ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Minutes of September 19, 2007

Attendance:

The Environmental Hearing Board Rules Committee met on September 19, 2007 at 10:15 a.m. Committee Chairman Howard Wein presided. In attendance were Maxine Woelfling, Susan Shinkman, Dennis Strain, Phil Hinerman and (by phone) Stan Geary and Joe Manko. Representing the Environmental Hearing Board were Acting Chairman and Chief Judge Thomas Renwand, Judge George Miller, Judge Michelle Coleman, Board Secretary William T. Phillipy^{IV} and Senior Assistant Counsel Maryanne Wesdock (who took the minutes).

Approval of Minutes:

Minutes of the July 10, 2007 meeting were approved on the motion of Ms. Woelfling, seconded by Mr. Strain. There was a correction to the minutes of the August 14, 2007 Rules Committee teleconference.[1] With that correction the minutes were approved on the motion of Mr. Hinerman, seconded by Ms Shinkman

Electronic Filing:

Board Secretary Bill Phillipy reported on his meeting with representatives of LT Court Tech, the Board's website provider, to discuss updates to the electronic filing (efiling) system. Improvements to the system had been recommended by members of the Rules Committee, private practitioners and Department of Environmental Protection attorneys and staff. Changes that have been made by LT Court Tech as part of its current contract are the following:

[1] The date of the next meeting should have been listed as September 19 rather than September 15.

1. The confirmation email that is sent to attorneys after an efiling now clearly indicates whether the other attorneys to the case have been served electronically or whether they need to be served by traditional means. In addition, the confirmation email is now in block text and is easier to read.

2. New items have been added to the drop down menu for the filing of documents.

The Board is currently operating under a sole source contract with LT Court Tech. The benefit of this is that it allows continuity of service. The drawback is that it is difficult to make improvements to the electronic filing system once the contract is in place. There would be an additional fee charged for any work that is not covered by the current contract. An additional dilemma is that any work that is not covered by the contract may be required to be put out for bid, but because the Board has a sole source contract it is not permitted to do so.

The contract was renewed July 1, 2007 for one year, and the Board would like to continue to have LT Court Tech as its website provider. It was suggested that some of the additional work that has been suggested which is not covered by the current contract could possibly be negotiated into next year's contract.

Items that have been suggested for improving the Board's efiling system that are not covered by the current contract with LT Court Tech are as follows:

1. Providing an online list of attorneys who are registered for efiling
2. Combining data for attorneys who have multiple registrations
3. Allowing multiple exhibits per efiling
4. Allowing exhibits to be filed in a format other than PDF
5. Providing online registration

The latter of these items – providing online registration – would cost approximately $4,875. The Board has agreed that this improvement may be worth the expense, and will explore funding options for the current fiscal year and will also consider including this item in next year's contract. Ms. Woelfling pointed out that other courts do not provide online registration such as the Federal District Court for the Middle District.

Mr. Wein asked whether the Board could make changes to the website without requiring work by LT Court Tech. Mr. Phillipy explained that Board personnel cannot make changes to the efiling system. However, the Board does have access to the electronic docketing system, whereby the secretarial staff in Harrisburg can make docket entries and update contact information. Two suggestions were made as to how one of the suggested improvements – i.e. having some method for indicating whether attorneys are registered for electronic filing and service – could be handled via the docketing system. First, whenever an attorney files a notice of appearance he can indicate whether he has registered to file and receive service electronically. This can be included in the docket entry for the notice of appearance. Second, on the case information page for a particular docket number, the secretarial staff in Harrisburg can indicate whether the attorneys of record have registered for electronic service. For instance, there could be a notation with the email address which says "Accepts electronic service" and the secretary entering the contact information could check either the "Yes" or "No" box. It was agreed that Mr. Phillipy, Judge Renwand and Ms. Wesdock will take steps to incorporate this process with the Harrisburg secretarial staff and will request the contractor to incorporate a screen change to accommodate the "click on" box feature.

