Environmental Hearing Board
Rules Committee

Minutes of July 10, 2007

Attendance:

The Environmental Hearing Board Rules Committee met on Tuesday, July 10, 2007 at 10:15 a.m. Committee Chairman Howard Wein presided. In attendance were the following Committee members: Susan Shinkman, Dennis Strain, Brian Clark, Phil Hinerman, Tom Scott and Stan Geary (by phone). Representing the Board were Acting Chairman and Chief Judge Tom Renwand, Judge George Miller and Senior Assistant Counsel MaryAnne Wesdock, who took the minutes.

Electronic Filing:

Judy Rankin and Dennis McKnight of LT Court Tech were invited to participate in the meeting in order to address problems and suggestions for improvement of the Board's electronic filing system. They participated by teleconference. The Board is considering whether to make electronic filing mandatory, with the exception of pro se appellants and other approved instances, and it was agreed that certain problems with the current system should be corrected before any such mandate would be imposed. Chief Judge Renwand and Ms. Wesdock explained that the efiling of documents allows greater manageability in large cases and makes it much easier to obtain extra copies of documents that must be circulated among the judges. Judge Miller suggested that the Board might simply consider making the electronic filing of briefs and motions mandatory, rather than all documents filed in an appeal. Mr. Hinerman stated that he was supportive of a mandatory e-filing requirement and pointed out that electronic filing is now mandatory in federal court. He also noted that it would be helpful to have an electronic docket

on the website with access to the filed documents. Currently, the only documents accessible on the Board's website are those that have been electronically filed. Those that have been filed by traditional means are not available for viewing.

Ms. Wesdock stated that a problem with the Board's current e-filing system that has repeatedly been brought to her attention is the content of the notice that is received by an attorney after he or she has e-filed a document. The notice is supposed to indicate whether the other parties to the appeal have been served electronically, but the notice is not clear and is often contradictory. It was agreed that there should be some mechanism for notifying the filing party that the other parties to the appeal have been served as part of the e-filing or whether they must be served separately. Possible ways to address this problem are as follows: 1) making the notice that is received by the e-filing attorney clearer as to who has been served electronically and who has not; 2) posting a list of which attorneys have registered to file and receive service electronically; or 3) including a notation in the contact information on the website as to whether an attorney is registered to file and receive service electronically.

Mr. Wein pointed out another problem which is that sometimes he does not receive the efiling notification until the following day. This is due to the fact that one of the Board's administrative staff must first accept the document for filing. If the filing occurs late in the day or after normal business hours, the acceptance of the document will not be done until the next business day.[1] Since LT Court Tech cannot send the efiling notification until the document has been accepted by the Board, the notice would not go out on the day the document has been efiled. The person at the Board who generally handles the acceptance of efiled documents,

[1] The date of *filing*, however, will still be reflected as the date the document is sent to the Board, not the date it is approved and accepted.

secretary Kathy Berwager, was asked to join the meeting briefly in order to explain the process that is involved in accepting and uploading an efiled document.

Mr. Clark inquired as to whether someone with an efiling question contacts the Board or LT Court Tech. Ms. Wesdock stated that questions generally are directed to her or the administrative staff in Harrisburg. Judge Miller suggested soliciting comments from a number of attorneys as to their experience with using the Board's efiling system. Ms. Wesdock noted that she posted an email to the PBA Environmental, Mineral and Natural Resources Law Section's listserv asking for comments or suggestions for improvement. She obtained only one comment, from attorney Mark Shaw. Additionally, staff at the Department of Environmental Protection provided comments. All of those comments were passed on to the Rules Committee as well as to LT Court Tech. A summary of the comments are attached in Appendix A.

The Committee returned to the issue of the efiling notification providing unclear or contradictory information as to whether other parties to the case have been served electronically. Mr. Wein suggested requiring that whenever an attorney files a notice of appeal or entry of appearance, they should give notice of whether they are registered to accept service electronically. This could be done by order or a rule change. Mr. Strain stated that if an attorney registers to file electronically, he should not be able to opt out of electronic service. Mr. Scott felt that if a document is properly efiled, it is the Board's responsibility to ensure that it is then served electronically; if that does not happen it is a breakdown in the Board's operation. Judge Renwand noted that it appears that efiled documents are being served electronically; it is simply the notice to the parties that is not clear.

