ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of January 17, 2002

Attendance:

The Environmental Hearing Board Rules Committee met at 10:30 a.m on Thursday, January 17, 2002, with Chairman Howard Wein presiding. In attendance were Stan Geary, Mike Bedrin, Dennis Strain, Maxine Woelfling, Tom Scott and Terry Bossert. Tom Renwand, Michelle Coleman and Mary Anne Wesdock attended on behalf of the Board.

Approval of Minutes:

On the motion of Dennis Strain, seconded by Tom Scott, the minutes of the November 8, 2001 meeting were approved.

Report on Current Rules Packages:

Mary Anne Wesdock reported on the status of the current rules packages. Rules package 106-6 (reorganization, electronic filing, withdrawal of appearance, reconsideration and certain other minor revisions) was published as proposed rulemaking in the November 10, 2001 issue of the Pennsylvania Bulletin. While no comments were received from the public, IRRC had some minor clarifications to the definitions of "electronic filing" and "registration statement." The Board responded in writing to IRRC's comments and is waiting for approval before beginning the steps for final rulemaking. Tom Scott suggested having computer terminals set up at the Environmental Law Forum for electronic filing demonstrations. Mary Anne will check with Bill Phillipy.

Rules package 106-7 (dispositive motions, attorney fees, withdrawal of appeals, signing and special actions) was sent to the Office of General Counsel for approval on January 14, 2002. Howard suggested adding any rules approved at the January 17 meeting to the rules package. Tom Scott agreed that practitioners would prefer to see large blocks of changes to the rules, rather than receiving changes in piecemeal fashion. The Committee agreed. Michelle Coleman contacted the Office of General Counsel, and because they had not yet begun their review of the rules package, they agreed to hold it for further revisions. Mary Anne will prepare the revised rules package and set up a public meeting for the judges to vote on the revisions.

Revisions to Rules on Prehearing Procedure (1021.81) and Prehearing Memoranda (1021.82) pertaining to expert reports:

At the November 8, 2001 meeting of the Rules Committee, Bernie Labuskes recommended revising rule 1021.81(a) to eliminate the requirement of producing an expert report where one is not requested by the opposing party. The Rules Committee made suggested revisions to rule 1021.81(a) that were subsequently considered by the Board. Because a majority of the judges prefer to have expert reports filed with the Board if such reports are prepared, the Board proposed alternate revisions to rules 1021.81(a) and 1021.82. These revisions would allow parties to serve expert reports in lieu of answers to expert interrogatories and would require parties to file expert reports with their prehearing memoranda if such reports are prepared.

The Board's proposed revision to 1021.81(a)(1) was as follows:

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

(1) **All** discovery, **including any discovery of expert witnesses,** shall be **[concluded] served [within] no later than** 90 days of the date of the prehearing order **except as set forth below with respect to experts.**

Terry questioned the necessity of the last phrase "except as set forth below with respect to experts" since subsection (1) deals only with *service* of discovery, which is the same for all interrogatories, including expert interrogatories. The Committee recommended that the last phrase be deleted. The Committee agreed with all other changes to rule 1021.81(a) as proposed by the Board.

The Committee next considered the Board's proposed revision to rule 1021.82(a)(5) as follows:

(a) A prehearing memorandum shall contain the following:

(5) **A copy of any report of any expert witness a party intends to call at the hearing or, if no such report exists,** a summary of the testimony of each expert witness.

Howard expressed the concern that a party could serve answers to expert interrogatories during discovery but then file an expert report with its prehearing memorandum that differed from the answers to interrogatories. Terry expressed a further concern that a party could file an expert report consistent with, but more detailed than, its answers to expert interrogatories; in that case, the opposing party would want to reopen discovery.

Tom Renwand explained that the intent of 1021.82(a)(5) was for the Board to receive a copy of whatever expert materials the parties had served on each other. In that case, Terry suggested that 1021.82 should require parties to attach answers to expert

interrogatories or an expert report to the prehearing memorandum, depending on which of these was provided during discovery.

Dennis suggested that the rule could require a party to provide a copy of an expert report or answers to expert interrogatories provided during discovery or, in the absence of expert discovery, a summary of any expert testimony. Howard questioned whether someone should be able to file an expert report if no expert discovery was propounded. Maxine noted that it would be a problem to allow a party to file his expert report for the first time with his prehearing memorandum. Tom Renwand explained that if the opposing party does not ask for an expert report it does not have to be filed with the Board; the Board wants to see it only if it has been served on opposing counsel. This avoids situations where an attorney objects to an expert witness' testimony as being outside the scope of his expert report and the Board has not seen the expert report.

