Environmental Hearing Board
Rules Committee

Minutes of May 16, 2007

Attendance:

The Environmental Hearing Board Rules Committee met on Wednesday, May 16, 2007 at 10:30 a.m. Committee Chairman Howard Wein presided. Committee members attending the meeting were as follows: Maxine Woelfling, Dennis Strain, Brian Clark, Tom Scott, Phil Hinerman and Stan Geary. Representing the Board were Chief Judge Tom Renwand, Judge George Miller and Senior Assistant Counsel MaryAnne Wesdock, who took the minutes. Also participating in the meeting by teleconference was Attorney David Mandelbaum.

Minutes:

On Mr. Strain's motion, seconded by Ms. Woelfling, the minutes were approved.

Expedited Litigation:

The Committee considered comments received at the Environmental Law Forum on the proposed rules on expedited proceedings. At the Environmental Hearing Board Roundtable, Professor Tom Buchele, who heads the University of Pittsburgh School of Law's Environmental Clinic, stated that if the Board did adopt such a rule it should not be applied in cases of complex litigation. He felt that it interfered with an appellant's right to due process and made it even more difficult for an appellant to obtain an expert witness, particularly in complex cases. Ms. Wesdock reported that she received similar comments from other attorneys who primarily represent citizen groups or appellants in third party appeals. It was noted by the Rules Committee that the need for an expedited hearing might exist even in complex cases, citing the *Groce v. DEP and Wellington* case as an example.

A concern expressed by Department of Environmental Protection attorneys was that the amount of discovery in an expedited matter will remain the same but must be conducted in a much shorter period of time. A suggestion was made that perhaps the rule should include a provision for expedited discovery. Mr. Strain felt that it would not be appropriate to limit the amount of discovery a party is permitted to conduct since that would be interfering with a party's due process rights. It was also noted that one of the factors that will be taken into consideration in determining whether to grant a request for expedited proceedings is the "status of discovery and the realistic need of the parties for extended discovery." (Proposed rule 1021.96(c)(3))

Mr. Clark voiced the question of whether a rule was needed, and in his opinion a rule is needed. He felt that in most cases that would qualify for expedited hearing, the issues are going to be narrow and not involve a large amount of discovery, which would eliminate the concerns set forth above. Judge Renwand agreed that a rule was needed in order to have a framework for the Board to follow when considering a request for expedited proceedings. Mr. Wein noted that if the parties could agree on an expedited pretrial schedule, there would be no issue and a rule was necessary only for those situations where the parties could not agree.

Mr. Mandelbaum expressed the opinion that the *Wellington* type of situation is probably only the first of such cases that the Board is going to see over the next several years and, therefore, it would be helpful to have a rule in place. He noted that as long as there are any requirements in the permitting statutes or regulations that require a short timeframe in which to begin construction and a project is not internally financed, there are going to be requests by permittees for expedited proceedings and opposition by groups challenging the project to any shortening of the litigation timeframe.

In response to Mr. Mandelbaum's comments, Judge Miller noted that even if the Board expedites the proceeding, groups challenging the project can always take an appeal to the Commonwealth Court to keep the litigation going. Mr. Mandelbaum noted that an appeal did occur in *Wellington* but they were able to get an expedited ruling. Judge Renwand agreed with Mr. Mandelbaum that the Board will continue to receive requests for expedited hearings and he would like to have standards in place for how to rule on them.

It was noted that Professor Buchele had expressed the opinion that the financing of a project should not be a basis for granting a request for expedited litigation. He also felt that a request for expedited proceedings should not be used as a litigation tactic.

Judge Miller stated that if a party were faced with the prospect of losing its permit because of the length of time it took to get to a hearing before the Board, that party is substantially prejudiced. Mr. Strain noted that most third party appeals involve a challenge to the construction of some project and that the developer is always going to argue a need to get the matter to a trial quickly.

It was agreed that the amount of prejudice to any of the parties should be a factor considered in determining whether to expedite a proceeding. The group looked at the language of subsection (c)(2) of proposed rule 1021.96 which says that one factor to be taken into consideration in determining whether to expedite a proceeding is "Severity of harm to the parties during the time period ordinarily required to complete the proceedings." Mr. Wein suggested changing "severity of harm" to "severity of prejudice." Judge Miller suggested changing "parties" to "party" since the way the provision is currently written makes it seem that there must be harm to all of the parties.

