**ENVIRONMENTAL HEARING BOARD**
**RULES COMMITTEE MINUTES**

**Meeting of November 8, 2001**
**(Draft)**

**Attendance:**

The Rules Committee convened at 10:30 a.m. on Thursday, November 8, 2001 with Chairman Howard Wein presiding. Also in attendance were Stan Geary, Mike Bedrin, Dennis Strain and Tom Scott. Bernie Labuskes represented the Environmental Hearing Board. Assistant Counsel Don Carmelite also attended.

**Scheduling of Meetings for 2001:**

The schedule of meetings for 2002 is as follows: January 10, March 14, May 9, July 11, September 12 and November 14. All meetings will begin at 10:30 a.m. unless otherwise noted.

The meeting dates and agenda will be posted on the Board's website. Notices in the Pennsylvania Bulletin will include the address for the Board's website, along with a notation that Rules Committee minutes and meeting dates can be found there.

**Approval of Minutes:**

On Dennis' motion, seconded by Tom, the Committee voted to approve the minutes of the September 20, 2001 meeting.

**Rule 1021.81(a)(2) – Exchange of Expert Reports:**

Bernie described a situation in one of his cases where the pro se appellant did not serve any discovery or a request for expert reports on opposing counsel. As a result, the Department of Environmental Protection (Department) identified its experts for the first time in its prehearing memorandum. The appellant contended that the Department

should be precluded from presenting the experts' testimony at hearing since it had not produced expert reports. The Department argued that the appellants had never asked for this information in discovery. Although the situation in Bernie's case was resolved, it led to the question of whether a party is obligated to produce an expert report if the other side does not request it.

Board Rule 1021.81(a)(2) states as follows:

> The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories within 120 days of the date of the prehearing order. The opposing party shall serve its expert reports and answers to all expert interrogatories within 30 days after receipt of the expert reports and answers to all expert interrogatories from the party with the burden of proof.

Howard noted that, historically, expert reports were produced with the prehearing memorandum. The Board's rule now specifies a timeframe for producing such reports.

Stan stated that he read the rule's use of the word "shall" as imposing an obligation on a party to produce an expert report regardless of whether it is requested by the other side. Prehearing order no. 1 sets forth dates for producing expert reports, and he treats that as the date on which his report is due by the Board.

Bernie raised the issue of Department witnesses who typically do not prepare expert reports. Stan said he felt there was an obligation to produce a report even for expert witnesses who typically do not produce one, such as Department employees. Mike noted that there are cases where Department experts do produce a report.

The Committee noted an inconsistency between what is required by this rule and Rule 1021.82 (prehearing memorandum). Rule 1021.82 sets forth the required contents of a prehearing memorandum, including "a summary of the testimony of each expert

witness," whereas 1021.81(a)(2) requires actual expert reports. Bernie felt the Board's rules needed to be clarified since the sanction of not allowing an expert to testify is severe.

Howard suggested language such as the following: "To the extent expert interrogatories are served, responses shall be filed within "x" number of days. To the extent the party with the burden of proof chooses to file an expert report, it must be filed within "x" days." Stan noted that, from a practical standpoint, it is easier to answer expert interrogatories than to file an expert report early in a case. The earlier this information is required, the more difficult it is to produce a final expert report. Howard suggested having an initial discovery period where expert interrogatories can be filed, then require parties to file an expert report with their prehearing memorandum, and finally, allow a window of time in which to reopen discovery after the filing of expert reports. Don expressed concern over allowing expert discovery only one month before trial. Stan and Howard noted this is done in civil court. Don saw a problem with this approach resulting in hearings being postponed.

Bernie stated that the rule did not need clarification with regard to answering expert interrogatories, only with regard to the exchange of expert reports. He suggested adding the words "if requested" after "expert reports." Dennis raised the question of whether the Board wanted expert reports to be automatic or optional. Bernie stated he had no preference; however, Don and Mary Anne noted that Mike Krancer and Tom Renwand like the filing of expert reports.

Howard suggested focusing on expert interrogatories and expert reports as two separate concepts. He noted that whereas 1021.81(a)(1) requires discovery to be

concluded within 90 days, (a)(2) allows a party 120 days in which to file answers to expert interrogatories. Dennis expressed the concern that if the rule requires parties to serve expert interrogatories at the outset, this might encourage pro forma filings. Howard stated that while there is no requirement under the Board's rules to serve expert interrogatories, there may be a requirement to file expert reports.

