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A JOINT COMMITTEE OF THE PENNSYLVANIA GENERAL ASSEMBLY

OFFICES: ROOM 400, FINANCE BUILDING, HARRISBURG TEL: (717) 783-1600

MAILING ADDRESS: P.O. BOX 8737, HARRISBURG, PA 17105-8737

EXECUTIVE DIRECTOR  
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## REPORT ON A PERFORMANCE AUDIT OF THE ENVIRONMENTAL HEARING BOARD

June 1988



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ENVIRONMENTAL HEARING BOARD

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## I. INTRODUCTION

This report on a performance audit of the Environmental Hearing Board addresses efficiency and effectiveness, compliance with applicable federal and state laws and regulations and the presence of appropriate administrative controls. Consideration also was given to the potential benefits of possible alternative approaches to existing Board operations. This audit report provides findings and recommendations as appropriate for administrative, operational and functional improvements.

The performance audit of the Environmental Hearing Board was adopted as a staff project at a meeting of the Legislative Budget and Finance Committee which was held on December 9, 1987. Staff activities conducted to acquire information for this report included analyzing Board performance data, contacting national and state associations related to the Board activities and meeting with Department of Environmental Resources officials and representatives of organizations having business before the Board. The audit staff sent and analyzed responses to survey questionnaires to Board members, Board staff, the Rules Committee of the Board and to a sampling of appellants to the Board. The audit team also attended hearings of the Board as part of its information gathering activities and reviewed relevant legal documents, statutes, reports and various Board files.

The LB&FC staff would like to extend its sincere thanks to all of those who participated and cooperated in the study. The LB&FC staff gratefully acknowledges the support and cooperation provided by the Chairman of the Board, Maxine Woelfling, and Board Members Robert D. Myers and William A. Roth, and by the Board Secretary, Diane Smith, along with the other members of the Board staff.

The LB&FC staff involved in the evaluation study was under the direction of Executive Director Richard D. Dario. Assistant Chief Analyst Robert C. Frymoyer was the Project Director, and the Team Leader was William B. Harral. Glenn B. Florence and James C. Hess, Jr., Analysts, worked on this study. Susan D. Simms, Attorney, and Krista Williard, Paralegal, provided legal services and also assisted in the development of this report. Secretarial support was provided by Beverly Brown, Shannon Opperman, Terry Beam and Terry Jenrette, with additional staff assistance from Chuck Saia.

A section containing FINDINGS AND RECOMMENDATIONS OF THIS PERFORMANCE AUDIT is presented immediately following this INTRODUCTION. Other report sections are THE ENVIRONMENTAL HEARING BOARD: ITS ORGANIZATION AND ITS OPERATIONS and APPENDICES.

Any questions or comments regarding the report should be directed to Richard D. Dario, Executive Director, Legislative Budget and Finance Committee, P.O. Box 8737, Harrisburg, PA 17105-8737.

**IMPORTANT NOTE REGARDING RESPONSIBILITY  
FOR FINDINGS AND RECOMMENDATIONS OF THIS REPORT**

This report contains information developed by the Legislative Budget and Finance Committee (LB&FC) staff. The release of this report by the LB&FC should not be construed as an indication that the Members of the Committee necessarily concur with all the report findings and/or support the recommendations. The Legislative Budget and Finance Committee as a body, however, supports the publication of the information within this report and believes it will be helpful to the Members of the General Assembly by promoting improved understanding of the issues.



II. FINDINGS AND RECOMMENDATIONS OF THIS PERFORMANCE AUDIT

## A. PROBLEM IN TIMELINESS OF CASE DISPOSITION

### FINDING:

The Environmental Hearing Board (EHB) is not handling its caseload in a timely manner. During the period 1980 through 1987, a total of 3,328 appeals had been filed with the EHB, and the number of open cases as of January 1, 1988, was 1,060 cases. There has been a gap between new cases and cases resolved each year for the period 1980 through 1987. This has resulted in an annual increase in the year-end number of open cases, increasing from at least 232 in 1980 to at least 1,060 in 1987. Table 1 and Exhibit A show the history of the number of cases filed with the EHB since 1980. The number of appeals filed with the EHB increased each year for the period 1983 through 1986 (301 in 1983 and 692 in 1986; decreasing to 535 in 1987). There were, as of January 1, 1988, at least 87 open appeals cases before the EHB more than four years old, 182 were more than three years old and 332 were more than two years old. This backlog of open cases has resulted in delays in case disposition. The EHB estimates that it takes an average of two and a half years for a case to be disposed of by the Board. A former EHB member in an article written in 1987 stated that "...unless the Board manages its caseload so as to keep its backlog within reasonable bounds, the Board is not fulfilling its legislatively appointed role." The impacts of such delays are manifold and can result in environmental damage, economic loss to appealing parties in the private sector, loss of taxpayers' dollars, and, perhaps under the most extreme situations, deprivation of citizens' rights to due process (see Exhibit B). The EHB's backlog/timeliness of appeals case disposition problem is widely recognized not only by other governmental agencies and environmentally-related organizations (see Appendix A) but by Board members, Board staff, and Board Rules Committee members (see Appendix B), as well as by parties involved in the Board appeals process (see Appendix C). A number of factors contribute to the continuing backlog/timeliness problem. The increase in the number of appeals cases filed with the EHB appears to be the result of an increase in public awareness of environmental issues and an increase in the enforcement responsibilities of DER brought about by changes in law and regulations (for example, new regulations regarding the Solid Waste Management Act and state assumption of enforcement responsibilities under the Federal Surface Mining Control and Reclamation Act). Also, according to DER officials, recent and pending laws and regulations (e.g., the underground storage tank program and the proposed hazardous waste law) contain mandatory enforcement provisions rather than the earlier discretionary enforcement provisions. Mandatory enforcement generally results in more DER actions and, therefore, may result in an increased number of appeals to the EHB in the future. Despite the substantial increase in the work load of the Board represented by appeals filed, the personnel resources of the Board have only recently been substantially increased in an effort to address the increased caseload. Additionally, numerous vacancies have occurred in Board membership since 1983 (see Exhibit C) further reducing personnel resources. For example, in 1984 there was a vacancy for all 12 months of the year; in 1987, for 11 months. The EHB has attempted to address the personnel resource situation over the past several years by requesting funds and author-

ization to hire more hearing examiners and support staff, some of which have been approved.<sup>1/</sup> The EHB's funding requests and funding are administered by DER since the EHB is an administrative board in that department. The EHB does not have the opportunity to provide its own distinct budget request to the legislature nor does it appear before the General Assembly as an independent entity to justify its budget needs. Accordingly, the EHB does not receive a separate earmarked appropriation, but rather is allocated an appropriation out of the DER budget. The Legislature, therefore, has been limited in its ability to impact directly on the EHB's resource needs.<sup>2/</sup> Since January 1988, the Board is fully constituted, and one hearing examiner has been hired and another is reportedly provided for in the 1988-89 Governor's Executive Budget. Also, three additional support staff have been hired since January 1988 to fill vacancies, and more are provided for in the Governor's 1988-89 proposed budget.<sup>3/</sup>

#### RECOMMENDATIONS:

1. IT IS RECOMMENDED THAT THE BOARD RECEIVE FUNDING FOR ADDITIONAL HEARING EXAMINERS, LEGAL STAFF AND SUPPORT STAFF WHICH ARE NEEDED TO STOP THE GROWTH OF THE CASE BACKLOG AND BEGIN BACKLOG REDUCTION.<sup>4/</sup>
2. IT IS ALSO RECOMMENDED THAT THE GENERAL ASSEMBLY PROVIDE AN ANNUAL LINE ITEM APPROPRIATION TO THE EHB IN ORDER TO REDUCE THE DEPENDENCE OF THE BOARD ON DER IN RECEIVING ALLOCATED DOLLARS.
3. ADDITIONALLY, IT IS RECOMMENDED THAT, IN ORDER TO FACILITATE THE FILLING OF POSSIBLE FUTURE VACANCIES IN EHB MEMBER POSITIONS, THE LAW PERTAINING TO THE EHB BE AMENDED TO SPECIFY THAT THE GOVERNOR MUST SUBMIT A NAME

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1/Other factors contributing to the timeliness/backlog problem of the Board are addressed in Finding B pertaining to caseload management, Finding C pertaining to the need for computerization of operations, Finding D pertaining to surface mining reclamation bond forfeiture appeals, Finding E pertaining to fees for appeals, and Finding H pertaining to full record review by the Board.

2/Two proposals currently before the General Assembly (Senate Bill 527 and House Bill 1432) would establish the EHB "as an independent quasi-judicial agency." Many individuals and organizations familiar with the EHB with whom the auditors made contact suggested fiscal independence from DER as a major reason for proposing an independent agency. Administrative independence from DER would reportedly necessitate additional EHB staff to deal with fiscal, personnel, and other administrative matters now handled by DER. (See Appendix D for the full text of these bills.)

3/In addition to increasing the number of hearing examiners, some have suggested that the size of the EHB be increased to five members, for example. The auditors address the possibility of increasing the number of EHB members in Finding H of this report.

4/See footnote 4 on next page.

TO THE STATE SENATE TO FILL A VACANCY WITHIN 60 DAYS OF THAT VACANCY AND THAT THE GENERAL ASSEMBLY CONSIDER THE POSSIBLE NEED FOR INCREASING THE EHB MEMBER SALARIES TO MAKE THEM MORE ATTRACTIVE FOR ATTORNEYS WITH EXPERIENCE IN THE ADMINISTRATIVE LAW AND/OR THE ENVIRONMENTAL LAW FIELDS.<sup>5/</sup>

4. IT IS FURTHER RECOMMENDED THAT OTHER RECOMMENDATIONS CONTAINED IN THIS REPORT WHICH ARE DIRECTLY APPLICABLE TO DEALING WITH THE TIMELINESS/BACKLOG PROBLEMS BE IMPLEMENTED. THESE ARE FOUND IN FINDING B PERTAINING TO CASE LOAD MANAGEMENT, FINDING C PERTAINING TO THE NEED FOR COMPUTERIZATION OF OPERATIONS, FINDING D PERTAINING TO SURFACE MINING RECLAMATION BOND FORFEITURE APPEALS, AND FINDING H PERTAINING TO FULL RECORD REVIEW BY THE BOARD.

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4/The DER's FY 1988-89 Budget Request sent to the Governor's Budget Office in the fall of 1987 contained a "Program Revision Request" totalling \$356,000 for the purpose of increasing the EHB staff by five employees (two hearing examiners, one law clerk and two support staff) as well as providing funds to finalize installation and operation of a computerized docketing system. The Governor's budget request as submitted to the General Assembly in February 1988 includes a total budget increase of \$251,000 for the EHB to "increase the Environmental Hearing Board by 20% to hear increased caseloads." Reportedly, the \$251,000 increase, if received, will permit the hiring of three new EHB employees (one hearing examiner, one law clerk and one support staff) in addition to providing \$100,000 to complete the Board's computer system installation. The justification for the budget increase in the DER request was that "extensive delays in the processing of EHB appeals . . . are resulting in costly delays to businesses throughout the State. At the same time, large sums of revenue in the form of fines, penalties and forfeit bonds are going uncollected by the Commonwealth for years. The annual work load . . . has tripled over the past four years and the Board has been understaffed for so long that a sizeable backlog of unadjudicated cases has developed."

5/Currently, the annual salaries of EHB's members are the Chairman, \$45,000; other two members, \$42,500.

TABLE 1

Annual Appeals, Dispositions and Open Cases  
of the Environmental Hearing Board 1980-1987

|            | <u>Annual Appeals</u> | <u>Annual Dispositions</u> <sup>a/</sup> | <u>Annual Gap</u> <sup>b/</sup> | <u>Total Cases Remaining Open at Year End</u> <sup>c/</sup> |
|------------|-----------------------|--|---------------------------------|---|
| 1980.....  | 292                   | 60                                       | 232                             | 232   |
| 1981.....  | 210                   | 189                                      | 21                              | 253   |
| 1982.....  | 308                   | 177                                      | 131                             | 384   |
| 1983.....  | 301                   | 248                                      | 53                              | 437   |
| 1984.....  | 434                   | 287                                      | 147                             | 584   |
| 1985.....  | 556                   | 349                                      | 207                             | 791   |
| 1986.....  | 692                   | 557                                      | 135                             | 926   |
| 1987.....  | <u>535</u>            | <u>401</u>                               | <u>134</u>                      | 1,060   |
| TOTAL..... | <u>3,328</u>          | <u>2,268</u> <sup>d/</sup>               | <u>1,060</u>                    |   |

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a/Includes all dispositions regardless of year appeal was filed.

b/Difference between annual appeals and annual dispositions.

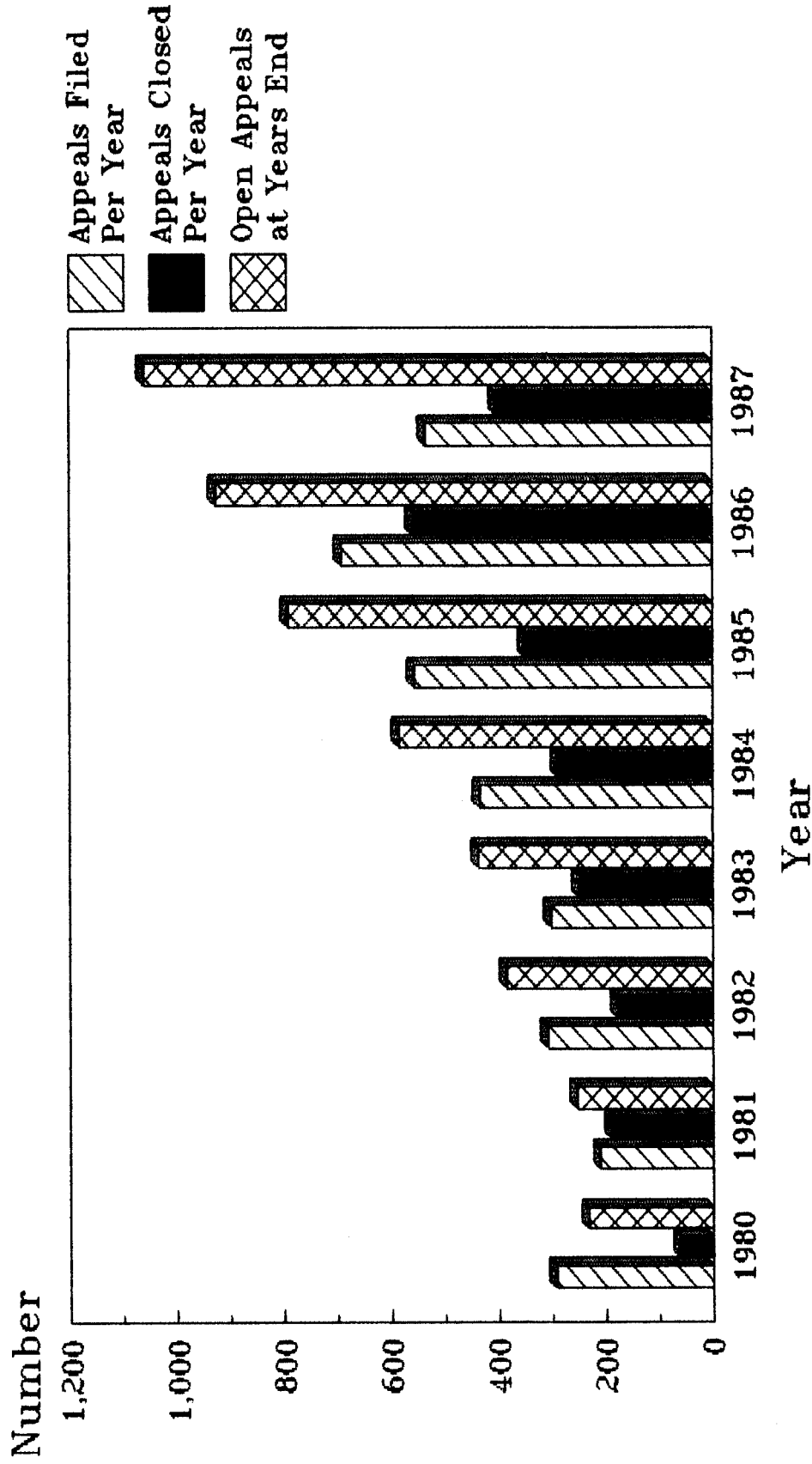
c/Does not include appeals filed before 1980.

d/For additional information on case dispositions, see Appendix E.

Source: Developed by LB&FC staff from data provided by the Environmental Hearing Board.

EXHIBIT A

# Appeals Filed Per Year, Appeals Closed Per Year, and Open Appeals at Years End 1980 - 1987



Source: Developed by LB&FC staff based on information provided by the Environmental Hearing Board.

## EXHIBIT B

### Example Cases of Delay in the Disposition of Appeals Resulting in Potential Environmental or Economic Impact<sup>1/</sup>

**1. Example of potential environmental impact due to delay.**

DER issued an order in March 1981 denying a permit for the application of sewage sludge for agricultural utilization. The order also required the cessation of existing activity and various remedial measures. The Board issued a limited supersedeas in July 1981, allowing the spreading of wastes on two fields, and in September 1981 the limited supersedeas was extended until the issuance of the final adjudication. In August 1985 the Board issued a final adjudication dismissing the appeal and terminating the supersedeas.

**2. Example of potential economic impact due to delay.**

DER denied mine drainage permit applications by the same company in December 1982 and September 1983. In October 1987, the Board issued an adjudication sustaining a consolidated appeal and remanding the permits to DER for re-evaluation. The adjudication found that the proposed mining operation would generate "highly probable economic benefits" of at least \$1,000,000.

**3. Example of potential environmental impact due to delay.**

A citizen appealed the issuance of a surface mining permit in February 1984. The appellant testified to having medical problems and alleged that DER did not include adequate noise and dust control provisions in the permit. In January 1986, the Board issued an adjudication suspending the permit and remanding it to DER.

**4. Example of potential environmental impact due to delay.**

In 1982, a group of citizens appealed the issuance of a solid waste permit to a landfill owner. In February 1986, the Board issued an adjudication partially sustaining the appeal because DER failed to include dust control provisions in the permit, and the permit was suspended and remanded to DER.

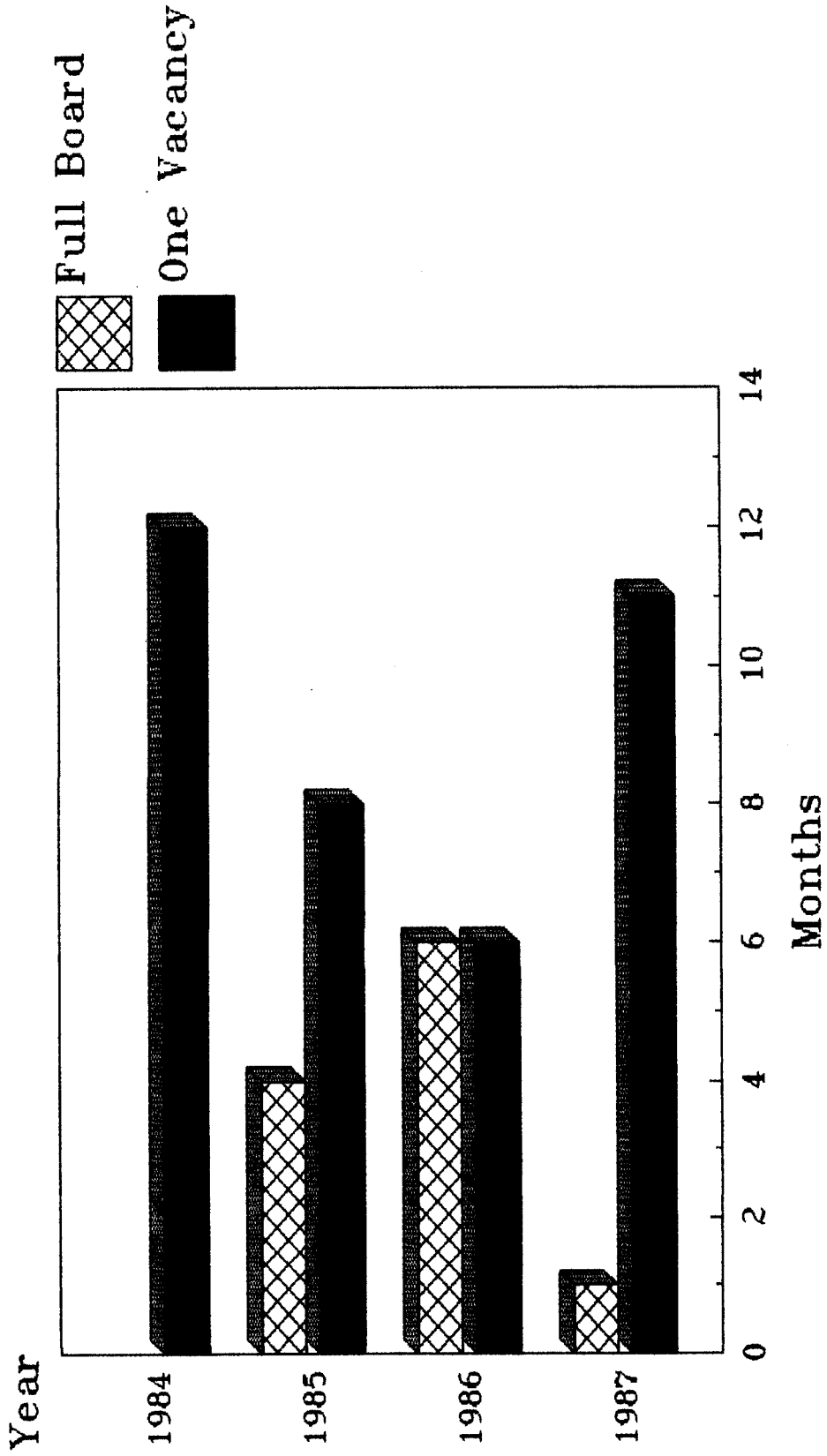
**5. Example of potential economic impact due to delay.**

In 1984, a mining operator appealed the forfeitures of 44 separate surface mining reclamation bonds. In April 1988, the parties agreed to a settlement under which the bonding companies will pay a total of over \$400,000 into the Commonwealth's reclamation fund.

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<sup>1/</sup>These example cases are intended to illustrate conditions under which negative impact may occur due to delay in the appeal process. The auditors did not attempt to independently assess the extent of actual environmental or economic impact. Also, the cases are intended to show the impact of delays inherent in the current process and are not intended to attribute the delays to the Board or the parties involved in the case.

**EXHIBIT C**  
**Board Member Vacancies by Months Vacant\*/**  
**1984 - 1987**



\*/Please also see Appendix G.

Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.



## B. PROBLEMS IN THE CASELOAD MANAGEMENT PROCESS

### FINDING

As discussed in Findings A and N, timely processing of the appeal caseload is necessary for the Environmental Hearing Board to be effective in achieving the purposes for which it was created. However, there are certain aspects of the Board's caseload management system which may contribute to the delays which are occurring in the disposition of appeals. These include: (1) the lack of formal time frames for some stages of the appeal process and frequent extensions/continuances to Board-imposed deadlines; (2) the lack of a formal system for prioritizing and tracking cases, and (3) a lack of formal mechanisms allowing for the opportunity for mediating appeals in order to enhance the opportunity for settlement thereby avoiding the formal hearing process. These are discussed below:

(1) The statutes governing the Board are silent in regard to required time frames for the Board to complete work on cases which come before it. The Board has informally adopted some requirements of this type, but these requirements deal with only certain aspects of the process and are routinely exceeded by the granting of extensions and continuances. Specifically, after an appeal is filed, the EHB member to whom the case is assigned issues a pre-hearing order which requires the appellant to submit a pre-hearing memorandum within 75 days, and DER then has 15 days to file its own pre-hearing memorandum. Neither of these deadlines are provided for in Board regulations. The auditors found cases of delay due to Board extensions/continuances granted to appellants, DER, or both parties, including cases in which multiple extensions were granted (see Exhibit D). The Board Chairman stated that it is rare for an appeal not to have any extensions. In instances in which deadlines are not met, the EHB issues default notices to parties for non-compliance. The Board is authorized to dismiss appeals for non-compliance with filing deadlines, but this seldom occurs; an auditors' sample found 3% of 1987 cases so dismissed. According to the Chairman, requests for extensions are granted because of the complexity of issues and because parties are working on settlement, among other reasons, and about 90% of requests for extensions are granted by the Board. There are no formal criteria for the granting of an extension. The Administrative Conference of the United States (ACUS) has recommended greater use of internal time limits and other case management techniques to improve case handling. The ACUS has stated, "Time extensions should be granted only upon strong, documented justification." Also, there are no time frame guidelines for holding hearings or issuing adjudications. An auditors review of cases for which a hearing was first held in 1987 found an average of 25 months from the date of appeal to the first hearing date, and a review of cases for which adjudications were issued in 1987 found an average of 32 months from the final hearing date to the issuance of the adjudication. The Public Utility Commission, for example, has statutory time frames for the holding of hearings and the issuance of decisions in certain proceedings before administrative law judges. In such cases, the judge must commence a hearing within 90 days of initiation of the proceeding, and he must issue a decision within 90 days after the record is closed.

(2) There is no formal system or criteria for prioritizing appeals; some appeals are expedited upon consideration of requests by the parties while others remain open for years. This situation may create a perception of inconsistency by the Board in processing appeals, and delays may result in potential negative economic and environmental impacts.<sup>1/</sup> The EHB's current case docketing system and "tickler"<sup>2/</sup> system for tracking due dates of required filings are not computerized. The Board Chairman stated that she is usually able to identify cases which are likely subjects for certain types of motions, particularly dismissal, but this is apparently not accomplished on a formal basis. One former Board Member has stated the need for the Board to re-evaluate its management system saying, "...there is little doubt that many of the Board's procedures could be streamlined for most appeals...it must be remembered that a comparatively few of the appeals reach adjudication, yet the rules are set up as if every appeal will get to the hearing stage; that makes for much time wasting, by the Board and the parties alike." Federal administrative agencies utilize a uniform caseload accounting system designed to assist the agencies to achieve more expeditious disposition of their cases by identifying areas of avoidable delay.

(3) The ACUS also advocates alternative means of dispute resolution, in particular, seeking party agreement and concessions on procedural and substantive issues and routinely offering the services of trained mediators.<sup>3/</sup> Concerning the possible role for mediation in the Environmental Hearing Board process, the auditors noted that most appeals are settled by means other than a formal hearing and some appeals are resolved after a hearing is scheduled, but the Board does not presently offer any formal assistance to parties in bringing about such resolution. When it occurs, settlement usually results when the contending parties get together themselves. It appears that perhaps the existence of a formal mediation service through the Board would increase the number of cases which could be resolved at an early stage. For each case that is so settled, the case management tasks relating to hearings and adjudications would be eliminated. Appropriate cases for mediation may include cases in which no major interpretation of law or regulations is involved, cases in which there appears to be a misunderstanding of facts, cases involving third parties and/or cases in which permit conditions are at issue or a party admits liability for a violation and there are issues relating to DER's discretion in assessing a penalty. The auditors learned of a private non-profit environmental mediation service in Pennsylvania which during the spring of

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<sup>1/</sup>See Finding A, Exhibit B.

<sup>2/</sup>See Finding C for further discussion on computerization.

<sup>3/</sup>Mediators are neutral third parties to disputes who have no power to make a decision concerning the dispute. The mediator listens to the views of each party in order to assist the parties in reaching a solution to the problem. Mediators are usually trained to handle disputes in a particular field (in this case, environmental disputes). The mediation process can be voluntary on all parties and should not interfere with any legal rights and responsibilities.

