

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Meeting of January 9, 2003

Attendance:

The Environmental Hearing Board Rules Committee convened on Thursday, January 9, 2003, at approximately 10:45 a.m. Chair Howard Wein presided. In attendance were the following members of the Rules Committee: Maxine Woelfling, Mike Bedrin, Dennis Strain, Brian Clark, Stan Geary and Tom Scott. Attending on behalf of the Environmental Hearing Board (Board) were George Miller, Tom Renwand, Michelle Coleman, Tracey Tubbs and Mary Anne Wesdock.

Preliminary Matters:

On behalf of the Rules Committee, Howard expressed his congratulations to George on being named the recipient of the Pennsylvania Bar Association Environmental, Mineral and Natural Resources Law Section (EMNRLS) Environmental Achievement Award for 2003. The award will be presented at the Section's Annual Dinner in April.

Brian moved to approve the minutes of the November 21, 2002 meeting. Mike seconded. All were in favor.

Mary Anne reported that the bound version of the EHB Rules/Practice and Procedure Manual is expected to be available at the end of January or beginning of February. As soon as the Practice and Procedure Manual is updated to reflect changes through the end of 2002, it will be available immediately on the Board's website.

Howard and Mary Anne will prepare an article for the next issue of the EMNRLS newsletter regarding the 2002 changes to the Board's rules.

Members' Terms:

A list of Rules Committee members and their terms was circulated. The Committee suggested that the list be revised as follows: 1) List the expiration date as month and year and 2) List the title of the appointing authority without a specific name. Brian also asked that the e-mail addresses of members be added to the list. He also noted a correction in his mailing address.

Mary Anne will provide to all members whose terms have recently expired or are due to expire a summary of the Rules Committee's actions since 2000.

Amendments to Sewage Treatment Plant and Waterworks Operator Certification Act, 63 P.S. § 1001 et seq.

Maxine reported on the February 2002 amendments to the Water and Wastewater Systems Operators' Certification Act, 63 P.S. § 1001 *et seq.* Pursuant to the 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. A question arose as to whether the Environmental Hearing Board's review would be *de novo*; it was determined that this matter would have to be addressed when a case arose under the Act. Mike reported that the Department of Environmental Protection had not yet addressed the position it would take on this issue.

Because the amendments give the Environmental Hearing Board jurisdiction over actions of the State Certification Board, Maxine stated that it might be necessary to amend the definition of "Department" in the EHB rules of practice and procedure to

clarify that the rules may apply to actions of entities other than the DEP. Stan felt it was not necessary to amend the definition of “Department” since the Act says “The [State Certification] board’s decision shall be considered an action of the department. . . .” (Section 4(a)(3))

Mike also suggested that actions of the State Certification Board should contain the same “notice of appeal rights” language as DEP actions, notifying recipients that their right of appeal is to the Environmental Hearing Board.

Dennis suggested expanding the definition of “Department” as follows: “The Department of Environmental Protection or other Boards, Commissions or agencies whose decisions are appealable to the Environmental Hearing Board.”

Howard suggested addressing this matter by focusing on the scope of the EHB rules as opposed to revising the definition of “Department.” George advised that a former assistant counsel had researched and prepared a list of statutes under which the Environmental Hearing Board has jurisdiction. He will provide a copy to the Committee members for the next meeting.

Mike stated that the General Law Division and, in particular, attorney Judy Rivera acts as counsel to the State Certification Board. He will ask that the State Certification Board include a notice on its decisions advising recipients of their appeal rights and further request that this matter be placed on the agenda of the next meeting of the State Certification Board. Mike will speak to the General Law Division and report back to the Committee at the next meeting.

Inclusion of Appellant's Telephone Number on Notice of Appeal:

Mary Anne reported that the Board had considered Terry's suggestion that telephone numbers of appellants need not be included on the notice of appeal as long as the telephone number of counsel is provided. The Board declined to change the rule at this time based on a concern that there might be no way to contact an appellant if counsel withdraws without substitute counsel or without leave of the Board. George advised the Committee that an appeal would not be dismissed for failure to include an appellant's telephone number. If there is an issue regarding privacy, an appellant may raise it at the beginning of the appeal.

Howard noted that the privacy issue arises more frequently with regard to providing one's address. Maxine stated that the privacy issue could become a concern should the Board ever begin posting notices of appeal on the website. George advised that the Board has no current plans to post notices of appeal on the website, and the privacy question would be considered before making such a decision.

Dennis noted that there is no mechanism for maintaining privacy should a member of the public wish to review the hard copy of a file. George agreed but noted that, although there is also no formal mechanism in place for protecting confidential business information, the Board does protect this type of information. Mary Anne also advised that, although there is no rule for protecting documents produced in discovery, the Board keeps such material confidential when it is filed with the Board. George also noted that once a person files a lawsuit, he waives some degree of privacy.

Mike suggested that if the real issue is simply one of privacy, there should be other ways to deal with the matter rather than through a rule. George agreed that the

Board will no longer send an order to perfect if a notice of appeal contains the phone number of counsel in lieu of the appellant's.

Howard suggested including forms such as the notice of appeal and subpoenas in the Practice and Procedure Manual. George felt he did not want to expand the Practice and Procedure Manual to include forms, especially since they are available on the website. Howard suggested notifying people that these forms are on the website.

