

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of January 11, 2024

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference on January 11, 2024. Committee Chairman Howard Wein presided. The following Rules Committee members were in attendance: Gail Conner, Matt Wolford, Jean Mosites, Dawn Herb and Doug Moorhead. Attending on behalf of the Environmental Hearing Board were Chairperson and Chief Judge Steve Beckman; Judges Bernie Labuskes, Sarah Clark, Paul Bruder and Maryanne Wesdock, who took the minutes; Senior Assistant Counsel Eric Delio; Assistant Counsel Alisha Hilfinger and Maggie White; and Board Secretary Christine Walker.

Minutes of November 9, 2023 Meeting:

On the motion of Mr. Moorhead, seconded by Ms. Mosites, the minutes of the November 9, 2023 meeting were approved.¹

Expert Discovery:

Mr. Moorhead's proposed revisions to EHB Rule 1021.102 (Discovery) were discussed at the November 9, 2023 meeting. Based on that discussion, Mr. Wein and Mr. Moorhead prepared additional edits to Rule 1021.102 as well as to Rule 1021.101 (Prehearing procedure) as follows:

§ 1021.101. Prehearing procedure.

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

(1) All discovery shall be completed no later than 180 days from the date of the prehearing order.

(2) **Discovery of facts known and opinions held by experts shall be governed by Pa. Rule of Civil Procedure 4003.5 (a)(1).** The

¹ Because there was no sunshine notice for the January 11, 2024 meeting, a formal vote on the approval of the minutes will be taken at the March 14, 2024 meeting.

service of a report of an expert together with a statement of qualifications, the subject matter on which the expert is expected to testify, the facts known by the expert, opinions to which the expert is expected to testify and a summary of the grounds for each opinion may be substituted for answers to expert interrogatories.

(3) Dispositive motions shall be filed within 210 days of the date of the prehearing order.

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

(b) A Joint Proposed Case Management Order shall propose alternate dates for the conclusion of discovery, the service of expert or supplemental reports, and the filing of dispositive motions. The Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties or other dates the Board deems appropriate.

(c) The Board will establish a hearing date for the issues in the appeal. The Board may also direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date. The Board may issue an order scheduling specific dates on which each party is to file its prehearing memorandum, deadlines for filing motions in limine and a prehearing conference.

(e) Subsection (d) supersedes 1 Pa. Code § 35.121 (relating to initiation of hearings).

§ 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) ~~Except for disputes related to expert discovery, as provided in subsection (e) (1) and (2) of this section, all discovery~~ ~~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) Absent an agreement of the parties, a person who has been identified as an expert witness expected to testify at a hearing before the Board, including Department employees, shall not be deposed without an order of the Board.

(1) ~~If after the service receipt of expert reports or answers to expert interrogatories, a party seeks further discovery of a person identified an expert witness, the party seeking further discovery shall file a motion with the Board within 10 days after the receipt of the expert report or answers to expert interrogatories in accordance § 1021.93 (relating to discovery motions) showing demonstrating why the information set forth in the expert reports or answers to expert interrogatories is not sufficient to provide the party with the information necessary to prepare its case and requesting that the Board should order further discovery, or showing other cause for the discovery it seeks.~~

(2) Within (7) days of service of the motion as provided in subsection (1) above, the Board will hold a conference with the parties to determine the process and deadlines for filing responses and, if necessary, filing briefs and, at the Board's discretion, conducting additional discovery. Following the conference, the Board will issue an order concerning these matters and any other issues that may need to be addressed.

~~(e)(f)~~ Subsections (a)—~~(d)~~~~(e)~~ supersede 1 Pa. Code §§ 35.145—35.152 (relating to depositions).

Mr. Wein provided the history behind the current version of Rule 1021.101: An earlier version of the rule provided for bifurcated discovery, i.e., a separate timeframe for fact discovery and expert discovery. The rule was revised in the early 2000's to allow both fact and expert

discovery to occur simultaneously.² In recent years, several attorneys have advocated for a return to bifurcated discovery. Mr. Moorhead explained that he and Mr. Wein considered that option but decided against it because it would further expand the discovery period, and there did not appear to be support among the EHB judges for lengthening the discovery period.