Mr. Strain raised another issue. It is impossible to attach more than one document to an efiling. In other words, only one attachment is allowed per efiling. This can be a concern when

a document has exhibits. It was noted that it would be extremely cumbersome to have exhibits efiled with certain documents, such as a prehearing memorandum where the exhibit list may be lengthy and where not all documents may be introduced during the trial. Mr. Wein suggested that the Board's efiling instructions be revised to distinguish between exhibits to a motion, which a judge may want to have efiled, and exhibits to a prehearing memorandum, which a judge would most likely want to have filed in hard copy for the trial.

Mr. Wein stated that if the Board wants to encourage the use of efiling, it needs to be user friendly. Mr. Hinerman stated that he advocates making efiling mandatory but agreed that the Board's system needs to be more user friendly, in particular with regard to making the registration process quicker and more efficient. Ms. Wesdock advised that the Board has approved online registration for efiling; however, it has not yet been implemented since the approval did not take effect until the current fiscal year which began on July 1. It was noted that with mandatory efiling in federal court, training is provided. Judge Miller agreed that if the Board makes efiling mandatory, it would need to provide training and would also need to figure out how to handle exhibits, such as whether they should be scanned and efiled or filed in hard copy. He would not be in favor of mandatory efiling for prehearing memorandum exhibits.

Mr. Hinerman felt the Board should consider whether there should be a different response time for documents that are efiled, as opposed to those filed by more traditional means, as is the case in the 3rd Circuit.

Mr. Wein suggested putting exhibits on a CD. Mr. Strain and Mr. Scott questioned whether this would be a good idea for certain types of exhibits such as maps and drawings. It was noted that it would not make sense to provide prehearing memorandum exhibits in electronic format since many of them may not be introduced at the trial and since it would be more

convenient to have them in hard copy for the trial. Ms. Wesdock did note, however, that after the *Groce v. DEP and Wellington* trial one of the parties provided the Board with a CD of all of the exhibits introduced at trial and it was very helpful.

Judge Renwand suggested that he, Ms. Wesdock and Board Secretary Bill Phillipy meet with Judy Rankin and Dennis McKnight and other personnel at LT Court Tech to discuss the issues with the efiling system in more detail.

Mr. Wein also recommended that Ms. Wesdock include a notice encouraging attorneys to sign up for efiling when she posts the July EHB decision summaries on the PBA Environmental Law Section listserv. Ms. Wesdock noted that if the Board were to adopt mandatory efiling, a notice could be provided on the website until a rule is in place. It was agreed that plenty of notice should be provided prior to making electronic filing mandatory.

Mr. Wein suggested that in the interim, the Board should have a box on the notice of appeal form and on the notice of appearance form for attorneys to check off whether they are registered for efiling. Mr. Strain suggested maintaining a list of attorneys who are registered for efiling. Mr. Wein suggested that the list should be maintained on LT Court Tech's website and be accessible only to other attorneys who are registered for electronic filing. This would keep it from being accessed by the general public. He felt that two lists should be maintained: one for private attorneys and one for Department attorneys, and should be in alphabetical order.

The group returned to the discussion of whether parties who are registered to file electronically should be able to opt out of being served electronically, and the Committee and judges were in agreement that this should not be permitted. Judge Miller asked whether it was still necessary to allow registered attorneys to opt out of electronic filing/service for a particular case. Mr. Wein stated that this should still be permitted since a particular client might not want

its information on the website. Judge Renwand noted that this might come up in a case where a party claims trade secrets are involved, but noted that such restrictions on information generally cause difficulties for the Board. Mr. Scott felt that once an attorney registers for electronic filing, he or she should not be able to opt out for individual cases. Mr. Wein was concerned that removing the "opt out" option might discourage some attorneys from registering. Judge Miller stated that if a party wants a trade secret protected he or she should apply to the Board for a protective order. Mr. Wein asked whether the efiling system is set up to address confidential documents, and Ms. Wesdock noted that it was not. In a recent case before the Board, an efiled document contained what was alleged to be confidential information covered by a protective order and the information became public.

It was agreed that Judge Renwand, Ms. Wesdock and Board Secretary Phillipy should meet with the LT Court Tech personnel to discuss efiling issues and report back at the September meeting.

