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

**Meeting of January 11, 2007**

**Attendance:**

The Environmental Hearing Board Rules Committee met on January 11, 2007 at 10:15 a.m. Committee Chairman Howard Wein presided. Committee members attending were as follows: Maxine Woelfling, Tom Scott, Dennis Strain, Phil Hinerman, Susan Shinkman and Joe Manko. Judge George Miller attended on behalf of the Board. Judge Tom Renwand and Senior Assistant Counsel MaryAnne Wesdock participated by teleconference. Chief Judge and Chairman Michael Krancer participated by teleconference for the discussion of filing uniformity and waiver.

**Minutes:**

On the motion of Ms. Woelfling, seconded by Mr. Scott, the minutes of the November 9, 2006 meeting were approved.

**Bylaws:**

The Committee discussed proposed revisions to the bylaws that would (1) allow members to designate alternates for purposes of voting and designating a quorum; (2) allow voting to take place by teleconference; and (3) allow transmission of the agenda for meetings by electronic transmission one week in advance of the meeting.

As to the first issue, designation of an alternate, Ms. Woelfling did not approve of the change. She felt that the number of Rules Committee meetings per year was not so onerous that members could not attend and that the designation of alternates was not in accordance with the selection of that person by the appointing authority.

Mr. Clark agreed with Ms. Woelfling's concerns and said that these issues had been discussed when the original bylaws were drafted. He also noted that Committee members may participate in meetings by telephone, which makes attendance easier.

Mr. Scott questioned whether alternates were permitted under the EHB Act as drafted. Mr. Clark and Mr. Strain noted that the designation of alternates could result in less consistency at meetings. Mr. Hinerman stated that he would not use the provision.

Mr. Clark asked whether it would be prudent to allow alternates for purposes of having a quorum but not for voting. The Committee felt this would not be advisable.

Ms. Wesdock expressed reasons for allowing the designation of alternates, most notably that it is often difficult to get a quorum for meetings and that, in many cases, it is not known whether there will be a quorum until the day before a meeting (and in some cases the day of the meeting). This can be a problem for people traveling to the meeting, particularly from a distance. It was determined that participation by teleconference should lessen that problem.

The consensus of the Committee was that alternates should not be permitted, but that members could attend meetings and vote by teleconference, if necessary. The Committee also agreed to allow electronic transmission of the agenda.

On the motion of Mr. Clark, seconded by Mr. Hinerman, the Committee voted as follows:

(1) The bylaws will not be revised to allow the designation of alternates.

(2) The bylaws will be revised in Article IX, Section A so as not to require a vote in person.

(3) The bylaws will be revised in Article X to allow the agenda to be sent electronically one week in advance of the meeting.

**Mandatory Certification for Discovery Motions:**

Mr. Hinerman explained the background of the proposed revision to Rule 1021.93 (Discovery Motions) that would require parties to confer or attempt to confer in an effort to resolve a discovery dispute before filing a motion to compel with the Board. The Board currently has no such requirement in place.

The Committee reviewed a draft rule prepared by Ms. Wesdock that is similar, but not identical to, the federal rule. Mr. Hinerman suggested one change – that the word "made" be changed to "filed."

On the motion of Mr. Hinerman, seconded by Mr. Strain, the following revision to Rule 1021.93(b) was approved:

**§ 1021.93. Discovery motions.**

(a) This section applies to motions filed to resolve disputes a rising from the conduct of discovery.

(b) **No discovery motion shall be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action.** Discovery motions shall contain as exhibits the discovery requests and answers giving rise to the dispute.

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**<u>Expedited Litigation</u>:**

At a prior meeting, Judge Renwand had explained the need for a rule on expedited proceedings since the Board sometimes receives requests for them. The Committee reviewed a draft of proposed rules prepared by Judge Miller, dealing with the topic of expedited litigation. (Copy attached to the minutes as Appendix A) The draft consisted of three proposed rules dealing with the following: (1) General Rule, (2) Contents of Petition for Expedited Hearing and (3) Conduct of the Hearing and Issuance of the Adjudication.

Before addressing the rules proposed by Judge Miller, Ms. Wesdock relayed comments provided by Appellants in a recent expedited proceeding held before the Board. One of the suggestions made by the Appellants was to allow written direct testimony of non-adverse witnesses. This is permitted under the Board's rules but is done infrequently. Providing written direct testimony of non-adverse witnesses is more common in other types of proceedings, e.g. before the Public Utility Commission. There was general agreement among the Committee that this proposal would be beneficial in cases of expedited litigation.

