ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Meeting of November 4, 2004

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, November 4, 2004 at 10:00 a.m. In attendance were the following: Committee Chairman Howard Wein, Susan Shinkman, Dennis Strain, Maxine Woelfling and Stan Geary. Participating by telephone were Brian Clark and Joe Manko. Representing the Board were the following: EHB Chairman and Chief Judge Michael Krancer (by phone), Judge Tom Renwand, Judge Bernie Labuskes, Connie Wilson and MaryAnne Wesdock.

Rules Package 106-8:

Ms. Wesdock reported on the status of the current rules package. The rules package was sent to the Office of General Counsel (OGC) on October 14, 2004. Following review by OGC, it will be sent to the Office of Attorney General, which has 30 days to review it. The Rules Committee would like the comment period for the rules package to coincide with the Environmental Law Forum, which will be held on April 6-7, 2005.

Expert Discovery:

At the prior Rules Committee meeting, Attorney Matt Wolford had raised what he perceived to be a problem with the timing of expert discovery. Under the Board's current rule at 1021.101(a), expert and non-expert discovery is bifurcated. Discovery, including expert discovery, is to be served within 90 days of the pre-hearing order. However, answers to expert interrogatories or expert reports need not be served until 150 days from

the date of the pre-hearing order for the party with the burden of proof and 30 days thereafter for the opposing party. Extensions of the discovery period usually extend each of these deadlines accordingly. However, Judge Krancer and Judge Renwand noted that when they receive a request to extend the discovery period, they often do not extend the period for filing answers to expert interrogatories or expert reports beyond the period for non-expert discovery.

Mr. Wolford explained that appellants sometimes have a difficult time getting information relating to the basis of the Department's action in the early stages of an appeal because it falls within the category of expert testimony. Where an appellant has the burden of proof, such as in a third party appeal, it is required to file its expert report first, sometimes without the benefit of certain information regarding the basis of the Department's action.

At the September meeting, a proposal was made to consider having both expert and non-expert discovery run concurrently. This proposal was discussed in further detail at the November 4 meeting. A question was raised as to why expert and non-expert discovery had been bifurcated. Mr. Strain explained that it had been done to mirror the practice of a federal judge in the Eastern District of Pennsylvania before the mandatory disclosure provisions were added to the Federal Rules of Civil Procedure. Mr. Wein noted that most of the decisions on expert discovery deal with medical malpractice cases, which do not neatly fit into the types of cases heard by the Board.

Judge Renwand provided a background of the Board's most recent rulings on expert discovery – *Borough of Edinboro v. DEP*, 2003 EHB 725, and *City of Titusville v. DEP*, EHB Docket No. 2003-097-R, (Opinion and Order issued May 19, 2004). In

Edinboro, Judge Renwand ruled that under the Board's rules if a party intended to provide expert testimony, it must answer expert interrogatories or provide an expert report. In *Titusville*, the appellant wanted certain information at an early stage of the appeal which the Department considered to be expert discovery and which it said it would provide when it filed its expert report or answers to expert interrogatories. The appellant felt that this information was critical to it being able to prepare its expert report.

Judge Renwand noted that a problem with requiring answers to expert interrogatories in the initial discovery period is that an appellant may not have hired an expert yet and may not be able to do so until it has certain information about the case. He felt the best solution would be to devise a rule unique to environmental practice and not one that was geared toward medical malpractice cases. Questions to be considered are the following: Are expert reports needed in all matters? At what stage of a proceeding should expert reports be provided? Should witnesses be allowed to be deposed first before the filing expert reports?

Mr. Wein agreed that in a third party appeal, in particular, it is difficult to have an expert retained early in the appeal process. It is necessary to see the basis for the Department's decision before figuring out what type of expert to retain. Mr. Strain pointed out that the problem is there may be twenty bases for the Department's action but the appellant is interested in only two of them. This requires the Department to go to a great deal of time and trouble providing information on matters that may not even be of importance to the appellant.

Mr. Geary pointed out that the rule on expert discovery had already been amended three times, the last time being only two years ago. He felt the Board would be making it

difficult for practitioners to be familiar with the rules if they are constantly being amended. He pointed to other possible solutions, such as filing a proposed case management order and requesting a discovery conference with the judge. Ms. Woelfling agreed that she was not convinced there was a problem with the existing rule.

