

ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE

Conference Call of September 15, 2005

**Attendance:**

The Rules Committee met by conference call on September 15, 2005 at 10:30 a.m. Participating in the call were Environmental Hearing Board Chairman and Chief Judge Michael L. Krancer, Judge Thomas Renwand, Committee Chairman Howard Wein, Committee members Phil Hinerman, Brian Clark, Joe Manko, Susan Shinkman and Dennis Strain, and EHB counsel MaryAnne Wesdock.

**Minutes:**

On the motion of Mr. Clark, seconded by Mr. Strain, the minutes of the July 20, 2005 conference call were approved.

**Rules Package:**

Ms. Wesdock reported that the final rules package (106-8) has been sent to the Governor's Policy Office for approval, after which it will be sent to the Office of General Counsel. There is no time limit for these offices to review the materials.

**Prepayment of Civil Penalties:**

At the July 20 conference call, a majority of the Rules Committee recommended the elimination of rule 1021.54 which required the prepayment of civil penalties to be made to the Board and agreed with the Board's recommendation that this role should be transferred to the Department, as required by various statutes. Mr. Strain reported that the Department is setting up a separate mailbox for the collection of prepaid civil penalties. The issue of payment of interest on prepaid civil penalties that are returned to the payer has not yet been resolved and Mr. Strain will report on this issue at the next meeting.

**Initial Disclosure:**

The Committee continued discussion of an issue first addressed at the February 17, 2005 meeting regarding whether the Board's rules should provide a mechanism for more specifically identifying the issues on appeal and focusing discovery. In response to discussion generated at the February 17 meeting, Mr. Strain agreed to draft a proposal in which parties would be required to file a preliminary case statement, similar to the mandatory disclosure requirement of Federal Rule of Civil Procedure 26. The proposal was discussed at the March 17 conference call, at which time the Committee agreed it should seek input on the proposal at the Environmental Law Forum and continue discussion at a later date. The Committee took up discussion of this issue again on the September 15 conference call.

There was no feedback on this topic at the Environmental Law Forum, though Mr. Wein noted that the discussion of the issue at the Forum was very brief. Mr. Strain reported that it was the opinion of DEP counsel that the filing of a preliminary case statement would not be particularly helpful. Mr. Hinerman and Mr. Clark pointed out that at a prior meeting there had been discussion of using Joint Proposed Case Management Orders to resolve this issue rather than creating a rule requiring the filing of preliminary case statements in every case. Ms. Wesdock further noted that the rule change requiring expert discovery to be conducted concurrently with fact discovery would also allow parties to get information about each other's case at an earlier stage of the proceeding. Judge Renwand noted that parties are not coming forth on a regular basis saying that they cannot get information about the opposing party's case and that the discovery process seems to be working quite well.

Several participants on the conference call questioned whether there was any benefit to requiring the filing of a preliminary case statement. Mr. Manko voiced the opinion that the use of preliminary case statements could lead to earlier settlements and advance the process of alternative dispute resolution. Mr. Strain felt that the use of a status conference could help to

resolve cases more easily than the filing of preliminary case statements. When asked whether the use of preliminary case statements would be helpful to them, Judges Krancer and Renwand felt they would be more for the benefit of the parties than for the judges.

Judge Renwand further noted that parties who are more likely to turn to alternative dispute resolution are those who already have a great deal of contact with the Department; the use of preliminary case statements in cases involving *pro se* appellants would not necessarily lead to this result. Mr. Clark agreed, noting that there is a great deal of interaction between the private bar and DEP counsel, which already lays the groundwork for narrowing the issues. In those cases, a preliminary case statement would not serve any useful purpose. For litigators who do not regularly practice environmental law, and even more so for *pro se* appellants, the requirement of a preliminary case statement would result in one more hurdle that must be overcome in the appeal process.

Based on this discussion and that of prior meetings and the lack of any push on this issue from the private bar, the consensus of the Committee was that it should not recommend to the Board the adoption of a rule requiring the filing of preliminary case statements.

**House Bill 1237:**

The Committee held a brief discussion on the status of HB 1237, which would grant the courts of common pleas concurrent jurisdiction over actions appealable to the Environmental Hearing Board. Ms. Wesdock reported that the Environmental Law Section council of the PBA reviewed draft language of a resolution opposing HB 1237, but had agreed to take no further action at this time unless there was further movement on the bill. Mr. Manko reported that no movement was expected on the bill.

**Agenda for next Meeting:**

The following agenda items were raised for the next meeting:

1) Publication of settlements – under what circumstances must settlement agreements be published. In particular, where one of the terms of a settlement is that the parties agree not to raise the issue of administrative finality in the future, does this trigger the requirement for publication?

2) Extension of appeal period – Should the appeal period be extended from 30 days to a longer period of time? Ms. Wesdock will research the statutes requiring a 30-day appeal period and report on her findings at the next meeting.

**Next Meeting:**

The next meeting will be on November 10, 2005 at 10:15 a.m. at the Board's office in Harrisburg.