All of the other suggested changes would need to be justified by the Board with special permission obtained from Comptroller Operations to be funded during the current fiscal year or written into the next contract for Fiscal Year 2008-2009 with LT Court Tech. However some of the changes were considered quite costly. For example, revising the system to allow for the filing of multiple exhibits could cost approximately $25,000. Ms. Woelfling suggested that instead of filing multiple exhibits, one could simply file all of the exhibits at once with blank pages between each exhibit to separate them. Judge Miller also pointed out that the Board prefers to receive prehearing exhibits in hard copy, rather than electronically. Ms. Woelfling agreed, stating that it did not make sense to efile prehearing exhibits, many of which may never even be introduced at hearing.

Prepayment of Penalties:

Ms. Wesdock had previously circulated a memo containing the rules that will be added or revised in the next rules package. One of the changes pertains to prepayment of penalties. Judge Miller pointed out certain corrections that should be made in the comment to new rule 1021.54, entitled "Prepayment of penalties": First, rather than saying "if a civil penalty is assessed under more than one statute an appellant shall follow the procedures set forth in *the* statute" it should say "*each* statute." Second, add a sentence stating that penalties assessed under the Air Pollution Control Act should be prepaid to the Environmental Hearing Board.

Summary Judgment:

The Committee reviewed two drafts of a proposed summary judgment rule: a draft prepared by Judge Miller and revisions to that draft prepared by Mr. Wein. It was agreed that any new rule should set forth the time period for filing a response and a reply.

It was also agreed that the new rule should incorporate the reference to affidavits which is set forth in subsection (d) of the current rule.

Judge Miller expressed concern about page limits. He felt that in a complex case two pages may not be sufficient for a motion. Mr. Manko noted that the rule should be written in a way that assists the judges in their review of summary judgment motions, and if the judges' preference is to allow longer motions, the rule should be amended to allow that. Judge Renwand stated that he would prefer two pages but he would be fine with increasing the limit to five pages based on Judge Miller's strong concern.

Judge Miller stated that he would like to receive an answer to a motion, as opposed to having the response contained in the brief and also expressed a preference for numbered paragraphs in both the motion and answer. Since there seemed to be a preference for a number of items in the current rule, Judge Renwand felt that perhaps it would be better to keep the rule as is. He noted that in discussions with Judge Labuskes, Judge Labuskes had stated he would prefer to keep the rule as it is and simply deal with any problems in the Board's opinions. Judge Coleman stated that originally she was in favor of changing the rule but now felt that perhaps it would be better to keep it as is. Judge Miller stated that he was fine with the present rule but wanted to make sure that the rule contained a reference to the Pennsylvania Rules of Civil Procedure. Mr. Wein suggested that the current rule be amended to incorporate subparagraph (a) of Judge Miller's proposed draft which states that motions for summary judgment shall be governed by Rules 1035.1 to 1035-1035.5 of the Pennsylvania Rules of Civil Procedure.

Judge Miller also stated that he had a problem with the following sentence in subparagraph (f) of the current rule: "All material facts in the movant's statement which

are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c) demonstrating existence of a genuine issue as to the fact disputed." He felt that this causes lengthy motions and responses and opens the system to abuse. He would prefer to say that a failure to respond will not be taken as an admission. Ms. Wesdock expressed a concern that that would make it difficult to determine what the facts are. Mr. Geary pointed out that in ruling on a motion for summary judgment the Board is not supposed to decide factual questions but simply whether there is an issue of fact. Judge Renwand felt that deleting the aforesaid provision would be confusing to practitioners. He expressed a concern that if there is a fact alleged in the motion that the Board deems to be important and the other side does not respond to it, the responding party is opening itself up to having summary judgment entered against it. If there is no response the Board could come to the conclusion that the fact is not disputed. He admitted, however, that this forces the responding party to respond to every statement of fact even if it's not material because they would not want it to be relied on by the Board. Mr. Geary agreed, stating that in order to be cautious most practitioners would respond to everything because they do not know which facts in particular the Board will rely on.

