ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Minutes of Meeting of September 28, 2006

Attendance:

The Environmental Hearing Board Rules Committee met by conference call on September 28, 2006 from 10:00 a.m. to 12:00 p.m. Chairman Howard Wein presided. Participating on the call were the following Rules Committee members: Susan Shinkman, Dennis Strain, Phil Hinerman, Tom Scott, Stan Geary. Participating on behalf of the Board were Chief Judge and Chairman Michael Krancer, Judge Tom Renwand, Counsel MaryAnne Wesdock and Counsel Jill Smith.

Minutes:

On the motion of Ms. Shinkman, seconded by Mr. Strain, the minutes of the May 11, 2006 meeting were approved.

Clean Up Rules Package:

Ms. Wesdock circulated a memo discussing comments received at the 2006 Environmental Law Forum on the most recent rules package that became effective in February 2006. At the May 11, 2006 Rules Committee meeting, the Committee had recommended preparing a rules package to correct and clarify matters raised at the Forum.

The first issue deals with rule 1021.34(b) which reads as follows:

> (b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery or personal service on the parties.

A question arose at the Forum as to whether the rule prohibited service by fax. The Committee agreed that the intention of the rule was not to limit the manner of service but to

ensure that opposing parties receive documents in approximately the same timeframe in which they are filed with the Board. Mr. Scott did note, however, that when he is served with a document by fax, he prefers to receive a hard copy as well.

A discussion ensued as to how to amend the rule to achieve its intent without limiting the manner of service, and also to ensure that the opposing parties *receive* the document in the same timeframe as the Board, not merely have service effected on the date of filing. On the motion of Mr. Scott, seconded by Mr. Geary, the Committee approved the following revision to rule 1021.34(b):

> When a document is filed with the Board by overnight delivery, **facsimile** or personal service, it shall be **[served] delivered to the opposing parties on the same day or** by overnight delivery **[or personal service on the parties]**.

The Committee also discussed whether the rule should apply to electronically filed documents. When all parties are registered to receive service electronically, the filing of a document electronically automatically effects electronic service on the other parties. A problem arises where one party is registered to file electronically and the other is not. A question arose at the Environmental Law Forum as to whether parties who file electronically must serve documents by same day or overnight delivery on parties not registered to receive documents electronically, in order to be in compliance with rule 1021.34(b). Ms. Wesdock stated that 1021.34(b) should not apply in such a case because it was the choice of the opposing party not to register for electronic service. Additionally, having 1021.34(b) apply to electronic filing would have the effect of penalizing parties who choose to file electronically. This is not the outcome intended by 1021.34(b), particularly since it is the desire of the Board to encourage electronic filing.

Mr. Wein noted that in the booklet of the rules printed and distributed by the Board, a comma should be inserted after "disposition" in 1021.34(c). The comma is not missing in the Pa. Code version of the rule.

Mr. Strain noted that there was a typographical error in 1021.32(f). The reference to 1021.34 *(b)* in the rule should actually be to *(c)*. On Mr. Strain's motion, seconded by Mr. Geary, the correction was approved.

The Committee tabled the matter of the clean up rules package for further discussion at the next meeting in order to proceed to the topic of electronic discovery while a quorum was present.

Electronic Discovery:

Mr. Strain circulated a proposed rule on electronic discovery. A copy is attached as Appendix A. Much discussion focused on subsection (e) which reads as follows:

> (e) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the Board for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

A number of people felt the rule inappropriately shifted the burden to the receiving party to take action with regard to privileged information that is inadvertently produced. Mr. Strain noted that this language was taken from the federal rules that will go into effect in January 2007. When asked whether (e) applied to all forms of discovery or only electronic discovery, Mr.

Hinerman said he believed it applied to all discovery. Ms. Shinkman said that is what revised Federal Rule 26 seems to indicate.

Chief Judge Krancer stated that the Board's approach to electronic discovery should move in the direction of the federal rules. He cited a case in the Middle District that involved the question of how an attorney should handle the matter when he discovers that the other side has produced material that is privileged. The court held that the attorney should call the other side and inform them.

Mr. Wein suggested tabling further discussion of subsection (e) and circulating the commentary to the federal rule.

The Committee next examined subsection (f) of the proposed rule. Mr. Hinerman explained the basis behind it and noted that the central issue is when the obligation to retain records begins. He feels that, for the Department of Environmental Protection (Department), it is when the Department realizes it is going to take an enforcement action, not when the appeal is filed. Mr. Wein questioned what the starting point would be for a permitting action. Mr. Strain voiced a concern that this standard would be impossible to follow. He gave an example of a case in the Williamsport office where it is going to take two years to review the permit and questioned whether the obligation to retain documents began now for a permit action that might be appealed in two years. He felt the expense of having to purchase a sufficient number of servers to handle the retention of such records, as well as additional staff, was not feasible.