1988 had trained fifteen environmental mediators, some of whom had had previous experience with the EHB and DER.<sup>4/</sup> The auditors also identified a mediation program administered through the PA Department of Education related to resolving disputes in the special education field.<sup>5/</sup> In addition, Act 195 of 1970 relates to the settlement of public employee labor relations disputes by authorizing the use of voluntary mediation.<sup>6/</sup> Several other states have used mediation in environmental dispute resolution,<sup>7/</sup> although the process is considered to be still evolving nationwide.

## RECOMMENDATIONS

1. IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY CONSIDER IMPOSING STATUTORY TIME REQUIREMENTS IN CONNECTION WITH AT LEAST CERTAIN ASPECTS OF THE ENVIRONMENTAL HEARING BOARD'S CASE LOAD MANAGEMENT PROCESS. FOR EXAMPLE, CONSIDERATION SHOULD BE GIVEN TO MANDATING THAT HEARINGS BE HELD WITHIN A SPECIFIC TIME FRAME AFTER AN APPEAL HAS BEEN FILED AND THAT ADJUDICATIONS BE ISSUED WITHIN A CERTAIN TIME FRAME AFTER A HEARING HAS BEEN HELD. ALSO, THE BOARD SHOULD FORMALLY ADOPT ITS 75-DAY AND 15-DAY RULES, PERTAINING TO RECEIPT OF BRIEFS FROM THE PARTIES, IN REGULATION AND SHOULD ADOPT REGULATIONS FOR SPECIFIC TIME FRAMES FOR EXTENSIONS AND FOR LIMITING THE NUMBER OF EXTENSIONS. THE BOARD SHOULD ADOPT IN REGULATION FORMAL CRITERIA FOR THE GRANTING OF EXTENSIONS AND ALLOW EXTENSIONS ONLY ON THE BASIS OF STRONG DOCUMENTED JUSTIFICATION IN LINE WITH THE CRITERIA SET FORTH.

2. IT IS ALSO RECOMMENDED THAT THE EHB DEVELOP FORMAL CRITERIA FOR PRIORITIZING CASES AND MAKE USE OF ITS PLANNED COMPUTERIZED DOCKETING SYSTEM TO MONITOR THE STATUS OF APPEALS AND TO TARGET CASES FOR PRIORITY ACTION. THE CRITERIA SHOULD CONSIDER THE DATES OF THE APPEAL ACTION AS WELL AS OTHER SPECIFIED REASONS FOR PRIORITIZATION INCLUDING, POSSIBLY, POTENTIAL ENVIRONMENTAL AND/OR ECONOMIC NEGATIVE IMPACTS. ADDITIONALLY, THE SYSTEM SHOULD BE USED TO IDENTIFY ON AN ONGOING BASIS BOTTLENECKS IN THE CASE MANAGEMENT PROCESS AND APPROPRIATE CORRECTIVE ADMINISTRATIVE ACTIONS TO RESOLVE THESE. (PLEASE SEE FINDING C FOR FURTHER DETAIL ON THE BOARD'S PLANNED COMPUTER SYSTEM).

3. ADDITIONALLY, IT IS RECOMMENDED THAT THE BOARD CONSIDER REQUESTING FUNDING FOR AND, IF RECEIVED, BEGIN A FORMAL PROGRAM TO PROVIDE LIMITED VOLUNTARY MEDIATION TO DISPUTING PARTIES BEFORE THE BOARD IN AN ATTEMPT TO RESOLVE CASES WHICH THE BOARD IDENTIFIES AS CASES WHICH COULD POSSIBLY BE

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<sup>4/</sup>See Appendix H for information on PennACCORD.

<sup>5/</sup>See Appendix I for information concerning the PA Special Education Mediation Service.

<sup>6/</sup>Senate Bill 527 of 1987 would authorize voluntary mediation in appeals to the Board. See Appendix J for this provision.

<sup>7/</sup>See Appendix K for a discussion of mediation in disputes, including environmental disputes, in other states.

RESOLVED IN A NON-ADVERSARIAL MANNER BEFORE IMPLEMENTATION OF A FORMAL HEARING PROCESS. IN CONNECTION WITH THIS, THE BOARD SHOULD DEVELOP PROCEDURES FOR APPLYING MEDIATION EFFORTS AND CRITERIA FOR IDENTIFICATION OF CASES TO WHICH THE MEDIATION SERVICE WOULD BE APPLIED (ONE OF THESE CRITERIA SHOULD BE THAT A MEDIATION WAS REQUESTED BY EITHER PARTY). ALSO, CRITERIA FOR DETERMINING AN AMOUNT OF BOARD FUNDS TO BE APPLIED TO EACH MEDIATION EFFORT SHOULD BE DEVELOPED.

EXHIBIT D

Example of an Appeal Case with  
Numerous Extensions and Continuances

|                         |  |
|-------------------------|--|
| November 1, 1985.....   | Appeal Filed.  |
| January 10, 1986.....   | Order: Proceedings stayed pending negotiations.              |
| July 21, 1986.....      | Order: Stayed to September 30.                               |
| September 19, 1986..... | Appellant requests continuance to October 31.                |
| September 23, 1986..... | Order: Appellant to October 31.                              |
| October 30, 1986.....   | Appellant requests to November 30.                           |
| November 7, 1986.....   | Order: Continued to November 30.                             |
| November 26, 1986.....  | Appellant requests extension to January 31.                  |
| December 5, 1986.....   | Order: Continued to January 31.                              |
| January 30, 1987.....   | Appellant requests to March 31.                              |
| February 3, 1987.....   | Order: Continued to March 31. Status Report due April 10.    |
| April 14, 1987.....     | Appellant Status Report.                                     |
| April 16, 1987.....     | Order: Continued to June 20. Status Reports due July 10.     |
| July 15, 1987.....      | Default Notice: Status Reports due July 27.                  |
| July 23, 1987.....      | Commonwealth Status Report.                                  |
| July 24, 1987.....      | Order: Commonwealth Status Report due August 14.             |
| July 24, 1987.....      | Appellant Status Report.                                     |
| September 1, 1987.....  | Default Notice: Commonwealth Status Report due September 11. |
| September 14, 1987..... | Commonwealth Status Report.                                  |
| October 19, 1987.....   | Order: Continued to November 30.                             |
| December 7, 1987.....   | Default Notice: Appellant Status Report due December 19.     |
| March 9, 1988.....      | Default Notice: Appellant Status Report due March 21.        |
| April 4, 1988.....      | Rule to Show Cause: Returnable by April 25.                  |

Source: Environmental Hearing Board, Case Docket Number 85-481-M.

### C. COMPUTERIZATION OF THE EHB DOCKET

#### FINDING:

The Environmental Hearing Board (EHB) currently does not have a computerized case docket system, but expects to have one soon.<sup>1/</sup> The EHB's manual docket system has hindered its ability to improve its appeal caseload management capabilities and to evaluate its performance. The caseload management of each appeal includes numerous steps which are recorded by hand on the docket in Harrisburg and a duplicate docket maintained by the Pittsburgh Office for cases assigned to the Board member who works out of that office. For example, entries such as the filing of the appeal, pre-hearing orders and default notices are included on the docket.<sup>2/</sup> Exhibit E shows an example sheet from the EHB case docket. The EHB's computer needs have been addressed in the Department of Environmental Resources' (DER) automated technology multi-year plan for fiscal years 1987-88 and 1988-89. An update on the fiscal year 1987-88 plan states, "The EHB requires a computerized case docketing system to manage its workload and reduce its current backlog." During the period 1980 through 1987, a total of 3,328 appeals were filed with the Board, and the number of open cases as of January 1, 1988, stood at 1,060. According to a November 1986 memorandum from the EHB Chairman to DER's Deputy Secretary for Administration and to the Bureau of Information Systems, the Board has been awaiting computer-related assistance from DER since late 1983 or early 1984. This memorandum states that a computerized case docket system would result in more efficient caseload management and information on the Board's performance. A number of possible approaches to the computerization of the EHB's docket has occurred over the past several years. Appendix L shows the history of this process. The Governor's FY 1987-88 budget included \$163,000 to increase the EHB's staff and to acquire a computerized system to track and manage its caseload. In addition, the Governor's FY 1988-89 budget includes an additional \$251,000 for the EHB to ". . . hear (an) increased caseload." Included in the \$251,000 is \$100,000 for the EHB's computer system. The Board and DER concluded that personal computers would be the best application to address the EHB's needs. Currently, the Department is in the process of purchasing six personal computers, two laser printers, two modems, software and miscellaneous hardware for the Harrisburg and Pittsburgh EHB offices. The total cost for the computer hardware and software is approximately \$39,000. Training for the EHB staff on the new system will be provided by DER. The computer equipment was delivered in early June 1988, and the EHB plans to have an operating case docket system by fall 1988. The new system will allow the Board to add workstations to the system as needed and will eliminate the need to keep a duplicate docket in Pittsburgh since Harrisburg and Pittsburgh will be linked via computer.

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<sup>1/</sup>As defined in Black's Law Dictionary, a docket is "a formal record, entered in brief, of the proceedings in a court of justice."

<sup>2/</sup>Finding B discusses the caseload management system of the EHB in more detail.

The proposed computerized docket will include such information as docket number, appeal date, parties' names and addresses, DER program area, counsels, intervenors and a listing of actions concerning the case. Appendix O summarizes several proposed computer generated reports which will help the EHB to improve its caseload management and to report on its performance.

RECOMMENDATIONS:

IT IS RECOMMENDED THAT, IN ORDER TO TAKE FULL ADVANTAGE OF THE COMPUTER EQUIPMENT WHICH THE EHB WILL BE GETTING THIS YEAR, THE BOARD SHOULD DO THE FOLLOWING:

1. ESTABLISH A STEERING COMMITTEE WITH REPRESENTATIVES FROM THE BOARD, BOARD STAFF, EHB RULES COMMITTEE AND DER COMPUTER STAFF TO DEVELOP AND MAINTAIN A WRITTEN COMPUTER APPLICATIONS AND UTILIZATION PLAN.
2. ESTABLISH VIA THE STEERING COMMITTEE A STEP-BY-STEP TIMETABLE FOR CONVERSION OF THE MANUAL DOCKET SYSTEM TO THE COMPUTER, INCLUDING A PLANNED TIME FRAME FOR JOINT OPERATION OF THE MANUAL SYSTEM AND THE NEW AUTOMATED SYSTEM. THE STEERING COMMITTEE SHOULD ALSO DEVELOP TIMETABLES FOR OTHER COMPUTER APPLICATIONS WHICH ARE DETERMINED BY THE STEERING COMMITTEE AND THE BOARD AS NECESSARY FOR EFFECTIVE CASE MANAGEMENT, MONITORING AND REPORTING.
3. CONSIDER THE FOLLOWING AS POSSIBLE ADDITIONAL APPLICATIONS OF THE AUTOMATED SYSTEM: REGULAR MANAGEMENT REPORTS ON SUCH MATTERS AS OPEN AND CLOSED CASES BY BOARD AND MEMBER; AVERAGE TIME OF CASE DISPOSITION BY BOARD, MEMBER AND PROGRAM AREA (FOR EXAMPLE, MINING PERMITS, SOLID WASTE PERMITS); AND A BREAKDOWN OF CASE DISPOSITIONS (FOR EXAMPLE, SETTLED, WITHDRAWN AND ADJUDICATED) BY BOARD MEMBER AND PROGRAM AREA.<sup>3/</sup>
4. OBTAIN IN-DEPTH TRAINING IN USAGE OF THE COMPUTER EQUIPMENT FOR AT LEAST TWO STAFF MEMBERS WHO WOULD SERVE AS PRIMARY AND SECONDARY RESOURCES FOR DAY-TO-DAY TROUBLESHOOTING, COMPUTER DATA MAINTENANCE (SUCH AS DATA BACK-UP), STAFF TRAINING AND SYSTEM DEVELOPMENT.

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<sup>3/</sup>The LB&FC recognizes planned management reports, as shown in Appendix O, and suggests these as other possible reporting areas.

EXHIBIT E  
Sample Docket

Docket # 87-408-W

ENVIRONMENTAL HEARING BOARD

APPELLANT [REDACTED]  
 V. •

Action Appealed 8/27/87 Compliance Order  
No. 87P1587L

COMMONWEALTH OF PA., D.E.R.  
 Board Member [REDACTED]

Region Central (Northumberland)  
 Program Surface Mining  
 COMM COUNSEL [REDACTED]

APP COUNSEL [REDACTED]  
[REDACTED]  
[REDACTED]  
 Frisch: [REDACTED]

PERMITTEE/INT. \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
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 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

| Filing Date | Action   |
|-------------|--|
| 9-25-87     | Appeal filed. Requires addtl information.                              |
| 9-29-87     | Ack + Reg for information  |
| 10-20-87    | 2 <sup>nd</sup> Ack + Reg. for Info.                                   |
| 11-12-87    | Publication of appeal (still no copy to litigations) (no copy to DEC.) |
| 11-18-87    | - Hearing Order 1 MW issued, filing due date Feb. 2, 1988.             |
| 2-2-88      | App. Pub. Hg. Memorandum.  |
| 3-14-88     | 3 <sup>rd</sup> default: Comm memo due March 24.                       |
| 3-30-88     | 3 <sup>rd</sup> default: Comm. memo due April 11.                      |
| 4-8-88      | Comm req. to 4/25 for memo.  |
| 4-14-88     | Order: Comm to April 25 for memo.                                      |



#### D. PROBLEMS ASSOCIATED WITH MINING RECLAMATION BOND FORFEITURE APPEALS

##### FINDING:

A high percentage of surface mining reclamation bond forfeiture orders by the Department of Environmental Resources (DER) are appealed by mining companies and/or surety bond companies to the Environmental Hearing Board, resulting in an increased Board workload/backlog and presenting potential danger to the environment and possible economic loss.<sup>1/</sup> There has been a significant increase in the percentage of appeals of reclamation bond forfeitures since the beginning of 1983.<sup>2/</sup> The backlog of appeals to the Board can delay the resolution of bond forfeiture appeals for many months and even years. As of April 1, 1988, the average number of days from the date of appeal to the date on which the bond forfeiture amount was collected by DER was 469 days.<sup>3/</sup> These cases not only add to the case workload and therefore the backlog of the EHB, they cause problems for Pennsylvania's surface mining reclamation program. According to DER, also as of April 1, 1988, the forfeiture cases under appeal represented over 8,000 acres of unreclaimed mining land and almost \$15 million of forfeited bond funds unavailable for reclamation purposes. The delays postpone reclamation of sites thereby increasing the possibility of public exposure to health and safety and environmental problems. Delay also has a financial impact on the Commonwealth through lost interest income, through the impact of inflation on the cost of reclamation, and through the delaying the return of the land to productive use. DER suggested in a report on the Pennsylvania Surface Mining Bond Forfeiture Program prepared in October 1985 that, in view of the delays associated with appeal cases in which all appeals had "been resolved in favor of the Department," the appeal of a for-

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<sup>1/</sup>When a mining company fails to reclaim a mining site, DER takes enforcement action which leads to a notice of intent to forfeit, followed by an issuance of the declaration of forfeiture (see Appendix P which illustrates the forfeiture process). The declaration of forfeiture is a DER order which is appealable by the mining company or the bonding company to the Environmental Hearing Board within 30 days of issuance. Appendix Q provides information on the status of funds related to forfeitures.

<sup>2/</sup>For the period 1977 (the year of the beginning of the surface mining reclamation program) through 1982, 20 out of 264 bond forfeitures were appealed (8%). For the period 1983 through May 1988, 254 out of 413 bond forfeitures were appealed (62%).

<sup>3/</sup>This average represents the average days for bond forfeiture cases under the DER primacy program which began in July 1982. Primacy refers to the DER assumption of the responsibility of enforcing the Federal Surface Mine Reclamation Program. Primacy forfeitures constituted about 65% of the 1988 forfeiture cases as of June 1, 1988. DER officials estimate that the average number of days from appeal to collection for non-primacy cases would be about the same; DER does not calculate this figure.

feiture could be a "delaying tactic" by bonding companies for the purpose of collecting additional interest on invested bond amounts. An auditors' review of Board adjudications for 1985 through 1987 found only one appeal of a bond forfeiture sustained by the Board. Representatives of the bonding industry and of the coal mining industry say that the filing of appeals in reclamation bond forfeiture cases is not for the purpose of delay so that additional interest may be collected, but that appeals are filed with the EHB in order to preserve the right to appeal which must be exercised within 30 days of the DER order. These representatives suggest that it is often not possible to check on all the cited DER violations within the 30-day appeal period. A representative of the EHB indicated that both scenarios (protection of appeal rights and delay for fiscal gain) probably are factors in the filing of bond forfeiture appeals. Upon declaration of forfeiture, DER sends notice to holders of collateral bonds (certificates of deposit, Treasury notes, etc.) that interest on the bonds belongs to the Commonwealth. However, the majority of reclamation bonds are surety bonds (held by bonding companies who charge an annual premium to coal operators), and there is no procedure for realizing interest on surety bonds subject to forfeiture. The Commonwealth of Kentucky has a law which requires payment of the bond amount within 7 days of forfeiture. The money is deposited in an interest bearing escrow account, and if the appeal is resolved in favor of the appellant the amount plus all interest is refunded by the Commonwealth. If the appeal is resolved in favor of the Commonwealth, the bond amount is immediately available for collection and all interest accrued during the appeals process belongs to the Commonwealth. Officials in Kentucky stated that approximately 2% of the Declaration of Forfeitures in Kentucky are appealed. In Pennsylvania, the corresponding percentage was 40% since the program's inception and 62% for the period January 1983 through May 1988.

#### RECOMMENDATIONS:

IT IS RECOMMENDED THAT THE ENVIRONMENTAL HEARING BOARD, BECAUSE OF THE POTENTIAL NEGATIVE IMPACTS ON THE ENVIRONMENT AND ECONOMY, MAKE SPECIAL EFFORTS TO FACILITATE EARLY RESOLUTION OF BOND FORFEITURE APPEALS, INCLUDING THE POSSIBLE USE OF MEDIATION (SEE FINDING B). ALSO, IT IS RECOMMENDED THAT, IF BOND FORFEITURE APPEAL CASES CONTINUE TO BACKLOG, THE GENERAL ASSEMBLY SHOULD CONSIDER STATUTORY AMENDMENTS WHICH WOULD REQUIRE THE DEPOSIT OF SURETY BONDS DECLARED FORFEITED BY DER INTO AN ESCROW ACCOUNT PENDING RESOLUTION OF AN APPEAL.

## E. LACK OF ENVIRONMENTAL HEARING BOARD APPEAL FEES

### FINDING:

Although operating in a judicial-type environment involving the resolution of appeal cases through hearings and adjudications, the Environmental Hearing Board (EHB) is unlike the courts in that it has no authority to impose fees related to case filings or motions. The number of cases filed with the EHB has increased in recent years (an average of 594 cases received per year for the years 1985 through 1987), and the case backlog has grown to an unmanageable level. In dealing with these cases, the Board is often asked to rule on various procedural motions raised by parties to the cases. For example, parties can make a motion for an extension of time to file a prehearing memorandum or to dismiss the appeal. The EHB Chairman informed the auditors that the largest portion of open cases before the EHB are those awaiting the outcome of prehearing motions, such as the motion to dismiss an appeal. Several individuals familiar with the creation and operation of the Board have suggested that fees associated with Board actions may be appropriate, and the EHB Chairman believes that a filing fee may play a limited role in eliminating frivolous appeals. The Board Chairman also suggests that filing fees, if enacted, be in line with similar court fees (see Exhibit F) and that there be a waiver provision for the fee in cases of financial hardship. A May 1981 report of a study conducted by the Office of Budget and Administration addressed the adequacy of executive branch fees. According to this report, state fees are sometimes appropriate to cover fee related costs and at other times are an appropriate mechanism to minimize the "capricious use" of certain state services. Total expenditures for the EHB averaged nearly \$400,000 per fiscal year during the period FY 1984-85 through 1986-87. It may be unreasonable to expect all costs for the Board's operation to be covered by a schedule of fees, and such action would probably be in conflict with the basic purposes and function of the Board. However, the basic purposes of the Board would perhaps be furthered by a schedule of appropriate filing and other service fees if such fees discouraged frivolous actions and thereby reduced the workload of the EHB enabling it to accomplish its responsibilities in a more timely manner. Additionally, even a nominal schedule of fees could help to offset the costs of expansions and improvements (cited elsewhere in this report) needed for the proper functioning of the EHB.

### RECOMMENDATION:

IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY AMEND THE ENVIRONMENTAL HEARING BOARD'S ENABLING LEGISLATION (71 P.S. §510-21) TO AUTHORIZE THE BOARD TO SET (VIA REGULATIONS) AND COLLECT FEES FOR THE FILING WITH THE BOARD OF APPEALS AND SPECIFIED MOTIONS (E.G., EXTENSION OF TIME FOR THE FILING OF A BRIEF) WHICH WOULD BE NO GREATER THAN COMMONWEALTH COURT SYSTEM FEES. THE LAW SHOULD ALSO AUTHORIZE THE BOARD TO PROMULGATE REGULATIONS PROVIDING FOR THE WAIVER OF FEES FOR APPEALING PARTIES WHO CAN DEMONSTRATE TO THE BOARD'S SATISFACTION THAT PAYMENT OF THE FEE WOULD BE AN UNDUE FINANCIAL BURDEN ON THE PARTY. ADDITIONALLY, PROVISION SHOULD BE INCLUDED TO PERMIT THE APPELLANT TO RECOVER FEES PAID FOR THE FILING OF THE APPEAL IF THE EHB RULES IN FAVOR OF THE APPELLANT.

EXHIBIT F

Selected Filing and Service Fees for Appellate Courts \*/

- I. Appeals and Reviews Fee
- A. For all services in connection with the filing, hearing, and disposition of an appeal from or direct review of a judgement or action of a lower governmental unit or other authority..... \$50
- This is a composite fee which covers:
1. All filings
  2. Ancillary matters
  3. Routine procedural matters
  4. Post-decision matters
- Except where a specific fee is provided below in this part.
- B. Second and subsequent requests for extension
1. For filing by a party of a request for a second extension of time to file a brief..... \$10
  2. For filing a third or subsequent request..... \$25
- C. Petition for reargument or reconsideration, filing..... \$15

II. Original Actions

For all services in connection with the filing, hearing, and disposition of an action or matter originally brought in an appellate court (or transferred to the Supreme Court under Judiciary Code, Section 726) or in connection with an application or petition for a writ preliminary to or in the nature of an indirect review of an action of a lower governmental unit or other authority..... \$30

This is a composite fee like that in Part I and subject to the same limitations.

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\*/County courts charge varying fees. For example, the Philadelphia Court of Common Pleas charges \$45 to file an appeal from an administrative agency's action and \$11 to file a motion. The Prothonotary Fee Bill for Dauphin County lists a \$30 fee to be paid to file an appeal but limits the fee to a maximum of \$10 for a political subdivision and lists no fees for the filing of motions.

Source: 204 Pa. Code §155.1, relating to Commonwealth appellate courts.

## F. EQB APPROVAL OF EHB REGULATIONS

### FINDING:

The EHB's function as an adjudicatory body deciding cases with citizens and other private and public entities as one party and the Department of Environmental Resources (DER) as the other party requires that, for balance and fair play, the EHB must operate independently of DER. This independence may be hindered by the mandate in law that the Environmental Quality Board (EQB), chaired by the Secretary of DER, adopt EHB rules and regulations. <sup>1/</sup> The EHB and EQB are defined in law as administrative boards within DER. However, in discussions with individuals familiar with the creation of the EHB, the auditors were informed that the EHB was intended to be independent from DER and was placed under DER only for the purpose of providing the EHB with administrative services. Moreover, organizational charts of DER depict the EHB as being outside the line of authority of DER (see Appendix R). Most of the individuals, both within and outside of state government with whom the auditors discussed the status of the EHB, emphasized the need for functional independence from DER because of a public perception that the EHB is part of DER. <sup>2/</sup> Because of the quasi-judicial role of the EHB, the Board's regulations are, for the most part, rules related to judicial procedure and somewhat related to rules of court. The nature of the EHB regulations is significantly different than the broad range of regulations proposed by DER and approved by the EQB. Further, the nature of EHB regulations has led the EHB to convene an EHB Rules Committee, consisting of EHB members, DER attorneys and private attorneys, which has the function of making recommendations to the EHB on the Board's rules of practice and procedure (please also see Finding M pertaining to the Rules Committee). The auditors believe that the Rules Committee provides a more appropriate body to participate in the development of EHB rules than the EQB, which consists primarily of the heads of various state agencies. An official of a DER-related entity interviewed by the auditors supports EHB rule approval by the EQB, suggesting that the process provides an opportunity for public scrutiny of proposed EHB rules and regulations. The auditors note, however, that EHB-proposed rules and regulations are subject to the regulatory review process which is designed to provide public input into the rule-making process.

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<sup>1/</sup>Two bills currently before the General Assembly address the promulgation of the Board's regulations. House Bill 1432 and Senate Bill 527 provide that the EHB Rules Committee recommend that regulations be promulgated by the EHB based on a majority affirmative vote. Both bills establish the EHB as an independent, quasi-judicial agency. Appendix D includes the complete text of these bills.

<sup>2/</sup>Please see Appendix S for selected comments from appellants concerning the relationship between the EHB and DER.

RECOMMENDATION:

IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY AMEND THE ENVIRONMENTAL HEARING BOARD'S (EHB) ENABLING LEGISLATION (71 P.S. §510-21(e)) TO REMOVE THE REQUIREMENT THAT THE ENVIRONMENTAL QUALITY BOARD ADOPT EHB RULES AND REGULATIONS AND THAT THE LAW PROVIDE THAT EHB RULES AND REGULATIONS BE PROMULGATED BY THE EHB FOLLOWING A MAJORITY VOTE AFTER THE BOARD RECEIVES ADVICE ON THE REGULATIONS FROM A LEGISLATIVELY-ESTABLISHED EHB RULES COMMITTEE. AFTER EHB APPROVAL THE RULES AND REGULATIONS SHOULD BE PROMULGATED IN ACCORDANCE WITH THE NORMAL COMMONWEALTH REGULATION PROMULGATION PROCESS.

## G. BOARD RULES

### FINDING:

The Environmental Hearing Board (EHB) and the Board's Rules Committee, whose function it is to recommend changes in the Board's rules, have identified several areas of concern relative to Board regulations which specify the requirements for practice before the Board. These areas of concern were identified and prioritized in May 1986. Since May 1986, the Rules Committee has been working on revisions to the Board's discovery, pre-hearing practice and motion practice rules. Proposed revisions have been completed in these areas, and the Board is preparing a package to be presented to the Environmental Quality Board (EQB) for proposed rulemaking and publication in the Pennsylvania Bulletin; however, as of late May 1988, the Board had not submitted the package to the EQB. The auditors reviewed the areas of concern and the proposed amendments and identified several examples of specific changes and the benefits of the changes.<sup>1/</sup> For example, in the case of pre-hearing conferences, the current rules are general as to the matters to be considered during a conference, whereas the amendments set forth specific matters to be disposed of during an initial pre-hearing conference and a final pre-hearing conference. In addition, the proposed amendments would allow a conference to be held by telephone thereby providing for flexibility in the scheduling of the conferences. Further, the current discovery rules allow for discovery within the first 60 days of the filing of a notice of appeal, whereas the proposed amendments adopt the Pennsylvania Rules of Civil Procedure which allow for a much more liberal time period for discovery and specific timetables for answering interrogatories and producing documents. As another example of a recommended change to a regulation and the benefit derived, no rules currently exist for motion practice before the Board; the proposed rules provide specific procedures for filing a motion and for the contents of the motion and answer, thus providing a greater level of uniformity. These are only a few examples of changes which were identified by the auditors. In addition to the amendments already proposed, the auditors were informed that the identification of other areas requiring modification is an ongoing process as Board decisions and Commonwealth Court opinions identify weaknesses or deficiencies in the rules.

