Environmental Hearing Board
Rules Committee

Minutes of March 15, 2007

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, March 15, 2007 at 10:15 a.m. Committee Chairman Howard Wein presided. Committee members attending the meeting were as follows: Maxine Woelfling, Susan Shinkman, Stan Geary, Dennis Strain and Brian Clark. Judge Thomas Renwand and Senior Assistant Counsel MaryAnne Wesdock represented the Board. Ms. Wesdock took the minutes.

Minutes:

On the motion of Ms. Shinkman, seconded by Mr. Geary, the minutes of the January 11, 2007 meeting were approved.

Prepayment of Penalties:

At a prior meeting of the Rules Committee a preliminary vote was taken on revisions to the sections of the rules dealing with prepayment of penalties, including the addition of a new rule on prepayment of penalties. The revisions were circulated for comment and further changes were suggested by various Committee members. A vote was taken at the March 15, 2007 meeting on the final set of changes. On the motion of Ms. Woelfling, seconded by Ms. Shinkman, the changes were approved. A copy of the changes is attached to the minutes as Appendix A.

Expedited Litigation:

At the January 11, 2007 meeting, the Committee reviewed a draft of proposed rules on expedited litigation prepared by Judge George Miller. Various changes were

suggested. The changes were incorporated into the proposed rules and were considered at the March 15 meeting. Also considered were suggestions provided by Mr. Strain with regard to expedited litigation and §§ 35.111 – 35.114 of the General Rules of Administrative Practice and Procedure dealing with the scheduling of prehearing conferences for the purpose of expediting proceedings before an agency.

The proposed rules considered by the Committee were as follows:

EXPEDITED HEARING

1021.____ General

(a) A petition for an expedited hearing may be filed at any time in either an [extraordinary or unusual] 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 not withstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure at 25 Pa. Code Section 121.201, or the Pennsylvania Rules of Civil Procedure relating to discovery. Any such order may defer ruling on a dispositive [or other] motion until [during or after] the completion of the expedited hearing.

(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 prehearing proceedings;
(2) Severity of harm to the parties [from extended prehearing proceedings];
(3) 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 (a) promote judicial economy or (b) serve the interests of the Department, the regulated community or the public in expedited disposition of important issues.]

(d) 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. _____ Contents of Petition for an Expedited Hearing

(a) A petition 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 upon which the issuance of a petition for an expedited hearing may depend, or
(2) An explanation of why affidavits have not accompanied the petition if no affidavits are submitted with the petition for an expedited hearing.

(b) A petition for an expedited hearing shall state with particularity the citations of legal authority, if any, the petitioner believes form the basis for the grant of an expedited hearing.

1021.___ Conduct of the Hearing and Issuance of Adjudication

(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.

(b) Nevertheless, the Board may limit the number of witnesses or the subjects of examination in order to avoid time-wasting duplication of evidence [as provided at 25 Pa. Code 1021.126.]

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

(d) After the conclusion of the hearing the Board shall direct the prompt filing of requests for findings of fact, conclusions of law or other briefs to enable it to render a prompt and just disposition of the dispute.

Mr. Strain felt that two areas needed to be addressed: first, that petitions for expedited litigation should be approved only in rare or extraordinary circumstances and, second, that such petitions should be approved only when made within 30 days of the issuance of prehearing order number one (PHO 1). Mr. Wein and Ms. Woelfling agreed with the concept of a time limit for requesting an expedited trial but did not agree with it being limited to only 30 days after PHO 1. Mr. Geary did not believe there should be a

time limit on the filing of such a petition since he felt that the parties could be well into a case before they discover a need for expedited proceedings. Judge Renwand questioned whether a request for expedited proceedings would be necessary at a later stage of an appeal.

The general consensus of the Committee was that petitions for an expedited trial should be granted in only limited circumstances, and the Board had previously agreed that a sentence should be added to the rule indicating such. Judge Renwand emphasized that such petitions would not be granted in the average case since expedited proceedings put a great deal of strain on the resources of the Board, counsel and the parties.

A discussion ensued as to the timing for allowing petitions for expedited trials to be filed, with Mr. Strain believing that there should be a shorter time limit. However, he agreed that since one of the factors the Board must consider is the need for discovery, his concern was addressed. Therefore, the Committee concluded that no time limit should be incorporated into the rule.

With regard to the requirement that petitions for expedited proceedings be granted only in extraordinary or unusual circumstances, Mr. Clark pointed out that those words encompassed different meanings. It was agreed that the term "rare" circumstances should be used, since that term dealt with the frequency of when such petitions would be granted rather than the type of case. Ms. Woelfling suggested putting this language in subsection (d) and moving (d) to (e). A typo in (b) was noted: notwithstanding should be one word.

Judge Renwand suggested deleting the last sentence of (b) because he questioned why dispositive motions would be filed after an expedited trial. It was agreed this

sentence should be removed. Mr. Wein felt the reference to "prehearing" should be deleted from (c)(2) so that it referred to all proceedings not just prehearing proceedings.

