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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 7, 2009

Thomas W. Renwand, Acting Chairman
Environmental Hearing Board
400 Market Street, 2nd Floor
Harrisburg, PA 17105

Re: Regulation #106-9 (IRRC #2732)
Environmental Hearing Board
Practice and Procedure

Dear Acting Chairman Renwand:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. We will send a copy to the new Standing Committees when they are designated.

If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

Comments of the Independent Regulatory Review Commission



Environmental Hearing Board Regulation #106-9 (IRRC #2732)

Practice and Procedure

January 7, 2009

We submit for your consideration the following comments on the proposed rulemaking published in the November 8, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Hearing Board to respond to all comments received from us or any other source.

1. 1021.51. Commencement, form and content. – Statutory authority; Clarity.

We are concerned that amendments to this section represent an impermissible attempt to assert jurisdiction over third parties when the facts and statute under which a claim is being pursued do not allow for Board review. In the preamble, the Board states it is amending subsections (h) through (j) to “ensure that all recipients of an action being appealed receive notice of the appeal and are provided an opportunity to participate in the appeal, under the Commonwealth Court’s holding in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).” In *Schneiderwind*, the Court made two distinct rulings: first, that the Board erred in considering Mr. Schneiderwind’s appeal and reviewing the merits of his complaint; and second, that the Board’s determination of liability for a third party violated that party’s due process rights.

Amendments to subsection (h) define the term “recipient[s] of the action” to include persons “to whom the action of the Department is directed or issued” and delete references to specific statutes. An amendment to subsection (i) states that “service upon the person to whom the action of the Department is directed or issued shall subject the recipient to the jurisdiction of the Board.” In *Schneiderwind*, the “person to whom the action of the Department is directed or issued” was Delaware Valley Concrete Company. However, the *Schneiderwind* court determined that the Department’s “discretionary refusal to prosecute the claim on [Mr. Schneiderwind’s] behalf” was not reviewable by the Board pursuant to the Board’s enabling statute (35 P.S. § 7514) and the

Noncoal Surface Mining Conservation and Reclamation Act, which provided for review by the filing of a civil action, not by appeal to the Board.

While we agree with the Board that *Schneiderwind* requires promulgation of enhanced notice and "opportunity to be heard" provisions, we disagree that implementation of such provisions can expand the Board's jurisdiction in violation of the Board's enabling statute or any other statute. In the final-form, the Board should narrow the language of this section to ensure that the regulation does not impermissibly expand the scope of the Board's jurisdiction in violation of any statute.

Additionally, an amendment to subsection (j) states that if a recipient of an action elects not to intervene, "the recipient's right to appeal from the Board's adjudication in the matter may be adversely affected." Because this language does not establish a binding norm, the final-form regulation should omit it.

2. 1021.54a. Prepayment of penalties. – Clarity.

This section allows appellants to file "a verified statement that the appellant is unable to pay" in lieu of a prepaid penalty or bond securing payment. Any requirements for verified statements should be included in the final-form regulation. Additionally, the comment following this section states that "[i]f a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute." The Board should include this rule in the final-form regulation or explain why it is omitted.

3. 1021.76a. Entry of default judgment. – Clarity; Implementation procedure.

Subsection (d) briefly references a hearing to determine civil penalties, but it lacks detail as to the procedure for conducting one. The final-form regulation should provide further detail, including information about whether a moving party must request such a hearing or whether the Board may convene one on its own motion, the kind of notice the parties entitled to, and whether a party may object to the setting of such a hearing.

4. 1021.96a. Motions for expedited hearing. – Clarity, Reasonableness.

Subsection (d), a notice that "[t]he Board will grant a motion for expedited hearing only in rare circumstances," is comprised of unenforceable non-regulatory language. Because this language does not establish a binding norm, the Board should omit it from the final-form regulation.

5. 1021.141b. Withdrawal without prejudice.

Subsection (a) allows a party to withdraw an appeal without prejudice, if all parties agree. The final-form regulation should explain whether the Board may approve a withdrawal without prejudice over the objection of a non-moving party.

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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: William T. Phillipy
Agency: Environmental Hearing Board
Phone: 7-3483
Fax: 3-4738
Date: January 7, 2009
Pages: 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Hearing Board's regulation #106-9 (IRRC #2732). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: [Signature] Date: January 7, 2009

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