

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Minutes of Meeting of May 10, 2012

Attendance:

The Environmental Hearing Board Rules Committee met in Harrisburg on May 10, 2012 at 10:30 a.m. Committee Chairman Howard Wein traveled from Pittsburgh to preside over the meeting. Also in attendance were Committee members Maxine Woelfling, David Raphael and Jim Bohan. Due to scheduling difficulties, Phil Hinerman and Rep. Kate Harper had to participate in the meeting by phone. Attending from the Board were Judges Michelle Coleman, Bernie Labuskes and Rick Mather; Board Secretary Vince Gustitus and Assistant Counsel Kris Gazsi. Chairman and Chief Judge Renwand and Senior Assistant Counsel Maryanne Wesdock were to attend in person, but had to participate by phone due to last minute scheduling changes.

Approval of Minutes:

On the motion of Ms. Woelfling, seconded by Rep. Harper, the minutes were approved.

Mandatory Electronic Filing:

The draft efilng rule revisions prepared by Mr. Bohan were presented at the Environmental Hearing Board Roundtable of the Environmental Law Forum. No changes were suggested at the Roundtable, although there were a few questions. Attorney Bill Cluck asked whether notices of appeal could be filed by emailing them to the Board Secretary. It was recognized that an enhancement is being made to the Board's

efiling system that will allow notices of appeal to be electronically filed. Mr. Cluck's suggestion of emailing notices of appeal to the Board Secretary would only need to be in place until the efilings enhancement went into effect. Several people pointed out potential problems: Mr. Raphael and Mr. Gazsi pointed out problems with emails being returned or sent to spam, particularly if they are from an unrecognized email address. In that case, there would be no proof of delivery, nor would the sender necessarily be aware that his email was not delivered. Mr. Bohan pointed out that attachments could be a problem.

Mr. Wein suggested that LT Court Tech could set up an email account that would automatically accept email filings. Ms. Woelfling cautioned that the Board should look at whether the cost of doing so was worth it, since the temporary email account would no longer be necessary once the efilings enhancement was in place. Mr. Gustitus, Mr. Gazsi and Ms. Wesdock gave a summary of LT Court Tech's timeline for completing the enhancements. LT Court Tech has started on some of the enhancements and will continue to work on them through the end of this fiscal year (June 30) and beginning in the new fiscal year. Mr. Gustitus estimated a completion date of September for all of the efilings enhancements. Judge Mather felt that a September completion date also helped the Board with its rules package since a rules package would be in the early review process – at the Office of General Counsel and the Attorney General – and could be pulled back if changes needed to be made. Judge Mather then explained the rulemaking process and noted that it usually takes 1 year to 18 months to get a rule finalized.

Mr. Bohan recommended two revisions to the draft of the efilings rule: To ensure that the most important information is listed first, he recommended moving subsections (3) and (4) under 1021.32(c) to (1) and (2). The current (1) and (2) would then be

renumbered to (3) and (4). In new subsection (c)(2) (previously (c)(4)), Mr. Bohan recommended changing the word “orders” to “directs.” The Committee agreed with Mr. Bohan’s changes. Due to the renumbering, Ms. Woelfling noted that the reference to (c)(3) in (d)(1) would need to be changed to (c)(1). The Committee thought it would be prudent to go through the entire set of rules to make sure that all cross references were correct. Judge Mather volunteered Mr. Gazsi for this project.

On the motion of Mr. Hinerman, seconded by Ms. Woelfling, the efilings rule revisions, including those revisions adopted at this meeting, were unanimously approved.

Enhancements to Electronic Filing System & Website:

Mr. Gustitus provided a summary of the enhancements that are being implemented by LT Court Tech. They are currently working on an enhancement that will allow confidential documents to be electronically filed but not available for viewing by the public. Only Board personnel and parties to the case will be able to view the documents. This is referred to as the “public site” enhancement.

Other enhancements that will be implemented by LT Court Tech over the summer are as follows: allowing notices of appeal and notices of appearance to be electronically filed, allowing the filing of multiple documents in one transmission, enhancements to the notices that parties receive when they are served electronically.

Mr. Gazsi also explained an upgrade to the AdLib software that the Board is currently using that will result in an improvement to the search capability feature of the Board’s website and will eliminate the problem of being unable to search for documents that are scanned. Currently, what the Board has to do with scanned documents is convert them into a searchable document. The new software will eliminate the need for

converting the documents. However, the software will not correct the problem of older documents that were scanned and not converted. They will remain unsearchable. Mr. Gazsi explained that it is an easy fix – the older documents simply need to be identified and then run through the newer software. Mr. Gazsi felt that only a small subset of documents fell into this category. He agreed to search for the older documents and take care of converting them.