Mike suggested that the filing of either an expert report or answers to expert interrogatories with the Board should be linked to discovery – whatever has been provided in discovery should be provided to the Board. The Committee agreed on the following language for 1021.82(a)(5):

1021.82. Prehearing memorandum

(a) A prehearing memorandum shall contain the following:

* * * * * * * *

(5) **For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under § 1021.81(a)(2). In the absence of answers to expert interrogatories or an expert report,** a summary of the testimony of each expert witness.

On Dennis' motion, seconded by Terry, the Committee voted in favor of the aforesaid changes to rules 1021.81 and 1021.82. Revised rules 1021.81 and 1021.82 are attached hereto as Appendix A.

Notice to Parties in Interest:

At the last meeting, the Committee discussed situations where a party in interest might not necessarily receive notice of the filing of an appeal. This has come up in two types of situations: 1) municipalities and municipal authorities who do not receive notice of appeals of denials of plan revisions under the Sewage Facilities Act and 2) mining companies in appeals of Department determinations that a water supply has not been affected. The Committee requested Dennis and Mike to ask their colleagues at the Department whether there were any other types of situations where this might occur.

Dennis reported on two possible situations: 1) third-party appeals under Act 2 and 2) third-party appeals of settlements under HSCA. The Committee felt that these situations would be covered by the Board's existing rule at 1021.51(g)(3), which requires appellants to serve copies of the notice of appeal on recipients of the action. Mike also pointed out that because the Board's rules require appellants to attach a copy of what is being appealed to the notice of appeal, the Board would be able to see all the parties in interest, and these situations would not slip through the cracks like those described above.

At the last meeting, the Committee had proposed the following additions to 1021.51(g):

> **1021.51. Commencement, form and content**
>
> (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:
>
> * * * * * * * *

> (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.
>
> (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.

Mike expressed a concern that the breadth of subsection (4) might be too large. The Committee recommended limiting its scope to Section 5 of the Sewage Facilities Act and changing "affected landowner" to "the proponent of the decision." Dennis also suggested that "the municipality and its municipal authority, if applicable" be changed to "any affected municipality and municipal authority."

Maxine noted that in subsection (5), it might be necessary to define which mining statutes fall under its purview. She also noted that there are other statutes in addition to those dealing with mining where water loss may be an issue, such as the Oil and Gas Act and the Storage Tank Act. Dennis also noted that water loss and subsidence would not be an issue under the Surface Mining Act but only in cases involving underground mining.

Tom Renwand stated that he saw subsection (5) as not only requiring that the mining company receive notice of the appeal but also requiring the mining company to be a party to the appeal. He gave as an example one of his cases that involved a claim of subsidence damage. The mining company was notified of the appeal but chose not to participate. The Pennsylvania Coal Association then requested leave to file an amicus brief. Although the case was resolved without going to a hearing, Tom noted that a mining company's lack of participation in such cases could create a problem. By not participating in the landowner's appeal, the mining company could then file its own

appeal of any subsequent action by the Department, as ordered by the Board, and, in effect, get two bites at the apple.

Stan disagreed with the requirement that a mining company served with notice in subsection (5) should automatically be made a party to the appeal. He noted that the scope of the Board's jurisdiction could not be expanded through its rules. Tom pointed to 1021.51(h), which states as follows: "The service upon the recipient of an action, as required by this section, shall subject the recipient to the jurisdiction of the Board as a party." Pursuant to this section, permittees automatically become parties in third-party appeals of permitting actions.[1] Tom suggested that the authority for (h) might also give the Board authority to make those entities notified under proposed subsections (g) (4) and (5) parties to an appeal. A question arose as to the source of (h) and Maxine noted that it existed before passage of the Environmental Hearing Board Act.

Tom Scott noted what he felt was a potential inequity with the rule if the notified entities were not required to be made parties to the appeal. Whereas there is a possibly fatal responsibility placed on the appellant to notify a mining company of an appeal under subsection (5), there is no requirement on the mining company to do anything once it is served. Tom Renwand noted that an appeal would not be dismissed for failure to notify a mining company under subsection (5). Rather, a notice to perfect would be sent to the appellant requiring notice to the mining company. Failure to perfect would result in the issuance of a rule to show cause.

Howard agreed with Tom Scott that there would be more of a burden on a landowner under subsection (5) if the mining company were not required to be a party to the appeal. If the mining company filed a subsequent appeal, the landowner would have

[1] Section (g)(3) of 1021.51 requires that "a recipient of the action" be served in third-party appeals.

the burden of intervening in the appeal. Thus, the landowner would be required to litigate his action twice – first in his own appeal and, then, as an intervenor in the mining company's appeal.