### RECOMMENDATION:

IT IS RECOMMENDED THAT THE ENVIRONMENTAL HEARING BOARD ESTABLISH A SPECIFIC WORK PLAN AND TIMETABLE FOR COMPLETION OF ITS CURRENT PROJECT WHICH IS DESIGNED TO IMPROVE AND EXPAND ITS REGULATIONS.

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<sup>1/</sup>Please see Appendices T, U and V for the auditors' comparison of the current regulations and proposed changes and additions.

## H. FULL BOARD REVIEW

### FINDING:

A recent Commonwealth Court decision has imposed a requirement that each Environmental Hearing Board (EHB) member who is not present at the taking of evidence in a case examine the prime source of the facts before the Board issues an adjudication. FR&S, Inc. vs. Department of Environmental Resources, decided February 22, 1988, states that ". . . in a multimember agency, where there is authorized machinery to permit fewer than all of the agency members, or a hearing officer appointed for the purpose, to hear and receive the evidence, there is no requirement that all of the decision-makers must sit in upon the evidentiary proceedings . . . [but] decision-makers, if not present at the taking of evidence, must give specific consideration to the testimony and exhibits by reading and examining the same."<sup>1/</sup> The EHB is constituted of three Board members and is responsible for holding hearings and issuing adjudications on any order, permit, license or decision of DER, and the Board has the authority to employ hearing examiners as necessary in the exercise of its functions. The Board's regulations provide that hearings may be held before the Board as a whole, by individual Board members sitting as hearing examiners, or by hearing examiners who are not members of the Board. The regulations further provide that "[h]earings held by hearing examiners not members of the Board will be decided by the Board based upon its review of the record and the examiner's proposed adjudication." The auditors were informed that the past and present procedure for case review

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<sup>1/</sup>The FR&S decision cited a Pennsylvania Supreme Court case, Department of Transportation v. Human Relations Commission, 510 Pa. 401, 508 A.2d 1187 (1986), which held that the requirement that the full Commission review the recommended findings, conclusions and order is not satisfied by a vacuous review of the recommendation. "The conclusions and order must be based on the findings of fact. No meaningful review of the findings of fact can be made without reference to the record. In order to properly review findings of fact, the record from which they are derived must be examined in order to determine if the findings are based on substantial evidence. To merely read the findings without examining the record in order to determine if those findings are supported is not to review those findings with the meaning and effect that tribunals regularly perform reviewing functions." The auditors note 43 P.S. §959(g) provides, in part, that the Human Relations Commission "...shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Three or more members of the Commission or a permanent hearing examiner designated by the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. The recommended findings, conclusions and order made by said members or permanent hearing examiner shall be reviewed and approved or reversed by the Commission before such order may be served upon the parties to the complaint."



by Board members who did not hear and receive the evidence in a case includes a review of the draft adjudication, the briefs of the parties and the notice of appeal. The exhibits and transcript of a case are usually not sent with the draft adjudication unless a Board member specifically requests such information. This practice is continuing because the Commonwealth Court's decision is being appealed to the Supreme Court. If this court case is resolved in accordance with the Judge's ruling that a full case review by all Board members would have to be conducted, the Board would be required to change its procedure. A full case review by all Board members would effectively "tie the hands" of the entire Board and reduce the capabilities of the Board to proceed with various cases simultaneously. The Board's Chairman is of the opinion that full case review by all Board members would increase the Board's backlog and the Board members' work load because, in some cases, the transcripts are in excess of 3,000 pages and involve numerous exhibits. (Please see Finding A for a discussion of the Board's backlog.) The auditors reviewed fifteen EHB case files and the transcripts of the proceeding ranged from 166 pages to 3,506 pages.<sup>2/</sup> The Office of General Counsel has appealed the Commonwealth Court decision to the Pennsylvania Supreme Court; seven other Commonwealth agencies have filed an amicus statement in support of this appeal.<sup>3/</sup>

RECOMMENDATION:

IF THE BOARD'S PROCEDURE FOR CASE REVIEW IS CHANGED IN ACCORDANCE WITH THE PRINCIPLE RECOGNIZED IN THE FR&S CASE, IT IS RECOMMENDED THAT THE BOARD'S MEMBERSHIP BE INCREASED TO FIVE MEMBERS AND THE BOARD BE GIVEN THE AUTHORITY TO ADJUDICATE ITS CASES IN PANELS OF THREE MEMBERS.

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<sup>2/</sup>The auditors note that in some cases there was more than one hearing held during the course of the appeal to the Board.

<sup>3/</sup>The Office of General Counsel filed a jurisdictional statement to the Supreme Court on March 8, 1988. The Supreme Court granted allowance of appeal on May 17, 1988, and dismissed as moot the jurisdictional statement in support of the asserted right of appeal.

## I. LACK OF FORMAL OPERATING PROCEDURES

### FINDING

The Environmental Hearing Board, through its Rules Committee, has begun to develop formal written operating procedures, thereby correcting a long-standing deficiency in this area. The Chairman of the Rules Committee reported that the procedures are intended to assist attorneys who practice before the Board, as well as serving as operating guidelines for Board members. The Board Chairman has indicated that procedures manuals have not been developed in the past because of a lack of time and money. One publication, "Environmental Hearing Board, Practices and Procedures in Pennsylvania," was prepared with the assistance of Department of Environmental Resources (DER) attorneys and published in 1978 by a private publisher. This publication was intended to assist attorneys who practice before the Board, especially those who only do so on an occasional basis, but is reportedly currently out of date and is not distributed by the Board (see Appendix W). Some persons, including the Board Chairman, have indicated that it is important to the efficient operation of the Board for attorneys who practice before the Board to be familiar with its rules. The U.S. General Accounting Office (GAO) recommends that agency procedures be organized in handbooks, manuals, or other forms of publication, noting that lack of clarity can result in misunderstandings and improper or inconsistent interpretation. It appears that there has been some confusion in regard to Board procedures, as well as cases in which the Board has dismissed appeals on procedural grounds such as untimeliness or failure to pre-pay civil penalties assessments. In regard to the application of rules of practice and procedure by Board members, development of a member manual, similar to that for attorneys, could serve to ensure that Board rulings are consistent among members. This seems especially important given the possible existence of members or hearing examiners with non-legal backgrounds, the member turnover rate, the possible addition of new members or hearing examiners, and the location of the Board in more than one office. Other Commonwealth boards, including the State Board of Education, have Board member manuals, and the Administrative Conference of the U.S. has developed a "Manual for Administrative Law Judges," which includes guidelines for pre-hearing activities, hearing mechanics and conduct and writing decisions. Additionally, the Board has no formal written staff administrative procedures for areas such as personnel, purchasing, and budgeting, because the Board is dependent upon DER in these areas. If the Board were to become administratively independent, then there would<sup>1/</sup> be a need to formally set forth administrative procedures in manual form.

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<sup>1/</sup>Proposed legislation (S.B. 527, Printer's No. 913, and H.B. 1432, Printer's No. 3426) would establish the Environmental Hearing Board as an independent quasi-judicial agency. See Appendix D for complete texts of these bills.

RECOMMENDATION

THE ENVIRONMENTAL HEARING BOARD IS COMMENDED FOR THE PLANNED DEVELOPMENT, THROUGH ITS RULES COMMITTEE, OF FORMAL WRITTEN INTERNAL OPERATING PROCEDURES. IT IS RECOMMENDED THAT THE BOARD, AFTER CONSULTING WITH THE RULES COMMITTEE, ESTABLISH A PLANNED COMPLETION DATE FOR THE DEVELOPMENT AND ADOPTION OF THESE PROCEDURES. ONCE ADOPTED, THE BOARD SHOULD PROVIDE COPIES TO ALL APPELLANTS AND OTHER INTERESTED PARTIES, AS WELL AS TO MEMBERS AND STAFF.

## J. LACK OF PUBLIC INFORMATION

### FINDING:

There is a lack of public information about the Environmental Hearing Board. The Board does not prepare an annual report; there is no statutory requirement for the Board to do so. Also, the Board does not have a publication which describes the Board and the appeal process to the general public. The Board does publish an annual volume of its adjudications, but, as noted in a House Conservation Committee report of August 1985, this volume is not a complete record of Board business. The volume includes all adjudications and opinions and orders of the Board but not other information on the Board such as number of appeals filed, types of appeals and types of dispositions. Other Commonwealth appeals agencies, such as the Human Relations Commission and the Labor Relations Board, are mandated by law to publish annual reports. The publication of an annual report could provide the General Assembly and other interested parties a standard source of information on the Board's activities. The Board Chairman has said that the planned computerization of the case docketing system should make preparation of annual statistical data relatively simple, but the Board currently has no means of producing statistics regarding numbers and types of appeals other than manual compilation from the case dockets.<sup>1/</sup> In regard to general information on the Board and its functions, Board staff identified various means by which the public may learn of the Board: the Department of Environmental Resources (DER) order or other notice of action may include notice of the right to appeal, attorneys who know of the Board may advise their clients about it, and the Board sends copies of appeal forms and Board regulations in response to calls to the Board. However, the auditors noted some concerns about the availability of information pertaining to the Board. The Board may dismiss an appeal because of failure to submit a timely appeal or failure to submit all required information,<sup>2/</sup> and there is apparently some confusion as to what constitutes timely filing. In addition, there is apparently a perception by some that the Board is not functionally separate from DER. The Board Chairman has stated that there may be a public perception that the Board is a "rubber stamp" for DER's decisions, and responses from a questionnaire sent to appellants have conveyed this belief (see Appendix S). A publication could serve to inform the public of the opportunity to appeal to the Board, to briefly describe the appeal process perhaps by use of a flowchart including required time frames for action by appellants and to clarify the Board's functional independence from DER. Other Commonwealth agencies, e.g., the Bureau of Professional and Occupational Affairs, have public information brochures (see Appendix X), and the auditors identified at least two other environmental appeals entities in other states, Ohio and New York, which have such brochures (see Appendix Y for the Ohio brochure). The Board Chairman has indicated that a brochure about the Board could be helpful and would be relatively easy to produce, given adequate resources.

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<sup>1/</sup>See Finding C for more information concerning the computerization of the Board's docketing system.

<sup>2/</sup>An auditors' sample found such dismissals occurred in 7% of 1987 appeals.

RECOMMENDATIONS:

1. IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY REQUIRE THE ENVIRONMENTAL HEARING BOARD TO PREPARE AN ANNUAL REPORT OF ITS ACTIVITIES.
2. IT IS ALSO RECOMMENDED THAT THE BOARD INCLUDE IN AN ANNUAL REPORT INFORMATION ON THE NUMBERS AND TYPES OF APPEALS RECEIVED, THE NUMBERS AND TYPES OF DISPOSITIONS OF APPEALS AND THE NUMBER OF APPEALS PENDING, AS WELL AS DATA ON BOARD EXPENDITURES.
3. ADDITIONALLY, IT IS RECOMMENDED THAT THE BOARD CONSIDER DEVELOPMENT OF A BROCHURE DESCRIBING, IN AN UNCOMPLICATED MANNER, THE BOARD, ITS FUNCTIONS AND THE APPEAL PROCESS. THE BROCHURE, IF DEVELOPED, SHOULD BE MADE AVAILABLE TO THE PUBLIC UPON REQUEST AND BE SPECIFICALLY AVAILABLE AT ALL DEPARTMENT OF ENVIRONMENTAL RESOURCES REGIONAL AND FIELD OFFICES.
4. THE BOARD AND THE DER SHOULD WORK TOGETHER TO ENSURE THAT ALL NOTICES OF APPEALABLE ACTIONS OF DER CONTAIN NOTICE OF THE RIGHT TO APPEAL ALONG WITH THE BOARD'S ADDRESS AND TELEPHONE NUMBER.

## K. LOCATION OF HEARINGS

### FINDING:

Environmental Hearing Board regulations (25 PA Code §21.96) state, "At the discretion of the Board, hearings will be held at the Commonwealth facility nearest the location of the complaint ...with consideration for the convenience of witnesses, the public and the parties in attending the hearings." Until 1986, the Board conducted hearings primarily in Pittsburgh and the Philadelphia area but also held hearings in a variety of other locations including Easton, Scranton, Greensburg, and Clearfield. The Board currently conducts almost all hearings in Harrisburg and Pittsburgh; only 15 of 199 hearing days in 1986 and 1987 were at other locations (see Exhibits G and H for information on hearing days and locations from 1984 through 1987). The auditors identified 14 cases totalling 74 hearing days held in Harrisburg in 1986 and 1987 in which at least one of the attorneys was from the five-county Philadelphia metropolitan area<sup>1/</sup>. A representative of the Department of Environmental Resources (DER) Southeast regional office has expressed concern over time spent by his staff traveling to and from Harrisburg and Pittsburgh to attend hearings. Hearings at other locations appear to be appropriate in cases in which a site inspection is desirable or in which there are numerous intervenors or witnesses from a local area. Some responses to an LB&FC questionnaire of past and current appellants noted the need for hearings at locations more convenient to witnesses and other interested parties (see Appendix Z). One example of a hearing held closer to the site in 1985 involved a landfill case near Easton in which a citizens' group and numerous local municipalities were intervenors. The Board Chairman said that the Board has held hearings primarily in Harrisburg and Pittsburgh because this is more efficient for the members, given the case backlog and their various other duties. She also noted that a few hearings in 1986 and 1987 were held in other locations because of greater convenience to the parties. In the past, the Board used contracted hearing examiners to conduct hearings, and these examiners held hearings at various locations. The Board recently hired a full-time hearing examiner, and another hearing examiner position is reportedly included in the 1988-89 Governor's Budget. It appears that use of hearing examiners to hold hearings at locations other than Harrisburg and Pittsburgh could minimize the possible inefficiency of members traveling to and from hearings. Another concern of the Chairman is that there is difficulty in obtaining adequate hearing room facilities at other locations. She noted that use of a DER facility may raise a question of propriety by the Board because of the need for real and perceived functional independence from DER. The Administrative Conference of the U.S. has

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<sup>1/</sup>Philadelphia, Bucks, Montgomery, Chester, and Delaware. Proposed legislation (Senate Bill 527, Printer's No. 913 and House Bill 1432, Printer's No. 3426) would require the Board to have an office and hearing room in Philadelphia, as well as Harrisburg and Pittsburgh.

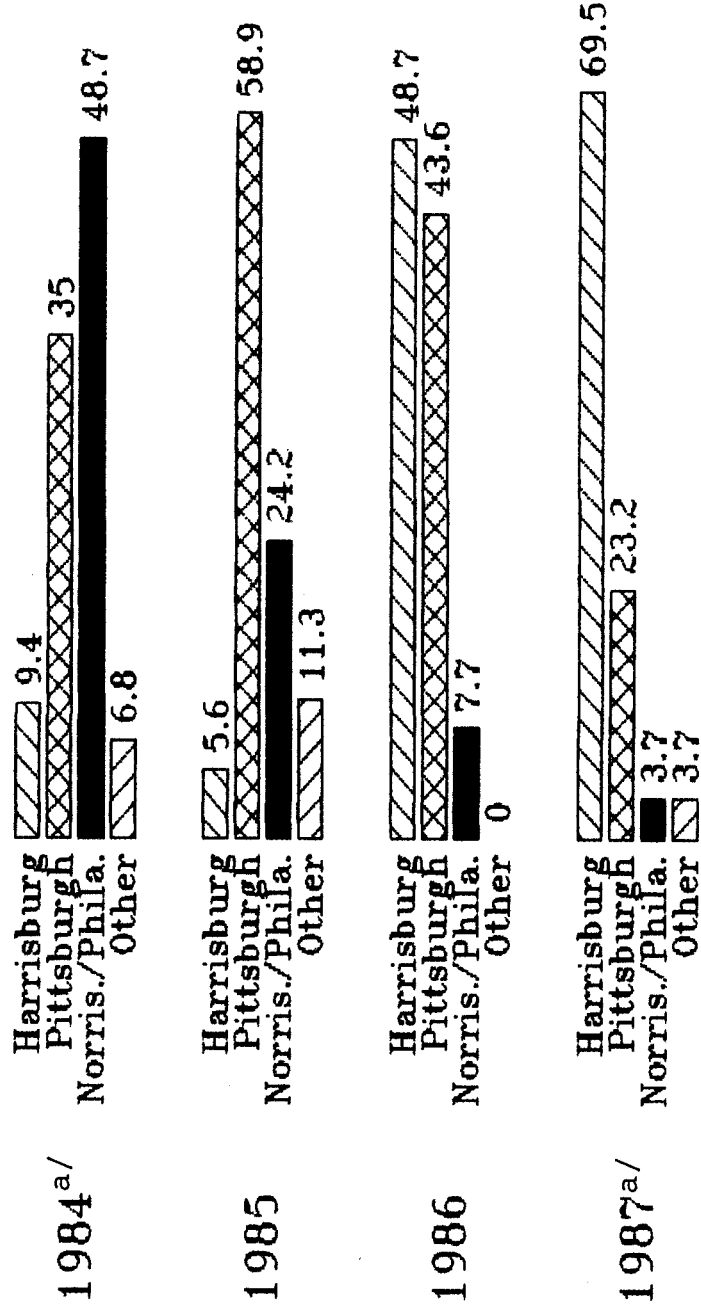
found that scheduling difficulties and a shortage of adequate sites are problems common to administrative appeals agencies. In response to these problems, the Conference has prepared a "Directory of Administrative Hearing Facilities" which lists and describes courtrooms, conference rooms, hearing rooms, and other hearing locations by state; there are over 100 such locations in Pennsylvania. An auditors' review of this list along with contacts with other Commonwealth agencies seems to confirm the existence of suitable hearing locations statewide.

RECOMMENDATION:

THE ENVIRONMENTAL HEARING BOARD IS ENCOURAGED TO DEVELOP AN APPROACH TO HOLDING HEARINGS AT MORE LOCATIONS THROUGHOUT THE STATE. IT IS RECOMMENDED THAT THE BOARD IDENTIFY AND PREPARE AN INVENTORY OF SUITABLE HEARING LOCATIONS OTHER THAN THE BOARD OFFICES AND DER FIELD OFFICES AND THAT THE BOARD DEVELOP FORMAL CRITERIA FOR HOLDING HEARINGS AT REASONABLE ALTERNATIVE SITES (FOR EXAMPLE, CASES IN WHICH A SITE INSPECTION IS DESIRABLE AND CASES IN WHICH THERE ARE NUMEROUS INTERVENORS OR WITNESSES FROM A LOCAL AREA). THE BOARD SHOULD THEN HOLD HEARINGS AT SUITABLE ALTERNATIVE LOCATIONS WHEN APPROPRIATE. IN SUCH CASES, THE BOARD MAY WANT TO ASSIGN HEARING EXAMINERS TO PRESIDE SO AS TO MINIMIZE BOARD MEMBER TRAVEL.

EXHIBIT G

Percentage of Hearing Days by Year and Location<sup>a/</sup>  
1984 - 1987



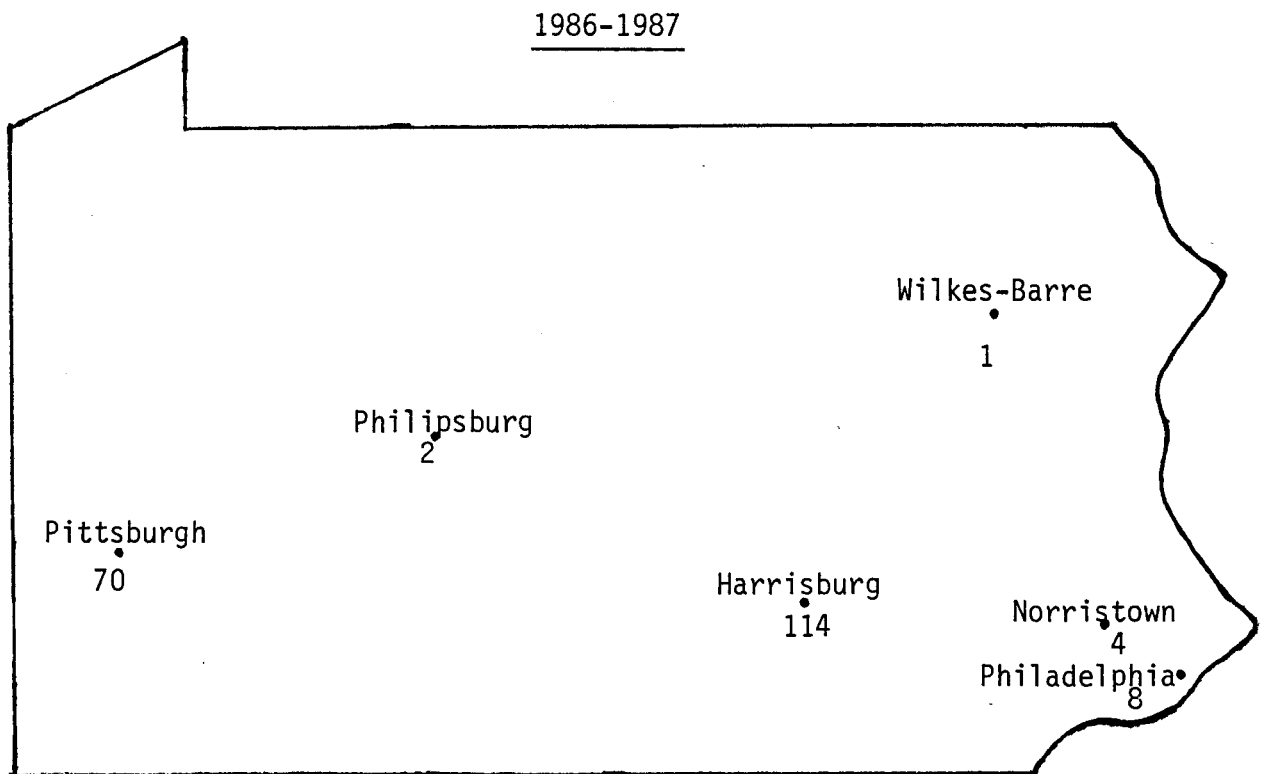
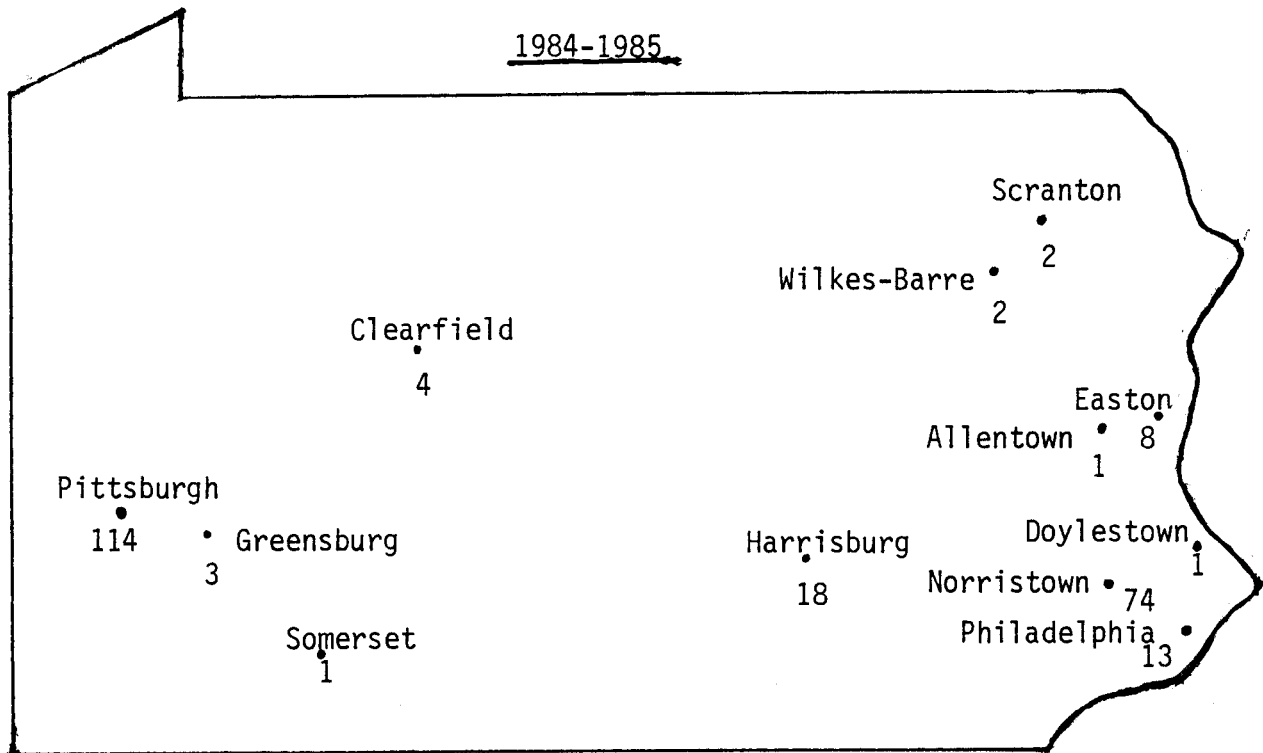
\*/Please also see Appendix AA.  
a/ Figures do not add due to rounding.



# EXHIBIT H

## ENVIRONMENTAL HEARING BOARD

### NUMBER OF HEARING DAYS BY LOCATION, 1984-1985 AND 1986-1987



Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

## L. NEED FOR BOARD MEMBER BACKGROUND AND CONFLICT OF INTEREST PROVISIONS

### FINDING

There are no statutory provisions concerning qualifications for persons serving on the Environmental Hearing Board, such as legal background, residency or conflicts of interest. Act 1970-275, which created the Board, required members to be "learned in the law," but this provision was removed when the act was amended in 1971.<sup>1/</sup> The Board functions similarly to a court, and the members' work is comparable to that of a judge. Members are responsible for conducting quasi-judicial administrative hearings, requiring the member to rule upon offers of proof and the relevancy of evidence, to ascertain the existence of facts and to draw conclusions and exercise discretion of a judicial nature. Many of the standards applied or observed during Board hearings are the same standards used in the courts. For example, the Board may grant leave for the filing of an appeal upon written request and for good cause shown; the Board standards defining good cause are the common law standards applicable in analogous cases in Courts of Common Pleas. Considering the judicial climate in which the Board operates, the auditors believe that a requirement for legal training for members is required for<sup>2/</sup> the most effective application of such standards in a hearing environment. Also, there are no provisions in statutes pertaining to the Environmental Hearing Board regarding potential conflicts of interest by members, and the Board does not have written guidelines defining conflict of interest or establishing procedures for resolving conflict of interest questions, such as member recusal from a case. Board members reportedly adhere to guidelines established in the Code of Judicial Conduct and the Rules of Professional Responsibility, and the Board Chairman stated that, in her opinion, these codes provide sufficient guidance to members in resolving potential conflicts of interest.<sup>3/4/</sup> The auditors believe that more explicit guidelines, contained in law and directly applicable to the functions of all Board members, would provide greater assurance of public confidence in the fairness of Board deliberations. An example of a state

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<sup>1/</sup>Currently S.B. 527, Printer's No. 913, and H.B. 1432, Printer's No. 3426, both contain provisions requiring Environmental Hearing Board members to be attorneys in good standing before the Bar of the Supreme Court of Pennsylvania.

<sup>2/</sup>This discussion applies to the work of the Board members in general and is not intended to reflect analysis of the work of specific members.

