ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES

Meeting of November 21, 2002

Attendance:

The November 21, 2002 meeting of the Environmental Hearing Board Rules Committee convened at approximately 9:45 a.m. Chairman Howard Wein presided. Also in attendance were the following members: Maxine Woelfling, Dennis Strain, Stan Geary, Mike Bedrin, Brian Clark and Tom Scott. Tom Renwand and Mary Anne Wesdock attended on behalf of the Board.

Approval of Minutes:

On the motion of Maxine, seconded by Brian, the minutes of the May 9, 2002 meeting were approved.

Status of Rules Packages 106-6 and 106-7:

Rules package 106-6 was published as final rulemaking on June 29, 2002. Rules package 106-7 has received all necessary approvals and is scheduled to be published as final rulemaking in the November 30 issue of the Pennsylvania Bulletin. Following that, the Board will publish an updated bound version of the Rules and Practice and Procedure Manual.

Practice and Procedure Manual:

Howard discussed a suggestion that he had previously raised with Mary Anne regarding the Board's Practice and Procedure Manual. He had recommended that the Practice and Procedure Manual on the Board's website provide electronic links to certain items cited in the Manual, such as cases and regulations. He also suggested that the

Board put the Manual on CD Rom, as DEP does with its Technical Guidance Manual on Land Recycling.

Mary Anne reported that she had raised Howard's suggestion with the judges and Assistant Counsel at a meeting in September and was asked to prepare a memorandum for George Miller and Bill Phillipy on the cost and feasibility of such a project. She recommended that, at a minimum, the Board could provide links to regulations and Board decisions from 1997 to the present for the Practice and Procedure Manual on the website. Bill Phillipy was requested to check with Verilaw to determine the cost, if any, of creating links in the Manual on the website.

Since the cost of producing a CD Rom version of the Manual would be at least $4,000, Mary Anne had suggested looking into whether there was sufficient need to justify the cost. Tom Scott noted that the Manual on the website could be updated easily, whereas a CD Rom could not.

The Committee requested Mary Anne to follow up with Bill Phillipy as to his discussion with Verilaw.

Mediation:

Brian noted that at the prior meeting, in discussing guidelines for handling pro se appeals, the Committee had requested Mary Anne and Mike to ask the officers/council of the PBA Environmental, Mineral and Natural Resources Law Section (EMNRLS) whether the Section's Pro Bono Committee could develop a mediation program in which attorneys could volunteer to act as mediators in pro se appeals before the Environmental Hearing Board (EHB). Mary Anne reported that the EMNRLS officers/council had

recommended that a separate program could be developed for mediation in EHB cases, rather than making it part of the Pro Bono Committee's activities.

The Rules Committee suggested that the mediation program could be handled by the Litigation Committee of the EMNRLS. Brian suggested that the mediation program could incubate in one committee and then spin off on its own once fully developed.

Mike reported on the newly-created mediation program offered through the Office of General Counsel. He also said he would inquire with DEP attorneys to find out how many have used mediation.

Howard raised a concern that, whereas in federal court the judge who mediates a case is different from the one who ultimately hears the case if it does not settle, at the EHB all the judges must sign off on the final adjudication. Tom Renwand stated that the EHB judge who acts as mediator could recuse himself if the parties request it.

Mike suggested looking at the mediation model used by the Commonwealth Court.

Brian asked whether any mediations before the Board have ever ended in partial settlement. Tom responded that the cases that settled did so in their entirety.

Dennis noted that one obstacle to mediation at the Board level is that appeals must be filed within 30 days of the DEP's action, thereby forcing people into litigation. Stan noted that pre-appeal mediation would not be feasible in all cases, especially in cases that ultimately end up as third-party appeals since the would-be appellants would not be known until after an appeal is filed.

Dennis recommended that this matter be placed on the agenda for the next meeting, giving people time to think of the potential obstacles and benefits to creating a

mediation program for EHB cases. In addition, Mike will follow up with DEP attorneys to determine how many have used mediation. Howard and Mary Anne agreed to raise this matter for discussion at the EMNRLS Section Day meeting that afternoon.