Mr. Moorhead and Mr. Wein proposed adding a reference to Pa. R.C.P. 4003.5 in paragraph (a)(2) of Rule 1021.101, as well as elaborating on what is required in an expert report. Judge Labuskes asked why it was necessary to repeat the requirements of an expert report in paragraph (a)(2) in addition to including a reference to Pa. R.C.P. 4003.5. Mr. Moorhead felt it was helpful to include both a reference to Pa. R.C.P. 4003.5 as well as the language of what is required in an expert report since it may not be clear to all practitioners how Pa. R.C.P. 4003.5 works within the Board's rules. Judge Wesdock noted that IRRC sometimes asks for clarification when the Board simply cites to a Rule of Civil Procedure.

Ms. Mosites noted that Rule 1021.102(a) already states that discovery before the Board is governed by the Pa. Rules of Civil Procedure. Mr. Wein explained that he and Mr. Moorhead felt it was important to provide more specificity in the rule.

Mr. Wolford shared Judge Labuskes' sentiment that if Pa. R.C.P. 4003.5 is referenced in the rule, it is not necessary to further elaborate on what is required in an expert report. He felt that if the additional language were being included in EHB Rule 1021.101 simply for purposes of clarification, it was more appropriate to include it in the Practice and Procedure Manual. Judge Labuskes pointed out that, although the proposed revision to Rule 1021.101(a)(2) states that expert discovery is governed by Pa. R.C.P. 4003.5, it then goes on to quote only a part of that rule.

² For a discussion of the history behind the rule change ending bifurcation of discovery, see the Rules Committee minutes beginning with the meeting of January 13, 2000.

The Committee moved on to review paragraphs (e)(1) and (2). Mr. Wein explained that paragraphs (e)(1) and (2) of Rule 1021.101 are intended to accomplish what Judge Beckman raised at the November 9, 2023 meeting – these provisions set up a mechanism for dealing with a request for an expert deposition without impinging on the discretion of the judge. Mr. Moorhead explained that in the *Range* case, the Department had to submit a substantial amount of material to address the issue of expert depositions; he felt that the proposed rule changes ensure that the issue gets before the judge quickly. Judge Labuskes said he felt that having these procedures in place was excessive. He contrasted this situation with the recent revisions to the rules on attorney’s fees, which included a detailed procedure for the Board to follow in ruling on petitions for attorney’s fees and costs. He felt that a detailed procedure was necessary in the case of the latter, but not in the case of discovery disputes. He was not in favor of paragraph (e)(2)’s requirement of a mandatory conference call.

Mr. Wolford raised a concern about the 10-day requirement of (e)(1). Mr. Moorhead shared his concern but stated that “10 days” was simply included as a placeholder until there could be discussion about the appropriate timeframe. Rather than including a set time period, Mr. Wolford recommended saying “so as not to unreasonably delay the proceeding.”

Ms. Mosites asked if the revision to subsection (d) was precipitated by the addition of paragraphs (e)(1) and (2), and Mr. Wein confirmed that it was. She noted that, absent the addition of paragraphs (e)(1) and (2), the issue would be resolved through motions practice as a discovery dispute. When she talked with her colleagues regarding the previous changes proposed at the November 9, 2023 meeting, they did not see a need for the changes. She requested an opportunity to discuss the new proposed changes with her colleagues.

Judge Beckman felt that what occurred in the *Range* case³ was an exception, and that 90% of the cases involving an expert discovery dispute can be resolved without the need for the procedures set forth in the proposed revisions to 1021.101 and 1021.102. Mr. Moorhead did not feel that *Range* was an outlier. He felt that the issue arises even among seasoned practitioners. Judge Wesdock noted that the issue had come up more than once in cases that she had worked on with Judge Renwand.

The Board agreed it would be a good topic to raise at the Environmental Law Forum. The revisions to Rules 1021.101 and 1021.102 will be included in the materials submitted to PBI. The Board will ask the attendees to provide feedback. Judge Beckman also asked Mr. Moorhead if he would be willing to discuss his reasoning behind the rule revisions when the Board presents this topic. Mr. Moorhead stated that he was planning to attend the Forum, but if he was not able to attend he would have a representative of the Department appear in his place. Mr. Wein suggested presenting pro and con viewpoints for the rule change and having the audience weigh in. Mr. Moorhead agreed. He stated that the new DEP Chief Counsel, Michael Braymer, would like to weigh in on the topic.