To address Mr. Strain's concern regarding discovery and the timing of filing a motion for expedited hearing, Ms. Woelfling suggested that (c)(3) be amended to read as follows: "The status of discovery and the realistic need of the parties for extended discovery and time to prepare for a hearing." Ms. Woelfling also recommended the following change to (c)(2): "Severity of harm to the parties during the time period ordinarily required to complete the [prehearing] proceedings."

The Committee addressed whether (c)(4) was needed (regarding judicial economy and serving the interests of the Department, the regulated community and the public), and Judge Renwand recommended keeping it as a catchall. Mr. Clark noted that it would need to be coupled with one of the other factors. He also noted that the opposing party could argue the counter to any of the enumerated factors. Judge Renwand felt that a case involving harms/benefits analysis under the Solid Waste Management Act would benefit from this language. It was agreed that factor (c)(4) should remain but that the parentheses should be removed. Ms. Woelfling also suggested simply saying "public policy" as opposed to fragmenting it into separate categories. Mr. Clark recommended the language "…would promote judicial economy or would otherwise be in the public interest."

As to the last section, formerly (d) and now (e), dealing with the scheduling of a prehearing conference to set a schedule for the proceeding, Mr. Wein noted that it shows parties that if an expedited proceeding is granted, the judge is going to act on it quickly. Judge Renwand recommended keeping it. Judge Renwand also asked the Committee to

look at Rule 1021.101(c) which states that a trial will not be scheduled until all dispositive motions are decided. It was agreed that Rule 1021.101(c) will be addressed at the next meeting.

The Committee discussed the numbering of the rules. It was recommended that they be placed in the section dealing with "motions." All references in the rules should be to "motions" rather than to "petitions." The title of the first rule will be changed from "General" to "Motions for Expedited Hearing" and will be Rule 1021.96. The second rule, dealing with contents of the motion, will be Rule 1021.96a. Additional rules would be numbered 1021.96b etc.

Ms. Wesdock noted that the Board still sees quite a few motions that do not comply with the new rule on summary judgment motions, 1021.94a. The briefs supporting the motions contain non-material facts set forth in lengthy numbered paragraphs. It was agreed that Ms. Wesdock should add this topic to the Environmental Law Forum program.

In proposed Rule 1021.96a, dealing with the content of a motion for expedited hearing, the following changes were recommended: 1) change "petition" to "order" in (a)(1); 2) change "of" to "to" in (b); 3) change "petitioner" to "moving party" in (b); 4) change "upon which" to "supporting" in (a)(1). Judge Renwand stated that he would like such a motion to be supported by a memorandum of law so this was added to (b) and the rest of the sentence after "shall" was deleted. Responses to motions shall be addressed in rule 1021.96b and shall read: "A response and supporting memorandum of law shall be filed within 10 days of service unless otherwise ordered by the Board."

Mr. Wein suggested that there should be a requirement that the parties discuss the matter first before filing a motion for expedited proceeding. Ms. Shinkman recommended that the motion contain a certification similar to the one proposed for discovery motions. The Committee agreed with the recommendation.

As to proposed Rule 1021.96c, regarding the conduct of the hearing, the following changes were recommended: 1) combine (a) and (b) and delete the word "nevertheless;" 2) delete the words "time wasting;" 3) change references to "findings of fact, conclusions of law" etc. to "post hearing briefs;" 4) delete "issuance of adjudications" from the title.

The numbering of the rules will be as follows:

1021.96: Motions for expedited hearing;

1021.96a: Contents of motion for expedited hearing;

1021.96b: Responses to motion for expedited hearing;

1021.96c: Conduct of expedited hearing.

On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee tentatively approved the proposed rules, subject to comment at the Environmental Law Forum. A copy of the rules, as approved by the Rules Committee, is contained in Appendix B.

Indispensable Parties

At the last meeting, the Committee had reviewed proposed revisions to Rule 1021.51(h) – (j) which would allow the Board to join indispensable parties. The proposed changes were discussed by the panel of attorneys who will be presenting the EHB Roundtable at the Environmental Law Forum, and Department attorney Michael

Heilman had several comments and suggestions with regard to the rule changes. This prompted another set of revisions, which were presented to the Rules Committee at the March 15 meeting. This new set of revisions does not require mandatory joinder of a party but gives that person the option of participating, and prevents that person from challenging the Board's final decision if he or she fails to participate as a party to the appeal.

The revisions considered by the Rules Committee at the March 15 meeting were as follows:

Rule 1021.51(h), (i) and (j)

(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 or order;

(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, including but not limited to any landowners who will be adversely affected by the relief requested.

(i) The service upon the recipient of a permit, license, approval[, or] certification or order, as required by subsection (h)(1), 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 or order 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 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. Where such recipient of an action is determined to be an indispensable party, either sua sponte by the Board or on the motion of any party, that recipient shall be given an opportunity to be added as a party, and the failure of that recipient to consent to being added as a party shall preclude him or her from challenging any final decision by the Board with regard to the action on appeal.

