ENVIRONMENTAL HEARING BOARD

RULES COMMITTEE MINUTES

Attendance:

A meeting of the Environmental Hearing Board Rules Committee was held on January 13, 2000 beginning at approximately 1:00 p.m. with Chair Howard Wein presiding. The following members of the Rules Committee were in attendance: Mike Bedrin, Rick Grimaldi, Tom Scott, Dennis Strain and Bob Jackson (arrived at 2:50 p.m.). Maxine Woelfling, Brian Clark and Jim Davis were not present. Eugene Dice attended on behalf of Brian Clark. George Miller represented the Board.

Minutes on Website:

The Rules Committee agreed to make the minutes of its meetings available on the EHB website. As soon as the minutes of a meeting have been prepared, Mary Anne will e-mail them to the Rules Committee members, who will notify her within five days of any corrections. The minutes will then be placed on the website and will remain there for one year or until the proposed rules discussed in the minutes have become final. In addition, the agenda for upcoming Rules Committee meetings will be placed on the web.

Amendments to Bylaws:

Mike Bedrin made a motion that the bylaws be amended to reflect the change in meeting dates from the second Friday of alternating months to the second Thursday of alternating months. Rick Grimaldi seconded. The motion passed unanimously.

The Committee then discussed Howard Wein's proposal to allow the Rules Committee to convene in offices of the Board via teleconference. Section IX.A of the bylaws states that voting must be done "in person." Dennis Strain noted that this is a Sunshine Act issue. Gene Dice mentioned a case which held that where participants were unable to be present in the room where a meeting was being held due to overcrowding but were able to hear the speakers from outside the room, that was sufficient under the Sunshine Act.

Tom Scott stated that he had mixed feelings about the proposal. He agreed that teleconferencing is a good idea if necessary to get a quorum or to allow someone to attend who otherwise could not, but felt that much of the dynamics which make the group work would be lost. George Miller agreed that it is difficult to transact business over the phone, but noted that the "paper problem" could be resolved by use of the fax machine. He also mentioned the possibility of electronic teleconferencing at the Board in the future. He proposed limiting the teleconferencing of Rules Committee meetings to situations where weather or other emergency conditions make attendance in Harrisburg impossible. Mike Bedrin agreed there should be some limiting language for urgent weather conditions or natural disaster. Gene Dice agreed that the proposal should be limited to exigent circumstances.

Howard Wein's recommendation was to amend the bylaws to say, "Meetings of the Rules Committee shall be held at the Harrisburg office of the Environmental Hearing Board, and at the discretion of the Chair, members may attend at the Board's Pittsburgh office." He noted that the September 9, 1999 meeting which was conducted by teleconference between the Harrisburg and Pittsburgh offices of the Environmental Hearing Board had a quorum, but if the meeting had been held in person in Harrisburg, a quorum would not have been possible. Tom Scott agreed with Howard's recommendation.

George Miller and Gene Dice recommended that the Committee first look at the Sunshine Act to make sure Howard's recommendation complies with it. Mary Anne Wesdock agreed to look at the Act and report to the Committee at the next meeting.

<u>Substitution of Parties</u> – <u>Seder Issue</u>:

The Committee approved the following proposed rule:

§ 1021.___ Substitution of Parties

a. A person who has succeeded to the interests of a party to an appeal by operation of law, election, appointment or transfer of interest may become a party to the pending action by filing with the Board a petition for substitution of party, which includes a statement of material facts upon which the right to substitute is based.

b. The substituted party shall have all the rights and liabilities of the original party to the proceeding provided that any other party to the proceeding may move to strike the substituted party for just cause. A substituted party-appellant is limited to pursuing only those objections raised by the original appellant in its appeal.

Chairman Miller noted that the last sentence of subsection (b) may be subject to interpretation but agreed with the basic principle.

Tom Scott moved that the Committee recommend adoption of the rule by the Board. Dennis Strain seconded. All were in favor.

<u>Substitution of Parties</u> – <u>Thomas Issue</u>:

In the Board's *Thomas* appeal, the Department had sent notice of approval to the wrong entity. As a result, the appellant served its notice of appeal on the wrong party as permittee. The proper permittee was not served with notice of the appeal. The Board ultimately advised the appellant to serve notice on the proper permittee and allowed the incorrect permittee to remove itself from the appeal.

