ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of May 17, 2001

Attendance:

The Rules Committee convened at approximately 10:15 a.m. on Thursday, May 17, 2001, with Chairman Howard Wein presiding. Also in attendance were Maxine Woelfling, Dennis Strain, Terry Bossert, Mike Bedrin and Brian Clark. Representing the Board were George Miller and Bernie Labuskes.

Approval of Minutes:

Mike moved to approve the minutes of the March 8, 2001 meeting and the March 28, 2001 emergency meeting. Maxine seconded. All were in favor.

Attorney's Fees:

The Rules Committee considered a memorandum prepared by Mary Anne Wesdock containing proposed amendments to the Board's rules on "Attorney Fees and Costs Authorized by Statute Other than the Costs Act." The proposed amendments were prepared in response to the enactment of Act 138 of 2000, which sets forth new standards for the award of attorney's fees and costs in mining actions.

The first issue dealt with how to incorporate any changes necessitated by Act 138 into the Board's rules on attorney's fees. Because there are a number of environmental statutes containing attorney's fee provisions, George suggested dividing the Board's rules on attorney's fees into three sections: 1) attorney's fees authorized by the Costs Act; 2) attorney's fees authorized by Act 138; and 3) attorney's fees authorized by statute other than the Costs Act and Act 138. He advised the Committee that when the Board had first

adopted the regulations dealing with attorney's fees, a memorandum had been prepared addressing all of the environmental statutes containing attorney's fee provisions. He stated that it might be helpful to review the memorandum before making further changes to the rules.

Terry stated that when the Board's original attorney's fees rules had been drafted, a question arose as to whether it would make sense to have a more general rule that required a party to comply with the requirements of the particular statute under which he had filed for attorney's fees.

The consensus of the Committee was to keep the rules dealing with attorney's fees under the Costs Act in place. Further, because the attorney's fee provisions of the environmental statutes other than Act 138 are rather general and do not contain detailed requirements for filing an application for fees, the Committee decided it would be more practical to simply revise the rule on attorney's fees authorized by statute other than the Costs Act rather than drafting a separate set of rules for attorney's fees in mining cases.

The next issue addressed by the Committee dealt with the meaning of the word "adjudication." Section 7708(D) of Act 138 states, "The petition for an award of costs and fees shall be filed with the Environmental Hearing Board within 30 days of the date an adjudication of the Environmental Hearing Board becomes final." Based on this language, Mary Anne had suggested revising subsection (b) of § 1021.142 (Application for Costs and Fees) as follows: "An applicant shall file an application with the Board within 30 days of the date [of a final order] an adjudication of the Board becomes final…."

Dennis raised the question of when an adjudication is considered "final," especially in light of the Commonwealth Court's recent ruling in *Blose v. DEP* (as well as an earlier order issued in *People United to Save Homes v. DEP*.) In both of these cases, the Board issued an adjudication that remanded all or a part of the matter to the Department of Environmental Protection. The Commonwealth Court quashed petitions for review filed in both cases, holding that the Board's adjudication was not a final order because of the remand.

George also pointed out that whereas the Board uses the term "adjudication" to refer to decisions issued after a hearing, under the General Rules of Administrative Practice and Procedure (GRAPP), it has a broader meaning. The latter meaning is likely to be what was intended in Act 138. Dennis also pointed out that the Administrative Agency Law defines "adjudication" as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations…."(2 Pa.C.S.A. § 101) Maxine agreed that the intent of Act 138 was that a petition for fees should be filed within 30 days of a "final order."

Dennis pointed out that even if we use the term "final order" it does not resolve the *Blose* problem. George thought it might be helpful to convene a meeting with the president judge of the Commonwealth Court and to present the Court with a written document addressing the "final order" issue. Howard raised the question of whether a written document on this issue should come from the Rules Committee. George suggested that it come from both the Rules Committee and the Board.

Dennis suggested that the Board might want to say in its adjudications that "this is a final order." However, George said this probably would not make a difference in how the Commonwealth Court treated the matter.

With regard to the issue of "finality," Terry brought up the situation where the Board grants partial summary judgment. In such a case, must the prevailing party wait until the entire case is adjudicated before he asks for fees? George noted that in federal court, a party can file a certificate that there is no reason for delay in order to get fees without waiting until the entire matter has been adjudicated. Dennis noted that in state court, a party can also make an appeal to the judge that the matter is final.

Terry also raised the following scenario: In a third-party appeal of a permit issuance, the Board finds in favor of the appellant and remands the case to the Department to consider a particular issue. The Department on remand decides that the permit should be issued. The matter is litigated again and the permittee prevails. In this situation, is the third-party appellant entitled to attorney's fees since he ultimately did not prevail? Dennis stated that the second appeal would be a new action under a different standard, and, therefore, the third-party appellant did succeed in getting the Department to proceed under a different standard.

