ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of July 12, 2001

Attendance:

The Rules Committee convened at approximately 12:35 p.m. on Thursday, July 12, 2001, with Chairman Howard Wein presiding. In attendance were Brian Clark, Maxine Woelfling, Stan Geary, Dennis Strain, Tom Scott, Mike Bedrin and Terry Bossert. George Miller attended on behalf of the Board. Attorney Mike Meloy attended the portion of the meeting dealing with the topic of withdrawals of appeals without prejudice.

Protective Appeals -- Withdrawal of appeal without prejudice:

Mike Meloy asked the Rules Committee to consider an issue that arose at the June meeting of the PBA Environmental, Mineral and Natural Resources Law Section concerning the withdrawal of protective appeals. Mike explained the problem as follows: Because of the 30-day jurisdictional time-limit for filing appeals with the EHB, regulated entities are often placed in the position of having to file a broad protective appeal even when it is likely there will be a negotiated resolution of the issues. The concern is that once an appeal has been settled and withdrawn, DEP may seek to preclude any issues raised in the appeal from being litigated in the future on the basis of administrative finality, res judicata or collateral estoppel. It is Mike's feeling and that of other practitioners that there should be some mechanism for terminating a protective appeal so as to leave the parties with as many of their rights in place as possible. In other words, if a party files a protective appeal and then terminates it, he should not be in a worse

position than if he had never filed the appeal in the first place. Mike suggested that one manner of correcting this would be to eliminate the presumption in the Board's rules that a withdrawal of an appeal is with prejudice.

The Board's rule on termination of appeals is at 25 Pa. Code § 1021.120. Subsection (b) states as follows: "When a proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board."

An example of the type of case where this situation arises is where DEP has issued a permit containing certain conditions. The permittee is unhappy with some of the conditions and files a protective appeal within the 30-day appeal period because a failure to do so would subject him to administrative finality. The appeal is necessarily broad because any issues not included in the appeal are deemed waived. DEP and the permittee renegotiate the language and the permit is reissued. The matter is withdrawn. Mike raised the following questions: In this scenario, is there some ancillary impact from having raised certain issues but not having litigated them? Is the permittee bound not just by the conditions in the new permit but also by all of the issues raised in the appeal? Mike felt that the Board's decision in *Kresge v. DEP*[1] seems to indicate that the termination of an appeal with prejudice would have collateral estoppel effects.

A question was raised as to what the phrase "with prejudice" means. In the scenario described above, does it mean 1) the permittee cannot file the same appeal again; 2) the permittee is now bound by every condition in the permit; or 3) is the permittee now precluded from raising any argument which it raised (but was not decided) in a subsequent appeal or a subsequent permit or activity?

[1] 2000 EHB 30.

Terry noted this is similar to the *Kent Coal*[2] situation where the recipient of a compliance order decides that it is more cost-effective to comply with the order than to challenge it but then wishes to challenge the subsequent civil penalty that is based on the underlying order.

Howard also compared this situation to that in *Nemacolin, Inc. v. DER*,[3] in which DER had instituted proceedings to close a swimming pool after an earlier unappealed permit denial. There, the Commonwealth Court held that administrative finality did not apply.

George noted that in one of his cases, *American Auto Wash v. DEP*, the appellant withdrew its appeal just days before the hearing. He stated that in such a case, the withdrawal should have res judicata effect, but noted this is not the type of situation to which Mike was referring.

Dennis expressed the opinion that not having some finality to issues is not in anyone's best interest. For example, the recipient of a permit would want some finality to his permit. Stan noted that regardless of whether an appeal is withdrawn with or without prejudice, the underlying Department action is final.

Mike Meloy phrased the issue as follows: Once an appeal has been filed, what is the effect of "shutting down" the appeal? Terry stated this seemed to be more a substantive issue than a procedural one. Maxine agreed.

Brian recommended that the issue be addressed in the course of settling the appeal, and the settlement agreement can set forth what issues are preserved or not

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[2] *Kent CoalMining Co. v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988)

[3] 541 A.2d 811 (Pa. Cmwlth. 1988).

preserved. Terry noted that one of his cases was settled subject to the ability to litigate certain issues in the future.