DEP Notices of Right to Appeal:

Maxine raised a concern that the notice of right to appeal form used by the DEP states that an appellant does not need counsel to file an appeal. She recommended that this language be eliminated because it could encourage appellants to proceed pro se. The same language is in the notice in the Pennsylvania Bulletin. Dennis and Mike agreed to look into this matter further.

Terms:

Mary Anne reported that the terms of Brian Clark, Tom Scott and Bob Jackson were up for renewal. Howard suggested that the minutes contain a running list of the expiration dates of everyone's terms.

Notice of Appeal:

Mary Anne reported on an issue raised by Terry Bossert. The Board's rules at 1021.51 currently require that a notice of appeal contain the name, address and telephone number of the appellant. Terry felt the rule should be revised so that the telephone number of either the appellant or his counsel, if represented, could be included in the notice of appeal.

Howard asked whether an attorney's signing of the notice of appeal acts as a notice of appearance. Mary Anne advised that it does. Brian asked whether a cell phone number could be used. The Committee determined there was no need to revise the rule for the purpose of allowing or disallowing the use of cell phone numbers. Brian also

asked whether an e-mail address could be provided. Howard recommended that the Board could request this information if it wanted to do so but there was no need to revise the rule for this purpose.

The Committee recommended that the rule be revised as follows:

§ 1021. 51. Commencement, form and content.

* * *

(c) The appeal shall set forth the name[,] **and** address **of the appellant** and **the** telephone number of the appellant **or the appellant's attorney, if represented.**

Brian moved to revise § 1021.51 as set forth above. Stan seconded. All were in favor.

Procedural and Miscellaneous Motions:

The Committee considered a proposal by George Miller to combine procedural and miscellaneous motions into one rule. Currently, procedural motions are covered by rule 1021.92 and miscellaneous motions by rule 1021.95. Stan noted that the rule for miscellaneous motions requires a supporting memorandum of law while the rule for procedural motions does not. The Committee pointed out that the Board might want a supporting memorandum of law for the types of motions listed as "miscellaneous" but would not necessarily want a supporting memorandum for procedural motions, such as motions for extensions or for a continuance.

Brian suggested that the Committee revisit the issue at the next meeting after the Board considers whether it wants to require memoranda for the types of motions listed in these two rules.

Expedited Hearings:

Tom Renwand reported that in one of his cases the Permittee's counsel requested an expedited schedule that would allow for a hearing within four to five months after the appeal was filed. Counsel for the DEP had no position on the request. Counsel for the appellant strongly opposed the request arguing that her clients' due process rights would be violated. Tom denied the motion but the parties agreed on a relatively expedited schedule in which the hearing will be held within seven months of the filing of the appeal. Tom noted that the Board's rules have no procedures for expedited hearings. Although the rules allow the parties to draft a joint proposed case management order, which would allow them to shorten or lengthen the standard deadlines, there are no procedures for allowing an expedited hearing when only one of the parties requests it. He felt that there may be some cases where the opportunity for an expedited merits hearing would be more beneficial than holding a supersedeas hearing.

Brian pointed out that if the Committee were to develop a procedure for holding expedited hearings, there would first need to be some criteria for determining when such a hearing would be warranted. For instance, when would a need for an expedited hearing outweigh the due process concerns of the opposing party? Tom noted that in some cases, a lengthy delay could be as detrimental to a party as an adverse decision. Further, in the case he described earlier, the appellant had already been heavily involved in the permit review process, as well as an earlier appeal. He felt that where a case involves only limited discovery and one to two experts on each side, it might be a good candidate for an expedited hearing schedule

Maxine noted that the rule on procedural motions allows parties to ask for an expedited hearing. However, that type of motion is used further along in the proceeding,

not in the early stages of an appeal. Dennis also noted that the advantage of having a separate rule covering expedited hearings is that many practitioners may not realize it is an option since it is hidden away in the rule on procedural motions.

Tom Scott noted there could be a problem with having two different sets of procedures because a party does not know which one is going to apply up front.

Mike asked how a joint request by all the parties for an expedited hearing is currently handled. Tom stated that it could be handled as a joint proposed case management order.

Brian suggested that the Committee members review the briefs filed in Tom's case. In addition, Howard suggested looking at the procedures that some courts have for expedited proceedings. Maxine noted the District Court for the Eastern District of Virginia is one such example and that it might be worthwhile to check its website.

