

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of November 9, 2006

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, November 9, 2006 at 10:30 a.m. Rules Committee Chairman Howard Wein presided. The following members were in attendance: Maxine Woelfling, Susan Shinkman, Dennis Strain, Stan Geary and Phil Hinerman. Attending on behalf of the Environmental Hearing Board (Board) were Judges Tom Renwand and Bernie Labuskes and Assistant Counsel Jill Smith and Andy Bockis. Senior Assistant Counsel MaryAnne Wesdock took the minutes.

Approval of Minutes:

On the motion of Ms. Shinkman, seconded by Mr. Strain, the minutes of the September 28, 2006 meeting¹ were approved.

PBA Section Day:

Topics for the upcoming Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section (Section) meeting on November 16, 2006 were discussed. One item on the agenda will be the proposal to develop a Board rule on electronic discovery. Mr. Wein will propose that the Section appoint a subcommittee consisting of attorneys from the Department of Environmental Protection, large and small law firms, citizens groups and in house counsel to work with Mr. Strain and Mr. Hinerman on the issue of electronic discovery and

¹ The September 28, 2006 meeting was held via teleconference.

develop a written proposal for the Rules Committee.² Ms. Wesdock will provide members of the joint subcommittee with materials on electronic discovery that were sent by Judge Miller.

Clean Up Rules Package – Rule 1021.34(b):

The Rules Committee continued discussion of comments received at the 2006 Environmental Law Forum regarding the most recently adopted rules package that went into effect in February of 2006. A suggestion had been made that some of the rules might need to be clarified.

The first issue dealt with Rule 1021.34(b) which currently reads as follows:

(b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery or personal service on the parties.

A question had arisen at the Forum as to whether the rule prohibited service by fax. The Committee agreed that the intention of the rule was not to limit the manner of service but to ensure that opposing parties receive documents in approximately the same timeframe in which they are filed with the Board. At the September 28, 2006 meeting, the Committee approved the following revision to Rule 1021.34(b):

When a document is filed with the Board by overnight delivery, **facsimile** or personal service, it shall be **[served] delivered to the opposing parties on the same day or by overnight delivery [or personal service on the parties]**.

A question had also arisen as to whether the rule applied to documents that are electronically filed. When a party has registered for electronic service he or she will receive an email from the Board that says a document has been filed and contains a link to the document.

² A joint subcommittee was formed at the Section meeting that was held on November 16. Rules Committee members in attendance at the meeting were Mr. Wein, Ms. Shinkman, Mr. Strain, Mr. Hinerman and Ms. Woelfling (by teleconference).

This constitutes service on that party. When a party is not registered for electronic service, he or she does not receive this notice. In such a case, the party who has filed electronically is supposed to receive a notice advising him or her that certain parties are not registered to receive electronic service, in which case they must be served by other means. However, this notification is not always accurate, particularly where an attorney has changed firms or address and has failed to notify the website administrator of the change.

The Board does not want to make electronic filing more burdensome but wants to encourage parties to sign up for it. After analyzing the rule, the Committee did not read 1021.34(b) as applying to documents that are electronically filed.

Ms. Wesdock reported that Terry Bossert had noted at a prior Section meeting that the Board's rules did not clearly state whether the electronic filing of a document effected electronic service on other parties to the case. As noted earlier, this is true when the other parties are registered for electronic service, but is not true when parties are not registered for electronic service. In that case, the party who has filed electronically will still need to serve the non-registered parties by traditional means. The Committee determined that no changes were necessary to the Board's rules on electronic filing and service.

Clean Up Rules Package – Rule 1021.51:

In the last rules package, Rule 1021.51 was amended to require that a notice of appeal be served on a “recipient of the action.” Subsection (h) was added to define “recipient of the action” as follows:

(h) For purposes of this section, the term “recipient of the action” shall include the following:

(1) The recipient of a permit, license, approval or certification;

(2) Any affected municipality, its municipal authority, and the proponent of the decision, where applicable, in appeals involving a decision under Sections 5 or 7 of the Sewage Facilities Act, 35 P.S. §§ 750.5, 750.7;

(3) The mining company in appeals involving a claim of subsidence damage or water loss under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.*;

(4) The well operator in appeals involving a claim of pollution or diminution of a water supply under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208;

(5) The owner or operator of a storage tank in appeals involving a claim of an affected water supply under Section 1303 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1303;

(6) Other interested parties as ordered by the Board.