Ms. Wesdock noted that the language of (c)(2) only takes into consideration the harm or prejudice to the requesting party in having to go through a normal pretrial proceeding. There should be some consideration of the opposing party's harm or prejudice at having the proceeding expedited. Mr. Scott suggested adding a fifth factor: (c)(5) "The effect of the expedited proceeding on the non-requesting party." Ms. Woelfling noted that the factors in subsection (c) involve a balancing test and consideration should be given to whether any particular factor takes precedence over others. Mr. Scott felt that the standard should be that a regular, non-expedited proceeding takes precedence and that the burden is on the party seeking to expedite the proceeding to show why it should be expedited.

It was recommended that proposed rule 1021.96 be amended as follows:

> 1021.96. Motions for expedited hearing.
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> (c) In issuing such an order the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:
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> * * * * *
>
> (2) Severity of ~~harm~~ prejudice to ~~the parties~~ any party during the time period ordinarily required to complete the proceedings;
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> * * * * *
>
> (5) The effect of expedited proceedings on the non-requesting party.

On Mr. Scott's motion, seconded by Mr. Clark, the Committee voted unanimously to adopt the proposed rules on expedited proceedings with the aforesaid revisions. A copy of the rules, as proposed, are set forth in Appendix A.

Suspense Docket:

Mr. Mandelbaum had previously requested that the Board consider adopting a rule that would allow for the creation of a suspense docket similar to that of the Federal Eastern District Court of Pennsylvania. As such, he was invited to participate at the Rules Committee meeting where this issue was going to be raised again. Mr. Mandelbaum explained that two types of appeals would fall into this category: 1) protective appeals, where there is no expectation that the appeal will be litigated but it must be filed to protect a party's rights in the event an appeal is necessary down the road and 2) where an appeal has been filed, but the parties have some other way of resolving the matter. His recommendation is that such cases be placed on a suspense docket where the case is stayed and the parties are given a certain amount of time to resolve the matter without the need to request extensions. The cases would be reviewed by the Board every six months.

Judge Miller felt that these types of situations could be handled by order on a case-by-case basis, and he noted that he has issued stays of up to one year in such cases. Mr. Mandelbaum stated that his practice has been that a judge will grant only a certain number of extensions and that such extensions do not necessarily stay the entire case but simply extend already established pretrial deadlines.

Ms. Wesdock related a case in front of Judge Renwand several years ago that required the collection of data over several years and suggested that such a case would benefit from the Board having a suspense docket. She noted that there is a certain pressure on the judges to have matters resolved within a certain period of time and the creation of a suspense docket would eliminate the need to push cases that will eventually resolve themselves over a period of time. Mr. Strain agreed that it is not necessarily delay by the parties that causes a case to be stayed, but that

certain types of cases need more time to negotiate. A question was raised as to whether the other judges would be in favor of creating a suspense docket, and Ms. Wesdock reported that they are.

Judge Miller suggested creating a suspense docket through the Board's internal operating procedures as opposed to a rule. Mr. Mandelbaum agreed to that approach as long as it made clear that there are certain types of cases that should be stayed and that the stays are not seen as allowing only a certain number of extensions. Judge Renwand felt that the cases on the suspense docket should not be included in a judge's case count.

It was agreed that the Board will amend its internal operating procedures to allow for certain cases to be stayed, and following the termination of a stay the parties will be given adequate time for conducting discovery. Mr. Mandelbaum was invited to participate in the July meeting by teleconference.

Mr. Scott questioned how parties would know to request that a case be put on hold if it is not published as a rule. He felt there needs to be some notice to the parties or some mechanism for triggering when cases will be stayed. He suggested adding the following language as subsection (5) of rule 1021.101: "(5) In appropriate cases parties may request that further proceedings be suspended pending events to be brought to the attention of the Board."

Judge Renwand felt that the problem with that approach is that it sets up a suspense docket without guidelines. He further commented that the internal operating procedures say they are for the Board's internal use and not for use by the parties.

