ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of January 10, 2008

Attendance:

The Environmental Hearing Board Rules Committee met on January 10, 2008 at approximately 10:30 a.m. Rules Committee Chairman Howard Wein presided. In attendance were Vice-Chair Maxine Woelfling, Brian Clark, Jim Bohan, Susan Shinkman, Phil Hinerman and Tom Scott. Participating by phone were Joe Manko and Stan Geary. Representing the Environmental Hearing Board were Acting Chairman and Chief Judge Tom Renwand, Judges George Miller and Michelle Coleman, and Senior Assistant Counsel Maryanne Wesdock, who took the minutes. The judges and Rules Committee welcomed DEP Supervisory Counsel Jim Bohan as the Committee's newest member, replacing Dennis Strain who retired in December 2007.

Minutes:

On the motion of Ms. Shinkman, seconded by Mr. Clark, the minutes of the November 8, 2007 meeting were approved.

Necessary Parties to an Action:

The Committee continued its discussion from prior meetings about whether EHB Rule 1021.51 should be amended to ensure that all necessary parties are brought into an appeal, in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005). At the last meeting, the Committee discussed adding language to subsection (j) of 1021.51 stating that where a recipient of a Department action was determined by the Board to have an interest that may be affected by the Board's adjudication and chooses not to be added as

a party, it would preclude that person from challenging any final decision of the Board with regard to that action. Judge Labuskes, however, had stated he was not in favor of such a rule, and Mr. Geary and Mr. Wein said they would re-work the language.

Ms. Wesdock circulated revisions to the rule prepared by Mr. Geary which stated that a person's appeal rights *may* be affected if he chose not to participate as a party. Immediately prior to the meeting, Mr. Wein circulated an alternative version of the language that would appear in a comment to the rule as opposed to the rule itself, in an effort to address Judge Labuskes' opposition to a rule. Judge Labuskes notified the Committee that he still did not concur with the change and felt the matter should be developed through case law. The remaining judges, however, strongly felt that a rule was needed. Therefore, the Committee proceeded to discuss the matter.

First, addressing paragraph (1) of 1021.51(h), Mr. Bohan pointed out that the concept of "recipient of the action" in 1021.51(h)(1) did not parallel the definition of "action" in the definition section of the rules, 1021.2. He further pointed out that in Rule 1021.52(a)(1) (dealing with timeliness of an appeal), the reference is to "[t]he person to whom the action of the Department is directed or issued," as opposed to "recipient of the action." Ms. Woelfling felt that the language of 1021.52(a)(1) was more appropriate for use in 1021.51(h)(1) than "recipient of the action" since the latter had a broader connotation. It was agreed that 1021.51(h)(1) should be revised to read as follows:

> (h) For purposes of this section, the term "recipient of the action" shall include the following:
>
> (1) The person to whom the action of the Department is directed or issued;

Moving on to paragraph (3) of 1021.51(h), Mr. Geary questioned why it covered only water loss or subsidence under the Bituminous Mine Safety Act and not the Surface Mining Act. Ms. Wesdock explained that the list was not exhaustive and that when it was being developed, the Committee members had simply tried to come up situations where an entity could be considered a recipient of an action. Mr. Manko noted a similar omission in paragraph (5) of 1021.51(h) dealing with affected water supplies under the Storage Tank Act. He noted that this should also include the Clean Streams Law. A similar omission was noted in paragraph (4) dealing with claims of pollution or diminution of water supply under the Oil and Gas Act. In order not to exclude any statutes inadvertently, it was agreed that the specific statutory references in paragraphs (h) (3), (4) and (5) should be deleted.

In subsection (i), it was suggested that "recipient of a permit, license. . ." be replaced with the language of 1021.51(a)(1), noted by Mr. Bohan, i.e., "person to whom the Department action is directed or issued."

Mr. Wein suggested taking Mr. Geary's proposed language (i.e., that a person's appeal rights may be affected if he chooses not to participate as a party) and placing it in the comment to the rule; however, Judge Renwand preferred to keep it in the rule itself. Both Judge Coleman and Judge Miller also preferred to keep the language in the rule. Judge Miller suggested changing the language to "*adversely* affected." Ms. Woelfling noted a concern that the language may be substantive rather than procedural.