This matter will be added to the agenda for the next meeting.

<u>Requirement of Prepayment to Perfect an Appeal</u>:

In cases where a mine operator has appealed an order of the DEP to repair or compensate for mine subsidence damage under the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), 52 P.S. § 1406.1 *et seq*., the mine operator must deposit an amount equal to the cost of repair or compensation in an escrow account within 60 days of the date on which the order was received in order for its appeal to be perfected. 52 P.S. § 1406.5e(e). Tom Renwand pointed out that, although the Board is charged with determining when an appeal is perfected, there is no mechanism currently in place for notifying the Board that this provision of the Mine Subsidence Act has been complied with.

Dennis noted that in other similar situations – such as prepayment of a civil penalty – the check is sent first to the Board, which then forwards it to the DEP. This instruction is placed in the DEP's notice to the party.

The Board's current rule on prepayment of civil penalties, 1021.54, contemplates a situation where the prepayment is contemporaneous with the appeal. Stan advised that because this rule deals with civil penalties, which is a different type of situation than that under § 1406.5e(e), he felt that it would be more appropriate to consider a parallel rule rather than simply revising rule 1021.54. He also noted that the subsequent rule, 1021.55, allows for a hearing on a party's inability to prepay, whereas § 1406.5e(e) does not.

Stan also raised the question of whether a failure to deposit the requisite funds under § 1406.5e(e) is jurisdictional. He noted that in most cases where a party has failed to perfect – e.g. a failure to include a telephone number – the Board does not automatically dismiss the appeal. Howard also noted that in such cases, the Board's normal practice is to send out a notice to perfect and then a rule to show cause why the appeal should not be dismissed for failure to perfect. Tom Renwand questioned whether it is the Board's obligation to notify a party that it has failed to perfect its appeal.

Dennis noted that if a new rule on prepayment were added to cover situations other than prepayment of civil penalties, the Committee should determine how many types of situations could fall into this category. Mike will send an e-mail to DEP staff asking when this type of "prepayment" situation arises; he will get back to Mary Anne with his findings. Dennis suggested a title for the rule as follows: "Prepayment of compensation" or "Prepayment of escrow."

Tom Scott suggested revising current rule 1021.54 as follows: Change the title to "Prepayment of penalties, **costs of repair or compensation**." Add the following sentence to the end of section (a): In the event the time for payment falls after the date of appeal, the appellant shall provide proof of payment within the applicable statutory period." In this case, however, rule 1021.55 would need to be revised since it allows for a hearing on inability to prepay.

Scope of the Board's Rules:

Tom Renwand reported that he had recently read the rules of practice and procedure for the Board's counterpart in Ohio. Those rules clearly set forth the scope of the board's review. Tom thought it might be helpful to have a rule setting forth the EHB's scope of review. He noted that many attorneys still cite *Sussex v. DEP*, 1984 EHB 355, as the case defining the Board's scope of review even though this case has been overruled by more recent Board decisions. *See Harriman Coal Corp. v. DEP*, 2000 EHB 960, 961-62, n. 1; *Smedley v. DEP*, 2001 EHB 131, 157-60. He felt it would be helpful for practitioners to be able to get as much information as possible from the Board's rules.

Dennis felt it would be helpful to a reviewing court to have a statement in the Board's rules saying the Board's scope of review is de novo. He mentioned the recent Commonwealth Court decision in *Manor v. Department of Public Welfare*, 796 A.2d 1020 (Pa.Cmwlth. 2002). In that case, the Department of Public Welfare (DPW) denied the application of Millcreek Manor (Millcreek), a nursing facility, to expand the number of beds it provided. In appealing the denial, the provider attempted to show that DPW was applying a statement of policy as a binding norm. The hearing examiner refused to

hear evidence on the issue, but decided it as a matter of law. Commonwealth Court held that the "fact that the hearing officer excluded the issue from consideration and then addressed the issue without affording Millcreek an opportunity to be heard or to present or rebut evidence constitutes a flagrant disregard of the law and a violation of Millcreek's due process rights." 796 A.2d at 1028.

