ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of March 9, 2011

Attendance

The Environmental Hearing Board Rules Committee met by conference call and in person on March 9, 2011 at 2 p.m. Committee Chairman Howard Wein presided. Rules Committee members participating in the meeting were: Maxine Woelfling, Phil Hinerman, Jim Bohan and Tom Scott. EHB Chairman and Chief Judge Tom Renwand, Judge Rick Mather, Senior Counsel Maryanne Wesdock and Assistant Counsel Kris Gazsi participated from the Board. Also participating in the meeting was incoming Chief Counsel of the Department of Environmental Protection, David Raphael. Mr. Gazsi took the minutes.

Approval of Minutes

The minutes of the November 10, 2010 meeting were not available for approval due to technical limitations. The minutes will be presented for approval at the next meeting.

Meeting Schedule

Mr. Wein suggested that the next meeting be held on May 12, 2011 to conform to the typical schedule for Rules Committee meetings.

Rules Committee Membership

Incoming DEP Chief Counsel, David Raphael, is expected to be appointed to the Rules Committee, replacing Susan Shinkman. A discussion was also held regarding other members' terms.

Mandatory Electronic Filing

The Committee renewed its earlier discussion on the topic of implementing mandatory electronic filing at the Board. Judge Renwand began the discussion by stating that he and former Judge Krancer have ordered mandatory participation in the electronic filing program on a case-by-case basis. He stated that he would like to receive all documents electronically. Judge Mather stated that he has not ordered electronic filing in any of his cases, but has left it up to the parties.

A problem with the Board's Guidance For Electronic Filing and Service (guidance document) [1] was discussed. Paragraph 10 of the guidance document allows attorneys to file electronically but opt out of receiving service electronically. Consequently, there may be parties who choose the convenience of electronic filing to file documents, but refuse receipt of service electronically in order to benefit from the extra three days allowed for responding to service by mail. It was suggested that the language of Rule 1021.34(d) allows parties to choose this option. That rule reads in relevant part as follows:

> A registered attorney may withdraw his registration statement for purposes of a specific case if he chooses not to receive electronic service in that case by filing an amendment to the filing party's registration statement.

25 Pa. Code § 1021.34(d).

Judge Mather disagreed that Rule 1021.34(d) authorized the aforesaid practice of opting to file electronically but refuse service electronically; rather, he felt that the rule simply allows parties to opt out of electronic filing and service for a particular case.

[1] ENVIRONMENTAL HEARING BOARD GUIDANCE FOR ELECTRONIC FILING AND SERVICE. Available at http://ehb.courtapps.com/content/guidance.htm.

Ms. Wesdock suggested that if the Rules Committee feels that the rule should be clarified, the Board could deal with it in the interim by order. Ms. Woelfling felt that the Board should not have two systems in place: one by rule and one by order.

Judge Renwand restated his preference that all filings be done electronically. Judge Mather voiced the opinion that electronic filing may not be appropriate in all cases, e.g., those involving *pro se* appellants. Ms. Woelfling suggested that the Board could set up a procedure similar to that in the federal court system where a party can apply for an exemption from a requirement to participate in electronic filing. Mr. Wein suggested that like some federal courthouses, the Board could make a computer available at its office in Harrisburg where a party would be able to file electronically. Judge Renwand and Judge Mather felt that Mr. Wein's proposal could not be implemented at the present time, due to staffing shortages at the Board and for security reasons. Mr. Wein raised the question of how often the Board receives handwritten filings. It was noted that notices of appeal are sometimes handwritten. However, notices of appeal may not be filed electronically. Occasionally, other documents are also received in handwritten form.

Judge Renwand suggested that the Rules Committee and the Board move forward with mandatory electronic filing. He and Judge Mather agreed that any rule mandating electronic filing should make an exception for anyone who does not have the ability to file electronically. The Board will continue to allow those parties to file by paper. Mr. Wein posed the question to the Rules Committee: does anyone believe that the Rules Committee should not be working on a rule for mandatory electronic filing? No one objected to a rule on mandatory electronic filing. Mr. Wein then asked Judge Renwand to poll the judges, which Judge Renwand agreed to do. Mr. Wein asked for a volunteer to

prepare a proposed rule on mandatory electronic filing for consideration at the next meeting of the Rules Committee. Mr. Bohan volunteered to do so.