George raised the issue of whether "protective appeals" should be addressed in the Board's rules. Stan noted that in the federal rules one can withdraw an action without prejudice if it is done before responsive pleadings are filed. The concept is that if the other parties have not had to file anything, the matter can be withdrawn without prejudice.

George suggested the following definition of protective appeal: Where neither Board nor Department resources are used up except in negotiations, a party can file a withdrawal of appeal without prejudice, which the Board would grant assuming there is no objection from the other side. He further noted that a protective appeal would not apply in the case of third parties.

Dennis stated that if there is no specificity as to what "withdrawal without prejudice" means, there may still be a problem.

Tom raised the following question: What is the advantage of having a settlement end up with preclusive impact on issues that were never addressed in the settlement or in litigation?

George gave the following example: If a permittee files a protective appeal from conditions in an air permit and includes as one of its objections that DEP has no jurisdiction to issue an air permit, does the withdrawal of that appeal bar the permittee from raising that issue again? Dennis felt it would bar the permittee from raising that issue again with regard to the renewal of that permit. The Committee disagreed as to

whether that would be the result. George stated that in antitrust litigation, such issues would not be barred if being raised for a different time period.

Brian stated he understood Dennis to be saying that in five years, when the renewal of that permit comes up, the permittee could challenge DEP's jurisdiction but only with regard to new conditions of the permit, not to the conditions that remain unchanged.

Terry raised the question of what it means to withdraw an appeal without prejudice, i.e. does it mean you could refile the same appeal? The consensus was that you could not refile the same appeal because it would be time-barred.

With regard to the earlier discussion of whether the issue of "with or without prejudice" could be resolved in the settlement of the appeal, Mike Meloy stated that the problem that presents is that it leaves DEP holding the cards on how to terminate the appeal. George noted that where the matter cannot be resolved in the settlement agreement, the appellant could approach the Board and seek and obtain an order stating that the withdrawal is without prejudice, without the effect of collateral estoppel and free of the application of administrative finality. Mike stated, however, that even if a party files something with the Board, DEP may dispute the meaning of it, and this is antithetical to the settlement process.

Mike Bedrin noted that the system currently in place seems to work in most cases, i.e. in most cases practitioners are able to resolve the manner in which an appeal is withdrawn. Brian agreed and suggested this might be dealt with on a case-by-case basis. He did not feel there was a clear way to change the rules to address the issue.

Terry noted that the current Board rule (1021.120) assumes all withdrawals are with prejudice unless otherwise indicated by the Board. If the rule were reversed, all that would do is make DEP file to have the appeal withdrawn with prejudice. If the rule were to say "with or without prejudice, as the Board may direct," then both parties would be fighting over how the appeal should be withdrawn. However, he said he had no opposition to making the rule neutral, i.e. "with or without prejudice…."

Brian stated that 99% of the time a withdrawal of an appeal is going to be with prejudice. He felt that the types of cases described by Mike Meloy are going to be very small in number, and, where they occur, the Board will be able to recognize it and make an appropriate decision.

Howard stated that perhaps the Committee needed to focus on the phrase "as to all issues" in the rule. George also noted that the rule refers to "action," the meaning of which could be ambiguous. Stan agreed that "action" could be read as the "action of withdrawing the appeal," as opposed to the definition of "action" in the rules.

Tom noted that it should be possible for an appellant to "undo" an appeal unilaterally without prejudice if it is done at a time when no one has been prejudiced by it. However, Terry noted that even if the appeal is withdrawn, the appellant may still be bound by the findings contained in DEP's order.

Brian reiterated that if a party wants to preserve the issue of DEP's authority to do something, it can preserve that issue in the settlement. However, Stan noted that if it cannot be worked out in the settlement, the parties may end up having to litigate the whole appeal, and they may end up litigating something that was not a real issue. Mike Bedrin pointed out that the parties also have the option of going to the Board.

