ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

Minutes of May 11, 2005 Meeting

Attendance:

The Environmental Hearing Board Rules Committee met on May 11, 2005. Rules Committee Chairman Howard Wein presided. Members of the committee in attendance were Stan Geary, Phil Hinerman, Susan Shinkman and Maxine Woelfling. Participating by telephone were Joe Manko, Dennis Strain and EHB Chairman and Chief Judge Michael Krancer. The minutes were taken by MaryAnne Wesdock.

Approval of Minutes:

On the motion of Mr. Hinerman, seconded by Ms. Woelfling, the minutes of the February 17, 2005 meeting and March 17, 2005 conference call were approved.

House Bill 1237:

The Committee discussed House Bill 1237. Mr. Geary reported that the bill has not moved out of the House Environmental Resources and Energy Committee. Mr. Hinerman stated that the Pennsylvania Bar Association's Environmental, Mineral and Natural Resources Law Section plans to discuss the bill at its Section Day meeting on June 10, 2005 and determine whether the Section should take a formal position with regard to the proposed legislation. Mr. Manko volunteered to obtain further information regarding the status of the bill.

Comments on Rules Package:

Ms. Wesdock reported on comments received from the Pennsylvania Department of Transportation (PennDot) and Citizens for Pennsylvania's Future (PennFuture) regarding the proposed rulemaking published in the April 9, 2005 issue of the Pennsylvania Bulletin. Judge

Krancer stated that the comments would be discussed at a conference call of the judges and assistant counsel on Tuesday, May 17, 2004 and requested that Ms. Wesdock provide the judges and counsel with a draft of the recommended responses to the comments.

PennDOT:

PennDOT questioned the proposed revision to rule 1021.53(b), which would change the current standard for amendment of appeals (and complaints) from one of "good cause" with specific factors to be considered by the Board to one of "undue prejudice." The proposed revision would allow a more liberal standard for amending one's notice of appeal and complaint. PennDOT expressed a concern that the proposed revision would upset the balance between allowing appellants to amend their appeals and recognizing opposing parties' interest in a speedy resolution to the litigation. The agency also expressed a concern that the term "undue prejudice" was not defined.

Ms. Wesdock noted that the committee had discussed whether to define "undue prejudice" in the rule itself and had determined that it should be decided on a case-by-case basis. Defining "undue prejudice" would result in a rule similar to the current one which sets forth specific conditions under which an appeal may be amended, and that was not the intent of the rule revision.

In its comments, PennDOT stated, "Allowing an appellant to add new issues to a permit challenge beyond the twenty-day period will always prejudice opposing permittees by expanding the litigation and thereby increasing the time and effort required to defend the permit." The agency recommended that the Board keep its existing rule or, in the alternative, clarify the proposed rule to explain that opposing parties are prejudiced by any amendments that would expand the litigation before the Board. Judge Krancer expressed a concern that a rule such as

that proposed by PennDOT, providing that if a case is expanded it *per se* prejudices the opposing parties, swallows the entire rule since in at least some cases, and possibly most cases, an amendment will expand what is involved in the case. He felt that the question of whether such an expansion is prejudicial must be decided on a case-by-case basis. An expansion early in the case might turn out not to be prejudicial, whereas an expansion a few weeks before trial could be.

Mr. Manko noted that the current rule at 1021.53(b)(3) states that an amendment may be allowed if "[i]t includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor." The proposed rule revision would allow a more liberal standard for amendment since it would require that there be no "undue prejudice" rather than "no prejudice," and would not be limited to "alternate or supplemental legal issues."

Ms. Woelfling stated that allowing a more liberal standard for amendment was a policy decision on the part of the Board, and Mr. Geary noted this was consistent with the Pennsylvania Rules of Civil Procedure.

PennDOT also requested that the Board clarify that the burden of proving there is no undue prejudice is with the party making the motion for amendment. The committee noted that the Board could simply refer to its rule on burden of proof.

After further consideration and discussion of PennDOT's comments, Mr. Geary moved to maintain the proposed revision to rule 1021.53(b). The motion was seconded by Mr. Manko. Those in favor were Mr. Geary, Mr. Manko, Mr. Wein, Mr. Hinerman and Ms. Woelfling. Opposed were Mr. Strain and Ms. Shinkman. Mr. Strain noted that he had been opposed to the original motion to revise the rule.

PennFuture:

PennFuture had a number of comments with regard to the proposed rule revisions. First, it opposed the proposed revision to rule 1021.34 that would require parties to serve opposing counsel by overnight delivery when they file a document with the Board by hand-delivery or overnight mail. It stated its opposition as follows: 1) the preamble does not explain what problem or inadequacy in the Board's rules the revision was meant to address; 2) rule 1021.35(a) already provides that when a document is served by regular mail, three days are added to the response time to allow for mailing time; 3) there is no tactical advantage gained by same day or overnight filing since the Board presumably will not consider the motion until it has received all the parties' responses; 4) imposing the additional expense of serving every party by overnight delivery when a filing is made by same day or overnight delivery may be too great a burden for *pro se* appellants; 5) rule 1021.34(b) sufficiently addresses the situation by requiring service of a document within 24 hours in matters involving requests for expedited disposition; and 6) the proposed revision does not explain how it would affect service when a document is electronically filed and not all parties are signed up to receive service electronically.

