ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of May 9, 2002

Attendance:

The Environmental Hearing Board Rules Committee met on Thursday, May 9, 2002 at 10:30 a.m. with Chairman Howard Wein presiding. In attendance were Brian Clark, Maxine Woelfling, Dennis Strain, Mike Bedrin, Terry Bossert, Tom Scott and Stan Geary. Bernie Labuskes, Michelle Coleman, Don Carmelite and Mary Anne Wesdock attended on behalf of the Board.

Approval of Minutes:

A correction was made to page 6 of the minutes of the January 17, 2002 meeting. Proposed subsection (4) to rule 1021.51(g) was corrected as follows: "When *an appeal* [a party] involves a decision under the Sewage Facilities Act…." Brian moved to approve the minutes as amended. Maxine seconded. All were in favor.

Status of Rules Packages:

Mary Anne reported on the status of the pending rules packages. Rules Package 106-6 (including, *inter alia*, reorganization of the rules and new rules on electronic filing and withdrawal of counsel) was reviewed by the Independent Regulatory Review Commission (IRRC) at its public meeting on May 9, 2002. Michelle attended the meeting on behalf of the Board and reported that the rules package passed unanimously. The rules package will be sent to the Attorney General who has 30 days to review it, and then it will be published in the *Pennsylvania Bulletin* as final rulemaking.

Rules Package 106-7 (including, *inter alia*, new rules on signing and special actions and revisions to the rules on prehearing procedure and dispositive motions) was

published as proposed rulemaking on April 20, 2002. The public comment period will end on May 20, 2002, after which the legislative committees will have 20 days to review the proposed rules and IRRC will have 10 days thereafter. Final rulemaking is not expected to be completed until mid to late fall 2002. Howard suggested that the Board might want to discuss the new rules during its session at next year's Environmental Law Forum.

References to "Pa.R.C.P." and "Pa.R.A.P.":

The Board's rules of practice and procedure contain a number of references to "Pa.R.C.P." and "Pa.R.A.P." Don Carmelite suggested that these acronyms be either defined in the definitions section or spelled out as "Pennsylvania Rules of Civil Procedure" and "Pennsylvania Rules of Appellate Procedure" since some people referring to the Board's rules are not attorneys.

Dennis suggested spelling out the entire reference, but Stan and Howard noted this would require amending a number of rules. Terry suggested also adding the citation to the rules of civil and appellate procedure.

Dennis felt that because this was simply a technical correction to the Board's rules, it might not be necessary to go through the rulemaking process. Brian suggested calling the correction a "clarification for purposes of *pro se* appeals" as opposed to adding a "definition." Mike agreed that since the spelling out of "Pa.R.C.P." and "Pa.R.A.P." did not change the scope or purpose of the rules, it might not need to go through the formal rulemaking process. Stan noted that since one of the amendments in rules package 106-6 was to correct the reference in rule 1021.171 from "Pa.R.C.P. 1951"

to "Pa.R.A.P. 1951," this could simply be done as a technical correction to that rules package.

The Committee agreed that "Pa.R.C.P." and "Pa.R.A.P." should be spelled out in the definition section and should contain a cite to 42 Pa.C.S.A. and to the Pa. Code.[1]

Mike suggested that the Practice and Procedure Manual should also clarify what references to "Pa.R.C.P. and Pa.R.A.P." mean and identify the website for the Pa. Code where they can be found. The Committee was in agreement.

Copies of Exhibits – Prehearing Memorandum:

The Board's Prehearing Order No. 2 requires that *copies* of exhibits to be introduced at trial must be submitted with a party's prehearing memorandum. Board rule 1021.82 simply requires that a party *list* the exhibits he intends to introduce at trial. Due to this inconsistency and based on the Board's preference that copies of exhibits be submitted with the prehearing memorandum, the Rules Committee was requested to consider revisions to rule 1021.82 to make it consistent with Prehearing Order No. 2.

Stan asked whether by providing a copy of exhibits with one's prehearing memorandum, that eliminated having to provide a copy for the Board at the hearing. Don stated that Judge Krancer requires extra copies of exhibits at the hearing. Mike suggested that the rule could be revised to require a party simply to provide copies of exhibits and Prehearing Order No. 2 could be tailored to each judge's specifications. Terry suggested adding a subsection to 1021.82(a) as follows: "(9) Such other matters as the Board may order."

[1] The Pennsylvania Rules of Civil Procedure and Rules of Appellate Procedure can be found in Title 231 and Title 210 of the Pa. Code, respectively.

Dennis felt the rule should be specific enough to give parties notice of what is expected of them with regard to filing pre-hearing memoranda, but should not necessarily state what needs to be attached to the pre-hearing memorandum since this may differ among individual judges. Brian stated that the important thing was that Prehearing Order No. 2 not be in violation of or inconsistent with the rule.

The Committee recommended the following revisions to rule 1021.82:

1021.82. Prehearing memorandum.

(a) A prehearing memorandum shall contain the following:

* * * * *

(7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. **A copy of each exhibit shall be attached.**

* * * * *

(9) **Such other information as may be required by the Board's prehearing orders.**

Brian moved that rule 1021.82 be amended as set forth above. Dennis seconded. All were in favor.

