

## **ENVIRONMENTAL HEARING BOARD RULES COMMITTEE**

### **Minutes of Meeting of May 2, 2024**

#### **Attendance:**

The Environmental Hearing Board Rules Committee met by videoconference on May 2, 2024 at 10:00 a.m. Rules Committee Chairman Howard Wein presided over the meeting. In attendance were the following members of the Rules Committee: Vice-Chair Phil Hinerman, Jean Mosites, Dawn Herb, Gail Conner, Tom Duncan and Matt Wolford. Attending from the Environmental Hearing Board were Chairperson and Chief Judge Steve Beckman; Judges Sarah Clark and Maryanne Wesdock, who took the minutes; Senior Assistant Counsel Eric Delio; and Assistant Counsel Maggie White. Former Environmental Hearing Board Chairperson and Chief Judge Tom Renwand also attended the meeting.

#### **Announcements:**

Mr. Duncan advised the Committee that he recently joined the firm of Faegre Drinker Biddle & Reath, LLP. The Committee wished him well in his new position.

#### **Presentation of Gift to Judge Renwand:**

The Rules Committee and Board presented former Chief Judge Renwand with the gift of a clock with an inscription recognizing his long-standing service to the Commonwealth of Pennsylvania, first as Judge and then as Chief Judge and Chairperson. Judge Renwand thanked the members of the Rules Committee and the Board for their service.

#### **Minutes:**

On the motion of Mr. Duncan, seconded by Ms. Mosites, the minutes of the March 14, 2024 meeting were approved.

#### **Rules Package 106-14:**

Judge Wesdock reported that Final Rulemaking 106-14 had received all necessary approvals and would be published in the *Pennsylvania Bulletin*.<sup>1</sup>

**Suggested Topic for Environmental Law Forum:**

Mr. Wolford suggested a possible topic for the next Environmental Law Forum. In his experience, when discovery is initiated immediately after the filing of an appeal, it engenders an adversarial relationship between the parties. He felt there is less opportunity for the parties to simply talk and work things out. He suggested developing an ethics program around this topic. Discussion of this topic will be on the agenda for the September 2024 Rules Committee meeting.

**Expert Discovery and Expert Reports:**

The Committee continued its discussion regarding proposed revisions to the Board’s rules on expert discovery. This discussion began at the May 11, 2023 meeting and continued at the meetings of September 14, 2023, November 9, 2023, January 11, 2024 and March 14, 2024.<sup>2</sup>

Mr. Wolford stated, in his experience, when a Department order sets forth a “determination,” sometimes this relates to an “expert conclusion.” For example, when a Department order states that the Department has “determined” that a certain activity caused groundwater contamination, that determination is based on an expert conclusion. Although it is necessary for the appellant to obtain information about this expert conclusion, there is a question about how that information may be obtained. When the subject of the appeal is a Department order, in which the Department has the burden of proof, Mr. Wolford questioned why the person challenging the order should be required to hire an expert before the Department substantiates expert conclusions supporting the Department action. If the Department cannot prove its expert

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<sup>1</sup> The [amendments to the Board’s Rules](#) were published on May 18, 2024 at 54 Pa.B. 2776.

<sup>2</sup> The meeting minutes are available on the Board’s website at: [Minutes | The Pennsylvania EHB \(pa.gov\)](#)

conclusion, he felt there should be no need for his client to retain an expert to counter the Department's conclusion. However, he did not believe that the Committee could draft a rule that would resolve these issues.

Ms. Conner related her experience with creating a task force to address various issues. She suggested that the Department create a protocol for providing recipients of an order or civil penalty with information on why the Department believes the recipient of the order or penalty is the source of the environmental problem which they have been ordered to address. Mr. Wolford agreed with this suggestion.

Judge Wesdock circled back to one of Mr. Wolford's comments. She recognized that once an appeal is filed with the Board, the matter becomes adversarial and there may be less opportunity for the appellant's technical staff/expert or lawyer to speak with the Department's technical staff. She noted that there had been discussion at a Rules Committee meeting several years ago about providing parties with an opportunity at the beginning of an appeal to determine whether the matter could be resolved without moving into "litigation mode." Mr. Wein agreed and recommended having a period of time after an appeal is filed to "stop the clock" and allow parties an opportunity to simply talk with each other before moving into discovery. This could be addressed in Prehearing Order No. 1.

