ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of November 10, 2021

Attendance:

The Environmental Hearing Board Rules Committee met by WebEx videoconference at 10:00 a.m. on November 10, 2021. Chairman Howard Wein presided. In attendance were the following Committee members: Vice Chair Phil Hinerman, Gail Conner, Jean Mosites, Diana Stares, Douglas Moorhead, and Matt Wolford. Attending from the Environmental Hearing Board (Board) were the following: Chairman and Chief Judge Tom Renwand, Senior Counsel Maryanne Wesdock, Assistant Counsel Eric Delio, and Assistant Counsel Alisha Hilfinger, who took the minutes.

Ms. Stares indicated that she has recently sent a letter to the Board that conveyed the Secretary of the Department of Environmental Protection (the Department) has appointed Doug Moorhead as the second Department representative to the Environmental Hearing Board Rules Committee (the Committee). Ms. Stares stated that if there was any voting that would take place during the meeting, Mr. Moorhead should be able to participate in that vote as the Secretary's letter would be coming through by the end of the day. No Committee members opposed this suggestion.

Ms. Wesdock introduced Ms. Hilfinger to the Committee members and explained that Ms. Hilfinger would be assuming the duties of taking the minutes due to Ms. Wesdock's recent carpel tunnel surgery.

Minutes of September 9, 2021 Meeting:

On the motion of Ms. Mosites, seconded by Ms. Stares, the minutes of the September 9, 2021 meeting were approved.

Update on Rules Package:

Ms. Wesdock provided an update on Rules Package 106-13 (the Package), which is now in the final rulemaking stage. The Package was recently approved by the Governor's Office of Policy. The Package will now be sent to the legislative committees, and then go to IRRC for a hearing. Ms. Wesdock explained that there are some logistical issues in sending the Package to the legislative committees and she is currently working through them. The trek through the legislative committees is a complicated process where the Package will go to both the Senate Environmental Committee and the House Environmental Committee and has to be sent to the majority chair and the minority chair of these committees. Some committee chairs will accept electronic delivery while others want an in-person delivery which has to take place on the same day. This requires checking in advance that there will be someone present to accept the rules package. Ms. Wesdock has begun to coordinate this process. Ms. Wesdock explained that the Package has 20 days with the legislative committees, 10 days with IRCC, followed by a hearing with IRCC, and finally, it goes to the Attorney General's Office for 30 days.

A discussion ensued as to whether it would be appropriate to advise the Environmental Law Section (the Section) as to how lengthy a process a rules package is so that the Section understands that any changes the Rules Committee decides to make, take several years to officially enact. Mr. Wein stated that he felt the environmental bar should be aware of how the Rules Committee works on and puts together rules packages, in that they go to the Environmental Hearing Board (the Board) for approval, and then there is, at the least, a two-year process to pass such changes. Ms. Wesdock stated that she could make an announcement at the PBA Environmental Law Section meeting next week and inform the Section that the Rules Package is close to finalization, inform all in attendance what rules changes are covered by the current package, and that to get the Package through was a two-year process.

ESI Discovery:

At the previous meeting, Ms. Mosites volunteered to review the ESI sample forms on the website and to draft revised language for paragraph 12 of Prehearing Order No. 1 (PHO1) pertaining to ESI plans. The impetus of these revisions stemmed from previous discussion about the PHO1.

Ms. Mosites stated that the Rules Committee has previously discussed the language regarding electronic discovery found within the PHO1 and how that language might be improved upon to reflect current practices and to ensure the language is not creating an obstacle to efficient discovery. Ms. Mosites opined that the Committee has much more experience regarding electronic discovery than when the sample ESI plans on the Board's website were drafted. Ms. Mosites observed that electronic discovery is a mainstay of what attorneys do in the present day and electronic discovery, whether it be emails, word documents, pdfs, all which are electronically stored, make up the basis of discovery. Because ESI is almost certainly a given in any case, Ms. Mosites felt the language under paragraph 12 of the PHO1 stating "if the parties believe that discovery of ESI is reasonably likely then they should meet and confer about a plan," is not the best suitable trigger under today's realities. Ms. Mosites posed the following questions: When is an ESI Plan really needed? What is it that warrants spending the time to negotiate an ESI plan when such negotiations can take time out of the discovery period?