Bernie suggested deleting the words "expert reports and" from 1021.81(a)(2). Stan noted that individual judges could customize their prehearing orders to require expert reports. Howard suggested borrowing the following language from Pa.R.C.P. 4003.5(a)(1)(b): "The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert."

The Committee considered the language of 1021.81(a)(1) that states that discovery shall be *concluded* within 90 days of the date of the prehearing order. Mike and Stan noted that the Board has not interpreted the word "concluded" as requiring that discovery must be both served and answered within the 90-day period. Dennis suggested clarifying this matter by using the word "served" instead of "concluded." The Committee agreed with the suggestion.

The Committee recommended that Bernie discuss the proposed revisions with the other EHB judges before the Committee formally recommended adopting them at the next meeting.

Tom raised the question of whether a party who intends to file an expert report has an obligation to disclose this prior to hearing. Mike and Dennis noted that the prehearing memorandum does not require expert reports. Tom noted that the system

would best protect pro se appellants if there were a requirement to provide expert reports prior to the hearing. Mike noted that the Board's Practice and Procedure Manual (p. 23, no. 5) states, "In a case involving expert witnesses, the exchange of expert reports is required."

Bernie expressed that it was his opinion the exchange of expert reports should be left to the parties, and he would not make it an automatic requirement.

Stan suggested that individual judges could personalize pre-hearing order no. 1 to require expert reports. Howard suggested that the Preamble to the proposed rulemaking should contain a statement such as the following: "Expert reports are no longer required as a matter of course in all cases but individual judges may require expert reports in their cases."

Dennis suggested adding a note to the rule as follows: "Under the Pa. Rules of Civil Procedure, expert interrogatories can be answered by filing an expert report." Rather than adding a note to the rule, Tom suggested adding a sentence to subsection (e) of 1021.81 as follows: "As set forth in § 1021.111, discovery shall be governed by the Pa. Rules of Civil Procedure." After further discussion, the Committee decided that neither a note to 1021.81 nor a reference to the Pa. Rules of Civil Procedure was necessary. However, the Committee agreed that the reference in 1021.81(e) stating that it "supplements" 1 Pa. Code § 35.121 should be changed to "supersedes."

Bernie noted that by revising 1021.81(a)(1) to say that "discovery shall be served within 90 days" (as opposed to "concluded"), this effectively adds 30 days to the discovery period and, therefore, he raised the question of whether the other timeframes stated in 1021.81(a) should be increased by 30 days. This would make expert

interrogatories due within 150 days of the date of prehearing order no. 1 for the party with the burden of proof and within 180 days for the opposing party. Dispositive motions would then be due within 210 days of prehearing order no. 1 in cases involving expert testimony and 180 days after the filing of the appeal where there are no expert witnesses.

Tom moved to recommend the proposed changes to Rule 1021.81, as set forth in Appendix A to the minutes. Mike Bedrin seconded. All were in favor.

**Rule 1021.51 – Notice to Parties in Interest:**

Rule 1021.51(g) states in relevant part as follows:

> (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
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> * * * * *
>
> (3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

Bernie explained that there are some cases before the Board where a party in interest is not necessarily the recipient of the action. For example, this frequently occurs in appeals of denials of plan revisions under the Sewage Facilities Act. Typically, the denial of a plan revision is appealed by the developer. Under the Board's current rules, the municipality whose plan revision has been denied does not get notice of the appeal. The municipality eventually learns of the appeal and seeks to intervene, thereby throwing off the dates set forth in pre-hearing order no. 1. A similar problem occurs in mining cases where the Department determines a water supply has not been affected. Although the mining company is a party in interest, it is not required to receive notice of the appeal. The Committee was asked to consider

two issues in these types of situations: Should the third entity be required to get notice of the appeal? Should the third entity be an automatic party to the appeal?

Tom suggested adding the words "and any other real party in interest" to 1021.51(g)(3). Howard stated that if that were done, the rules would need to define "real party in interest." Dennis suggested allowing the Board to order service on additional parties. However, he stated that if service were made mandatory, a failure to serve could result in a defect in the proceedings, and he did not believe the rules should incorporate the concept of "necessary parties."

