr. Wein suggested holding off on submitting Rules Package 106-14 in order to include any proposed changes to the Board's rules on sanctions that might be recommended at this meeting or the November meeting.

Ms. Wesdock advised the group that the Board has been assigned a new liaison at OGC. Ms. Stares also informed the group that Jim Bohan, a former member of the Rules Committee, has moved into the role of Deputy General Counsel at OGC. Since he is well-versed in Board procedure and rules, he will be an excellent resource at OGC with regard to upcoming rules packages.

ESI Discovery:

At a previous meeting, Ms. Mosites had raised a question regarding the Department's handling of discovery of electronically stored information (ESI). Paragraph 12 of Prehearing Order No. 1 (PHO1) addresses ESI discovery and reads as follows:

> Not later than 14 days after the conference under Paragraph 11, the parties shall submit to the Board for its consideration a proposed plan for conducting electronic discovery along with a proposed order, *unless all parties agree that a proposed plan for conducting electronic discovery is not necessary.*[1]

Ms. Mosites raised the following questions: When is an ESI plan required? Since nearly all information is electronically stored, is an ESI plan necessary in all cases?

The submission of an ESI plan used to be mandatory under paragraph 12 of PHO1; however, it was recently modified pursuant to discussion at a prior Rules Committee meeting to make the submission of a plan at the discretion of the parties. Ms. Mosites stated that the practitioners at her firm rarely find ESI plans to be necessary in cases before the Board, which often involve smaller, less complicated cases. She asked the Department to expand on when it believes an ESI plan is necessary.

Mr. Moorhead explained that the Department looks at three factors in determining whether an ESI plan is required:

1) Complexity – For example, a case involving an administrative order to clean up a tire pile is not likely to require ESI discovery, whereas an appeal of a Title V air permit is likely to require such a plan. He felt that the cases of sufficient complexity to require a plan are fairly rare.

[1]The italicized language was added in June 2021, following the recommendation of the Rules Committee.

2) Number of custodians involved – For example, a case involving a pro se appellant will almost never require an ESI plan, but where the appellant is a large company with a large number of custodians of information, an ESI plan may be appropriate.

3) Duration – For example, an action that involves one inspection report is not likely to require an ESI plan, whereas an enforcement action that has been going on for 10 years may require such a plan.

Mr. Moorhead stated, in his opinion, an ESI plan will not be necessary in most cases. He noted that even though the Department may have a large amount of electronic data, most appellants do not. He stated that the parties can usually work out how to handle discovery without the need for an ESI plan. If difficulties arise, the parties can usually address them by means of an informal conference. Ms. Mosites agreed with the approach stated by Mr. Moorhead but stated that the practice outlined by him is not consistent among Department attorneys. In her experience, some Department attorneys hold the position that an ESI plan is always necessary. At that point in the discussion, Mr. Wein asked Ms. Wesdock to circulate a copy of PHO1 to the committee. Ms. Walker provided a copy of the Board's current PHO1.

Mr. Moorhead asked whether the Board would like to receive a status letter from the parties when they believe an ESI plan is not necessary. Judge Renwand explained that the requirement to submit a plan for discovery of ESI did not come from the Board; rather, it was a recommendation made by members of the Rules Committee and other practitioners. Ms. Mosites noted that the deadline for submission of an ESI plan is close in time to the deadline for conferring regarding settlement. In her practice, she often includes both pieces of information in the same report, i.e., that the parties have conferred regarding settlement and the parties do not see a need for an ESI plan. Judge Renwand agreed that it might be helpful to modify the language of paragraph 12 of

PHO1. He stated that the Board is open to making any changes that make the process more streamlined and more helpful to the environmental bar. The Board's intention in adopting the requirement of an ESI plan was not to make the process more burdensome to the parties. Ms. Mosites felt that a tweaking of the language might be helpful. As it stands now, the parties can spend a lot of time meeting the deadline to prepare an ESI plan that may not be necessary.

Mr. Wolford asked how the Board handles a case where the parties disagree on whether an ESI plan is needed. Judge Renwand admitted that this issue has never occurred in one of his cases; however, if it did occur, he would suggest that the parties ask for a conference call with the judge. Mr. Wolford stated that, in his experience, some Department lawyers will not provide information in discovery unless an ESI plan is in place. In that case, he suggested that a motion to compel could be filed. Mr. Delio recalled a case in which the parties could not agree on whether an ESI plan was needed before discovery could proceed and it was resolved with a conference call.

