

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**Minutes of Meeting of May 8, 2003  
(Draft)**

**Attendance:**

The Environmental Hearing Board Rules Committee met by video-conference on Thursday, May 8, 2003 at 9:30 a.m. Chairman Howard Wein presided. In attendance were the following members of the Rules Committee: Brian Clark, Maxine Woelfling, Joe Manko, Dennis Strain, Mike Bedrin, and Tom Scott. Representing the Environmental Hearing Board were Tom Renwand, Mary Anne Wesdock and Tracey Tubbs.

**Terms:**

The Rules Committee welcomed Joe Manko, who was recently appointed by the Governor to serve a two-year term beginning on April 24, 2003. Members whose terms have recently expired or are due to expire in 2003 are as follows: Bob Jackson (June 2002), Brian Clark (July 2002), Howard Wein (March 2003), Stan Geary (May 2003). If they have not already done so, these members will contact their appointing authority regarding reappointment.

**Approval of Minutes:**

Brian moved to approve the minutes of the January 9, 2003 Rules Committee meeting. Maxine seconded. All were in favor.

**Amendments to the Sewage Treatment Plant and Waterworks Operator Certification Act (now entitled the Water and Wastewater Systems Operators' Certification Act), 63 P.S. § 1001 et seq.**

The Committee continued its discussion of the February 2002 amendments to the Sewage Treatment Plant and Waterworks Operator Certification Act (now entitled the Water and Wastewater Systems Operator Certification Act), 63 P.S. § 1001 et seq. Pursuant to these amendments, certain actions of the State Board for the Certification of Water and Wastewater Systems Operators (State Certification Board) that were previously appealable to the Commonwealth Court are now appealable to the Environmental Hearing Board. Because the amendments give the Environmental Hearing Board jurisdiction over actions of the State Certification Board, the Committee had noted at the January meeting that it might be necessary to revise the definition of "Department" in the Environmental Hearing Board Rules of Practice and Procedure to clarify that the rules may apply to actions of entities other than the Department of Environmental Protection (DEP).

Howard suggested focusing on the scope of the Environmental Hearing Board's jurisdiction as opposed to simply revising the definition of "Department." At the January meeting, George Miller advised the Committee that a former assistant counsel had prepared a list of statutes under which the Environmental Hearing Board has jurisdiction ("Sources of Board Jurisdiction"). This list was distributed to the Committee at the May 8 meeting.

In reviewing the "Sources of Board Jurisdiction," the Committee noted that the list was not complete. It was recommended that further research be done in order to make sure the list contains all the statutes from which the Board derives jurisdiction. The

Committee further suggested that, if the Board felt it were appropriate, the “Sources of Board Jurisdiction” could be placed on the Board’s website.

With regard to expanding the definition of “Department” in the Board’s rules, at the January meeting Dennis had proposed the following language: “The Department of Environmental Protection or other Boards, Commissions or agencies whose decisions are appealable to the Environmental Hearing Board.” Brian noted that this definition conflicted with the Environmental Hearing Board Act, which states, “The board has the power and duty to hold hearings and issue adjudications...on orders, permits, licenses or decisions of the department.” 35 P.S. § 7514 (a). The Act defines “department” as “Department of Environmental Resources.” *Id.* at § 7512.

The Committee also considered the question of what to do where enforcement of a statute has been transferred to another agency (e.g. enforcement of the Egg Refrigeration Law is handled by the Department of Agriculture). In those cases, should jurisdiction be transferred away from the Environmental Hearing Board?

Brian felt that an argument could be made that actions taken by the Department of Conservation and Natural Resources (DCNR) are subject to the Environmental Hearing Board’s jurisdiction since no new provision was made for appeals of that agency’s decisions when the Department of Environmental Resources was reorganized into two separate agencies consisting of DCNR and DEP. However, Tom Renwand noted that DCNR takes the position that its actions are not appealable to the Environmental Hearing Board.

