ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Conference Call of July 20, 2005

Attendance:

The Environmental Hearing Board Rules Committee met by conference call at 2:00 p.m. on Wednesday, July 20, 2005. Rules Committee Chairman Howard Wein presided. Participating in the call were Maxine Woelfling, Susan Shinkman, Dennis Strain, Stan Geary, Joe Manko, Tom Scott, Phil Hinerman and Brian Clark. Participating on behalf of the Environmental Hearing Board (Board) were Chief Judge and Chairman Michael Krancer, Judge Thomas Renwand and Board Secretary William Phillipy. Attorney Matt Wolford participated in the portion of the call dealing with the prepayment of civil penalties. Board counsel MaryAnne Wesdock took the minutes.

Approval of Minutes:

On the motion of Ms. Woelfling, seconded by Mr. Clark, the minutes of the May 11 meeting were approved.

Prepayment of Civil Penalties: Rule 1021.54:

The Rules Committee addressed an issue raised by attorney Matt Wolford with regard to the prepayment of civil penalties. Under most environmental statutes that authorize the Department of Environmental Protection (Department) to collect a civil penalty, an appellant who wishes to challenge the civil penalty assessment or complaint is required to prepay the amount of the penalty within the thirty-day appeal period. Under all statutes except the Air Pollution Control Act, the prepayment is to be sent to the Department for placement in an escrow

account with the State Treasurer or bank.[1] Historically, payments were sent to various offices of the Department and were difficult to trace once the appeal was resolved; as a result, the Board began taking over the collection of the prepayments. This was done in part so that the Board had a record of whether the prepayment was made. Eventually a system was in place whereby prepayments were sent to the Board along with the notice of appeal, and the Board forwarded the payment to the Department's Division of Bonding and Licensing which in turn deposited the payment into a Commonwealth account. This led to the adoption of rule 1021.54 which specifies that prepayments of civil penalties are to be made to the Board. In the current rules package, the Committee had recommended adding a comment to rule 1021.54 saying that an administrative agreement existed between the Department and the Board for the handling of prepaid civil penalties.

The Rules Committee was asked to reconsider rule 1021.54 and the prepayment issue based on a concern raised by Matt Wolford. In a letter dated July 20, 2005, Mr. Wolford outlined a problem his client had experienced concerning the return of a civil penalty prepayment. His client had appealed a civil penalty the Department had assessed under section 1307 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1307. The case was settled for an amount less than the original assessment and Mr. Wolford sought the reimbursement of the balance of his client's prepaid funds plus interest.

Mr. Wolford pointed out two problems that he encountered during the prepayment and reimbursement process. First, he noted there was initial confusion over where the prepayment

[1] For example, *see* Section 605 of the Clean Streams Law, 35 P.S. § 691.605; Section 1307 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1307; Section 18.4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.18d; Section 17 of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.17; Section 21 of the Noncoal Act, 52 P.S. § 3321; Section 11 of the Coal Refuse Disposal Control Act, 52 P.S. § 30.61; Section 1704 of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.1704.

should be sent since Section 1307 of the Storage Tank Act states that payment is to be made to the Department, whereas rule 1021.54 states it is to be made to the Board. Second, when he sought the payment of interest on that portion of the civil penalty that was returned to his client, he was advised that interest is not paid on such funds, even though this is clearly required by the statute.

Upon further investigation, he discovered the following: First, even though the Storage Tank Act requires civil penalty prepayments to be placed in escrow, they are deposited into the Clean Water Fund. Second, prepayments that are returned to an appellant are not returned with interest, as is required by statute. Third, even though rule 1021.54 requires prepayments to be sent to the Board, the Board merely acts as a conduit for getting such funds to the Department for deposit; there is no written agreement in place between the Department and the Board for the handling of such funds.

Based on his experience, Mr. Wolford made the following observations and recommendations: First, the current system could subject the Board to a cause of action for mishandling personal property under 42 Pa. C.S. § 8522(b)(3). Second, he recommended that the payment of interest should be automatic.

A discussion ensued regarding rule 1021.54. Judge Krancer stated that 1021.54 was contrary to the statutory provisions on prepayment of civil penalties and he felt it should be deleted. Mr. Strain voiced a concern that it is important for appellants to know where to send the prepayment. Ms. Woelfling and Mr. Phillipy provided a history of how the current system arose and noted that in the past there was no single location within the Department where payments were collected for deposit. There is now a single entity within the Department for handling such funds.

Mr. Wein asked whether the Department considers the prepayment of a penalty to be a jurisdictional issue and Mr. Strain responded in the affirmative. Mr. Wein noted that it was not necessary for the Board to be the recipient of the prepayment, but simply to be notified of it. Judge Renwand noted that if a prepayment were not made, it would be brought to the attention of the Board by Department counsel. Ms. Wesdock suggested adding a box to the notice of appeal form whereby the appellant certifies that prepayment has been made in those instances where it is required. The idea of requiring the appellant also to provide a copy of the prepayment check was rejected as being unduly burdensome.