Ms. Mosites reflected on comments Mr. Moorhead made during the last Committee meeting. Parties do not necessarily want an ESI plan unless one is needed. A plan may be needed if it is a complicated matter, if there are many custodians, if the case is anticipated to be long in duration, and/or if there will be substantial time and resources spent on ESI.

Ms. Mosites provided a redline version of the PHO1 that revised paragraphs 11 and 12. The current version of paragraph 11 in the PHO1 reads:

> If the parties believe discovery of electronically stored information is reasonably likely to be sought in this matter, not later than 45 days after the issuance of this order, all parties shall confer and discuss a plan for conducting electronic discovery.

Ms. Mosites' suggested revision of paragraph 11 is as follows:

> Not later than 30 days after the issuance of this order, all parties shall confer and discuss whether the parties believe discovery of electronically stored information requires an ESI plan.

The current version of paragraph 12 of the PHO1 reads:

> Not later than 14 days after the conference under Paragraph 11, the parties shall submit to the Board for its consideration a proposed plan for conducting electronic discovery along with a proposed order, unless all parties agree that a proposed plan for conducting electronic discovery is not necessary.[1]

Ms. Mosites' revised version of paragraph 12 is as follows:

> If the parties agree that an ESI plan is necessary, not later than 14 days after the conference under Paragraph 11, the parties shall submit to the Board for its consideration a proposed plan for conducting electronic discovery along with a proposed order.

Ms. Mosites explained that she eliminated the language "[i]f the parties believe discovery of electronically stored information is reasonably likely to be sought in this matter" in paragraph 11 because she believes that is not the scenario that should trigger an ESI plan. Because ESI is nearly inevitable in all cases, Ms. Mosites stated that parties should only need to meet and develop ESI plans when they believe that discovery of ESI *requires* a plan. Ms. Mosites emphasized that the concept of these revisions is to change the trigger for an ESI plan because it is not a question

[1] Paragraph 12 goes on to list items that should be included in a plan for ESI. Those subsections are not included above as they are not relevant to the substantive issues the Committee discussed.

of whether ESI is going to be discovered, it is a question of whether a plan to manage ESI is needed.

Ms. Mosites further explained that in her redline version of paragraph 11, she revised the timeframe for conferring about the necessity of an ESI plan from 45 days to 30 days, with the intention of cutting down on the time that could be taken away from the discovery period. Ms. Mosites also suggested changing paragraph 12 of the PHO1 to begin with, "[i]f the parties agree that an ESI plan is necessary." She explained that by reorienting this paragraph in this way, it could clarify under which circumstances that parties need to submit a plan to the Board for consideration and approval. Currently, the language in paragraph 12 contains a similar clause that reads "unless the parties agree that it is not necessary," which appears at the end of the sentence. Ms. Mosites believes that the meaning of paragraph 12 would be made clearer with functionally equivalent language at the start of the paragraph.

Mr. Duncan commented that in previous Committee meetings, there was general agreement that an ESI plan was not needed in every scenario and accordingly the language in the PHO1 was changed. The intent for the change was that any one party could demand an ESI plan. Mr. Duncan indicated that he was agreeable to the suggested changes. He stated that he would, however, prefer to keep a 45-day deadline rather than a 30-day deadline to confer about the necessity of an ESI plan. Mr. Duncan explained that having a 30-day deadline could create some confusion and logistical difficulties. Parties are required to participate in a meeting to confer about settlement 45 days after the issuance of the PHO1 pursuant to paragraph 5 in the PHO1. Mr. Duncan explained that it can take time to organize the settlement meeting and may create the potential for confusion at the first 30-day meeting on ESI as to whether the parties will discuss settlement as well, and additionally, it creates the potential for having two meetings which can be challenging at the

beginning of an appeal. Ms. Mosites expressed that she shared the exact concerns that Mr. Duncan raised and asked if there was a willingness to change the settlement conference from 45 days to 30 days so both subjects could be covered in one meeting.

Mr. Delio raised the concern of how moving both meetings to 30 days could affect third-party appeals. Third-party appeals involve another entity that may have 30 days to enter into a case from the date of service of the Notice of Appeal (NOA). Mr. Delio indicated that if both the settlement and ESI meetings were moved up to 30 days, that timeline could negatively affect parties that find themselves in third party circumstances. Mr. Duncan agreed with Mr. Delio's concern and expressed he was recently involved in a matter where a similar situation arose.