Judge Renwand agreed that in trying to fix one problem with the rules, another one may be created. He felt the most important thing to keep in mind was to make sure all the parties had the information they needed by the time they got to a hearing.

Judge Renwand suggested having the first 90 days of discovery remain as is, but when extensions in discovery were requested, combine the discovery period for both expert and non-expert discovery. That would solve the problem of an appellant not having retained an expert in the first 90 days of a case. Mr. Wein felt it was important to answer the question of when an appellant is entitled to know the basis for the Department's action.

Mr. Strain felt that expert reports were designed for the medical malpractice area and were not helpful in the types of cases before the Board. He explained that the environmental area is fluid, with information being gathered over time, and the filing of an expert report acts as a trap since the author of the report cannot testify outside the report itself. Mr. Strain proposed eliminating the distinction between expert and fact discovery, eliminating the requirement for filing expert reports and require that all testimony, both expert and fact, be summarized in the pre-hearing memorandum.

Judge Krancer felt it was important to maintain a distinction between experts and non-experts. Eliminating this distinction would, in essence, be eliminating the *Frye*

rule.[1] He felt it should still be necessary to have someone qualified as an expert if he or she is going to give opinion testimony in a scientific or technical field.

Ms. Woelfling noted that Mr. Strain was proposing eliminating the distinction between experts and non-experts solely with regard to discovery not for purposes of the trial. Mr. Geary saw this as creating the potential problem of parties calling non-testifying experts to be deposed if the distinction were eliminated for purposes of discovery.

Without the need for Department witnesses to file an expert report, Mr. Geary questioned how one could limit what the witness testified to at the trial. He was concerned that the Department witness might testify to something that wasn't asked about in the deposition.

Mr. Clark recommended that the parties deal with the timing of discovery in a proposed case management order rather than by revising the Board's rules. Mr. Wein pointed out that the Board's rules act as guideposts and create a mechanism for how to proceed where the parties cannot agree.

Mr. Geary pointed out that when answering expert interrogatories, a party sometimes says it will provide the information with the expert report. Ms. Woelfling questioned whether it would be helpful to have disclosure similar to that in federal practice. Mr. Geary felt that if a party is served with expert interrogatories and has the answer at that point, he should provide it rather than saying it will be provided with the expert report.

[1] *Frye v. United States*, 293 F. 1013 (D.C. 1923), adopted as the rule in Pennsylvania in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977).

Judge Labuskes questioned what the advantage was of having bifurcated discovery. Judge Renwand noted that eliminating the bifurcation of discovery could affect appellants who had not had time to retain an expert within 90 days after an appeal is filed. Ms. Wesdock recommended extending the discovery period to longer than 90 days and eliminating the distinction between expert and non-expert discovery. Judge Renwand raised the question of how an appellant would deal with interrogatories served on the second day of discovery asking who the appellant's expert is. Ms. Wesdock replied that if he had not yet retained an expert, he could simply say so and supplement his answer as soon as he had retained one.

Judge Renwand questioned how the Board would handle a motion to compel under such circumstances. Mr. Wein recommended that the rule require that a party must respond to the question of who his expert is within a certain timeframe. Judge Renwand felt that a party should have retained an expert within 120 to 150 days after the filing of the appeal. Mr. Manko recommended that the party must supply the other side with information about his expert within so many days prior the filing of his pre-hearing memorandum. Mr. Strain felt that did not give the opposing side adequate time.

Mr. Geary noted that when he sends out his second set of interrogatories he reminds opposing counsel of the questions in the first set that have not yet been answered.

Judge Labuskes and Mr. Strain both noted they were in favor of extending the discovery period and eliminating the bifurcation of expert and non-expert discovery. Mr. Wein noted that this did not resolve Mr. Strain's issue of not requiring the filing of expert reports. However, the Committee agreed it resolved the issue raised by Mr. Wolford at

the September meeting since the appellant's expert report would not be due before the Department's or permittee's.

Mr. Wein asked whether this revision allowed parties to depose Department personnel integral to the decision-making process. Judge Renwand said these personnel would still be treated as experts and therefore could not be deposed except by agreement of the parties or by court order.