<sup>3/</sup>The Rules of Professional Responsibility applies specifically to attorneys, and the Code of Judicial Conduct applies to judges.

<sup>4/</sup>Reportedly, the Chairman has recused herself from an estimated 100 cases because of her prior employment as Director of the Bureau of Regulatory Counsel of the Department of Environmental Resources. An auditor's sample identified certain specific cases in which the Chairman has recused herself.

agency with statutory conflict of interest provisions is the Liquor Control Board (see Appendix BB).<sup>5/</sup> The General Assembly has established certain other qualifications for membership on other Commonwealth boards and commissions, such as the Public Utility Commission (PUC) and the ICB. These qualifications for membership include the person being a Pennsylvania resident, being a qualified elector for at least one year prior to appointment and meeting a minimum age requirement.

#### RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD ENACT LEGISLATION CONTAINING BASIC REQUIREMENTS FOR MEMBERSHIP ON THE ENVIRONMENTAL HEARING BOARD, INCLUDING AT LEAST PROVISIONS THAT MEMBERS BE LEARNED IN THE LAW AND PENNSYLVANIA RESIDENTS. THE LEGISLATION SHOULD ALSO INCLUDE GUIDELINES CONCERNING POTENTIAL MEMBER CONFLICTS OF INTEREST, INCLUDING PROCEDURES FOR MEMBER RECUSAL FROM CASES, AS WELL AS PENALTIES FOR LACK OF ADHERENCE TO THESE GUIDELINES.

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<sup>5/</sup>Another example of statutory guidelines establishing member recusal procedures is contained in proposed legislation concerning the Independent Regulatory Review Commission.

M. ESTABLISHMENT OF EHB RULES COMMITTEE IN LAW

FINDING:

The Environmental Hearing Board Rules Committee is an advisory body which makes recommendations to the Board concerning the Board's rules of practice and procedure.<sup>1/</sup> The Committee, however, is not established in law or regulation, nor are there formal guidelines for appointment to the Committee.<sup>2/</sup> Since the Rules Committee is not established by statute, the legislature lacks oversight authority of an entity which directly influences EHB rules. The Rules Committee currently consists of 25 members and includes the three (3) EHB members, four (4) DER attorneys and eighteen (18) private attorneys. Appointments to the Committee are usually initiated by the Committee Chairman (a private attorney) and "confirmed" by the EHB Chairman. One informal appointment criterion reportedly used is that prospective members have some experience practicing before the Board. The Rules Committee provides an opportunity for broad-based input into the development of practices and procedures before the EHB. Full realization of this concept would be enhanced by having broad representation throughout the state as opposed to having representatives from only certain parts of the State. Of the 18 current Rules Committee members who are not EHB members or DER attorneys, only one is not from the Philadelphia, Pittsburgh or Harrisburg areas.

RECOMMENDATION:

IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY AMEND THE ENVIRONMENTAL HEARING BOARD'S (EHB) ENABLING LEGISLATION TO PROVIDE THE FOLLOWING: (1) ESTABLISHMENT OF THE ENVIRONMENTAL HEARING BOARD RULES COMMITTEE IN LAW, (2) INCLUSION OF APPOINTMENT GUIDELINES FOR RULES COMMITTEE MEMBERSHIP WHICH WOULD PROMOTE A REPRESENTATIVE COMMITTEE COMPOSITION, AND (3) AUTHORIZATION TO PAY MEMBER TRAVEL AND RELATED EXPENSES FOR RULES COMMITTEE MEETING ATTENDANCE.<sup>3/</sup>

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<sup>1/</sup>The EHB's rules of practice and procedure are delineated in 25 Pa. Code §21 et seq.

<sup>2/</sup>Two bills currently before the General Assembly, House Bill 1432 and Senate Bill 527, would provide a statutory basis for the EHB Rules Committee. Exhibit I includes key provisions of both bills pertaining to the Rules Committee.

<sup>3/</sup>Currently there is no provision for the reimbursement of expenses.

EXHIBIT I

EHB Rules Committee Related Legislation

| <u>Provision</u>           | <u>Senate Bill 527<sup>1/</sup></u>   | <u>House Bill 1432<sup>2/</sup></u>  |
|----------------------------|---|--|
| Members.....               | 11 attorneys  | 9 attorneys  |
| Appointments.....          | 2 Senate President Pro Tempore, 2 House Speaker, 2 DER Secretary, 2 Governor upon advice of PA Bar Association, and 3 EHB   | 1 Senate President Pro Tempore, 1 Senate Minority Leader, 1 House Speaker, 1 House Minority Leader, 1 CAC Chairman, 2 Governor upon advice of PA Bar Association, and 2 DER Secretary  |
| Experience.....            | 3 years before EHB  | 3 years before EHB or comparable experience  |
| Terms.....                 | 2 years   | 2 years  |
| Expense Reimbursement..... | No provision  | Yes--"necessary and reasonable"  |
| Function.....              | The Rules Committee shall recommend to the Board regulations for hearings conducted by the Board. The regulations shall include the limits and procedure for the taking of appeals and locations of hearings. | The Rules Committee shall recommend to the Board regulations for hearings conducted by the Board and for the use of mediation under Section 4(H). The regulations shall include the limits and procedure for the taking of appeals and locations of hearings. Regulations under this subsection shall be promulgated by the Board upon a majority affirmative vote on the recommended regulations. |

<sup>1/</sup>Passed by Senate on May 6, 1987 (35-14). Referred to the House Conservation Committee on May 12, 1987.

<sup>2/</sup>Passed by House on October 26, 1987 (195-0). Referred to the Senate Environmental Resources and the Energy Committee on October 28, 1987. Amended by the Senate, June 7, 1988.

Source: Developed by LB&FC staff from Senate Bill 527 and House Bill 1432.

## N. POSSIBLE ALTERNATIVES TO THE ENVIRONMENTAL HEARING BOARD

### FINDING:

The EHB was reportedly created to afford the public a means to take its appeals of DER actions to an agency easily accessible, prompt in its rendering of decisions, and less costly than going to court. In addition, the Board was reportedly created in response to concern over DER's ability to take unilateral action and the corresponding effect of overloading the court system with appeals. Further, it was thought that the EHB would free the courts from the need to acquire expertise in a new technical field. As discussed throughout this report, however, the EHB is not functioning as intended. Using 1980 as the base year, the number of appeals filed in a year has consistently exceeded the number of appeals disposed of in a year resulting in a steady increase in open appeals before the EHB. As of January 1, 1988, a total of 1,060 open appeals were before the Board. Further, appeals which are adjudicated by the Board are reportedly taking 2.5 years to resolve. Since 1980, EHB staff (including EHB members) has ranged from a complement of 7 to the current complement of 13.<sup>1/</sup> Other Findings in this report address contributing factors to the number of open cases currently before the EHB including lack of a computerized docket, problems with caseload management, an increase in mining reclamation bond forfeiture appeals, an inadequate number of hearing examiners and support staff, and Board member vacancies.<sup>2/</sup> While the audit suggests a number of corrective actions to deal with these problems, the backlog and related problems are so severe that they may indicate a fundamental flaw in the current concept of the EHB as the environmental appeals resolution entity in Pennsylvania.

### RECOMMENDATION:

IT IS RECOMMENDED THAT THE GENERAL ASSEMBLY, ENVIRONMENTAL HEARING BOARD AND DEPARTMENT OF ENVIRONMENTAL RESOURCES IMPLEMENT THE RECOMMENDATIONS SET FORTH IN THIS REPORT IN ORDER TO IMPROVE THE PERFORMANCE OF THE EHB AND SIGNIFICANTLY REDUCE THE CASE BACKLOG. EXHIBIT J OUTLINES SEVERAL ALTERNATIVE METHODS BY WHICH APPEALS FROM DER ACTIONS COULD POSSIBLY BE HANDLED; THESE AND OTHER POSSIBLE ALTERNATIVES SHOULD BE SERIOUSLY CONSIDERED BY THE GENERAL ASSEMBLY IF CORRECTIVE ACTIONS NOTED IN THIS REPORT ARE TAKEN AND MARKED IMPROVEMENTS, PARTICULARLY IN A REDUCTION OF THE CASE BACKLOG, ARE NOT EVIDENT IN THE EHB PERFORMANCE.

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<sup>1/</sup>The EHB contracted with hearing examiners during the period 1980 to 1987 and hired its first salaried hearing examiner as of March 1988.

<sup>2/</sup>Please see Findings A, B, C, D and E.

EXHIBIT J

Alternative Methods to the EHB

| <u>Method</u>   | <u>Agency</u>                                      | <u>Comments</u>  |
|---|--|--|
| 1. Separate board or designated EHB member(s) to handle surface mining (SM) appeals.  |  | For the period January 1987 to June 1987, 66% of EHB appeals were SM cases. It has been suggested that a separate board be created to handle all SM cases or have EHB members specialize in SM appeals.                |
| 2. Centralized Administrative Hearing Agency  | (Proposed) Office of Administrative Hearings (OAH) | House Bill 845 of 1987 proposes the establishment of the OAH consisting of all state administrative law judges and headed by a chief administrative law judge appointed by the Governor and confirmed by the Senate.1/ |
| 3. Create a specialized court, possibly on a regional basis, within the Commonwealth court system which would hear environmental appeals. |  | See Appendix CC for a letter in support of this alternative.   |
| 4. Independent Appeal Board   | EHB as proposed by SB 527 and HB 1432 of 1987.     | Both bills create the EHB as an independent quasi-judicial agency.2/   |

1/New Jersey has a separate executive branch agency, the Office of Administrative Law, which holds hearings on appeals for all state agencies, including the New Jersey Department of Environmental Protection.

2/In Ohio, the Environmental Board of Review serves as an appellate review board which is separate and distinct from the Ohio Environmental Protection Agency.

Source: Developed by LB&FC staff.





SECTION III

THE ENVIRONMENTAL HEARING BOARD: ITS ORGANIZATION AND ITS OPERATIONS

### III. THE ENVIRONMENTAL HEARING BOARD: ITS ORGANIZATION AND ITS OPERATIONS

#### A. Legal Background

The Environmental Hearing Board was created by Act 1970-275 (P.L. 834), 71 P.S. §510-21. This act, which amended the Administrative Code of 1929, also created the Department of Environmental Resources (DER). The Board is a departmental administrative board whose function is to hold hearings and issue adjudications on any order, permit, license or decision of DER, and it began operations in 1972. Although the Board is administratively part of DER, it is considered to be independent in the performance of its function. In addition to hearing appeals on DER orders, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, the Clean Streams Law, the Dam Safety and Encroachment Acts and the Oil and Gas Act. The Board also reviews civil penalties assessed under the Bituminous Mine Subsidence and Land Conservation Act, the Clean Streams Law, the Coal Refuse Disposal Act, the Safe Water Drinking Act, the Solid Waste Management Act and the Surface Mining Conservation and Reclamation Act.

#### B. Appeals Process

DER is always a party before the Board. The other party is usually the recipient of the DER order, permit denial, penalty assessment or other action. Appeals from third parties are reportedly also common in cases of permit issuance. In such cases, the permittee is also a party, and DER reportedly often does not actively participate in the appeal but lets the permittee defend the issuance. Board regulations also permit intervention by appropriate parties at the discretion of the Board. Any party wishing to intervene must file a petition to intervene which must be reviewed and approved by the Board.

Appeals to the Board must be filed within 30 days and must include a copy of the order which is being appealed along with specific objections. After preparation of a pre-hearing order by the Board, the appellant has 75 days to file a pre-hearing memorandum with the Board. DER then has 15 days to respond with its own pre-hearing memorandum. Please see Exhibit K showing the flow of EHB actions.

There are four basic means by which the Board disposes of appeals; these are withdrawal, dismissal, settlement or adjudication through hearing. Please see Exhibit L for a summary of Board dispositions from 1980 through 1987.

If an appeal reaches the hearing stage, the Board conducts a "de novo" hearing.<sup>1/</sup> The Board procedures are established by regulation at 25 PA Code §21.1 et seq. The general rules of administrative practice and

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<sup>1/</sup>Black's Law Dictionary defines "hearing de novo" as a court hearing a matter as a court of original and not appellate jurisdiction.

procedure contained elsewhere in the PA Code are also applicable unless specifically superceded by the EHB regulations. The Board's hearings have been referred to as "quasi-judicial" in nature and as "thorough and rigorous."

Upon conclusion of a hearing and receipt of post-hearing briefs and the hearing transcript, the Board member or hearing examiner prepares a written adjudication which includes findings of fact, conclusions of law, discussion and an order. Upon majority approval, the Board issues the adjudication, and the order effectively constitutes a court order. While Board adjudications may be appealed to Commonwealth Court, the latter does not hold hearings "de novo" but based on the record made before the EHB.

An appeal to the Board does not act as a supersedeas (injunction of the DER order pending EHB action), but upon petition and cause shown the Board may grant a supersedeas. If there is a petition for supersedeas, the Board attempts to schedule a hearing to expedite the matter. The Board is to consider the following factors in its decision to grant a supersedeas: irreparable harm to the petitioner, the likelihood of the petitioner prevailing on the merits and the likelihood of injury to the public. In granting a supersedeas, the Board may impose certain conditions, such as the filing of a bond or other security.

#### C. Board Composition

The Board consists of a Chairman and two other full-time members appointed by the Governor and confirmed by two-thirds of the Senate. Board member salaries are set by the Executive Board pursuant to statute and currently are \$45,000 for the Chairman and \$42,500 for the other members. Members serve six-year terms.

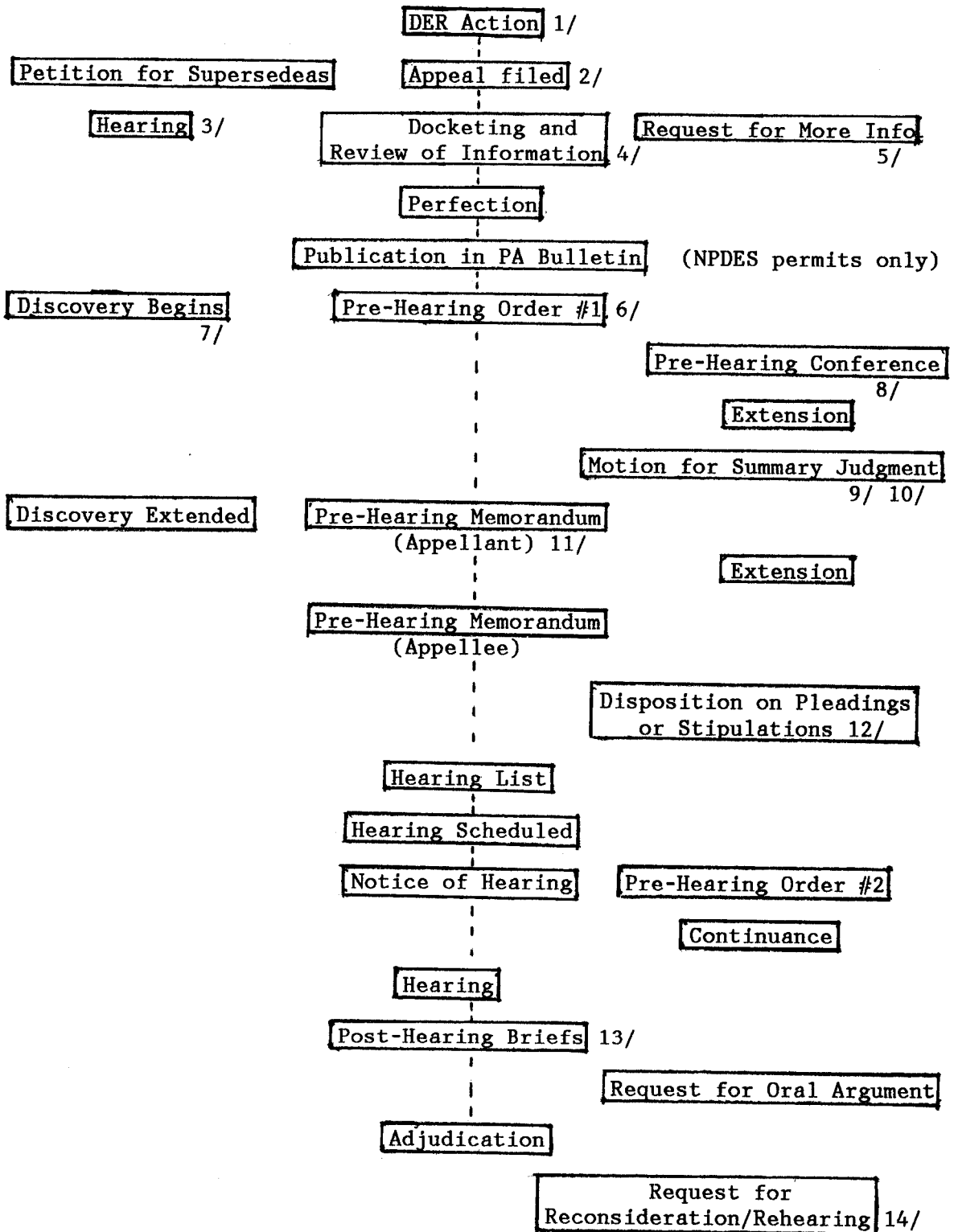
#### D. Staffing

71 P.S. §180-2 requires the appointment by the Board (with the Governor's approval) of a Secretary to the Board. Statute also allows the Board to employ, with the concurrence of the Secretary of DER, hearing examiners and such other personnel as are necessary in the exercise of its functions. The Board previously used hearing examiners on a contractual basis, and a full-time hearing examiner began work with the Board in March 1988. In addition, the Board is authorized to employ four attorneys as law clerks (as of June 15, 1988, there is one vacancy) who assist the Board members in caseload management and processing, as well as three clerk-stenographers and one clerk typist. The full complement of the EHB, including Board members, is 13. Two court reporting firms are retained on a contractual basis to record hearing transcripts. Please see Exhibit M for the Board organizational chart.

E. Fiscal Information

While the Board is considered functionally separate from DER, it is part of DER for budgetary, personnel and purchasing purposes. The Board's annual funding is included in the "General Government Operations" appropriation of DER, an appropriation which includes other entities such as the Environmental Quality Board and the Citizens Advisory Council. Please see Table 2 for the expenditures of the Board from FY 1982-83 through 1986-87.

EXHIBIT K  
Flowchart of the Board's Appeal Process

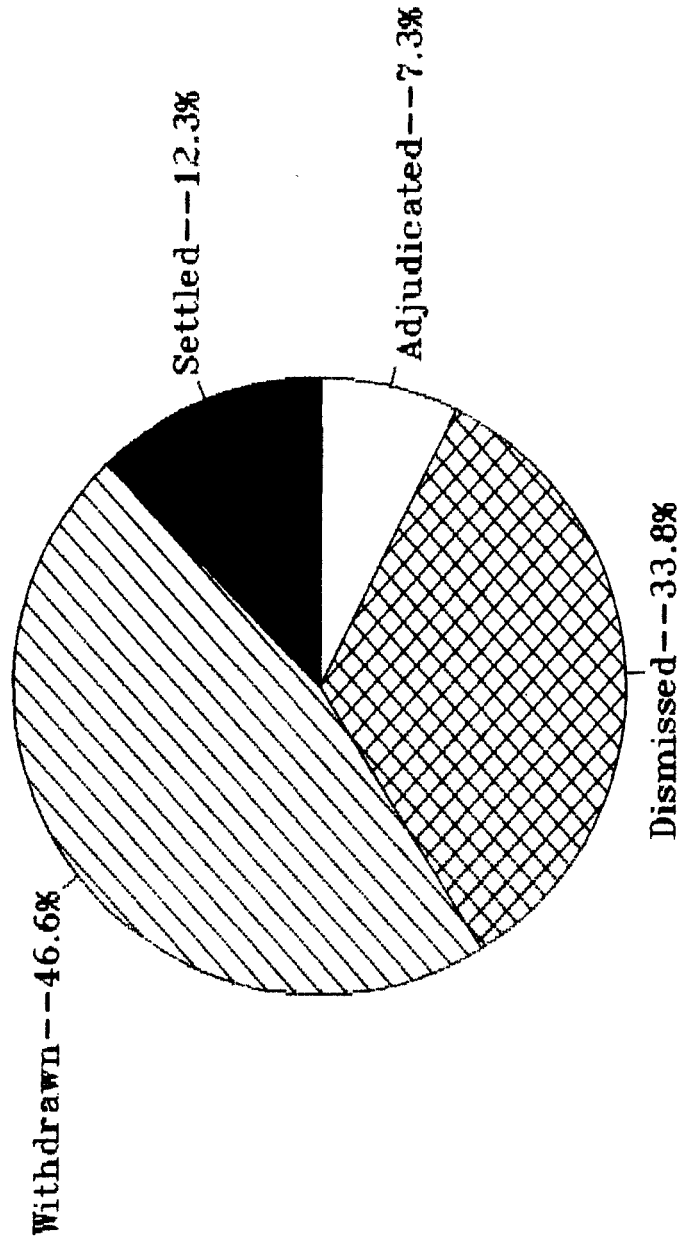


Footnotes on next page.

- 1/ The Board also hears complaints for civil penalties under the Air Pollution Control Act and the Clean Streams Law. These matters follow a different process; pre-hearing memoranda are not filed, and the parties advise the Board when the matter is ready for hearing.
- 2/ Appeals must be filed within 30 days from the date of receiving a copy of the DER action.
- 3/ Board regulations stipulate that a supersedeas hearing shall be held expeditiously; if feasible, within two weeks of the filing of the petition.
- 4/ An appeal must include a copy of the DER action and specific objections to the action.
- 5/ If additional information is requested, it must be submitted within ten days of the receipt of the request.
- 6/ This order sets the deadline (usually 75 days) for submission of a pre-hearing memorandum by the appellant.
- 7/ Discovery lasts until the filing of the appellant's pre-hearing memorandum but may be extended.
- 8/ If held, this conference is usually in the form of a conference call. The conference may establish an alternate schedule for discovery and the filing of pre-hearing memoranda.
- 9/ Such motions usually occur after the completion of discovery but can occur at any time.
- 10/ Other actions which may occur at any point in the process are a petition to intervene, a motion to dismiss, a request for a status report, and settlement.
- 11/ The appellee (usually DER) must file a pre-hearing memorandum within 15 days of receipt of the appellant's pre-hearing memo.
- 12/ If such a disposition occurs, then the appeal proceeds directly to writing of an adjudication. The parties may request that they be permitted to file briefs.
- 13/ A post-hearing briefing schedule is usually included in the transcript of the last day of hearings. A formal order establishing the schedule is issued upon receipt of the complete transcript.
- 14/ Such a request usually occurs after the issuance of an adjudication or other order disposing of an appeal, but may occur after the issuance of an interlocutory order.

Source: Developed from information provided by the Environmental Hearing Board.

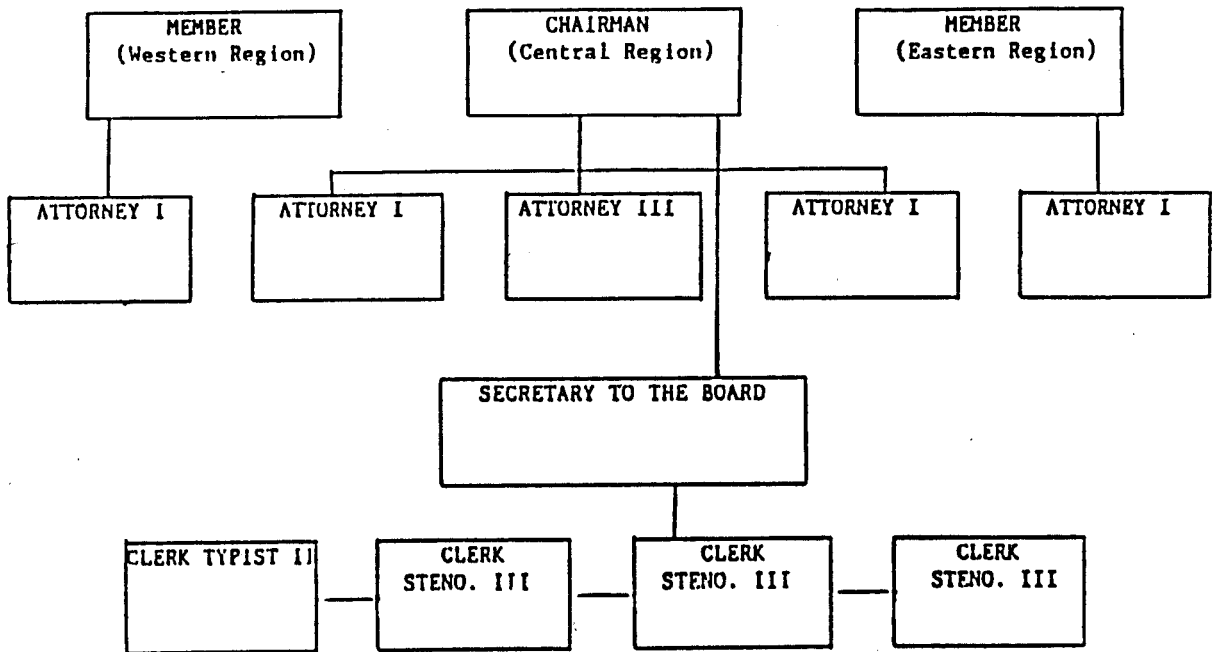
EXHIBIT L  
Closed EHB Appeals by Method of Disposition  
1980 - 1987



Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

EXHIBIT M

Organizational Chart of the Environmental Hearing Board  
(as of February 1988)



Source: Environmental Hearing Board



TABLE 2

Environmental Hearing Board Expenditures  
FY 1982-83 - FY 1986-87

|                             | <u>FY 82-83</u> | <u>FY 83-84</u> | <u>FY 84-85</u> | <u>FY 85-86</u> | <u>FY 86-87</u> |
|-----------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Personnel.....              | \$247,769       | \$208,581       | \$236,511       | \$323,937       | \$308,378       |
| Transfer <sup>a/</sup> .... | -0-             | -0-             | -0-             | (43,000)        | (58,500)        |
| Operations....              | 120,944         | 112,322         | 105,856         | 154,712         | 139,903         |
| Fixed Assets..              | <u>1,570</u>    | <u>-0-</u>      | <u>7,518</u>    | <u>15,651</u>   | <u>606</u>      |
|                             | \$370,283       | \$320,903       | \$349,885       | \$451,300       | \$390,387       |

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<sup>a/</sup>Transfer of expenditures for indirect personnel services between State appropriations/executive authorizations and related Federal appropriations/executive authorizations.

Source: Environmental Hearing Board.