Mr. Moorhead moved to table discussion on the topic until the next meeting. Mr. Wolford seconded. All were in favor. Mr. Wein suggested that if anyone would like to propose alternate language to Rules 1021.101 and 1021.102 they should circulate it prior to the March meeting.

Judge Wesdock thanked the group for their detailed discussion of this topic. She noted that when IRRC submits a question or comment to an EHB rules package, she frequently relies on the Rules Committee discussion to respond.

New DEP Chief Counsel:

³ 2021 EHB 37 and 2021 EHB 182.

Mr. Moorhead advised the group that Michael Braymer had been named the new Chief Counsel at DEP. The Board and Rules Committee extended their well wishes to him.

Response Time to Non-Summary Judgment Dispositive Motion:

Mr. Wolford stated that he has been asked by experienced practitioners, “What is the length of time to respond to a motion to dismiss?” The Rules of Practice and Procedure do not include a rule entitled “Motion to dismiss.” Rather, Rule 1021.94 is entitled “Dispositive motions other than summary judgment motions.” He felt that the motions rules should be more streamlined. He noted that “there are a lot of rules for different types of motions.” He also pointed out that the Practice and Procedure Manual refers to Rule 1021.94 as “Motions to Dismiss” whereas the actual title of Rule 1021.94 is “Dispositive motions other than summary judgment motions.” Finally, he noted that the section of the Practice and Procedure Manual discussing Rule 1021.94 does not address the timeframes for responding to motions to dismiss. He recommended that the Board revise the Practice and Procedure Manual and give thought to reorganizing the motions rules.

Mr. Moorhead felt that it was easier to address the matter in the Practice and Procedure Manual. He felt that it would be too cumbersome to combine the motions rules into one rule. He recommended changing the title of Rule 1021.94 to “Non-summary judgment dispositive motions, such as motions to dismiss.”

Judge Wesdock and Ms. White agreed to work on updating the Practice and Procedure Manual.⁴

Recognition of Brian Clark:

Judge Wesdock reported that Brian Clark had recently retired and was stepping down from the Rules Committee after 30+ years of service. Mr. Clark was a founding member of the Rules

⁴ The Board will have a summer intern who will work on this update and other updates to the Practice and Procedure Manual.

Committee and served since its inception in 1989. He also was a member of the “informal Rules Committee” which existed prior to the formation of the current committee. Various suggestions were made such as presenting Mr. Clark with a plaque, a framed letter signed by the Rules Committee members and Judges, and a bottle of wine. Mr. Wein will work with Judge Wesdock to come up with the language to include on the plaque and/or letter. Judge Beckman suggested presenting the plaque/letter/gift at the Environmental Law Forum. If a letter is presented to Mr. Clark, the letter can be signed at the Forum.

Judge Clark offered to assist in the wine selection. Ms. Herb recommended including a gold seal on the letter.

New Efiling and Docketing System:

Judge Beckman explained that the Board is working with a developer to create a new electronic filing and docketing system. He explained the history of this project. The Board will be discussing the new system at the Environmental Law Forum. Mr. Wein suggested including slides demonstrating the new system in the Board’s power point presentation. Ms. Herb recommended using the term “electronic filing” for the Environmental Law Forum program description because it is more explanatory than “electronic docketing.”

Adjournment:

On the motion of Mr. Wolford, seconded by Ms. Mosites, the meeting was adjourned.

Next Meeting:

The next meeting will be held on March 14, 2024 at 10:00 a.m. Agenda items will include a continuation of the discussion regarding expert discovery, an update on final rulemaking 106-14, and a report by Mr. Wein and Judge Wesdock regarding the gift presentation to Mr. Clark.⁵

⁵ Subsequent to the January 11, 2024 meeting, Mr. Delio recommended revising Rule 1021.94 to include the same language that was proposed for Rule 1021.94a on the filing of a memorandum in support of

another party's motion. The revisions to Rule 1021.94a were discussed at the January and March 2023 Rules Committee meetings.