Ms. Woelfling also noted that there was not commonality of language among the terms being used to describe water loss and contamination in the paragraphs of subsection (h). Some of the paragraphs refer to water loss, while others refer to diminution of water supply. Likewise, some paragraphs refer to contamination, while others refer to pollution. Originally, the language

was intended to track that of the statute being referenced therein. However, with the deletion of specific statutes, there was no longer a need to track the specific language. It was agreed the terminology should be consistent. The group discussed various alternatives and decided upon "water loss or contamination." The Committee decided to use the language "water loss" as opposed to "water supply loss" in case there is a loss involving water that is not being used as a water supply.

Ms. Woelfling questioned whether (5) should state "water loss" since there is no claim for water loss under the Storage Tank Act. However, because (5) could also encompass claims under the Clean Streams Law, which does allow claims for water loss, it was agreed this language should remain in (5).

Mr. Hinerman questioned the language of subsection (i) of 1021.51 which says that "service upon the recipient of a permit, license. . . (now "person to whom the Department action is directed or issued"), *as required by subsection (h)(1),* shall subject the recipient to the jurisdiction of the Board" since no service is required by (h)(1). Mr. Bohan suggested striking "as required by subsection (h)(1)."

In subsection (j), it was also agreed that the language "*appealed by a third party, served as required by* subsections (h)(2), (h)(3), (h)(4)…" should be deleted and replaced with "under."

In conclusion, the Committee recommended the following changes to 1021.51:[1]

Rule 1021.51. Commencement, form and content (of an appeal)

*** * * * ***

(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] person to whom the action of the Department is directed or issued**;

[1] Note: Some of the changes were approved at prior meetings of the Rules Committee.

(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 **or contamination [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] water loss or contamination**;

(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] water loss or contamination**;

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

(i) The service upon the **[recipient of a permit, license, approval or certification, as required by subsection (h)(1),] person to whom the action of the Department is directed or issued** shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene pursuant to § 1021.81. The **[recipient of a permit, license, approval or certification] person to whom the action of the Department is directed or issued** who is added to an appeal pursuant to this section must still comply with §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance.)

(j) Other recipients of an action **[appealed by a third party, served as required by] under** subsections (h)(2), (h)(3), (h)(4)[, or] (h)(5) **or (h)(6),** 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. **If a recipient of notice of an action pursuant to subsections (h)(2), (h)(3), (h)(4), (h)(5) or (h)(6) elects not to intervene as of course, said recipient's right to appeal from the Board's adjudication in the matter may be adversely affected.**

Comment: Subsection (j) of this rule was amended in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

Judges Renwand, Coleman and Miller concurred with the changes to Rule 1021.51.

On the motion of Mr. Hinerman, seconded by Mr. Clark, the Rules Committee recommended that the rules recommended for approval to date should be submitted by the Board for rulemaking. A summary of the proposed rules is attached to the minutes as Appendix A.

Additionally, it was recommended that the comment period be extended to 60 days and that the comment period not conclude less than two weeks following the Environmental Law Forum.

Protective Appeals and Civil Suspense Docket:

The Committee resumed discussion of an issue that had been previously raised by David Mandelbaum and Phil Hinerman, i.e., the need for a mechanism that would allow protective appeals to be stayed while parties are attempting to settle them. Mr. Mandelbaum had suggested the creation of a suspense docket similar to that in federal court. Judge Miller noted that the need for a suspense docket, or some mechanism for allowing cases to be stayed, has arisen in two types of cases: the filing of protective appeals and cases involving TMDL's where the parties are waiting for EPA to act. However, he did not believe that a rule was needed to address the issue. At a prior meeting of the Rules Committee, it was suggested that this issue be handled through the Board's internal operating procedures, and Judge Renwand agreed to place it on the agenda for the Board's next conference call on January 28, 2008.

Next Meeting:

Since the Board will be preparing a new rules package, it was agreed that no meeting will be held in March. The next Rules Committee meeting will be held on Thursday, May 8, 2008 at 10:15 a.m.

Appendix A

Rules Recommended for Adoption: Rules Package 106-9 (March 2006 – January 2008)

A. *Default Judgment* (adopted March 9, 2006):

§ 1021.74. Answers to complaints.