Judge Renwand noted that Department expert witnesses and private experts come to their conclusions differently. The Department's decision-making process begins before the decision is made, e.g. before a permit is issued, but then continues afterward as well. The question is when is the work final. Mr. Strain noted that after an appeal is filed, the Department must develop its justification for the decision. Under Pa.R.C.P. 4003.5, an expert report is required for expert testimony which is prepared in anticipation of litigation. Judge Renwand noted that Pa.R.C.P. 4003.5 was written with medical malpractice cases in mind. Under this rule, most Department experts would be exempt from preparing expert reports.

Mr. Strain noted that the Department employees involved in the decision-making process would be experts but not subject to rule 4003.5. Judge Renwand noted this creates a problem of an expert giving expert testimony but no prior indication of what he or she is going to say. Judge Renwand felt that if a person is going to give expert testimony, the opposing side should have knowledge as to what that testimony is going to be, whether by deposition, answers to expert interrogatories or an expert report. He noted that eliminating the requirement of expert reports in general would be perceived as a problem by the bar.

Mr. Strain voiced the opinion that an expert report artificially condenses the facts. Judge Renwand felt that from the Board's standpoint of having to decide what evidence comes in and what is excluded, it helps to have an expert report. He also felt it helped to promote settlement.

Mr. Strain agreed it made sense for a hydrogeologist to file an expert report, but felt it was much more difficult for a permit reviewer to identify all the things he or she considered in deciding whether to issue or deny a permit. He noted that background information may not be included in the report, but obviously he or she would have relied on it. However, if it's not in the expert report, he or she cannot testify to it. Mr. Strain saw this as a trap in the environmental field.

Mr. Geary pointed out that environmental cases get litigated in common pleas court. However, Mr. Strain said in those cases, the expert would be subject to Pa.R.C.P. 4003.5. Judge Renwand noted that in Pittsburgh, it was common for the Department to file expert reports. The situation in *Edinboro* was an exception to the typical practice.

Mr. Strain stated he had no problem with having to provide a summary of expert testimony; his problem was with having to file expert reports.

Judge Labuskes suggested voting on the timing issue and continuing further discussion of the issue of expert reports to the next meeting.

The following revisions were recommended in rule 1021.101(a):

(1) Eliminate the phrase "including any discovery of expert witnesses" and change the timeframe from 90 days to 180 days.

(2) Eliminate the first two sentences dealing with the timing of expert discovery.

(3) Eliminate the phrase "in a case requiring expert testimony" in the first sentence and eliminate the second sentence.

(4) Judge Labuskes questioned why parties were given only 45 days to submit a joint proposed case management order. The timeframe was extended to 60 days.

On the motion of Mr. Geary, seconded by Mr. Manko, the proposed revisions were unanimously approved. Ms. Woelfling also recommended adding the word "expert" before the word "interrogatories" in the last sentence of (a) (2). On her motion, seconded by Mr. Manko, the revision was unanimously approved.[2] A draft of revised rule 1021.101(a) is attached.

Ms. Shinkman and Ms. Wesdock will check with the Office of General Counsel to see if this revision can be incorporated into the current rules package.[3]

Meetings for 2005:

The tentative schedule for 2005 meetings is as follows:

January 13, 2005

March 10, 2005

May 12, 2005

July 14, 2005

September 8, 2005

November 10, 2005

The meetings will begin at 10:15 a.m unless otherwise noted.

[2] Mr. Clark left the meeting at 12:00 due to another commitment and was not able to join in the vote. However, he concurred with the result.

[3] Following the meeting, Ms. Shinkman contacted OGC and the package will be held to add this revision.

Proposed Revisions to Rule 1021.101 (a):

§ 1021.101. Prehearing procedure

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing that:

(1) All discovery **[,including any discovery of expert witnesses,]** shall be **[served] completed** no later than **[90] 180** days from the date of the prehearing order.

(2) **[The party with the burden of proof shall serve its answers to all expert interrogatories within 150 days of the date of the prehearing order. The opposing party shall serve its answers to all expert interrogatories within 30 days after receipt of the answers to all expert interrogatories from the party with the burden of proof.]** The service of a report of an expert together with a statement of qualifications may be substituted for an answer to **expert** interrogatories.

(3) Dispositive motions **[in a case requiring expert testimony]** shall be filed within 210 days of the date of the prehearing order. **[If neither party plans to call an expert witness, dispositive motions shall be filed within 180 days after the filing of the appeal unless otherwise ordered by the Board.]**

(4) The parties may, within **[45] 60** days of the prehearing order, submit a Joint Proposed Case Management Order to the Board.