SECTION IV

Appendices

APPENDIX A

Environmental Hearing Board  
Summary of Prior Reports Recommendations

|  |   |   |   |
|--|---|---|---|
| <p>House Conservation Committee, August 26, 1986</p>   | <p>House Mines and Energy Management Committee, March 1987</p>  | <p>Auditor General - Findings and Recommendations through September 8, 1986</p>   | <p>U.S. Office of Surface Mining Reclamation and Enforcement, March, 1987</p>   |
| <ol style="list-style-type: none"> <li>1. Increase number of EHB members.</li> <li>2. Supplemental funding, greater EHB autonomy in hiring hearing examiners and staff.</li> <li>3. Subject DER conduct to jurisdiction of Courts in appropriate cases.</li> <li>4. Establish an expeditious petition and review process.</li> </ol> | <ol style="list-style-type: none"> <li>1. Bring EHB to full complement.</li> <li>2. Increase the clerical complement of EHB.</li> <li>3. Fund hiring of hearing examiners in numbers sufficient to maintain pace with appeals.</li> <li>4. Consider increasing EHB to five members; or</li> <li>5. Establish administrative law judgeships in sufficient number to serve each of DER's mining districts.</li> </ol> | <ol style="list-style-type: none"> <li>1. Fill vacant EHB position.</li> <li>2. Increase EHB's clerical staff complement.</li> <li>3. Hire a sufficient number of hearing examiners and clerical staff to help eliminate case backlog and process current cases in a reasonable time period.</li> </ol> | <ol style="list-style-type: none"> <li>1. Backlogged and ongoing workload of the EHB must be assessed to determine what additional measures are required and resources needed for timely review of mining-related appeals.</li> <li>2. Provide necessary resources to the EHB to accomplish timely review, or if statutory changes are required, initiate appropriate activity in support of such changes.</li> <li>3. By July 1, 1987, DER will present evidence to HAFO, in the form of a comprehensive evaluation of EHB's administrative review process and caseload demonstrating the effectiveness of DER initiatives for addressing this issue.</li> </ol> |
|  |   |   | <ol style="list-style-type: none"> <li>4. A schedule for addressing backlogged appeals must be developed which provides for eliminating identified backlog of appeals before the EHB by July 1, 1988.</li> <li>5. Consider increasing EHB membership or creating a first level administrative board to hear and screen appeals before EHB review.</li> </ol>  |

Source: Developed by IB&FC staff from cited reports.

APPENDIX A (Continued)

Environmental Hearing Board  
Summary of Positions of Environmentally-Related Organizations

| Citizens Advisory Committee to the Department of Environmental Resources<br>Position Statement, March 31, 1988  | Ad Hoc Environmental Dispute Resolution Subcommittee to the Allegheny County Bar Association Environmental Law Committee, December 17, 1987   | Letter from the Pennsylvania Coal Association to IREFC, April 14, 1986   |
|---|---|--|
| <p>1. Every group that has examined the backlog of appeals to this Board has agreed there is a serious problem of excessive delays. The average case before the Board which is adjudicated must now wait approximately 2 1/2 years before it is heard and resolved. It is too long for the Commonwealth to wait to collect bonds, fines, and penalties.</p> <p>2. Council supports legislation which would establish an independent board with adequate resources to provide fair and expeditious hearings of environmental disputes. We also believe that additional resources beyond those requested in the Commonwealth budget are needed by this Board.</p> | <p>1. A mediation service may also be appropriate to relieve judicial tribunals of the overwhelming number of cases of conflict in the environmental area. The EHB, which hears appeals from all actions taken by DER, currently has a caseload of some 1,100 cases, 550 of which are open cases from previous years. Parties affected by action taken by DER have a right of appeal to the EHB; however, many cases before the Board do not raise novel issues of law.</p> | <p>1. The EHB must control its own budget so that the Board is truly independent.</p> <p>2. The appropriation for the Board must be adequate to allow the employment of hearing examiners to eliminate the backlog.</p> <p>3. The number of Board members should be increased to five members.</p> |
|   |   | <p>4. The EHB must have the ability to promulgate its own rules of practice with the assistance of a rules committee. The EQB members are not from the legal profession. The EQB can do little more than "rubber stamp" rules of practice proposed for the EHB.</p>                                |
|   |   | <p>5. The Board should have the authority to allow a voluntary mediation process between the parties subject to Board approval.</p>  |

Source: Developed by IREFC staff from cited sources.

## APPENDIX B

### Selected Comments by Board Members, Board Staff and Members of the Rules Committee Concerning the Board's Problem in Timeliness in Case Disposition

- Going through DER for administrative matters is cumbersome.
- Additional personnel qualified to preside at hearing are needed.
- Additional hearing examiners are needed as there is a bottle-neck in holding hearings and writing adjudications.
- There is insufficient Board Members and support staff to settle matters expeditiously compared to the number of appeals filed.
- Since there is a tremendous case load and backlog, many adjudications are not timely.
- Board is achieving intended results but not as expediently as it should ideally.
- Board is unsupported properly in a financial sense.
- There is an insufficient number of hearing examiners, secretarial staff to keep up with typing of decisions and other administrative matters.
- Insufficient personnel including Board Members particularly in view of the time needed to replace vacancies.
- Lack of staff prevents work from being processed.
- The Board is understaffed administratively.
- The Board produces opinions quickly and efficiently, but needs more people to produce them.
- The quality of service is excellent, but due to the backlog people just become frustrated when they don't get results sooner.
- Board goals are not being met as a result of the failure of the executive branch to provide sufficient members and staff.
- EHB has been hampered in recent years by shortage of Board members and staff and membership turnover.
- Board objectives are not being met mainly because it lacks the resources to handle the appeals which have flooded in in recent years, compounded by the fact that new appointments have not been made promptly.
- The Board has been too slow in adjudications.
- Hearings are not prompt and private citizens are put at a disadvantage.

APPENDIX B  
(Continued)

- Matters languish before the EHB for an overly long period.
- A weakness of the Board is an inability to keep the Board at full strength.
- There is a need to keep the Board at full strength and perhaps increase the number of members for prompter disposition of appeals.
- EHB has been, until recently, consistently understaffed; low salaries have hindered filling vacancies.
- Matters take too long to be processed by the EHB.
- Another entity is not needed if the backlog of the EHB can be addressed and resolved.
- The EHB should be independent of DER which would preserve the Board's impartiality and make independent funding possible.
- EHB's budget should not be subject to review by DER.
- The requirement that the Board go through DER could mean that the EHB relies on its friendly relationship with DER for funding.
- The recent change in the supersedious rules may have been driven by the Board's backlog.
- Make EHB independent of DER for all purposes including budgetary.
- The Board would be more efficient if it had more hearing examiners.
- A critical issue is the backlog caused by a lack of members.
- Increased staffing is needed to more promptly process appeals and issue decisions.
- A critical issue is getting rid of the present backlog.
- A critical issue is getting control of the Board's burgeoning case load and another issue is inadequate for Board members.
- The Board needs resources to accomplish prompt adjudication; the backlog and the speed of adjudication are problems.
- The Board's backlog must be addressed by keeping the Board at full strength; pay of Board members has always been too low.
- The credibility of the Board is low as a result of the great amount of time it takes to process an appeal.
- Increase the Board staff and make it independent of DER for all purposes.

Source: Responses to an LB&FC questionnaire sent to Board Members, Board staff and Rules Committee Members.

APPENDIX C

Selected Comments by Appellants  
to the Environmental Hearing Board  
Concerning Problems in Timeliness of Case Disposition

- Unless appeals are promptly addressed, damage occurs and the Hearing Board is not accomplishing its purpose.
- I suggest that the Board adjudicate hearings promptly.
- Speed up the review process as delays means damage.
- The EHB is overloaded and should be expanded, perhaps.
- The EHB can't deal with its current work load which could prove to be much smaller than the future work load therefore it would not provide an effective appeals process and would not function as intended.
- Proposals to accelerate the review process are good because no one should experience a fifteen months delay during which degradation could have occurred.
- Two and a half years to render a decision is bad.
- I was not satisfied that it took four years to answer the appeal.
- The delay of the EHB is prejudicial to us as a prompt adjudication is important to us.

Source: Responses to an LB&FC questionnaire of a sample of persons who have filed appeals with the Environmental Hearing Board.



APPENDIX D

Senate Bill 527 of 1987 (Printer's No. 913)  
House Bill 1432 of 1987 (Printer's No. 3426)

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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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**SENATE BILL**

No. **527** Session of  
1987

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INTRODUCED BY FISHER, KELLEY, WILT, HELFRICK, REIBMAN,  
GREENWOOD, SALVATORE AND PETERSON, MARCH 10, 1987

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AS AMENDED ON THIRD CONSIDERATION, MAY 4, 1987

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AN ACT

1 Establishing the Environmental Hearing Board as an independent,  
2 quasi-judicial agency; providing for the membership and  
3 staff, powers and duties, seats and existing members of the  
4 board; making an appropriation; and making a repeal.

5 The General Assembly of the Commonwealth of Pennsylvania  
6 hereby enacts as follows:

7 Section 1. Short title.

8 This act shall be known and may be cited as the Environmental  
9 Hearing Board Enabling Act.

10 Section 2. Definitions.

11 The following words and phrases when used in this act shall  
12 have the meanings given to them in this section unless the  
13 context clearly indicates otherwise:

14 "Board." The Environmental Hearing Board.

15 "Department." The Department of Environmental Resources of  
16 the Commonwealth.

17 "Rules committee." The Environmental Hearing Board Rules  
18 Committee established under section 5.

1 Section 3. Board.

2 (a) Establishment.--The Environmental Hearing Board is  
3 established as an independent quasi-judicial agency.

4 (b) Membership.--The board shall consist of five members.  
5 The members shall be full-time administrative law judges.  
6 MEMBERS SHALL DEVOTE PULL TIME TO THEIR OFFICIAL DUTIES. NO  
7 MEMBER SHALL HOLD ANY OFFICE OR POSITION, THE DUTIES OF WHICH  
8 ARE INCOMPATIBLE WITH THE DUTIES OF HIS OFFICE OR BE ENGAGED IN  
9 ANY BUSINESS, EMPLOYMENT OR VOCATION FOR WHICH HE SHALL RECEIVE  
10 ANY REMUNERATION, EXCEPT THAT MEMBERS MAY SPEAK, WRITE OR  
11 LECTURE IF ANY REIMBURSED EXPENSES, HONORARIUMS, ROYALTIES OR  
12 OTHER MONEYS RECEIVED IN CONNECTION WITH THESE ACTIVITIES ARE  
13 DISCLOSED. Members shall be appointed by the Governor with the  
14 consent of a majority of the members elected to the Senate.  
15 Members of the board on the effective date of this act may  
16 complete their terms and continue in office until their  
17 successors are appointed and qualified.

18 (c) Chairperson.--The Governor shall designate one member of  
19 the board to serve as chairperson.

20 (d) Terms.--A member of the board shall serve for a term of  
21 six years or until a successor is appointed and qualified. Of  
22 the two additional members appointed under this act, one shall  
23 serve a term of six years and the other shall serve an initial  
24 term of four years. Vacancies shall be filled in the same manner  
25 as the original appointment.

26 (e) Qualifications.--A member of the board must:

27 (1) Be an attorney in good standing before the Bar of  
28 the Supreme Court of Pennsylvania.

29 (2) Have three years of practice before administrative  
30 agencies or have equivalent experience.

1 (f) Staff and facilities.--The board shall appoint a  
2 secretary to the board. The board shall provide facilities at  
3 each seat under the provisions of section 6. The board may  
4 employ hearing examiners and other personnel necessary to  
5 exercise its functions.

6 (g) Salary.--Members of the board and the chairperson shall  
7 receive the same salaries, respectively, as the commissioners  
8 and chairman of the Pennsylvania Public Utility Commission.  
9 Section 4. Jurisdiction.

10 (a) General rule.--The board has the power and duty to hold  
11 hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A  
12 (relating to practice and procedure of Commonwealth agencies) on  
13 orders, permits, licenses or decisions of the department.

14 (b) Continued powers.--The board shall continue to exercise  
15 the powers to hold hearings and issue adjudications which powers  
16 were vested in the agencies listed in section 1901-A of the act  
17 of April 9, 1929 (P.L.177, No.175), known as The Administrative  
18 Code of 1929.

19 (c) Departmental action.--The department may take an action  
20 initially without regard to 2 Pa.C.S. Ch. 5 Subch. A; but no  
21 action of the department adversely affecting a person shall be  
22 final as to that person until the person has had the opportunity  
23 to appeal the action to the board. If a person has not perfected  
24 an appeal in accordance with the regulations of the board under  
25 subsection (g), the department's action shall be final as to the  
26 person.

27 (d) Supersedeas.--

28 (1) An appeal taken to the board from an order, a permit  
29 revocation, a license revocation or a decision by the  
30 department may, at the discretion of the board, act as a

1 supersedeas.

2 (2) The board shall promulgate regulations on grounds  
3 for issuance or denial of a supersedeas.

4 (3) The board shall promulgate regulations on grounds  
5 for issuance or denial of a temporary supersedeas.

6 (e) Joinder.--In an appeal from an order of the department  
7 or in a response to a civil penalty complaint or assessment  
8 before the board, a party may join additional parties who may be  
9 liable under the provisions of applicable environmental  
10 statutes.

11 (f) Subpoenas.--The board has the power to subpoena  
12 witnesses, records and papers. The board may enforce its  
13 subpoenas in Commonwealth Court. Commonwealth Court, after a  
14 hearing, may make an adjudication of contempt or may issue  
15 another appropriate order.

16 (g) Procedure.--Hearings of the board shall be conducted in  
17 accordance with the regulations of the board in effect at the  
18 effective date of this act until new regulations are promulgated  
19 under section 5.

20 (h) Voluntary mediation.--Subject to board approval, parties  
21 to any proceeding may request permission to utilize voluntary  
22 mediation services to resolve the dispute or narrow the areas of  
23 difference. If the board approves, any hearing shall be  
24 continued until the parties report the results of the mediation.  
25 If the parties accept the mediation report and the result is  
26 consistent with State and Federal environmental laws, then the  
27 board may enter the settlement as its decision. If mediation is  
28 unsuccessful, then the hearing shall be rescheduled and  
29 conducted in accordance with the provisions of law.  
30 Section 5. Rules committee.

1       (a) Establishment.--The Environmental Hearing Board Rules  
2 Committee is established. The rules committee shall consist of  
3 eleven attorneys who are in good standing before the Bar of the  
4 Supreme Court of Pennsylvania and who have practiced before the  
5 board for a minimum of three years. Two members shall be  
6 appointed by the President pro tempore of the Senate. Two  
7 members shall be appointed by the Speaker of the House of  
8 Representatives. Two members shall be appointed by the Secretary  
9 of Environmental Resources. Two members shall be appointed by  
10 the Governor, upon the advice of the Pennsylvania Bar  
11 Association. Three members shall be appointed by the board.

12       (b) Function.--The rules committee shall recommend to the  
13 board regulations for hearings conducted by the board. The  
14 regulations shall include time limits and procedure for the  
15 taking of appeals and locations of hearings. Regulations under  
16 this subsection shall be promulgated by the board upon a  
17 majority affirmative vote on the recommended regulations.

18       (c) Terms.--Members of the rules committee shall serve a  
19 two-year term of office. The rules committee shall adopt bylaws  
20 to govern the conduct of its affairs.

21 Section 6. Seats of the board.

22       (a) Location.--The board shall have offices and hearing  
23 rooms in Harrisburg, Pittsburgh and Philadelphia. The  
24 headquarters of the board shall be in Harrisburg. The board may  
25 hear cases at other locations in this Commonwealth.

26       (b) Assignments.--At least one member of the board shall sit  
27 in each seat of the board. The remaining two members of the  
28 board shall be assigned to a seat by the chairperson. The  
29 chairperson shall, within 60 days of the effective date of this  
30 act, establish either:

1           (1) a rotation schedule involving the movement of board  
2 members between the three hearing sites; or

3           (2) a case assignment schedule which will assign cases  
4 to board members from outside of their regional location.

5 Section 7. Appropriation.

6       The sum of \$1,000,000, or as much thereof as may be  
7 necessary, is hereby appropriated to the Environmental Hearing  
8 Board for the fiscal year July 1, 1987, to June 30, 1988, to  
9 carry out the provisions of this act.

10 Section 8. Repeals.

11       Sections 472, 709(a) and 1921-A of the act of April 9, 1929  
12 (P.L. 177, No. 175), known as The Administrative Code of 1929, are  
13 repealed.

14 Section 9. Applicability.

15       This act shall not affect the terms or eligibility of the  
16 current members of the board or of current members of the board  
17 who are subsequently reappointed and confirmed for a new term or  
18 to serve an unexpired term.

19 Section 10. Effective date.

20       This act shall take effect in 60 days.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

# HOUSE BILL

No. 1432

Session of  
1987

INTRODUCED BY GEORGE, ITKIN, LUCYK, STEIGHNER, BELARDI, TRELLO,  
MORRIS, BATTISTO, LLOYD, KUKOVICH, VAN HORNE, KOSINSKI,  
STABACK, LASHINGER, McHALE, McCALL, DeLUCA, FOX AND BROUJOS,  
MAY 27, 1987

SENATOR FISHER, ENVIRONMENTAL RESOURCES AND ENERGY, IN SENATE,  
AS AMENDED, JUNE 7, 1988

## AN ACT

1 Establishing the Environmental Hearing Board as an independent,  
2 quasi-judicial agency; providing for the membership and  
3 staff, the powers and duties, the seats and the existing  
4 members of the board; transferring certain funds; and making  
5 repeals.

6 The General Assembly of the Commonwealth of Pennsylvania  
7 hereby enacts as follows:

8 Section 1. Short title.

9 This act shall be known and may be cited as the Environmental  
10 Hearing Board Act.

11 Section 2. Definitions.

12 The following words and phrases when used in this act shall  
13 have the meanings given to them in this section unless the  
14 context clearly indicates otherwise:

15 "Board." The Environmental Hearing Board ~~established under~~ ←  
16 ~~this act~~ OF THE COMMONWEALTH. ←

17 "Department." The Department of Environmental Resources of



1 the Commonwealth.

2 "Rules committee." The Environmental Hearing Board Rules  
3 Committee established under section 5.

4 "Secretary." The Secretary of Environmental Resources of the  
5 Commonwealth.

6 Section 3. Board.

7 (a) Establishment.--The Environmental Hearing Board is  
8 established as an independent quasi-judicial agency.

9 (b) Membership.--The board shall consist of three FIVE ←  
10 members. The members shall be full-time administrative law  
11 judges. Members shall devote full time to their official duties.  
12 No member or hearing examiner shall hold any office or position,  
13 the duties of which are incompatible with the duties of his  
14 office, or be engaged in any business, employment or vocation  
15 for which he shall receive any remuneration, except that members  
16 may speak, write or lecture if any reimbursed expenses,  
17 honorariums, royalties or other moneys received in connection  
18 with these activities are disclosed. Members shall be appointed  
19 by the Governor with the consent of a majority of the members  
20 elected to the Senate. ~~Initial appointments to this board by the~~ ←  
21 ~~Governor may be made prior to the effective date of this act,~~  
22 ~~and the terms shall take effect on the effective date hereof.~~  
23 MEMBERS OF THE BOARD ON THE EFFECTIVE DATE OF THIS ACT MAY ←  
24 COMPLETE THEIR TERMS AND CONTINUE IN OFFICE UNTIL THEIR  
25 SUCCESSORS ARE APPOINTED AND QUALIFIED.

26 (c) Chairperson.--The Governor shall designate one member of  
27 the board to serve as chairperson.

28 (d) Terms.--A member of the board shall serve for a term of  
29 six years or until a successor is appointed and qualified. ONE ←  
30 OF THE ADDITIONAL MEMBERS APPOINTED UNDER THIS ACT SHALL SERVE

1 AN INITIAL TERM OF FOUR YEARS. Vacancies shall be filled in the  
2 same manner as the original appointment. ~~Initial appointments to~~ ←  
3 ~~the board shall be as follows:~~

4 ~~(1) One member for a term of two years.~~

5 ~~(2) One member for a term of four years.~~

6 ~~(3) One member for a term of six years.~~

7 (e) Qualifications.--A member of the board must:

8 (1) Be an attorney in good standing before the Bar of  
9 the Supreme Court of Pennsylvania.

10 (2) Have five years of practice before administrative  
11 agencies or have equivalent experience.

12 (f) Staff and facilities.--The board shall appoint a  
13 secretary to the board. The board shall provide facilities at  
14 each seat under the provisions of section 6. The board may  
15 employ hearing examiners and such additional personnel necessary  
16 to exercise its functions. Hearing examiners shall be attorneys  
17 in good standing before the Bar of the Supreme Court of  
18 Pennsylvania and shall have three years of practice before  
19 administrative agencies or equivalent experience. ~~all employees~~ ←  
20 ~~of the board shall be subject to the act of August 5, 1941~~  
21 ~~(P.L. 752, No. 286), known as the Civil Service Act.~~

22 ~~(g) Salary. Salaries of board members appointed under this~~  
23 ~~act shall be \$55,000 per year and \$57,500 for the chairperson~~  
24 ~~during the first two years after the effective date of this act.~~  
25 ~~Salaries of the board members and the chairperson shall be set~~  
26 ~~by the Executive Board two years after the effective date of~~  
27 ~~this act.~~

28 (G) SALARY.--MEMBERS OF THE BOARD AND THE CHAIRPERSON SHALL ←  
29 RECEIVE THE SAME SALARIES, RESPECTIVELY, AS THE COMMISSIONERS  
30 AND THE CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

1 Section 4. Jurisdiction.

2 (a) General rule.--The board has the power and duty to hold  
3 hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A  
4 (relating to practice and procedure of Commonwealth agencies) on  
5 orders, permits, licenses or decisions of the department. The  
6 ~~board shall have the power to issue adjudications on all matters~~  
7 ~~pending before the former Environmental Hearing Board where the~~  
8 ~~former Environmental Hearing Board has not issued adjudications~~  
9 ~~on the matters prior to the date that it is abolished.~~

10 (b) POWERS CONTINUED.--THE BOARD SHALL CONTINUE TO EXERCISE  
11 THE POWERS TO HOLD HEARINGS AND ISSUE ADJUDICATIONS WHICH  
12 (POWERS) WERE VESTED IN AGENCIES LISTED IN SECTION 1901-A OF THE  
13 ACT OF APRIL 9, 1929 (P.L.177, NO.175), KNOWN AS THE  
14 ADMINISTRATIVE CODE OF 1929.

15 ~~(b)~~ (c) Departmental action.--The department may take an  
16 action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but  
17 no action of the department adversely affecting a person shall  
18 be final as to that person until the person has had the  
19 opportunity to appeal the action to the board UNDER SUBSECTION  
20 (G). If a person has not perfected an appeal in accordance with  
21 the regulations of the board, the department's action shall be  
22 final as to the person.

23 ~~(c)~~ (D) Supersedeas.--

24 (1) No appeal shall act as an automatic supersedeas. The  
25 board may, however, grant a supersedeas upon cause shown. The  
26 board, in granting or denying a supersedeas, shall be guided  
27 by relevant judicial precedent and the board's own precedent.  
28 Among the factors to be considered are:

29 (i) Irreparable harm to the petitioner.

30 (ii) The likelihood of the petitioner prevailing on

1 the merits.

2 (iii) The likelihood of injury to the public or  
3 other parties, such as the permittee in third party  
4 appeals.

5 (2) A supersedeas shall not be issued in cases where  
6 pollution or injury to the public health, safety or welfare  
7 exists or is threatened during the period when the  
8 supersedeas would be in effect.

9 (3) THE BOARD SHALL PROMULGATE REGULATIONS FOR ISSUANCE ←  
10 OR DENIAL OF A TEMPORARY SUPERSEDEAS.

11 ~~(d)~~ (E) Intervention.--Any interested party may intervene in ←  
12 any matter pending before the board.

13 ~~(e)~~ (F) Subpoenas.--The board may subpoena witnesses, ←  
14 records and papers. The board may enforce its subpoenas in  
15 Commonwealth Court. Commonwealth Court, after a hearing, may  
16 make an adjudication of contempt or may issue another  
17 appropriate order.

18 ~~(f)~~ (G) Procedure.--Hearings of the board shall be conducted ←  
19 in accordance with the regulations of the former ~~Environmental~~ ←  
20 ~~Hearing Board~~ BOARD in effect at the effective date of this act ←  
21 until new regulations are promulgated under section 5.

22 (H) VOLUNTARY MEDIATION.--SUBJECT TO BOARD APPROVAL, PARTIES ←  
23 TO ANY PROCEEDING MAY REQUEST PERMISSION TO UTILIZE VOLUNTARY  
24 MEDIATION SERVICES TO RESOLVE THE DISPUTE OR NARROW THE AREAS OF  
25 DIFFERENCE. IF THE BOARD APPROVES, THE HEARING SHALL BE  
26 CONTINUED UNTIL THE PARTIES REPORT THE RESULTS OF THE MEDIATION.  
27 IF THE PARTIES ACCEPT THE MEDIATION REPORT AND THE RESULT IS  
28 CONSISTENT WITH STATE AND FEDERAL ENVIRONMENTAL LAWS, THEN THE  
29 BOARD MAY ENTER THE SETTLEMENT AS ITS DECISION. IF MEDIATION IS  
30 UNSUCCESSFUL, THEN THE HEARING SHALL BE RESCHEDULED AND

1 CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF LAW.

2 Section 5. Rules committee.

3 (a) Establishment.--The Environmental Hearing Board Rules  
4 Committee is established. The rules committee shall consist of  
5 nine attorneys who are in good standing before the Bar of the  
6 Supreme Court of Pennsylvania and who have practiced before the  
7 board for a minimum of three years or who have comparable  
8 experience. One member shall be appointed by the President pro  
9 tempore and one member shall be appointed by the Minority Leader  
10 of the Senate. One member shall be appointed by the Speaker and  
11 one member shall be appointed by the Minority Leader of the  
12 House of Representatives. One member shall be appointed by the  
13 Chairman of the Citizens Advisory Council to the department. Two  
14 members shall be appointed by the Governor, upon the advice of  
15 the Pennsylvania Bar Association. Two members shall be appointed  
16 by the secretary. The initial appointments of the Governor and  
17 the secretary shall serve terms of one year; the initial  
18 appointments of the President pro tempore and Minority Leader of  
19 the Senate, the Speaker and Minority Leader of the House of  
20 Representatives and the Chairperson of the Citizens Advisory  
21 Council shall serve terms of two years commencing three months  
22 after the effective date of this act. Thereafter, members of the  
23 rules committee shall serve terms of two years and may be  
24 reappointed for additional terms. Such vacancies as may arise  
25 shall be filled in the same manner as the original appointment.  
26 The chairperson of the board shall be a member of the committee  
27 ex officio.

28 (b) Expenses.--The board shall reimburse members of the  
29 rules committee for necessary and reasonable expenses incurred  
30 in attending rules committee meetings.

1 (c) Function.--The rules committee shall recommend to the  
2 board regulations for hearings conducted by the board AND FOR ←  
3 THE USE OF MEDIATION UNDER SECTION 4 (H). The regulations shall  
4 include time limits and procedure for the taking of appeals and  
5 locations of hearings. Regulations under this subsection shall  
6 be promulgated by the Environmental Quality Board upon a ←  
7 recommendation from the Environmental Hearing Board. Regulations  
8 promulgated under this subsection shall not be subject to the  
9 act of June 25, 1982 (P.L.633, No.181), known as the Regulatory  
10 Review Act. BOARD UPON A MAJORITY AFFIRMATIVE VOTE ON THE ←  
11 RECOMMENDED REGULATIONS.

12 (D) BYLAWS.--THE RULES COMMITTEE SHALL ADOPT BYLAWS TO  
13 GOVERN THE CONDUCT OF ITS AFFAIRS.

14 Section 6. Seats of the board.

15 (a) Location.--The board shall have offices and hearing  
16 rooms in Harrisburg, PHILADELPHIA and Pittsburgh. The ←  
17 headquarters of the board shall be in Harrisburg. The board may  
18 maintain additional offices and hearing rooms and hear cases at ←  
19 other locations in this Commonwealth.

20 (b) Assignments.--At least one member of the board shall sit  
21 in each seat of the board. The remaining member TWO MEMBERS of ←  
22 the board shall be assigned to a seat by the chairperson. At ←  
23 least once during the term of a member of the board, that member  
24 shall rotate to one of the other seats of the board. The  
25 chairperson shall determine rotation and shall determine  
26 assignment of cases within each geographic area.

