

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**Meeting of July 15, 2004**

**Attendance:**

In attendance were the following members of the Rules Committee: Chair Howard Wein, Maxine Woelfling, Stan Geary, Dennis Strain, Brian Clark and Tom Scott. Attending on behalf of the Environmental Hearing Board were Chairman and Chief Judge Michael Krancer and the following Assistants Counsel: Richard Morrison, Tracey Tubbs, Connie Wilson and MaryAnne Wesdock.

**Approval of Minutes:**

On the motion of Mr. Strain, seconded by Mr. Clark, the minutes of the May meeting were approved.

**Rules 1021.51(e) and 1021.53 (Amendment of Notice of Appeal and Complaints):**

The Committee considered amendments to rules 1021.51(e) and 1021.53 prepared by Ms. Wesdock. Mr. Geary noted that “Complaints” should be added to the title of 1021.53. He also suggested changing the first sentence of 1021.53(a) from “An appeal *and* complaint may be amended....” to “An appeal *or* complaint may be amended....”

As revised, the rule stated that after the 20-day period for amending appeals as of right, the Board may grant leave to further amend the appeal “if no prejudice will result to the opposing parties.” Mr. Geary questioned whether “no prejudice” was too strong a standard. Judge Krancer noted it really is a question of whether the amendment would be unfairly prejudicial.

Mr. Strain stated that the standard for whether an amendment is prejudicial is a temporal one, i.e. whether the opposing party has sufficient time to prepare his or her case. Mr. Clark pointed out that a party can always argue prejudice with a late filing.

Mr. Strain noted that the existing rule refers to “no prejudice” and there is case law addressing what is meant by “no prejudice.” He was concerned that if the rule were changed to “undue prejudice” as opposed to “no prejudice” it would be creating a new standard. Mr. Clark pointed out that the standard is not one of zero tolerance of any prejudice, but undue prejudice. He felt that by changing the rule to state “undue prejudice” the Committee would simply be clarifying Board case law and practice.

The majority of the Committee felt that the rule should refer to “undue prejudice” as opposed to “no prejudice.” Judge Krancer stated that he agreed with this.

A vote was taken on the proposed changes to rules 1021.51(e) and 1021.53 as follows:

1. On the motion of Mr. Clark, seconded by Mr. Geary, the Committee voted unanimously to amend the caption of 1021.53 to add “Complaint” and to amend subsection (a) as follows: “An appeal or complaint may be amended as of right within 20 days after the filing thereof.”
2. On the motion of Mr. Clark, seconded by Mr. Geary, the majority of the Committee voted to amend 1021.53(b) as follows: “After the 20-day appeal period as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. [The remainder

of subsection (b) as well as subsection (c) are deleted.] Mr. Strain opposed the amendment.

3. On the motion of Mr. Geary, seconded by Ms. Woelfling, the Committee voted unanimously to delete the last two sentences of 1021.51(e).
4. On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee voted unanimously to add the following comment to rule 1021.53: Comment: In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commn. v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

**Rule 1021.51(h) (Recipient of an action):**

On the motion of Mr. Geary, seconded by Ms. Woelfling, the Committee voted unanimously to adopt the following comment to rule 1021.51(h): “Comment: With regard to subsections (i)-(j), parties are required to abide by the rules set forth at §§ 1021.21 and 1021.22 (dealing with representation of parties and notice of appearance.)

**New Rule 1021.54 (Nunc Pro Tunc Appeals):**

The Committee determined that no comment needed to be added regarding the General Rules of Administrative Practice and Procedure. On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee voted unanimously to move subsection (f) of 1021.53 (dealing with nunc pro tunc appeals) to become a separate rule at 1021.54.

**Rules 1021.91 to 1021.94 (Dispositive motions) and New Rule 1021.95 (Summary Judgment):**

Mr. Morrison provided a summary of the rule revisions he had drafted and the reason for the revisions.

Since the new rule at 1021.95 would become the exclusive rule for summary judgment motions, Mr. Geary recommended changing the heading of 1021.94 from “Dispositive motions” to “Dispositive motions other than summary judgment motions.”

Mr. Strain noted that the advantage of having numbered paragraphs in a summary judgment motion is to more easily determine what is admitted and what is disputed. It was pointed out that under the revised rule the brief will be required to set forth the statement of material facts in numbered paragraphs. Mr. Wein noted that the reason for the rule revision was to avoid duplication in motions and briefs and to avoid motions containing unnecessary non-material facts. Under the old rule, rather than giving a narrative, briefs often simply contained the same statements set forth in the motion, but without the numbers. Mr. Scott pointed out that even under the old rules what was more likely to be read was the brief rather than the motion, since people tend to read what is written like a story rather than what is written like a pleading. Mr. Morrison noted that the purpose of the rule revisions was to create one comprehensive document, i.e. the brief, while the motion is to simply contain the party’s request for relief, i.e. a request for summary judgment.

Mr. Strain was concerned that the brief no longer contained a statement of the case. Mr. Wein proposed that the brief be required to contain an Introduction and Summary of the Case. Judge Krancer agreed, stating that he would like to see a one to

two-page summary of what the case is about and why the movant feels he is entitled to summary judgment as a matter of law. The Committee agreed that subsection (c), which sets forth the requirements for what should be contained in a brief, should also include “Introduction and Summary of Case.”

