ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of January 11, 2001

Attendance:

A meeting of the Environmental Hearing Board Rules Committee was held on January 11, 2001 beginning at approximately 1:05 p.m. The following members of the Rules Committee were in attendance: Chairman Howard Wein, Maxine Woelfling, Michael Bedrin, Dennis Strain, Brian Clark, and Bob Jackson. Representing the Environmental Hearing Board were George Miller, Michelle Coleman, and Michael Krancer.

Approval of Minutes:

Maxine Woelfling moved to approve the minutes of the September 21, 2000 meeting. Mike Bedrin seconded. All were in favor.

Electronic Filing:

George Miller reported on the progress of the EHB's pilot project in electronic filing. Seven appeals are participating in the pilot project. To date, there have been eight electronic filings, and all have been completed successfully. George and Board Secretary Bill Phillipy participate in a conference call with Verilaw every other week to discuss any problems.

Initially, the Board experienced problems with transmitting the electronically filed documents to assistant counsel, who are designated to receive the documents after they have been accepted for filing by the Board's administrative staff. These problems have been resolved.

Petitions for Reconsideration:

The Committee discussed a memorandum circulated by Mary Anne Wesdock regarding whether a supporting memorandum of law must be filed with a petition for reconsideration. The current rules on reconsideration (§§ 1021.123 and 1021.124) are silent on whether a supporting memorandum must be filed. Because petitions for reconsideration must be filed within 10 days of the date of the order for which reconsideration is sought, it has been customary practice to accept petitions without supporting memoranda.

Dennis Strain pointed out that the time constraints on filing and ruling on petitions for reconsideration are dictated by the rules of appellate procedure since appeals from orders must be taken within 30 days. However, if the Board grants a petition for reconsideration, it is no longer limited by the appellate time schedule. At that point, the Board can ask for further briefing on a particular issue if it wishes to do so.

George stated that in the interest of advocacy, an attorney would want to make as strong a case as possible, and this may require filing a memorandum of law in support of a petition for reconsideration. Howard Wein commented that whether an attorney is able to do so may depend on what resources are available to him. Brian Clark stated that whether an attorney is able to do so also varies depending on the case.

Howard suggested adding language after the first sentence of § 1021.124 (reconsideration of final order) stating that a party *may* file a supporting memorandum of law. The Committee considered whether the same language should be added to § 1021.122 (reopening of record) and § 1021.123 (reconsideration of interlocutory order). Mary Anne pointed out that the 10-day time limit is also contained in § 1021.123 and,

therefore, it would make sense to add it to that section as well. George noted that there is no such time constraint in § 1021.122 and, therefore, a party should be able to file a supporting memorandum or brief in that situation.

Bob Jackson responded to an earlier question by George as to whether a party in state court is required to file a brief with a motion for judgment NOV or a motion for a new trial. Bob stated that no memorandum of law or brief is required with a motion for a new trial.

Maxine suggested adopting the same language contained in § 1021.72(d) (regarding discovery motions). The Committee agreed.

Maxine then made a motion to add the following language after the first sentence of §§ 1021.123 and 1021.124: "A party may file a memorandum of law in support of its petition for reconsideration or its response to a petition for reconsideration. The supporting memorandum of law shall be filed at the same time the motion or response is filed." Brian seconded the motion. All were in favor.

Pending the adoption of the revision to §§ 1021.123 and 1021.124, George suggested adding language to this effect in the Board's Practice and Procedure Manual.

Reorganization of the Rules:

The Committee examined two alternatives proposed by Maxine for reorganizing the Board's Rules of Practice and Procedure. Both alternatives are identical except for the manner in which they deal with the section on "Hearings."

Since the reorganization of the rules is likely to be combined with other proposed rules, the reorganization will go through the IRRC review process and public comment period.

George stated that he felt the rules on special actions should be expanded to cover other types of proceedings, such as cases referred to the EHB by other courts (e.g. takings cases) and unusual cases (such as citizen suits under the Solid Waste Management Act and complaints for recovery of costs under the Hazardous Sites Cleanup Act) and, therefore, requested that the Committee leave space in the numbering system to accommodate such additions to the rules. The Committee agreed to reserve three spaces under "Special Actions" for possible additions to the rules.

Likewise, Howard suggested reserving space for possible revisions to the rule on summary judgment.

The Committee decided to take a vote on the proposed reorganization up to, but not including, the section on "Hearings." Judges Miller, Coleman and Krancer agreed with the proposed reorganization up to this point. Bob moved to approve the proposed reorganization of the rules up to the section on "Hearings." Brian seconded. All were in favor.

