

ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Conference Call of March 17, 2005

Attendance:

The Rules Committee met by conference call on March 17, 2005 at 10:00 a.m. Participating in the call were Chair Howard Wein, Phil Hinerman, Brian Clark, Maxine Woelfling, Dennis Strain, Susan Shinkman and Stan Geary. Joe Manko joined the call in progress. Representing the Board were Chief Judge and Chairman Michael Krancer and EHB counsel MaryAnne Wesdock.

Preliminary Case Statement:

The purpose of the call was to continue the discussion originated at the February 17 meeting regarding whether the Board's rules should provide a mechanism for more specifically identifying the issues on appeal and focusing discovery. Mr. Strain agreed to draft a proposal that was circulated for discussion at the March 17 conference call.

Mr. Strain proposed a procedure similar to the mandatory disclosure requirements of Federal Rule of Civil Procedure 26. Under the Board's rules on pre-hearing procedure (as proposed to be amended under the current rules package), parties will have 60 days in which to submit a joint proposed case management order, 180 days to complete discovery and 210 days to file dispositive motions. Under the proposal presented by Mr. Strain, in addition to the previously stated timeframes, the appellant would be required to file a preliminary case statement within 45 days of Pre-Hearing Order No. 1 and the appellee would be required to file a response within 60 days of Pre-Hearing Order No. 1. A copy of the proposal, setting forth what would be

required in a preliminary case statement as well as discovery sanctions and limitations, is attached at the end of the minutes.

Mr. Strain noted that the idea of a preliminary case statement did not have support among Department attorneys. They felt the preliminary case statement simply involved one more step in the pre-hearing process and would not provide much more information than the notice of appeal. Mr. Geary felt that all the information provided by a preliminary case statement could be obtained through discovery. Ms. Wesdock noted that the need for a mechanism to make discovery more focused had arisen from concerns by third-party appellants that they could not get specific information about the Department action at an early stage of the appeal.

Ms. Shinkman noted that Federal Rule of Civil Procedure 26 works well and perhaps it was worth trying a similar procedure with regard to Board proceedings. Mr. Clark agreed that the concept had merit and that some procedure for allowing initial disclosure was worth pursuing. Mr. Wein agreed. Mr. Hinerman stated that in his experience mandatory disclosure in federal court had not proven to be particularly helpful.

Judge Krancer felt that the Committee should take into consideration the fact that Department lawyers seemed to be uniformly adverse to the procedure, particularly since the Department is a party in all Board proceedings.

Mr. Wein felt that mandatory disclosure would be helpful for appellants in cases where the Department's position may not be expressly articulated. In those cases, mandatory disclosure would help an appellant focus on who should be deposed or to whom interrogatories should be directed. Mr. Strain felt that there are few actions taken by the Department that are not expressly outlined; the exception would be those actions the Department does not believe are appealable.

Ms. Woelfling noted that the situation articulated by Mr. Wein seemed to occur more often in third-party appeals. Mr. Manko noted a number of changes he would make to the proposal.

Mr. Geary stated that the intent of the mandatory disclosure requirement of the federal rules was to reduce the amount of discovery. He felt that adding the requirement of a preliminary case statement would have the opposite result.

The Committee agreed that it would be helpful to hear from practitioners on this subject. Mr. Wein and Ms. Wesdock will give a brief presentation at the EHB Roundtable at the Environmental Law Forum in order to get input from practitioners.

Next Meeting:

The next meeting will be held on **Wednesday, May 11, 2005 at 10:15 a.m.**¹ The topics to be discussed are as follows:

- 1) Continuation of discussion of mandatory disclosure.
- 2) Discussion of any comments received by the Board on its proposed rulemaking.

¹ Please note that the May meeting will be held on a Wednesday due to several members of the Rules Committee attending a Pa. Resources Council meeting on Thursday, May 12.

Preliminary Case Statement²

Introduction

At the last meeting of the environmental Hearing Board Rules Committee, there was considerable discussion about providing a mechanism for identifying the issues on appeal and focusing discovery. This is being done informally through status conferences. This message outlines a formal procedure that is loosely patterned on the mandatory disclosure requirements of Federal Rule Of Civil Procedure 26.

Present Procedure

Rule 1021,101 (Pre-hearing procedure) establishes the following schedule that starts with the issuance of Pre-hearing Order No. 1:

- 45 days for submitting joint proposed case management order;
- 90 days for serving discovery;
- 150 days for expert reports from party with burden of proof;
- 180 days for expert reports from opposing parties;
- 210 days for dispositive motions.

Proposed Amendment

The EHB is proposing to amend the pre-hearing procedure as follows:

- 60 days for submitting joint proposed case management order;
- 180 days for completion of discovery;
- 210 days for dispositive motions.

Alternative Procedure

In order to provide an early identification of the issues and to focus discovery, the following is proposed:

- 45 days for the appellant to file a preliminary case statement;
- 60 days for appellees to respond to the preliminary case statement;
- 60 days for submitting joint proposed case management order;
- 180 days for completing discovery;
- 210 days for dispositive motions.

Preliminary Case Statement

- A statement of the claims and defenses, including any facts and legal arguments that support the adjudication sought from the Board;
- Name of each person likely to have discoverable information that the disclosing party may use to support its claims and defenses, and the subjects of the information;
- A copy or description, by category and location, of all documents, data compilations, and objects that the disclosing party may use to support its claims or defenses.

² Drafted by Dennis Strain and presented at the March 17, 2005 conference call of the Rules Committee.

Discovery Sanctions

- Discovery limited to issues identified in preliminary case statement
- Amendments allowed to preliminary case statement absent prejudice to other parties.

Possible Discovery Limitations

In conjunction with these pre-hearing disclosures, the Board might also consider the following limitations on discovery under the federal rules:

- Requiring leave of the Board to conduct more than 10 depositions or any deposition lasting more than one day of seven hours;
- Limiting each party to 25 interrogatories, including discrete subparts.

Requiring consultation with opposing counsel prior to filing a motion to compel