ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of March 9, 2006

Attendance:

The Environmental Hearing Board Rules Committee met on March 9, 2006 at 10:15 a.m. Attending the meeting were Committee Chair Howard Wein, Susan Shinkman, Maxine Woelfling, Dennis Strain, Stan Geary, Phil Hinerman, Tom Scott and Brian Clark (by teleconference). Attending on behalf of the Board were Environmental Hearing Board Chief Judge and Chairman Michael L. Krancer and Judge Bernie Labuskes. Senior Assistant Counsel MaryAnne Wesdock took the minutes.

Approval of Minutes:

On the motion of Ms. Woelfling, seconded by Mr. Strain, the minutes of the November 10, 2005 and January 12, 2006 meetings were approved.

Default Judgment:

The Committee reviewed a proposed rule authorizing the Board to enter default judgment where a defendant fails to answer a complaint. The proposal differed from the language recommended at the January 12, 2006 meeting that had authorized the Board to enter default judgment without a trial on the amount of a civil penalty where the penalty was a "sum certain." Judge Labuskes noted his concern that the rule proposed at the January 12 meeting lessened the Board's authority to enter default judgment since a civil penalty is never a "sum certain." He explained that holding a trial in such a case is ineffective since only the Department is present. He felt the Board should have the discretion to determine whether a trial was necessary as to the

amount of the penalty. He noted that the Board was not likely to enter default judgment if there were any activity by the defendant in response to the complaint.

Mr. Hinerman asked whether the Department of Environmental Protection would want a trial as a further stamp of approval on the amount of penalty requested, and Judge Labuskes noted that the Department could ask for a trial if it felt one were necessary.

On the motion of Mr. Strain, seconded by Mr. Clark, the Rules Committee approved a proposed default judgment rule as set forth in Annex A to the minutes. Judges Krancer and Labuskes were in agreement with the proposed rule.

Civil Suspense Docket:

At the January 12, 2006 meeting, the Committee had reviewed a letter from Attorney David Mandelbaum asking the Board to consider promulgating a rule allowing appropriate cases to be placed on a suspense docket similar to the practice in federal civil court. Based on discussion by Judge Krancer and several members of the Committee, it was determined that there were other ways to address the issues raised by Mr. Mandelbaum rather than the creation of a suspense docket. In addition, Mr. Clark noted that the idea of a suspense docket had been discussed several years ago by the Rules Committee and had been rejected. Judge Michelle Coleman agreed to review the prior minutes that included that discussion and produce them for the Committee to review. It was agreed that, based on the discussion at the January 12, 2006 meeting as well as the earlier discussions noted by Mr. Clark, Mr. Wein would compose a letter to Mr. Mandelbaum advising him of the Committee's decision.

Further discussion was held at the March 9 meeting regarding this topic. The consensus of the Committee remained the same. Mr. Scott noted that the idea of a suspense docket

appeared to be a solution looking for a problem, to which Judge Krancer agreed. Mr. Wein will draft a letter to Mr. Mandelbaum to be reviewed by the Committee at the next meeting.

Prepayment of Penalties:

In the most recent rules package promulgated by the Board, rule 1021.54 (dealing with prepayment of civil penalties) was deleted due to the fact that it required prepayment of penalties to be made to the Board, contrary to the requirement of various statutes that required prepayment to be made to the Department in the case of an appeal of a civil penalty assessment.[1] After publication of the rule change, it was discovered that another subsection of the rules, 1021.51(f), also makes reference to the prepayment of penalties and, therefore, required revision.

Mr. Strain and Ms. Shinkman reported on the status of setting up a system at the Department for collection of prepayments and appeal bonds. They will report on the logistics at the next Rules Committee meeting. Mr. Strain noted that the notice of appeal rights in the various penalty assessment forms the Department uses will need to be revised because it currently states that prepayments are to be made to the Board. Mr. Wein suggested that the prepayments should be sent to the same person at the Department who receives copies of notices of appeal.

Ms. Wesdock advised the Committee that the changes to rule 1021.51(f) would not need to go through the entire rulemaking process but could be completed as emergency or final-omitted rulemaking, and she would confirm this with the staff at the Legislative Reference Bureau.