Ms. Stares opined that the situation that Ms. Mosites described – where some Department lawyers insist on an ESI plan in all cases – may be a reaction to the previous wording of PHO1 which seemed to say that a plan was required. Ms. Wesdock asked whether it would be helpful to change the language of PHO1 to clarify that the submission of an ESI plan is not the default option but merely an option available to the parties if they believe it is necessary. Ms. Mosites agreed that the use of the word "shall" in the current language makes it seem like submission of an ESI plan is mandatory unless the parties otherwise come to an agreement. Mr. Wolford suggested revising the language to state that "the Board encourages the submission of an ESI plan in complex cases."

Mr. Clark stated that the Department and most private practitioners who appear before the Board have standardized agreements already developed for conducting ESI discovery. In addition,

Mr. Wein noted that there are three sample ESI discovery plans on the Board's website. Mr. Moorhead stated that the Department has a form agreement that is utilized for discovery of ESI; it is primarily directed at the type of ESI that the Department has. Mr. Hinerman stated that the sample ESI discovery plans on the website were selected by him and Mr. Bohan when the issue of ESI discovery was discussed at prior meetings. He noted that several attorneys have told him that they use the sample agreements and find them helpful. Mr. Wein suggested reviewing the sample agreements and categorizing them based on complexity.

Mr. Wolford stated that the problem with the current language of paragraph 12 of PHO1 is that it suggests an ESI plan is required even in the simplest of cases that may only involve production of emails. Mr. Moorhead stated that when the only electronic information requested in discovery is emails, and not information from databanks, the Department's preference is to produce the information as pdf files.

Ms. Mosites volunteered to review the ESI sample forms on the website and to draft revised language for paragraph 12 of PHO1 pertaining to ESI plans. Mr. Wolford suggested that it may be helpful to combine everything into one sample form, rather than three separate forms. Mr. Moorhead offered to talk with Department lawyers regarding the handling of ESI discovery.

Single Judge Opinions:

This topic arose at a prior Rules Committee meeting: A suggestion was made that the Board consider amending its Internal Operating Procedures to require full Board review of two types of single judge opinions – opinions on supersedeas petitions and opinions on denials of summary judgment motions.

Judge Renwand reported on his discussion of this matter with the other judges of the Board. First, he noted that, even though it is not formally required by the Board's rules or Internal

Operating Procedures, in practice, supersedeas opinions are frequently discussed by the full Board before they are issued. Opinions denying summary judgment motions may be discussed by the Board, but it occurs less frequently. Judge Renwand reported on a few concerns voiced by the judges regarding a requirement that supersedeas decisions be issued by the full Board: 1) A requirement that supersedeas decisions must be signed by the full Board eliminates the ability to rule on the petition from the bench at the conclusion of the hearing, which is sometimes requested by the parties, and 2) if all judges are required to sign the decision, it will require a review of the transcript by the judges who did not hear the case,[2] which could delay issuance of the decision. It will also require an expedited transcript which can be cost-prohibitive. Simply requiring a review of the decision, but not requiring the signature of all judges, would resolve the second problem.

Mr. Wein stated his opinion that simply requiring full Board review, but not signature, was fine. He also would not eliminate the ability to rule from the bench. Ms. Stares asked what the impetus was for proposing full Board review of supersedeas opinions and summary judgment denials. Ms. Wesdock stated that several attorneys have contacted her over the years with regard to this issue. She felt it was prudent to take it to the Rules Committee.

Mr. Wolford noted that the decision on a supersedeas petition can end up being the decision on the case. Depending on what happens with the supersedeas petition, an appellant may decide not to pursue his appeal. In effect, the merits of the case end up being decided by one judge. He suggested that this could be remedied by allowing en banc reconsideration of supersedeas opinions. Judge Renwand expressed the opinion that foregoing a supersedeas hearing for an expedited hearing on the merits could also resolve the problem. Mr. Moorhead noted that a party can ask for reconsideration of a supersedeas decision under Rule 1021.151 (reconsideration of an

[2] The Commonwealth Court has ruled that a case may be decided by a judge who did not hear the case so long as he or she has the ability to review the transcript.

interlocutory order) but must demonstrate extraordinary circumstances justifying reconsideration. He acknowledged that there should be some standards that must be met before allowing reconsideration and did not believe that a request for reconsideration should be filed after every supersedeas decision.