Before proceeding to the "Hearings" section, Howard stated that he felt the rule on "Voluntary mediation," shown at § 1021.81, should go before the rules on "Pre-hearing memorandum," shown at § 1021.79, and "Pre-hearing conferences," at § 1021.80. He suggested that it be moved prior to the rule on "Discovery," shown at § 1021.77. Dennis suggested moving "Voluntary mediation" to § 1021.40 after "Docket" and making "Docket" § 1021.37. Maxine disagreed, stating that voluntary mediation does not occur until formal proceedings have been initiated; the rules prior to the subchapter on "Formal Proceedings" simply deal with administrative matters.

Bob felt that "Voluntary mediation" should go after "Discovery" since a party would want to know all about the case first before agreeing to submit to mediation.

Dennis stated that, in the alternative, he agreed with Howard in moving "Voluntary mediation" before "Discovery."

The consensus of a majority of the committee was to leave "Voluntary mediation" at § 1021.81, as shown in Maxine's proposal.

The Committee next turned to a discussion of the two proposals dealing with the section on "Hearings." Alternative 1 would leave the "Hearings" section as it is currently organized. Alternative 2 would reorganize it in a more chronological fashion. In Alternative 2, Maxine also suggested the possibility of moving the rule on "Oral argument after hearing" from where she had placed it at § 1021.98. Howard suggested placing it after the rule on "Post-hearing briefs," shown at § 1021.111, or after the rule on "Amicus curiae," at § 1021.112. George questioned whether the rule on ""Amicus curiae" should be earlier in the rules, in the section on "Representation." Brian agreed. The Committee agreed to move the rule on "Amicus curiae" to the "Representation" section. Since the soon-to-be-published rule on "Pro bono representation" will be located at § 1021.24, Maxine recommended moving "Amicus curiae" to § 1021.25.

Mary Anne also noted that the reorganization would have to take into account the other soon-to-be-published rules on "Substitution of parties" and "Hearing examiners" currently slotted for § 1021.54 and § 1021.99, respectively. Maxine suggested the rule on "Substitution of parties" would probably fit in the section on "Intervention and Consolidation."

Brian pointed out that there appeared to be an unnecessary gap between § 1021.36 and § 1021.41. Since there was no explanation for the gap, the Committee agreed to move the rule on "Docket" from § 1021.41 to § 1021.37 and to have Subchapter C and the section on "Appeals" begin at § 1021.41 rather than § 1021.51. Everything thereafter would be renumbered up to the section on "Motions" which would remain numbered the same.

Dennis suggested moving the new rule on "Hearing examiners," currently slotted for § 1021.99, to § 1021.44, after "Amendments to appeal; nunc pro tunc appeals." Sections 1021.53, 1021.54 and 1021.55 would be reserved under "Special Actions" as requested by George. Sections 1021.60 – 1021.64 would either be reserved, but not under any particular heading, or simply not be used. With regard to the latter, Bob asked whether it was better to reserve the numbers for purposes of research. Maxine noted that there are other ways to determine whether a rule was at a particular number at any given time.

"Hearings" would then begin at § 1021.81. Howard stated he liked Alternative 2's numbering under "Hearings" but would move "Oral argument" after "Post-hearing briefs." Bob questioned whether "Initiation of hearings" and "Waiver of hearings" should be reversed. Brian and Howard stated they preferred to keep the order of "Initiation of hearings" and "Waiver of hearings" as proposed by Maxine.

The rule on "Oral argument" will move to § 1021.112, after "Post-hearing briefs."

George suggested that Maxine prepare a draft of the reorganized numbering of the rules based on the Committee's comments and suggestions, and that the Committee vote on the proposed reorganization at its next meeting.

The Committee and EHB judges extended their thanks to Maxine for her efforts in preparing a proposed reorganization of the rules.

Act 138 of 2000:

Maxine brought to the attention of the Committee Act 138 of 2000, recently enacted by the Pennsylvania legislature. Act 138 was enacted to conform the attorney fee provisions under the Surface Mining Conservation and Reclamation Act with federal requirements. The Committee requested that Mary Anne review the act and report to the Committee at its next meeting as to whether any of the Board's rules on attorney's fees should be revised as a result of the act.

Summary Judgment:

The Committee reviewed a memorandum circulated by Howard regarding proposed amendments to the Board's rules on summary judgment. Howard explained that the Board's current procedures for filing for summary judgment often lead to duplication in the pleadings filed. The Board's current practice requires motions and responses to set forth in numbered paragraphs "everything but the kitchen sink." The Board's rules also require that parties file a supporting memorandum of law, in which the facts set forth in the motion are simply restated in a different form.

In federal practice, a motion for summary judgment may simply state that a party moves for summary judgment for the reasons set forth in its supporting brief. State practice also does not require that the motion contain much detail.

The Board's rules also require that exhibits must be attached to the motion, rather than the memorandum, in order to be considered part of the record. The historical basis for this requirement is that in "pre-photocopier days" briefs were not part of the official

record sent to an appellate court because they were too difficult to reproduce. Now that records are easier to reproduce, this requirement appears outdated.

