ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Minutes of Meeting of November 13, 2003

Attendance:

The Environmental Hearing Board Rules Committee met on November 13, 2002 at 10:00 a.m. Participating in the meeting were Rules Committee Chairman Howard Wein, Maxine Woelfling, Mike Bedrin, Dennis Strain, Tom Scott, Bob Jackson and Stan Geary. Representing the Board were Chairman and Chief Judge Michael Krancer, Judge Michelle Coleman, and Assistant Counsel Richard Morrison and MaryAnne Wesdock.

Approval of Minutes:

Mr. Bedrin moved to approve the minutes of the July 10, 2003 meeting. Mr. Geary seconded. All were in favor.

Bylaws:

Given the Board's recent acquisition of videoconferencing equipment at its Harrisburg and Pittsburgh offices, at the July meeting the Rules Committee had recommended amending the bylaws to allow the Committee to meet via videoconference. Ms. Wesdock circulated a proposed amendment to the bylaws authorizing the Committee to meet via videoconference or teleconference at the Board's offices in Harrisburg, Pittsburgh and Norristown. Ms. Woelfling suggested that the language simply state "at the Board's offices" rather than list locations, in the event that the locations would change in the future. Judge Krancer asked whether it was necessary to meet at an office of the Board. Mr. Wein explained that members of the Rules Committee had participated via telephone from their own offices and it was more difficult to transact business that

way. Since the Board will soon have offices in three locations, it is not unreasonable to ask Committee members to meet at one of the offices. On rare occasions it might be necessary for a Committee member to participate by telephone from his or her office, but this would be dealt with on an as-needed basis. Judge Krancer noted that until the Board's own videoconferencing equipment is set up in Norristown, the Board will be using the Department of Environmental Protection's equipment and, therefore, would not technically be meeting in the Board's office. On the motion of Ms. Woelfling, seconded by Mr. Strain, the Committee voted to adopt the following language:

Article IX. Meetings.

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> 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 chairperson, members may attend by videoconference or teleconference [at the Board's offices].

Filing:

At the July meeting, the Rules Committee had recommended certain language amending rule 1021.32 (Filing) but did not have a quorum to vote on the proposed language. The recommendation had been to eliminate subsection (g) and add that language to subsection (b). A further recommendation was to change the word "filed" to "received."

Judge Krancer questioned why the rule contains a filing deadline of 4:30 p.m.for documents filed by hand, mail or other delivery service, whereas documents filed electronically or by fax may be filed after 4:30 p.m. and still be deemed received on that day.

On the motion of Mr. Geary, seconded by Mr. Scott, the Committee voted in favor of the following amendment to rule 1021.32:

> **§ 1021.32. Filing.**
>
> (a) Documents filed with the Board shall be filed at its headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.
>
> (b) The date of filing shall be the date the document is received by the Board.
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> * * * * *
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> **[** (g) Documents filed by United States mail, hand or other delivery services after the close of the business day at 4:30 p.m. Eastern Time shall be deemed to be filed on the following business day. Documents filed electronically, including by facsimile, shall be deemed filed on the day received by the Board.**]**[1]

The effect of this change is to eliminate the 4:30 p.m. cutoff for filing documents, whether by hand, mail, delivery service, fax or electronically.

Definition of "Department":

At a prior Rules Committee meeting, it was determined that the definition of "Department" should be revised for two reasons: one, to update it from the "Department of Environmental *Resources*" to the "Department of Environmental *Protection*" and, second, to reflect the fact that decisions of certain other agencies, commissions and boards are statutorily appealable to the Board.

On Mr. Jackson's motion, seconded by Ms. Woelfling, the Committee voted in favor of the following definition of Department:

[1] Material in brackets is deleted.

Department – The Department of Environmental [Resources or its successor agencies] Protection or other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board.

Rule 1021.51 (Commencement, form and content):

Mr. Morrison related the facts of a case currently before the Board in which a surety appealed a bond forfeiture. The mining company was added as the permittee but did not have an attorney enter an appearance. The Board issued an order requiring the mining company to file an entry of appearance, which it ignored. Pursuant to rule 1021.51(g), however, the mining company is required to be added as a party to the appeal as a permittee.

Ms. Wesdock stated that the Rules Committee had previously considered amending rule 1021.51(g) to deal with the following situations: 1) a municipality that is not given notice of an appeal of a private request denial under the Sewage Facilities Act and 2) a mining company that is added as an automatic party in an appeal by a landowner of a determination by the Department that no subsidence or water loss had occurred due to mining. It was ultimately decided not to revise subsection (g) to add more parties to the list of those required to be served with notice of an appeal because under subsection (h) those to whom notice must be given automatically become parties to the appeal.

