

ENVIRONMENTAL HEARING BOARD**RULES COMMITTEE MINUTES****Meeting of March 9, 2000****Attendance:**

A meeting of the Environmental Hearing Board Rules Committee was initiated on March 9, 2000 at 1:30 p.m. with Chair Howard Wein presiding. The following members of the Rules Committee were in attendance: Mike Bedrin, Brian Clark, Bob Jackson and Maxine Woelfling. Absent were Jim Davis, Rick Grimaldi, Tom Scott and Dennis Strain. Representing the Board were Chairman George Miller (via teleconference) and Judge Michelle Coleman.

Approval of Minutes:

Maxine Woelfling made a motion to approve the minutes of the January 13, 2000 meeting. Brian Clark seconded. All those present voted in favor of approval.

Expert Discovery:

The Committee reviewed a draft letter which Howard Wein proposed to send to Attorney Bob Ging in response to issues which he had raised regarding the timing of expert discovery. Howard advised Attorney Ging that the Committee had concluded that the Board's existing rules were adequate to address the concerns raised by him.

Amendment of Bylaws:

The Committee reviewed a memorandum prepared by Mary Anne Wesdock regarding the Sunshine Act, 65 Pa.C.S.A. §§ 701 – 716, and whether the Act prohibited meetings from being convened in the Board's Harrisburg and Pittsburgh offices via teleconference. The memorandum noted that Section 703 of the Sunshine Act defines a "meeting" as "[a]ny prearranged gathering of an agency which is attended *or participated in* by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." (Emphasis added) Brian Clark questioned whether there was any case law defining what was meant by "participated in." Maxine Woelfling confirmed that there is no case law addressing this provision of the Act. The members of the Committee concluded that the Sunshine Act permitted amending the bylaws to incorporate Howard Wein's proposal to allow the Rules Committee to convene at the Board's office in Harrisburg and, at the discretion of the Chair, at the Board's Pittsburgh office via teleconference.

The Committee voted to amend the bylaws as follows:

1) In Article IV (Membership), Sections E and G, respectively, replace "Department of Environmental Resources" with "Department of Environmental *Protection*" and "Secretary of Environmental Resources" with "Secretary of Environmental *Protection*."

2) Amend Article IX, Section D (Frequency of Meetings) to change the date on which the Rules Committee will meet to the second Thursday, as opposed to the second Friday, of the months designated therein. The first sentence of section D will now read as follows: "The Committee will meet on the second Thursday of the months of January, March, May, July, September and November."

3) Add the following new section to Article IX (Meetings): "E. PLACE: 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."

Bob Jackson moved to amend the bylaws as set forth above. Brian Clark seconded. All voted in favor.

Electronic Filing:

The Committee reviewed a document prepared by George Miller entitled "Electronic Filing and Service Pilot Project: Temporary Rules for Electronic Filing or Service by Consent." The document contains guidelines for the Board's proposed pilot project on electronic filing. The pilot project and guidelines will be discussed during the final quarter of the EHB presentation at the Environmental Law Forum. If the pilot project proves to be successful, the Board will propose formal rules on electronic filing through the Rules Committee.

The last sentence of paragraph 1 of the guidelines originally read, "Both the electronic file and the hard copy file will be available to the public for inspection and copying during the Board's office hours to the extent consistent with the proper discharge of the Board's duties." It was amended to read as follows: "The electronic file will be available on the Board's website, and the hard copy file will be available to the public for inspection and copying during the Board's office hours to the extent consistent with the proper discharge of the Board's duties."

Paragraph 4 of the guidelines, dealing with exhibits, was amended to add the following language: "The program ultimately may permit faxing exhibits to the Board for entry in the electronic docket through an automated system."

Brian Clark suggested adding language requiring all parties using the electronic filing system to immediately notify the Board and all parties when a potential virus is identified. Chairman Miller proposed adding the following language: "Counsel shall take precautions to assure that their transmissions will not result in disruption to the system such as the transmission of computer viruses. Counsel shall undertake to advise the Board and all other counsel in the case of any risk of such a disruption." The Committee concurred.

Howard Wein suggested that in the Board's discussion of electronic filing at the Environmental Law Forum, it should note that the automatic numbering feature does not always work and that parties taking part in the project should be aware of this.