Dennis stated it was his opinion that the Commonwealth Court would not overturn a Board requirement that parties notified under subsections (4) and (5) must either intervene in the action or lose their right to appeal. Maxine questioned whether issue preclusion would apply. Dennis felt it would not apply if the entities notified under (4) and (5) were not parties to the action. Again, he stated he did not foresee the Commonwealth Court overturning the Board if the Board applied subsection (h) to the parties covered by (g) (4) and (5).

Stan stated there was an early decision by the Board holding that the Board cannot expand its jurisdiction by its rules. He suggested looking at the EHB Act to determine the scope of the Board's jurisdiction.

Tom Renwand felt this was not an issue of joinder but that of including an ongoing permittee in an action. Tom Scott felt the entities covered by (4) and (5) were similar to indispensable parties. Mike saw this as a matter of efficiency – not requiring the Board to have two hearings on the same matter.

Dennis felt the jurisdictional issue for (g) (4) and (5) was the same as for third-party appeals covered by (g) (3). However, Maxine noted that in third-party appeals, the Department sends a letter to the permittee telling it to defend the permit.

Tom Scott felt that if service on the entities covered by (4) and (5) is required, they should automatically become parties to the appeal. In that case, there would be no need for a rule on intervention as of right. Howard felt the Board should not expand on

what is currently covered by (g) (3). Maxine noted there is no practical difference between subsection (g) (3) and subsections (g) (4) and (5). Stan felt the Committee should look into the statutory authority for the rule.

The Committee agreed to recommend the addition of (4) and (5) to (g) without considering the application of (h) at this time. The scope of (5) was narrowed as follows: "If the appeal involves a claim of water loss or subsidence damage under either Section 5.2 or 5.5 of the Bituminous Mine Subsidence and Land Conservation Act, the mine operator shall be served with the notice of appeal."

On Stan's motion, seconded by Mike, the Committee recommended the adoption of subsections (g) (4) and (5), as set forth above. The Committee agreed to revisit the jurisdictional issue of subsection (h) at the next meeting.

Service by a Party:

At the last meeting, the Committee had considered revising rule 1021.32 (service by a party) to require that where a party files a document with the Board by overnight mail or in person, service on all other parties must be by overnight mail as well. This avoids parties filing documents with the Board by overnight mail while serving other parties by regular mail. The Committee recommended using the term "delivery" rather than mail to include Federal Express, UPS and hand delivery.

On Maxine's motion, seconded by Tom Scott, the Committee recommended the following revisions to rule 1021.32:

§ 1021.32. Service by a party

* * * *

(b) When a document is served on the Board by overnight delivery or personal service, it shall be served by overnight delivery on the parties.

(c) Subsections (a) **[and (b)] through (c)** supersede 1 Pa. Code 33.32 (relating to service by a participant).

Filing in Pittsburgh:

Tom Renwand explained that even though the Board's rules only provide for filing at the Board's office in Harrisburg, it would be more practical to allow attorneys in Pittsburgh to have the option of filing at the Board's office in Pittsburgh if they wish to do so. De facto filing already occurs in Pittsburgh. When parties hand-deliver documents to the Board's Pittsburgh office, the Board faxes a copy of the first page of the document to Harrisburg for docketing.

Maxine asked whether the Board envisioned having someone handle docketing in Pittsburgh as well as in Harrisburg. The Board does not envision this at this time.

Maxine recommended revising rule 1021.30 (filing) as follows:

§ 1021.30. Filing

(a) Documents filed with the Board shall be filed at its **offices [headquarters….]**

Maxine recommended simply using the term "offices" rather than specifying the Harrisburg and Pittsburgh addresses in the event that either or both of the addresses should change in the future.

Maxine moved for the adoption of the amendment to rule 1021.30 as set forth above. Stan seconded. All were in favor.

Next Meeting:

The next meeting will take place on **Thursday, March 14, 2002** at **10:30 a.m.**

Appendix A

§ 1021.81. Prehearing procedure.

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

(1) **All** discovery, **including any discovery of expert witnesses,** shall be **[concluded] served [within] no later than** 90 days of the date of the prehearing order ~~except as set forth below with respect to experts~~.

(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. **The service of a report of an expert together with a statement of qualifications may be substituted for an answer to interrogatories.**

(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.)

§ 1021.82. Prehearing memorandum.

(a) A prehearing memorandum shall contain the following:

* * * * *

(5) **For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under § 1021.81(a)(2). In the absence of answers to expert interrogatories or an expert report,** a summary of the testimony of each expert witness.