George noted that when he receives a motion for summary judgment, he reads the brief first and if he needs to check on a fact, then goes to the motion. He feels that much lawyer time is wasted in producing a motion that sets forth essentially everything that is stated in the brief, and he would be in favor of moving in the direction of federal practice. Brian agreed, noting that in federal practice, a party responding to a motion for summary judgment need not prepare such an elaborate response as is required by the Board's current rules.

Dennis raised the issue of how the Board would deal with factual issues asserted in a brief. Howard noted that some courts issue a pre-trial order requiring the parties to prepare a statement of disputed facts. Maxine stated that even if the court does not require it, one may include a statement of facts at the beginning of his or her brief.

Dennis questioned how one would respond to factual assertions interspersed throughout a brief. Howard responded that in state practice, if the factual assertions are not in paragraph form, one can respond to them en masse, and need not do so seriatim. This would be especially helpful in the case of background facts not material to deciding the motion.

Bob noted that if a case is dismissed on a motion for summary judgment, briefs are not part of the record that goes to the appellate court. Howard suggested that perhaps the Board needs more of a hybrid procedure to insure that both facts and law are in one document. In addition, George and Howard noted that as long as the Board's rules

provide that briefs are a part of the record, this alleviates the problem. Howard suggested adopting a rule that is a hybrid between Federal Rule 56 and Pa.R.C.P. 1035.1 – 1035.5.

Howard summarized that the purpose of a revision to the rules on summary judgment was to eliminate duplication and long paragraph-by-paragraph documents requiring a similar response. Maxine agreed that the purpose of a new rule should be to make the summary judgment process more manageable and meaningful.

Bob questioned whether such a purpose would be better handled by individual orders of the judge. The problem with this approach, explained George, is that the rules as they stand require paragraph-by-paragraph responses to motions. Bob commented that whoever pleads in the first instance then sets the stage for the length and complexity of all of the pleadings.

George raised the following question: If an opposing party fails to respond to a motion, he will be held as having admitted the facts pleaded in the motion in all cases except that of a motion for summary judgment. What is the rationale for this rule? Maxine responded that she was not sure of the rationale for the rule, other than breaking out summary judgment as a separate class of motion. Dennis stated that perhaps it is because with a dispositive motion, the facts would be admitted for all purposes and not simply with regard to the motion.

Dennis stated that the Board has an interest in not having to hold hearing on more issues than it needs to hear, and he noted that Department lawyers spend a great deal of time preparing summary judgment motions in their cases. Brian stated that he is of the view that unless a client has a very strong case for summary judgment, his attorney should not spend the time and client's money filing a summary judgment motion.

Howard noted that if summary judgment could be accomplished by simply writing one paragraph on each issue, an attorney would not feel that he had to write forty paragraphs. George sensed that some attorneys feel that in order to move for summary judgment, they must put their entire case on paper.

Brian asked whether George has ever granted only partial summary judgment when faced with a motion for full summary judgment. George stated that he has, but indicated the burden should not be on the Board to sort out which issues qualify for summary judgment; the attorney, as an advocate for his client, should take on this burden. Motions should at least say, for example, that issues 4, 5 and 6 are not in dispute and partial summary judgment is requested on these issues, but George noted that attorneys often do not want to sacrifice the motion for the possibility of partial summary judgment even though failing to do so may result in a denial of summary judgment on all issues.

Mike posed the following question: What is making the summary judgment motions too long – is it that the motions include facts that are not material and then the opposing party is required to respond to everything, producing an equally long response? George believes this is part of it – parties feel that they must include " everything but the kitchen sink." Bob noted that the purpose of the federal rules has been to streamline the practice.

Howard stated it was his opinion that motions should include only two things: 1) facts regarding the central issue and 2) the law on which the party relies. Background facts should not be a part of the motion. Bob questioned whether we should put less emphasis on the brief and perhaps require that the motion contain the essence of the basis for summary judgment.

Howard raised the question of proper terminology – "brief" versus "memorandum of law." The consensus of the Committee was to keep the terminology as it is stated in the rules.

Howard suggested that the Committee members obtain a copy of the Federal District Court local rules for their district and some sample scheduling orders for the next meeting. These should be forwarded to Mary Anne, who will circulate them with the agenda for the next meeting. Howard and Mary Anne will work on proposals for amending the Board's summary judgment rules.

Next Meeting:

The next meeting is scheduled for Thursday, March 8, 2001 from 12:30 to 4:30 p.m. However, because Brian and George will be unavailable for that meeting, Mary Anne will e-mail the members of the Committee to determine whether March 15, 2001 would be a more convenient date for members of the Committee.