Chairman Miller stated that he felt it was important to formalize the Board's authority to substitute a proper permittee for a party which has been improperly served and requested the Rules Committee to consider adopting a rule addressing this issue.

Gene Dice raised a concern that there may occasions when the late service of a notice of appeal on a proper permittee will have a prejudicial impact. This can occur when the permittee waits 30 days after the Department's approval, receives no notice of appeal and then acts on the permit by investing money or taking out a loan, not knowing that an appeal has been filed. Mike Bedrin noted that there may be cases which warrant dismissal of the appeal for failure to serve the proper party.

Chairman Miller stated that he would draft some language for a proposed rule addressing this issue.

<u>Hearing Examiner</u>:

The Committee continued its discussion of a proposed rule on delegating authority to hearing examiners and considered the memorandum prepared by Mary Anne on the powers assigned to federal magistrates. Chairman Miller explained that while such a rule was not critical at the present time, the rulemaking process can take a long time, and he felt it was important to get such a rule in place in the event circumstances changed and it was needed in the future.

The proposed rule as originally drafted read as follows:

§ 1021.___ Authority Delegated to Hearing Examiners

The Board may appoint hearing examiners to preside at hearings. Subject to the approval of the Board Member assigned to the case, any such hearing examiner shall have the following authority:

1. To schedule and regulate the course of hearings.
2. To administer oaths and affirmations.
3. To rule on motions in limine, offers of proof and the reception or exclusion of evidence.
4. To hold all appropriate conferences with counsel and to dispose of procedural matters.
5. To schedule the filing of post-hearing briefs following the conclusion of the hearing.
6. To recommend to the Board Member or to the Board an opinion and order disposing of the matters considered at the hearing.

> The hearing examiner shall consult with the Board Member assigned to the case before entering a ruling on the exclusion of evidence or the disposition of any procedural matter that might substantially affect the Board's final decision on the merits of the matters considered at the hearing.

Howard Wein recommended amending subsection (4) of the draft rule to reflect language contained in Mary Anne's memo, to read as follows: "To conduct pre-trial conferences, settlement conferences and related pre-trial proceedings and to dispose of procedural matters." He also suggested adding "adjudications" to subsection (6) of the draft rule.

Committee members questioned whether a hearing examiner would be authorized to decide discovery disputes in a pre-hearing conference or whether he would be required to first consult with a Board Member. Chairman Miller stated that in his opinion a hearing examiner should be able to dispose of small discovery disputes, but on any matter which affected the merits of a case, he would be required to consult with an Administrative Law Judge. He further suggested that if a party disagrees with a ruling of a hearing examiner, the party may raise the matter with the Administrative Law Judge to whom the case was originally assigned.

Dennis Strain pointed to the last sentence of the draft rule which requires a hearing examiner to consult with a Board Member on any ruling on the exclusion of evidence. He noted that virtually every trial involves exclusion of some evidence and a case may rise or fall on whether, for instance, a map gets admitted into evidence. Tom Scott suggested having a procedure for the preservation of excluded evidence so the Board has an opportunity to review it if necessary.

Gene Dice pointed out, however, that it would not be practical to allow attorneys to turn to an Administrative Law Judge every time there is a disputed ruling and that the hearing examiner must be allowed some authority. Dennis Strain suggested that perhaps there should be an internal procedure in place which requires that in the case of a close call, even Administrative Law Judges must consult with each other. Chairman Miller pointed out that this, in fact, is done.

Dennis Strain suggested removing the last sentence of the draft rule and requiring, instead, that the Board adopt internal guidelines as to when a hearing examiner should consult with an Administrative Law Judge. Chairman Miller stated he had no problem with Dennis' suggestion. Howard Wein, however, stated that he would prefer to retain some of this language in the rule. Dennis Strain suggested putting this language in the section of the rules dealing with "reopening of the record." Chairman Miller suggested a party could file a post-hearing motion allowing reopening of the record.

Tom Scott cautioned that the rule should not make the hearing procedure more difficult in front of a hearing examiner than before an Administrative Law Judge.