Ms. Woelfling pointed out that the problem is substantive as much as it is procedural, in that summary judgment motions are often filed in inappropriate cases, such as cases that are too complex or where the subject matter is not conducive to summary judgment being entered. Mr. Strain pointed out that even in a complex case parties may want to be able to eliminate some of the factual issues. The only way to do that is with a motion for summary judgment or at least partial summary judgment. Mr. Strain felt that

the only way to get summary judgment motion practice under control is to impose a page limit on the brief. If the case is too complex or not conducive to summary judgment, it will not be able to be explained in a limited brief.

It was agreed that page limits on the brief should be imposed and that the current rule should refer to the Pennsylvania Rules of Civil Procedure and also incorporate the requirement of affidavits. The affidavit should be based on personal knowledge. Ms. Shinkman noted that this is already required by Pa. R.C.P. 1035.4 which is referenced in subsection (d) of the current rule on summary judgment. It was decided that a sentence should be added to the comment to the rule stating what is required by Pa. R.C.P. 1035.4.

Judge Miller stated that he was still concerned about subparagraph (f) of the current rule since, if a lengthy statement of facts is set forth by the moving party, it requires the responding party to come forward with evidence from the record disputing each and every one of those facts, no matter how unnecessary or immaterial they may be. Judge Renwand asked whether subparagraphs (c) and (d) of Mr. Wein's proposed revisions addressed this issue.[2] A suggestion was made that perhaps subparagraph (f) of the current rule should be eliminated. However it was noted that other sections of the

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2 These subparagraphs state as follows:

(c) A response to the motion ~~may be made either by a formal answer or by~~shall by in the form of a brief. ~~Neither the answer nor the supporting~~The brief ~~need~~shall not contain a paragraph-by- paragraph answer to ~~the motion and the failure to make a paragraph-by- paragraph response will not be deemed to be an admission of any statement made in~~ the motion.

(d) ~~Both the~~The brief in support of motion and the response shall ~~be accompanied by a brief containing~~contain legal argument and references to the evidence in the record establishing or negating the existence of a genuine issue of material fact. The brief in support of motion and the response may supplement the evidence of record by attaching affidavits based on personal knowledge in support of the motion or response.

rule still required this same concept. Additionally, Ms. Shinkman was concerned that by simply deleting this statement in subparagraph (f) it leaves practitioners up in the air about what to do and does not necessarily address the problem since responding parties would still feel they must address every statement of fact. Mr. Hinerman felt that some of the problem would go away with page limits. He suggested deleting the sentence of subparagraph (f) that begins with "An opposing party may…" Judge Miller suggested taking out the sentence that begins "All material facts …" Mr. Wein pointed out that one of his colleagues had stated that page limits hurt the responding party since the movant gets to tell his entire story, whereas the respondent has to use most of his limited pages to respond to the movant's story before telling his own. Mr. Wein suggested the following:

1. Delete from 1021.94a(f) the sentence beginning "All material facts …"
2. Add subparagraph (a) from Judge Miller's proposed draft rule regarding the Pennsylvania Rules of Civil Procedure.
3. Increase the length of the motion to five pages rather than two.
4. Impose page limits on the brief in support of the motion, as well as the brief in support of the answer and the reply.

A suggestion was also made that subparagraph (f) should contain a statement saying "The opposing party shall file a response which shall include a concise statement as to why the motion should not be granted."

Ms. Woelfling suggested a rewrite of Board Rule 1021.94a in accordance with the above changes, to be circulated at a later date. Ms. Shinkman suggested looking to Federal Rule of Civil Procedure 56(e) which puts the burden on the responding party to raise issues of disputed fact. She suggested incorporating similar language into the

revised Board rule. Ms. Shinkman also pointed out that if the rule continues to require numbered paragraphs in the motion then the answer must state whether the responding party admits or denies each paragraph. Mr. Hinerman suggested moving subparagraph (f) after the *Motion* section of 1021.94a and in subparagraph (c) stating that the motion and response shall be accompanied by a brief.

Mr. Wein suggested that the aforesaid changes be made to 1021.94a and that the Committee reconvene by phone call in October to discuss them. Other Rules Committee attendees felt that a phone call was not necessary. A draft of the rule incorporating the above suggestions will be circulated either in October or immediately prior to the next Rules Committee meeting.

