ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of January 8, 2009

Attendance:

The Environmental Hearing Board Rules Committee met on January 8, 2009 at 10:15 a.m. In attendance were the following committee members: Chair Howard Wein, Vice-chair Maxine Woelfling, Jim Bohan, Brian Clark, Stan Geary, Phil Hinerman, Tom Scott and Susan Shinkman. Attending on behalf of the Board were the following: Chairman and Chief Judge Tom Renwand, Judge George Miller and Counsel Andy Bockis and Maryanne Wesdock

Approval of Minutes:

On the motion of Mr. Clark, seconded by Mr. Bohan, the minutes of the September 11, 2008 meeting were approved.

IRRC Comments:

The Committee discussed the comments of the Independent Regulatory Review Commission (IRRC) to the Board's proposed rule revisions (#106-9).

Revisions to Rule 1021.51(j) and Comment to rule (re Schneiderwind issue):

IRRC objected to the proposed revisions to rule 1021.51(j) as expanding the Board's jurisdiction.

Judge Miller noted that the IRRC comments confused personal jurisdiction with subject matter jurisdiction. While the Board may not have *subject matter jurisdiction* over a case where the Department of Environmental Protection (Department) has exercised prosecutorial discretion (according to the *Schneiderwind* decision), that does not mean the Board may not exercise personal jurisdiction over a third party whose rights are affected by an appeal of that matter. In other words, simply because it may be argued that the Board does not have jurisdiction over an

issue in the case due to prosecutorial discretion, it does not mean that the Board does not have jurisdiction over the person making that argument in the first place.

Judge Renwand agreed, noting that Party A and B may be in front of the Department initially when the Department makes its decision, and the Board is placed in a difficult position. If Party A appeals and Party B is not a party to the appeal, the Board is impermissibly denying Party B its right to due process, according to the *Schneiderwind* ruling. But, if the Board attempts to include Party B in the proceeding, IRRC then feels that the Board is impermissibly expanding its jurisdiction.

Ms. Wesdock noted that there is a new chief counsel at IRRC, Leslie Johnson, replacing Mary Wyatte who served as chief counsel for several years and with whom the Board had dealt on previous rules packages. The IRRC staff attorney handling the current rules package is Heather Emery. Mr. Clark suggested scheduling a meeting with IRRC and explaining the Board's function and operation. Ms. Shinkman echoed that sentiment, noting that Rick Mather, DEP Regulatory Counsel, had recommended a meeting with IRRC. It was agreed that Judge Renwand and Ms. Wesdock should attend the meeting.

The Committee members and Board also agreed not to contest IRRC's disapproval of the last sentence of subsection (j) and agreed it could be removed from the rule and placed in the comment and further clarified. That sentence reads:

> If a recipient of an action pursuant to subsections (h)(2), (h)(3) or (h)(4) elects not to intervene as of course following service of notice of an appeal, said recipient's right to appeal from the Board's adjudication in the matter may be adversely affected.

The comment currently reads:

> *Comment*: Subsection (j) of this rule was amended in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

Rule 1021.54a - Prepayment of penalties

IRRC expressed a concern that the rule did not include requirements for a "verified statement" and that the comment (stating that the procedures set forth in each statute should be followed if a penalty is assessed under more than one statute) should be incorporated into the rule.

As to the second concern, the Committee agreed to delete the first sentence of the comment and move the last sentence to the rule, making it a new subsection (c), which would read: "If a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute."

As to the concern about verified statements, there was confusion over the precise nature of IRRC's question, since "verified statement" is defined in the Pa. Rules of Civil Procedure. It was unclear whether IRRC wanted a definition of "verified statement" or simply had a question about the wording of subsection (c) (which would become subsection (d) under the revision proposed in the previous paragraph.) That section reads:

> 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.

The placement of this sentence in subsection (c) may look like it is an additional requirement to what is already set forth in subsections (a) and (b).

A definition of "verified statement" is contained in Pa. R.C.P. 76, as well as in the Rules of Appellate Procedure at R.A.P. 102. Ms. Shinkman suggested that in our response to IRRC's comments, the Board should state that it believes the definition of "verified statement" is clear, but will agree to reference Pa. R.C.P. 76 in the rule or paraphrase it, if IRRC believes this is necessary.

Ms. Wesdock will rewrite the language of subsection (c) and move it to (a) and (b). It will state as follows: "When an appellant submits a verified statement of inability to prepay, a copy shall be included with the notice of appeal."

Rule 1021.76a – Default judgment

IRRC requested further detail as to the procedure for conducting a hearing on the amount of the default judgment, notice and objections. Additionally, Mr. Scott pointed out that the word "sought" in line one should be changed to "entered." The Committee and Board agreed to add to subsection (d) the following language:

> (d) Where default judgment is **[sought] entered** in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim or may assess the amount of the penalty following a**n evidentiary** hearing **as directed by the Board** at which the issues shall be limited to the amount of the civil penalties.

Rule 1021.96a – Expedited hearing

IRRC took issue with the use of the word "rare" in subsection (d), as not establishing a binding norm.

Mr. Clark felt it was necessary to include this language in the regulation in order to give practitioners the understanding that expedited hearings will not be routinely granted. He also

pointed out that if the word "rare" is deleted in the final form regulation, some explanation will need to be given.

Ms. Woelfling suggested that the language could simply become a part of the case law, as the Board begins to get more motions for expedited hearing after the rule goes into effect. Mr. Wein expressed the viewpoint that there was a good argument for placing the language in a comment to the rule since IRRC acknowledged it was not a "standard." Mr. Bohan suggested using the word "extraordinary" and the Committee noted that this term had been previously considered and rejected based on case law explaining that term.