Judge Beckman brought up the Board's presentation at the Environmental Law Forum. At the Forum, the Board presented the rule changes regarding expert depositions that had been proposed by Mr. Moorhead and Mr. Wein at the last meeting. Judge Beckman noted that Department practitioners had one view about the proposed rules, while private practitioners held an opposing view. He felt that neither side was happy with the current process, but because the views were diametrically opposed and there was no consensus among the bar on how to resolve

the issue, he did not think it would be possible to find middle ground for a rule. He believed that it made more sense to handle it on a case-by-case basis rather than through the adoption of a rule.

Mr. Hinerman noted that historically an issue that the Rules Committee grappled with was “When must a party produce its expert report?” whereas the current issue is “When can an opposing party depose an expert?” Judge Beckman stated that he believes that the line is not clear as to when a Department employee crosses over from performing the duties of one’s job to being an expert.

Ms. Herb circled back to issues raised earlier in the discussion. She noted that any discussion of what the Department does before an appeal is filed is outside the purview of the Rules Committee. She also stated that the Department is not opposed to having discussions with opposing counsel after an appeal has been filed, but attorneys in different regions may handle this situation differently. She stated that whenever the Department takes an action, it must have the facts to support that action. She pointed out that under the Board’s rules and case law, if a Department witness is going to offer an expert opinion, they must be designated as an expert even if that person will also be giving factual testimony. It is up to the judge to determine if that witness can be deposed. The purpose of the rule that Mr. Moorhead proposed is not to change this process but simply to make it more efficient. Ms. Mosites stated that she was not in favor of a rule that would generally prohibit expert depositions. She felt that the Pa. Rules of Civil Procedure provided guidance to the Board on how to handle this issue.

Ms. Mosites noted a disparity between the Board’s rules and Prehearing Order No. 2. She directed the Committee’s attention to Board Rule 1021.101(a) that states 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) The service of a report of an expert together with a statement of qualifications may be substituted for an answer 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.

She pointed out that the language of (a)(2) does not appear in Prehearing Order No. 2 (PHO2), which requires the filing of a prehearing memorandum containing the following information:

A. A statement of the facts in dispute and the facts upon which the parties agree.

B. A statement of the legal issues in dispute, including citations to statutes, regulations, and case law supporting the party's position.

C. A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.

D. A list of all expert witnesses and indicate whether their qualifications will be challenged.

E. A summary of the testimony of each expert witness or a report of the expert as an attachment.

F. A list of fact witnesses which each party intends to call. The list shall include the full name and address of each witness.

G. The proposed order of witnesses.

H. A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. Copies of these exhibits shall be attached. All documentary evidence shall be numbered and marked in order to allow for expeditious offering into evidence.

I. Signed copies of any stipulations reached by the parties.

Ms. Mosites felt that the disparity between Rule 1021.101 and PHO2 creates ambiguity as to when a party must serve its expert report if it is provided in lieu of answers to expert interrogatories. She felt that if the expert report is provided in lieu of answers to expert interrogatories it should be served within the 180-day discovery period in accordance with the language of Rule 1021.101(a)(1) and (2); however, she noted that this is generally not the practice followed by most attorneys, who generally provide the expert report with their prehearing memorandum pursuant to PHO2.

Judge Wesdock agreed that PHO2 did not match the requirements of Rule 1021.101. She noted that the Board has made some revisions to PHO2 to make it more consistent with the rules but that more work needs to be done. She agreed to work with Assistant Counsel Maggie White and the Board's intern to determine if further revisions should be made to PHO2 and/or Rule 1021.101.<sup>3</sup>

Mr. Hinerman shared Ms. Mosites' concern. Additionally, he stated that he has had to provide expert reports without having all the facts necessary to prepare the report. It is his opinion that where a Department employee who is designated as an expert is also a factfinder, that person should not be immune from being deposed.

Judge Beckman questioned why the Board's rules had moved away from Pa. R.C.P. 4003.5(a) with regard to determining who is an expert. He noted that Pa. R.C.P. 4003.5(a) states that expert opinion is that which is "acquired or developed in anticipation of litigation." Judge Wesdock raised a question as to how Pa. R.C.P. 4003.5(a) would apply to a Department hydrogeologist whose findings are not developed in anticipation of litigation but which, nonetheless, require specialized knowledge. She noted that if that employee were not treated as

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<sup>3</sup> This topic will be added to the agenda for the September 2024 Rules Committee meeting.

an expert, he or she would not be required to prepare an expert report. Mr. Wolford stated that he did not see a problem with that since, in his opinion, the findings of the hydrogeologist are factual, not expert. Mr. Duncan pointed out that the group seemed to be distinguishing between “scientific opinion” and “expert opinion.” He noted that in many cases, an appellant does not have access to many facts in the case until they receive the Department’s expert report, and this can sometimes take up to a year.