Mr. Geary felt that a Board rule setting forth what records must be retained prior to an appeal was not appropriate since the Board's jurisdiction does not attach until an appeal is filed. Mr. Scott felt that a rule that told parties what they should do prospectively in order to ensure compliance was appropriate.

Mr. Hinerman noted that much of the documentation that used to be preserved in hard copy is now being emailed. In the past, the documents would have been stored in a file; now they are in electronic form. He felt the retention of such documents should continue as it did in the past. Mr. Strain countered that the documentation preserved in the past did not include telephone conversations, which is what email often takes the place of now. He also noted that much more information is generated and reviewed online.

Mr. Geary recommended that a file clerk be added to the list of all the individuals receiving emails on a given matter and have that person print a copy and place it in a file. Mr. Strain felt that would involve unnecessary expense and would require the Department to be doing what other parties would not be required to do.

Mr. Scott felt that if something would have been in a file when it was generated in hard copy in the past, it should also be placed in a file now even if generated in electronic form. Mr. Hinerman acknowledged, however, that more material may end up in an email than what would have been included in a memo.

Mr. Strain commented that the draft rule he prepared was intended to deal not with what documents should be preserved, but what to do with the ones that are.

Mr. Scott noted that a body of case law will be developed once the federal rule goes into effect.

Mr. Wein suggested that the EHB Roundtable portion of the Environmental Law Forum should include a panel discussion of electronic discovery. He recommended that Mr. Strain and at least one other Department attorney be on the panel and also recommended that the members of the Rules Committee be present at the program. Mr. Hinerman also suggested that a program

on electronic discovery like the one held last year be presented prior to the EHB Roundtable session.

Mandatory Certification for Discovery Motions:

Mr. Hinerman recommended that the Board consider adopting a rule like Fed.R.C.P. 37(a) (2)(A) requiring counsel to certify that they have first tried to amicably resolve a discovery dispute prior to filing a motion to compel. He noted that in one of his cases recently he was served with a motion to compel without the other party ever having contacted him first to discuss the disputed matter.

The judges will discuss this issue on a conference call to be held Monday, October 2, 2006. Chief Judge Krancer proposed that the judges use a standard order that he includes in his cases addressing this matter.

Expedited Litigation:

Judge Renwand discussed two cases that have arisen in Pittsburgh that involved expedited proceedings. He feels the Board should develop a rule to deal with such cases in the future. One of the Department's suggestions is to hold a conference early in the case in order to outline discovery and narrow the issues and then hold monthly conference calls thereafter. There will be further discussion of this topic at the November meeting.

Next Meeting:

The next meeting will be at **10:15 a.m**. on **November 9, 2006** at the Board's offices in Harrisburg. Mr. Wein recommended that everyone attend the meeting in person if at all possible. Discussion of the clean up rules package and expedited litigation will continue, as well as any other matters that arise.

Appendix A

Proposed Rule on Electronic Discovery (9/28/06)

§ 1021.102. Discovery.

(a) Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by the Pa.R.C.P. When the term "court" is used in the Pa.R.C.P., "Board" is to be understood; when the terms "prothonotary" or "clerk of court" are used in the Pa.R.C.P., "Secretary to the Board" is to be understood.

(b) Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

(c) If a person or party is to be deposed by oral examination more than 100 miles from his or its residence or principal place of business, the Board may, upon motion, order the payment of reasonable expenses, including attorney's fees, as the Board deems proper.

(d) Discovery disputes shall be resolved pursuant to a motion filed in accordance with § 1021.93 (relating to discovery motions), except that to facilitate the prompt completion of discovery, the Board may hear argument on discovery disputes by telephone conference call at the time the dispute arises and may issue oral rulings which will be later memorialized in written orders.

(e) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the Board for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(f) Discovery of electronically stored information will be subject to the following limitations:

(1) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost; the Board, however, may order appropriate discovery from sources that are not reasonably accessible, considering the following factors:

1. the specificity of the discovery request;
2. the quantity of information available from other and more easily accessed sources;
3. the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources;
4. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
5. predictions as to the importance and usefulness of the further information;
6. the importance of the issues at stake in the litigation; and the parties' resources.

(2) Absent exceptional circumstances, the Board may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(3) Electronically stored information will be produced in a form that is reasonably usable; the producing party may produce it in the form in which it is normally maintained if the cost of converting it to a more accessible form is the same for both parties.

(g) Subsections (a)-(d) supersede 1 Pa. Code §§ 35.145-35.152 (relating to depositions).