

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of September 20, 2001

Attendance:

The Rules Committee convened at approximately 10:15 a.m. on Thursday, September 20, 2001, with Chairman Howard Wein presiding. In attendance were Stan Geary, Mike Bedrin, Dennis Strain, Brian Clark and Bob Jackson. Bernie Labuskes and Tom Renwand represented the Board. Howard, Stan and Tom attended via teleconference from the Board's Pittsburgh office, pursuant to Article IX, E of the Rules Committee bylaws. Prior to commencing the meeting, the Committee held a moment of silence in memory of the victims of the tragedy of September 11, 2001.

Withdrawal of Appeals With or Without Prejudice:

At the July 12, 2001 meeting, Attorney Mike Meloy had requested the Rules Committee to consider a problem concerning the withdrawal of protective appeals. The Board's current rules contain the following provision regarding the termination of proceedings:

§ 1021.120 Termination of proceedings

* * * * *

(b) When a proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board.

Mike reported that it was his concern and that of other practitioners that there should be some mechanism for withdrawing a protective appeal without the presumption that the

withdrawal is with prejudice. The Committee considered the matter at length at the July meeting, and George Miller concluded that he would like to have the Board consider the issue.

At the September 20 meeting, Bernie reported that the Board had considered the issue and had recommended deleting subsection (b) from the rule. The result of this would be to eliminate the presumption that a withdrawal is with prejudice. The Board had considered simply removing the language “with prejudice,” but determined that this left nothing of substance in the rule. Therefore, the most practical resolution seemed to be the deletion of subsection (b).

Brian agreed that the simplest way to deal with the situation was not through a rule, but on a case-by-case basis. He made a motion to recommend the deletion of subsection (b) of § 1021.120. Stan seconded. All were in favor.

Brian asked whether the Board had considered other options in dealing with this issue, such as some of the suggestions made by members of the Rules Committee at the July 12 meeting. Bernie stated that the approach taken by the Board was to be as flexible as possible and to prevent the Board’s rules from getting in the way of settlements.

Howard asked whether the presumption now was that a withdrawal was without prejudice. Bernie replied that was not the presumption; the deletion of subsection (b) simply made the rule neutral. Brian suggested that the rules package containing this amendment should explain why the language of subsection (b) was deleted and further explain that the determination of whether an appeal is with or without prejudice will be predicated on case law. Mike asked whether this was already done in a rules package and

Mary Anne Wesdock stated that the preamble must contain an explanation of any amendments to the rules.

Howard suggested that an explanation be contained in a note to the rule, rather than simply in the preamble to the rules package. Brian agreed, stating that since subsection (b) of § 1021.120 has been around for long time, it is important to include an explanation of why it is being deleted. Dennis proposed the following language: “The prior rule authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule.”

Howard noted that parties can still specify how the matter is being terminated in a settlement document. The issue of withdrawal with or without prejudice will be determined by case law unless the parties specify otherwise.

The Committee agreed with Brian and Howard’s earlier suggestion of including a note with the rule explaining why subsection (b) was deleted. Mary Anne will prepare a draft and circulate it by email for approval.

Approval of Minutes:

Mike moved to approve the minutes of the July 12, 2001 meeting. Brian seconded. All were in favor.

Signing of Documents:

The Committee considered the draft of a proposed rule on the signing of documents. Mike noted that the proposed rule contained language from both Pa.R.C.P. 1023 and Rule 11 of the Federal Rules of Civil Procedure.

Brian made a motion, seconded by Bob, to recommend approval of the proposed rule.

Prior to a vote, Mike raised a question regarding language in subsection (b) of the draft. Subsection (b) states that the signature to a document constitutes a certification that the person signing it, “or otherwise presenting it to the Board,” has read it, submits it in good faith, etc. Mike asked if this language was intended to cover a situation where the attorney presenting a document is not the one who prepared it. Stan noted that there are times when the Board has oral argument on a motion and it is possible that the attorney presenting the motion might not be the attorney who signed it. Mike agreed that the aforesaid language was likely to cover such a situation.