Mr. Moorhead thanked Ms. Mosites for the changes she made and stated that the changes reflected the substantive revisions the Committee had previously spoken about. Mr. Moorhead agreed with concerns regarding timing and stated that the ESI conference and the settlement discussions should take place at the same time, specifically the 45-day mark. Mr. Moorhead also suggested that the date for the submission of an ESI agreement should be made more certain. Mr. Duncan agreed that that would be a good idea because, from the Board's perspective, it is trying to set an outside deadline for when the parties are going to submit an ESI plan and not to penalize or disincentivize the parties who would like to meet earlier to discuss the plan. Mr. Duncan recommended changing the revised language in paragraph 12 to read, "If the parties agree that an ESI plan is necessary, not later than 60 days after the issuance of this Order, the parties shall submit to the Board for its consideration a proposed plan for conducting electronic discovery along with a proposed order." Ms. Mosites, along with Ms. Wesdock and Judge Renwand, were in favor of the suggested change. Judge Renwand pointed out that extending the deadline to submit an ESI

plan to 60 days could cut into the parties' time for conducting discovery, but also noted that the Board frequently grants extensions of discovery in the normal course of most cases.

Mr. Wein pointed out that a 60-day deadline for the submission of an ESI plan also corresponds with the timeframe found in paragraph 7 of the PHO1 which is the deadline for an alternative schedule to be submitted. Mr. Wein stated that the initial 45-day conference would give the parties an opportunity to discuss several things, including an alternate discovery schedule, whether an ESI plan is required, and settlement. This would also allow the parties to present everything to the Board at one time.

Mr. Moorhead explained that in his experience, he has only been on one case that needed an extensive ESI agreement. During that case, actual written discovery went out prior to the ESI agreement being in place. The ESI agreement was negotiated in the context of knowing what the first round of initial discovery was seeking. Mr. Moorhead stated that it was possible to get some written discovery served before a full discussion of the ESI plan took place and that seeking discovery first could even help in giving context to a potential ESI plan. Judge Renwand agreed that parties could conduct some discovery before an ESI plan was in place. He stated that the rules for an ESI plan are not meant to be a hinderance and add unnecessary expenses or create difficult hoops to jump through. He acknowledged that the attorneys are more familiar with the discovery process than the Board, but the Board wishes to establish a smooth and efficient system for those appearing before it.

Mr. Wein suggested adding a footnote to the PHO1 that would explain the confluence of these several points. Mr. Wein explained that the footnote could recognize that all three of these issues could be discussed at one meeting and instruct the parties to report back to the Board within 60 days of the issuance of the order. Ms. Mosites alternatively suggested that paragraph 5 could

be revised, which refers to conferring about settlement and notifying the Board of that conference, to include language that suggests to the parties that the settlement meeting could be combined with the conferences required by paragraphs 7 and 11. Ms. Wesdock voiced her support of this suggestion. Mr. Delio pointed out that the deadline for reporting to the Board found in paragraph 7 would need to be changed from 50 days to 60 days to accomplish the confluence that Mr. Wein suggested. Mr. Wein agreed and asked if there were any issues with such a change. Judge Renwand responded that he saw no problem with that change.

Mr. Wein noted the existence of some stylistic inconsistencies in the PHO1, and suggested highlighting all of the deadlines within the order rather than just a few. He pointed out the timeframes in paragraphs 7, 11 and 12 should be bolded like other deadlines appearing throughout the order. Ms. Mosites moved that the revisions the Committee discussed in paragraphs 7, 11, and 12 with respect to meetings and ESI plans be recommended to the Board for adoption in its PHO1. Ms. Stares seconded the motion. None opposed or abstained from the motion.