Mike Bedrin suggested that paragraph 1 of the guidelines should state that registered users receive a password. The Committee concurred, and the following sentence was added to paragraph 1: "Each registered user will be assigned a password for use of the system for filing and service."

Maxine Woelfling suggested that the last sentence of paragraph 3 be amended to delete the language "to assure receipt by the Board." The Committee concurred.

Mike Bedrin suggested amending paragraph 10 to read as follows: "Subpoenas and any bond or check required to be filed with an appeal of a penalty assessment is not a legal paper for purposes of electronic filing." The Committee concurred.

Howard Wein questioned why paragraph 3 required that documents exceeding 25 pages in length must also be filed by hard copy. He proposed changing this sentence to read, "If the document *with electronic exhibits* exceeds 25 pages in length, the party must also file the document in hard copy." (Emphasis added) The Committee concurred.

Maxine Woelfling noted that paragraph 5 of the guidelines requires timely filing but pointed out that by the time a document makes its way over the Internet, it may be past the 4:30 p.m. filing deadline. Chairman Miller stated that the Board would take this into consideration, and noted that paragraph 7 of the guidelines states that the Board would be liberal in excusing transmission failures and deficiencies.

Mike Bedrin noted a typographical error and an error in the numbering of paragraphs.

The Committee recommended renaming the document "Temporary Guidance" as opposed to "Temporary Rules" since these are more like filing requirements as opposed to actual rules of practice and procedure.

The Committee recommended that the Board publish notice of the pilot program in the *Pennsylvania Bulletin*. Bob Jackson questioned whether the Committee and the Board needed to take formal action before the guidelines could be published. Howard, Maxine and Judge Coleman advised the Committee that notice of a pilot program could be published in the *Pennsylvania Bulletin* without formal action. Maxine noted that the Board of Claims had published notice prior to launching its pilot program. Howard recommended waiting until after the Environmental Law Forum to see if the Board receives any comments from practitioners at the Forum.

Substitution of Parties (Improper Permittee):

The Committee continued its discussion from the last meeting regarding a proposed rule which would allow the Board to substitute parties where it determines that an improper permittee has been served. The Committee reviewed language proposed by Chairman Miller.

Mike Bedrin stated that his concern was that the proposed rule vested the Board with the authority to redirect a Department action to a party that the Board deems to be the proper party. Brian Clark agreed, stating that the problem was twofold: First, there is the jurisdictional hurdle, i.e. does the Board have authority to redirect a Department action to another party? Second, it has the potential to be unfair to the new party brought into the case. In response, Bob Jackson stated that it was his opinion that the Board has the right to designate how service is to be received, and if it does not, it should have that authority.

Maxine stated that the problem with the proposed rule on substitution of parties is that it authorizes the Board to join additional parties, and the Board does not have this power. Howard suggested correcting the problem in the context of Board rule 1021.53(g), which deals with service of a notice of appeal. However, the general consensus was that this would not avoid the problem.

Howard summarized the issue as follows: Is it better for the Board to cure a procedural defect or to require the Department to initiate a new action against the proper entity?

Brian stated that he views this issue as substantive not procedural, and he does not believe the Board has the authority to take such action under its enabling act. He stated that it would be more balanced for the Board to dismiss an appeal where it believes an improper permittee has been served. He likened this situation to dismissing an appeal which has been untimely filed.

Howard disagreed, stating that the appellant should not be penalized for serving the entity to which the Department has issued notice of its action.

Chairman Miller stated that if the Board determines that an improper permittee is the recipient of the Department's action, it would sustain, rather than dismiss, the appeal. He noted that where an appellant has served an improper permittee because the appellant has relied on the Department's action, and was not aware that the named permittee was the wrong party, it would not be fair to dismiss the appeal. Instead, the appeal would be sustained on the basis that the Department has acted improperly by taking action with respect to the wrong entity.

Mike Bedrin pointed out that the underlying assumption of the discussion thus far was that the Department will have served notice of its action on the wrong permittee. He stated that there may be a case where this is not so, such as where the Department issues a permit to an industrial authority rather than the underlying entity. In such a case the Department might not be likely to agree that the wrong party has been served, especially if the industrial authority was the only entity with which the Department had any dealings.

Howard raised the question as to when, other than in a case like *Thomas* dealing with the Sewage Facilities Act, could this situation arise. Maxine noted that in an earlier Board case, *Carter Farm Joint Venture v. DER*, the issue was whether an improper corporate entity had been served. Chairman Miller also noted that there might be a situation where Department approval is issued to a consultant, who would not be the proper permittee.