On a related note, Mr. Hinerman stated that he is in the process of setting up a meeting to deal with ediscovery on August 7, 2007.

Summary Judgment:

The recent experience of the Board and some of the Rules Committee members is that the current rule on summary judgment has not resolved the problem of parties filing motions, briefs or responses containing lengthy statements of both material and non-material facts and/or filing motions for summary judgment where it is not warranted. Judge Miller related his experience in a recent case in which an appellant's motion for summary judgment contained 89 statements of what were purported to be undisputed material facts. The Department asserted that the number of material facts put forth by the appellant was too numerous, to which the appellant responded

that the Department could have filed a motion to limit the statement of material facts and, by not doing so, waived its right to question it. The dispute over the summary judgment motion created a second set of litigation within the main appeal. S*ee, Borough of Ambler v. DEP,* EHB Docket No. 2005-336-GM (Opinion and Order issued July 2, 2007).

Judge Miller felt that one problem with the current rule is that it no longer references Pa.R.C.P. 1035.2, thereby eliminating an entire body of jurisprudence pertaining to that rule of civil procedure.

Mr. Wein provided a history of how the rule was developed. In particular, the Rules Committee wanted to eliminate the practice of parties filing a voluminous motion with a lengthy statement of facts accompanied by an equally voluminous brief containing the same information in paragraph form. He explained that the Committee created a hybrid of the federal rule on summary judgment. In the Board's opinion, however, the way the rule is being applied is the same as before, except that now the lengthy recitation of facts appears in the brief rather than in the motion. Mr. Clark pointed out that even when parties are ordered to comply with the rule, they are not doing so, and where ordered to limit their statement of material facts to a certain number of paragraphs, they simply provide subparts. In some cases, parties may use it as a litigation tactic, requiring the case to go to a hearing. Mr. Hinerman suggested that if the Board feels the solution is to limit the number of paragraphs, it will need to limit the number of subparts too.

Mr. Scott asked what percentage of summary judgment motions were granted by the Board, and Judge Renwand replied that he believed it was slightly less than half.

Mr. Clark felt that the statement of material facts should be limited to factual statements clearly dealing with the content of the appeal. He noted that the Rules Committee did not envision the core statements of material fact as being so lengthy.

Judge Miller felt that motions for summary judgment should be reserved for cases involving simple issues, not complex matters.

Mr. Strain opined that it might be helpful for the Board to hold a status conference prior to the parties filing summary judgment motions in order to determine whether any issues can be resolved in that manner. Ms. Wesdock noted that the Board has held oral argument on summary judgment motions which has proven helpful. Judge Renwand was not sure a status conference would work in every case. He related that in many cases parties will wait until very late in the appeal process to file a motion to dismiss based on administrative finality even though this issue could have been raised much earlier in the proceeding. Judge Miller stated that in his cases when attorneys say they are planning to move for summary judgment, he questions them about it prior to scheduling the hearing. He suggested a rule containing language such as the following: "A motion for summary judgment should be reserved for fairly simple issues of law and should not be filed in cases where there are likely to be issues of fact in dispute, especially with regard to expert testimony. The motion should be brief and the response should not reply point by point to what is in the motion." He would eliminate the requirement of numbered paragraphs and would discourage parties from filing motions for summary judgment in complex cases.

Ms. Wesdock pointed out that Mr. Strain had felt a need for numbered paragraphs the last time this issue was discussed; however, Mr. Strain indicated he was fine with not having numbered paragraphs at this point.

Mr. Hinerman and Mr. Clark felt there could be some merit to filing motions for summary judgment in complex cases to limit some of the issues and as Mr. Clark noted, "clear the underbrush." Ms. Wesdock felt that could be covered by the filing of a motion for partial summary judgment. However, Mr. Hinerman stated that he believed there could be some complex cases where full summary judgment would be appropriate. Judge Miller stated that his proposed language could be revised to read that "summary judgment is reserved for issues that do not involve conflicting statements of fact and expert opinion."

Mr. Hinerman stated that if the Board put a limitation on the number of material facts a party is allowed to have in his motion, that will simply lead to more artful drafting. Mr. Wein suggested requiring the parties to stipulate to the facts. Mr. Hinerman proposed holding an evidentiary hearing on summary judgment motions. Mr. Clark suggested holding oral argument on the motion before the opposing party is required to respond. Mr. Strain advised that if parties see that lengthy, complex motions for summary judgment are being denied, that would discourage parties from filing lengthy motions.