Howard summarized the matter as follows: The first question is whether certain parties should be put on notice. Second, by being put on notice, what flows from that? Tom raised another issue: Does the failure to serve result in any type of penalty?

Stan suggested requiring the appellant to list in his notice of appeal all the people whose interests could be affected by the appeal, and the Board could make a decision as to whether any of those people should receive notice. Tom raised the question of what happens if the appellant identifies a person he believes has an interest and serves the notice of appeal on that person, but the person chooses not to get involved at this time – what effect does this have on the person's rights with regard to this matter down the road? Mary Anne noted that this could raise issues of administrative finality.

Stan suggested adding language saying that if a party is served with notice of the appeal, he can intervene as of right within 30 days. Dennis saw a problem with listing all parties whose interests could be affected by an appeal because some

appeals, such as those involving a landfill permit, might simply say "everyone in the township."

Bernie saw a problem with how to define who gets notice. Howard suggested revising the rule to deal with specific situations rather than trying to make it generic. He suggested revising the rule to require service on the mining company in the case of water loss and the municipality and municipal authority in the case of a sewage facilities plan revision. As for the question of whether these entities should be automatic parties, Howard recommended adopting Stan's suggestion of allowing them to intervene as of right within 30 days.

Tom suggested that the following language be added to 1021.51(g):

> (4) When an appeal involves a decision under the Sewage Facilities Act, an affected landowner, the municipality and its municipal authority, if applicable, shall be served with the notice of appeal.

Stan also suggested adding the following language to 1021.51(g):

> (5) If the appeal involves a claim of subsidence damage or water loss under the mining statutes, the mining company shall be served with the notice of appeal.

Howard suggested that Mike and Dennis have their colleagues at DEP review the proposed revisions and consider whether there are any other similar situations that should be covered by the rule. If so, they will prepare a draft of further revisions for the next meeting.

The Committee agreed there should be a rule allowing intervention as of right for the situations described above. The new rule will be added after the current rule on intervention at 1021.62. Rule 1021.62 will be renamed "Permissive Intervention," and

the new rule will be captioned "Intervention as of Right." Dennis proposed the following language for the new rule:

> Anyone required to be served with a notice of appeal under § 1021.51(g)(4) and (5) may intervene as of right by filing a notice of intent to intervene within 30 days after receipt of the notice of appeal.

Stan agreed to look at language in the Municipalities Planning Code and forward it to Mary Anne and Don to be reviewed at the next meeting.

**Rule 1021.32 – Service on Other Parties:**

At the last meeting, the issue arose as to whether the Board's rules on service should be revised to specify the manner of service. This issue came up because parties sometimes serve other parties in a different (i.e. slower) manner of service than they do the Board. Manner of service was dealt with separately in the newly drafted rules on special actions. Howard suggested the following language be added as subsection (c):

> When a document is served on the Board by overnight mail, it shall be served by overnight mail on the parties. When a document is served on the Board by personal service, it shall be served by overnight mail on the parties.

Mary Anne will prepare a draft of the final language for the next meeting.

Dennis questioned whether subsection (b) (dealing with requests for expedited disposition) was still necessary if the new language above were added. Stan felt (b) was still necessary since (b) primarily deals with situations where parties are asking for a supersedeas or other expedited ruling.

**Adjournment and Next Meeting:**

The meeting adjourned at approximately 1:30 p.m. The next meeting will take place on Thursday, January 10, 2002, at 10:30 a.m.

**Appendix A**
**Proposed Rule on Prehearing Procedure**
**(November 8, 2001)**

**§ 1021.81. Prehearing procedure**

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing**, among other things,** that:

(1) Discovery shall be [concluded] **served** within 90 days of the date of the prehearing order.

(2) The party with the burden of proof shall serve its [expert reports and] answers to all expert interrogatories within [120] **150** days of the date of the prehearing order. The opposing party shall serve its [expert reports and] answers to all expert interrogatories within 30 days after receipt of the [expert reports and] answers to all expert interrogatories from the party with the burden of proof.

(3) Dispositive motions in a case requiring expert testimony shall be filed within [180] **210** days of the date of the prehearing order. If neither party plans to call an expert witness, dispositive motions shall be filed within [150] **180** days after the filing of the appeal unless otherwise ordered by the Board.

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(e) Subsection (d) [supplements] **supersedes** 1 Pa. Code § 35.121 (relating to initiation of hearings.)