Chairman Miller suggested striking the last sentence of the draft rule and issuing an internal memorandum containing this language. Dennis Strain agreed. Tom Scott commented that the second sentence of the draft rule appears to assert sufficient ALJ authority over hearing examiners.

Howard Wein asked if the case assignment to a hearing examiner would be done by order. Chairman Miller stated that it would. Howard suggested that the order could set forth the ground rules for review of hearing examiner rulings.

The Committee then recommended the following changes to the language of the draft rule set forth above: a) Incorporate language from Mary Anne Wesdock's memorandum into subsection 2; b) Add "adjudication" to subsection 6; and c) Delete the last sentence. The rule as amended reads as follows:

> § 1021.___ Authority Delegated to Hearing Examiners
>
> The Board may appoint hearing examiners to preside at hearings. Subject to the approval of the Board Member assigned to the case, any such hearing examiner shall have the following authority:
>
> 1. To schedule and regulate the course of hearings.
> 2. To administer oaths and affirmations.
> 3. To rule on motions in limine, offers of proof and the reception or exclusion of evidence.
> 4. To conduct pre-trial conferences, settlement conferences and related pre-trial proceedings and to dispose of procedural matters.
> 5. To schedule the filing of post-hearing briefs following the conclusion of the hearing.
> 6. To recommend to the Board Member or to the Board an opinion and order or adjudication disposing of the matters considered at the hearing.

Tom Scott moved for adoption of the rule as amended. Dennis Strain seconded. All voted in favor.

Rule on Pro Bono Referrals:

Chairman Miller suggested that the Board submit a proposed rulemaking package consisting of the rule on pro bono referrals, substitution of parties and authority delegated to hearing examiners. Mary Anne Wesdock will put together the materials for submission of these proposed rules to the appropriate agencies and committees.

Electronic Filing:

Chairman Miller stated that one-quarter of the EHB's program at the Environmental Law Forum will be devoted to electronic filing. Mike Bedrin and Howard Wein agreed that a hands-on demonstration might be beneficial.

With regard to the proposed pilot program in electronic filing, Dennis Strain voiced a concern that documents might not get filed on time when working with new technology. Howard Wein suggested setting up a pilot where documents did not actually get placed on the website. However, Dennis was concerned that the placement of documents on the website might be where many of the problems occur.

Howard also voiced a concern that public access to documents that are filed electronically and placed on the website would be broader than for documents filed in the traditional manner, and this was, in effect, "penalizing" those parties who choose to file electronically. However, Mike Bedrin questioned whether parties who file electronically are, in fact, "penalized" since the result of electronic filing is simply to make an otherwise public

document available on another medium, the web. He noted that the Department heard similar concerns when it made the decision to place compliance information on the web. Rick Grimaldi noted that the public has a right to view filings in the Board's office and the fact that the web simply makes such access easier is something that we have to live with.

Howard suggested that where a party chooses to file a document on paper, he should also be required to provide a copy of the document on disk so the Board can then place the document on the web. Bob Jackson was of the opinion that this should be voluntary. However, Howard reasoned that this should be mandatory in order to keep the playing field level. He pointed out that, with electronic filing, an individual will be able to access a document by pulling up the docket sheet for a particular case and clicking on the document he wishes to view. Where documents have been filed on paper and no disk has been provided, the docket sheet will contain entries which cannot be accessed.

In response, Mike Bedrin questioned whether the Board must commit that everything that gets filed must be placed on the web. George Miller also questioned how Howard's proposal might affect a *pro se* party who does not have a computer. Mike Bedrin and Dennis Strain noted that, in such a case, the Board would be required to have a mechanism for scanning documents. Chairman Miller stated that if additional staff are needed to run disks and scanners, the Board would need to re-think its proposal to allow electronic filing.

Rick Grimaldi stated that in his opinion requiring disks was going to create too many levels of difficulty. He felt that a party who chooses to file electronically must accept that it is a trade-off: It is easier to file, but it also makes the filing more accessible. Mike Bedrin agreed that if a client decides that a case is too sensitive and does not want the documents on the web, he can opt out of electronic filing.