Judge Renwand noted that a number of the issues that parties argue over during the summary judgment stage fall to the wayside during the trial. In some cases, the time it takes to address disputes over summary judgment motions simply delays getting to trial.

Mr. Clark asked about the Board's recent evidentiary hearing in *Veolia Greentree Landfill, LLC v. DEP* and oral argument in *Seneca Landfill et al. v. DEP*, both of which involved summary judgment motions. Both were extremely helpful in allowing Judge Renwand and the Board to rule on the summary judgment motions filed in both cases. Mr. Wein pointed out, however, that extensive stipulations of fact were filed in both cases.

Mr. Strain suggested putting a page limit on summary judgment motions and briefs to force people to be concise. Mr. Wein acknowledged that the briefs in the *Veolia* and *Seneca* cases were short since a decision had been made to keep them simple and concise. Judge Renwand pointed out that although the *Groce v. DEP and Wellington* case was very complex, the summary judgment motions and briefs filed in the case were not lengthy.

Mr. Wein stated that the intention of the Rules Committee was to have a rules package ready to go in September. Therefore, he suggested generating alternate versions of a summary judgment rule and holding a conference call in August to discuss them. Mr. Wein and Judge Miller will prepare proposed drafts of a new rule. Mr. Geary also suggested keeping the existing rule on the table and simply revising it in a way that would prevent abuse. Mr. Wein agreed to make an attempt at reworking the existing rule.

Appealable Actions:

Mr. Hinerman brought to the Committee's attention a topic for discussion at the next meeting: He would like to see a rule clarifying what needs to be appealed, particularly from the standpoint of when the Department issues a notice of violation that appears to affect a party's rights and duties, etc. He related that even though most Board case law indicates that a notice of violation is not an appealable action, he generally tells his clients to file a protective appeal in the event the Department later determines it to be a final action. Mr. Strain stated that if the Department first says something is not a final action, it cannot later change its mind. A question arose as to whether the Department could be estopped from later claiming that an action was not a final action for purposes of appeal. Mr. Strain felt that in such a case, the parties should enter into a stipulation of settlement or the appellant should seek to withdraw the appeal without prejudice.

Although there was a concern that this might be a substantive, rather than procedural, issue, the Committee agreed to put it on the agenda for the next meeting.

Necessary Party to an Action:

Mr. Scott will send cases to Ms. Wesdock regarding the issue of necessary party pursuant to the discussion at the May 16, 2007 Rules Committee meeting.

Next Meeting:

The next meeting of the Rules Committee will be on **Wednesday, September 19, 2007 from 10:00 a.m. to 3:00 p.m.** The agenda will include the following:

1) Summary judgment – Review drafts of new rule prepared by Mr. Wein and Judge Miller and revisions to existing rule prepared by Mr. Wein.
2) Electronic filing – Judge Renwand, Ms. Wesdock and Board Secretary Bill Phillipy will meet with LT Court Tech and will also look at the Board's existing contract. Ms. Wesdock will also solicit additional comments for improving the system from the bar and legal secretaries.
3) Necessary parties to an action – Mr. Scott will provide relevant cases to Ms. Wesdock as discussed at the May 16, 2007 meeting, and Ms. Wesdock will draft waiver language and/or further revisions to the proposed rule.
4) Suspense docket – Review proposed revisions to the Board's internal operating procedures.
5) Appealable actions – Discuss the issue raised by Mr. Hinerman.

Additionally, following the meeting Mr. Wein asked that the following items also be added to the agenda for the September 19 meeting:

1) Rules package – Ms. Wesdock will circulate a summary of the rules to be included in the Board's next rules package.
2) Electronic filing – Mr. Wein proposed eliminating the last sentence of Board Rule 1021.34(d), clarifying the Board's efiling instructions, and determining whether exhibits should be filed as separate PDF documents.
3) Pro hac vice – Consider an email from attorney Bill Cluck regarding the new requirement that attorneys admitted pro hac vice must pay a fee to IOLTA. Additionally, Mr. Wein proposed amending the rules of representation to make Board Rules 1021.21(b) and (c) consistent regarding pro hac vice representation.