With regard to the question of what constitutes an "adjudication" for purposes of the Board's rules on attorney's fees, Terry noted that the Board's rules are procedural rules and not substantive law. He felt that if the Board tried to define "adjudication" it might be crossing the line into substantive law, especially since the term is defined in GRAPP and the Administrative Agency Law. He questioned whether the Board's rules could properly change the definition of something that appears in a statute.

Howard noted that the proposed revision to § 1021.142(b) did not define anything but simply set forth at what point in time a party was to file an application for fees.

Maxine asked whether the Committee could get around the problem by calling a decision reached after a hearing on the merits something other than an "adjudication." She noted, however, that that was going against nearly 30 years of tradition and would also involve revising references to "adjudication" in the Board's rules.

Dennis suggested keeping the original language – i.e. "final order" – and letting case law decide what constitutes a "final order." Howard also suggested adding a note to the end of the rule stating that a "final order" is what the applicable law says.

Terry proposed adding language to § 1021.142 saying that an application for costs and fees shall conform to any requirements set forth in the statute under which costs are being sought. The Committee agreed this language could be added as a new subsection (a). Terry also noted that the response time should be changed from 15 days to 30 days. The Committee agreed. In addition, the Committee initially agreed to add the following language to the remaining subsections of § 1021.142 and § 1021.143: "Unless otherwise provided by statute…." George questioned whether the latter proposal was necessary and, instead, suggested simply adding a note at the end of § 1021.141 referencing other statutory provisions.

Maxine made a motion to adopt the following changes to § 1021.142 and § 1021.143, which was seconded by Terry:

§ 1021.142. Application for Costs and Fees

(a) A request for costs and fees shall conform to any requirements set forth in the statute under which costs are being sought.

[(a)] (b) A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.

(3) [A detailed listing of the costs and attorney fees incurred in the proceedings.] An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of such costs and fees.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of the party from whom costs and fees are sought.

[(b)] (c) An applicant shall file an application with the Board within 30 days of the date of a final order. An applicant shall serve a copy of the application upon the other parties to the proceeding.

[(c)] (d) The Board may deny an application sua sponte if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested.

§ 1021.143. Response to Application

A response to an application shall be filed within [15] 30 days of service. A factual basis for the response shall be verified by affidavit.

The motion passed unanimously. The Committee further agreed to draft a note to § 1021.141 for the next meeting.

Dispositive Motions:

The Committee continued its discussion of Howard's proposal to revise the Board's rules on dispositive motions that had been initially raised at the January 11, 2001

Rules Committee meeting. The purpose of revising the rules would be to eliminate the filing of lengthy motions and responses and to allow background information and non-material facts to appear in the supporting brief rather than in both the motion (or response) and brief, as is the current practice. Howard noted that the historical reason for requiring information in a motion was that briefs were not part of the reproduced record. Dennis pointed out, however, that just recently a court struck a brief in a reproduced record.

Howard stated that the purpose of revising the rules on dispositive motions was to eliminate extraneous information in a motion. This would then also eliminate the need for lengthy responses. Terry noted that just because something is stated a motion, that does not make it a fact unless it is supported by an affidavit or other appropriate document. Therefore, if a party makes an unsupported statement in its motion, the opposing party need not respond to it. Howard stated that the problem is that with some motions, it is difficult to tell if a statement is properly supported. Terry further stated that § 1021.70(f) could be read as requiring a paragraph-by-paragraph response for all motions except summary judgment and partial summary judgment.[1]

George stated that his preference as a judge was to have motions set forth facts quickly. He felt that the language that had been proposed as a note at the last meeting should, instead, be part of the rule itself.[2]

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[1] § 1021.70(f) reads as follows: "Except in the case of motions for summary judgment or partial summary judgment, for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion."

[2] The language proposed as a note at the March 8, 2001 meeting was as follows: "The Board contemplates that dispositive motions will contain only a request for the relief sought and a concise statement of the basis for that relief. Facts set forth in a brief need not be set forth in a motion."

Section 1021.70(d) requires that a motion set forth in numbered paragraphs the facts in support of the motion and the relief requested. Subsection (e) requires that a response set forth in correspondingly numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. Maxine suggested adding language to these sections excluding motions for summary judgment or partial summary judgment from their coverage.

The Committee considered using the language proposed as a note at the last meeting but to exclude the final sentence, i.e. "The Board contemplates that dispositive motions will contain only a request for the relief sought and a concise statement of the basis for that relief."

Mike questioned what would happen if a party filed a traditional motion with numbered paragraphs. He asked whether the Board would reject it. George replied that the Board would accept it, but the important thing was to reduce the burden on people filing motions and responses with the Board.

