



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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January 7, 1998

Brian J. Preski, Chief Counsel
House Judiciary Committee
House Box 202020
Room 18 Capitol Annex
Harrisburg, PA 17120-2020

Re: Subcommittee on Courts
Public Hearing -- House Bill 1939 (Armstrong)
Office of Administrative Hearings

Dear Mr. Preski,

Thank you for your letter of December 23, 1997 advising me of the time and place of the public hearing on this Bill. These are the comments of the Environmental Hearing Board ("Board") on this Bill which envisions the establishment of an Office of Administrative Hearings ("Office") to conduct fair and impartial hearings in contested cases where there is a need to separate the investigatory or prosecutorial function from the adjudicatory function.

The Board has served this function for more than 25 years in reviewing the regulatory actions of the Department of Environmental Protection ("Department") in the highly controversial area of environmental protection. The Board believes subjecting it and the Department to the proposed legislation would be a disastrous backward step for environmental regulation in Pennsylvania adversely affecting the public and the legal profession.

Because of the extraordinary need to preserve the independence of the members of this Board in the highly politicized field of environmental regulation, the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P. S. §§ 7511-7516, established the Board as an independent quasi-judicial agency. To assure the Board's independence, the Act provides that its members are appointed, with the consent of the Senate, to a fixed term of six years. To assure that the Board can attract members who are highly qualified in the field of Environmental Law and have the requisite judgment to exercise the Board's independence, the Act provides that its members shall receive the same salary as the members of the Public Utility Commission.

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The Environmental Hearing Board Act grants the Board many of the powers of a Pennsylvania Court in the review of actions of the Department. For example, section 4 of the Act gives the Board the power to issue a supersedeas of the Department's actions based on standards applicable to preliminary or permanent injunctions in Pennsylvania Courts. Under the authority granted by the Act, the Board has promulgated regulations, and has exercised its powers, for the issuance of a temporary supersedeas.

The Board also exercises legislative-like powers in that it is empowered to base its judgments on the basis of the evidence before it whether or not that evidence was available to, or considered by, the Department. *Warren Sand & Gravel, Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975) This is particularly important in the consideration of appeals from third parties who only rarely have the opportunity to participate in the proceedings before the Department.

Other legislation has granted jurisdiction to the Board over enforcement actions instituted by the Department. Some of the substantive environmental legislation grants the Board the power to assess penalties in the Department's enforcement actions and also gives the Board jurisdiction over citizen suits against the Department. In addition, the Hazardous Sites Clean Up Act (HSCA), which is the state equivalent of the federal Superfund Act, grants jurisdiction to the Board over the Department's actions to recover response costs. The Commonwealth Court recently held that it does not normally have jurisdiction over these proceedings and has transferred them to the Board for resolution. The Board also has the power to award counsel fees to litigants who appear before it under the Costs Act and under substantive environmental legislation.

The Board also has the power to adopt its own rules of procedure with the advice and guidance of a Procedural Rules Committee established by the Environmental Hearing Board Act. The Board has had its own rules of procedure over the 25 years of its operations. They have been amended twice in the past three years to make the Board's procedures similar to those in existence in the Pennsylvania Courts, and a third rulemaking is now in progress to make further improvements in its rules.

As stated above, the Board believes that subjecting it and the Department to the proposed legislation would be a disastrous backward step for environmental regulation in Pennsylvania. Unlike the Board, only the Chief Judge of the proposed Office would have a fixed term of office. In the highly politicized area of environmental disputes, a fixed term for all judges in environmental disputes is an essential.

The proposed Office would not have the power to issue a supersedeas of the Department's actions. This is critical in environmental disputes before the actions taken under the Department's authority become an unalterable status quo. That power is important to industry to protect it against unreasonable actions and to third parties whose interests may be adversely affected before discovery can be conducted and a hearing on the merits held.