Appendix A

ELECTRONIC FILING COMMENTS

Efiling Comments received prior to the July 10, 2007 Meeting:

1) Efiling Questions raised by DEP:

>>
>> After an e-filing is completed, we receive a notice "Submission Acknowledged." Within 24 hours the attorney receives an email indicating who was served electronically and who needs to be served by traditional means. The date the filing is received (Submission Acknowledged) is the date it is considered filed, not the date you receive the email confirmation.
>>
>> QUESTION:
>> Typically you can remember which attorney will need to be served by traditional means, but that is not always the case. In the past I have called the LT Court Tech HelpDesk to ask if they could provide me whether or not an attorney was registered for e-filing - the answers always came after the fact. So my question is, can the EHB have LT Court Tech provide a link which provides a list of attorneys who are registered - that would eliminate the guessing game? If not a link, perhaps on the "Case Information Sheet" where each attorney is listed with their address & telephone number it could also indicated "E-filer" or "Traditional Filer" or another category under Email entitled "E-Filing" and it could indicate Yes or No.
>>
>> QUESTION:
>> If you don't know on Wednesday evening who needs to be served by traditional means - how should you indicate the Certificate of Service (COS)? The confirmation email from LT did not arrive until Thursday at 7:30 AM, so on Thursday copies will go out to those who need served by traditional means - should we then do another COS indicating the new service date? Typically we provide a COS indicating "Service via e-filing" (on the day the e-filing occurs) and then the next day will mail out the copies with no new COS - should we continue this method and is that OK with the Board?
>>
>> QUESTION:
>> An e-filing was made on Wednesday evening, Thursday morning we
>> received
the confirmation e-mail. Our COS indicates seven people who we were to be served, however on the confirmation email it showed one attorney (our own) who was served electronically and two others who needed to be served via traditional means - does LT not indicate each individual attorney listed on the Case Information Sheet? It appears they only listed the first attorney for each section (i.e. Commonwealth, Appellant and Permittee) and not each individual attorney at the different addresses and law firms. Attached below in PDF format is an e-filing (just the first page, COS & email) which indicates this scenario.
>>

>> Please feel free to call me should you have any questions, comments concerns.
>>
>> Thanks in advance for your cooperation and please advise,
>> Cassandra A. Fritch
>> Clerical Supervisor II
>> DEP - Southwest Office of Chief Counsel>
>> 412-442-4262

Response by LT Court Tech:

It would be possible to pull this data periodically in the form of a spreadsheet listing all of the attorneys and their information and whether or not they are an e-filing attorney or if they receive service by traditional means. This is something that we could do and send to you in the form of an Excel spreadsheet. If you wanted to have this as part of the application, it would require about 10 hours of effort. At our current bill rate of $195/hr., that would be $1950.00. Please let me know how you would like to proceed.

Thanks,
Judy Rankin
LT Court Tech, LLC
jrankin@lt-holdings.com

2) **Efiling Comments from Mark Shaw:**

A couple of comments from my secretary on the e-mail format. First, it would be helpful if the e-mail we receive has the case name on it along with the case number. Second, it would also be helpful if the e-mail listed the docket number for the document - this helps her make sure that we have received everything. Lastly, it would be easier to read if it was in block text, aligned to the left margin. The e-mails we receive from the federal courts include this information.

Thanks for the opportunity to comment.

3) **Efiling – Example of Middle District Notice:**

Middle District Efiling Notice: Forwarded by Maxine M. Woelfling/HA/MLBLaw on 05/16/2007 01:48 PM

PAMDEfilingstat@p
amd.uscourts.gov

05/09/2007 08:12 PM

To
pamd_ecf_nef@pamd.uscourts.gov

cc

Subject
Activity in Case 1:06-cv-02348-CCC
Womack v. Smith et al Motion for
Extension of Time to File

This is an automatic e-mail message generated by the CM/ECF system. Please
DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS You may view the filed documents once
without charge. To avoid later charges, download a copy of each document
during this first viewing.