While permittees continued to be added to appeals as automatic parties, the rule was revised to allow all other recipients of an action to intervene as of right by filing an entry of appearance as set forth in subsection (j), which reads as follows:

(j) Other recipients of an action appealed by a third party, served as required by subsections (h)(2), (h)(3), (h)(4) or (h)(5), may intervene as of course in such appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene pursuant to § 1021.81.

(Emphasis added)

Two questions arose at the Environmental Law Forum: First, whether the word “order” should be added to the definition of permittee in subsection (h)(1) (i.e., a recipient of an order would fall under this category) and, second, whether (h)(6) was intentionally omitted from (j) or whether the omission was inadvertent.

Judge Renwand noted a further problem, highlighted in part by the recent decision in *Schneiderwind v. Department of Environmental Protection*, 867 A.2d 724 (Pa. Cmwlth. 2005), *appeal denied*, 889 A.2d 1218 (Pa. 2005), which involved a property owner's claim that a company that had conducted surface mining activity in the area of his property had diminished his water supply. The Department of Environmental Protection (Department) had investigated the matter and found no correlation. The property owner appealed the Department's determination to the Board, which ruled in favor of the property owner. The Commonwealth Court vacated the Board's order, finding, among other things, that the Board had improperly ruled on the company's liability without the company's participation in the proceeding. The company had chosen not to intervene in the appeal before the Board. Judge Renwand stated that in light of the court's ruling in *Schneiderwind*, the Board needs to have some mechanism for requiring indispensable parties to be a part of the case. In other words, in order to protect the Board's jurisdiction and ability to grant relief, the Board needs some mechanism for joinder. Rule 1021.51, as currently written, does not go far enough.

The Committee noted there are two types of joinder: that which is ordered by the Board (compulsory joinder) and that which the parties request.

Mr. Geary suggested a separate rule dealing with joinder, rather than trying to incorporate it into Rule 1021.51.

Mr. Strain noted that if the word "order" were added to subsection (h)(1), it would also need to be added to subsection (i). Mr. Geary felt that if *Schneiderwind* says everyone whose rights may be affected should be a party, then subsections (h)(2) through (h)(5) become unnecessary. Judge Renwand was not sure *Schneiderwind* says this but agreed with the Committee that the issue should be further reviewed.

It was agreed that the topic of “joinder” should be placed on the agenda for the next meeting. Ms. Wesdock will send the Committee members a link to *Schneiderwind*, as well as the Commonwealth Court’s ruling in *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678 (Pa. Cmwlth. 1998), which discussed the scope of the Board’s authority.

The Committee agreed to hold off on any further discussion regarding revisions to Rule 1021.51 until the joinder issue had been discussed.

Clean Up Rules Package – Pretrial Procedure:

A question had been raised at the Environmental Law Forum as to whether under the new rule on discovery that requires discovery to be *completed* rather than *served* within a certain timeframe, a party must respond to a discovery request served with less than 30 days remaining until the end of discovery.

The Committee agreed that a party would have to file a motion with the Board to extend the discovery period if he or she wished to send out discovery with less than 30 days before the end of the discovery period. No change to Rule 1021.101 was needed.

Mandatory Certification for Discovery Motion:

At the last Rules Committee meeting, Mr. Hinerman proposed that the Board adopt a rule similar to Fed.R.C.P. 37(a)(2)(A) requiring counsel to certify that they have first tried to amicably resolve a discovery dispute prior to filing a motion to compel. He noted that in one of his cases recently he was served with a motion to compel without the other party ever having contacted him first to discuss the disputed matter.

The judges discussed the matter in a conference call and are in favor of such a rule. There was also general agreement among the Rules Committee for the rule. The Committee recommended adopting a rule similar to Eastern District Local Rule 26.1(f) that reads as follows:

No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties after reasonable effort, are unable to resolve the dispute.