Mr. Clark preferred keeping the language of subsection (d) in the rule, but the consensus of the Committee and the Board was to place the language in a comment.

Rule 1021.141 – Withdrawal without prejudice

Ms. Wesdock explained the genesis of the rule revision. Prior to 2002, the Board's rules stated that a withdrawal of appeal "shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board." The rule was deleted in 2002, and a comment was added as follows:

> Comment: The prior rule at § 1021.120(b) [prior to renumbering of the rules] authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule.

The revision appearing in the current rules package was an attempt to clarify that parties may come to an agreement as to withdrawals without prejudice.

IRRC commented that the rule should explain whether the Board may approve a withdrawal without prejudice over the objection of a non-moving party. Ms. Wesdock expressed a concern that the proposed rule, as written, gives the impression that a withdrawal without prejudice requires the agreement of the parties and defeats the purpose of the 2002 revision,

which was to allow the question to be decided on a case-by-case basis. Additionally, she felt that the proposed rule was in conflict with the Board's September 11, 2008 opinion in *Upper Gwynedd Township v. DEP*, authored by Judge Labuskes. Andy Bockis, Judge Labuskes' assistant counsel, expressed the opinion that the proposed rule was not necessary since the case law, and in particular, *Upper Gwynedd*, addresses the question of when an appeal may be withdrawn without prejudice. He felt that the proposed rule simply gives parties notice of how an appeal could be withdrawn without prejudice. Mr. Scott noted that the proposed rule does allow the parties to control what will occur in the future, as to the question of finality.

The majority of the Committee did not have an issue with the wording of the proposed rule but recognized the concerns expressed by Ms. Wesdock and Mr. Bockis. Mr. Bohan suggested holding off on finalizing the proposed rule, in order to see if any issues develop that would clarify whether the rule is necessary. The Board has two years in which to publish a proposed rule as a final regulation.

Mr. Scott moved to withhold the proposed rule from this rules package in order to further address whether it is necessary or whether the language should be changed. Mr. Clark seconded the motion. All were in favor. Ms. Wesdock will monitor the two-year timeframe in which the Board has to publish the rule.

Subpoenas:

Mr. Bohan had noted at the last meeting that the Board has no provision dealing with a subpoena requesting documents without the person testifying. He revised the current rule to add a reference to Pa. R.C.P. 4009.21 – 4009.27 dealing with this issue. On the motion of Ms. Woelfling, seconded by Ms. Shinkman, the revision was approved.

Filing Uniformity:

The proposed rule on filing uniformity, requiring compliance with Pa. R.C.P. 204.1, was rejected in favor of a rule that paralleled the filing uniformity requirements of the General Rules of Administrative Practice and Procedure. Based on comments received at the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section meeting on October 29, 2008 and telephone calls to Ms. Wesdock, it was determined that some of the Board's own forms did not comply with Pa. R.C.P. 204.1, and specifically the three inch top margin requirement.

Because the new proposed rule requires double spacing, and Ms. Woelfling pointed out that most notices of appeal are single spaced, it was agreed that the rule should state that "pleadings and legal documents" should be double spaced. A notice of appeal is not a pleading and is not defined in the rules as a "legal document."

Upon the motion of Mr. Clark, seconded by Ms. Shinkman, the new proposed rule was adopted.

The new proposed rule is attached at the end of the minutes.

Electronic Filing:

Mr. Bockis presented a proposed revision to Rule 1021.32(f) regarding filing. The proposed revision would allow parties to electronically file exhibits, with the exception that pre hearing exhibits must also be filed in hard copy. The current rule only requires hard copies where the number of pages is over 50. On the motion of Mr. Hinerman, seconded by Mr. Geary, the proposal was approved. A copy of the proposed rule revision is attached at the end of the minutes.

General Permits:

Mr. Bohan gave a brief overview of his research regarding general permits. Discussion of general permits and appealability was deferred to the next meeting. In the interim, it was suggested that the Committee review recent Board opinions dealing with this issue.

The meeting was adjourned at 12:15 p.m.

Next Meeting:

The next meeting is scheduled for Wednesday, March 18, 2009, at 10:15 a.m.

Revisions to 25 Pa. Code § 1021.32

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(f) Hard copy of any electronically filed legal document which exceeds 50 pages in length must also be filed with the Board in accordance with subsections (a) and (c) and § 1021.37 (relating to the number of copies). Exhibits to legal documents, *with the exception of those filed pursuant to § 1021.104(a)(7) (relating to prehearing memorandum)*, may be filed and served either electronically or by hard copy in accordance with the sections in this chapter relating to filing and service. *Exhibits to legal documents filed pursuant to § 1021.104(a)(7) (relating to prehearing memorandum), if filed electronically, must also be filed by hard copy with the Board in accordance with subsections (a) and (c) and § 1021.37 (relating to the number of copies).* If these requirements are met by hard copy of exhibits, they must be sent to the Board ….

(h) Documents filed with the Board, other than exhibits, shall be typewritten on letter size paper (approximately 8 to 8 ½ inches by 10 ½ to 11 inches) and pages after the first shall be numbered. Legal documents, as defined in § 1021.2 (relating to definitions), shall be double spaced, except that footnotes shall be single spaced and quotations in excess of a few lines shall be single spaced and indented. Photocopied documents will be accepted as typewritten, provided that all copies are legible. Failure to comply with this subsection shall not result in the dismissal of a filing, but the Board may request the party to resubmit the document in proper form.