Mr. Scott stated it would not be productive to create a mechanism where the Board is spending more time addressing matters on the suspense docket than active cases. Judge Renwand stated that the Board spends a great deal of time addressing protective appeals and determining whether further extensions should be granted.

Mr. Strain stated that when parties are negotiating, sometimes it is helpful to have deadlines in place. Judge Renwand felt that those types of cases would not fall on the suspense docket. Mr. Strain gave an example of a case that would benefit from being placed on a suspense docket: a situation where a permit applicant appeals a letter of the Department that the Department does not consider an appealable action, but all parties know that a permit is going to be issued within a few months. If the appeal could be placed on a suspense docket until such time as the permit is issued, it would be a better use of the Board's and parties' resources.

Judge Miller expressed a concern that the minute a case gets on the suspense docket, the parties will forget about it. This would be avoided with a periodic review process by the presiding judge. Mr. Mandelbaum felt that a revision to the Board's internal operating procedures avoids the problem expressed by Judge Miller while still recognizing that there is a non-trivial number of cases that would benefit from at least a six-month stay at the beginning of the appeal.

The Board will draft an amendment to its internal operating procedures to be discussed at the July meeting.

Necessary Parties to an Action:

No comments were received at the Environmental Law Forum regarding the proposed revisions to rule 1021.51(j) that would waive a person's right to appeal if he chooses not to participate in an earlier appeal. However, in preparations for the Environmental Hearing Board Roundtable, Attorney Tim Reed raised a concern that would not be addressed by the proposed revisions. In a situation where a mining company is ordered to provide water to a landowner and appeals the order, if the Board invites the landowner to participate in the proceeding and he chooses not to do so, there is no mechanism at the Board level for allowing the mining company

entry onto the landowner's property to do its own testing. It was noted that the mining company can obtain a subpoena from the Board and then proceed to Commonwealth Court to have it enforced. Judge Miller stated that the Board has prepared an *ex rel* petition form that can be used by parties seeking to enforce a Board subpoena. It was agreed that the Practice and Procedure Manual should be revised at section VIII.G.7.d to notify parties that this form may be obtained by contacting the Board.

Ms. Wesdock mentioned another concern expressed by Mr. Reed that dealt with the Board's rule at 1021.52(a)(2) which allows a third party appellant to appeal 30 days after notice of an action in the Pennsylvania Bulletin. Mr. Reed questioned how the proposed waiver language of 1021.51(j) would come into play in a scenario where the Department forgets to advertise notice of its action and then advertises it a year later when it realized its error. In a case where a landowner refuses to join in a mining company's appeal and is thereby barred from challenging the Board's decision under the proposed revisions to 1021.51(j), would the landowner still be able to appeal based on the late notice in the Pennsylvania Bulletin?

In response, Mr. Geary felt that the Board could bar the appeal on the basis that the appellant had waived its right to appeal when it had the chance to join in the mining company's appeal. Mr. Scott felt that it should be made clear that an affected party is waiving its right to appeal. Waiver language will be included in the notice sent by the Board to the affected party asking him to join in the appeal. Mr. Scott felt that if this is a valid way to limit someone's appeal rights, then that would constitute appropriate notice. Mr. Scott suggested placing the burden of sending the notice on the party that wants to benefit from precluding the other person. Mr. Geary was concerned that this would result in a number of different versions of the notice and that it was better to have a Board form.

Mr. Scott reiterated a concern raised by Ms. Shinkman at the last Rules Committee meeting: whether the Board has the ability to limit a person's appeal rights. Judge Renwand stated that the Board was simply trying to comply with the Commonwealth Court's ruling in *Schneiderwind*. Ms. Wesdock suggested citing *Schneiderwind* in any Board order stating that a third party had waived its appeal rights by failing to join in the earlier appeal.

Mr. Scott stated there is an analogue in the Employment Code with regard to retirement benefits. There is an indication in some retirement cases that if an employee was not told of an earlier proceeding the case would be remanded. He will circulate some of the decisions to the Committee.

Judge Miller brought up a recent case before the Pennsylvania Supreme Court which he believed stated that if someone was not a party to an earlier administrative proceeding they did not have standing to take an appeal. He will circulate that opinion to the Committee.