Mike stated that the following statutes on the list of “Sources of Board Jurisdiction” raised questions regarding the Environmental Hearing Board’s jurisdiction:

Egg Refrigeration Law, 31 P.S. §§ 300.1-300.9

Wild Resource Conservation Act, 32 P.S. §§ 5301-5314

Phosphate Detergent Act, 35 P.S. §§ 722.1-722.10

Plumbing System Lead Ban and Notification Act, 35 P.S. § 723.1-723.17

Seasonal Farm Labor Act, 43 P.S. §§ 1301.101- 1301.606

If the Board wishes to pursue the matter, the Committee recommended taking the following action:

1) Brian felt that the Committee's research should be coordinated with DEP. Mike suggested taking a look at Rick Mather's chapter in *Pennsylvania Environmental Law and Practice*, since it discusses the statutes DEP administers.

2) Mike volunteered to have a summer intern at DEP work on researching the sources of Board jurisdiction for the Committee.

3) Howard asked Mike to discuss the matter with Chief Counsel Maslund at DCNR. Brian agreed, noting it would be helpful to hear DCNR's rationale for deciding that its actions are not appealable to the Environmental Hearing Board.

Prior to any of the above action being initiated, Tom Renwand will discuss the issue with the other EHB judges and report back to the Committee.

**Mediation:**

Joe commented on a discussion held at the last meeting regarding mediation. He has been heavily involved with alternative dispute resolution and felt it would be effective in Environmental Hearing Board proceedings. He recommended that in order for mediation to be meaningful and taken seriously, it should not be limited to cases in which the mediator serves *pro bono*. He further recommended that mediation should not

simply be voluntary but should, if possible, be required and that the mediator should be paid and have had training in mediation. Howard noted, however, that the EHB Act allows only for voluntary mediation. Brian mentioned that the PUC does not have mandatory mediation but strongly encourages it and has established a team of mediators for such cases.

Tom Renwand stated that if a judge felt it was appropriate to strongly encourage mediation in a particular case, this could be done through a pre-hearing order.

Tom asked whether DEP has money in its budget to pay for mediation. Mike responded that there is no special fund for mediation but it is paid for by the specific program utilizing it. He also noted that the Office of General Counsel runs a mediation program that allows attorneys who have gone through the training to mediate disputes involved other agencies. Three DEP lawyers have gone through the training. There is a charge for this service (approximately \$85 per hour).

At the last meeting, Brian had raised the possibility of mediation at the pre-appeal level. Joe felt that mediation that early in the process did not have as much of a chance of succeeding. He felt mediation should take place after a protective appeal has been filed. Dennis suggested an alternative pre-hearing order requiring the parties to explore mediation and report back to the Board within 60 days. Tom Renwand also noted that the paragraph on settlement in the Board's existing Pre-Hearing Order No. 1 could be revised to require the parties to report to the Board whether they consider mediation to be a viable option. Dennis agreed it would be more effective to have the parties report whether they thought mediation was a viable option rather than simply asking them to consider it.

Brian suggested that the Board could have a list of mediators from which parties could choose. Mike suggested that the Environmental, Mineral and Natural Resources Law Section of the PBA could form a committee on Alternative Dispute Resolution to develop a mediation program and list of potential mediators. Mike and Mary Anne will discuss this with the Section on Section Day, June 6. Howard also suggested approaching the topic of mediation as an ethics program at the next Environmental Law Forum.

Tom Renwand will raise the issue of mediation at the Board's next conference call and report back to the Rules Committee at its next meeting.

**Location of Meetings:**

Since the Rules Committee now has the capability to meet via video-conferencing, Howard suggested that the Committee consider amending the bylaws to allow members to attend via video-conference in the Philadelphia area (currently in the DEP's office in Conshohocken but subsequently in the Board's new office in Norristown). The current bylaws allow members to meet only at the Board's offices in Harrisburg and Pittsburgh. Mary Anne will circulate a copy of the bylaws for the next meeting.

**Next Meeting:**

The Rules Committee will meet briefly by video-conference, tentatively scheduled for July 10, 2003 at 9:30 a.m., in order to follow up on the topics raised at the May meeting. Tom Renwand will report on the Board's discussion of these matters.