Another suggestion made by the Appellants was that there should be no limit on the number of requests for admissions and that there should be a shorter time frame for responding to the requests for admissions. There is no limit on requests for admissions, and Ms. Woelfling suggested that the shorter response time could be handled through a case management order.

Mr. Strain noted that proceedings before the Board become "expedited," in effect, when there are no discovery disputes or when such disputes are resolved expeditiously. Judge Renwand suggested that if discovery disputes are brought to the Board's attention promptly, oral argument could be held in an attempt to resolve them more quickly. Mr. Clark also suggested that parties could address discovery issues in a conference with the judge rather than filing discovery motions.

Mr. Scott asked whether "expedited litigation" actually gets a party to trial more quickly. In the two expedited cases that Judge Renwand has handled, both cases did get to trial much more quickly than the average case.

Judge Miller stated that he had previously not been a strong advocate of expedited proceedings, but explained that he had a case recently where expedited consideration was necessary. He recognized that it would be an unusual case where an expedited trial schedule

would be necessary but does see a need for it in some cases, particularly where it is in the interest of the public to have an issue resolved quickly.

Mr. Wein raised the question of whether the Board could request an expedited schedule *sua sponte* or whether it should be done only on the motion of a party. The consensus was that the Board could do it *sua sponte* but it would be unlikely where it had not been requested by a party.

Mr. Clark asked whether the Board would allow the filing of responses to the petition, and Judge Miller advised that the Board would likely issue a rule to show cause as to why the proceedings should not be expedited.

Judge Miller asked whether litigants prefer to have monthly status conferences to discuss their cases or simply contact the Board when there is a problem. The consensus was the latter, although Mr. Strain also pointed out reasons why more frequent conferences might be helpful even when there are no disputes among the parties.

Ms. Woelfling noted that in the General Rule drafted by Judge Miller, the criteria set forth in subsection (c) paralleled the criteria for a supersedeas. She was concerned that some of the factors, e.g. irreparable harm, might not fit into the context of expedited litigation and felt that a more elastic concept was needed.

The Committee considered revisions to the criteria set forth in subsection (c). Mr. Manko felt that the ability of the parties to be prepared for trial should be one of the criteria added to this subsection. Mr. Clark also felt that judicial economy should be a factor. Mr. Strain expressed a concern that this could encompass almost any case coming before the Board. Mr. Wein agreed with Ms. Woelfling's earlier concern about whether "irreparable" harm was an appropriate factor. Mr. Manko suggested changing it to "severity of harm."

Mr. Scott was concerned that the proposed rule, as drafted, focused entirely on the petitioner. Mr. Manko suggested that the criterion of "severity of harm" be changed to "severity of harm to the parties" as opposed to "the petitioner."

Mr. Strain noted that the size of the notice of appeal might be a factor to be considered in whether a matter should be expedited and that it might be more appropriate to allow expedited proceedings for appeals that are more limited in scope. Ms. Wesdock suggested that "complexity and manageability of the case" be added as a factor.

Ms. Shinkman noted that the *Wellington* case was very complex but was expedited, and it was agreed that complexity and manageability was simply one factor to be considered and that a decision to allow expedited proceedings would involve a balancing of all of the factors.

Mr. Scott expressed a concern that if a rule were adopted to allow for expedited proceedings it would increase exponentially the number of cases coming before the Board seeking expedited trials. Mr. Clark felt that the Board would not be utilizing the procedure very often; he noted that where all parties did not agree to expedited litigation, the Board would be more reluctant to agree to it. Judge Miller agreed with Mr. Clark, but was concerned that if the number of applications seeking an expedited trial increased, that could put more of a burden on opposing parties. Mr. Clark noted that it might also act to narrow the issues in the case, which would have a positive effect.

Judge Miller also expressed a concern that if one of the criteria to be considered is judicial economy, that might promote the idea of filing for expedited consideration even in cases where it would not normally be sought.

Mr. Strain noted that if the Board grants fewer or no extensions, it would result in an expedited proceeding without the need for a rule. Despite the concerns that the number of

applications would increase, Judge Renwand felt it would be beneficial to have a rule with guidelines. Mr. Hinerman stated that if a petitioner needs to show why he wants an expedited trial, he will need a rule setting forth the guidelines.

Ms. Wesdock suggested inserting a proviso in the rule that "in rare circumstances" the Board will consider a petition for expedited consideration. Mr. Scott suggested putting it in a note to the rule, or simply having a note on expedited proceedings as opposed to a rule. Mr. Clark stated he would prefer a rule and agreed that it should be limited to "unique and compelling" circumstances.