Howard raised the following question: Does the Board have the authority to bind a party which it determines to be the proper permittee? The majority of the Committee members agreed that the Board does not have such authority.

Mike pointed out that the problem might resolve itself in the following manner: If the Board threatens to sustain an appeal on the basis that the recipient of the Department's action is not the proper permittee, it may cause the Department to reevaluate the situation and serve notice of its action on the entity the Board believes to be the proper permittee.

Chairman Miller concluded the discussion by stating that this is not a situation which arises frequently before the Board and perhaps the Committee should postpone acting on it in order to determine if there may be other ways of dealing with the situation. He withdrew the proposed rule from consideration by the Committee.

A suggestion was made as to the possibility of seeking a legislative amendment which would give the Board the power to join additional parties. Chairman Miller stated that he was not in favor of seeking a legislative amendment.

Reorganization of Rules:

The Committee discussed Chairman Miller's proposal to reorganize the EHB Rules of Practice and Procedure. Chairman Miller proposed reorganizing the rules along procedural lines in a way that would make them more user-friendly. Two proposals were presented to the Committee for reorganization of the rules.

The Committee addressed the following two questions: 1) Should the rules be reorganized? 2) If so, which of the two proposals presented to the Committee should be adopted?

With regard to the first issue, the Committee noted that members of the bar are familiar with the rules in their current form. Howard asked whether the Board had received any input from practitioners who felt that the existing rules were difficult to use. Chairman Miller responded that some of the assistant counsel to the Board had expressed difficulty in finding particular items in the rules and that he also felt the rules are difficult to use in their current form.

Mike Bedrin reported that he has not heard any complaints within the Department as to the manner in which the EHB rules are structured. He expects that any change in the rules would at first be seen as a "bump in the road" but should not pose a significant problem.

As to the Committee's comment that practitioners are familiar with the rules in their current form, Chairman Miller noted that the Board had adopted a significant number of new rules in the past year and practitioners would not have become familiar with their location. Therefore, he felt that this might be a good opportunity for reorganizing the rules.

Bob Jackson recommended an appendix which would cross-reference old and new sections.

Howard agreed with Chairman Miller that if the Board is going to reorganize the rules, now is the time to do it. He stated he is not adverse to reordering the rules, but questioned whether it is necessary to do so except where there are glaring inconsistencies in the location of certain rules. Maxine stated that the existing rules appear to follow a natural progression, except for the provisions on prepayment of civil penalties.

Chairman Miller stated that a complete table of contents at the beginning of the rules would be helpful. However, the Legislative Reference Bureau will not permit a full table of contents in the Pennsylvania Code; instead, it breaks the contents down by subchapters.

Brian Clark stated that the Committee has three options: 1) recommend keeping the rules in their present form; 2) adopting one of the two proposals submitted to them; or 3) take a middle-ground approach, which would involve making the rules more user-friendly without a wholesale reorganization.

Brian also noted that it could be argued that reordering the rules could constitute a substantive change because of a change in a rule's location. Chairman Miller responded that a general statement could be included in the rules to the effect that changes in location of a rule do not constitute a substantive change.

Maxine agreed with Brian's option of a middle-ground approach and suggested that the issue be raised with practitioners at the Environmental Law Forum. She recommended questioning practitioners as to whether and where they find the structure of the EHB rules to be troublesome.

Bob Jackson suggested that at the next meeting the Committee should focus on where there are glaring inconsistencies in the location of certain rules. Howard asked Mary Anne to send a notice to the Committee members asking for their comments on where they believe the rules should be reorganized and requesting them to respond to her by May 1, 2000.

The Committee also suggested working on a table of contents and an index.

Agenda for Next Meeting:

The following topics were suggested for the agenda of the next meeting to be held on May 11, 2000 at 1:00 p.m.:

1. Default judgments – Consider whether a rule should be adopted giving the Board authority to issue default judgments.
2. Continue discussion of reorganization of the Rules of Practice and Procedure
 - a. Sections which should be reorganized.
 - b. Table of contents and index.

3) Effect of Lobbying Disclosure Act on the Rules Committee and whether the Committee should ask for an advisory opinion.

Adjournment:

Brian Clark moved to adjourn. Maxine Woelfling seconded. All were in favor.