Suspense Docket:

When this issue was previously raised at the Board in 2006, then Chairman Mike Krancer and Judge George Miller were opposed to the creation of a suspense docket. Judges Renwand, Labuskes and Coleman were not opposed to it.

Judge Mather stated his opposition to a suspense docket because he felt it could interfere with the ability to control his cases.

Mr. Bohan stated that he looked at the operating procedures for other courts that do have suspense dockets, such as the federal bankruptcy court. He noted that where it is used, it applies to a specific type of case. Mr. Wein felt that at the EHB, it could apply to protective appeals.

Some committee members stated opposition to it: Ms. Woelfling felt that the EHB rules now give the parties more flexibility by extending the discovery period and, therefore, she did not see a need for it. Mr. Raphael felt that a suspense docket could result in the Board ending up with some old cases, but also stated he understood why private practitioners might see it as a benefit so that clients would not get billed while a case was in suspense. On the other hand, Mr. Hinerman saw a benefit to having a suspense docket since parties would not be in “war mode” when trying to settle a case.

Judge Renwand felt that a suspense docket could work where a case clearly involves a protective appeal, such as where the Department intends to issue another permit. He stated he would be in favor of a rule that automatically places a case on a suspense docket if all the parties request it. He would not be in favor of a suspension period of more than six months, thereby avoiding the concern voiced by Mr. Raphael that old cases would simply linger. Mr. Wein also saw a benefit to the judges: If a case is placed on the suspense docket, it could be listed as a separate statistic from the “active” cases. Judge Mather felt that parties could simply get a stay for six months.

Rep. Harper asked if there is ever an occasion where environmental conditions require suspension of a case. Judge Renwand and Ms. Wesdock agreed that this could be a basis for a case being suspended and related the story of one of Judge Renwand’s cases that is stayed while the permittee conducts testing that must be undertaken during all four seasons.

Judge Labuskes felt that a case would not be placed on the suspense docket unless it was agreed to by all the parties, whereas a stay or an extension may be granted even where all the parties don’t agree.

The Committee did not recommend pursuing a rule formally creating a suspense docket. Rather, it can be addressed individually by the judges.

Summary Judgment:

At a previous meeting, Judge Mather had raised the following problem that occurred in one of his cases which involved a third party appeal: Party A filed a summary judgment motion. Party B filed a response opposing the motion. Party C filed a “response” joining in the motion which included a discussion in support of the motion.

The question is: Shouldn't Party B get an opportunity to respond to Party C's "response?"

The Board's rules on summary judgment give the opposing party 30 days to respond to a motion, but say nothing about responding to a response in support of the motion. It was noted that by allowing the opposing party an opportunity to respond to a supporting response, this creates the problem of whether the moving party should be allowed to reply to the additional response.

Mr. Bohan stated that, in the example above, Party C should be filing a new motion, not a supporting response. He felt that if new facts are raised in the supporting response then they are outside the scope of the original motion, and, therefore, the party should be filing a new motion. Judge Mather noted that in all of his cases where this issue has occurred, it has been the Department who has filed the supporting motion.

Judge Labuskes agreed with Judge Mather and said that he has seen this occurring in his cases as well.

It was suggested that the rule say that a response to a summary judgment motion must be in opposition; a party cannot file a supporting response. A party could still join the motion, they just could not include a response. However, Judge Renwand said that he wants to hear from all of the parties.

Mr. Bohan agreed to draft a proposed revision to 1021.94a, the rule on summary judgment motions. Mr. Raphael agreed to get feedback from Department attorneys.

Joinder:

The issue of joinder had been raised at a previous Rules Committee meeting and the Committee had been in opposition to a rule allowing joinder. Judge Renwand asked

that the Committee reconsider the issue. He sees it as an issue of fairness and due process. In some cases, without the ability to join the other entity, the appellant has a more difficult time developing its case.

However, during discussion various jurisdictional issues were raised by Ms. Woelfling, Mr. Raphael and Judge Labuskes.

The discussion on joinder ended at this point.

Termination of Proceedings and Mootness:

At the last meeting, Mr. Hinerman raised an issue regarding Rule 1021.141 and the fact that there is no mechanism for terminating an appeal based on mootness. The Committee agreed to add this to the agenda for the next meeting.

Central ALJ Office:

Judge Labuskes reported that the PBA Environmental and Energy Law Section voted to approve a letter opposing the legislation. Judge Renwand will contact a member of the Administrative Law Section to find out if that Section is taking any action.

New Business:

Attorney Marty Siegel requested the Rules Committee to consider whether the Board's rules on attorney's fees should flesh out the procedure for seeking attorney's fees, such as whether a hearing is required, discovery, etc. Ms. Woelfling agreed that the rules should be revisited since there have been some changes, such as the elimination of the Costs Act.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Raphael, the meeting adjourned at 12:35 p.m.

The next meeting is scheduled for July 12, 2012 at 10:15 a.m.