Ms. Woelfling suggested adding to subsection (a) of the General Rule the language "extraordinary or unusual circumstances" in order to alert practitioners that a request for expedited consideration is not something that should be filed in due course.

There was consensus that the draft rule dealing with Contents of Petition for Expedited Hearing was fine and needed no change.

As to the draft rule dealing with Conduct of the Hearing and Issuance of the Adjudication, Mr. Wein suggested inserting the right to file written direct testimony. In the alternative, Ms. Woelfling suggested adding it to the General Rule as a technique that could be used to expedite the proceeding.

Mr. Scott suggested that the person seeking expedited consideration be required to file a proffer of his case. Judge Renwand noted that in *Wellington* the party requesting the expedited proceeding was not the appellant but the petitioner and that it was not done because of likelihood of success on the merits but because of a construction deadline that had to be met. Mr. Wein and Ms. Woelfling expressed concern that the Board would not necessarily want to prejudge at that point and would not be in a position to do so.

Judge Miller asked whether the Committee wanted to keep the criterion of "likelihood of success on the merits" in subsection (c) of the General Rule. Judge Renwand felt that he would not feel comfortable saying that a petitioner was likely to succeed, especially in circumstances such as *Wellington*. He felt that this was an appropriate criterion to consider in a supersedeas context because there a party is seeking extraordinary relief. Where a party has simply requested an expedited trial on the merits he would not want to take into consideration whether a party was likely to win or lose and felt that was not a determining factor in whether a trial on the merits should be expedited.

Judge Miller will work on revisions to the rule and circulate them for the next meeting.

Ms. Wesdock suggested including this issue in the Environmental Law Forum hypothetical.

Mr. Wein suggested getting the rule as close to final form as possible before the Forum.

**Filing Uniformity:**

Ms. Wesdock explained that the Board would be requiring parties to comply with newly adopted Pa.R.C.P. 204.1 on Filing Uniformity and there was a notice to that effect on the Board's website. Judge Krancer had suggested that this should also be incorporated into the Board's rules.

Mr. Wein stated that the Committee had two options: simply reference Pa.R.C.P. 204.1 or adopt its language as a rule. Ms. Wesdock suggested simply referencing it. Mr. Hinerman noted that the appropriate location would be in Board Rule 1021.32.

On the motion of Mr. Scott, seconded by Mr. Clark, the Committee agreed to add subsection (h) to 1021.32 as follows:

**§ 1021.32. Filing.**

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**(h) Pleadings and other documents filed with the Board shall comply with Pa.R.C.P. 204.1.**

**Waiver of Issues:**

Mr. Strain brought to the Committee's attention a decision of the Pa. Supreme Court in *Goods v. Pennsylvania Board of Probation and Parole,* No. 144 MAP 2005 (Pa. December 27, 2006), which dealt with the subject of issue preservation and waiver in a matter involving the Pennsylvania Board of Probation and Parole (Parole Board). A brief summary of the case is as follows: The appellee, a state prisoner, had failed to raise the issue of timeliness of his parole revocation hearing at the hearing itself but subsequently raised it when seeking administrative relief from the Parole Board. The Parole Board found that the issue had been waived for not having been raised at the hearing itself. On appeal, the Commonwealth Court held that the issue of timeliness had not been waived. The Supreme Court affirmed, holding that the issue had not been waived but that the Parole Board could adopt a rule requiring issue preservation at the hearing level.

Mr. Strain felt that it might be useful to have a specific rule discussing issue preservation/waiver for Environmental Hearing Board proceedings. He stated his concerns as follows: Rule 1021.51 (Commencement, form and content) requires factual and legal objections to be listed in a notice of appeal but provides no penalty for not listing them. Rule 1021.53 (Amendments to appeals or complaints) provides a liberal amendment process but contains no provision limiting the party to the amended appeal. Rule 1021.104 (Prehearing memorandum) authorizes sanctions that include preclusion of testimony at trial but the sanctions are discretionary. Rule 1021.131 (Posthearing briefs) simply states that an issue that is not argued in

a posthearing brief *may* be waived. He stated that his concern was one of fairness – that if it is not specifically stated in the rules a party is not put on notice that his issue will be waived. He noted that there is case law to that effect but no rule.

Chief Judge Krancer stated his opposition to such a rule. He felt that the Commonwealth Court's recent decision in *Maple Creek Mining, Inc. v. Lang*, No. 650 C.D. 2006 and 693 C.D. 2006 (Pa. Cmwlth. December 28, 2006), clearly addressed the issue and there was no need to deal with it through a rule.