Ms. Mosites intended to present her suggestions regarding the ESI model plans available on the Board's website. She noted that this discussion would take some time and the Committee had already spent considerable time on her first line of discussion involving ESI. Ms. Mosites recommended that the Committee members in attendance take the ESI model plans to their IT personnel and see if they had any suggestions that they could offer based on the current understanding of how information is stored, obtained, and produced as opposed to the understanding in place at the time when these models were first drafted. While Ms. Mosites recommended withholding a full discussion of the ESI model plans until the next Committee meeting, she suggested that she did not see a need for three different model plans that are currently on the Board's website. Ms. Mosites explained that one of the model plans included custodians in

the language while one did not, and the other was created specifically for third party appeals. Ms. Mosites took the most thorough and complete model ESI plan, which was the one pertaining to third party appeals, and suggested revisions to it. Ms. Mosites recommended limiting the model ESI plan to one on the Board's website and suggested that the Committee members revisit this issue once conferring with their IT personnel to decide whether the model plan could be improved.

Mr. Hinerman recalled that there were several people involved in producing the model ESI plans. He stated that in creating the plans, there was some hesitation as to whether it should be done because of the concern that there would be parties that would adopt a plan merely because it was available on the Board's website. This concern was why there were disclaimers added to the model plans. Mr. Hinerman explained that the plans are there for people who may know very little about the subject of ESI. The currently available model ESI plans were accepted by the Board and the Department. Mr. Hinerman opined that if the plans need to be changed, it is likely because electronic systems have changed and that those plans were created based on how systems worked at the time of their drafting.

Through recent experience, Ms. Mosites recognized a potential gap in the model ESI plans concerning custodians and the collection of ESI. Ms. Mosites explained that there was no obligation or clarity about who would be responsible for obtaining ESI from shared servers. Ms. Mosites provided the example that the Department uses SharePoint when it drafts memos or letters. She explained that the emails sent back and forth provide a link to their work products rather than an attachment and it is not clear that custodians have an obligation to access shared servers to obtain documents that would be responsive to discovery requests. Ms. Mosites pointed out that there are references to shared data sources in the model ESI plans but there is no reference to who is responsible for obtaining the ESI. Ms. Mosites requested that Mr. Moorhead and Ms. Stares

confer with their IT personnel at the Department and review her recommendations to help clarify the gap. Mr. Moorhead indicated that he was aware of several shared data sources and that he would look into them before the next meeting and inquire as to how the Department allocates responsibility in retrieving ESI from those shared sources.

Mr. Hinerman stated that the Committee's private practitioners would also look into this issue and weigh in once conferring with IT personnel. Mr. Wolford stated that he would reach out to several clients to inquire as to how they store their information because it is more important to gain an understanding for him as to how his clients handle ESI. Mr. Wein stated that in the normal course of litigation, a hold letter is sent out to the client and then there is communication between the client and the counsel as to what kind of information the client has, how it is stored and then to contemplate how that fits into a potential sample plan and then making it an actual plan. The Committee members resolved to return to this subject at the next meeting after conferring with their IT personnel and clients.

Schneiderwind/Notice to Interested Parties

In previous Rules Committee meetings, a subcommittee was created and was tasked to review the topics of "notice to interested parties" and "essential parties to an action." The subcommittee consisted of Mr. Wein, Mr. Wolford, Mr. Delio, Ms. Wesdock, Mr. Moorhead and Ms. Stares. Mr. Wein reported that since the last Rules Committee meeting, the subcommittee had participated in several calls to discuss ideas as to how to best address the *Schneiderwind* issue. Mr. Wein explained that the group agreed that the issues of subject matter jurisdiction and due process would not be addressed in these discussions except to the extent that providing adequate notice and opportunity to participate relates to due process in relation to *Schneiderwind*. Mr. Wein stated that the first item to discuss at this Committee meeting would be a definition that Mr. Delio

suggested. Mr. Wein noted that Mr. Delio was very helpful in this process and was an excellent "scrivener."

Mr. Delio recapped that the impetus for the subcommittee was a previous issue raised by Mr. Wolford. Mr. Wolford observed that in one of his cases, a municipality should have been served, but that the municipality was not captured in the current Notice of Appeal rule at 25 Pa. Code § 1021.51, and additionally, this particular case was not a third-party appeal. Mr. Wolford's client was the party to whom the Department's action was directed, but he noticed that the municipality could be affected and should have notice of the case. Mr. Delio explained that the subcommittee eliminated and changed references within § 1021.51 that pertained to "third-party appeals" and "recipient of an action" because of concerns the current language could be unfairly restrictive as to who should receive notice.