Terry stated that the Board might want to treat other dispositive motions in the traditional way, i.e. requiring numbered paragraphs.

Dennis noted that a fundamental problem is that many attorneys plead both facts and evidence and will err on the side of including everything in a motion. George felt that a reference to requiring a "short and concise statement" would catch people's attention. Dennis added that the Board could strike a motion if it were too long.

Terry asked whether the rule should apply solely to summary judgment/partial summary judgment motions or to all dispositive motions. Howard felt it should apply to all dispositive motions. Maxine agreed since it could be difficult to separate the two.

George suggested placing the language of the proposed revisions on the Board's website to get feedback before it is published in the Pa. Bulletin.

George proposed adding the following language to § 1021.73: "Dispositive motions shall contain a concise statement of the reasons why the Board should grant the relief requested, including, where necessary, such material facts which support that request."

Brian suggested deleting the existing language of § 1021.73(a) ("This section applies to dispositive motions") since it was redundant and replacing it with the language proposed by George. Maxine noted that the problem with deleting the existing language of subsection (a) is that this language parallels that of the other sections dealing with motions. She suggested placing George's proposed language in subsection (b) and moving existing subsection (b) to (c) and so forth.

Howard also noted that at the March 8, 2001 meeting, the Committee had agreed to change the response time for dispositive motions from 25 to 30 days. This also necessitated deleting the "except for" clause in § 1021.73(b).[3]

The Committee agreed to the following changes in § 1021.70 (General): In subsection (a), state that this section does not apply to dispositive motions. In subsections (e), (f) and (g), delete references to summary judgment, partial summary judgment or dispositive motions.

It further agreed to the following changes in § 1021.73 (Dispositive Motions): Add George's proposed language to subsection (a). Revise subsection (c) to state that dispositive motions shall be "in writing, signed by a party or its attorney, and served on

[3] § 1021.73(b) reads as follows: "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) *except for the provisions of the 30-day period in which to file a response*."

the opposing party." Revise subsection (d) to allow responses to dispositive motions to be filed within 30 days, rather than 25 days, of the service of the motion and, further, to state that responses shall, rather than may, be accompanied by a supporting memorandum. Revise subsection (e) to require that replies, if any, be filed within 15, rather than 20, days of the service of the response. Delete references to "reply" in subsection (f). Delete the existing comment.[4]

Brian noted that at the March 8, 2001 meeting, Tom Scott had suggested changing the title of § 1021.70 from "General" to "Non-Dispositive Motions." However, because subsection (a) of § 1021.70 states that it applies to all motions except those made during the course of a hearing, and because dispositive motions can be made during the course of a hearing, the Committee agreed to keep the title as "General."

With regard to the language to be added to subsection (a) of § 1021.73, Dennis proposed the following language that was slightly different from that proposed earlier: "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."

The second sentence of § 1021.73(c) states that a motion or response shall contain a certificate of service. Because the requirement of a certificate of service is covered earlier in § 1021.34 of the rules, the Committee recommended deleting this sentence in subsection (c).

Terry suggested adding responses and replies to subsection (c) of § 1021.73, which currently says that "dispositive motions shall be accompanied by a supporting

[4] The existing comment reads as follows: "Subsection (d) supersedes the filing of a response within 30 days set forth in Pa.R.C.P. 1031.3(a).

memorandum of law" and to which the Committee earlier agreed to add the language "shall be in writing, signed by a party or its attorney, and served on the opposing party." However, he questioned that if a party chooses to file a response, must it be accompanied by a memorandum of law or is that discretionary? George stated that if someone files a response, he would like to see it accompanied by a memorandum of law. Maxine and Terry suggested replacing "may" with "shall" in the second half of § 1021.73(d) as follows: "A response to a dispositive motion may be filed within [25] 30 days of the date of service of the motion and [may] shall be accompanied by a supporting memorandum of law."

Subsection (e) of § 1021.73 currently says that a reply may be filed within 20 days of service of a response. George questioned why the rule allows 20 days instead of 15 days. The Committee agreed to change the reply time to 15 days.

Subsection (f) of § 1021.73 states, "An affidavit or other document relied upon in support of a dispositive motion, response or reply, that is not already a part of the record, shall be attached to the motion, response or reply or it will not be considered by the Board in ruling thereon." Based on the case mentioned by Dennis at the beginning of the discussion, the Committee agreed that it seemed best not to revise (f) to allow supporting documents to be attached to a memorandum.

George stated that the way in which (f) was currently drafted appeared to give a party the opportunity to raise new matter in a reply, and he did not agree that this should be allowed. He explained that a problem is presented if a party saves its real argument for its reply because the opposing party has no opportunity to respond. He felt that new matter should only be raised in a reply if the Board grants leave to do so. Dennis

suggested amending the rule to state that a reply shall not include matters that should have been raised in the original motion. Maxine questioned whether this could be accomplished in a comment to the rule.