In explanation of the proposed rule revision, Judge Krancer noted that the change was not about any party getting a tactical advantage, but rather it had to do with courtesy and civility. He noted that the Code of Civility provides that a party who serves a paper on a court should deliver that paper to other parties at substantially the same time and by the same means as the document is served on the court. On April 21, 2005, the Pennsylvania Supreme Court amended the Code of Civility to further emphasize the duty of courtesy that lawyers owe to each other (35 Pa.B. 2722). Judge Krancer felt that the amendment to the Code of Civility provided even stronger support for the proposed EHB rule change and that the rule change is in concert with what is

expected by the Supreme Court. He noted that we should not have a different standard for *pro se* appellants than we have for attorneys.

Mr. Hinerman stated that the way in which the proposed revision is written it appears that parties must serve documents by overnight mail and may not deliver them in person, where a filing is made in person or by overnight delivery. He suggested amending the proposed revision to make it clear that the purpose of the revision is to ensure that parties are served no later than the following day whenever a document is filed by overnight mail or hand delivery. He proposed the following language: "(b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery OR PERSONAL SERVICE on the parties." On the motion of Mr. Hinerman, seconded by Ms. Shinkman, the proposed amendment passed unanimously.

PennFuture also opposed the proposed revision to rule 1021.104(a), dealing with the contents of a pre-hearing memorandum. The current rule requires that parties list in their pre-hearing memorandum the exhibits they intend to introduce at trial. The proposed rule revision would require parties to attach copies of the exhibits. PennFuture opposed the revision on the basis that it would result in additional unnecessary expense to the parties and consume additional paper with no showing as to why the revision is necessary. Since copies of exhibits must be produced at the trial, it questioned why it is necessary to also produce them with the pre-hearing memorandum. PennFuture also noted that electronic filings may not be done for documents over 50 pages and that in most cases exhibits to a pre-hearing memorandum will exceed that limit.

Judge Krancer noted that even under the current rule, it has been his practice to require parties to produce copies of their exhibits with their pre-hearing memorandum. Ms. Wesdock

reported that Judge Renwand does the same. Thus, the rule change simply codifies the existing practice of at least some of the EHB judges.

Ms. Wesdock noted that exhibits to e-filed documents may be either e-filed or delivered in hard copy by mail or messenger. Therefore, a pre-hearing memorandum may still be e-filed even if the exhibits to it must be delivered by mail or personal service.

Mr. Strain voiced a concern that requiring parties to file exhibits with their pre-hearing memorandum could result in unnecessary filing if the case is then settled prior to the trial. The committee discussed this matter but the consensus was that the proposed revision to rule 1021.104(a)(7) should go forward. On the motion of Mr. Hinerman, seconded by Ms. Woelfling, the Committee unanimously voted to keep the revision as originally proposed.

Finally, PennFuture recommended that the proposed comment to the new rule on summary judgment (1021.94a) be incorporated into the rule itself. The comment reads as follows:

> Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. The evidentiary materials relied upon should not be attached to the motion or the brief but should be bound as a separate item and labeled as exhibits to facilitate reference.

Ms. Woelfling, Mr. Geary and Mr. Strain stated they had no problem with adding both sentences of the comment to the rule. Mr. Hinerman felt that the second sentence could be added to the rule but the first sentence should remain as a comment since it was not procedural.

The committee agreed that the second sentence of the comment could be added to the rule. Ms. Shinkman and Mr. Wein recommended the following language to be added to subsection (d):

> (d) *Evidentiary Materials.* All affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief AND SHALL BE SEPARATELY BOUND AND LABELED AS EXHIBITS. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4.

On motion of Mr. Hinerman, seconded by Ms. Woelfling, the committee unanimously voted to amend subsection (d) as set forth above and to keep the first sentence of the proposed comment as a comment rather than incorporating it into the rule.

Preliminary Case Statement/Mandatory Disclosure:

On the motion of Mr. Geary, seconded by Mr. Manko, discussion of this item was tabled in order to get feedback from the PBA Environmental, Mineral and Natural Resources Law Section which will be meeting on June 10, 2005.

Electronic Filing:

Ms. Wesdock reported that the Board had received an email from an individual commenting on the Board's website and asking the Board to consider implementing a requirement that all parties either e-file or scan their filings so that all filings would be available on the Board's electronic docket. She noted that a problem with requiring mandatory electronic filing or scanning was that it could be a deterrent to *pro se* appellants who do not have the means or ability to e-file or scan. Ms. Shinkman noted that where scanning is required in federal court, scanning equipment is available to the public at the court's filing offices for those who do not otherwise have the capability. She also noted that a disk could be required with all filings.

Members of the committee agreed that even if the Board did not wish to require mandatory electronic filing or scanning, it should look at ways to strongly encourage parties to e-file. The committee decided to add this item to the agenda for the next meeting and to ask Bill

Phillipy to participate in the meeting. In addition, Mr. Hinerman and Ms. Wesdock will discuss this topic at the PBA Environmental, Mineral and Natural Resources Law Section meeting on June 10.

Next Meeting:

The next meeting of the Rules Committee will be Thursday, July 14, 2005, at 10:15 a.m. The agenda will include the following items: Electronic filing and PBA discussion of the items raised at this meeting.