The current version of § 1021.51(f)(1)(iv), which refers to third-party appeals, reads as follows:

> In a third-party appeal, the appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on the recipient of the action. The service shall be made at the address in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

The proposed revision of this section reads as follows:

> The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve by facsimile or overnight mail a copy on any potentially adversely affected persons as identified in subsection (h)(1)-(3). The service shall be made at the address in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the person.

The current version of § 1021.51(f)(2)(vi)(C) is as follows:

> In a third-party appeal, the recipient of the action. The service shall be made at the address in the document evidencing the action by the

> Department or at the chief place of business in this Commonwealth of the recipient.

The proposed revision of § 1021.51(f)(2)(vi)(C) reads as follows:

> Any potentially adversely affected persons as identified in subsection (h)(1)-(3). The service shall be made at the address in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the person.

Mr. Delio presented further proposals made by the subcommittee to several definitions in § 1021.2. The current definition of third-party appeal reads: "The appeal of an action by a person who is not the recipient of the action." The suggested revised version reads, "The appeal of an action by a person to whom the action is not directed or issued." The subcommittee also recommended changing the definition of "permittee" which currently is defined as "[t]he recipient of a permit, license, approval or certification in a third-party appeal," to "the recipient of a permit, license, approval or certification issued by the Department."

Mr. Delio explained that after the proposed change to the definition of "permittee" was made, a new issue was raised during the subcommittee discussions, acknowledging that it is not always the Department that is issuing approvals, certifications, or permits, but it is sometimes a conservation district carrying out those actions. With that concern in mind, the subcommittee suggested changing the definition of the Department from "the Department of Environmental Protection, or other boards, commissions or agencies whose decisions are appealable to the Board," to "the Department of Environmental Protection, its delegated agents, or other boards, commissions or agencies whose decisions are appealable to the Board."

Mr. Duncan commented that the phrase "its delegated agents" added to the definition of "Department" and inquired if that was mainly intended to encompass conservation districts. Mr. Duncan suggested that if the term "delegated agents" was limited to conservation districts, then it

might be better to specifically use the language "conservation districts" in the event using "delegated agents" could impact other rules where the term Department is referenced.

Mr. Wein stated that several counties have been delegated programs which may or may not be appealable to the Board. He explained that some counties have their own appeals process such as the Allegheny County Health Department, which has its own appeals process for orders that are issued pursuant to air permits that it has the power to grant. Mr. Wein also recalled a similar situation for permitting obligations involving solid waste inspections conducted by county inspectors. These inspectors issue a violation or a citation which does not come before the Board. Mr. Wein stated that by using the term "delegated agents," it could act as a catch all for all situations where the appeal could end up before the Board. Mr. Duncan stated his concern that the phrase "delegated agents" could open the door to include entities that were not contemplated under the Board's rules; he felt that by instead specifying "conservation districts," it could curb such unintended results. Mr. Wein suggested that the subcommittee could amend the language to specifically identify conservation districts and explore more on the question of any other specifics or categories that could be included in the definition and revisit the issue at the next meeting.

Judge Renwand recalled that during his years at the Board, conservation districts have been a part of proceedings occasionally, and that in every one of those cases, the Department has represented the conservation districts. Judge Renwand stated that the witnesses could be slightly different but overall, the conservation district's presence in a matter does not change the procession of a case. Judge Renwand posed the question to Mr. Moorhead and Ms. Stares as to whether there were entities other than conservation districts to which the Department delegated responsibilities. Mr. Moorhead was not certain if there was any agent beyond the conservation districts that the Department delegated matters to but stated that he would investigate the question more. Mr.

Moorhead also commented that he believed the last part of the definition which states "whose decisions are appealable to the Board" was useful in narrowing potential entities that could enter into matters before the Board.

Mr. Duncan proposed using the language "other Boards, commissions, agencies, or governmental entities, whose decisions are appealable to the Board." He suggested that this language would cover conservation districts as they are governmental entities and this language would not need to be updated if the Committee later found there was another agency or entity it had not contemplated.

Mr. Wolford stated that he did not believe that the Department's delegated agents were limited to conservation districts. He offered the example that the Erie County Department of Health (ECDH) handles sewage treatment in Erie County and manages things such as permits for holding tanks and on lot systems. Mr. Wolford reviewed the Clean Streams Law to look for a delegation provision that allowed for the ECDH to function in this manner but was unable to find such a provision. He explained that if the ECDH takes an action and someone takes issue with that action, the Department becomes involved in the matter. He felt that in situations like this one, it was important to include the word "agents" in the definition of "Department" because such entities, even absent a delegation provision, are acting on behalf of the Department.