* * * * *

(d) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made **as set forth in § 1021.76 (relating to entry of default judgment)**, all relevant facts in the complaint may be deemed admitted **and default judgment may be entered [as to liability]**. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

§ 1021.76. Entry of default judgment. (New rule)

(a) The Board, on motion of the plaintiff, may enter default judgment [as to liability] against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.

(b) The motion for default judgment shall contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least ten days prior to filing the motion.

(c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.

(d) Where default judgment is sought in a matter involving a complaint for civil penalties, the Board may assess civil penalties in **[an] the** amount **[to which] of** the **plaintiff's claim or may assess the amount of the penalty [is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the civil penalties shall be assessed]** at a trial at which the issues shall be limited to the amount of the civil penalties.

Comment: This rule is modeled after Pa.R.C.P. 237.1 and 1037.

B. *Prepayment of Penalties* (adopted March 9, 2006):

1021.51. Commencement, form and content.

* * * * *

(f) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall **follow the procedures set forth in § 1021.54 (relating to prepayment of civil penalties) [submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay]**.

1021.54. Prepayment of penalties. (New Rule)

(a) When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Department, the appellant shall submit to the Office of Chief Counsel of the Department a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

(b) When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Board, the appellant shall submit to the Board a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

(c) When an appellant claims it does not have the ability to prepay a civil penalty assessment, it shall include with the notice of appeal a verified statement that alleges financial inability to prepay or post an appeal bond.

Comment: Practitioners should note that the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, requires that prepayment of a civil penalty be made to the Board and not to the Department. If a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute.

1021.55. Hearing on inability to prepay penalty.

(a) If an appellant submits a verified statement that he is unable to pay in accordance with §§ 1021.51 **and 1021.54 (c)** (relating to commencement, form and content of appeals; **and prepayment of penalties)**, the Board may schedule a hearing on the validity of this claim and may require the appellant to supply appropriate financial information to the Department in advance of the hearing.

C. *Withdrawal Without Prejudice* (adopted March 9, 2006):

§ 1021.142. Withdrawal without prejudice. (New Rule)

(a) Upon agreement of all parties, an appellant may withdraw an appeal without prejudice.

(b) Except as agreed by the parties under subsection (c), when an appeal is withdrawn without prejudice the withdrawal of the appeal shall have no effect

upon the ability of any party to raise, in future proceedings, any issue of law or fact raised or that could have been raised in the withdrawn appeal.

(c) Any agreement by the parties that limits the issues that may be raised or that determines the finality of the action being appealed will be binding in future proceedings.

D. *Filing* (adopted September 28, 2006)

Correct a typographical error in 1021.32(f) to change the reference to "1021.34(*b*)" to "1021.34(*c*)."

E. *Service* (adopted September 28, 2006):

§ 1021.34. Service by a party.

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(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]**.

F. *Certification for Discovery Motions* (adopted January 11, 2007)

§ 1021.93. Discovery motions.

(a) This section applies to motions filed to resolve disputes arising from the conduct of discovery.

(b) **No discovery motion shall be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action.** Discovery motions shall contain as exhibits the discovery requests and answers giving rise to the dispute.

G. *Filing Uniformity* (adopted January 11, 2007)

§ 1021.32. Filing.

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(h) Pleadings and other documents filed with the Board shall comply with Pa.R.C.P. 204.1.

H. *Expedited Hearings* (adopted May 16, 2007)

1021.96. Motions for expedited hearing. (New rule)

(a) A motion for an expedited hearing may be filed at any time in either an Appeal or Special Action, or the Board may order an expedited hearing on its own motion.

(b) The Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure at 25 Pa. Code §1021.201, or the Pennsylvania Rules of Civil Procedure relating to discovery.

(c) In issuing such an order the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

(1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings;

(2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings;

(3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing;

(4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest.

(5) The effect of expedited proceedings on the non-requesting party.

(d) The Board will grant a motion for expedited hearing only in rare circumstances.

(e) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings as well as the time and place of the hearing.

1021.96a. Contents of motion for an expedited hearing. (New rule)

(a) A motion for an expedited hearing shall state facts with particularity and shall be supported by one of the following:

(1) Affidavits based on personal knowledge or experience setting forth facts supporting the issuance of an order for an expedited hearing, or

(2) An explanation of why affidavits have not accompanied the motion if no affidavits are submitted with the motion for an expedited hearing.