Mr. Scott questioned whether the Air Pollution Control Act should be amended since it appeared to be the only statute that required prepayment to be made to the Board. Ms. Woelfling

[1] The majority of statutes authorizing the assessment of penalties require prepayment to be made to the Department; however, the Air Pollution Control Act requires prepayment to be made to the Board.

expressed a concern that opening the statute for review could lead to other changes not anticipated by the Rules Committee.

Mr. Hinerman questioned what the procedure would be if a civil penalty were assessed under both the Air Pollution Control Act and another statute. It was agreed that the rule should contain a comment saying if a penalty were assessed under more than one statute, the appellant should ensure that payment was sent to the proper place. Mr. Hinerman felt that even if the penalty assessment contained a breakdown of how much was being assessed under the Air Pollution Control Act and how much was being assessed under a statute that required prepayment to be made to the Department, people would not want to have to file prepayments in two separate locations. Mr. Strain noted that most assessments under the Air Pollution Control Act were done under only that statute.

It was noted that the address of the Department's Office of Chief Counsel was contained on the notice of appeal form but not in the Board's rules. Ms. Shinkman stated that it was not uncommon for people to try to file their appeals with the Department and then be referred to the Board for proper filing. Requiring prepayments to be made to the Department, with appeals going to the Board, complicates the matter further.

After further discussion, it was agreed that the subsections in 1021.51 would remain the same, that the prepayment language would be moved to rule 1021.54 and that subsection (f) of 1021.51 would refer to 1021.54. On the motion of Mr. Scott, seconded by Mr. Hinerman, the Committee approved the changes to 1021.51 (f) as set forth in Annex A. On the motion of Ms. Woelfling, seconded by Mr. Geary, the Committee approved the changes to 1021.54. Ms. Wesdock will circulate the language for a vote prior to the next meeting.

Mr. Strain suggested that the language of 1021.54 also state that the check be made payable to the Commonwealth of Pennsylvania. Ms. Woelfling suggested that this language be included in the assessment rather than the rule. Ms. Woelfling also noted that a change should be made to 1021.55 so that it referred to the proper subsection of the rules.

The proposed amendments to rules 1021.51(f), 1021.54 and 1021.55 are set forth in Annex B. Ms. Wesdock will circulate the proposed changes for a vote and will thereafter begin the process of getting the rule changes promulgated.

Withdrawal Without Prejudice:

Mr. Strain circulated a proposed rule for withdrawal of appeals without prejudice. Ms. Wesdock also circulated minutes from prior meetings where this issue had been discussed.

Mr. Strain explained that this issue arises in a number of contexts, such as the following:

- DEP sends a letter stating that the use of unclean fill requires a permit and the operator appeals. Both parties agree to address the issue when the Department rules on the pending permit application.
- DEP issues a TMDL and argues that the matter is not ripe until DEP applies it to individual permit applications.
- DEP issues a permit based on outdated information. The permittee is developing new information that will be used in a revision of the permit.
- DEP issues a permit under current requirements, knowing that either DEP or EPA will be changing the requirements within the next year.
- DEP issues an order and the operator complies but files a protective appeal.

He stated that the proposed rule seeks to accomplish the following three objectives:

- Allowing the parties to agree to a withdrawal without prejudice;
- Defining the effect of a withdrawal without prejudice;
- Allowing the parties to agree on the issues that will be preserved.

The language proposed by Mr. Strain was as follows:

Rule 1021.142 Withdrawal Without Prejudice

(a) Upon agreement of all parties, an appellant may withdraw an appeal without prejudice.

(b) Except as agreed by the parties under subsection (c), when an appeal is withdrawn without prejudice the withdrawal of the appeal shall have no effect upon the appellant's ability to raise, in future proceedings, any issue raised in the withdrawn appeal.

(c) Any agreement by the parties that limits the issues that may be raised or that determines the finality of the action being appealed, will be binding in future proceedings.