Certification of Orders for Interlocutory Appeal:

Don explained that the Board has received a number of calls from attorneys regarding the procedure for certifying a Board order for interlocutory appeal. He suggested it might be helpful to have a rule or a comment guiding people to the appropriate section of the Pa. Rules of Appellate Procedure. Terry suggested that, if the rules were so revised, a reference should also be made to the appellate rules governing appeals of final orders. Maxine noted that a reference to the Darlington and Shuckers

treatise on *Pennsylvania Appellate Practice* in the Practice and Procedure Manual might also be helpful.

Dennis was concerned that a reference to Pa.R.A.P. 1311 (regarding interlocutory appeals) might be too specific. He also felt that this brought up the issue of what constitutes a "final order." Tom felt the Rules Committee might be treading on dangerous ground by engaging in "legal research" for attorneys appearing before the Board. Don noted that the Board's rules already contain references to specific sections of the Rules of Civil Procedure. He further noted that a reference to the Rules of Appellate Procedure would not be telling attorneys how to bring an interlocutory appeal but simply where to look. Terry suggested adding a comment to the rule on reconsideration as follows: "Appeals of interlocutory orders are governed by the Pennsylvania Rules of Appellate Procedure." Don also noted that it was his understanding that the section of the Practice and Procedure Manual dealing with interlocutory appeals was being expanded.

Howard asked whether it was the Committee's recommendation to 1) add a comment regarding interlocutory appeals to the Board's rule on reconsideration (1021.123) and 2) expand the section in the Practice and Procedure Manual dealing with interlocutory appeals. Bernie stated that he agreed with Dennis; he had no problem with expanding the discussion in the Practice and Procedure Manual but was concerned about referencing specific Rules of Appellate Procedure in the Board's rules. He was particularly concerned because one rule seems to reference another rule and so forth. Maxine agreed that this might be stepping into the realm of another tribunal.

The consensus of the Committee was that no changes should be made to the Board's rules but the Practice and Procedure Manual should elaborate on this subject in more detail.

Subpoenas to Depose a Non-Party:

Attorney Dick Ehmann had raised the question of whether the Board's rules adequately address the issuance of subpoenas to depose a non-party witness. Terry asked what is the Board's authority to enforce a subpoena to depose a non-party. Bernie explained that a party must file an *ex rel* petition with the Commonwealth Court to enforce a subpoena; i.e., the Board has no power to enforce a subpoena on its own.

Stan noted that, although the Board's rules on subpoenas and discovery refer to the Rules of Civil Procedure regarding the deposition of non-parties, those rules are confusing. The question, then, was whether the Board's rules should provide a simpler explanation. Michelle stated that this matter had been reviewed at one time outside the purview of the Rules Committee, and it was decided that no action would be taken. It was also noted that the Practice and Procedure Manual discusses the deposition of non-parties.

The consensus of the Committee was that Howard should send a letter to Dick stating that the Rules Committee had reviewed the issue and concluded that it was adequately addressed in the rules and the Practice and Procedure Manual.

Handwritten Filings:

Mary Anne explained that the Board on occasion receives filings that are handwritten. Recently, the Pittsburgh office received briefs and memoranda of law that

were handwritten and difficult to read. She asked the Rules Committee to consider whether there was a mechanism for encouraging or requiring that filings be typed.

Mike noted that the Pennsylvania Rules of Appellate Procedure require that briefs be typed. Rule 210 of the Rules of Civil Procedure contains a similar requirement. Additionally, Rule 33.2 of the General Rules of Administrative Practice and Procedure reads as follows:

> (a) *Typewritten.* Pleadings, submittals or other documents filed in proceedings, if not printed, shall be typewritten on paper cut or folded to letter size….[the remainder of the sentence deals with the size of the paper and margins.]
>
> (b) *Printed.* Printed documents may not be less than 10-point type on unglazed paper…[the remainder of the sentence deals with the size of the paper and margins.]

Based on rule 33.2 of GRAPP, the Committee felt that the Board could require that all documents filed with the Board must be typed.

Guidelines for Pro Se Appeals:

Dennis presented guidelines he had drafted for managing pro se appeals. The guidelines are meant to accomplish four things: 1) provide more information; 2) give pro se appellants a "say;" 3) encourage pro se appellants as to the need for counsel; 4) provide an opportunity for mediation. Dennis noted that drafting a rule might not be the appropriate mechanism for instituting the guidelines; other options include drafting a special order or preparing something similar to the Practice and Procedure Manual.

Brian stated that the guidelines should not provide a separate set of rules for pro se appeals but, rather, constitute an educational process for pro se appellants early in the proceeding. He raised a concern that if the Board were to institutionalize the guidelines, it might encourage more pro se appeals.

Howard and Tom expressed the opinion that the Board is not the proper entity for explaining matters to pro se appellants; Howard suggested that this should be done by DEP. Dennis disagreed, stating that this would put DEP in the position of being the pro se appellant's "lawyer." He reiterated that the Board's role under the guidelines would simply be to educate the pro se appellant about the appeal process. Additionally, Stan noted that the difficulty with having DEP assume that role is that DEP cannot give legal advice to an adversary.

