

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE MINUTES**

**Meeting of May 8, 2008**

**Attendance:**

The Environmental Hearing Board Rules Committee met on May 8, 2008 at 10:00 am. Participating in the meeting were Rules Committee Chair Howard Wein, Vice Chair Maxine Woelfling, members Jim Bohan, Susan Shinkman, Stan Geary and Tom Scott and from the Board, Acting Chairman and Chief Judge Tom Renwand and Maryanne Wesdock, who took the minutes.

**Summary Judgment:**

The Rules Committee addressed comments received at the Environmental Law Forum opposing some of the Committee's proposed revisions to the summary judgment rule (1021.94a), namely: 1) deletion of numbered paragraphs for the statement of material facts and 2) increasing the length of the motion from two pages to five. Additionally, it was suggested that parties should file a separate statement of undisputed material facts along with the motion/response and brief. Based on the comments, Mr. Wein prepared a new set of revisions to the rule, which the Committee reviewed.

The new revisions include a statement of undisputed material facts which should be included with the motion/response as a separate document. Mr. Wein proposed a five page limit. Mr. Bohan raised a concern that a five-page limit for the statement of undisputed material facts might be too short. He noted that motions for summary judgment have been granted where the statement of material facts was longer than five pages and have on some occasions been denied where a party left out a fact the Board considered material. Because it is not always apparent

which facts the Board may consider to be material in deciding a motion for summary judgment, he prefers to err on the side of inclusion. He suggested that instead of putting a page limit in the rule it might be more appropriate to place it in the comment as guidance to parties filing a motion. Mr. Geary raised a concern that it would be ignored if placed anywhere other than in the rule. Since a majority of the Rules Committee and the Board felt strongly about having a page limit in the rule, Mr. Bohan dropped his objection. It was agreed the statement of undisputed material facts should be limited to five pages unless leave of the Board were granted.

Ms. Shinkman noted a typographical error in subparagraph (3)(c), and Mr. Geary noted the paragraphs needed to be renumbered.

Mr. Geary questioned the wording of subparagraph (e) setting forth what needed to be contained in the brief and whether the introduction and summary were to be one and the same. Ms. Shinkman and Ms. Woelfling questioned the inclusion of the words “*a discussion of the legal argument...*” It was agreed that a comma should be added and “a discussion of” deleted.

It was agreed that Ms. Wesdock should circulate the proposed rule on the PBA Environmental, Mineral and Natural Resources Law Section (EMNRLS) listserv and also bring it up at the Section Day meeting on June 4.

Mr. Hinerman moved to recommend the revised rule to the Board, subject to comments received from the EMNRLS. Ms. Woelfling seconded. All were in favor. A copy of the revised rule is attached as Appendix A.

**Electronic Discovery:**

Judge Renwand stated the Board would soon be issuing a Supplement to Prehearing Order No. 1 that addressed electronic discovery. The Supplement will be sent in cases where the parties or the Board determines that electronic discovery may be likely. Mr. Bohan noted that

electronic discovery is requested in nearly all of his cases and, therefore, it was decided that the Supplement would be sent in most cases, with the exception of cases where it was not likely to be utilized, e.g. small civil penalty cases.

The Committee addressed comments by DEP Attorney John Herman regarding the Board's pilot rule on electronic discovery. One question was whether parties could engage in electronic discovery if no order from the Board were issued. Judge Renwand stated that if the question arises, an order will be issued. He noted the Supplement is meant to assist parties, not make the process more cumbersome.

Mr. Wein suggested putting a notice on the Board's website regarding the pilot ediscovery program. Judge Renwand agreed and said a copy of the Supplemental Prehearing Order would also be included. Mr. Wein also suggested including information about the ediscovery pilot program in the email Ms. Wesdock will be sending to the EMNRLS listserv.

Mr. Hinerman addressed the benefits of the meet and confer requirement of the rule.

**Approval of Minutes:**

On the motion of Mr. Scott, seconded by Ms. Woelfling, the minutes of the January 2008 meeting were approved.

**Next Meeting:**

At the suggestion of Mr. Wein, the July meeting will be cancelled, and any comments to the proposed summary judgment rule will be addressed by conference call.

## Appendix A

### § 1021.94a. Summary judgment motions

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure.

(b) *Summary judgment motion record.*

(1) A summary judgment motion record shall contain the following separate items:

- (i) a motion prepared in accordance with subsection [b] (c).
- (ii) **a statement of undisputed material facts prepared in accordance with subsection (d).**
- (iii) a supporting brief prepared in accordance with subsection [c] (e).
- (iv) the evidentiary materials relied upon by the movant; and
- (v) a proposed order.

(2) Motions and responses shall be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).

[(b)] (c) *Motion.* A motion for summary judgment shall contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(d) *Statement of undisputed material facts.* A statement of undisputed material facts shall consist of numbered paragraphs and shall contain only those material facts to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on. The statement of material facts, absent the portions of exhibits and affidavits relied upon, shall not exceed five pages in length unless leave of the Board is granted.

[(c)] (e) *Brief in support of the motion for summary judgment.* The motion for summary judgment shall be accompanied by a brief containing an introduction, [and] summary of the case[, a statement of material facts] and [a discussion of] the legal argument supporting the motion. [The statement of material facts shall set forth in separately numbered paragraphs a

concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.]

**(f) *Opposition to motion for summary judgment.*** Within 30 days of the date of service of the motion, a party opposing the motion shall file:

**(1) a response to the motion for summary judgment which shall include a concise statement, not to exceed two pages in length, as to why the motion should not be granted;**

**(2) a response to the statement of undisputed material facts** either admitting or denying or disputing each of the facts in the movant's statement [and a discussion of the legal argument in opposition to the motion.] **Any response shall include citation to the portion of the record contraverting a material fact.** [All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c)] **The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on** demonstrating existence of a genuine issue as to the fact disputed. Each such fact shall be stated in separately numbered paragraphs [together with] **and contain** citations to the motion record. [Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.] ; **and**

**(3) a brief containing the legal argument in opposition to the motion.**

**(g) *Length of brief in support of and in opposition to summary judgment.*** Unless leave of the Board is granted, the brief in support of or in opposition to the motion shall not exceed 30 pages.

[(d)] **(h) *Evidentiary Materials.*** [All] Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment **or a response** shall accompany the motion **or response, statement of undisputed material facts** and brief and shall be separately bound and labeled as exhibits. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

[(e)] **(i) *Proposed Order.*** The motion shall be accompanied by a proposed order.

[(g)] **(j) *Reply brief.*** A [concise] reply brief may be filed by the movant within 15 days of the date of service of the response. **It may not exceed 15 pages unless leave of the Board is granted.** Additional briefing may be permitted at the discretion of the presiding administrative law judge.

[h] **(k) Summary judgment.** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

[i] **(l) Judgment rendered.** The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts [in the briefs] should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.