Tom focused on the words "with prejudice" and asked whether it was clear that phrase covered everything raised in the appeal or simply meant one could not bring the same appeal again. Brian questioned whether the language "as to all other matters" should be in the rule since the withdrawal is to that matter only. He noted that the Board's order following the withdrawal of an appeal states, "This matter is marked closed and discontinued."

Tom expressed the opinion that the rule as written tilts in favor of DEP. Mike Bedrin stated that, while it might have that effect, the rule was not necessarily written that way. Maxine stated that the rule has the effect of keeping the Board's docket clear.

Dennis suggested that perhaps the concept of "with or without prejudice" should be eliminated, especially in the case of administrative actions. He suggested the following language: "will not be subject to future challenge unless by order of the Board."

Terry noted that a party could end up being worse off by filing a protective appeal than if he had never filed an appeal in the first place. George stated that perhaps we should say that in the case of a protective appeal, the withdrawal of the appeal shall have no relevance to collateral estoppel, res judicata, and administrative finality that might otherwise apply. Mike Meloy agreed that the settlement of an appeal will resolve some issues but there will be a whole host of issues not dealt with in the settlement that a party should not be precluded from raising again.

Terry raised the following question: If an appeal is disposed of prior to adjudication, are you subject to collateral estoppel on the *grounds* raised in the appeal – i.e., not the action itself but the grounds stated in opposition to the action? Howard

restated the question as "Under what circumstances should you be bound by the grounds you raise in an appeal?" Stan stated that if an appeal is dismissed with prejudice, you are barred from relitigating the grounds for the appeal.

Tom suggested the rule be revised as follows: "When a proceeding is withdrawn prior to adjudication, the withdrawal shall be without prejudice to the grounds raised in support of the appeal unless otherwise indicated by the Board."

George said he would like to take a closer look at the law on res judicata and collateral estoppel and give this topic further consideration at the next meeting. He and Howard thanked Mike Meloy for bringing the matter to the Rules Committee's attention.

Approval of Minutes:

Dennis noted a correction to the minutes of the May 17, 2001 meeting that had been previously circulated. The corrected minutes were circulated to the parties with the agenda for the July 12 meeting. With that correction, Brian moved to approve the minutes and Maxine seconded.

Rules Package – Comments by OGC:

The Committee reviewed the comments of the Office of General Counsel (OGC) on the Board's latest rules package. Since the package had been returned from OGC, Howard raised the possibility of incorporating the newly approved rules on dispositive motions and attorney's fees into the package. George said he would prefer to keep the package as is and include the dispositive motion and attorney's fee rule revisions in the next package. Mary Anne also noted that the current package had been submitted to the Governor's Policy Office, and it would have to be resubmitted if new rules were added.

As to the OGC comments, George stated he did not agree with the suggestion to delete the last sentence of the definition of "legal document." Howard agreed that it should be clear that there are certain things that are not "legal documents." In addition, George thought the suggestion for revising subsection (c) of proposed rule 1021.23 (withdrawal of counsel) was too strict since he could envision circumstances where this would not apply. Maxine also stated that the proposed rewrite of 1021.23 was incorrect because it appears to indicate that an attorney can withdraw without leave even where there is no substitute counsel.

George also stated he saw no merit to the proposed revision to 1021.31(f) (dealing with hard copies of electronically-filed documents and exhibits to legal documents.) George was not opposed to making the suggested changes to 1021.38, 1021.142 and 1021.151.

George stated that he would contact Scott Roy at OGC to discuss the comments.

Electronic Filing:

George reported on the status of the Board's electronic filing project. He anticipates that the program will be open to everyone by the beginning of October. He also noted that the Board has adopted a policy of having the Board Assistant Counsel call counsel of record at least one hour prior to the posting of adjudications and dispositive motions on the Board's website.