Ms. Stares asked whether anyone looked at the definition of "the Department" under the Environmental Hearing Board Act. She stated that the Act and its jurisdiction specifically refers to the decisions of the Department. Ms. Stares stated her agreement with Mr. Duncan and felt that the subcommittee's proposed amendment of the definition of "the Department" was confusing and was unclear as to the purpose it was trying to reach.

Mr. Wein summarized the discussion that took place around the definition of "Department" in § 1021.2; the Department will further explore the issue of "delegated agents" and research to see if there are other entities other than conservation districts that could be included and will report back to the Committee on that issue. Mr. Wein asked if the Committee was comfortable with Mr. Delio's changes to the definition of "permittee" and "third-party appeal" and the Committee voiced its support for those revisions.

Mr. Hinerman posed a hypothetical pertaining to the addition of the "potentially adversely affected persons" language proposed in § 1021.51(f)(2)(vi)(C). In this hypothetical, he outlined a scenario where he represented a municipality that wished to challenge a landfill permit. He posited that, potentially, every township has an interest in that county because trucks could be traveling through those municipalities, and/or every potentially competing landfill could argue an interest in the appeal. He posed the following questions: Who should he notify in that situation? How broad does the word "potential" make notification requirements? He expressed concerns regarding who he should notify and what would happen if he failed to get the service correct. In regard to Mr. Hinerman's question, Ms. Wesdock explained that if a party forgets or fails to notify someone that could be potentially adversely affected, that would not necessarily affect the appeal or render the appeal not perfected or viewed as an error. Ms. Wesdock stated that the revisions were approached in terms that were meant to be helpful so that parties could notify the Board as to who else could be affected by the appeal. It would then be up to the Board to take further steps or not. Ms. Wesdock stated that the revisions are not intended to create ways to hurt an appellant if they did not notify other potentially affected persons and that the Board would not penalize an appellant if they did not notify someone.

Mr. Wein stated that the concept of the revisions is to alert the Board where it is possible that someone may be potentially affected by a final decision of the Board. Mr. Wein stated that it will ultimately be the decision of the Board to determine whether an appellant should send notice to an identified potentially affected party. Mr. Wein indicated that Ms. Stares has emphasized that the Board has limited jurisdiction and that the subcommittee's goal is to reconcile that limited jurisdiction with the due process requirement that *Schneiderwind* discussed. Mr. Wein stated the way towards this reconciliation is to provide notice and an opportunity to participate.

Mr. Hinerman asked if the *Schneiderwind* case includes the term "potentially affected parties." Ms. Wesdock answered that it does not. Mr. Hinerman stated his concern for the term "potentially," and explained he could imagine scenarios where motions to dismiss could be filed because a party failed to include a person that could be considered "potentially affected." Mr. Hinerman suggested looking for alternative language in the *Schneiderwind* decision that could limit the term "potentially."

Mr. Moorhead explained that the context where the term "potentially affected parties" is used is qualified in 25 Pa. Code § 1021.51(h)(2) and (h)(3). Additionally, the (h)(2) subsection is limited to section 5 and 7 of the Sewage Facilities Act which greatly narrows the use of the term. Mr. Moorhead emphasized that the subcommittee did not wish the term to be punitive and that the Department also wanted to refrain from affecting a broad range of people, leading the subcommittee to the decision not to significantly expand (h)(1)-(h)(4).

Mr. Wolford stated that the subcommittee had many discussions in regard to subsection (h)(4) and that the subcommittee considered that the word "potentially" could be broadly construed. He used the example of a grant of an air permit which could possibly require the notification of all cities along the eastern seaboard because of the rise in sea levels due to carbon

dioxide emissions. With this in mind, he stated that the subcommittee was mindful to word the rules in a way that did not open the door for every possible grievance. Mr. Wein agreed with Mr. Moorhead that (h)(2), as currently revised, is a fairly narrow category of "potentially adversely affected" parties. Mr. Wein explained that the concept of (h)(4) is to have the Board review whether someone else should be served with the appeal, and if so, the Board would order the appellant to serve the Notice of Appeal on that party. Mr. Wein noted the distinction between the Board ordering service on a person and the Board ordering another person into a case.