Thus, two situations arise:

1) where a mining company is automatically added as a party-permittee but does not want to participate in the appeal, and
2) where an entity, such as a municipality in the case of a private request denial, is not served with a copy of the notice of appeal but upon learning of the action wants to participate as a party and must seek to intervene.

In the situation described by Mr. Morrison, Mr. Scott noted that it might be a situation where the use of *ex rel* in the caption was appropriate, since the action is against the mining company but the surety stands in place of the mining company.

In the case of a mining company that does not want to participate, a question was raised as to whether the Board's decision would act as *res judicata*. Mr. Jackson noted this was a question of who is the real party in interest. Judge Krancer felt the mining company was proceeding at some risk if it chose not to participate in the appeal.

Judge Krancer stated he was in favor of making it easier for entities who have an obvious right to intervene – e.g. the municipality in a private request denial – to enter the case; however, he was not in favor of surrendering the Board's authority to make permittees a party to an appeal.

Mr. Geary suggested leaving 1021.51(g) and (h) as is and adopting a new section to deal with the situation of entities who are not the recipient of a Department action but who should be served with a copy of the notice of appeal and should be able to enter the case as a party.

Mr. Morrison suggested language allowing such an entity to enter the case by simply filing an entry of appearance rather than having to petition to intervene. He also suggested that one way to deal with this situation was to create a definition for "recipient of an action." Mr. Morrison agreed to prepare a draft of the rule for the next meeting.

Rule 1021.53 (Amendment of appeals):[2]

There is no provision in the Board's rules for amendment of a complaint. Judge Krancer also suggested looking at whether the Board's current rule on amendment of

[2] Mr. Wein had to leave the meeting during the discussion of proposed amendments to Rule 1021.53 and the Vice-Chair, Ms. Woelfling , chaired the remainder of the meeting.

appeals should be more liberal. Ms. Wesdock circulated draft language proposing two different revisions to the rule.

Mr. Wein noted that the case law on amendment of appeals refers to the existing rule. Judge Krancer questioned whether the rule had changed the substantive law, i.e., whether the rule had become more restrictive than what was allowed by law.

Mr. Strain noted there was some value to requiring the facts on which an appeal is based to be identified early in the process. Mr. Geary also felt that a rule allowing amendment at anytime could present a problem in cases involving pro se appellants.

Mr. Jackson suggested that appeals could be amended to add facts "as allowed by law." Judge Krancer agreed, noting that *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991) was a direction to the Board to be more liberal concerning notices of appeal.

Judge Krancer questioned the logic behind subsections (b) (1) and (2) of rule 1021.53, which set forth conditions that must be met in order for the Board to grant leave to amend an appeal after the 20-day period for amendment as of right. Subsection (b)(1) states that an amendment may be granted if it is based on specific facts discovered during discovery of a hostile witness or Department employee. Judge Krancer questioned why the rule requires that the discovery be of a *hostile* witness. Subsection (b)(2) states that an amendment may be granted if it is based on facts discovered during preparation of an appellant's case that the appellant using due diligence could not have previously discovered. Judge Krancer felt that an attorney might be loathe to request an amendment under this subsection because he or she would not want to be subject to a possible malpractice claim. Judge Krancer had no problem with subsection (b)(3) which states

that an amendment may be granted if it includes alternate or supplemental legal issues, the addition of which will cause no prejudice to any party.

Mr. Scott noted that subsection (b) had been drafted to be restrictive but perhaps it was too restrictive.

The following revision to rule 1021.53 was proposed:

> **§ 1021.53. Amendments to appeals and complaints; nunc pro tunc appeals.**
>
> (a) An appeal and complaint may be amended as of right within 20 days after the filing thereof.
>
> (b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint for good cause shown and as otherwise allowed by law. **[**This leave may be granted if appellant establishes that the requested amendment satisfies one of the following conditions:
>
> (1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employes.
>
> (2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
>
> (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor. **]**
>
> (c) **[**An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.**]**

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The Committee will consider this proposed revision at the next meeting. In addition, it may be necessary to amend the last sentence of rule 1021.51(e), which states "good cause

shall include the necessity for determining through discovery the basis of the action from which the appeal is taken."

Ms. Wesdock will put the language into final form for the next Rules Committee meeting.

Adjournment and Next Meeting:

On Mr. Geary's motion, seconded by Mr. Jackson, the meeting was adjourned. The next meeting will be on January 8, 2004 at 10:00 a.m.