(b) A motion for an expedited hearing shall be accompanied by a memorandum of law.

(c) No motion shall be filed unless it contains a certification that the moving party has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure an agreement on expediting the proceeding.

1021.96b. Response to motion for expedited hearing. (New rule)

A response and supporting memorandum of law shall be filed within 10 days of service unless otherwise ordered by the Board.

1021.96c. Conduct of the hearing. (New rule)

(a) Nothing contained in this rule shall limit the rights of the parties to a full hearing before the Board under the applicable rules of evidence with full rights of cross-examination of witnesses. The Board may limit the number of witnesses or the subjects of examination in order to avoid duplication of evidence as provided at 25 Pa. Code § 1021.126.

(b) Testimony may be submitted by prepared written testimony as provided for by 25 Pa. Code 1021.124.

(c) After the conclusion of the hearing the Board shall direct the prompt filing of post hearing briefs.

I. *Summary Judgment* (adopted November 8, 2007)

§ 1021.94a. Summary judgment motions.

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure.

(~~a~~b) *Summary judgment motion record.*

(1) A summary judgment motion record must contain the following separate items:

(i) A motion prepared in accordance with subsection (~~b~~c).

(ii) A supporting brief prepared in accordance with subsection (~~c~~d).

(iii) The evidentiary materials relied upon by the movant.

(iv) A proposed order.

(i) Motions and responses must be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).

(~~b~~c) *Motion*. A motion for summary judgment must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed ~~two~~five (5) pages in length.

(~~c~~d) *Brief in support of the motion for summary judgment*. The motion for summary judgment shall be accompanied by a brief containing an introduction and summary of the case, a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts must set forth ~~in separately numbered paragraphs~~ a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

~~(d) *Evidentiary materials*. Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief and shall be separately bound and labeled as exhibits. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.~~

~~(e) *Proposed order*. The motion shall be accompanied by a proposed order.~~ ~~(f) *Brief by party in opposition to motion.*~~ (e) *Opposition to motion for summary judgment.* Within 30 days of the date of service of the motion, a party opposing the motion shall file :

(i) a response to the motion for summary judgment which shall include a concise statement, not to exceed five pages in length, as to why the motion should not be granted, and

(ii) a brief containing a responding statement either admitting or denying or disputing ~~each of~~ the facts in the movant's statement and a discussion of the legal argument in opposition to the motion. Any response must include citation ~~All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c)~~to the portion of the record contraverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall ~~be stated in separately numbered paragraphs together with~~contain citations to the motion record. Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.

(f) *Length of Brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion shall not exceed thirty (30) pages.

(g) *Evidentiary materials.* Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion or response and brief and shall be separately bound and labeled as exhibits. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

(h) *Proposed order.* The motion shall be accompanied by a proposed order.

(i) *Reply brief.* ~~A concise~~ A reply brief may be filed by the movant within 15 days of the date of service of the response. It may not exceed 15 pages unless leave of the Board is granted. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(~~h~~i) *Motion for summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(i) *Judgment rendered.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.

J. *Necessary Parties to an Action* (adopted January 10, 2008)

§ 1021.51. Commencement, form and content.

* * * * *

(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] person to whom the action of the Department is directed or issued**;

(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 **or contamination [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] water loss or contamination**;

(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] water loss or contamination**;

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

(i) The service upon the **[recipient of a permit, license, approval or certification, as required by subsection (h)(1),] person to whom the action of the Department is directed or issued** shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene pursuant to § 1021.81. The **[recipient of a permit, license, approval or certification] person to whom the action of the Department is directed or issued** who is added to an appeal pursuant to this section must still comply with §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance.)

(j) Other recipients of an action **[appealed by a third party, served as required by] under** subsections (h)(2), (h)(3), (h)(4)[, or] (h)(5) **or (h)(6),** 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. **If a recipient of notice of an action pursuant to subsections (h)(2), (h)(3), (h)(4), (h)(5) or (h)(6) elects not to intervene as of course, said recipient's right to appeal from the Board's adjudication in the matter may be adversely affected.**

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Comment: Subsection (j) of this rule was amended in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).