Ms. Wesdock pointed out that even though Rule 1021.131 uses the word *may* as opposed to *will*, that should be sufficient to put parties on notice. Judge Renwand stated that he preferred the current language of 1021.131; changing the word to *will* takes away from warning parties that their issue could be waived and makes it absolute, leaving no discretion to the Board. He also felt that the *Goods* case was specific to the intricacies of the Parole Board's system and was not applicable to the Environmental Hearing Board.

Mr. Strain questioned whether the word *may* in Rule 1021.131 was enough to result in a waiver of any issues not raised in a posthearing brief. Judge Miller pointed out that on appeal, the Commonwealth Court will decide whether it wants to address an issue not raised in the posthearing brief and will not be bound by the Board's rules. The same would apply for issues not raised in the notice of appeal.

Mr. Scott expressed his opinion that there are plenty of rules at every step of the Board process that deal with waiver and no further rules were necessary.

Judge Miller also pointed out that if the Board wishes to address an issue not raised by the parties, it must give the parties an opportunity to brief it.

Mr. Strain expressed the concern that if the waiver of an issue is not upheld on appeal, it puts the opposing party in the position of having to brief every issue, even ones that were waived. Judge Miller said he was not convinced that this was the effect of the *Goods* decision since that case dealt with the Parole Board's two-level procedural process, which differs from the procedure before the Environmental Hearing Board.

After the discussion, a majority of the Committee felt that no vote was necessary.

**Joinder:**

The issue of joinder came up at the last meeting during the discussion of the Board's recent amendments to Rule 1021.51 (Commencement, form and content) which require that "recipients of an action" be served a copy of the notice of appeal.[1] This generated a discussion of whether recipients of an action should automatically be made parties to the appeal, rather than simply allowing them to intervene as the rule currently reads.

The Committee reviewed decisions of the Commonwealth Court in *DEP v. Schneiderwind,* 867 A.2d 724 (Pa. Cmwlth. 2005) (which addressed the issue of a necessary party) and *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth. 1998) (which addressed the extent of the Board's powers).

Judge Miller stated that, based on *Schneiderwind*, the Board needs a rule to subject to the Board's jurisdiction a person who is operating under the terms of a permit and who will be adversely affected by the relief requested. He felt that if a joinder rule were limited to that context, it would be permissible.

Judge Miller felt that if Rule 1021.51 were revised to say that any adversely affected holder of a permit or license is automatically a party to the Board's action, that would resolve the *Schneiderwind* problem.

[1] A copy of Rule 1021.51(h), (i) and (j) are attached as Appendix B.

Judge Renwand summarized the problem that exists under the rule as currently drafted. The "recipients of an action" under subsections (h) (2) through (5), as well as "other interested parties as ordered by the Board" set forth in (h)(6), may intervene in the case but are not required to do so. Then, if an adverse ruling comes down from the Board, they get a second bite at the apple by appealing that decision to the Commonwealth Court. He stated that the Board needs a rule saying that if a person chooses not to participate in the Board proceeding, he may not come back and get a second bite at the apple at the appeal level. In other words, they should be barred from participating in any further proceeding challenging the ruling.

Ms. Woelfling questioned whether the Commonwealth Court would look favorably on such a rule. Judge Renwand felt that in light of *Pequea* and *Schneiderwind*, all prior decisions saying the Board has no power of joinder are suspect.

Ms. Wesdock pointed out that the Board already "joins" permittees in third party appeals and the same argument could apply to other recipients of an action listed in (h)(2) through (5). It was noted that historically in third party appeals, the Department requires the permittee to take an active role in defending the permit, which requires them to be a party to the appeal.

Ms. Woelfling noted that in the situations addressed in (h)(2) through (5), the Department has exercised its enforcement discretion as opposed to issuing a permit.

Mr. Scott suggested language saying that any party who is the recipient of an order and who receives notice of a proceeding and may intervene pursuant to Board Rules 1021.51(h) and (j) but chooses not to do so waives his right to challenge the action being appealed.

Judge Miller stated that an order to that effect issued in any cases involving the types of entities covered by (h)(2) through (5) may be stronger in the eyes of the Commonwealth Court

than a rule on waiver. He stated that if he were to address the situation in *Schneiderwind* again, he would issue such an order.

Mr. Scott pointed out that the issuance of an order as opposed to a rule puts the onus on the Board.