Comment: The determination of whether a party is an indispensable party pursuant to subsection (j) of this rule shall be made in accordance with the Commonwealth Court's ruling in *Schneiderwind v. Department of Environmental Protection*, 867 A.2d 724 (Pa. Cmwlth. 2005).

Mr. Heilman also suggested using the term "necessary party" as opposed to "indispensable party." Mr. Strain agreed that the case law on "indispensable party" views this term as someone whose rights are necessarily going to be affected by the decision, whereas "necessary party" was someone intimately involved in the matter but not necessarily adversely affected. Judge Renwand was hesitant to use either term since each of those terms has a special meaning outside of Board practice.

A discussion ensued as to the proper terminology and whether "adversely affected" should be used. Mr. Geary stated this situation was similar to issue preclusion, where someone has the opportunity to challenge a matter and if he fails to do so is barred from challenging it in the future. Ms. Woelfling suggested using the same standard as that for intervention: an interest that may be affected. The following language was agreed upon: "Where such recipient of an action is determined to have an interest that

may be affected by the Board's adjudication, that person shall be given an opportunity to be added as a party, and the failure of that person to consent to being added as a party shall preclude that person from challenging any final decision of the Board with regard to the action on appeal."

Ms. Shinkman questioned whether the Board had the authority to say what the Commonwealth Court could consider on appeal. Judge Renwand agreed but felt that such a rule was necessary in light of the Commonwealth Court's holding in *Schneiderwind v. DEP,* 867 A.2d 724 (Pa. Cmwlth. 2005). He felt that such a rule would put people on notice that they cannot have two bites at the apple. Mr. Strain agreed that the rule was appropriate, noting that the Board has the ability to develop rules and to determine what is the effect of a person's failure to raise an issue at the proper time. He felt that Ms. Shinkman's comment was addressed by putting a reference to *Schneiderwind* in the comment to the rule. The Committee agreed on the following language for the comment to the rule: "Subsection (j) of this rule was developed in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005)." Ms. Shinkman noted that "developed" should be changed to "amended" since it was a revision to an existing rule.

Mr. Geary pointed out that the language of (j) made it unclear as to whether it applied only if a party did not intervene. The language was further amended as follows: "Where such recipient of an action <u>does not intervene as of course and</u> is determined to have an interest that may be affected by the Board's adjudication, that person shall be given an opportunity to be added as a party, and the failure of that person to consent to being added as a party shall preclude that person from challenging any final decision of

the Board with regard to the action on appeal." It was agreed that the intervention language currently contained in subsection (j) should remain in place.

On the motion of Mr. Geary, seconded by Ms. Shinkman, the Committee tentatively approved the revisions to Rule 1021.51(h) – (j), subject to comment at the Environmental Law Forum. They further approved presenting the proposed rule as well as the rules on expedited hearings at the EHB Roundtable program of the Environmental Law Forum, addressing the feedback at the next meeting and thereafter sending a proposed rules package to the Board for approval and further action.

Next Meeting:

The next meeting will be on **Thursday, May 10, at 10:15 a.m.** The agenda will include discussion of feedback on the rules at the Environmental Law Forum and possible revisions to Rule 1021.101(c) requiring that all dispositive motions be resolved before a trial date is set.[1]

In addition to the **May 10** meeting, future meeting dates for the remainder of the year are as follows: **July 12, September 19, November 8**.

[1] Additionally, after the meeting Mr. Wein recommended having a representative from LT Court Tech, the firm that administers the Board's website, participate in the May 10 meeting to discuss issues regarding electronic filing, including a method to notify counsel if opposing counsel is registered to receive service electronically.

Appendix A

Prepayment of Penalty Revisions

1021.51. Commencement, form and content.

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(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 (dealing with 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 with the service copy of appellant's notice of appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty.

(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 with appellant's notice of appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty.

(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: If a civil penalty is assessed under two statutes with different procedures to prepay the civil penalty or post a bond, the procedures for each statute will apply to the portions of the penalties assessed for that statute.

1021.55. Hearing on inability to prepay penalty.

(a) If an appellant submits to the Board 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.

Appendix B

Expedited Proceedings

MOTIONS

* * * * *

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 harm to the parties 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.

(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.

Appendix C

Necessary Parties to an Action

Rule 1021.51(h), (i) and (j)

(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 or order;

(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, including but not limited to any landowners who will be adversely affected by the relief requested.

(i) The service upon the recipient of a permit, license, approval[, or] certification or order, as required by subsection (h)(1), 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 or order 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 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. Where such recipient of an action does not intervene as of course and is determined to have an interest that may be affected by the Board's adjudication, either sua sponte by the Board or on the motion of any party, that person shall be given an opportunity to be added as a party, and the failure of that person

to consent to being added as a party shall preclude that person from challenging any final decision of the Board with regard to the action on appeal.

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).