U.S. District Court

United States District Court for the Middle District of Pennsylvania

Notice of Electronic Filing

The following transaction was entered by Hewitt, Aaron on 5/9/2007 at 8:12
PM EDT and filed on 5/9/2007

Case Name:	Womack v. Smith et al
Case Number:	1:06-cv-2348
Filer:	David Lee Womack

Document Number: 32

Docket Text:
MOTION for Extension of Time to File Joint Case Management Plan by David Lee Womack. (Attachments: # (1) Proposed Order)(Hewitt, Aaron)

1:06-cv-2348 Notice has been electronically mailed to:

Michael Butler Michael.J.Butler@usdoj.gov, alxlegalsvcs@bop.gov, Anita.Lightner@usdoj.gov, Dawn.Mayko@usdoj.gov, Dennis.Pfannenschmidt@usdoj.gov, lew/legalsvcs@bop.gov, Michele.Lincalis@usdoj.gov, msullivan@bop.gov

Alexis J. Gilman agilman@morganlewis.com

Deborah M. Golden deborah_golden@washlaw.org

Aaron B. Hewitt ahewitt@morganlewis.com, agilman@morganlewis.com, mreiter@morganlewis.com

John H. Shenefield jshenefield@morganlewis.com

Maxine M. Woelfling mwoelfling@morganlewis.com

1:06-cv-2348 Filer will deliver notice by other means to::

The following document(s) are associated with this transaction:

Document description:Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1027698419 [Date=5/9/2007] [FileNumber=1603595-0] [007aef1bd5eb6eb3d99c10dc1e8e671268d636bfb8ebd95160513134d1a54acd78b7 46c7223b02f89adf179b9d280586c1b32c26ab2ddd82b33da7d9c760ad40]]
Document description:Proposed Order
Original filename:n/a
Electronic document Stamp:

[STAMP dcecfStamp_ID=1027698419 [Date=5/9/2007] [FileNumber=1603595-1]
[30df97407d80edd0abe60468b545c9723d789c8192323ac6730cdb14e98a091f4a10
6defc5e2bd2297301b010375008253420d3d2d66160a99e426e16dd51f66]]

E-Filing Comments received after the July 10, 2007 Meeting:

Cassandra Fitch (DEP)
In addition to the emails above, I also indicated to her that one of the other problems involved was the way attorneys were listed. I gave her the following "for instance." Gail Guenther asked me to print her a list of her EHB cases from the EHB website. When I did, she noted there were some missing. What I noticed was that if I input her name as "Gail G. Guenther" I was given a certain number of cases and then when I entered her name again as "Gail Guenther" then there were more/less (can't quite remember which way it flowed). This should be crossed referenced or remedied in some manner.

Adam Bram (DEP)
1. E-filing only allows for one pdf attachment. If a filing has more than one attachment, that requires either a voluminous pdf attachment that might not scan properly or go through our email system due to the size OR the laborious task of filing separate attachments for each exhibit to a filing. I recently had to file a motion, where I attached Exhibit A to the motion and then had to file 3 additional documents for the next 3 exhibits. That also creates a very cluttered docket for anyone to review. You can imagine what a docket would look like if there were several motions/petitions with multiple attachments. Also, it creates a greater tendency for something to get left out of filing.

2. I have had appeals where a party had opted to use the verilaw system to file (and serve on me) but opted out of receiving service electronically. It seems that if a party chooses to use electronically filing, which saves time and money, it should not be able to force the other party to serve by traditional means. Quid pro quo. Whether this was truly the case or some glitch in the system, in Eureka Stone Quarry, Inc. v. DEP, Dkt. 2006-044-MG, counsel for the company files electronically, I get notice that the filing is available on the EHB website and that is my service. The notice that I get when I file something is that I must file by traditional means on counsel for the company.

3. There may be a need to expand the pull-down categories for filings. At least, it is worth looking to see how many filings have "none of the above" selected and why.

Bill Gelles (DEP)
On the whole, the e-filing system works well. I only wish that more opposing counsel would register.
I can think of two very minor flaws. First, the e-filing system currently permits the filing of only one exhibit per docket entry (meaning that any further exhibits require separate docket entries, which is not always logical and takes extra time).

Second, while primary filings can be in any file format, exhibits must be in PDF format (which requires an extra step or two to convert many files).
It would be an improvement if we could, if needed, attach multiple exhibits to a single filing and could attach them in other file formats, such as Word, WordPerfect, or Excel spreadsheets.