

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of November 10, 2005

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, November 10, at 10:15 a.m. Chairman Howard Wein presided. The following members of the Committee were in attendance: Maxine Woelfling, Stan Geary and Susan Shinkman. Dennis Strain, Brian Clark and Phil Hinerman participated by teleconference. MaryAnne Wesdock attended on behalf of the Board.

Approval of Minutes:

On the motion of Mr. Geary, seconded by Ms. Shinkman, the minutes of the September 15, 2005 meeting were approved.

Final Rules Package 106-8:

Ms. Wesdock reported that the final rules package had been approved by the Office of General Counsel and would be hand-delivered to the legislative committees and IRRC that day. Following approval by IRRC, the rules go to the Office of the Attorney General for review and approval. If there are no complications, the rules are expected to be published as final rulemaking in February 2006.

Mr. Wein suggested that the new rules be discussed at the beginning of the EHB Roundtable session of the 2006 Environmental Law Forum, which is to be held April 4-5. Ms. Wesdock noted that the PBI received a number of comments regarding last year's program stating that the discussion of the rules was very beneficial and not enough time had been devoted to it. Mr. Strain suggested having a separate program to discuss the rules. Mr. Clark agreed that

the typical format for the EHB Roundtable provides too little time for a summary of the rules and noted that a separate program focusing on the rules could discuss the background of some of the recent substantive rule changes and provide a comparison of the EHB rules to the Pa. Rules of Civil Procedure. A number of the Rules Committee members concurred that it might be worthwhile to hold a separate session solely for the EHB rules. Since Ms. Woelfling and Mr. Wein are on the planning committee for the Environmental Law Forum, they will consider this proposal.

Proposal to Extend 30-Day Appeal Period:

At the last Rules Committee meeting, Ms. Wesdock reported that a suggestion had been made by an attorney asking the Board to consider revising Rule 1021.52 to extend the appeal period from 30 days to a slightly longer period of time. Ms. Wesdock had agreed to look at the statutory provisions requiring a 30-day appeal period.

At the November 10 meeting, Ms. Wesdock reported on the results of her research. She noted that she did not do an exhaustive search but simply looked at some of the more common statutes under which appeals are taken to the Board. All of the following statutes require either that appeals must be taken within 30 days of the Department of Environmental Protection (Department) action being appealed or that civil penalties must be prepaid within 30 days of the assessment if they are going to be challenged:

Air Pollution Control Act – 35 P.S. § 4000 et seq., at § 4010.2

Clean Streams Law – 35 P.S. § 691.1 et seq., at § 691.605 (b) (1)

Hazardous Sites Cleanup Act – 35 P.S. 6020.101 et seq., at § 6020.1105

Safe Drinking Water Act – 35 P.S. § 721.1, at § 721.13 (g)

Sewage Facilities Act – 35 P.S. § 750.1, at § 750.16b

Solid Waste Management Act – 35 P.S. § 6018.101, at § 6018.605

Storage Tank Act – 35 P.S. § 6021.101, at § 6021.1313

Because a change in the 30 day appeal period would not simply involve a change in the Board's rules but would require an amendment of the aforementioned statutes, and probably several other statutes, the Committee agreed that this is not a matter that can be acted upon by the Board.

House Bill 1237:

Ms. Wesdock reported on the work that has been done by the Pennsylvania Bar Association's Environmental, Mineral and Natural Resources Law Section in response to H.B. 1237, which would grant concurrent jurisdiction over Department actions to the courts of common pleas. The Section's council appointed a subcommittee consisting of Mr. Wein, Mr. Hinerman and Ms. Wesdock, as well as Richard Ehmann and John Carroll, to draft a proposed resolution opposing H.B. 1237. The subcommittee prepared a draft resolution. However, the council decided not to take formal action on the resolution at this time since there had been no movement on H.B. 1237. The council expressed concern that action on the resolution at this time could act as an impetus for support for the bill since such a resolution would also be reviewed by other committees of the PBA who might find the bill favorable.

Default Judgment:

The Board asked the Rules Committee to draft a rule on default judgments. Although the Board has the authority to issue default judgments for failure to prosecute appeals or failure to respond to dispositive motions or complaints, there is no rule codifying this procedure. Traditionally, the Board has dealt with such situations by issuing a rule to show cause as to why an appeal should not be dismissed for failure to prosecute or why allegations in a complaint

should not be deemed admitted for failure to file an answer. Ms. Wesdock noted that this practice is still followed by some but not all of the judges.

The Committee reviewed Rules 237.1 and 1037 of the Pa. Rules of Civil Procedure and Rule 55 of the Federal Rules of Civil Procedure, which deal with default judgments.