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Most importantly, the proposed Office would not have the power to entertain enforcement actions or assess penalties under substantive environmental legislation. Adoption of the proposed legislation would require wholesale amendments to the state's environmental statutes to enable the proposed Office to entertain citizen suits and third party appeals and to render judgments for response costs under HSCA. In addition, some provision would have to be made for oversight of the operation of the proposed Office by the federal Office of Surface Mining as is required under the federal Surface Mining Control and Reclamation Act.

The application of the proposed legislation to the Board can only result in imposing large, wasteful costs on the Commonwealth and parties involved in environmental regulation in order to bring the proposed Office up to the Board's high standards. The Board has developed rules of procedure over the years of its existence which facilitate disposition of matters before it tailored to the resolution of complex scientific disputes which are the core of environmental litigation. It has rarely applied, or needed to apply, the General Rules of Administrative Practice and Procedure which would be the rules of procedure in the proposed Office. In fact, most of the Board's rules specifically supersede the General Rules of Administrative Practice and Procedure. The proposed Office would have to create entirely new Rules of Procedure to deal with the resolution of environmental litigation. Because the proposed and final new rules would have to be approved by the IRRC after previous review by legislative committees, the General Counsel's Office and Attorney General's Office, many years would pass before appropriate Rules of Procedure for environmental litigation could be developed. The proposed legislation does not give the proposed Office the advantage of a Procedural Rules Committee to guide it in the development of better rules of procedure.

The Board's rules of procedure have been interpreted by published decisions of the Board and of the Commonwealth Court over the 25 years of the Board's operations. For the convenience of the practicing Bar, the Board has published over the 25 years of its operations its opinions in readily available book form. It also publishes a Practice and Procedure Manual containing references to the Rules of Procedure and the leading decisions of the Commonwealth Court and of the Board with respect to practice and procedure before the Board. I enclose a copy of this practice guide for your consideration. The Board is now working on a project to make all of these materials available to the practicing bar and other members of the public on an Internet site. All of this precedent would be lost if the proposed legislation were to be applied to the operations of the Department and of the Board.

The Board is now functioning well and has eliminated all of its backlog from the past. Further information about the Board can be obtained from its last two annual reports which I enclose. You may be particularly interested in the high qualifications of the Board's members and of the importance of the Board in the history of environmental regulation in Pennsylvania as reported by former State Representative Franklin L. Kury which immediately precedes the Board's summary of its history in the Fiscal 1997 Report.

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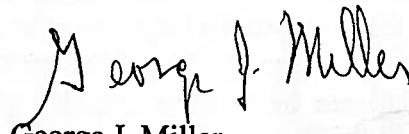
We interpret the language of the present Bill to *exclude* the Board and other existing independent quasi-judicial agencies from its provisions because, where the law has already separated an agency's investigatory or prosecutorial function from its adjudicatory function, it is not necessary to do so again. With respect to the Board, Section 3(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §§ 7511-7516, established the Board as an independent quasi-judicial agency with jurisdiction over final actions of the Department of Environmental Protection (Department).

Other provisions of the Bill indicate that the Board is excluded from its coverage. For example, Section 102 of the Bill defines a "contested case" as: "A proceeding before an agency that involves the personal or property rights of a person subject to the jurisdiction of the agency *and in which there are prosecutorial or investigatory functions and an adjudicatory function to be performed by the agency under the laws of this Commonwealth.*" Because the laws of this Commonwealth do not give the Department adjudicatory functions to perform, the Department's proceedings would never meet the definition of a "contested case" and, therefore, would never be referred to the proposed Office. Instead, under the Bill, the Board would continue to perform its adjudicatory function in connection with the Department's actions.

Nothing in the Bill as presently drafted, however, explicitly excludes the Board or the Department from the scope of its provisions. We would be pleased to submit amending language to so exclude the Board and the Department from coverage.

Please let me know if you need any further information.

Sincerely,



George J. Miller
Administrative Law Judge
Chairman

Enclosures

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