Judge Mather offered that, in the interim, perhaps the Board should discuss where people are misapplying the rule and address the problem that arises when a party participates in electronic filing, but refuses to accept electronic service. Mr. Wein asked whether the Rules Committee should vote on recommending that the Board revise its guidance document on electronic filing. Mr. Bohan moved that the Rules Committee advise the Board to amend the guidance document to make it consistent with 25 Pa. Code § 1021.34(d), as set forth in the Rules Committee's discussion. Ms. Woelfling seconded the motion. Mr. Wein offered the motion for a vote, and it carried unanimously.

On behalf of other attorneys at the Department, Mr. Bohan raised two miscellaneous issues on the subject of electronic filing. Some attorneys have stated that it would be helpful for notices of appeal to be posted on the electronic docket on the Board's website. Judge Renwand agreed. He reported that he has his appeals scanned to the electronic docket. Former Judge Krancer followed the same practice. Judge Renwand said he doesn't believe it's an unreasonable administrative burden.[2]

Mr. Bohan also reported that Mike Sokolow had inquired whether it would be possible for the search engine on the website to be configured so that if a search is done for specific time periods[3] it defaults to the current month and year. Ms. Wesdock agreed to check with the Board's website provider.[4]

Representation of Partnerships

[2] Effective April 22, 2011, all notices of appeal filed with the Board will be posted on the Board's electronic docket.

[3] *See* http://ehb.courtapps.com/public/opinion_search.php.

[4] This change to the search feature has been made.

As the next item for discussion, Mr. Wein called up an item raised by former Judge Krancer. Judge Krancer had noted that the Board's rules at 25 Pa. Code § 1021.21 on Representation are clear as to whether an individual or corporation must be represented by counsel; however, the rule is silent as to partnerships. Mr. Wein opened the discussion by inquiring whether the Rules Committee should recommend a rule requiring partnerships to be represented by counsel in appeals before the Board.

At the last meeting, Mr. Hinerman brought to the Committee's attention a decision by the Commonwealth Court in *Appeal of NIC Land Co.*[5] addressing the issue of whether a partnership may be represented by one of the partners in a civil action. Judge Mather offered his read of the Commonwealth Court decision: a natural person representing the partnership may appear on his own behalf to represent his individual interest in the partnership. Based on the Court's holding, he felt that the Board did not need to change its rules on representation since the Board's rules allow an individual to appear on his own behalf. Mr. Hinerman agreed that it would not make sense for the Board to order a partnership to be represented by counsel in a matter before the Board, and then, if the matter is appealed to the Commonwealth Court, the partnership would not be required to have counsel.

Mr. Bohan noted that the Commonwealth Court relied on language in certain Pennsylvania Rules of Civil Procedure which do not apply to the Board, in addition to language from the Judicial Code. He explained that the language from the Judicial Code is very similar to language from 28 U.S.C. § 1654, which – as the U.S. Supreme Court

[5] *In Re Petition of Lawrence Cty Tax Claim Bureau, et al., Appeal of: NIC Land Co. and Family Way L.P.*, No. 94 C.D. 2009 (Pa. Cmwlth., Issued July 1, 2010)(Available at http://www.aopc.org/OpPosting/Cwealth/out/94CD09_7-1-10.pdf).

discussed in *Rowland v. California Men's Colony* – did not allow a partnership to appear in Federal Court except when represented by counsel.[6] Mr. Bohan stated, therefore, that he didn't believe that the Board had a legal obligation to change the rules as they presently exist. Judge Mather raised the question of whether the Board would be ignoring the ruling of the Commonwealth Court by following the U.S. Supreme Court decision. Mr. Bohan replied that the Commonwealth Court based its decision on both the Judicial Code provision and the Rule of Civil Procedure, but that the Rule of Civil Procedure is more specific. Since the Board is not bound by either, the Board's current rule is fine as drafted.

Ms. Woelfling observed that there are situations where a partner is not a natural person. Mr. Wein gave as an example the situation where an LLC is a general partner of a partnership. Judge Mather stated that they would need counsel to represent the corporate interest within the partnership. Mr. Scott posed the question of whether the Rules Committee needs to distinguish a general partnership from an LLP because an individual does not necessarily represent his own interest in an LLP. Mr. Wein noted that the Commonwealth Court only looked at a general partner in its opinion in the *NIC Land* case. Judge Mather pointed out that in a footnote, the court said a limited partner cannot represent a general partner.