The Committee recommended adding the language at the beginning of Board Rule 1021.93(b). Ms. Wesdock will add the language and circulate prior to the January meeting for a vote.

Ms. Shinkman asked whether the certification should be included in the motion itself or be separate. The consensus was that it should be contained within the motion.

Expedited Litigation:

The Committee decided to hold off on discussion of this issue until Brian Clark was present and until such time as Judge Renwand has had an opportunity to address his ideas with Mr. Strain and Mr. Clark.

Revision to Bylaws:

Ms. Wesdock raised the issue of allowing Rules Committee members to designate alternates to attend meetings in their place when they are not able to be present; the alternates would have voting rights and would be counted for purposes of establishing a quorum. Under the current bylaws, alternates may attend meetings in place of members but they may neither vote nor count as part of a quorum. The Environmental Hearing Board Act contains no provision that would prohibit this revision to the bylaws.

Ms. Shinkman noted that the Environmental Quality Board allows alternates to vote. Mr. Wein raised the question of whether the appointing authority should be the one to designate an alternate. The Committee felt this would be too cumbersome.

A question arose as to whether the bylaws should require a previously designated alternate or whether a Committee member should be allowed to designate someone as the need arises. It was noted that a previously designated alternate would provide for consistency but would be more restrictive and might not resolve the problem of having enough people present for a quorum.

Mr. Hinerman stated that an alternative solution would be to lower the number needed for a quorum to 30%. However, with only 9 members on the Rules Committee, the group felt this number would be too low.

Ms. Woelfling noted that according to Article X of the bylaws, amendments cannot be voted on unless they have been placed on the agenda. The Committee recommended the following revision to Article V:

Alternates: Any member may designate an alternate to appear for a current member. An alternate may **[not cast a]** vote **in place of a member and may [or]** be counted for constituting a quorum.

The Committee also recommended the following change to Article IX.A, dealing with meetings:

Voting: Members **or his or her alternate** shall be entitled to one vote, **[in person,]** on all matters which shall come before the Committee....

Ms. Wesdock will place the proposed changes on the agenda for the January meeting. The effective date of the bylaws will also be added.

Electronic Discovery:

Among the materials distributed to the Rules Committee on the subject of electronic discovery was a presentation at the Delaware Valley Inn of Court on October 25, 2006 attended by Judge George Miller. Ms. Wesdock will talk with Judge Miller regarding the Inn of Court program and any recommendations he may have for the Environmental Law Forum panel. The Committee agreed to table the topic of electronic discovery until after the Environmental Law Forum. Mr. Strain noted that a critical issue that will need to be decided before proceeding with the drafting of a rule on electronic discovery is what constitutes “reasonably accessible.”

Meetings for 2007:

The schedule of Rules Committee meetings for 2007 is as follows:

January 11

March 15

May 10

July 12

September 13

November 8

All meetings will begin at 10:15 a.m. unless otherwise noted. The November 8 meeting will have an earlier start time that will be established at a later date. All Rules Committee members are asked to mark the dates on their calendars and plan to attend the meetings in person if possible.

Agenda Items for Next Meeting:

The agenda items for the January 11, 2007 meeting are as follows:

- 1) Bylaws – Vote on proposed revisions to bylaws to allow members to designate alternates who may vote and who may be counted toward a quorum.
- 2) Joinder – Ms. Wesdock will send Committee members a link to the *Schneiderwind* and *Pequea Township* decisions prior to the meeting.
- 3) Certification for discovery motions – Ms. Wesdock will circulate the proposed revision to rule 1021.93(b) based on Eastern District Local Rule 26.1(f) and Fed.R.C.P. 37(a)(2)(A).
- 4) Expedited litigation – Judge Renwand, Brian Clark and Dennis Strain will circulate a proposal prior to the meeting.
- 5) Environmental Law Forum – Ms. Wesdock will report on her conversation with Judge Miller with regard to selecting someone from the Delaware Valley Inn of Court electronic discovery presentation to serve on the EHB Roundtable panel.