The Committee also considered the proposed comment to the new rule on summary judgment. The comment reads as follows:

Comment: The motion document should not include any recitation of the facts and should not exceed two pages in length. The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. The evidentiary materials relied upon should not be attached to the motion or the brief but should be bound as a separate item and labeled as exhibits to facilitate reference.

Mr. Strain felt that the substantive requirement that the motion should not exceed two pages in length should be in the rule itself and not in the comment. The Committee agreed that the first sentence of the comment should be inserted as the second sentence of subsection (b).

Based on the second sentence of the comment, Mr. Scott asked where one should put a recitation of undisputed facts. Mr. Wein noted that the key word was “lengthy.” The rule allows a recitation of undisputed facts, but it should not be lengthy.

The Committee voted on the proposed amendments to Rule 1021.91 (General). On the motion of Mr. Geary, seconded by Mr. Scott, the revisions were approved unanimously. The Committee next voted on the proposed revisions to Rule 1021.94, as well as the revision to the caption of “Dispositive motions other than motions for summary judgment.” On the motion of Mr. Geary, seconded by Ms. Woelfling, the

revisions were approved unanimously. The Committee voted on the proposed new rule at 1021.95 (Summary judgment motions), as well as the changes discussed at the meeting. On the motion of Mr. Clark, seconded by Mr. Scott, the revisions were approved unanimously. Finally, the Committee voted to renumber current Rule 1021.95 (Miscellaneous motions) to Rule 1021.96. On the motion of Mr. Geary, seconded by Ms. Woelfling, the renumbering was approved unanimously. The changes to the rules on dispositive motions are attached at the end of the minutes.

**Next Rules Package:**

Mr. Wein proposed having the next rules package prepared and submitted so that it would appear in the Pennsylvania Bulletin on the Saturday prior to the Environmental Law Forum. The Forum will be held April 6-7. This way, the proposed rules can be discussed during the EHB presentation and those attending the Forum will have an opportunity to submit comments on the proposed rules.

The rules package will contain all proposed rules approved through the July 15, 2004 meeting as well as any proposed rules voted on at the September 2004 meeting.

Ms. Wesdock will begin preparation of the rules package prior to the September meeting but will not submit it until after the meeting. Mr. Wein suggested having the Board vote on all rules proposed prior to the September meeting and then vote on any additional rules approved at the September meeting in order to save time.

**Topic for Next Meeting:**

Attorney Matt Wolford would like the Committee to address an issue concerning DEP employees as expert witnesses and the hybrid nature of their testimony, since it often involves both factual and expert testimony.

**Terms:**

Ms. Wesdock circulated a list of members and the dates on which their terms expire. Members continue to serve on the Rules Committee even after expiration of their terms unless a new person is appointed in their place. Those members whose terms have expired will either take steps to be reappointed or have a replacement appointed.

**Date of Next Meeting:**

The next meeting will be on September 9, 2004 at 10:30.

**Adjournment:**

On the motion of Mr. Scott, seconded by Ms. Woelfling, the meeting was adjourned.

**Revisions to Rules on Dispositive Motions:**

**§ 1021.91. General.**

(a) This section applies to all motions except **[dispositive motions]** **summary judgment motions** and those made during the course of a hearing.

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(g) The moving party may not file a reply to a response to **[its motion]** **procedural, discovery, or miscellaneous motions** unless the Board orders otherwise.

**§ 1021.94 Dispositive motions other than summary judgment motions.**

[(a) This section applies to dispositive motions. Dispositive motions shall contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought.]

[(b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 1035.1-1035-5 (relating to motion for summary judgment).]

[(c)] **(a)** Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party in accordance with § 1021.34 (relating to service). Dispositive motions shall be accompanied by a supporting memorandum of law or brief. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.

[(d)] **(b)** A response to a dispositive motion may be filed within 30 days of service of the motion and shall be accompanied by a supporting memorandum of law or brief.

[(e)] **(c)** A reply to a response to a dispositive motion may be filed within 15 days of the date of service of the response, and may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the presiding administrative law judge.

[(f)] **(d)** An affidavit or other document relied upon in support of a dispositive motion or response, that is not already a party of the record, shall be **[attached to]** **filed at the same time as** the motion or response or it will not be considered by the Board in ruling thereon.

~~[(g)]~~ ~~(e)~~ Subsection ~~[(c)]~~ ~~(a)~~ supersedes 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection ~~[(d)]~~ ~~(b)~~ supersedes 1 Pa. Code § 35.179 (relating to objecting to motions).

**§ 1021.95 Summary judgment motions.**

**(a) A summary judgment motion record shall contain the following separate items: (i) a motion prepared in accordance with subsection (b); (ii) a supporting brief prepared in accordance with subsection (c); (iii) the evidentiary materials relied upon by the movant; and, (iv) a proposed order. Motions and responses shall be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).**

**(b) Motion. A motion for summary judgment shall contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.**

**(c) Brief. The motion for summary judgment shall be accompanied by a brief containing an introduction and summary of the case, a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.**

**(d) Evidentiary Materials. All affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.**

**(e) Proposed Order. The motion shall be accompanied by a proposed order.**

**(f) Within 30 days of the date of service of the motion, a party opposing the motion shall file a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion. All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of**

the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c) demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record. Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.

(g) A concise reply brief may be filed by the movant within 15 days of the date of service of the response. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(h) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(i) The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. The evidentiary materials relied upon should not be attached to the motion or the brief but should be bound as a separate item and labeled as exhibits to facilitate reference.

[§ 1021.95.] §1021.96. Miscellaneous motions.

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