Mr. Wein noted that if the Board's rule were to be revised to require partnerships to be represented by counsel, and if a Board order enforcing the rule were appealed to the Commonwealth Court, the rule would be subject to review and could be struck down by

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[6] *Rowland v. California Men's Colony*, 506 US 194 (1993)(Available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=%3C%20riend%3E&navby=case&court=US&vol=506&invol=194&pageno=200) *citing* 28 USC 1654 (Available at http://codes.lp.findlaw.com/uscode/28/V/111/1654).

the Commonwealth Court. Mr. Hinerman suggested making an inquiry to the PBA Unauthorized Practice of Law Committee in order to get its input.

At this point, Mr. Raphael joined the meeting by telephone.

Mr. Bohan offered that from a litigation perspective, the more conservative approach for the Board and Rules Committee would be to require that partnerships be represented by counsel only if the Board specifically wants the Rules Committee to do so. Mr. Wein, in turning to the language of rule 1021.21, noted that subsection (c) says that groups of individuals require representation. If a group of individuals is a general partnership, does this require representation? Mr. Hinerman replied that subsection (c) applies to groups of *pro se* litigants.

Mr. Scott stated that it was unlikely that the rule as currently drafted – silent on whether a partnership must be represented by counsel – would be reviewed by the Commonwealth Court. If the Board did not order a partnership to be represented by counsel, the partnership certainly would not appeal the Board's decision. If the Department, on the other hand, wanted the partnership to be represented by counsel, it would have to appeal the matter to the Commonwealth Court and essentially ask the court to rule inconsistently with its own decision.

Mr. Bohan pointed to the General Rules of Administrative Practice and Procedure which say that individuals may represent themselves, and a partner may represent the partnership.

Mr. Hinerman stated that he believes that the Rules Committee should change 1021.21(d) to say that "individuals *and their partners* may appear in person on their own behalf. . ." Mr. Wein stated that if the rule is revised in subsection (d) then it should also

be changed in (a) to refer to individuals and partners. However, he felt that it should make reference to "natural persons" to exclude cases where a general partner is a corporation.

Mr. Raphael offered that his experience with *pro se* litigants has been challenging, nevertheless it looks like the Commonwealth Court is providing guidance with its opinion in *NIC Land*. He suggested that the Rules Committee lean toward not requiring representation if the partner is a natural person.

Mr. Scott, in returning to the question of whether to write a rule at all, said that if the rule were to be changed to state specifically that an individual partner may represent his interest in the partnership, it would call attention to the issue. It would advertise that a partnership does not need to retain counsel. He believes that if the Rules Committee leaves the rule alone, it has a very low chance of being challenged. Mr. Wein pointed out that the only area where a problem arises is when the question comes up in a case and the presiding judge has no clear cut rule to point to.

Mr. Wein stated that the minutes should reflect the Rules Committee's discussion that the rule, as currently written, should be interpreted as allowing natural persons to represent their interest in the partnership. However, Ms. Woelfling and Mr. Bohan raised a caution that it could be misleading to leave the rule as is. Ms. Woelfling suggested adding a comment to the rule in order to clear up any ambiguity. The comment would refer to the Commonwealth Court's decision in the *NIC Land* case.

Ms. Wesdock noted that in the last set of rule revisions, it was difficult to get IRRC's approval where they felt a substantive change was being made through a comment rather than a revision to the rule. Judge Mather responded that the addition of a

comment to an existing rule does not require IRRC review; it goes directly to the Legislative Reference Bureau. The last set of rule revisions, where IRRC expressed concern, involved comments that were to accompany a new rule. The latter situation requires IRRC review.

Mr. Hinerman moved that the Committee recommend that a comment be added to Rule 1021.21 to address whether partnerships may be represented by a partner. Mr. Scott seconded the motion. All were in favor.

Mr. Bohan raised the question of whether the comment should state that a partner may appear on his own behalf or that a partner may represent a partnership. The Committee agreed to review the exact language of the comment at the next meeting.

Dismissal of Matter where Intervenor/Beneficiary Abandons Case

The Committee turned to an issue that it had been asked to consider by former Judge Krancer. He had expressed the opinion that the rules do not assist the Board in dealing with a situation where an intervenor abandons a case and the Department is left having to defend the matter. An example of this situation occurred in Judge Krancer's case, *Pine Creek Valley Watershed v. DEP* decided in November 2010.[7] Mr. Bohan said that he would like to defer this discussion until he has had the opportunity to discuss the issue with Mr. Raphael. Mr. Wein agreed and the issue was suspended until the next meeting.