Ms. Herb felt that the discussion was overlooking the actual language of Pa. R.C.P. 4003.5. She pointed out that factual information can be obtained from an expert absent a deposition. She further pointed out that experts can be deposed when the requirements of Pa. R.C.P. 4003.5(a)(2) are met. She noted that simply because a witness is designated as an expert does not preclude the opposing party from obtaining the facts that the expert relied upon. She pointed out that “scientific knowledge” is that which is beyond what is possessed by the average person. She also noted that permit cases can present particular challenges because the Department may not obtain all the information from the applicant and the Department’s action is subject to de novo review by the Board.

Mr. Hinerman referenced malpractice cases and noted that when a doctor is asked “what is the standard of care?” that is the point at which the testimony crosses the line from fact to expert opinion.

Ms. Mosites circled back to the question asked earlier, i.e., if a Department hydrogeologist were not designated as an expert he would not need to provide an expert report. Ms. Mosites pointed out that answers to expert interrogatories would still need to be provided. Mr. Wein opined that the answers to expert interrogatories might not be helpful since they are often drafted by the

attorney. In that case, Ms. Mosites said, an argument could be made that the witness should be permitted to be deposed.

Judge Beckman expressed the view that when an employee is simply doing their job, they should be available in discovery to explain why they took a particular action. Ms. Herb stated that those employees are subject to discovery, just not by means of a deposition unless so ordered by the Board. Mr. Wolford expressed his opinion that anything done by the employee up to the point of taking the action in question is factual in nature, not expert. Ms. Herb felt that reasonable professional minds could disagree on this topic. She gave the following example: When an engineer is working on engineering solutions leading up to the Department's action, she believes this constitutes expert opinion.

Ms. Herb reminded the group that any change in the rules or procedure that apply to Department employees who are hybrid fact/expert witnesses will also apply to similar employees of appellants and permittees. Judge Beckman agreed. For example, all staff of a permittee who worked on a permit application would be subject to deposition. Similarly, this would apply to employees of a consulting firm hired to assist the permittee in preparing a permit application.

Judge Beckman stated his view that, based on the language of Pa. R.C.P. 4003.5, an expert is someone who is hired in anticipation of litigation. Judge Wesdock pointed out that there are two definitions of "expert": the legal definition, which is someone hired in anticipation of litigation, and the practical definition, which is someone with specialized knowledge. Ms. Herb went a step further and pointed out that while the Rules of Civil Procedure refer to an "expert" as someone holding facts and opinion acquired or developed in anticipation of litigation (Pa. R.C.P. 4003.5), the Pennsylvania Rules of Evidence allow expert testimony to be presented by a witness with "scientific, technical, or other specialized knowledge...beyond that possessed by the average

layperson.” (Pa. R.E. 702(a)). Judge Beckman stated that while he believed more weight should be given to the testimony of someone with specialized knowledge, in his opinion it did not meet the definition of an expert.

Ms. Herb pointed out that if the Board does not qualify a witness as an expert, that could disadvantage a party if the case goes to the Commonwealth Court.

Judge Beckman stated he did not see a middle ground on this issue. He felt it would need to be decided on a case-by-case basis. He would like to see parties propose case management orders, and he is fine with case management orders that set a due date for expert reports.

Ms. Mosites pointed out that the deadline set forth in PHO1 for providing a joint case management order is 60 days. She felt that 60 days was a realistic timeframe. Mr. Wolford stated that he is generally more interested in resolving the matter than in coming up with a case management order. He felt that filing a case management order puts the parties in litigation mode. Mr. Wolford stated that, in his experience, the Department is not always willing to turn over information at the beginning of a case. As an example, he stated that in civil penalty cases the Department does not turn over its penalty worksheet unless requested in discovery. Mr. Hinerman stated that he has experienced this issue as well.

A majority of the Rules Committee members agreed that they did not wish to move forward on the rule proposed by Mr. Moorhead. However, since Mr. Moorhead was not able to attend the meeting, the Committee agreed to wait to take a vote until Mr. Moorhead was present.

**Next Meeting:**

The July meeting is canceled. The next meeting will be held on September 12, 2024 at 10:00 a.m.<sup>4</sup> The agenda items for the September meeting include the issue raised by Ms. Mosites

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<sup>4</sup> Due to scheduling conflicts, the meeting was subsequently moved to **September 19, 2024**.

regarding the discrepancies between Rule 1021.101 and PHO2 and the ELF topic proposed by Mr. Woford.

**Adjournment:**

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