ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Meeting of May 13, 2004

Attendance:

In attendance were the following: EHB Chairman and Chief Judge Michael Krancer, Rules Committee Chairman Howard Wein, Mike Bedrin, Dennis Strain, Brian Clark, Joe Manko, Richard Morrison and MaryAnne Wesdock.

Approval of Minutes:

On the motion of Mr. Strain, seconded by Mr. Clark, the minutes of the March 11, 2004 meeting were approved.

Amendment of Notice of Appeal (rules 1021.51(e) and 1021.53):

Mr. Strain presented research done by DEP Legal Assistant Brenda Houck on the history of § 1021.51(e). Rule 1021.51(e) reads as follows:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

At a prior meeting, the Committee had proposed deleting the last sentence of this subsection dealing with what constitutes "good cause" since the Board had proposed revising the rule on amendment of appeals to allow appeals to be amended "for good cause shown and as otherwise allowed by law." Mr. Scott was concerned that deleting this language might result in a stricter standard for amending appeals as set forth by the Commonwealth Court in *Pennsylvania Game Commission v. Department of*

Environmental Resources, 509 A.2d 877 (Pa. Cmwlth. 1986) (known as the *Ganzer* decision) because it was believed that this language might not have been in 1021.51(e) at the time *Ganzer* was decided. In *Ganzer,* the Commonwealth Court applied a nunc pro tunc standard to amendment of appeals.

According to Ms. Houck's research, the rule did not change from 1979 to the time of the decision in *Ganzer,* and the current version of the rule is virtually identical to that in effect at the time of the *Ganzer* decision. One change that occurred between *Ganzer* and the present was the addition of language in § 1021.53 setting forth the circumstances under which an appeal may be amended.

The Committee discussed whether going back to a "good cause" standard might be adopting the stricter standard enunciated in *Ganzer.* Ms. Wesdock recommended explaining the reason behind the rule change in the preamble to the rules package. Mr. Clark recommended adopting a comment to rule 1021.53 stating that the proposed revision – i.e. allowing amendments for good cause – was not intended to adopt the standard set forth in *Ganzer* but was meant to allow for more liberal amendment of appeals. Mr. Manko recommended revising the rule to say that an amendment may be granted for good cause shown, including the circumstances currently set forth in the rule at (b) (1), (2) and (3), but not excluding other circumstances at the discretion of the Board.

Judge Krancer pointed out that the Commonwealth Court in *Ganzer* was simply interpreting our rule, not setting forth its own standard. Therefore, he felt we should have a comment to the rule stating that the standard applied in *Ganzer* – i.e., a nunc pro tunc

standard – is not the appropriate standard to be applied in the case of an amendment to an appeal and make it clear that *Ganzer* is not good law.

A discussion ensued on whether the Board could amend the rule requiring that appeals be filed within 30 days of notice of the Department's action since there is no such requirement in the Environmental Hearing Board Act. Mr. Wein and Mr. Clark thought the 30 day requirement was contained in other statutes giving the Board jurisdiction over Department actions. The Committee decided this question did not need to be decided at this time.

Mr. Strain felt that since different standards were to be applied in determining what constitutes "good cause" for an appeal nunc pro tunc and "good cause" for allowing an amendment of an appeal, different terminology should be used for each. It was determined that the standard the Board was actually considering with regard to amendment of appeals was one of prejudice – i.e., whether allowing an amendment was prejudicial to the opposing party. Mr. Bedrin noted that the court in *Ganzer* also looked at the issue of prejudice.

In addition to revising rule 1021.53 to allow for amendment of appeals unless prejudice will result to the opposing party, Mr. Strain recommended deleting the last two sentences of 1021.51(e) and moving 1021.51(f) (dealing with nunc pro tunc appeals) to a different section.

In summary, the proposed revisions to 1021.51(e) and 1021.53 are as follows: (1) delete the last two sentences of 1021.51(e); (2) revise 1021.53 to allow for amendment of appeals unless prejudice will result to the opposing party; (3) move 1021.53(f) to a new section dealing solely with appeals nunc pro tunc; (4) add a comment to 1021.53

regarding *Ganzer*. Mr. Wein asked that the proposed revisions be circulated to the Committee by June 15, 2004.

Automatic Party Status:

The Committee considered proposed revisions to rules 1021.51 (h), (i) and (j) prepared by Mr. Morrison based on the discussion at the March 11 meeting. The proposed revisions are 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.

(i) The service upon the recipient of a permit, license, approval or certification, 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.