The Committee will develop waiver language to be included in 1) the proposed revision to rule 1021.51(j) and 2) the notice sent by the Board pursuant to that revision. These will be reviewed at the July meeting.

Electronic Discovery:

The Committee engaged in some discussion regarding electronic discovery. Mr. Hinerman and Ms. Wesdock reported on comments received at the Environmental Law Forum which primarily concerned how the Department responds to requests for electronic discovery. Mr. Hinerman and Mr. Strain co-chair the joint subcommittee of the Rules Committee and the PBA Environmental Law Section on electronic discovery and are planning to hold a meeting in the next few weeks.

Mr. Hinerman said that it would be helpful if Mr. Strain would prepare a summary of what electronic discovery is retained and produced in a permit appeal by the Department. Mr. Strain gave a detailed explanation of the Department's current procedure.

No further action on a proposed Board rule on electronic discovery will take place until after Mr. Strain and Mr. Hinerman's committee has had an opportunity to meet.

Electronic Filing:

Problems with the Board's electronic filing system were discussed. The problems centered on the notice that is sent by the Board when someone has made an electronic filing and include the following: 1) the notice that is sent to an electronic filer saying whether other parties have been served electronically is not clear and 2) the sender is a strange address and does not say "EHB." Ms. Woelfling agreed to forward to Ms. Wesdock samples of notices sent in EHB cases and a sample of a notice from the Federal Court of the Middle District of Pennsylvania.

Mr. Wein suggested that since Department attorneys are involved in all EHB proceedings, all Department attorneys should register for e-filing. Mr. Strain was reluctant to impose such a requirement unless e-filing were made mandatory and all counsel were required to sign up for it.

It was agreed as follows:

1) Board Secretary Bill Phillipy will be invited to the July meeting to discuss e-filing issues.
2) Ms. Wesdock will send a notice to the PBA Environmental Law Section listserve asking Section members to report problems, comments or suggestions with regard to the Board's e-filing system. These will be addressed at the July meeting.

Summary Judgment:

Due to lack of time, the Committee was not able to address comments made to the Board's current rule on summary judgment and this issue was tabled until the next meeting. Judge Miller noted that the comments about the rule indicate it is too complex for people to comply with and he feels the rule should be revisited.

Next Meeting:

The next meeting of the Rules Committee will be July 12, 2007 at 10:15 a.m. at the Board's office.

Appendix A

EXPEDITED PROCEEDINGS: New proposed rules

1021.96. Motions for expedited hearing.

(a) A motion for an expedited hearing may be filed at any time in either an Appeal or Special Action, or the Board may order an expedited hearing on its own motion.

(b) The Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure at 25 Pa. Code §1021.201, or the Pennsylvania Rules of Civil Procedure relating to discovery.

(c) In issuing such an order the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

(1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings;

(2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings;

(3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing;

(4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest.

(5) The effect of expedited proceedings on the non-requesting party.

(d) The Board will grant a motion for expedited hearing only in rare circumstances.

(e) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings as well as the time and place of the hearing.

1021.96a. Contents of motion for an expedited hearing.

(a) A motion for an expedited hearing shall state facts with particularity and shall be supported by one of the following:

(1) Affidavits based on personal knowledge or experience setting forth facts supporting the issuance of an order for an expedited hearing, or

(2) An explanation of why affidavits have not accompanied the motion if no affidavits are submitted with the motion for an expedited hearing.

(b) A motion for an expedited hearing shall be accompanied by a memorandum of law.

(c) No motion shall be filed unless it contains a certification that the moving party has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure an agreement on expediting the proceeding.

1021.96b. Response to motion for expedited hearing.

A response and supporting memorandum of law shall be filed within 10 days of service unless otherwise ordered by the Board.

1021.96c. Conduct of the hearing.

(a) Nothing contained in this rule shall limit the rights of the parties to a full hearing before the Board under the applicable rules of evidence with full rights of cross-examination of witnesses. The Board may limit the number of witnesses or the subjects of examination in order to avoid duplication of evidence as provided at 25 Pa. Code § 1021.126.

(b) Testimony may be submitted by prepared written testimony as provided for by 25 Pa. Code 1021.124.

(c) After the conclusion of the hearing the Board shall direct the prompt filing of post hearing briefs.