New Business:

Timing for Filing of Non-Dispositive Motions

[7] *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, (Opinion and Order granting Joint Motion for Continuance, issued Nov. 5, 2010).

The next item for consideration at the meeting was an issue that Judge Labuskes had asked the Committee to review. The Board's Pre-Hearing Order No. 1 contains a deadline by which dispositive motions must be filed. The language reads as follows: "All dispositive motions shall be filed within 210 days of the date of this pre-hearing order. . . " An argument was made in one of his cases that this language implies that *non-dispositive* motions may be filed at any time. He asked the Rules Committee to consider the question of whether the Board should have a rule that clarifies when non-dispositive motions may be filed. In other words, should there be a deadline for motions not covered by the dispositive motion deadline set out by Pre-Hearing Order No. 1?

Ms. Wesdock explained that only certain types of non-dispositive motions could be covered by any such rule or deadline. For example, it would be difficult to impose a deadline for motions for an extension or a continuance. Mr. Raphael stated that, based on his experience as a litigator, he would not like to see motions practice cut off too early in a proceeding. He felt that a premature deadline for the filing of motions in limine would create inefficiency and hurt a party's case because issues that could otherwise be eliminated prior to trial would need to be given attention at the hearing.

Judge Renwand agreed with Mr. Raphael in principle, but offered his assessment that there are some problems with that approach. Judge Labuskes had asked the Rules Committee to discuss the matter after both he and Judge Renwand had faced challenging situations where a party arrived on the first day of a hearing with four or five motions seeking to limit issues. Judge Renwand reported that sometimes those motions are very extensive. Under normal circumstances the opposing party would have fifteen days to respond, but here the issues had to be argued on the spot for an immediate ruling so that

the hearing could go forward. Judge Renwand said that he encountered a situation where he granted a motion at the hearing based on the facts and law presented, but was confronted several days later with law supporting a clear reversal of the motion after the party had time to research the issue. In such a situation, the Board is forced to reverse itself, which can be embarrassing. Moreover, in the case described by Judge Renwand, it presented a difficulty for the appellant who had already presented its case based on the earlier ruling.

Judge Renwand then explained that he has attempted to moderate the potential for such occurrences by imposing some motion deadlines in his orders. He imposes a deadline for motions in limine to be filed; he sets the deadline to occur sometime after the parties have filed their pre-hearing memoranda and before the beginning of the hearing. For consistency and the information of the parties, Judge Renwand proposed that perhaps the Board would like to consider adopting this approach as a rule.

Mr. Wein offered that the Rules Committee may be able to identify a category of motions, coined "semi-dispositive motions", and create a rule that sets a deadline for filing such motions 20 days before the beginning of a hearing, with a response to be filed 10 days later. That would give the Board 10 days before the hearing to rule on the motion.

Judge Renwand recognized the value of Mr. Wein's proposal, but said it would be challenging to set a deadline far in advance of the hearing because attorneys do not always focus on a case until right before the hearing. It might also interfere with the Board's current deadlines for the filing of pre-hearing memoranda. If the deadline for

filing pre-hearing memoranda were set too far in advance, parties will ask for extensions, especially if there are settlement discussions going on.

In an exchange between Mr. Bohan and Judge Renwand, the two agreed that the problem is not with non-dispositive motions in general, but only with motions in limine. They felt that there needs to be a requirement that a motion in limine cannot be sprung on the Board, and that motions in limine must be filed so as to give the other party a sufficient amount of time to respond. To which, Mr. Scott inquired whether a more general statement of rule could be effective; for example, a motion in limine must be filed in a timely manner so as not to interfere with the orderly proceeding of the hearing. He offered that a sufficient basis for denying such a motion could be for untimely filing. Mr. Raphael stated that he preferred to have a rule containing a date-certain. Mr. Hinerman shared that he has been the recipient of motions filed at the eleventh hour and sometimes such motions are simply intended to be a distraction before a hearing. The problem for the non-moving party is that responding to the motion takes valuable time away from trial preparation.

Judge Renwand stated that he issues an order giving parties until 20 days before the start of a hearing to file motions in limine and seven days to respond. He had no objection to a 10 day response time. Ms. Wesdock suggested that perhaps the judges could do as Judge Renwand does, and set a deadline for the filing of motions in limine by order and see how it works out before making a formal revisions to the rules. Judge Renwand agreed to raise this issue with the other judges.