Composition of Certified Record on Appeal to Commonwealth Court:

The Committee considered a proposed change to Rule 1021.171 (Composition of Certified Record on Appeal to Commonwealth Court) made necessary by the proposed

rules on electronic filing. The proposal was to add the following to the rule as subsection (d):

> (d) In the event an electronic filing is not included in the Board's paper file, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.41(c) [§ 1021.38(c) under the reorganization] that the official copy of an electronically filed document shall be that appearing on the Board's website.

Maxine suggested the following language: "In the event that a legal document was electronically filed, a paper copy of the document will be submitted to the Commonwealth Court…."

George agreed with Maxine's proposal with the following change: "In the event that a legal document was electronically filed, a paper copy of the *electronic filing* will be submitted to the Commonwealth Court…."

Brian moved to recommend the adoption of the following language, which was seconded by Dennis:

> **1021.171. Composition of the Certified Record on Appeal to Commonwealth Court**
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> * * * * *
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> d) In the event that a legal document was electronically filed, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.41(c) [§ 1021.38(c) under the reorganization] that the official copy of an electronically filed document shall be that appearing on the Board's website.

The Committee unanimously voted in favor of recommending adoption of the proposed revision to Rule 1021.171.

General Rules of Administrative Practice and Procedure:

At the last meeting of the Rules Committee, it was recommended that Mary Anne review the Board's rules on motions in order to determine whether the rules should be revised to state that they *supersede* as opposed to *supplement* sections of the General Rules of Administrative Practice and Procedure (GRAPP). Howard explained that the Rules Committee intended to minimize cross-references to GRAPP in the Board's rules over time. Where the Committee determined there was still a need to cross-reference a section of GRAPP, Howard suggested it might be more prudent to revise the Board rule so that it contained the required language. Mike Bedrin pointed out that doing so would require an amendment to the Board's rules whenever relevant sections of GRAPP were amended.

1021.70 – Motions - General

Rule 1021.70 states that it supplements the following sections of GRAPP: §§ 33.11 (execution of documents), 33.32 (service by a participant), 35.177 (scope and contents of motions) and 35.178 (presentation of motions).

Terry noted that § 33.11 contained more information than the Board's rule but questioned whether it was useful. George noted that subsection (c) of § 33.11 deals with the effect of a signature and that the Board might want to develop its own rule, especially in light of electronic filing. He suggested looking at this rule's analogue in the Pa. Rules of Civil Procedure and at Rule 11 of the Federal Rules of Civil Procedure. Tom also mentioned looking at the Rules of Professional Responsibility. The consensus of the Committee was to keep § 33.11 for the time being and to revise the Board's rule in the future to deal with the execution of documents.

The Committee agreed that the other rules could be superseded. Terry moved to recommend that Board rule 1021.70 supersede GRAPP rules 33.32, 35.177 and 35.178. Tom seconded. All were in favor.

1021.71 – Procedural Motions

Rule 1021.71 states that it supplements the following sections of GRAPP: §§ 33.12 (verification), 35.177 (scope and content of motions) and 35.179 (objections to motions). Maxine questioned whether it was necessary to reference § 33.12 since this information is contained in the Crimes Code. In addition, whereas GRAPP rule 33.179 states that a party has 10 days in which to respond to a motion, Board rule 1021.71 fixes a 15-day response period. Maxine moved to recommend amending § 1021.71 to supersede §§ 33.12, 35.177 and 35.179 of GRAPP. Stan seconded. All were in favor.

1021.72 – Discovery Motions

Rule 1021.72 states that it supplements the following sections of GRAPP: §§ 33.12 (verification) and 35.177 (scope and content of motions). The Committee agreed these sections could be superseded. Maxine moved to recommend amending Board rule 1021.72 to supersede § 33.12 and 35.177 of GRAPP. Stan seconded. All were in favor.

1021.73 – Dispositive Motions

Rule 1021.73 states that it supplements § 35.177 of GRAPP (scope and content of motions). The Committee agreed this section could be superseded. Brian moved to recommend amending § 1021.73 to supersede § 35.177 of GRAPP. Maxine seconded. All were in favor.