(j) Other recipients of the 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.

The Committee had a discussion as to whether (i) should also require the filing of an entry of appearance. Mr. Morrison pointed out that, under the Board's current practice, a permittee or licensee is already an automatic party without the filing of an entry of appearance. On the motion of Mr. Clark, seconded by Mr. Manko, the revisions prepared by Mr. Morrison were approved, and it was agreed that a comment should be added to the rule stating that parties are required to abide by the rules regarding representation and entry of appearance. Ms. Wesdock will circulate proposed language for the comment.

Dispositive Motions:

Ms. Wesdock explained the basis for further revising the rules on motions and, specifically, dispositive motions: (1) to make summary judgment motions and responses more concise, which was not accomplished by the last set of revisions to the rules on dispositive motions; (2) to allow facts to be deemed admitted when no response is filed to a motion to dismiss; and (3) to allow exhibits and affidavits to be attached to the supporting memorandum of law.

Mr. Morrison explained the proposed revisions he prepared to the rules on motions: (1) have the general rule on motions (1021.91) apply to all motions except summary judgment motions, thus allowing the Board to deem admitted all facts in a motion to dismiss where no response is filed; (2) revise 1021.91(g) since replies may be filed to motions to dismiss; (3) remove subsections (a) and (b) from 1021.94; (4) create a separate rule (1021.95) for summary judgment motions rather than attempting to deal

with summary judgment motions and motions to dismiss in one rule; and (5) include subsection (f) in 1021.95, with language taken from the Pennsylvania Rules of Civil Procedure, allowing summary judgment to be entered where the non-moving party does not respond to the motion. The changes proposed by Mr. Morrison are as follows:

§ 1021.91 General

(a) This section applies to all motions except [dispositive motions] summary judgment motions and those made during the course of a hearing.

. . .

(g) The moving party may not file a reply to a response to [its motion] procedural, discovery, or miscellaneous motions unless the Board orders otherwise.

§ 1021.94 Dispositive motions

[(a) This section applies to dispositive motions. Dispositive motions shall contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought.

(b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 1035.1-1035-5 (relating to motion for summary judgment).]

[(c)] (a) Dispositive motions, responses and replies shall be in writing . . .

[(d)] (b) A response to a dispositive motion may be filed within 30 days of service . . .

[(e)] (c) A reply to a response . . .

[(f)] (d) An affidavit . . .

[(g)] (e) Subsection [(c)] (a) supersedes 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection [(d)] (b) supersedes 1 Pa. Code § 35.179 (relating to objecting to motions).

§ 1021.95 Summary Judgment Motions

(a) A motion for summary judgment shall contain only a concise statement of the relief requested and the reasons for granting that relief.

(b) Motions and responses shall be in writing, signed by a party or its attorney and shall be accompanied by a proposed form of order. An affidavit or other document relied upon in support of a motion for summary judgment or response thereto shall be included with the motion or response. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

(c) The motion for summary judgment shall be accompanied by a brief containing a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts shall 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 shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

(d) Within 30 days of the date of service of the motion, a party opposing the motion shall file 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. 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) 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 such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

(e) A concise reply brief may be filed by the movant within 15 days of the date of service of the response. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(f) 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 motion.

(g) 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.

[§ 1021.95.] §1021.96. Miscellaneous motions

. . .

The Committee agreed that the rule should initially set forth exactly what is required: (1) a motion containing a concise statement of the relief requested and the reasons for granting that relief; (2) a brief containing a statement of material facts and legal discussion; (3) exhibits and/or affidavits; and (4) a proposed order.

Mr. Strain suggested that each subsection could contain a heading. Mr. Bedrin suggested that the Board might want to prepare a model or standard form for what the Board expects to see with a motion for summary judgment. Mr. Strain also suggested the Board might want to have a comment to the rule saying the motion should be no more than 1-2 pages.

A discussion ensued as to whether the new rule would simply result in lengthy briefs containing non-material information. Mr. Wein noted the comment to the rule could state that the Board does not want this. Mr. Morrison felt that by requiring a citation to the record, that would provide a disincentive to parties to put non-material information in the brief.

Mr. Morrison will redraft the rule and circulate it to the Committee. In addition, it was suggested that when the rules package containing this rule change is prepared, the Board might wish to circulate the proposed changes as a practice tip.

Next Meeting:

Although the next meeting was scheduled for July 8, Mr. Wein is not available on that date. Therefore, the meeting date was changed to **July 15, 2004** at **10:30 a.m.**