27 Section 7. Abolishment of Environmental Hearing Board.

28 The Environmental Hearing Board established or otherwise  
29 provided for under section 472, 709 (a) or 1921-A of the act of  
30 April 9, 1929 (P.L.177, No.175), known as The Administrative

1 ~~Code of 1929, is abolished three months after the effective date~~  
2 ~~of this act. Current members of that board shall be eligible for~~  
3 ~~appointment to the board established under this act if they meet~~  
4 ~~the requirements of section 3(e).~~

5 ~~Section 8. Transfer of funds.~~

6 THE CHAIRPERSON SHALL, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF ←  
7 THIS ACT, ESTABLISH EITHER:

8 (1) A ROTATION SCHEDULE INVOLVING THE MOVEMENT OF BOARD  
9 MEMBERS AMONG THE THREE HEARING SITES; OR

10 (2) A CASE ASSIGNMENT SCHEDULE WHICH WILL ASSIGN CASES  
11 TO BOARD MEMBERS FROM OUTSIDE THEIR REGIONAL LOCATION.

12 SECTION 7. APPROPRIATION.

13 The sum of \$647,000, or the unexpended portion thereof, of  
14 the amount of the appropriation made to the Department of  
15 Environmental Resources for general government operations and  
16 designated for use of the Environmental Hearing Board is hereby  
17 transferred to the Environmental Hearing Board established by  
18 this act for the current fiscal year.

19 Section 9 8. Repeals. ←

20 (a) Specific.--Sections 472, 709 (m) and 1921-A of the act of  
21 April 9, 1929 (P.L.177, No.175), known as The Administrative  
22 Code of 1929, are repealed.

23 (b) General.--All acts and parts of acts are repealed  
24 insofar as they are inconsistent with this act.

25 SECTION 9. APPLICABILITY.

26 THIS ACT SHALL NOT AFFECT THE TERMS OR ELIGIBILITY OF THE  
27 CURRENT MEMBERS OF THE BOARD.

28 Section 10. Effective date.

29 ~~This act shall take effect as follows:~~ ←

30 ~~(1) Section 9 shall take effect in three months.~~

1           ~~(2) The remainder of this act shall take effect~~  
2           ~~immediately.~~  
3           THIS ACT SHALL TAKE EFFECT IN 60 DAYS.

←



APPENDIX E

Status as of January 1, 1988 of All Appeals  
Filed with the EHB Since January 1, 1980

| CY          | Appeals<br>Filed | Cases Closed as of January 1, 1988 |                  |                    |                    |              | Cases Open as of<br>January 1, 1988 |
|-------------|------------------|------------------------------------|------------------|--------------------|--------------------|--------------|-------------------------------------|
|             |                  | Settled <sup>a/</sup>              | WD <sup>b/</sup> | Dis. <sup>c/</sup> | Adj. <sup>d/</sup> | Total        |                                     |
| 1980.....   | 292              | 29                                 | 90               | 121                | 46                 | 286          | 6                                   |
| 1981.....   | 210              | 31                                 | 73               | 39                 | 39                 | 182          | 28                                  |
| 1982.....   | 308              | 33                                 | 135              | 93                 | 28                 | 289          | 19                                  |
| 1983.....   | 301              | 30                                 | 119              | 94                 | 24                 | 267          | 34                                  |
| 1984.....   | 434              | 36                                 | 162              | 119                | 22                 | 339          | 95                                  |
| 1985.....   | 556              | 61                                 | 201              | 138                | 6                  | 406          | 150                                 |
| 1986.....   | 692              | 48                                 | 215              | 120                | 1                  | 384          | 308                                 |
| 1987.....   | <u>535</u>       | <u>10</u>                          | <u>62</u>        | <u>43</u>          | <u>0</u>           | <u>115</u>   | <u>420</u>                          |
| TOTALS..... | <u>3,328</u>     | <u>278</u>                         | <u>1,057</u>     | <u>767</u>         | <u>166</u>         | <u>2,268</u> | <u>1,060</u>                        |

\*/The numbers shown for a given year represent the dispositions of appeals filed in that year, regardless of the year of the disposition. Please also see Appendix F.

a/Settled appeals.

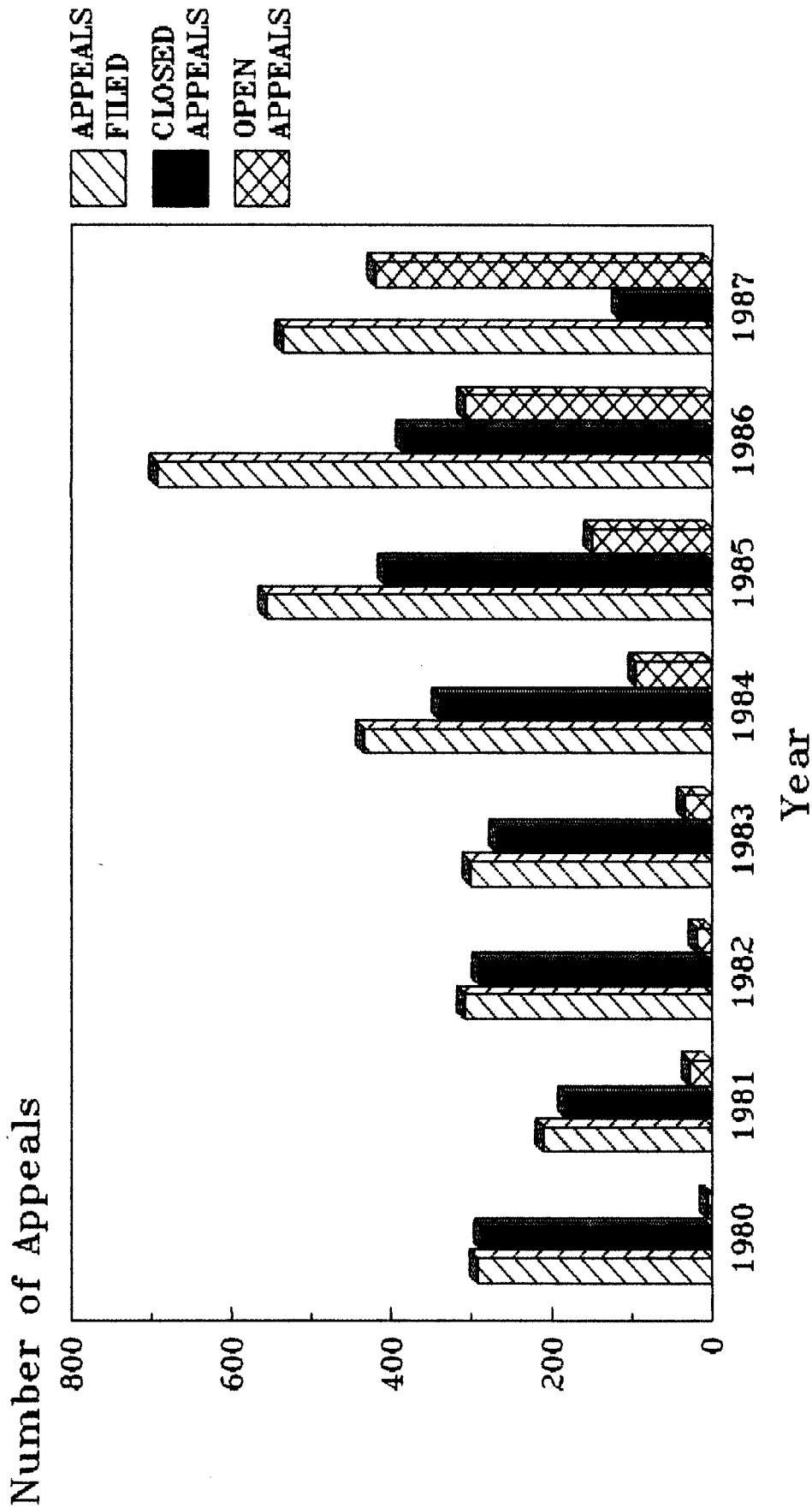
b/Withdrawn appeals.

c/Dismissed appeals.

d/Adjudicated appeals.

Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

APPENDIX F  
**Status of Appeals by Year Appeal Filed**  
 1980 - 1987



Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

APPENDIX G

Board Member Vacancies 1983 - 1987

|      |                                    | <u># of<br/>Members</u> | <u># of<br/>Months Vacant</u> |
|------|------------------------------------|-------------------------|-------------------------------|
| 1983 | January - March <sup>1/</sup>      | 3                       |                               |
|      | April - December                   | 2                       | 9                             |
| 1984 | January - December                 | 2                       | 12                            |
| 1985 | January - August                   | 2                       | 8                             |
|      | September - December <sup>2/</sup> | 3                       |                               |
| 1986 | January - June <sup>3/</sup>       | 2                       | 6                             |
|      | July - December <sup>4/</sup>      | 3                       |                               |
| 1987 | January - November <sup>5/</sup>   | 2                       | 11                            |
|      | December <sup>6/</sup>             | 3                       |                               |

---

1/Member resigned in April.

2/Member appointed in June and began serving in September.

3/Member resigned in January.

4/Member appointed in June and began serving in July.

5/Member resigned in January.

6/Member appointed and began serving in December.

Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

## APPENDIX H

### PennACCORD: Center for Environmental Dispute Resolution

PennACCORD is the Pennsylvania Center for Environmental Dispute Resolution, a project of the Pennsylvania Environmental Council (PEC), co-sponsored by the Western Pennsylvania Conservancy (WPC). PEC is a statewide environmental research and education organization headquartered in Philadelphia. WPC is a private land conservation organization located in Pittsburgh.

PennACCORD is the first center of its kind in the Commonwealth. It provides trained mediators who help parties find solutions to environmental and land use problems through impartial consultation and mediation.

Pennsylvania contains in microcosm the nation's land use and environmental conflicts. Critical issues for the state include:

- \* Waste management
- \* Acid rain
- \* Natural resource protection
- \* Development pressures

There is a need to move forward on these issues in ways that take into account the interest of all parties. Traditional approaches - litigated decisions, administrative proceedings, and regulatory processes - can be expensive and slow, and often do not offer real solutions. Mediation can provide an alternative and a support to existing decision-making processes.

PennACCORD's mediated agreements are likely to be durable and effective because:

- \* The goal is consensus; agreements are the creation of all involved parties.
- \* Participants have a vested interest in making the decisions work.
- \* Participation is voluntary. Mediators have no authority to impose solutions.

PennACCORD offers impartial third-party services. The Center is equipped to:

- \* Mediate in a variety of dispute situations.
- \* Guide policy dialogues critical to the public welfare.
- \* Assist in negotiation of rules and regulations.
- \* Develop strategies for addressing controversial projects.

APPENDIX H

PennACCORD: Center for  
Environmental Dispute Resolution  
(Continued)

- \* Design and manage complex planning efforts.
- \* Facilitate meetings with difficult agendas.
- \* Serve as a sounding board on environmental issues.
- \* Provide information on mediation and related techniques.

The following examples show how PennACCORD services can be useful:

- \* A mediator helps a county and its municipalities negotiate an acceptable county waste management plan.
- \* A facilitator leads discussions on state ground water policy with representatives from different interest groups. The discussion concludes with policy recommendations for the government and legislature.
- \* A conflict management consultant advises a corporation on resolving an energy controversy by working constructively with competing interests.
- \* A mediator assists a municipality, a developer and local citizens to design jointly features of a disputed housing project.

Source: Information provided by PennACCORD.

## APPENDIX I

### PENNSYLVANIA'S SPECIAL EDUCATION MEDIATION SERVICES

Beginning in February 1987, a forward step in the education of exceptional children took place in Pennsylvania. As of that time, parents and school officials in disagreement regarding the evaluation, placement or programs of exceptional children were given the opportunity to access positive conflict resolution - MEDIATION.

In its present status, special education conflicts in need of third party assistance result in a due process hearing. This hearing takes on similarities of a court session - a hearing officer (judge), expert witnesses, stenographer, presentation of evidence, subpoenaed witnesses, etc. Special Education Mediation Services (SEMS) has removed the threatening components. The end result is a structured, yet informal, non-adversarial approach to dispute resolution.

In March 1985, a Task Force, composed of educators and advocates, was convened to study mediation. The Mediation Task Force overwhelmingly endorsed mediation in Pennsylvania. In May 1986, the Schuylkill Intermediate Unit (a local education agency) was awarded \$256,000 to develop "Special Education Mediation".

The following outline will highlight and explain the process SEMS has used in approaching the implementation of mediation as an option to due process:

#### I. Establish An Office

- A. Appearance of neutrality - separated from Pennsylvania Department of Education, schools and advocate organizations.
- B. Accessible - toll free "800" telephone number.

#### II. Select An Advisory Panel

- A. Nine individuals representing educators, advocates and consumers; provides guidance and feedback.

#### III. Draft Procedures and Guidelines

- A. Detailed explanation of process.

- B. Forms to be used in scheduling, conducting and following-up a session.

#### IV. Selection of Mediators

- A. Application, vitae, letters of reference, interviews and review by Project and Advisory Panel.

#### V. Training

- A. Pre-training preparation through preview of materials.
- B. Hands-on training (Neighborhood Justice Center of Atlanta, Inc.).

#### VI. Project Evaluation

- A. Systematic, detailed evaluation of actual mediation session.

During the fall of 1986, training was held for thirty (30) special education mediators. Also receiving training were four administrative and support staff members. A thirty hour (30) training event, designed and conducted by the Neighborhood Justice Center of Atlanta, was a major success. The training agenda was uniquely designed to meet the needs of the diverse audience. Participants, who are now certified mediators, represent children and youth agencies, special education university professors, social workers, attorneys, therapists and practicing mediators.

The anticipated success of SEMS is based on factors such as, but not limited to:

1. Requests may be made by either party;
2. Mediation is voluntary;
3. Parents due process rights will not be denied nor delayed;
4. The school may be represented by three individuals;
5. Parents may bring two other individuals to the meeting;
6. Attorneys may not be present;
7. The meeting may not be recorded;
8. Mediation is confidential;
9. A mediator may remove disruptive participants;
10. Other than a final written agreement, no other records will be kept.

Since mediation in other arenas has been such a success, there is no reason to believe that SEMS will experience results other than positive. As the pilot project became operational, parties soon learned of this win-win solution to problems. Having a neutral, trained mediator available within a few days of a request, at no cost to either party, SEMS will soon develop a reputation for its ability to facilitate agreements satisfactory to both parties.

SEMS is interested in studying the processes established in other states offering mediation in education and in sharing experiences. For more information telephone or write:

Special Education Mediation Services  
Box 130  
Marlin, Pennsylvania 17951

Telephone: 1-717-544-2657

OR

Toll Free in PA: 1-800-992-4334

Source: Information provided by Special Education Mediation Services.



APPENDIX J

Provision for Voluntary Mediation in Senate Bill 527

Subsection (h) of Section 4 of Senate Bill 527 of the Session of 1987 (Printer's No. 913) which would establish the Environmental Hearing Board as an independent, quasi-judicial agency; providing for the membership and staff, powers and duties, seats and existing members of the board; making an appropriation; and making a repeal.

(h) Voluntary mediation.--Subject to board approval, parties to any proceeding may request permission to utilize voluntary mediation services to resolve the dispute or narrow the areas of difference. If the board approves, any hearing shall be continued until the parties report the results of the mediation. If the parties accept the mediation report and the result is consistent with State and Federal environmental laws, then the board may enter the settlement as its decision. If mediation is unsuccessful, then the hearing shall be rescheduled and conducted in accordance with the provisions of law.

Source: Senate Bill 527 of the Session of 1987 (Printer's No. 913).

APPENDIX K

Descriptions of Mediation  
Programs in Five Other States

Source: Resolve, No. 19, 1988, published by the Conservation Foundation, Washington, D.C.

### **Minnesota Office of Dispute Resolution**

The Minnesota program is the newest of the statewide offices. The proposal of the Minnesota Planning Agency was approved by the NIDR Board of Directors in January 1985. Program activities began in fall 1985 with the appointment of Roger Williams of the Planning Agency as the Office's half-time director, and the work program for the office was accepted by NIDR in May 1986. The primary advocate within state government for the establishment of the office was Thomas Tripiett, then director of the state planning agency and currently secretary of the Minnesota Department of Finance.

Several dispute resolution programs were already in place in the state when the program was created. In 1983, the legislature appropriated funds for the state Supreme Court to use to support four neighborhood dispute resolution centers. State legislation had also already authorized district courts, by majority vote of their judges, to order arbitration. In Hennepin County, one of two counties using arbitration as a pilot project, 1,200 cases were arbitrated in 1986, with a 71 percent rate of settlement. Minnesota's Office of Administrative Hearings is also authorized to mediate cases in which state agencies are involved. The University of Minnesota has a dispute resolution project funded by the Hewlett Foundation, that focuses on research and theory-building. Nonprofit and private firms also offer mediation services.

The state contribution to the office budget consists of funding for the director's

salary and overhead. The NIDR grant covers program expenses. In fall 1986, Roger Williams organized an advisory board of 11 members from all three branches of state government, the Minnesota bar, nonprofit groups, and the University of Minnesota.

One of the early efforts of the Minnesota Office of Dispute Resolution focused on the development of voluntary farmer-lender mediation programs through an agreement between Governor Rudy Perpich and the Minnesota Bankers Association. Shortly after the mediation of cases under this program began, the Minnesota legislature passed a mandatory program that superseded the voluntary one. The Office of Dispute Resolution maintains statistics on the farmer-lender program that show that thousands of farmers have agreed to use the service, and approximately one-half of the cases referred to the mediation service have been settled.

Other activities of this state office include assisting the Department of Human Rights to address civil rights grievances, providing mediation training for state employees, and sponsoring a dispute resolution week. While the Minnesota office considers its primary mandate to be education and support of state officials to increase their awareness of and use of mediation and dispute resolution alternatives, it is also increasing its direct involvement in some case-specific activities. It played a significant role in a recent mediation of a dispute over standards for herbicide spraying and co-mediated a dispute involving sewage treatment for two municipalities.

### **Wisconsin Statewide Office of Mediation**

The Wisconsin state government has implemented dispute resolution programs in labor and other fields for decades. Wisconsin state agencies have mediation programs for farmer-lender and medical malpractice cases, and the state has used conciliation in fair employment and housing disputes. In 1983 the state legislature passed a statute requiring that the developers of a proposed solid or hazardous waste facility negotiate with the host community at the community's option. Wisconsin's proposal to NIDR for the formation of a statewide mediation program was approved in May 1984.

In contrast to most of the other state programs, Wisconsin did not establish a new organizational entity to provide mediation services. NIDR and state funds were used exclusively to fund the services of independent mediators. In part this approach was shaped by the program architects' goal of devoting resources to funding the mediation of a small number of major, complex policy disputes, and in part it was related to the amount of funding available. The program was established between budgetary cycles with an administrative allocation of about \$20,000 in lapsed state funds, to which was added \$10,000 in NIDR funding.

In seeking appropriate public policy disputes, the Wisconsin program relied on high-level support within the executive branch to identify appropriate disputes for mediation, to interest the parties in the process, and to match cases with mediators.

Howard Bellman, then secretary of the state's Department of Labor, Industry, and Human Relations and a former labor and environmental mediator, was the primary state contact with the NIDR program and served on a screening panel along with Doris Hanson, secretary of the Department of Administration, and Hal Bergen, Governor Anthony Earl's chief policy advisor.

Between the program's inception and early 1986, it sponsored the mediation of two disputes between several Indian tribes and the state's Department of Natural Resources over hunting and fishing regulations. One case was mediated by Ed Krinsky of The Mediation Institute, Wisconsin, and the other by Byron Yaffe, an independent arbitrator and mediator (see "Updates").

By early 1986, however, it was clear to the screening committee that the "desk drawer" model was "too simple to provide the level of support that the mediation service deserves." The many demands on high-level state officials made it difficult to maintain momentum within the program. The committee decided to suspend the program until after the 1986 elections. After the governor's subsequent election defeat, the program was not restarted.

Had the program continued, Bellman says that its program design would have been modified. Part of a state employee's time (or a full-time employee serving several dispute resolution programs) would have been devoted to consulting about and promoting the use of mediation to agency heads.

### **Massachusetts Mediation Service**

Massachusetts traditionally has been a center for both the study and practice of dispute resolution. Home to the Program on Negotiation at the Harvard Law School and several nonprofit mediation organizations, the state also has 40 court-related neighborhood and small claims mediation programs and a dispute resolution coordinator associated with the attorney general's office.

The Massachusetts Mediation Service began operations in January 1985 with the hiring of David O'Connor, formerly of the New England Environmental Mediation Center, as director. The Massachusetts Mediation Service is organized as an independent office of mediation within the Executive Office of Administration and Finance, a state government agency with administrative rather than programmatic responsibilities. The primary sponsor of the project at the state level was Frank Keefe, secretary for administration and finance, who had worked on the negotiated investment strategy implemented in Columbus, Ohio. The director of the service consults regularly with a 14-member advisory board appointed by the governor and attorney general and composed of representatives of businesses, public interest groups, state government, and academia. The service has been funded with a combination of NIDR and state funds at a level of slightly over \$100,000 yearly.

The goals of the office are to improve the capability of state agencies to manage conflict and to initiate and support mediation of cases involving state agencies. Activities of the office include consulting with state

agencies involved in conflicts, training state employees in negotiation, acting as an advocate for the use of mediation, screening cases and matching them to mediators, providing some funding to mediators, and providing mediation services directly to parties in dispute.

In its three years of operation, the Massachusetts Mediation Service has been involved in over 40 cases. Some cases have been mediated by the director; others have been conducted by private mediators funded by the service or by the parties. The service has been appointed coordination monitor for the construction of a new \$43 million jail in downtown Boston. It has conducted several policy dialogues involving nursing home admissions policies and long-term health care insurance policies, and it has provided mediation for cases involving a fishing dispute on Stellwagen Bank, historic preservation concerns in a waterfront transportation facility, and provisions for public amenities in a commercial waterfront development.

The Mediation Service has provided negotiation training to state officials and senior managers and was instrumental in the passage of a mediator confidentiality statute in Massachusetts. Its budget from the Office of Administration and Finance has been increased, and the service has established a mediator revolving fund with the help of a local foundation. It has begun to use case investigators to identify cases in specific topic areas, like health care and housing. Its plans for the future include publicizing the results achieved to date and proposing legislation to assure its future funding.

### **New Jersey Center for Public Dispute Resolution**

The New Jersey Center for Public Dispute Resolution was the first of the statewide offices to begin operations, in September 1984. It was, essentially, an expansion of the state's existing Office of Dispute Settlement, which was part of the Department of the Public Advocate. Since 1974, the Office of Dispute Settlement had provided mediation, conciliation, and other third party services in community disputes where a public interest issue is involved.

In December 1983, Public Advocate Joseph H. Rodriguez, working with Bill Drake, Larry Susskind, Chris Carlson, Sanford Jaffe (then of the Institute for Judicial Administration at New York University), and others, convened a consensus-based planning process with top New Jersey state officials to formulate a plan for an office to address public policy disputes. These officials included Governor Kean's director of policy and planning, the attorney general, the Office of Management and Budget director, and representatives of the court system and the Department of Environmental Protection. The plan developed through this process was submitted to NIDR in April 1984 and approved the following month.

Jim McGuire was chosen as the center's first director; he was formerly deputy director of the Office of the Public Advocate's Division of Citizen Complaints and Dispute Settlement. He served in that position until fall of 1987, when Jack Gleeson was named acting director. A training director, an attorney-mediator, and two additional mediators cur-

rently serve as center staff in specific cases. The center has been funded by a yearly \$70,000 appropriation from the legislature, which covers operations of the center, and \$50,000 from NIDR, which is dedicated to funding the services of outside mediators.

Since its inception, the Center for Public Dispute Resolution has been involved in a variety of public disputes, many referred from the court system. In three early cases the center was appointed as special master to resolve disputes over the design and cost allocation for a regional sewer system involving 37 municipalities and a regional authority, (see Update, page 18), over the alleged mismanagement of a county sheriff's office, and over the appointment of a new office of the superintendent of elections for a county election board. The center has provided mediation in a dispute involving a homeowners' association and its 50 members, and it resolved a conflict over the standardization of volunteer and public emergency medical treatment services across the state, thereby preserving \$20 million in federal funding.

In addition, the center trains volunteer mediators for the local municipal courts and court personnel responsible for resolving family disputes, and it has provided one-time negotiation training to public administrators, planning board officials, and law students. In October 1986, the center cosponsored a conference on alternative dispute resolution with the New Jersey League of Women Voters, and in December 1987 the center sponsored a Symposium on Critical Issues in Alternative Dispute Resolution from which proceedings will be published and disseminated.

### **Hawaii Program on Alternative Dispute Resolution**

Hawaii's program is unique among the state-wide offices in that it is the only one actually located within the judicial branch of a state government—in the Office of the Administrative Director of the Courts. Led by its chief justice, Herman Lum, the judiciary has actively explored alternative dispute resolution opportunities in family and community disputes for years. In addition, Hawaii's neighborhood justice centers handle many community disputes and the Program on Conflict Resolution at the University of Hawaii is a center for the study of dispute resolution processes. In the early 1980s, Chief Justice Lum and Lester Cingcade, the former administrative director of the courts, began to seek opportunities to expand their programs and play a stronger role in promoting dispute resolution processes in other fields. Their proposal to NIDR was approved in January 1985 in the second round of grants for state offices of mediation.

The mission of Hawaii's program as stated is: "To gather and disseminate up-to-date information on alternative methods of dispute resolution; to explore, test and evaluate new uses of mediation, arbitration and other alternative dispute resolution methods; and to help institutionalize methods in Hawaii. The program serves as a catalyst for the development of legal, policy, and program frameworks for mediation, arbitration and

alternative dispute resolution."

The program has two full-time staff, supplemented by volunteers and interns. Peter Adler, formerly of the Neighborhood Justice Center of Honolulu, is its director. The public disputes program budget is approximately \$100,000 annually, \$25,000 of which is provided through the NIDR grant and the remainder of which is allocated through the budget of the administrative director of the courts.

An early effort of the Hawaii program involved a survey of the views of Hawaii's judges about their role in settling cases. The program also convened a committee of providers of mediation services to develop a set of standards of practice for all types of mediators. The program was involved in the passage of legislation authorizing the use of special masters and mediators in geothermal energy development conflicts, and provides mediation in some of these cases. Public policy cases have involved mediation of disputes about construction defect allegations for the Aloha Stadium, pineapple and chemical companies' requests for state contributions to \$28 million paid out in pollution suits, land-use and development issues, low-income housing construction problems, and development of a state water code. The program is also conducting an Environmental Litigation Research Project. The program publishes a newsletter on alternative dispute resolution, which is circulated throughout the three branches of the state government.

## APPENDIX L

### History of the Computerization of the Environmental Hearing Board Docket

| <u>Date</u>           | <u>Event</u>  |
|-----------------------|---|
| Late 1983/ Early 1984 | Initial request by EHB for DER computer assistance.   |
| October 1986          | DER assesses EHB computer needs and recommends the case docket system be implemented on DER's mainframe computer.   |
| Winter 1987           | Governor's FY 1987-88 Budget includes funding for EHB computer system.  |
| September 1987        | DGS study released on EHB computer needs including examining alternatives to using DER's mainframe computer. <sup>a/</sup>                                      |
| Fall 1987             | Using the DGS study as a stepping stone, DER reassesses the EHB's computer needs and concluded that PCs would be the best option. The EHB agreed. <sup>b/</sup> |
| Winter 1988           | Governor's FY 1988-89 Budget includes \$100,000 for the EHB computer system.  |
| Spring 1988           | EHB computer equipment purchase initiated.  |
| June 1988             | Computer equipment delivered.   |
| Fall 1988             | Planned implementation of EHB case docket system.   |

---

a/Appendix M lists EHB objectives for the DGS study and the computer system and Appendix N lists computer applications desired by the EHB. DGS recommended that a request for proposal be initiated outlining the EHB's needs, including software and storage requirements, expansion capabilities, and training, and suggested that an evaluation committee could review the candidate companies responding to the RFP and recommend the most appropriate system at the best cost.

b/According to the DER's Bureau of Information Resources Management, an RFP, as recommended by the DGS study, was not pursued. The Department, working with the EHB, assessed the various options available to the EHB including linking with DER's mainframe, using a mini-computer, or using personal computers. The mainframe option was disposed of since the Board did not want to increase its dependence on DER for administrative services, and the mini-computer option was dropped because it would require the EHB to have its own computer specialist to maintain the system.