Brian expressed a concern that the pro se appellant might misinterpret the "advice," which could negatively affect the other party/parties. Mike stated that in order to avoid such a situation, the guidelines involve all parties in the process, not simply a one-sided conversation with the appellant.

Tom suggested taking the matter to the Pro Bono Committee of the PBA Environmental, Mineral and Natural Resources Law Section (EMNRLS).

Brian asked if pro se appellants have ever taken advantage of mediation in Board proceedings. Mary Anne responded that the Board has not conducted any formal mediation but has held settlement conferences that were similar to mediation. Dennis noted there are two options for formal mediation. One is conducted within DEP through the Bureau of Personnel. The other is operated outside the agency through the Office of General Counsel. Howard recommended having the Pro Bono Committee develop a mediation program, whereby attorneys agree to act as mediators in pro se appeals where mediation is requested. The Committee agreed with Howard's recommendation. Michelle will discuss this matter further with Dennis and Joel Burcat, who chairs the EMNRLS Pro Bono Committee. Mike and Mary Anne will raise it at the next conference

call of the EMNRLS officers and council. Brian asked that the Rules Committee be given a status report at the next meeting regarding the outcome of these discussions.

Finality:

The Committee revisited an issue that had been raised at the May 17, 2001 meeting regarding "finality," i.e., when is an order of the Board considered "final. This issue arose in light of two cases, *People United to Save Homes* (*PUSH*) and *Blose*, in which the Board had remanded all or a part of the matter to DEP and had relinquished jurisdiction in one of the cases. The Commonwealth Court quashed petitions for review filed in both cases, holding that the Board's adjudication was not a final order because of the remand.

Tom stated he believed that if the court of common pleas remands a matter to the zoning hearing board, that does not constitute a final order.

Dennis noted that a problem arises in cases where the Board remands a matter to DEP to apply a different standard. DEP cannot appeal that decision because, according to the Commonwealth Court's rulings in *PUSH* and *Blose*, it is not a final order. Tom stated that to the extent the Board feels the issue should be reviewed at that point, it can certify the order for interlocutory appeal.

Maxine noted that the problem seemed to be on a larger scale than just the Environmental Hearing Board. Brian suggested addressing the matter with the Office of General Counsel. Maxine and Tom also suggested raising the issue with the Appellate Rules Committee. The consensus of the Committee was that Howard should prepare a letter to the Appellate Rules Committee from the EHB Rules Committee, asking them to

address this issue. In addition, DEP will explore this issue with other Commonwealth agencies through the General Counsel's Office.

Parties in Interest:

The Committee continued its discussion from the last meeting regarding notice to parties in interest and, specifically, whether providing such entities with notice subjects them to the jurisdiction of the Board.

Rule 1021.51(g) requires that an appellant serve a copy of the notice of appeal to the following: 1) the office of the Department issuing notice of the action, 2) the Office of Chief Counsel, and 3) in a third party appeal, the recipient of the action. At the last meeting, the Rules Committee had also voted to require service of the following entities: 4) when an appeal involves a decision under Section 5 of the Sewage Facilities Act, the proponent of the decision and any affected municipality or municipal authority and 5) a mine operator in the case of an appeal involving a claim of water loss or subsidence damage under Sections 5.2 or 5.5 of the Bituminous Mine Subsidence and Land Conservation Act.

Subsection (h) of 1021.51 states, "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." The focus of the Committee's discussion was on whether 4 and 5 above should automatically be made parties to an appeal pursuant to subsection (h).

Bernie asked what was the authority for subsection (h). Maxine responded that the concept predated the Environmental Hearing Board Act and the regulations.

Bernie checked with Bette Lambert regarding why the Board does not treat a municipality or municipal authority as an automatic party in the case of an appeal of a

sewage facilities plan disapproval. The reason behind this is based on the definition of "permittee." The Board's rules define "permittee" as "the recipient of a permit, license, approval or certification in a third-party appeal." Because the definition does not mention "disapproval," a municipality or municipal authority would not be treated as a permittee, and, hence, an automatic party, in the case of an appeal of a disapproval of a sewage facilities plan.

Tom felt that if subsection (h) were limited only to permittees as defined in the Board's rules and did not apply to municipalities and municipal authorities in the case of a sewage facilities plan disapproval or a coal company in the case of a denial of a claim for water loss that might raise an issue of administrative finality.

Tom stated he was in favor of deleting proposed sections (g) (4) and (5) since they have arisen in only a few cases and it has been worked out without having a specific rule. Terry agreed, stating he could envision the concept of requiring notice to other entities being further extended in the future as more situations arose.

Stan moved to withdraw the Committee's recommendation to adopt proposed subsections (g)(4) and (5). Brian seconded. All were in favor, except Dennis who abstained from the vote.

Next Meeting:

The Committee recommended that there be no meeting in July unless there is a need for it. If there is a need for a meeting in July, it will be held on July 18. If no meeting is required in July, then the next meeting will be on September 12, 2002. The meeting time will remain the same at 10:30 a.m.