Circling back to Ms. Stares' question as to the impetus for the proposed change to the Board's operating procedures for review of certain one-judge opinions, Ms. Wesdock explained the basis for requiring full Board review of one-judge denials of summary judgment motions. She stated that she has been contacted by more than one member of the environmental bar who has made this suggestion. In some cases, the attorney was not seeking to overturn the denial but felt that statements may be made in one-judge opinions that are more sweeping than necessary. Ms. Wesdock explained that the Board's current Internal Operating Procedures require circulation of one-judge opinions that deal with a new area of law or that are precedent-setting or expansive, but sometimes it's not clear that circulation of an opinion is necessary.

Returning to the subject of supersedeas opinions, Mr. Moorhead stated that the Department has relied on Rule 1021.151 (reconsideration of an interlocutory order) to petition for reconsideration of a supersedeas opinion. However, the decision of whether to grant a petition for reconsideration is usually made by the judge who issued the supersedeas opinion, not by the full Board. Mr. Delio noted that the Board's rules are silent on whether reconsideration is en banc. It appears that if a party wants reconsideration en banc, it must request it. Ms. Wesdock agreed and noted that most petitions for reconsideration of an interlocutory order are decided by the judge who issued the underlying opinion, not by the full Board.

Mr. Clark felt that the Rules Committee should seek input from the Board before suggesting changes to the rules. Judge Renwand agreed and volunteered to talk to the other judges before the next meeting.

In response to Judge Renwand's earlier statement that the judges often discuss supersedeas decisions before they are issued, Mr. Hinerman asked whether the discussions were about factual issues or legal theory. Judge Renwand replied that both types of issues may be discussed. Mr. Wolford stated that, by definition, supersedeas decisions are interlocutory and, based on the very high standard that must be met for reconsideration of an interlocutory order, such requests will almost always be denied. He felt that it would be helpful to amend either the rules or the Internal Operating Procedures to require full-Board review of supersedeas decisions. Mr. Wein agreed, especially in light of the fact that a decision on a supersedeas petition may end up deciding the entire case.

Returning to the subject of denials on summary judgment motions, Ms. Stares pointed out that a number of cases settle after receiving a denial of a summary judgment motion. She stated that in some cases parties file a motion for summary judgment to see where the Board will come out on a certain issue. How the Board rules on certain issues raised in the motion can be definitive in deciding whether to take the case to trial. Mr. Wein agreed that in several cases a loss on a summary judgment motion may result in a withdrawal of appeal. Judge Renwand agreed to discuss these matters with the other judges and report back at the November meeting.

Sanctions:

This issue was first discussed at the July 8, 2021 meeting. Before proceeding, Ms. Conner stated that she wanted to review the proposed changes in order to assess how they might affect appellants. Following her review, Ms. Conner's advice was not to amend the sanctions rule but to

keep the existing language. In her opinion, the proposed revisions would make the rule overly broad. She agreed with comments provided by Mr. Duncan prior to the meeting. Since Mr. Duncan was unable to attend the meeting he provided his comments by email to Ms. Wesdock and she circulated them to the Committee members prior to the meeting. Mr. Duncan's comments were as follows:

> What are specific examples of actions that some believe should be sanctionable but that are not currently subject to sanctions under Rule 1021.161, an ethics violation, attorney's fees under the state environmental statutes, or penalties for making false statements to government agencies? The minutes note a concern with "incorrect statements made in filings where a party has not done its due diligence." This situation would seem to be covered by one or more of the above. I also think that broadening Rule 1021.161 would have a chilling effect on parties' ability or willingness to fully litigate appeals, especially for third-party appellants.

In response to Mr. Duncan's comments, Mr. Wein stated that the Rule of Civil Procedure referenced in the Board's rule on sanctions – Pa.R.C.P. 4019 – pertains to sanctions for discovery violations, and since it is referenced in Board Rule 1021.161 it appears to indicate that the Board's rule is limited to sanctions for discovery violations. Ms. Mosites stated that she did not read the reference to Pa.R.C.P. 4019 as limiting the Board's rule exclusively to discovery sanctions, but as simply one example of the types of sanctions covered by the rule. Mr. Wolford agreed with Mr. Wein; he read the reference to Pa.R.C.P. 4019 as being exclusive.

Mr. Moorhead felt that it was not clear which rule could be used to sanction an attorney or appellant for making unfounded statements in pleadings. Mr. Wein agreed and stated that this type of situation is exactly the reason the Committee decided to look at whether the rule on sanctions should be revised. Mr. Wolford stated that a request for sanctions brought under Federal Rule of Civil Procedure 11 or its Pennsylvania counterpart, Pa.R.C.P. 1023, is usually denied. Under those rules, sanctions are generally granted only when the complained of conduct is outrageous. Mr.