Mr. Hinerman suggested that (b) contain language similar to that in rule 1021.74 regarding "legal objections" and "denial of facts." He also asked what effect this rule would have on intervenors, to which Mr. Strain responded that a withdrawal without prejudice would need the approval of an intervenor. Mr. Geary recommended that subsection (b) state that the withdrawal shall have no effect on "the ability of any party" to raise issues in the future, not just the appellant.

Judge Labuskes asked whether this rule would allow parties to reinstate a pre-existing appeal and voiced his concern that the language of the rule should not give parties that impression. Since the Board's jurisdiction is dependant on the Department taking an action, it was his opinion that parties could not reinstate a pre-existing appeal that had been withdrawn. Mr. Hinerman suggested that the Board could have a procedure similar to that in federal court that allowed parties 90 days in which to reopen a case if a deal had not been reached. Mr. Wein noted that the Board's rules could state a withdrawal would not become final for 90 days.

Judge Labuskes felt it was important that the rule not give parties any impression that a withdrawn appeal could be reinstated. Mr. Scott noted that the words "withdrawal without prejudice" generally mean that a party can re-file so long as the statute of limitations has not run. He suggested that it might be necessary to change the terminology.

Mr. Strain noted that in the case of the Department withdrawing its order, the rule would not apply. A discussion ensued regarding the purpose of the rule to preserve the status quo until a future event occurred. At this point, Mr. Clark left the meeting for another matter.

A majority of the Committee thought it would be helpful for the rule to contain a comment stating that a party could not re-file an appeal that had been withdrawn in order to remove the concern voiced by Judge Labuskes.

A discussion ensued regarding administrative finality and the language "any issue raised in the withdrawn appeal" in subsection (b). Ms. Woelfling noted that (b) appeared to allow parties to raise issues that would otherwise be barred by administrative finality. It was suggested that this language be amended to read "any issue of law or fact raised or that could have been raised in the withdrawn appeal."

On the motion of Mr. Hinerman, seconded by Mr. Geary, the Committee voted to approve the rule drafted by Mr. Strain with the following two changes:

1. Amend (b) to read as follows: "Except as agreed by the parties under subsection (c), when an appeal is withdrawn without prejudice the withdrawal of the appeal shall have no effect upon the ability of any party to raise in future proceedings any issue of law or fact raised or that could have been raised in the withdrawn appeal."
2. Add a comment stating that the rule did not allow a party to re-file an appeal that had been withdrawn.

The rule, as approved, appears in Annex C to the minutes.

Next Meeting:

The next meeting of the Rules Committee is Thursday, May 11, 2006 at 10:15 a.m.

Annex A

§ 1021.74. Answers to complaints.

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(d) A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made as set forth in § 1021.76 (relating to entry of default judgment), all relevant facts in the complaint may be deemed admitted and default judgment may be entered [as to liability]. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

§ 1021.76. Entry of default judgment. (New rule)

(a) The Board, on motion of the plaintiff, may enter default judgment [as to liability] against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.

(b) The motion for default judgment shall contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least ten days prior to filing the motion.

(c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.

(d) Where default judgment is sought in a matter involving a complaint for civil penalties, the Board may assess civil penalties in [an] the amount [to which] of the plaintiff's claim or may assess the amount of the penalty [is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the civil penalties shall be assessed] at a trial at which the issues shall be limited to the amount of the civil penalties.

Comment: This rule is modeled after Pa.R.C.P. 237.1 and 1037.

Annex B

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 (relating to 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 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.

(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 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.

(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 more than one statute, an appellant shall follow the procedures set forth in the statute.

1021.55. Hearing on inability to prepay penalty.

(a) If an appellant submits 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.

Annex C

§ 1021.142. Withdrawal without prejudice.

(a) Upon agreement of all parties, an appellant may withdraw an appeal without prejudice.

(b) Except as agreed by the parties under subsection (c), when an appeal is withdrawn without prejudice the withdrawal of the appeal shall have no effect upon the ability of any party to raise, in future proceedings, any issue of law or fact raised or that could have been raised in the withdrawn appeal.

(c) Any agreement by the parties that limits the issues that may be raised or that determines the finality of the action being appealed will be binding in future proceedings.