Admission of Expert Reports in Lieu of Direct Examination

Ms. Wesdock next called the Rules Committee's attention to an issue raised by Judge Labuskes regarding whether the Board should adopt a rule that would allow a party to introduce an expert report in lieu of direct testimony by an expert. In February, 2011, Judge Labuskes denied an appellant's motion that sought to block the admission of documents listed in the Department's pre-hearing memorandum; the appellant had argued that the documents fell into the category of "expert reports."[8] In his opinion, Judge Labuskes held that the Board has no categorical prohibition against the admission of expert reports and that the Board would need to rule on the admissibility of such documents on a case-by-case basis.[9] Ms. Wesdock asked the Rules Committee for input, reporting that the Board has no position on the adoption of a rule at this time.

Mr. Wein noted that Board Rule 1021.124 allows the introduction of written direct testimony and makes no distinction between fact or expert testimony. He represented that such a procedure for introducing direct expert testimony through expert reports is utilized by the PUC. He stated that he had utilized this procedure previously in a Board proceeding. In that case the Department cross-examined the expert according to the contents of the expert report.

Judge Renwand stated that he does not admit expert reports. He feels that live testimony is more helpful and that written direct testimony would change the dynamic of the Board's cases. He also expressed a concern about hearsay and the fact that the person whose name appears on the report may not be the author. Ms. Wesdock stated that the introduction of expert reports in lieu of live testimony would allow hearings to be more streamlined since the reports are more succinct and concise.

[8] *Pine Creek Valley Watershed Assn, Inc. v. DEP*, EHB Docket No. 2009-168-L (Opinion issued February 11, 2011).
[9] *Id.* at p. 1, 3-4.

Mr. Bohan raised a concern that the expert reports constitute hearsay unless they fall within a hearsay exception and, as such, they violate a general principle of administrative law that a case cannot be resolved on hearsay evidence. Mr. Wein stated that if the writer is available for cross-examination, he doesn't believe that it constitutes hearsay.

Judge Renwand was concerned that allowing expert testimony to be presented in written format could raise some due-process issues. For example, if an expert is allowed to set forth five pages of technical evidence on paper, the judge doesn't get to see his demeanor or how he is presenting it. On several occasions, he has seen an expert get on the stand and present his testimony – even on direct – with a different level of certainty than one might get from simply reading a report. The witness' presentation on the stand may easily influence the result of the case; a case may fall apart on direct examination of a witness, not necessarily on cross. The Board's job is to weigh which expert appears more credible, and it is much more difficult to accomplish this task if direct expert testimony is presented in written format.

Mr. Wein asked whether there is a difference between submitting a written expert report and written direct testimony. Judge Renwand responded that there is a difference: written direct testimony consists of a series of written questions and answers, while an expert report is a complex narrative. In either case, however, he prefers having live testimony over written in whatever format. In his opinion, an expert report might put words in the mouth of the expert, whereas the expert might back away from those statements on direct examination. Ms. Woelfling agreed with Judge Renwand. In her

experience as the Chief Judge and Chairperson of the Board, she did not find expert reports particularly useful in deciding a case.

Mr. Wein stated that there appeared to be consensus among the members of the Committee to leave the decision of whether to admit expert reports up to the discretion of the individual judges, as opposed to trying to craft a rule. Ms. Wesdock agreed to present the Committee's discussion to all of the judges. Judge Mather also agreed that he would like to talk to the other judges about this issue before taking any further action.

Mr. Wein asked Ms. Wesdock to report on the Board's discussion of this issue at the next meeting.

Other New Business

Mr. Bohan reported on a question raised by Department counsel, Marty Siegel, with respect to Board Rule 1021.122(c)(4). That section deals with burden of proof and reads as follows:

> (c) A party appealing an action of the Department shall have the burden of proof in the following cases:
>
> (4) When a party appeals or objects to a settlement of a matter between the Department and a private party.

Mr. Siegel questioned the use of the term "private party" since the Department is frequently involved in settlement negotiations with municipalities.

Ms. Woelfling and Judge Renwand agreed that there was no intention to exclude municipalities and the rule was simply inarticulately drafted. Mr. Wein agreed, and he suggested that the Rules Committee should recommend a revision to the rule at the next meeting so that the rule would read ". . .and *another* party" rather than ". . .and a *private* party."

Next Meeting

The next meeting of the Rules Committee is scheduled for May 12, 2011 at 10:15 a.m.

Adjournment

On the motion of Ms. Woelfling, seconded by Mr. Bohan, the meeting was adjourned at 3:57 p.m.