Ms. Shinkman asked what volume of cases at the Board involved the prepayment of penalties. Mr. Phillipy stated that it involved approximately 10-15 cases a year.

The Committee discussed whether the rule could be deleted as emergency rulemaking without having to undergo the entire rulemaking process. Ms. Wesdock advised the Committee of the criteria necessary for emergency rulemaking, and Ms. Shinkman stated that this situation did not appear to meet the necessary criteria.

Mr. Scott moved to delete subsection (a) of 1021.54 which requires prepayment to be made to the Board and to retain the language of subsection (b) which states that a bond shall be in favor of the Department except in the case of the Air Pollution Control Act. He also moved to amend the notice of appeal form to require a space for certification of prepayment. Mr. Clark seconded. No vote was taken. Mr. Geary and Ms. Woelfling noted that the rule, as revised, simply set forth what was already in the statute and it was not necessary to repeat it in the rule. Mr. Scott withdrew the motion and Mr. Clark withdrew his seconding of the motion.

Mr. Geary made a motion to amend rule 1021.54 to read "Prepayment of penalties should be made in accordance with the statutory requirements." Mr. Manko seconded. They did not

move for amendment of the notice of appeal form since they felt that was an internal administrative matter for the Board. Mr. Strain stated he would prefer to leave the rule as is and did not believe it was ultra vires. A vote was taken on the motion. All were in favor, except for Ms. Shinkman and Mr. Strain who were opposed.

Judge Krancer asked Ms. Shinkman and Mr. Strain why they preferred having the Board receive the funds. Mr. Strain felt that having one recipient in all cases made it easier to keep track of the funds. Judge Krancer and Mr. Wolford suggested this could still be accomplished at the Department's end.

After more discussion it was determined that it made more sense simply to delete rule 1021.54 than to revise it to say that payment should be made in accordance with the statutes.

There was further discussion on whether the deletion of rule 1021.54 could be done in the current rules package. Mr. Strain raised a concern that there would be no comment period, but Ms. Woelfling noted that the Independent Regulatory Review Commission (IRRC) had commented on the rule when the package had been published as proposed rulemaking.

Mr. Wein proposed that rule 1021.54 be deleted as part of the final rulemaking package in response to IRRC's comment. He recommended that the preamble to the final rulemaking state that the Rules Committee reviewed rule 1021.54 in response to IRRC's comment and that a majority of the Committee concluded the rule was ultra vires and recommended that it be deleted.

Mr. Phillipy asked whether the Board should set a specific date by which the collection of prepayment funds should no longer be handled by the Board but turned over to the Department. Judge Krancer noted this could not be done until the final rulemaking eliminating 1021.54 was

published. Mr. Phillipy offered his services to Ms. Shinkman and Mr. Strain to assist in the transition.

IRRC Comments on Proposed Rulemaking:

The Board requested that the Rules Committee review and approve the responses to IRRC's comments on the rules package. Ms. Wesdock distributed a written copy of the Board's responses to IRRC's comments. Mr. Geary made a motion to approve the Board's response, taking into account the earlier recommendation by Mr. Wein regarding rule 1021.54. Ms. Woelfling seconded. The Committee discussed the comments, in particular IRRC's concern over revising rule 1021.53 regarding amendment of appeals and complaints. Mr. Manko noted that the Committee had given the proposed revision a great deal of consideration and discussion when it was first proposed and he recommended continuing to support the revision. A vote was taken on the motion. The following voted in favor: Mr. Geary, Ms. Woelfling, Mr. Hinerman, Mr. Manko, Mr. Clark and Mr. Scott. Ms. Shinkman and Mr. Strain were opposed.

Filing in Offices Other than Harrisburg:

Mr. Manko asked whether there were plans to allow filing in the Board's Norristown office. Ms. Wesdock explained that the office is not staffed to allow filing at the present time. She also reported that the plans to have a formal filing office in Pittsburgh were to be placed on hold, also due to staffing. Ms. Wesdock provided an explanation of the staffing concerns in Pittsburgh that would not allow filing at the present time. On the motion of Mr. Manko, seconded by Mr. Hinerman, the Committee approved the Board's decision to hold off on revising rule 1021.32 to allow filing in Pittsburgh at this time.

Mr. Manko questioned whether the word "decision" in rule 1021.51(h)(2) should be replaced with "action," and it was determined that "decision" was the proper term. Mr. Manko also noted that the proposed revisions to rules 1021.94 and 1021.94a referred to "opposing party" and questioned whether it should be changed to "or parties." Ms. Woelfling noted that the rules of statutory construction include the plural form of the word in the interpretation.

Next Meeting:

The next meeting of the Rules Committee will be on September 15, 2005 at 10:15 a.m.[2] On the motion of Mr. Manko, seconded by Mr. Hinerman, the meeting was adjourned.

[2] Although the Committee would normally meet on September 8, the meeting was changed to the 15th due to a General Counsel conference on the 8th.