The Committee determined that two distinct rules may be required with regard to default judgments: 1) Where an action is initiated by an appeal and the appellant fails to prosecute its appeal, the Board may issue a rule to show cause why the appeal should not be dismissed upon the praecipe of any party or upon its own motion. 2) Where an action is initiated by a complaint of the Department, a rule similar to that at Rule 237.1 of the Pa. Rules of Civil Procedure might be more appropriate.

Ms. Woelfling asked whether the Board's current rule on sanctions at 1021.161 was sufficient to address this issue but determined that did not apply to all situations where default judgment might be appropriate.

The Committee determined that if the Board wants to address default judgments in both types of situations, i.e., a failure to prosecute an appeal and a failure to defend a complaint for civil penalties, two separate rules are needed. The Committee suggested the following:

Default Judgments – Complaints

The Committee suggested following Pa. R.C.P. 237.1. When the Department files a complaint it contains a notice to plead, which informs the defendant that a failure to respond will result in the allegations contained therein being deemed admitted. If the defendant fails to plead within the requisite time period, the Department will send him or her a notice of intent to seek default judgment if an answer is not filed in 10 days. If the defendant still fails to respond, the

Department may file a motion for default judgment with the Board, attaching a copy of the notice sent to the defendant.

An issue arises with regard to complaints for civil penalties. Where the other party fails to defend, in most cases the Board may not enter judgment with regard to the amount of the penalty. In such a case, judgment may be entered as to liability and all allegations in the complaint may be deemed admitted, but a hearing would need to be held as to the amount of the penalty. An exception to this might be where the complaint is asking for the minimum penalty allowed by statute. Under the Federal Rules of Civil Procedure, a party may get judgment on an “ascertainable amount.” Whether the Department may get a default judgment on the actual amount of the penalty may be dependent on the language of the statute under which it is seeking the penalty.

Ms. Woelfling suggested the Committee consider the case of *DER v. Canada PA – Ltd.*, 1987 EHB 177, which dealt with a complaint for civil penalty under the Clean Streams Law. In that case, the Board entered default judgment as to liability based on the defendant’s failure to respond to the complaint, but found that a hearing was necessary on the issue of penalties where the amount of the penalties could not be readily ascertained.

Mr. Strain raised the question of who should send the notice of intent to seek default judgment; under the Pa. Rules of Civil Procedure it is the moving party, whereas in Board practice such notices would traditionally come from the Board. Mr. Geary noted that since it will be the Department that subsequently files a motion to dismiss, it should bear the burden of notifying the defendant that it will be seeking a default judgment. Ms. Wesdock will bring this issue to the Board’s attention at the next staff meeting which will be held on November 21.

The Committee noted that a rule following Pa. R.C.P. 237.1 would involve a practice familiar to judges on the Commonwealth Court in the event an entry of default judgment were appealed.

Default Judgment – Appeals¹

This rule would deal with cases initiated by the filing of a notice of appeal, where an appellant fails to prosecute its appeal either by failing to respond to motions or comply with Board orders. The Committee agreed that this should be drafted as a simple rule authorizing the Board to issue a rule to show cause why an appeal should not be dismissed for failure to prosecute.

The Committee agreed to take the following action:

- 1) Ms. Wesdock will discuss this issue at the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section meeting on Section Day, November 17, 2005 to get feedback from the Section.
- 2) Ms. Wesdock will get feedback from the EHB judges on the issues raised at this meeting during the Board's staff meeting on November 21, 2005.
- 3) Ms. Wesdock, with the assistance of Mr. Geary, will prepare a draft rule/rules to be discussed at the January Rules Committee meeting.

Agenda for January 2006 Meeting:

The Committee will continue discussion of the default judgment issue. In addition, if Judge Krancer is able to attend the January meeting, there will be a discussion of settlement

¹ Following the November 10, 2005 Rules Committee meeting, the Board discussed whether a rule was necessary to address default judgments in cases initiated by the filing of a notice of appeal, which the appellant subsequently fails to prosecute, and determined that no such rule was necessary. The Board determined that it had adequate authority under its rule on sanctions at § 1021.161 to dismiss such appeals. The Board felt that a rule allowing the entry of default judgments was necessary only for cases initiated by the filing of a complaint to which the defendant fails to respond.

agreements where parties agree to preserve certain issues and avoid administrative finality. In addition, Mr. Strain agreed to prepare a draft rule allowing parties to preserve issues for future appeals where there is an agreement to withdraw an appeal without prejudice.

Ms. Wesdock will provide each member with a list of the meetings for 2006.

Adjournment:

On the motion of Mr. Geary, seconded by Ms. Woelfling, the meeting was adjourned at 12:05 p.m.