Mary Anne Wesdock asked whether a party may opt out of electronic filing half-way through a case if he decides that it has become too sensitive. Chairman Miller responded that he could. Rick Grimaldi then suggested that a party may wish to file some documents electronically while choosing to file others on paper.

Chairman Miller concluded by saying that he is putting together a set of ground rules for electronic filing which he is going to present at the Environmental Law Forum. He will circulate these to the Rules Committee to be discussed at its March 9, 2000 meeting.

Expert Discovery:

The Committee held further discussion on the issue previously raised in a letter by Bob Ging to the Rules Committee regarding expert discovery and third-party appellants. In summary, where a third-party appellant has the burden of proof, and the permittee and Department hold the technical information, the appellant may not be in a position to formulate its case or determine where issues lie until after the completion of expert discovery, when it is too late in the process. Attorney Ging had noted in his letter that, in serving interrogatories under Pa.R.C.P. 4003.5, he has had permittees respond that they are not required to answer the interrogatories due to Board orders requiring that expert reports be submitted with the pre-hearing memorandum. He also noted that since discovery closes before expert reports are required to be filed, it would appear that a party may not take an expert's deposition after the report is filed without an extraordinary demonstration of need.

At the November 18, 1999 meeting, the Rules Committee discussed the issue raised by Attorney Ging in his letter and recommended that he respond, in writing, as to how he felt the Board's rules on expert discovery should be revised. Attorney Ging responded by letter dated January 7, 2000. In his letter, he suggested that the Board consider amending its rules to require that where interrogatories are propounded pursuant to Pa.R.C.P. 4003.5, they shall be answered in the manner provided for in the Rules of Civil Procedure, unless otherwise ordered by the Board for good cause shown.

George Miller stated that he did not think there was much difference between the Rules of Civil Procedure and the Board's rules on expert discovery. Gene Dice stated that the Board's rules might actually provide more protection since they put a time limit on when a party must identify his expert witnesses.

Dennis Strain questioned whether deposing a Department witness would resolve at least some of the problem raised by Attorney Ging since this would provide an appellant the opportunity to obtain much of the information it will need to formulate its case. Gene Dice responded that it might not resolve the problem, since during the deposition of a Department witness, an objection is often raised that the witness is being asked to give an expert opinion. This places the appellant in a difficult position: The Department's opinion may be the basis for the action being appealed, yet the witness cannot be asked about this opinion. Howard Wein agreed that Attorney Ging raised a valid argument: Where the Department has made the decision, the appellant should be able to know up front how it made that decision.

George Miller stated that he felt there were a number of mechanisms for obtaining information held by the Department prior to the time for filing one's pre-hearing memorandum, including examination of Department files, expert reports and dispositive motions. Dennis Strain agreed that virtually all facts regarding a Department action are a matter of public record. Chairman Miller further noted that even after the close of discovery, a party may file a motion for leave to take the deposition of an expert.

Mary Anne Wesdock stated that Attorney Ging's letter indicated he had experienced the following problem in his representation of third-party appellants: During the discovery phase, he frequently encounters objections from opposing counsel that they do not have to answer expert interrogatories until the filing of their expert reports, and, therefore, the third-party appellant, as the party with the burden of proof, is required to file its expert report first, without benefit of the opposing parties' responses to expert interrogatories.

Chairman Miller responded to this concern by stating that where a party has served expert interrogatories and receives the type of objection stated above, he may file a motion to compel the opposing party to respond to the interrogatories with respect to experts already retained and to further supplement their answers at a later date.

The majority of the Committee members concluded that the Board's existing rules are adequate to deal with the concern raised by Bob Ging in his letters and recommended that Howard Wein notify Attorney Ging of the Committee's conclusion.

Approval of Minutes:

Dennis Strain made a motion to approve the minutes of the November 18, 1999 meeting. Mike Bedrin seconded. All were in favor.

Agenda for Next Meeting:

Issues which will be addressed at the March 9, 2000 meeting are as follows:

1. Substitution of a proper permittee where an improper permittee has been served notice of the appeal. (The *Thomas* issue.)

2. Whether the Sunshine Law permits the bylaws to be amended to allow members to attend meetings via teleconference at the Board's Pittsburgh office.

3. Ground rules for electronic filing.