

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Meeting of March 11, 2004

Attendance:

Attending were Chief Judge Michael Krancer, Rules Committee Chair Howard Wein, Stan Geary, Mike Bedrin, Dennis Strain, Joe Manko and Assistant Counsel Richard Morrison and MaryAnne Wesdock.

Approval of Minutes:

Mr. Bedrin moved to approve the minutes of the January meeting. Mr. Strain seconded. All were in favor.

Rule 1021.51(e):

The Committee discussed whether to eliminate or retain the last sentence of 1021.51(e) dealing with good cause. Since Mr. Scott had raised concerns regarding the elimination of this sentence, it was decided the Committee would wait until his attendance at a meeting to further discuss this matter. Mr. Strain will have someone check on the status of the rule from the time of the initial Ganzer¹ appeal to the Board up through and including the appeal to the Commonwealth Court.

Rule 1021.51 (h) and (i):

The Committee continued its discussion from the November 2003 meeting regarding problems with rule 1021.51 (h) and (i) with regard to automatic parties and serving notice on interested parties. Mr. Morrison discussed two proposed revisions to the rule. The proposed revisions were as follows:

Proposed Revision, Version A

¹ *Pa. Game Commn. v. Ganzer Sand & Gravel, Inc.*, 509 A.2d 877 (Pa. Cmwlth. 1986)

(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.

~~(h)~~ (i) The service upon the recipient of an the action, as required by this section, 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.

Proposed Revision, Version B

~~(h) 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.~~

(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.

(i) The recipient of the action appealed by a third party, served as required by this section, shall be added as a party to such appeal upon the filing of an entry of appearance within 30 days of service of the notice of appeal, and in accordance with sections 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene.

Mr. Strain suggested adding a sixth category under (h): (6) “other interested parties as ordered by the Board.” Mr. Geary also suggested adding “intervention as of right” to subsection (i), similar to section 11004-A of the Municipalities Planning Code.

Judge Krancer felt that a permittee should be a mandatory automatic party since by filing an action against the DEP, an appellant is derivatively taking an action against the permittee as well. They subject themselves to the jurisdiction of the Board when they accept the permit.

The general consensus was to combine (h) and (1), making (1) a mandatory automatic party, and to make subsections (2) through (6) permissive and subject to (i). Mr. Morrison will redraft the proposed revision for the next meeting.

Prepayment of Penalties:

The Board has proposed adding a comment to the rule on prepayment of penalties which will read as follows: “There is an administrative agreement between the Department and the Board which allows prepayments of penalties to be transmitted to the Commonwealth to an appropriate escrow account.”

Rule 1021.34:

The Committee’s proposed revision to Rule 1021.34 (Service by a party), adopted at the January 17, 2002 meeting, would require overnight service where a document is filed with the board by overnight or same day delivery. Ms. Wesdock questioned whether this revision was necessary given that the rule currently requires that documents must be served upon every party to the proceeding *on or before the day that the document is filed with the Board*. Mr. Bedrin noted that since service simply means placing the document in the mail, a party could hand deliver a document to the Board for filing but simply place the document in the mail to the other parties. It was recommended to keep the proposed revision.

Dispositive Motions:

Judge Krancer noted that parties are continuing to file summary judgment motions in numbered paragraphs and questioned whether this was permissible under the prior rule change to 1021.91 and 1021.94. He recommended that the Board send out an order under his signature saying any such motion not filed in proper form would be stricken. It was also suggested that this information be transmitted at the Environmental Law Forum and through the PBA Environmental, Mineral and Natural Resources Law Section (EMNRLS) and county newsletters, that a notice be placed on the PBA

EMNRLS listserv and that the Board's pre-hearing order no. 1 be amended. Mr. Geary moved that the Rules Committee recommend that notice be given in this manner. Mr. Manko seconded. All were in favor.

The Committee agreed that 1021.94, as drafted, is confusing. There seems to be an apparent conflict between subsection (a) and (b). Mr. Bedrin noted that the manner in which (a) is drafted – requesting that material facts be included – would indicate that numbered paragraphs are required. Mr. Morrison noted that motions with only one or two short paragraphs are not helpful. However, while it is necessary to list material facts, non-material facts should not be included in the motion. Mr. Strain suggested that the rule state that a motion for summary judgment should have the following components: material facts, relief requested and citation to the record. Ms. Wesdock will circulate a copy of the preamble to the rule change at the next meeting.

Ms. Wesdock suggested revising 1021.91(a) to say that “summary judgment motions” rather than all dispositive motions are excluded from the scope of 1021.91. This is necessary in order to be able to deem facts admitted when a motion to dismiss is not responded to. Summary judgment motions to which no response is filed are dealt with in the Pa. Rules of Civil Procedure.

The following recommendations were made:

- 1) Revise 1021.91(a) to say that summary judgment motions, rather than dispositive motions, are not covered by 1021.91.
- 2) Apply 1021.94 to summary judgment motions only and fine tune it.
- 3) Create a separate rule for other dispositive motions.

Mr. Wein said he would like to have revisions to the rules finalized by the July meeting so that a rules package can be prepared.

In light of the aforesaid discussion, it was decided that the earlier recommendations regarding disseminating notice as to what is required by 1021.94 would be withdrawn.

Next Meeting:

The next meeting will be held on May 13, 2004.