Source: Development by LB&FC staff based on a review of EHB files and discussions with EHB staff and DER computer staff.



## APPENDIX M

### EHB Computer Study and Implementation Objectives

1. Completely computerize the legal docketing system.
2. Create electronic interaction with the two regional offices (Pittsburgh and Philadelphia).
3. Produce timely statistics of EHB actions.
4. Improve caseload management.
5. Reduce caseload backlog.
6. Eliminate outdated manual information management methods.
7. Automate current manual tickler/tracking files.
8. Respond more efficiently and effectively to requests from members of the bar, general public, DER, legislative, and administrative entities.
9. Create a database to manage and manipulate data files.
10. Generate reports, pleadings, briefs, orders, etc., from automated database.
11. Manage and maintain a multi-task, multi-shared in-house computer system for entire EHB staff.
12. Train and improve computer literacy for entire EHB staff.

Source: The DER Environmental Hearing Board Automated Technology Study, conducted by DGS, September 1987, page 4.

## APPENDIX N

### EHB Desired Computer Applications

1. Document and verify the validity of appeal records and respond more timely to mail and phone requests.
2. Create an automated tickler/tracking system to allow the capability to change and track attorneys' appeal caseloads and automatically search/inquiry by alpha index, appellant name, action type, date/time to be reminded, and docket number.
3. Establish a historical inactive file for withdraw appeals.
4. Generate statistics on closed appeals by the following categories: dismissals, adjudications, opinions, orders, stipulations, and withdrawals.
5. Facilitate electronic mail and messages between the Harrisburg, Pittsburgh, and Philadelphia offices (proposed office).
6. Provide an automated calendar and appointment utility to accommodate the EHB schedules and meetings for date, day/week/month/year, start/end time, duration, topic of meeting, participants, location, confirmations, reminders, notes, etc.
7. Extract data from the automated docket system to merge, sort, select interactively into other relevant office automation applications.
8. Implement software for the automated docket system to provide, without end user programming, a database with query, storage, retrieval, and report generator functions. A fourth generation or equal programming language is desired.
9. Perform office automation/word processing functions to create, update, delete, view, print, move, copy, merge, save/archive, math, footnote, spellcheck, help/tutorial, mail merge, etc.
10. Create a departmental and personal telephone directory.
11. Generate yearly status reports on court reporting services by member, volume, billing, etc.
12. Generate weekly, monthly, and yearly law clerk status reports.
13. Create a standard Commonwealth agency and action abbreviations list.
14. Maintain an automated EHB schedule to manage board member, case name, docket number, time, location, court reporting firm, cancelled, re-scheduled, categories by program area, and types (supersedes, nunc pro tunc, and general on merits).

Source: The DER Environmental Hearing Board Automated Technology Study, conducted by DGS, September 1987, pages 4 and 5.

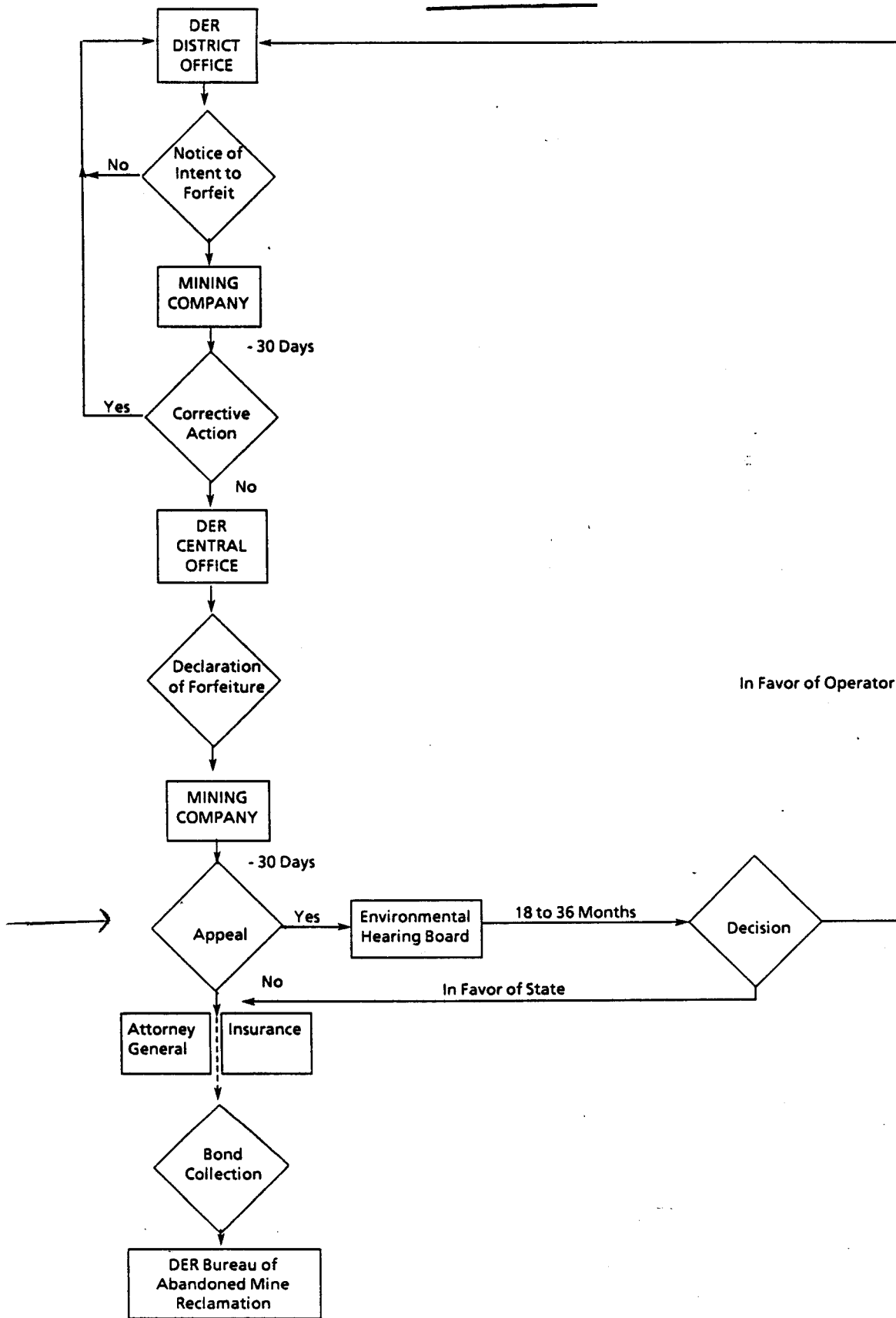
## APPENDIX O

### Planned EHB Reports

1. Bi-Monthly Board Member Report - This report is a "tickler" file for EHB Members to keep them informed of due dates for opinions, orders, adjudications, etc.
2. Weekly Action Due Report - This report is a tickler file for the EHB staff to alert them of due dates of required actions by the litigants, e.g., filing of pre-hearing memoranda, post-hearing briefs, status reports, etc. Required actions are categorized by those that are due, overdue, and due in the "short-term."
3. Board Member Case Report - This report, one for each member, will consist of a listing of cases by name before a member, the docket number, date of last action, and file date.
4. Quarterly/Year to Date Report - This report will tally cases for each EHB Member and the Board by program area (e.g., air quality, dams and waterway, surface mining, etc.) and program type (bond forfeiture, bond release, civil penalty assessment, etc.).

Source: Developed by LB&FC staff based on information received from the DER Bureau of Information Resources Management

APPENDIX P  
FORFEITURE FLOW

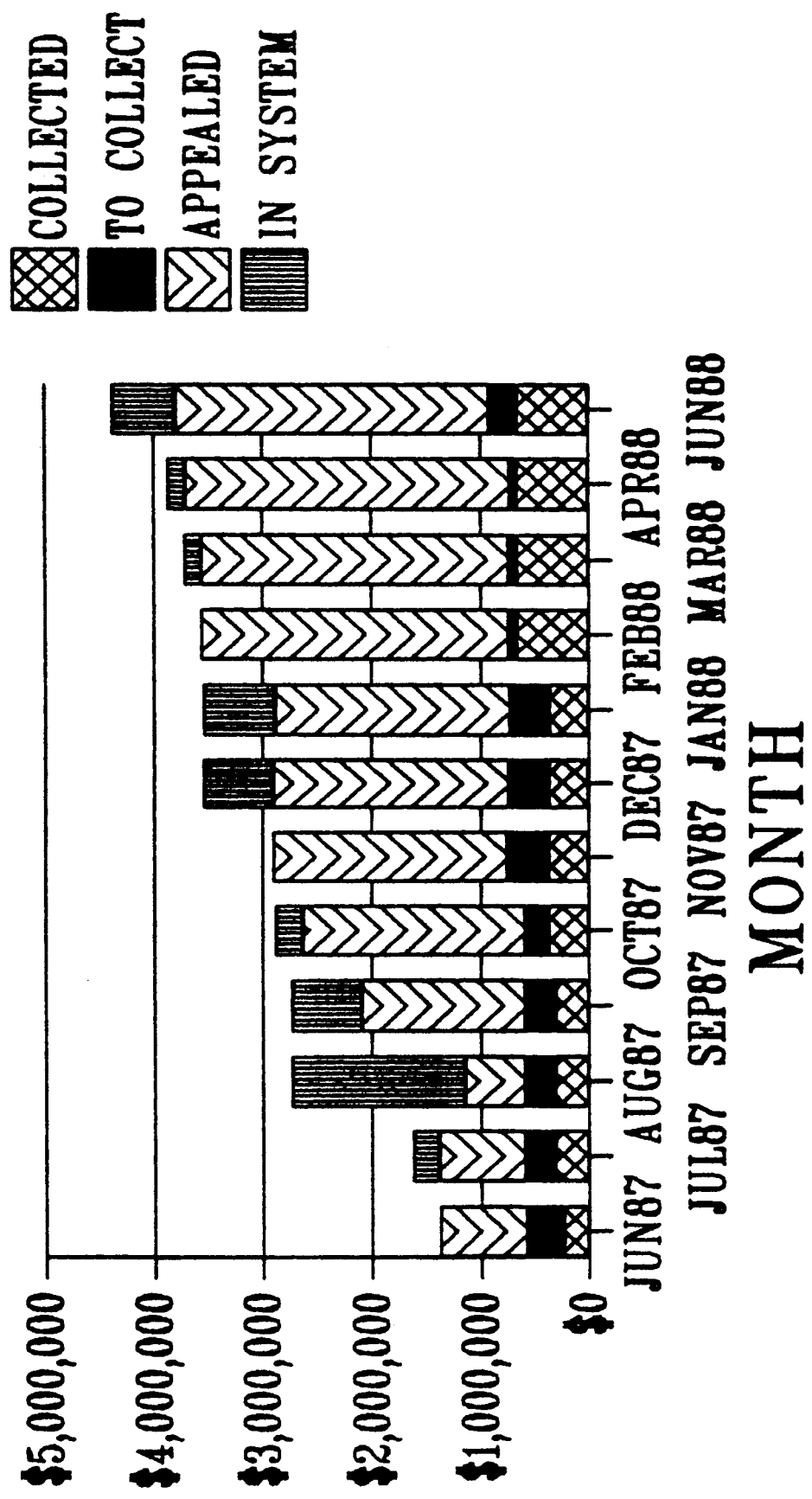


Source: Pennsylvania's Surface Mining Bond Forfeiture Program: The Problem and Reclamation Options, Pennsylvania Department of Environmental Resources, October 1985.

APPENDIX Q

# PRIMACY\* FORFEITURES

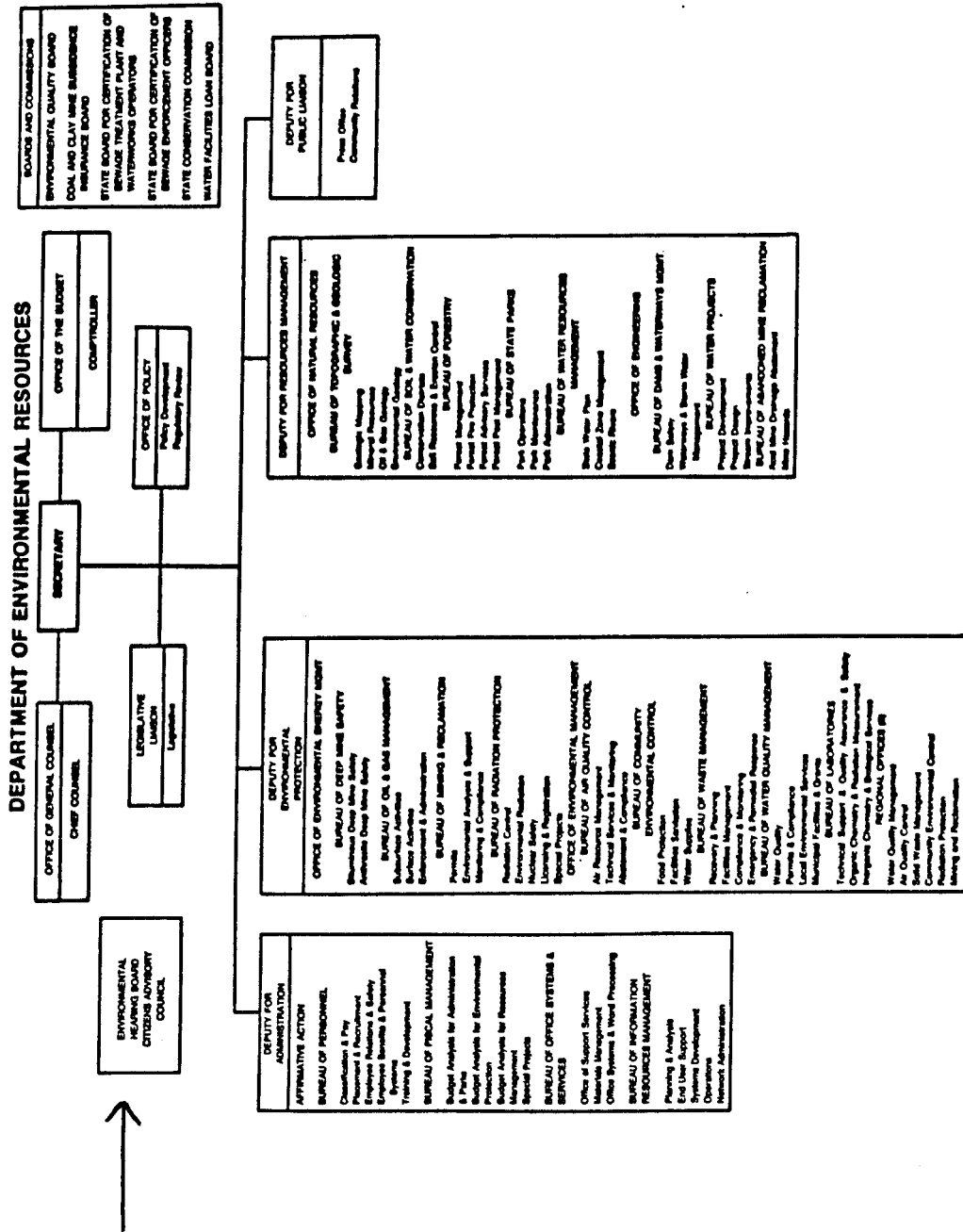
## STATUS OF FUNDS



\*Primacy refers to the DER responsibility of enforcing the Federal Surface Mining Program which began in July 1982.

Source: BMR (DER's Bureau of Mine Reclamation) Board Forfeiture Report, June 1988.

APPENDIX R



## APPENDIX S

### Selected Comments from Appellants Concerning the Relationship between the Board and DER

- When a person sits down at a hearing with DER, they go with the decision they want, regardless of what is said.
- The Environmental Hearing Board is a rubber stamp for the Department of Environmental Resources.
- Our interests should coincide with those of DER, but DER seems to be influenced too much by business and politics. The Board appeared to side with DER when it realized we were attacking the actions of DER.
- Board members and staff are identified too closely with DER.
- The Board is influenced by vengeful DER staff who want to get even with all those who question their unfair tactics.
- We never received the same treatment or were given the same privileges as DER. We incurred costly water treatment during the appeal process, but the Board never insisted that DER act in a timely fashion and never imposed sanctions for DER's persistent non-compliance with the time limits imposed upon it... The Board consistently favors DER, and in the industry, the Board is perceived as a biased tribunal.

Source: Responses to an LB&FC questionnaire of a sample of persons who have filed appeals with the Environmental Hearing Board.

APPENDIX T

Pre-Hearing Conference and Pre-Hearing Procedures

Current Rules

25 Pa. Code §21.82, Prehearing Conferences and Prehearing Procedures:

- (a) The Board, on its own motion or on motion of a party, may hold a conference either prior to or during a hearing for purpose of considering offers of settlement, adjustment of the proceeding or an issue therein or other matters to expedite the orderly conduct and disposition of a hearing.
- (b) A stipulation of the parties or rulings of the Board as a result of the conference shall be binding upon the parties.
- (c) The Board may issue such prehearing orders as it considers necessary for limiting issues of fact and law.
- (d) The Board shall, at any time, be authorized to delay a formal hearing and order settlement discussions or stipulations, either on or off the record.
- (e) Subsections (a)-(d) supplement 1 Pa. Code §§35.111-35.115 (relating to conferences to adjust, settle or expedite proceedings; conferences to expedite hearings; initiation of conferences; authority of presiding officer at conference; and offers of settlement).

Proposed Changes

25 Pa. Code §21.82, Prehearing Conference and Prehearing Procedures:

- (a) The Board, on its own motion or on motion of any party, may hold a conference either prior to or during a hearing for the purpose of considering the status of offers of settlement, adjustment of the proceeding or any issue therein, issues of discovery or other matters to expedite the orderly conduct and disposition of any hearing, including, but not limited to, the following:
  - (i) An initial prehearing conference for the purpose of considering matters such as:
    - (1) Jurisdictional defects if any;
    - (2) Nature of the issues to be resolved;
    - (3) Schedules for remaining prehearing proceedings, including, but not limited to, discovery, prehearing memoranda, exchange of exhibits and exchange of expert reports;
    - (4) A date and place for the hearing;
    - (5) Prospects for settlement.
    - (6) Stipulations as to facts (including documents) or issues;
    - (7) Any special provisions for discovery;
    - (8) Any contemplated or pending motions;
    - (9) Any other pertinent matters;
  - (ii) A final prehearing conference for the purpose of considering matters such as:



Pre-hearing Conference and Pre-hearing Procedures  
(Continued)

Current Rules

Proposed Changes

- (1) The positions of the parties regarding settlement.
  - (2) The simplification of issues.
  - (3) The limitation of the number of expert witnesses.
  - (4) The probable length of the hearing.
  - (5) Evidentiary questions.
  - (6) Such other matters as may aid in the hearing or disposition of the appeal.
- (b) The Board may issue such orders in preparation for or as a consequence of any conference held under this rule as the Board, in its discretion, deems necessary.
- (c) The Board may also, on its own motion or the motion of any party, issue orders relating to prehearing procedures as it deems necessary or appropriate for the orderly administration of the matter.
- (d) For the purposes of any conference under this rule, the Board, in its discretion, may either direct the parties or their counsel to appear before it or hold such conference by telephone conference call.
- (e) Subject to 1 Pa. Code §35.115, the Board may, at any time, delay any proceeding to allow the parties to pursue settlement discussions or stipulations.
- (f) The provisions of subsections (a) through (d) of this section supplement the provisions of 1 Pa. Code §35.111, §35.112, §35.113, §35.114, §35.115, and §35.116.

Source: Developed by LB&FC staff from information obtained from the Environmental Hearing Board and the Pa. Code.

APPENDIX U

EHB Rules of Discovery

Current Rules

25 Pa. Code §21.111. Discovery

(a) Discovery shall be available to parties without leave of the Board upon written notice served upon each party or his counsel of record for a period of 60 days after the appeal or complaint has been filed with the Board. Discovery requested subsequent to the 60-day period is available only upon leave of the Board.

(b) Discovery by deposition (upon oral examination or written interrogatories) shall be taken in the manner prescribed by 231 Pa. Code (relating to rules of civil procedure), except where this section provides otherwise. A party taking a deposition by written interrogatories shall file the interrogatories with the Secretary to the Board and shall serve a copy upon each party or his attorney of record.

(c) Discovery by written interrogatories to the adverse party shall be conducted in the manner prescribed by 231 Pa. Code. A party serving interrogatories or answers to interrogatories shall file the original interrogatories or answers with the Secretary to the Board and shall serve a copy of the interrogatories or answers upon each party or his attorney of record.

(d) Written requests for the production of documents, things, or for entry for inspection and other purposes shall be governed by 231 Pa. Code Rule 4009 (relating to production of documents and things and entry for inspection and other

Proposed Changes

25 Pa. Code §21.111. Discovery

(a) Except as otherwise provided in this section or by order of the Board, all parties shall have the right to discovery to the extent and in the manner provided in civil actions pursuant to the Pennsylvania Rules of Civil Procedure (the "Rules"). In applying such Rules, unless the context requires otherwise:

(i) All references to the "Court" shall be deemed to refer to the Board, or to the member thereof or the hearing examiner presiding over the matter in issue;

(ii) All references to the "prothonotary" or "clerk of court" shall be deemed to refer to the Secretary of the Board.

(b) Except if requested, copies of requests for discovery and responses thereto should not be filed with the Board unless and only to the extent that portions thereof are requested by the Board, or are relevant to the resolution of a dispute (including disputes concerning discovery) or are offered and accepted into evidence.

(c) The place of taking depositions shall be as reasonably convenient to the parties, their counsel and the witnesses as is practical in the circumstances.

(d) The mileage limitation of Rule 4008 shall be one hundred (100) miles from the residence or principal place of business or employment of the person or party to whom the discovery is directed.

EHB Rules of Discovery  
(continued)

Current Rules

25 Pa. Code §21.111. Discovery

purposes).

(e) The Board may issue the protective orders in connection with discovery proceedings as is authorized by 231 Pa. Code Rule 4012 (relating to protective orders). The Board may order a stay of proceedings with regard to depositions or discovery in such manner as is provided by 231 Pa. Code Rule 4013 (relating to stay of proceedings).

(f) Written requests for admissions before the Board shall be governed by 231 Pa. Code Rule 4014 (relating to request for admission).

(g) Subsections (a)-(f) supersede 1 Pa. Code §§35.145-34.152 (relating to depositions).

Proposed Changes

25 Pa. Code §21.111. Discovery

(e) Hearings or conferences to deal with matters pertaining to discovery, including disputes, may be held pursuant to §21.82. To the extent practical, Board may hear argument on discovery disputes by conference telephone call at the time the dispute arises and may issue rulings orally for later confirmation in writing in order to facilitate the prompt completion of the discovery proceeding.

(f) The provisions of subsections (a) through (e) of this section supersede the provisions of 1 Pa. Code §35.145 through §35.152 (relating to depositions).

Source: Developed by LB&FC staff from information obtained from the Environmental Hearing Board and the Pa. Code.

## APPENDIX V

### Motion Practice Rules

No specific rules currently exist for motion practice before the Environmental Hearing Board, although 25 Pa. Code §§21.61 and 21.64 do refer to motions filed in civil penalties and special actions. The General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.54 and §35.55 would apply to motion practice to the extent they were relevant to Board proceedings.

Below are proposed rules for motion practice currently under review by the Rules Committee and are being finalized for approval by the Environmental Quality Board in the promulgation process.

#### Proposed Rules

##### Section 21.71 General

(a) Except as provided in Section 21.71(c), all motions and answers to motions shall be in writing. Each motion and answer shall include a certificate of service, setting forth the date and manner of service and shall be signed by the party or the party's attorney.

(b) Answers shall be filed within 20 days of service of the motion unless otherwise ordered by the Board.

(c) Discovery motions may be made orally, either in person or by conference call, in the following circumstances:

(1) there is insufficient time for filing a written motion; and

(2) each party is given the opportunity to participate in the argument upon the motion; and

(3) the Board, in its discretion, agrees to consider such oral motion.

(d) After the pleadings are closed or the appeal is filed, but within such time as not to delay any required formal evidentiary hearing, any party may move for summary judgment or partial summary judgment.

#### Comment

It was the practice of certain parties to file a motion designated as a "Motion to Limit Issues" in proceedings before the Environmental Hearing Board which often was substantially equivalent to a motion for a partial summary judgment. The Rules Committee decided to recognize the practice but to standardize the nomenclature by designating such a motion as a motion for partial summary judgment.

Motion Practice Rules  
(continued)

Section 21.72 Contents

(a) Motions and answers shall contain:

- (1) A statement of the relief to be granted, denied or amended;
- (2) A statement of the facts relied upon to support the motion or answer;
- (3) A statement of the legal grounds for granting, denying or amending the relief requested which may be supported by an attached legal memorandum;
- (4) A proposed order; and
- (5) For uncontested motions, a certification by the party or the party's attorney that all parties have been advised of the motion and that none is contesting it.

(b) Except as provided in Section 21.72(c), factual assertions in motions and answers need not be verified. All motions and answers shall be signed by the party or its attorney whose signature shall constitute a certification that to the best of the signer's knowledge or information and belief formed after reasonable inquiry the motion or answer is well grounded in fact.

(c) Motions for summary judgment and partial summary judgment shall be supported and opposed in the same manner and in accordance with the provisions of Pennsylvania Rule of Civil Procedure 1035.

Section 21.73 Disposition

(a) Where the disposition of a motion requires the resolution of a contested assertion of fact, the Board may conduct a hearing, or require the parties to support their contested assertions in the manner provided in Pennsylvania Rule of Civil Procedure 1035, or otherwise require the parties to provide additional support for their factual assertions.

(b) Except as provided in Sections 21.73(e) and 21.74(4), in disposing of all motions the Board shall issue a written order briefly setting forth the reasons for its order or rulings. When disposing of oral motions considered pursuant to Section 21.71(c), the Board's written order shall also set forth the nature of the motion.

(c) Motions for summary judgment and partial summary judgment shall be dealt with and disposed of by the Board in the same manner as a court acting under and in accordance with the provisions of Pennsylvania Rule of Civil Procedure 1035. In disposing of motions for summary judgment or partial

Motion Practice Rules  
(continued)

summary judgment, or when disposing of other motions by issuing an order or decree from which an appeal may be taken pursuant to the Pennsylvania Rules of Appellate Procedure, the Board shall issue an opinion setting forth the reasons for its order or rulings.

(d) The Board, upon its own motion or the motion of any party, may schedule oral argument upon any motion.

(e) Motions to reconsider the disposition of a motion shall be filed within 20 days of the date of the Board's order disposing of the motion. No answer shall be required unless requested by the Board. Disposition of a motion for reconsideration shall be in accordance with the provisions of Section 21.73(a) through (d), except that the Board may issue an order denying a motion for reconsideration without setting forth in a written opinion or order its reasons for such denial.