1021.74 – Miscellaneous Motions

Rule 1021.74 states that it supplements § 33.12 of GRAPP (verification). The Committee agreed this section could be superseded for the reasons set forth above. Maxine moved to recommend amending § 1021.74 to supersede § 33.12 of GRAPP. Brian seconded. All were in favor.

Special Actions

The Rules Committee considered proposed rules dealing with the following types of special actions: regulatory takings and actions initiated by complaints filed against DEP.

Regulatory Takings

George explained that when a regulatory taking case is transferred to the Board, it has been the Board's practice to direct the claimant to file a complaint. Stan noted that a claim of regulatory taking can also be made in the course of appealing a permit denial and that perhaps the proposed rule should indicate that an appellant can raise regulatory taking as a grounds for his appeal. Howard noted that if a claim of regulatory taking is brought as part of an appeal, it would not be covered by a rule on special actions. Dennis recommended that the rule deal with any type of transfer to the Board, not simply those involving regulatory takings. Stan suggested that the scope of the rule read as follows: "This rule deals with cases transferred to the Board from courts of common pleas." George recommended making this language subsection (a) of the proposed rule.

Terry commented that the rule should reflect that after a complaint and answer are filed, the rest of the Board's procedural rules apply. Dennis suggested that there be one rule dealing with answers rather than a separate one for each type of complaint. He also proposed changing the title of the rule on regulatory takings to "Transferred Complaints."

Stan noted, however, that eminent domain proceedings do not start out with complaints. Dennis suggested "Transferred Matters."

Tom suggested that "statement of claim" might be a more appropriate term than "complaint." George agreed that most orders he has issued have referred to a "statement of claim," but he had a preference for using the term "complaint" because that would be easily understood by any lawyer.

Stan asked why the current rule on special actions and the proposed rules do not allow for new matter. George explained that it seems to be more fruitful and expeditious to follow the federal practice of allowing a respondent to add additional defenses in the answer and to seek a ruling by moving for summary judgment rather than pleading new matter.

Complaints Against the Department

Howard noted that the proposed rule used the term "action" and that this is a defined term. George suggested using the term "proceedings" instead. The Committee agreed this change should be made in subsections (a), (a)(2) and (b). Where the term "action" was used in subsection (c), Howard suggested using the term "relief."

Maxine stated that subsection (a) should set forth the scope. Brian suggested the following language for (a): "This section applies to the following types of proceedings, as authorized by statute…."

Howard suggested changing the caption of the rule from "Complaints Against the Department" to "Special Proceedings Authorized by Statute." He also suggested changing the heading of this section of the rules from "Special Actions" to "Special Proceedings."

Maxine mentioned that the Committee should look at the definition of "party" since it might need to be revised in light of the new rules on special proceedings.

The Committee agreed to look at the following two matters more closely at the next meeting: whether the definition of "party" needs to be revised and whether the heading "Special Actions" should be changed to "Special Proceedings."

Brief vs. Memorandum of Law

Howard explained that the terms "brief" and "memorandum of law" are used interchangeably throughout the Board's rules and suggested that the rules should more clearly reflect which of these two types of documents the Board wishes to receive.

George also noted that although there is a 25-page limit for post-hearing reply briefs, there is no such limit in the rules for reply briefs to motions. Maxine and Howard suggested incorporating the following language of rule 1021.116 (b) (post-hearing briefs) into rule 1021.73(e) (dispositive motions): "Reply briefs shall be as concise as possible and may not exceed 25 pages. Longer briefs may be permitted at the discretion of the presiding administrative law judge." Maxine moved to incorporate this language into rule 1021.73(e). Brian seconded. All were in favor. However, rule 1021.73(e) refers to a "memorandum of law" as opposed to a "brief," and, therefore, some revision to this language will need to be made at the next meeting.

Other Matters:

Both George and Howard welcomed Stan Geary as the newest member of the Rules Committee. Stan was appointed to the Rules Committee by Representative Bill DeWeese on May 11, 2001.

Next Meeting:

The next meeting of the Rules Committee is scheduled for Thursday, September 20, 2001 from 10:00 a.m. to 2:00 p.m.