The Commonwealth Court further found that the hearing examiner erred when she applied an abuse of discretion standard:

> In conducting a *de novo* review, the hearing officer of the Bureau, as the reviewing tribunal, is in effect substituted for the LTC Bureau, the prior decision-maker, and must re-decide the case. The issue before the hearing officer is not whether the LTC Bureau abused its discretion in denying Millcreek's exception request, but whether, from the evidence before the hearing officer, Millcreek's exception request should be denied.

796 A.2d at 1030.

Brian suggested that the Committee start with the language of the EHB Act and branch out from there. He also felt that the Board's bound version of the rules/Practice & Procedure Manual should have a copy of the EHB Act.

Brian also noted that it would make sense to codify the scope of the Board's review since it is based on a host of long-standing, well-recognized cases that are not likely to be challenged, such as *Warren Sand & Gravel*.

The Committee discussed whether scope of review was an appropriate subject for the Board's rules. Dennis felt scope of review was no more substantive than burden of proof, which is addressed by the Board's rules. Tom Scott stated he was reluctant to codify case law because it could change. Dennis noted that the rules on supersedeas were initially common law and then codified. Tom stated he was concerned the scope of

review would not always be the same. Dennis felt that it would be since the Commonwealth Court had defined the Board's scope of review as de novo. Maxine noted that there are some instances, such as under the Hazardous Sites Cleanup Act, where the Board's scope of review is not de novo. Stan also pointed out that in a case involving a complaint for civil penalties, the scope of review is different.

Howard questioned whether the scope of review should be in the statute. Stan noted that if we open up the EHB Act for amendment, it could lead to more being amended than anticipated. Tom Renwand agreed.

Maxine noted that if the Committee started to codify decisional law, there is a whole universe of decisional law that would need to be considered.

The discussion of this topic was tabled.

Pa.R.C.P. 1023.1:

Newly promulgated rules of civil procedure 1021.1 – 1021.4 deal with the signing of documents, representations to the court and sanctions for violations of these rules. Howard suggested that the Committee address whether the Board should adopt similar rules. He described a case in which he was involved in which the appellant had not even read, much less verified, the allegations raised in the notice of appeal.

Tom Renwand noted that the Board has a new rule on signing. Howard suggested that the signing rule incorporate more of Pa.R.C.P. 1023.1.

Dennis noted a conflict in that the Board's rules state that anything not raised in the notice of appeal will be waived; this forces a party to put a number of claims in the notice of appeal. He asked whether this would then put the appellant's attorney in a position of having to make sure every objection in the notice of appeal is valid. Stan

noted that the appellant has the right to amend his or her appeal. He stated that at some point the appellant has to be able to represent that the objections in the notice of appeal are valid.

The Committee discussed what types of sanctions the Board could impose. Maxine and Brian noted that there is no authority to impose monetary sanctions. Maxine also noted that the Board is limited in its ability to bar an attorney from appearing before it. Stan noted that even though federal court has the ability to assess monetary sanctions it is rarely done; it is more likely to dismiss a case. Tom Scott noted that when monetary sanctions are imposed it often poisons the relationship among counsel.

Mike asked what was the difference between the Board's new signing rule and Pa.R.C.P. 1023.1. Howard stated that the only major difference was subsection (3) of 1023.1: "the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Maxine noted that if this language were added to the Board's rule on signing, it could present the problem raised earlier by Dennis.

Mike asked Howard whether the case he described earlier would have been properly addressed under the new signing rule. Howard agreed it would have been.

Howard suggested seeing how the new rule on signing works and raising this issue at a later time if necessary.

Next Meeting:

The next meeting will be on **Thursday, January 9, 2003, at 10:30 a.m.**

The agenda will include the following:

1) *New business* - Recent amendments to the Sewage Treatment Plant and Waterworks Operator Certification Act, 63 P.S. § 1001 *et seq*.

2) *Old business –*

a) Combining rules on procedural and miscellaneous motions

b) Electronic links in Practice and Procedure Manual

c) Mediation

d) Expedited hearings

e) Prepayment under 52 P.S. § 1406.5e(e), etc.

Future Meetings:

The meetings tentatively scheduled for 2003 are as follows: January 9, March 13, May 8, July 10, September 11 and November 13. All meetings will begin at 10:30 a.m. unless otherwise noted.