Electronic Discovery

Mr. Hinerman reported on the recent telephone conferences held by the Rules Committee/PBA Environmental, Mineral and Natural Resources Law Section joint subcommittee on electronic discovery (ediscovery) which is chaired by Mr. Hinerman and Mr. Strain. According to Mr. Hinerman, the subcommittee is only a few months away from circulating a draft rule on ediscovery. Mr. Hinerman reported that the Committee had decided to incorporate many of the features of the recently amended Federal Rules of Civil Procedure dealing with electronic discovery. Mr. Strain is preparing a draft for discussion for the subcommittee's next conference call which is October 18. Mr. Strain also stated that he is looking at the Uniform State Rules on electronic discovery for guidance.

During the subcommittee's most recent conference call, it was decided that two requirements of the Federal Rules should be incorporated into the Board's Rule: 1) the

requirement to meet and confer (which could be done by telephone) and 2) mandatory disclosure (which could apply not just to electronic discovery but all discovery). The mandatory disclosure requirements were considered by the Rules Committee previously but were not pursued. At that time, however, they were considered solely in the context of discovery in general and not electronic discovery.

In response to questions about the need for mandatory disclosure, Mr. Hinerman explained that it provides the parties with an opportunity for some immediate discovery. Ms. Woelfling stated that she has seen it work well in cases. Mr. Strain explained that through use of mandatory disclosure, a court can set limits on discovery and what issues are relevant. He pointed out that it can be useful not just in electronic discovery cases but also in cases involving paper discovery. The types of information that would be disclosed include potential witnesses, documents, theories and defenses. Since this would simply be an initial disclosure, it can be amended at a later date. Mr. Hinerman stated that he has never seen a case where sanctions have been imposed for failure to provide information at this initial stage of disclosure.

In response to questions about the Department's capabilities to provide certain documents in electronic discovery, Mr. Strain pointed out that the Department's system changes and is updated approximately every six months. He felt that initial disclosure would be helpful because it would allow the Department to focus on the type of information that is going to be requested and begin to retrieve that information. Mr. Hinerman noted that one of the issues being addressed by the ediscovery subcommittee is that of ensuring a fair playing field for both private parties and the Department, and he was concerned that this would not be achieved by a rule. He expressed a concern that the

rule might be applied differently to a party with more sophisticated electronic capabilities than that of the Department. Mr. Strain pointed out that there has never been a case before the Board where the Department has been incapable of producing a requested document.

Judge Renwand questioned whether extensive electronic discovery was necessary in an Environmental Hearing Board proceeding. He pointed out that a number of administrative agencies have very limited discovery. Although the Board has much more extensive discovery than most other administrative agencies, in his experience on the Board most cases have not hinged on the production of certain emails or other documents by means of electronic discovery. In other words, there is never a "smoking gun email" which determines who wins or loses a case. He did not feel that a rule needed to be developed using the same model as for a complex civil case.

In response, Mr. Strain felt that what was important was an opportunity for an early ruling by the Board on what matters were going to be relevant in the proceeding. It would cut down on the amount of work that the Department would have to go through to produce certain documents. Mr. Wein pointed out there was no discovery in appeals of Department matters until the mid 1980s. Mr. Hinerman stated that whether electronic discovery will take place is dependent on how much money and effort a case is worth. He has had cases where an email has made a big difference. Judge Renwand questioned whether or not this would be the case in an Environmental Hearing Board proceeding since it comes to the Board *de novo*. He questioned whether a separate rule was needed for electronic discovery apart from the general rules on discovery. Mr. Strain stated that he would like to see a "meet and confer" rule. He felt this would be helpful especially in

the case of third parties. He also felt that an early ruling on discovery as to what is relevant would be helpful. Judge Miller questioned whether the parties would be in a position to know what the issues are early in the proceeding. Judge Renwand stated that if a requirement to meet and confer were incorporated into the rules, it would be helpful to include the Board in the meeting.

The Committee agreed to revisit the issue of mandatory disclosure. Mr. Strain will provide a draft of a mandatory disclosure rule for the next meeting.