Brian noted that the draft of the rule used the term “subdivision” rather than “subsection” in (b) and (c). He recommended changing it to “subsection” in order to keep the language consistent with that of the Board’s other rules. The Committee agreed.

The Committee voted unanimously in favor of Brian’s earlier motion to recommend approval of the proposed rule subject to revising the word “subdivision” to “subsection.” A copy of the proposed rule on signing, as approved by the Committee, is attached.

Special Actions:

Bernie explained that the Board’s current rules do not cover two types of situations: 1) takings actions referred to the Board from courts of common pleas and 2) complaints filed against the Department under the Hazardous Sites Cleanup Act and other statutes. The Committee considered drafts of two proposed rules covering these types of

special actions: Proposed Rule 1021.57 (Complaints Filed by Other Persons) and Proposed Rule 1021.58 (Transferred Matters).¹

Dennis felt that language in the proposed rules requiring a certificate of service was redundant since the Board already has rules dealing with the service of documents. Stan also pointed out that the language of subsection (c) of the proposed rules saying when an action shall commence was inconsistent with civil practice. Subsection (c) of the draft rule contained the following language: “The action before the Board shall commence when a complaint is filed and service of the complaint is made on the Department.” Stan noted that in civil practice, an action commences when the complaint is filed. Proposed rules 1021.57 and 1021.58, as drafted, appeared to say that if a complaint is filed but not served within the 30-day filing period, the action would not be timely. Howard pointed out that this language was probably included in order to be consistent with existing rule 1021.56 (Complaints filed by the Department), which contains the same wording. Stan questioned whether the language was necessary, and Howard suggested addressing it not just in proposed rules 1021.57 and 1021.58 but also in existing rule 1021.56.

Stan noted a conflict between subsections (b) and (c) of proposed rule 1021.58. Subsection (b), as drafted, stated as follows: “*When directed to do so by the Board*, the party who initiated the transferred action shall file a complaint with the Board...” (emphasis added) This language indicated that the Board would not direct a person to file a complaint on every occasion. However, as noted above, subsection (c) stated that an action was not commenced until a complaint was filed. Stan suggested that the phrase

¹ Existing rules 1021.57 (Answers to complaints) and 1021.58 (Procedure after an answer is filed) would be renumbered as 1021.59 and 1021.60.

“When directed to do so by the Board...” be replaced with “Within the time prescribed by the Board...”

Howard suggested a wording change in subsection (a) of proposed rule 1021.58. As drafted, subsection (a) stated, “This rule deals with matters transferred to the Board fro a court.” Howard recommended replacing “deals with” with “addresses.”

As drafted, subsection (b) of proposed rule 1021.58 required that the complaint contain a certificate of service of the complaint on the Department. Stan suggested adding “and any other parties” after “Department” since there might be other parties to the action. Dennis felt that the language requiring a certificate of service should be deleted since the Board’s rules already deal with service of documents. He felt it was not a good practice to insert procedures that are dealt with elsewhere in the rules. Brian suggested that the proposed rules contain a reference to the rules dealing with service.

Stan noted that whereas existing rule 1021.56 and proposed rule 1021.58 required the filing of a complaint containing a notice to respond, proposed rule 1021.57, dealing with complaints filed against the Department, did not contain this requirement. Dennis stated he did not feel it was necessary to send the Department a notice to respond. Mike pointed out, however, that there may be other parties to the action in addition to the Department.

Howard raised the question of whether the reference to a certificate of service should be deleted from existing rule 1021.56, as well as proposed rules 1021.57 and 1021.58. Stan stated he agreed with Dennis that the requirement of a certificate of service is redundant.

Bob pointed out an inconsistency between subsections (a) and (b) of existing rule 1021.56. Subsection (a) states the Department may initiate an action by filing a complaint or petition. Subsection (b) states the action commences when the complaint is filed *and served*. However, Dennis noted that under the Board's rules, filing and service are simultaneous.