Section 21.74 Requests for Continuances, Extensions and Other Scheduling Matters

Requests for continuances, or to extend or shorten a filing deadline, or to schedule a conference, or relating to other scheduling matters shall be made, opposed and disposed of as follows:

(1) Contested requests shall be made and opposed in the same manner and in accordance with the requirements of Sections 21.71(a) and (b) and 21.72 relating to motions and answers;

(2) Uncontested requests may be made by informal letter, provided that such letter indicates that the consent of all opposing counsel to the relief requested has been obtained;

(3) All requests shall state a specific period of time or due date for the action required or relief requested;

(4) All requests shall be disposed of by the Board in the same manner and in accordance with the requirements of Section 21.73 relating to motions and answers; except that the Board shall not be required to set forth in its order the reasons for its order or rulings.

Source: Developed by LB&FC staff from information obtained from the Environmental Hearing Board and the Pa. Code.

APPENDIX W

Sample Pages from 1978 Procedures Manual

# ENVIRONMENTAL HEARING BOARD

§ 1

## § 1. INTRODUCTION

### § 1.1. PURPOSE AND SCOPE

This coverage is intended primarily to assist attorneys who practice before the Pennsylvania Environmental Hearing Board. We anticipate that it will be particularly useful to those attorneys who only occasionally handle a case before the Board. Other persons with a strong interest in Pennsylvania environmental matters might also find it valuable.

Analytical reconciliation of decisions of the Board and of appellate courts as to practice and procedure before the Board and of the Board's Rules of Practice and Procedure<sup>1</sup> is not available elsewhere, and we hope to facilitate practice before the Board by providing such reconciliation.

Scope is limited to matters of practice and procedure. Substantive environmental law is not dealt with except in passing. One reason for this limitation of scope is that a significant proportion of cases within the Board's jurisdiction are dismissed on procedural grounds, usually upon the motion of the Department of Environmental Resources' attorneys. Those attorneys, who daily handle cases within the Board's jurisdiction are familiar with the Board's procedural rules and rulings. Often, it is difficult for counsel for other parties in environmental cases to obtain the Board's rulings (§ 7.1.3., *infra*) and even its Rules of Practice and Procedure.<sup>2</sup>

Detailed treatment is provided only where practice and procedure before the Board differs from practice and procedure generally followed in litigation before the Pennsylvania courts. Some of the Board's rules—for instance, the one regarding pleadings<sup>3</sup>—make applicable the Pennsylvania Rules of Civil Procedure where those rules do not conflict with the Board's rules. In such cases, this coverage does not treat the law under the Pennsylvania Rules of Civil Procedure, but merely notes its applicability.

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1. 25 Pa. Code, Chapter 21.\* Although the Board's rules are presently not published in the *Code* volume (note 2, *infra*) they are cited throughout in this manner, because the Board and appellate courts use this cite.

2. 25 Pa. Code, Chapter 21.\* That chapter is currently absent from the *Pennsylvania Code*; the *Code* states that the chapter is reserved. A copy of the Board's rules is appended to this textlet (Appendix B). Alternatively, copies are available upon request from the Environmental Hearing Board, Blackstone Building, First Floor Annex, 112 Market Street, Harrisburg, Pennsylvania 17101.

3. 25 Pa. Code § 21.18.\*



# ENVIRONMENTAL HEARING BOARD

## § 6

Appeal of DER action or decision  
(final action as described in  
§ 3.1.1.(b), *supra*)

Appellant presents case.  
Commonwealth presents case. (In  
practice the Permittee actually  
carries the burden if the permit  
is challenged by a third party. It  
is DER practice to suggest to  
permittees that they handle the  
defense of their own permits.)

### § 6.4. EVIDENCE

The Board's rules guarantee parties the right of presentation of evidence, cross-examination, objection, motion, and argument.<sup>21</sup> These rights are accommodated through trial-type procedures. "The Board [is] not bound by technical rules of evidence but all relevant and material evidence of reasonably probative value [is] admissible."<sup>22</sup> In practice, the Board is liberal about admitting evidence, as is the case in most administrative agency proceedings. For an objection to be sustained, the objection should be very specific and well reasoned.

#### § 6.4.1. Hearsay

A limited amount of hearsay is admissible in Board proceedings.† However, as under general principles of administrative law, the Board will not rely solely on hearsay when writing the final adjudication. Critical findings of fact cannot be based on hearsay.† Theoretically, appellate courts view the record on appeal as if the hearsay testimony were not there for the purpose of applying the substantial evidence test. However, it may be difficult or impossible for the appellate court to know what is hearsay unless it is pointed out to the court. One former Board Member stated the limitation on admissibility of hearsay in Board proceedings as follows: Where a matter is going to be an essential finding of fact and no other evidence will be introduced on the subject then the hearsay evidence will be excluded.†

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21. 25 Pa. Code § 21.33(a).\*

22. *Id.*

† See explanation, § 1.2.

## APPENDIX X

### Public Information Brochure of the Pennsylvania Bureau of Professional and Occupational Affairs

#### **The Bureau of Professional and Occupational Affairs**

Twenty six licensing boards within the Bureau of Professional and Occupational Affairs, Department of State, insure that professionals in 26 different fields meet standards of ethics and competence.

With the help of the bureau's staff, the boards approve and disapprove professional schools, process applications for licenses, conduct examinations, issue licenses and regulate licenseholders. The boards have the power to suspend and revoke licenses.

The boards are comprised of professionals in those fields and consumer members, who represent the public at large. The commissioner is a member of all the boards by virtue of the position.

The licensing boards are as follows, with the name of the profession first:

Accountancy, State Board of  
Architects Licensure Board, State  
Auctioneer Examiners, State Board of  
Barber Examiners, State Board of  
Chiropractic, State Board of  
Cosmetology, State Board of  
Dentistry, State Board of  
Professional Engineers, State Registration Board for  
Funeral Directors, State Board of  
Landscape Architects, State Board of  
Medicine, State Board of  
Nursing, State Board of  
Nursing Home Administrators, State Board of  
Examiners of  
Occupational Therapy Education and Licensure,  
State Board of  
Optometry, State Board of  
Osteopathic Medicine, State Board of  
Pharmacy, State Board of  
Physical Therapy, State Board of  
Podiatry, State Board of  
Psychology, State Board of  
Real Estate Commission, State  
Social Work Examiners, State Board of  
Speech-Language and Hearing, State Board of  
Examiners in  
Navigation Commission for the Delaware River  
Vehicle Manufacturers, Dealers & Salespersons,  
State Board of  
Veterinary Medicine, State Board of

#### **Information For Consumers**

- Be aware of what types of professionals must be licensed to practice in the state of Pennsylvania.
- Make sure that the professionals who serve you are licensed.
- **TO FILE COMPLAINTS**, - Call this toll free number: 1-800-822-2113.
- **TO MAKE INQUIRIES**, - Call: 1-717-787-8503

#### **HOW COMPLAINTS ARE HANDLED**

- To file a complaint, write the Bureau or call

**1-800-822-2113**

#### **The COMPLAINTS OFFICER**

receives the complaint and assigns it a case number.

#### **THE BOARD PROSECUTOR**

reads the complaint and determines:

- no violation of law; warrants no further action, or
- can be settled informally, or
- warrants a formal hearing.

**The BOARD** reviews the prosecutors' recommendations and:

- accepts the recommendation, or
- rejects the recommendation, or
- calls for further investigation before reaching a decision.

If the board calls a formal hearing then...

#### **The BOARD PROSECUTOR**

writes an administrative complaint which sets forth allegations, asks for a response, from the licensee and sets a formal hearing date.

#### **The BOARD or a HEARING EXAMINER**

holds a formal hearing in which evidence is presented, testimony is presented and the licensee can respond.

The board or hearing examiner issues an order calling for:

- dismissal of the charges, or
- suspension of license, or
- revocation of license, or
- reprimand
- monetary penalty or
- other actions allowed by law.

A decision by a hearing examiner may be appealed to the Board.

All orders may be appealed to  
**COMMONWEALTH COURT.**

Source: Bureau of Professional and Occupational Affairs.

## APPENDIX Y

### Public Information Brochure of the Ohio Environmental Board of Review

#### Environmental Board of Review

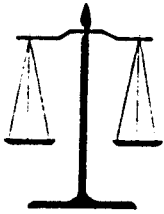
STATE OF OHIO

Richard F. Celeste, Governor

James L. Baumann, Chairman

Richard E. Midden, Vice-Chairman

Peter A. Precario, Member



Are you in disagreement with final orders of the Ohio Environmental Protection Agency? If so you should be aware that the laws of Ohio give you a place to get an impartial review of your objections. It's called the ENVIRONMENTAL BOARD OF REVIEW.

Whether you are a private citizen, government entity, small business, or a large corporation, the Environmental Board of Review exists to protect you against unlawful or unreasonable agency action in the enforcement of environmental laws. It seeks to resolve the tension between individual rights and the general goal of compliance with environmental laws.

#### WHAT IS THE ENVIRONMENTAL BOARD OF REVIEW?

The Environmental Board of Review is NOT a part of the Environmental Protection Agency. It is a separate organization with its own budget and staff.

The Board is composed of three citizens appointed by the Governor and confirmed by the Senate. Each member is an expert on pollution control and technology and environmental matters, one member is also a lawyer. This expertise enables the Board to review agency actions with an insight not normally available in a court of general

jurisdiction. The Board has state-wide jurisdiction. It is the highest administrative level of appeal of EPA actions. Appeal to the Board is provided in lieu of an appeal to a common pleas court, which has no jurisdiction over the OEPA.

#### WHAT KINDS OF ACTIONS CAN BE APPEALED?

Generally speaking, all final actions of the Director of EPA or local Boards of Health are appealable. You must be able to show that the action is unlawful or unreasonable. The terms "unlawful" and "unreasonable" are legal terms and an action which may seem unreasonable to you may not be unreasonable according to the legal definition of that term which the Board is bound to apply. Mere dissatisfaction with an agency action is not sufficient.

The following are examples of the type of actions most often appealed to the Board: a final denial of an air or water discharge permit or an air variance permit; a refusal of the EPA to act on a written complaint alleging a violation of the pollution laws and the granting of any of the aforementioned permits. Currently adopted regulations or special orders of the Director are also subject to appeal. One example of a special order is a sewer connection ban. The final granting or denial of a license for a solid waste disposal facility may also be appealed to the Board. Almost all final actions of the Director are appealable.

#### HOW DO YOU APPEAL TO THE BOARD?

(a) File a "Notice of Appeal" with the Board within 30 days time after notice of the OEPA final action. (You must have your notice stamped in the Board's office within 30 days. Appeals have been lost at the outset because the Ohio Revised Code permits no exception to this 30-day rule.)

(b) The notice of appeal must be specific and clear so the Board can understand your side of the dispute and what you feel the law requires the agency to do. The Notice must include a statement of: (1) the agency action being appealed; (2) the reasons you believe the action is improper; and (3) the action you desire the Board of Review to take.

(c) Attach a copy of the agency's decision or final action to your notice of appeal.

(d) Mail a copy of your notice to the other party, that is, the Environmental Protection Agency or the local Board of Health which made the decision, within 3 days after filing with the Board. (Every document which you send to the

Board must also be sent to all parties throughout the appeal process.)

#### THEN WHAT HAPPENS?

Once these steps have been taken, the appeal process has commenced. The EPA or Board of Health must send its records to the Board. You should review this "certified record" to be sure every document has been sent to the Board.

The Board will at this point schedule a hearing. Several things may happen before your case is heard. It may be necessary to file a brief stating the issues involved and your arguments. The Board may request you to appear for a prehearing conference in order to agree on witnesses and the procedure to be followed at the hearing. In addition, parties to the appeal may request information from each other. You will be asked to report progress that has been made toward settling the dispute.

#### WHAT IS THE HEARING LIKE?

The type of hearing depends upon the procedure followed by the Director or Board of Health in reaching the final decision being disputed.

If the agency held a full hearing before its action was finalized, the Board will review the evidence presented to the agency. No new evidence will normally be presented nor will witnesses testify. The parties must argue their case based on the facts presented to the agency below. This is referred to as a "record" hearing.

However, if the agency issued the action without a hearing, then evidence may be presented by both sides and witnesses may testify under oath. This is called a "de novo" hearing.

In either case, the Board will hear the arguments and/or evidence and will rule on whether or not the agency action was lawful and reasonable, or unlawful or unreasonable.

#### CAN THE BOARD CHANGE AN AGENCY DECISION?

Yes, under certain conditions. First it must be remembered that the Board is a reviewing body and, therefore, does not have the power to substitute its judgement for that of the agency. The decision of the EPA or Board of Health must be affirmed if the Board determines that the action taken was (1) legal and (2) that there was a reasonable factual foundation for the decision. If either one of these two

Source: Ohio Environmental Board of Review.

APPENDIX Z

Selected Comments from Appellants  
Concerning the Convenience of Hearing Locations

- We had more than 100 signatures requesting EHB to hold the hearings in \_\_\_\_\_ but it was held in Harrisburg. Local people should have been able to attend since the permits impacted on their lives. Distance was too great for regular attendance and work hours also create problems.
- The hearing was in Pittsburgh, a convenient location for the Board and the DER attorneys. The appeal pertained to a strip mine located in \_\_\_\_\_. All of the witnesses, including DER's, had to travel long distances, and the Commonwealth has offices in the pertinent location which could have been used..
- I believe it should be held so everyone is in the same room not in different cities.
- It was not convenient for the principal expert witness I wanted to call!
- I think it could have been held closer to the alleged violation.

Source: Responses to an LB&FC questionnaire of persons who have filed appeals with the Environmental Hearing Board.

APPENDIX AA

Environmental Hearing Board  
Number of Hearing Days by Location  
 (1984-87)

| <u>Year</u> | <u>Harrisburg</u> |                         | <u>Pittsburgh</u> |                         | <u>Norristown/<br/>Philadelphia</u> |                         | <u>Other</u> |                         | <u>Total<sup>1/</sup></u> |                         |
|-------------|-------------------|-------------------------|-------------------|-------------------------|-------------------------------------|-------------------------|--------------|-------------------------|---------------------------|-------------------------|
|             | <u>Cases</u>      | <u>Hearing<br/>Days</u> | <u>Cases</u>      | <u>Hearing<br/>Days</u> | <u>Cases</u>                        | <u>Hearing<br/>Days</u> | <u>Cases</u> | <u>Hearing<br/>Days</u> | <u>Cases</u>              | <u>Hearing<br/>Days</u> |
| 1984        | 8                 | 11                      | 23                | 41                      | 10                                  | 57                      | 4            | 8                       | 45                        | 117                     |
| 1985        | 6                 | 7                       | 32                | 73                      | 15                                  | 30                      | 6            | 14                      | 59                        | 124                     |
| 1986        | 22                | 57                      | 21                | 51                      | 4                                   | 9                       | 0            | 0                       | 47                        | 117                     |
| 1987        | 13                | 57                      | 10                | 19                      | 2                                   | 3                       | 2            | 3                       | 27                        | 82                      |

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<sup>1/</sup>The total number of cases is less than the sum of the columns because of some hearings on the same case being held at different locations or in more than one calendar year.

Source: Developed by LB&FC staff from information provided by the Environmental Hearing Board.

APPENDIX BB

Selected Provisions of the Liquor Code (Section 210)  
Establishing Restrictions on LCB Members and Employees

(d) No member or employe of the board or enforcement bureau may use his position with the board or enforcement bureau, or any confidential information received through his position with the board or enforcement bureau, to obtain financial gain, other than compensation provided by law, for himself, a member of his immediate family or a business with which he is associated.

(e) No person may offer or give to a member or employe of the board or enforcement bureau or a member of his immediate family or a business with which he is associated, and no member or employe of the board or enforcement bureau may solicit or accept anything of value, including a gift, loan, political contribution, reward or promise of future employment, based on an understanding that the vote, official action or judgment of the member or employe of the board or enforcement bureau would be influenced thereby.

(g) No former member or employe of the board or enforcement bureau may represent a person, with or without compensation, on any matter before the board or enforcement bureau for one year after leaving the board or enforcement bureau.

(k) No person having an adverse interest in a contract with the board or enforcement bureau may become an employe of the board or enforcement bureau until the adverse interest has been wholly divested.

(l) No member or employe of the board or enforcement bureau, except in the performance of his duties as such employe, may, for remuneration, directly or indirectly, represent a person upon a matter pending before the board or enforcement bureau.

(m)(2) Any person who violates the provisions of subsections (b), (d) or (e) shall be guilty of a felony and, upon conviction thereof, shall be sentenced to pay a fine of not more than ten thousand dollars (\$10,000) or to undergo imprisonment for not more than five (5) years, or both.

(3) Any person who violates the provisions of subsections (a) or (f) through (l) shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars (\$1,000) or to undergo imprisonment for not more than one (1) year, or both.

Source: PA Liquor Code, 47 P.S. §2-210.

APPENDIX CC

LAW OFFICES OF:

*Robert P. Ging, Jr., P.C.*

PROFESSIONAL OFFICE BUILDING  
430 BOULEVARD OF THE ALLIES  
PITTSBURGH, PA 15219

May 2, 1988

TELEPHONE  
(412) 471-3900

Richard D. Dario, Executive Director  
Legislative Budget and Finance Committee  
P.O. Box 8737  
Harrisburg, PA 17105-8737

Dear Mr. Dario:

As a follow-up to our previous conversations during recent Environmental Hearing Board hearings, I am writing this letter to you. In our discussions I indicated to you that any problems which exist with respect to practitioners and the Hearing Board are not inherently the fault or responsibility of the staff and members of the Hearing Board. It is my feeling that because of the legislative nature of the Hearing Board, that in many respects the Hearing Board, as structured, is not able to deal with the problems which face it.

As I stated to you at that time, the Environmental Hearing Board routinely hears hundreds of cases involving millions and millions of dollars, effecting the lives of every citizen in the Commonwealth of Pennsylvania. In addition to simply hearing cases which involve monetary determinations (permit cases) the Hearing Board also deals with matters which will effect the quality of life in Pennsylvania for years and years to come. I can honestly say that the cases tried before the Environmental Hearing Board are the most complex, involved, and difficult cases in any field to try.

This is so for a number of reasons, including the fact that once the trial is finished, the parties must then file Briefs and the Board must review the Briefs, the record, and file a proposed adjudication.

The process in and of itself is not as efficient as the process which we see in many of our Common Pleas Courts.

As an alternative to the structure of the Hearing Board, as currently constituted, I would like to suggest such things as the possibility that the Environmental Hearing Board be expanded to five, six or seven members, who would become judges in the same senses as judges of the Court of Common Pleas. Many judges of the Court of Common Pleas never deal with cases as complex as those

Richard D. Dario, Executive Director  
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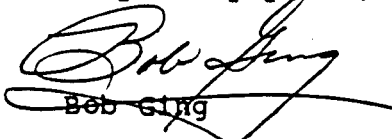
dealt with by the Hearing Board. Salaries should also be commensurate with those of the judges of Courts of Common Pleas, and the Board should be given the power to enforce its own subpoenas, hold parties in contempt, and other traditional judicial functions which it currently cannot do. The Board could be divided up on a regional level, such as the regional DER offices, or could be an adjunct to the Commonwealth Court. In that context, the Environmental Hearing Board could be the Common Pleas level for environmental disputes of the Commonwealth Court. This would be consistent with the judicial structure in Pennsylvania today where the Commonwealth Court primarily reviews decisions arising from governmental agencies. Given the fact that there are five or six hundred appeals per year taken to the Environmental Hearing Board, given the fact that I have rarely encountered a hearing which lasts less than a week, this would certainly expedite the handling of cases, eliminate any docket backlog, and give the dedicated staff the type of help which they need.

So, conceptually, as I see it from the standpoint of a practitioner who practices routinely before the Hearing Board, the problem we are faced with is a quasi-judicial board performing judicial functions, on a diminimous budget, and subject to review by the Executive Branch of the government. As such, this peculiar type of a hybrid institution, funded by DER, with rules approved by the Environmental Quality Board, which is nevertheless judicial in character, is in many respects, the equivalent of a judicial dinosaur. An administration dedicated to preserving the quality of life in Pennsylvania must deal with the problem such as we are faced within the Hearing Board today.

By the same token, I must say that Chairperson Woelfling, Secretary M. Diane Smith, and their respective staffs, do a far superior job in terms of dealing with the prospective problems which confront them, than any forum before which I have practiced. It is the cumbersome nature of the administrative procedure which in many respects causes backlogs, lengthy time periods before decisions, and the other problems which we are faced with. By making the Hearing Board the equivalent of a Court of Common Pleas, and avoiding administrative procedure, many of the problems which contribute to lengthy cases and untimely delays could be eliminated. The same staff which exists now, in the proper framework, I am certain could cure any of the problems which may exist in the Hearing Board today.

Should you have any further questions or wish to discuss this matter, please feel free to contact me.

Very truly yours,

  
Bob Gling



APPENDIX DD

Summary of Contacts Made During Study

As part of the performance audit of the Environmental Hearing Board, the auditors established contact through meetings, interviews, questionnaires, form letters, correspondence, and/or telephone contact with the following at least on one occasion:

1. EHB Members<sup>1/</sup>
2. EHB Employees<sup>1/</sup>
3. EHB Rules Committee Members<sup>1/</sup>
4. EHB Appellants (Sample of open and closed cases)<sup>1/</sup>
5. DER Officials and Employees (including a Deputy Secretary, Counsels at several levels and a Regional Director)
6. Organizations representing entities with members having or potentially having business before the EHB<sup>2/</sup>
7. Legislators and legislative staffers
8. Private attorneys having business before the Board
9. Former state officials familiar with the creation of the EHB
10. Federal officials
11. National associations with environmental interest
12. Officials of environmental agencies in other states
13. PA officials of several agencies aside from DER

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<sup>1/</sup>Contacted by questionnaire.

<sup>2/</sup>Contacted by form letter.

APPENDIX EE

Information About the Questionnaire Process

One of the audit activities during the preliminary survey phase was the development and distribution of questionnaires to persons and organizations involved with the knowledgeable about the Environmental Hearing Board. The purpose of these questionnaires was to solicit comments from individuals responding as to the strengths, weaknesses, problems, and perceptions of the Environmental Hearing Board. Summarized below are the number of questionnaires sent to each category of persons, number of questionnaires received as of June 10, 1988, and response rate.

| <u>Recipient Group</u> | <u>Number Sent</u> | <u>Number Received</u> | <u>Response Rate</u> |
|------------------------|--------------------|------------------------|----------------------|
| EHB Members.....       | 3                  | 3                      | 100%                 |
| EHB Staff.....         | 7 <sup>a/</sup>    | 5                      | 71%                  |
| Appellants.....        | 280 <sup>b/</sup>  | 39                     | 14%                  |
| EHB Rules Committee.   | 22 <sup>c/</sup>   | 8                      | 36%                  |

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a/EHB staff as of March 9, 1988.

b/Random sample of appeals filed with the EHB from 1982 to 1987.

c/Does not include EHB Members who are also EHB Rules Committee Members.

APPENDIX FF

Response to this Report



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
101 South Second Street  
Suites Three - Five  
Harrisburg, PA 17101

(717) 787-3483

M. DIANE SMITH  
SECRETARY TO THE BOARD

June 23, 1988

Mr. Richard D. Dario  
Legislative Budget and  
Finance Committee  
Room 400, Finance Building  
Harrisburg, PA 17105-8737

Dear Mr. Dario:

Thank you for giving the Environmental Hearing Board the opportunity to review the Legislative Budget and Finance Committee's draft report concerning its performance audit of the Board. Messrs. Roth, Myers, and I have reviewed the draft in detail and have several comments to offer.

It is suggested on pages 13-14 of the draft that Board funds be used for mediation and that the Board request funding from the General Assembly for a mediation program. Board funds should not be used for mediation unless Board personnel are involved in the mediation (e.g. a Board hearing examiner acting as a mediator) or there is a dedicated source of funding for mediation (e.g. a special fund created for receipt of filing fees) which will not divert the Board's limited financial resources from other competing needs which may be more pressing and may result in a greater public benefit if addressed. Furthermore, as the Committee notes, environmental mediation is still very much an evolving area. In light of these factors, an experimental program may be more appropriate at this stage in the Board's development.

The Board concurs with the Committee's recommendation in Section II-E of the draft report that the Board be given authority to collect filing and other fees. However, unless those fees go into a dedicated fund, they provide little direct benefit to the Board. As suggested above, such a special fund could be utilized for mediation services.

The Committee makes the observation in Section II-I of the draft report that the Board doesn't distribute the 1978 publication "Environmental Hearing Board Practice and Procedure" by Bak et al. There is a simple reason for this - the pamphlet must be purchased from its publisher, the George T. Bisel Company. It is the Board's understanding that the Bak publication will be updated.

Finally, with respect to Section II-K of the draft report, concerning location of hearings, 25 Pa.Code §21.96 does not state that the Board hearings

June 23, 1988

will be held at the Commonwealth facility nearest the location of the complaint. Rather, that rule gives the Board the discretion to schedule the hearing at such locations.\* Exhibit H indicates that 88 days of hearings were conducted in the Philadelphia area in 1984-85; it should also be noted that the Board Member conducting those hearings was headquartered at his home in Doylestown and, therefore, the scheduling of the hearings in that area was as much for the convenience of the Board as the parties.

The Board believes that the Committee's draft report comprehensively identifies the Board's problems and provides constructive and practical solutions. The Board has benefited from the interplay with the audit team and commends them for their thorough and highly professional work. We do note that the many excellent recommendations in the report will be meaningless unless there is an on-going commitment to adequately staff and fund the Board. The Board staff's professionalism and dedication to public service have carried it through some very difficult years, but these qualities, alone, cannot realistically be expected to sustain the Board in its future efforts to carry out its statutory mission.

Sincerely,

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
Maxine Woelfling, Chairman

cc: Honorable William A. Roth  
Honorable Robert D. Myers  
Honorable Arthur A. Davis

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\*/Correction made in final report.



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Post Office Box 2063  
Harrisburg, Pennsylvania 17120

JUN 28 1988

787-2814

The Secretary

Mr. Richard D. Dario  
Legislative Budget and  
Finance Committee  
Room 400, Finance Building  
Harrisburg, PA 17105-8737

Dear Mr. Dario:

Thank you for providing the Department of Environmental Resources the opportunity to comment on the Legislative Budget and Finance Committee's draft report on the performance audit of the Environmental Hearing Board.

The Department commends the Committee's staff for this thorough and professional examination of the Environmental Hearing Board, and for the comprehensive recommendations offered by the Committee. The Department would like to make several comments regarding the findings and recommendations of the Committee.

The Department agrees the case backlog problem at the EHB is serious. We have taken several steps to address this problem.

Governor Casey recommended additional staff be added to help the EHB in the last two budget requests. A total of three positions were recommended and an additional \$251,000 to finance a new computer system for the Board.

The Department notes that several of the Committee's recommendations are contained in House Bill 1432, a bill the Department supports as a means to address the Board's problems.

In particular, House Bill 1432 provides for the voluntary mediation of cases and the establishment of an Environmental Hearing Board rules committee--two recommendations emphasized in the Legislative Budget and Finance Committee's report.

These are concepts which the Department endorses, provided that the procedures established by the rules committee will be subject to public comment and regulatory review.

RECEIVED JUN 28 1988

The Department once again thanks the Legislative Budget and Finance Committee for the opportunity to review this report and offer comments on its conclusions.

Sincerely,

A handwritten signature in cursive script that reads "Arthur A. Davis". The signature is written in black ink and is positioned above the typed name.

Arthur A. Davis  
Secretary

Department of Environmental Resources