

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of January 12, 2006

Attendance:

The Environmental Hearing Board Rules Committee met on January 12, 2006 at 11:15 a.m. Rules Committee Chairman Howard Wein presided. The following members of the committee attended the meeting: Brian Clark, Tom Scott and Dennis Strain (via teleconference). Representing the Environmental Hearing Board were Chairman and Chief Judge Michael L. Krancer and Judge Michelle A. Coleman. Senior Assistant Counsel MaryAnne Wesdock took the minutes.

Minutes of November 10, 2005 Meeting:

Because there was not a quorum, the minutes of the November 10, 2005 meeting could not be approved. However, there were no changes to the minutes.

Default Judgment:

The Board had previously asked the Rules Committee to draft a rule providing for the entry of default judgment in cases where a defendant fails to respond to a complaint. Ms. Wesdock and Rules Committee member Stan Geary developed a rule based on Pa.R.C.P. 237.1 and 1037.

Mr. Clark asked Ms. Wesdock to provide a summary of how the draft rule compared to Pa.R.C.P. 237.1 and 1037, which she did. Two issues were addressed: First, Judge Krancer noted that the reference to “hearing” in the draft rule should be to “trial” since the Board does, in fact, hold trials, and a discussion was held regarding the fact that references to “hearing” in the Board’s rules should be changed to “trial.” Second, Ms. Wesdock noted that, in the case of

complaints for civil penalties, the rule had been drafted in an attempt to allow the Board some discretion in determining whether it was necessary to hold a trial on the amount of the penalty or whether default judgment could be entered as to both liability and the penalty amount. The Committee agreed that the draft rule allowed the Board this discretion. Judge Coleman noted that the Department uses a matrix in determining the amount of the penalty and this could be included with the Department's motion for default judgment.

After discussion and suggested changes by Judge Krancer, the revisions set forth in Annex A were approved. Because the Committee did not have a quorum, no formal vote could be taken. It was recommended that Ms. Wesdock circulate the proposed revisions to the rest of the Committee and take a "straw vote" by email. If there is no opposition to the rule changes, a formal vote will be taken at the March 9, 2006 meeting.

Civil Suspense Docket:

At a meeting of the Pennsylvania Bar Association's Environmental, Mineral and Natural Resources Law Section on Section Day in November 2005, attorney David Mandelbaum raised the question of whether the Board would consider a rule allowing certain cases to be placed on a suspense docket as is the practice in federal district court. Ms. Wesdock advised Mr. Mandelbaum that he should contact the Rules Committee, and he sent a letter to Mr. Wein on November 23, 2005 regarding the matter. A copy of the letter was distributed to the Rules Committee for discussion.

Judge Krancer stated his opposition to such a rule for a number of reasons, including the following:

1. The desire to continue former Chief Judge Miller's practice of ensuring that cases do not become backlogged.

2. There are very few cases before the Board that are appropriate for placement on a suspense docket.
3. To the extent a case needs additional time for settlement or other reasons, this can be easily accomplished by individual management of the case by the presiding judge.
4. The concern that a rule allowing placement of cases on a suspense docket might send the message that delay of cases will be permitted.

Mr. Clark advised the group that this issue had been raised with the Rules Committee previously, sometime between 1995-1998, and had been thoroughly discussed and dismissed for the same reasons articulated by Judge Krancer. Judge Coleman recalled the discussion and agreed that the issue had been thoroughly addressed at that time. She also described some cases in the Board's history that had been stayed a number of times for a period of years and did not settle; they ended up in lengthy trials several years after the appeals had been filed. She was concerned that the creation of a suspense docket might cause cases such as this to get lost in the shuffle, never resulting in closure.

Ms. Wesdock noted there may be certain types of cases that would benefit from a suspense docket and gave as an example a prior case of Judge Renwand in which the parties were working on a settlement but first needed to compile more than a year's worth of test results. Such a case could not be disposed of within the two-year framework that is generally sought by the Board. Mr. Wein noted that many protective appeals fall within this category. Judge Krancer noted that such cases can be addressed through a case management order, which would require the filing of status reports on a regular basis and avoid the case simply being placed on a shelf and forgotten.