Pro Hac Vice:

It was agreed that the new Pa. Supreme Court rules on *pro hac vice*, requiring a $300 fee for out-of-state counsel and requiring that the sponsoring attorney be the primary attorney of record, were not applicable to the Board since it is not a "court" as defined within the rules. EHB Assistant Counsel Andy Bockis was asked to attend this portion of the meeting to discuss a case on which he is working for Judge Labuskes. The case involved a question from an attorney from out of state as to whether she must follow the *pro hac vice* rules since the Board's Rule on representation at 1021.21(b) requires the filing of a *pro hac vice* motion by an out-of-state attorney who is representing a corporation in a proceeding before the Board. The Committee recommended that when the Board's assistant counsel receive such an inquiry, they should advise the attorney that the new Pennsylvania rules on *pro hac vice* do not apply to the Board. As in the past, the Board should simply require that the sponsoring attorney file a general *pro hac vice* motion stating that the out-of-state attorney is an attorney in good standing in his state of

practice. It was agreed that the Board should discuss this in more detail at the next Board conference call.[3]

Appealability

The Committee reviewed the recently issued *Langeloth* opinion which dealt with whether a notice of violation was appealable. Mr. Hinerman pointed out that counsel often feel the need to file a protective appeal from notices of violation even where the notice of violation states it is not a final action, in the event the Department should state at a later date that it was in fact a final action. He inquired whether a rule could be drafted to estop the Department from claiming an action is final when it had earlier stated the action was not final. This would prevent parties from having to file protective appeals each time they receive a notice of violation and avoid the possibility of sanctions being brought against them for filing a frivolous appeal.

Mr. Manko agreed that if one did not take an appeal in such a case they were putting themselves in jeopardy of being precluded from filing an appeal at a later date on the basis of administrative finality. He asked whether the recipient of the action could toll the appeal period, but the Board's rules do not allow for the tolling of the appeal period.

Judge Renwand said he was not aware of any case where the Department has said a matter was not final and then claimed it was final at a later date. He did not envision that ever happening. Mr. Geary pointed out that simply because the Department might not later claim the action was final, that would not prevent a third party from making the claim. For instance, if the recipient of a notice of violation did not file an appeal, a third

[3] This topic was addressed by the Board at its conference call on October 1, 2007 and Ms. Wesdock recommended that the next edition of the Practice and Procedure set forth in general the procedure to be followed when filing a pro hac vice motion.

party could later claim that the findings of the notice of violation are final and cannot be challenged.

Mr. Hinerman discussed one of his cases in which he filed a protective appeal from a notice of violation. He is now filing a motion to dismiss on behalf of his client on the grounds that it is not a final action, and the motion will not be opposed by the Department. Ms. Wesdock raised the question of what happens in that case if a third party had intervened in the appeal and then seeks attorney's fees from the appellant for withdrawing from the protective appeal. Mr. Geary stated that the third party would be bound by the Board's opinion saying the matter was not final.

Mr. Wein pointed out that the issue was substantive and not procedural and, therefore, may not be appropriate for the Rules Committee to consider. Mr. Strain suggested that one way to deal with this issue would be simply to withdraw without prejudice. He noted that pursuant to the Board's rule on sanctions at 1021.161, sanctions would not apply to the filing of protective appeals.

Judge Miller suggested that one way to deal with the issue raised by Mr. Hinerman was to have a rule on protective appeals stating that the Board would take no action for a certain number of months. At the end of that time, the Board would hold a conference call to determine whether to extend the stay or to proceed. Ms. Wesdock noted this might resolve the issue raised at an earlier time by David Mandelbaum involving the creation of a civil suspense docket. The Department concurred with Judge Miller's proposal.

Mr. Hinerman will prepare a draft rule to circulate at the next meeting.

Next Meeting:

The next meeting will be held on Thursday, November 8, 2007, at 10:15 a.m. Items on the agenda will include the following:

1) Completion of summary judgment rule
2) Protective appeals, possibly in conjunction with the topic of civil suspense docket
3) Electronic discovery – review draft rule if it is completed by that time
4) Necessary parties to an action – continue discussion from several meetings ago