Tom pointed out that the Board's rules are silent on how a complaint is to be served, i.e. by personal service or mail. Stan noted that the Board's rules on service discuss service by mail but do not distinguish between service of original process and other documents. Howard raised the question of whether the Board should have separate rules for the service of complaints. Tom pointed out that whereas the court of common pleas has a sheriff to effect service, the Board does not have that option. Stan suggested allowing service by either certified mail or personal service. He felt there should be some way of knowing whether the defendant has in fact been served and when the time period for answering starts running. Dennis stated he did not see a need to serve the Department by certified mail. Tom said he would not want to see a system where the Board requires personal service because this would slow things down. Howard felt that since there is a requirement that the recipient of a complaint respond within a certain amount of time, there should be a requirement of service by certified mail or personal service, even on the Department. Bob agreed that if service is done by mail, it should be done in a manner in which receipt is verified, such as certified or registered mail. Tom raised the question of whether service should be allowed by e-mail or fax. Dennis noted that the advantage to service by certified mail is that there is case law on this subject.

Mike summarized the issue with regard to service as follows: 1) The Board's rules, as currently structured, do not address the manner of service and 2) Should there be a different set of rules for service of complaints?

Dennis reiterated that he did not feel it was necessary to serve the Department by certified mail. Mike pointed out that it might be confusing to have separate service rules pertaining to complaints served on the Department.

The Committee asked whether the question of service of complaints has ever come up before the Board, and Tom and Mary Anne reported that they had recently responded to such a question from a Department attorney.

Bernie suggested revising rule 1021.32 to track the language of the Administrative Code. Howard suggested also allowing service by Federal Express, and Mike suggested allowing service by fax as well.

Mike suggested setting aside the issue of manner of service for the time being and focus on the proposed rules on special actions. He suggested requiring that complaints be served by certified mail and personal mail if there was no disagreement from the Committee and then revisit the other issue later.

Members of the Committee suggested making the following changes to existing rule 1021.56 (Complaints filed by the Department): Mike and Bob suggested striking the phrase "together with a certificate of service" in subsection (a). Howard suggested replacing the word "initiate" with "commence." Stan, Mike and Howard suggested adding the following sentence to subsection (a): "The action is commenced when the complaint or petition is filed with the Board."

Subsection (a) reads, “When authorized by statute the Department may initiate the action by filing a complaint or petition...” Dennis suggested deleting the phrase “when authorized by statute” since there are times when the Department might wish to ask the Board to take action on a matter that the Department could otherwise act on, such as a decertification. Stan and Howard did not agree the Department could file a complaint with the Board if there was not statutory authority to do so. Dennis felt that the ability to take this course of action derived from the Administrative Code and Section 4 of the Environmental Hearing Board Act. Stan asserted that, in that case, it was authorized by statute, and Howard noted that leaving in the language “when authorized to do so by statute” did not preclude the type of situation Dennis was concerned about. The Committee decided to revisit this issue at another meeting.

The Committee agreed to revise subsection (b) of 1021.56 by incorporating the language of Pa.R.C.P. 403 dealing with service by mail. They agreed on the following language:

1021.56 Complaint filed by the Department

* * * * *

(b) Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party’s authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.32.

With regard to proposed rule 1021.57 (Complaints filed by other persons), the Committee suggested the following changes: Delete the reference to certificate of service in (a), make (b) the same as above, move (b) to (c), and delete (c).

With regard to proposed rule 1021.58 (Transferred Matters), the Committee recommended the following changes: Replace “deals with” with “addresses” in (a), replace “when directed to do so by the Board” with “in the time period directed to do so by the Board” in the first sentence of (b), move the second sentence of (b) to (d), replace (c) with the language above, move (d) to (e).

Bob made a motion, seconded by Stan, to adopt the changes to the special action rules set forth above. All were in favor. The revisions to existing rule 1021.56 and proposed rules 1021.57 and 1021.58, as recommended by the Committee, are attached to the minutes.

Usage of “Brief” and “Memorandum of Law”:

Howard suggested that if the terms “brief” and “memorandum of law” are used interchangeably in the Board’s rules, then perhaps the rules should say so. Bob stated he felt a “brief” contemplated a more extensive document. Dennis commented that the rules appear to require a brief in support of a motion for summary judgment and after a hearing but a memorandum of law for everything else. Stan pointed out that the rules do not say what the Board expects with regard to each type of document, other than for a pre-hearing memorandum and post-hearing brief.