Delio pointed out that the Board's rule on supersedeas petitions, Rule 1021.61(e), allows a party to seek sanctions if he or she believes that the supersedeas petition was filed in bad faith or on frivolous grounds. Where such grounds are found, the sanctions may include the imposition of costs. In his recollection, this rule was invoked once and the request for sanctions was denied. Mr. Wein noted that Rule 1021.61(e) also references the rule on sanctions, Rule 1021.161.

Mr. Wolford suggested changing "including" to "including but not limited to" before the reference to Pa.R.C.P. 4019 in Board Rule 1021.161. Ms. Mosites agreed that Mr. Wolford's suggested revision would add clarity to the rule. Ms. Conner reiterated a question raised by Mr. Duncan: What will be sanctioned under the revised rule that was not covered by the original rule? She cautioned that the practice of environmental law can be complex and the Board's rules should not make it more difficult.

Ms. Mosites noted that the first sentence of Rule 1021.161 sets forth what the rule covers, i.e., that the Board may impose sanctions for failure to abide by a Board order or rule. The second sentence sets forth the type of sanctions that may be imposed. She did not recommend making any change to the first sentence. Mr. Wein felt that it should be made clear that Rule 1021.161 includes the sanctions permitted by Pa.R.C.P. 4019 but is not limited to those sanctions. Mr. Moorhead agreed with Mr. Wein. He also noted that the situation he referenced earlier – i.e., unfounded claims made in a pleading – could be sanctioned under Rule 1021.31 (dealing with signing). Mr. Wein agreed with the language proposed by Mr. Wolford earlier – i.e., revising "including those permitted under Pa.R.C.P. 4019" to read "including but not limited to those permitted under Pa.R.C.P. 4019." Judge Renwand stated that he does not read the rule, as currently written, as being limited to the discovery sanctions set forth in Pa.R.C.P. 4019. Mr. Wein suggested adding the following language: "other sanctions as the Board may impose."

Mr. Wolford suggested deleting the reference to Pa.R.C.P. 4019. He felt that the rule was micromanaging the Board's authority by including specific Rules of Civil Procedure. He raised the question of how the reference to Pa.R.C.P. 4019 ended up in Board Rule 1021.161 to begin with. Mr. Wein noted that changes were made to Rule 1021.161 in 2002. He suggested looking at the Rules Committee minutes from that time period.

Mr. Clark felt that the language suggested by Mr. Wolford might be more readily accepted by IRRC since it involves a clarification to the rule rather than a substantive amendment. He felt that any amendment to the rule on sanctions would be viewed with a critical eye during the rulemaking process.

Ms. Conner asked if she could be given a copy of any communications regarding the sanctions rule prior to the next meeting. Mr. Wein agreed that any information should be circulated prior to the November meeting and that any email communications regarding the sanctions rule should be included in the minutes of the next meeting. Mr. Wolford agreed with circulating information on the sanctions rule prior to the next meeting, but he suggested that the Rules Committee members should refrain from advocacy in their emails. He felt that any opinions on the topic should be expressed at the meeting itself.

Topics for the November Meeting:

The next meeting of the Rules Committee is Wednesday, November 10, 2021, at 10:00 a.m.[3] Topics will include the following:

1) Update on rules package 106-13.

[3] The meeting date was moved from Thursday, November 11, to Wednesday, November 10, due to Veteran's Day being a state holiday.

2) Ms. Mosites will report on her review of the sample ESI discovery plans on the Board's website and will present amended language for the Board's Prehearing Order No. 1, paragraph 12.

3) Judge Renwand will report on his further discussion with the other judges regarding amending the Internal Operating Procedures to require full Board review of supersedeas decisions and denials of summary judgment motions.

4) The subcommittee consisting of Mr. Wein, Mr. Wolford, Ms. Stares, Mr. Moorhead, Mr. Delio and Ms. Wesdock will present proposed amendments to Board Rule 1021.51 and the Notice of Appeal form addressing the following issues: a) ensuring that all interested parties receive notice of the filing of an appeal and b) ensuring that all appropriate parties are included in the appeal.

5) Ms. Wesdock will review the minutes of Rules Committee meetings leading up to the inclusion of "Pa.R.C.P. 4019" in the Board's rule on sanctions and report on her findings. Further discussion will take place on whether the rule should be amended.

Adjournment:

On the motion of Ms. Conner, seconded by Ms. Mosites, the meeting adjourned at 12:05 p.m.