Judge Miller stated that if the language of 1021.51(h)(1) were revised, he would prefer it to read "adversely affected permit holder" which would expand its reach beyond simply that of third party appeals of a permit issuance. Mr. Hinerman suggested putting this language in subsection (h)(6) as opposed to the more general "other parties as ordered by the Board." He also suggested revising (i) to make all of the entities listed in (h) subject to the Board's jurisdiction and then dropping subsection (j).

Judge Renwand pointed out that it is not just permit holders who may not wish to participate in an appeal. He noted that in one of his cases the Department had ordered a mining company to replace a water supply and the landowner said he did not want to be a party to the appeal. This is the reverse of what is currently addressed in (h)(3).

Mr. Scott noted that a similar situation is addressed in hearings before the Zoning Hearing Board, i.e., if neighbors do not intervene they lose their right to challenge the decision. There is case law to that effect. Although the Municipalities Planning Code does not contain this provision, it requires that neighbors receive notice.

Judge Renwand suggested expanding (h)(3) to cover landowners. Ms. Woelfling and Mr. Hinerman proposed doing so for all of the categories in (h). Mr. Clark suggested leaving (h)(6) in place as a catchall.

Ms. Wesdock and Mr. Hinerman will prepare a draft of the revised rule for the next meeting.

**Topics for the Environmental Law Forum:**

Topics to be covered at the Environmental Law Forum will include the following:

- Joinder
- Expedited proceedings
- Electronic discovery

Mr. Clark made an excellent suggestion of providing a comment sheet for participants to write down suggestions, comments, questions and ideas for the Rules Committee in considering the proposed rules.

**Next Meeting:**

The next meeting is scheduled for **Thursday, March 8, 2007, at 10:15 a.m.**

## Appendix A

## EXPEDITED HEARING
## (Draft)

1021.____ General

(a) A petition for an expedited hearing may be filed at any time in either an Appeal or a Special Action.

(b) The Board may issue an order for an expedited hearing not withstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure at 25 Pa. Code Section 121.201, or the Pennsylvania Rules of Civil Procedure relating to discovery. Any such order may defer ruling on a dispositive motion until after the completion of the expedited hearing.

(c) In granting or denying such a petition the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

(1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete prehearing proceedings;
(2) Irreparable harm to the Petitioner;
(3) The likelihood of the Petitioner prevailing on the merits;
(4) The realistic need of the parties for extended discovery.

(d) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings.

1021. _____ Contents of Petition for an Expedited Hearing

(a) A petition for an expedited hearing shall state facts with particularity and shall be supported by one of the following:

(1) Affidavits based on personal knowledge or experience setting forth facts upon which the issuance of a petition for an expedited hearing may depend, or
(2) An explanation of why affidavits have not accompanied the petition if no affidavits are submitted with the petition for an expedited hearing.

(b) A petition for an expedited hearing shall state with particularity the citations of legal authority, if any, the petitioner believes form the basis for the grant of an expedited hearing.

1021.___ Conduct of the Hearing and Issuance of Adjudication

(a) Nothing contained in this rule shall limit the rights of the parties to a full hearing before the Board under the applicable rules of evidence with full rights of cross-examination of witnesses.

(b) Nevertheless, the Board may limit the number of witnesses or the subjects of examination in order to avoid time-wasting duplication of evidence.

(c) After the conclusion of the hearing the Board shall direct the prompt filing of requests for findings of fact, conclusions of law or other briefs to enable it to render a prompt and just disposition of the dispute.

Appendix B

**Rule 1021.51(h), (i) and (j)**

(h) For purposes of this section, the term "recipient of the action" shall include the following:

(1) The recipient of a permit, license, approval or certification;

(2) Any affected municipality, its municipal authority, and the proponent of the decision, where applicable, in appeals involving a decision under Sections 5 or 7 of the Sewage Facilities Act, 35 P.S. §§ 750.5, 750.7;

(3) The mining company in appeals involving a claim of subsidence damage or water loss under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.*;

(4) The well operator in appeals involving a claim of pollution or diminution of a water supply under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208;

(5) The owner or operator of a storage tank in appeals involving a claim of an affected water supply under Section 1303 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1303;

(6) Other interested parties as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval or certification, as required by subsection (h)(1), shall subject the recipient to the jurisdiction of the Board [as a party], and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene pursuant to § 1021.81. The recipient of a permit, license, approval or certification who is added to an appeal pursuant to this section must still comply with §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance.)

(j) Other recipients of an action appealed by a third party, served as required by subsections (h)(2), (h)(3), (h)(4) or (h)(5), may intervene as of course in such appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene pursuant to § 1021.81.