Procedural Motions and Miscellaneous Motions:

The Rules Committee continued its discussion of whether the rules on procedural and miscellaneous motions should be consolidated. The issue addressed by the Committee at the last meeting was that the rule on miscellaneous motions requires that the motion be accompanied by a supporting brief, whereas the rule on procedural motions does not. The Rules Committee considered two alternatives: 1) keeping two separate rules or 2) consolidating the rules but specifying which types of motions require a supporting brief.

Brian stated he preferred having two rules. Maxine stated she preferred having specificity as to when a brief is required. George stated that a problem arises when a party files a motion that does not clearly fit into either category, such as a motion to dismiss a petition for supersedeas. The rules are not clear as to whether a brief would be required for this type of motion.

Brian stated that, as a practical matter, if an attorney believes it is a significant enough motion, he will file a supporting brief. In addition, the Board can always require a brief if it wants one. Tom Renwand and Stan Geary felt it would delay the proceeding if the Board were required to ask for a brief.

Mary Anne suggested making the filing of a brief optional for procedural motions. Dennis stated that for liability reasons, an attorney might feel he must file a brief to protect himself.

Stan suggested leaving the rule as is since it was not clear that a change was necessary. He pointed out that it is becoming difficult to know what the rules are because they are constantly changing. George agreed that he would prefer not to have a rule change for 1 – 1½ years.

The consensus of the Committee was to let the rules stay as they are and consider whether this needs to be addressed in the future when the Board is considering putting together another rules package.

Expedited Hearings:

Mary Anne reported that the Board does not intend to consider rules on expedited hearings at the present time.

Prepayment Issues:

At the last Rules Committee meeting, the Committee considered Tom Renwand's suggestion that there needs to be a mechanism in place for notifying the Board that prepayment has been made to DEP in matters requiring prepayment. Other than civil penalty assessments, Dennis reported that funds must be prepaid and escrowed in two types of cases: 1) under Section 5e(e) of the Mine Subsidence Act and 2) in certain types of waste transportation cases under Act 97 and Act 101. Stan questioned whether a rule was necessary for this. George reported that he and Mike would continue to talk about handling this by administrative agreement between the Board and DEP.

Mediation:

Howard reported on the discussion regarding mediation at the EMNRLS meeting on November 21, 2002. He reported that the Section is very interested in the concept of setting up a subcommittee to handle mediation in Board proceedings. The Section felt that more attorneys might be willing to commit to serve as a mediator in an EHB proceeding rather than as a pro bono attorney due to the time commitment.

Having a mediation program through the EMNRLS avoids the problem of having EHB judges having to act as mediators in their own cases. Mike also noted that mediation is offered through the Office of General Counsel. George also suggested that assistant counsel could act as mediators.

Brian suggested that DEP's notice advising parties of their right of appeal should also state that mediation is available. He also stated that mediation would be more effective if it is available *before* an appeal is filed. He felt there would be a higher success rate and fewer appeals if there were a more formal mediation process available at the permit review level, at least with regard to issues that are technically driven. Dennis noted that when a permit application is being reviewed, the idea of mediation is often not on the radar screen of the permit review staff since they are trying to meet certain deadlines. Mike reported that mediation does happen informally at the pre-permit level, and DEP is moving toward facilitating the use of mediation at this level more frequently. He pointed out that mediation would have to occur before DEP takes its final action in order to avoid the 30-day appeal deadline. Brian suggested developing a mediation program at this level and then using it as a model for drafting regulations down the road.

Howard agreed that a more formal process would have to be developed in order for pre-appeal mediation to be successful, rather than simply leaving it to the discretion of the DEP lawyer. Dennis suggested that perhaps the EMNRLS could develop a proposal as to when mediation would be appropriate. Stan noted that if the focus is on pre-appeal mediation, that is outside the jurisdiction of the Rules Committee.

Dennis questioned whether the mediator should be paid since that could be a problem for some appellants. He felt this was a good reason to offer mediation through the pro bono committee of the EMNRLS since it would be done free of charge. Mike and Mary Anne agreed to check with the Section at the next council meeting to ensure they intended to offer the program free of charge. Mike noted that a fee is associated with the OGC program.

Tom Scott explained that the current rule dealing with mediation had not contemplated pro bono mediation but, rather, the services of a paid mediator for cases involving significant community issues.

Mike and Mary Anne will check with the Section at the next council meeting and report on the following two questions: 1) Is there a market for mediation in EHB or pre-appeal proceedings? 2) Should mediation be voluntary or required?

Electronic Links in Practice and Procedure Manual:

At a prior meeting, the Committee had considered Howard's proposal for including electronic links to the Board's rules and cases (1997-present) in the Practice and Procedure Manual on the website. Howard's proposal was based on the electronic version of DEP's Technical Guidance Manual on Land Recycling.

Mary Anne reported that Bill Phillipy had reviewed the matter with Verilaw and there would be an additional charge by Verilaw to perform this work. The Board cannot accommodate the request under the current budget, but it might be able to do consider the matter at a future time.

Next Meeting:

The meeting scheduled for March 13, 2003 will be cancelled unless new business arises that needs to be addressed at that time. Otherwise, the next meeting will be on **Thursday, May 8, 2003.**