Brian asked whether this has ever been an issue, and Tom and Bernie responded that it has not. Howard pointed out that rule 1021.171 (Composition of certified record on appeal to Commonwealth Court) refers to a “post-hearing memorandum” as opposed to a “post-hearing brief” so the Board’s rules themselves are not consistent.

At the July meeting, the Committee voted on new language to be added to rule 1021.73(e) dealing with dispositive motions. The new language approved by the

Committee contained the word “memorandum of law” whereas the rest of the subsection refers to the term “brief.” The Committee agreed the language should be consistent. Stan suggested referring to both “memorandum” and “brief” in rule 1021.73(e). The Committee agreed. The Committee also agreed to revise rule 1021.171 to read “post-hearing briefs” as opposed to “memorandum.” The Committee agreed to leave the other rules as is.

Bob made a motion, seconded by Brian, to recommend the following changes: Replace “post-hearing memorandum” with “post-hearing brief” in 1021.171 and insert the words “or brief” in sections (c), (d) and (e) of 1021.73. All were in favor.

Agenda for Next Meeting:

Bob recommended that future meetings be held at 10:00 am rather than the usual time of 12:30. In order to accommodate those traveling from Pittsburgh, the time of future meetings was set at 10:30 am to 2:30 pm. The next meeting will be on Thursday, November 8, 2001 from 10:30 am to 2:30 pm. The agenda will include the following:

1. Consider revisions to the general service rules as discussed above – If these changes are to be included with the next rules package, the Committee may be required to address them in a conference call prior to the next meeting.
2. Bernie asked the Committee to consider the issue of clarifying who gets served in a third-party appeal. For example, in the case of a denial of a plan revision that is appealed by the developer, under the Board’s current rules the municipality whose plan revision has been denied does not get notice of the appeal. Tom and Bernie explained a similar problem occurs in mining cases where the Department determines a water supply has not been affected. Two issues arise: Should the

third entity get notice of the appeal? Should the third entity be an automatic party to the appeal?

Bob moved to adjourn the meeting at approximately 1:00 pm. Brian seconded. All were in favor.

Appendix A – Proposed Rule on Signing

25 Pa. Code § 1021.____ **Signing**

- (a) Every notice of appeal, motion, legal document or other paper directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, or if a party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number.
- (b) The signature to a document described in subsection (a) constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay, or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.
- (c) The Board may impose an appropriate sanction for a bad faith violation of subsection (b).

Appendix B – Special Actions – Revisions to existing rule 1021.56 and proposed rules 1021.57 and 1021.58

§ 1021.56. Complaints filed by the Department.

- (a) When authorized by statute the Department may [initiate] commence the action by filing a complaint or petition[, together with a certificate of service] and a notice of a right to respond. The action is commenced when the complaint or petition is filed with the Board.
- (b) [This action shall commence when the complaint is filed and service of the complaint and a notice of a right to respond is made upon the defendant.] Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party’s authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.33.²
- (c) * * * * *
- (d) * * * * *
- (e) * * * * *

§ 1021.57. Complaints filed by other persons.

- (a) When authorized by statute, a person may institute an action against the Department by filing a complaint.
- (b) Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party’s authorized agent. In the

² Under the reorganization of the rules, § 1021.32 becomes § 1021.33.

instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.33.

- (c) The complaint shall set forth the statutory authority under which the Board is authorized to act and shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for action is based.
- (d) Subsections (a) – (c) supersede 1 Pa. Code §§ 35.5 – 35.7 and 35.9 – 35.11 (relating to informal complaints and formal complaints).

§ 1021.58. Transferred matters.

- (a) This rule addresses matters transferred to the Board from a court.
- (b) Within the time period directed to do so by the Board, the party who initiated the transferred action shall file a complaint with the Board.
- (c) Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party’s authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.33.
- (d) The complaint shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for relief is based.
- (e) Subsections (a) – (b) supersede 1 Pa. Code § 35.5 – 35.7 and 35.9 – 35.11 (relating to informal complaints and formal complaints).

§ 1021.59. Answers to Complaints.

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§ 1021.60. Procedure after an answer is filed.

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