Mr. Scott noted that it would not be fruitful for the Committee to consider a rule allowing a suspense docket if the Board is strongly opposed to it. Of the other judges, it was noted that Judge Miller is opposed to the creation of a suspense docket, while Judges Renwand and Labuskes felt that it did merit discussion.

Ms. Wesdock noted that because the judges are able to give their cases individual attention, the reasons that exist for the use of a suspense docket in federal court may not be present at the Board. Mr. Clark felt that the policy reasons against the creation of a suspense docket have not changed from when this issue was previously discussed. Mr. Wein requested that the Committee obtain the minutes of the prior meeting or meetings where this issue had first been discussed. Judge Coleman agreed to obtain the minutes since they are stored in the Board's Harrisburg office.

After obtaining a copy of the prior minutes, Mr. Wein will draft a letter responding to Mr. Mandelbaum's letter and will circulate it to the Committee for approval before sending it to Mr. Mandelbaum.

Service of Department Action:

Judge Krancer raised an issue with the Committee that had been brought to his attention by a state senator. The issue concerned whether an individual may appeal an action of the Department that is mailed to his house, accepted by the individual's spouse but not given to him by the spouse either because the couple is estranged or for other reasons, and then is discovered by the individual more than 30 days after service of the action. A discussion ensued regarding whether the Board's rules should be amended to allow for an appeal under those circumstances if they currently do not do so.

Mr. Strain felt that it was an evidentiary issue and, therefore, was not a matter to be addressed through the Board's rules. Mr. Wein noted that it might involve an issue of whether a nunc pro tunc appeal would be allowed and, therefore, a rule change might be necessary. Judge Coleman noted that it involved issues of agency and who may accept service on behalf of an individual.

Mr. Strain noted that the 30-day appeal period would begin on the day of *receipt*, to which Judge Krancer responded that the Department's argument would most likely be that the date the certified mailing receipt was signed by the spouse would constitute the date of receipt.

Mr. Scott expressed that a balance is needed when the government wants a presumption that is in its favor, and it appeared that the senator who raised the question felt that the burden should be on the government to prove service, rather than a presumption that service was complete upon signature of the certified mailing receipt by the spouse. He stated that a rebuttable presumption is fine so long as the rebuttal is something that can be achieved.

Judge Krancer stated that he is having research done on this issue and would report on it at the next meeting. Mr. Wein also asked Mr. Strain to report on the Department's position at the next meeting.

Rules Package:

Ms. Wesdock reported that the final rules package had been sent to the office of the Attorney General in mid-December and, therefore, the Board should be getting final approval shortly. The next step will be publication in the Pennsylvania Bulletin. Mr. Wein requested Ms. Wesdock to send a copy of the final rules to the following:

1. The members of the Rules Committee.
2. The panel for the EHB Roundtable at the Environmental Law Forum.

Agenda for Next Meeting:

The next meeting will be held on March 9, 2006 at 10:15 a.m. Mr. Wein requested that the members of the Committee attend the meeting in person.

The agenda items are as follows:

1. Formal approval of November and January minutes.
2. Formal approval of draft rule on default judgment.
3. Formal approval of letter responding to David Mandelbaum.
4. Continued discussion of service issue, as outlined above.
5. Mr. Strain will present a draft rule on withdrawal of appeal without prejudice.

Annex A

Recommended revisions to Board's rules regarding the entry of default judgment. New material is underlined:

§ 1021.74. Answers to complaints.

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(d) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made as set forth in § 1021.76 (relating to entry of default judgment), all relevant facts in the complaint may be deemed admitted and default judgment may be entered as to liability. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

§ 1021.76. Entry of default judgment.

(a) The Board, on motion of the plaintiff, may enter default judgment as to liability against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.

- (b) The motion for default judgment shall contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least ten days prior to filing the motion.
- (c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.
- (d) Where default judgment is sought in a matter involving a complaint for civil penalties, the Board may assess civil penalties in an amount to which the plaintiff is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the civil penalties shall be assessed at a trial at which the issues shall be limited to the amount of the civil penalties.

Comment: This rule is modeled after Pa.R.C.P. 237.1 and 1037.