Bernie noted that Pa.R.C.P. 1017 (Pleadings Allowed) allows a reply "if the answer contains new matter or a counterclaim." A question was raised as to how much benefit the Board gets from a reply. George responded that generally not much benefit is gained from a reply having been filed. Mike suggested amending the rule to allow replies only upon leave of the Board.

Bernie cited Pa.R.A.P. 2113 that states "the appellant may file a brief in reply to matters raised by appellee's brief not previously raised in appellant's brief…." Dennis stated that as long as replies are referenced in the Board's rules, parties are going to think they have to file a reply. Bernie also noted that if replies were only allowed upon leave of the Board, the Board would be likely to grant leave every time such a request is made and, therefore, it may be a wasted step.

Terry noted that to the extent a motion for summary judgment is based on an affidavit or expert report and the opposing party challenges the credentials of the expert in his reply, the moving party may need to bring new matter into his reply in order to rehabilitate his expert.

George suggested striking the words "or reply" in subsection (f). Maxine agreed that if the matter needed to be addressed it would then be covered by Pa.R.C.P. 1035.4, which states in relevant part that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Mike summarized that this approach would maintain the right to file a reply but a party could

not attach an affidavit or other document to the reply in support of new matter, except as allowed by Pa.R.C.P. 1035.4. Howard stated that the Preamble to the rules package should clearly state that the purpose of this revision was to prevent a party from raising new matter in a reply.

Finally, the Committee reviewed subsection (g) which says that the rule supplements 1 Pa. Code § 35.177 and supersedes 1 Pa. Code § 35.179. After review of these sections of GRAPP, the Committee decided to recommend no changes to (g). However, the Committee requested Mary Anne to review all of the references to GRAPP in §§ 1021.70 – 1021.74 to determine whether our rules supersede the GRAPP provisions.

Terry moved to recommend the following revisions to § 1021.70, which was seconded by Maxine:

1021.70. General.

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

(b) *****

(c) A copy of the motion or response shall be served on the opposing party. [The motion or response shall include a certificate of service indicating the date and manner of service on the opposing party.]

(d) *****

(e) A response to a motion shall set forth in correspondingly numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. Material facts set forth in a motion[, other than a motion for summary judgment or partial summary judgment,] that are not denied may be deemed admitted for the purposes of deciding the motion.

(f) [Except in the case of motions for summary judgment or partial summary judgment,] For purposes of the relief sought by a motion, the Board will deem a

party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

(g) [Except as provided in § 1021.73(e) (relating to dispositive motions),] The moving party may not file a reply to a response to its motion unless the Board orders otherwise.

The motion to amend § 1021.70 passed unanimously.

Brian moved to recommend the following revisions to § 1021.73, which was seconded by Mike:

§ 1021.73. 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) [except for the provision of the 30 day period in which to file a response].

(c) Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party. Dispositive motions shall be accompanied by a supporting memorandum of law. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law.

(d) A response to a dispositive motion may be filed within [25] 30 days of the date of service of the motion and [may] shall be accompanied by a supporting memorandum of law.

(e) A reply to a response to a dispositive motion may be filed within [20] 15 days of the date of service of the response and may be accompanied by a supporting memorandum of law.

(f) An affidavit or other document relied upon in support of a dispositive motion[,] or response[, or reply], that is not already a part of the record, shall be attached to the motion[,] or response[, or reply] or it will not be considered by the Board in ruling thereon.

(g) *****

[Comment: Subsection (d) supersedes the filing of a response within 30 days set forth in Pa.R.C.P. 1035.3(a).]

The motion to amend § 1021.73 passed unanimously.

Joint Meeting with EMNRLS:

Howard proposed having a joint meeting between the Rules Committee and the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section. The purpose of the meeting would be to get feedback from the Section on where they felt revisions to the Board's rules might be necessary. This could also include discussion of the proposed revisions to the rules on dispositive motions. Howard noted that the Committee has received letters from private practitioners regarding proposed changes to the rules and, therefore, it is not inappropriate for the Committee to get feedback from the Section. Mike felt that a joint meeting would be useful but it would be more helpful if the Committee had something to present to the Section. Howard proposed providing the Section with a report of what the Rules Committee has accomplished over a certain period of time and request input from the Section as to where further changes may be necessary. Brian felt it would be helpful for the Committee to prepare a list of potential areas to be considered in order to stimulate discussion.

Adjournment and Next Meeting:

The meeting of the Rules Committee adjourned at 2:00 p.m. The next meeting will be on Thursday, July 12, 2001, from 12:30 to 4:30 p.m.