Mr. Delio discussed a case he worked on with Judge Coleman where they identified a potentially affected party that was not captured in (h)(2), (h)(3), or section 5 or 7 of the Sewage Facilities Act. As such, Mr. Delio and Judge Coleman decided the interested township needed to have notice of the appeal and ordered the appellant to serve the township. Mr. Delio explained that the (h)(4) language is based on that experience. Mr. Delio recalled another time where the Department found an oil and gas company responsible for contaminating a water supply and ordered the oil and gas company to restore and replace the supply, and the company appealed this order. Under the Board's rules, the person who owned the water well at issue was not required to be served with the Notice of Appeal, so the Board ordered the company to serve the landowner under (h)(4). Mr. Wolford added that the subcommittee settled on "interested persons" rather than "interested parties" in consideration of the difference between a party and an intervenor in this context.

Judge Renwand stated that the Board wishes to ensure that everyone has due process and to avoid another case similar to *Schneiderwind*. He endorsed the Board using orders similar to the one Judge Coleman recently used as explained by Mr. Delio. Judge Renwand explained that such an order would inform the interested person that if they chose not to intervene then their rights

may be adjudicated which may adversely affect them. He went on to state that these orders could be offered as an exhibit to the Commonwealth Court if that same person would appeal a Board decision and make the claim that their due process rights had been violated. Judge Renwand reiterated that he felt a viable answer to the *Schneiderwind* dilemma would be in the form of a strong order from the Board which sets forth to the Commonwealth Court that the Board ensured the affected party had notice, the Board exercised its due diligence to bring them into the case, but ultimately, that party chose not to participate in the proceedings.

Mr. Wolford stated that the subcommittee was sensitive to the complications of a party versus intervenor status because of concerns from the Department. Mr. Wolford pointed out that what was missing in *Schneiderwind*, according to the Commonwealth Court, was something on the record showing the party had had an opportunity to participate. Mr. Wolford stated that he believed an order issued by the Board would satisfy the *Schneiderwind* problem and if the Board wished to add 'notice to defend' language, he would be amendable to that. He emphasized that he believed the important thing to resolve this issue is to get something on the record showing that the party was given notice and opportunity to participate.

Ms. Stares stated that the Department did not object to the idea of an order that directs the appellant to notify potentially adversely affected parties that a proceeding is taking place and the nature of the matter. She agreed that such an order would constitute notice and an opportunity to be heard and would allow the party that is not currently participating to decide whether they would file a petition for intervention. Ms. Stares suggested that at that point, the Board should review the facts to determine to what extent the party can participate in the proceedings. She explained that there are many instances where the Department issues orders or permits and is not aware of every affected party as it often has to act with expedience. Although the Department does not

always know all of the parties that are affected, when it does, it will send information regarding the action/proceeding to that party. Ms. Stares reiterated that a party that receives notice should not be immediately assumed to have full participation rights, and that the Board should still engage in some analysis to determine whether a party should be brought into a proceeding, and if so, to what extent. She referred back to Mr. Hinerman's earlier comments that the language identifying people who are interested could be an incredibly diverse set of people and the Board should take care to filter which parties have the types of interests that need to be adjudicated by the Board.

Judge Renwand voiced his agreement with Ms. Stares. Judge Renwand explained that the Board would not grant anyone a party status based on a remote interest in the action but that the intervenor rule would help inform the Board to the extent to which an interested party could participate. Judge Renwand offered the example of instances when the Board has not always allowed legislators to participate in matters, finding that their interests were no greater than the public itself in particular cases. The circumstance Judge Renwand was considering was one in which a party would be directly and substantially affected by the Board's decision and would then take the position before the Commonwealth Court that the Board adjudicated their rights without their participation. Judge Renwand explained that directing an appellant to serve an interested party would be a good compromise as opposed to allowing an appellant to join anyone they wanted.

Mr. Duncan presented an alternative idea to the Committee as to how to handle the *Schneiderwind* issue. Mr. Duncan explained that if someone is adversely affected by a Department action, there are notice rules which exist that cover those people. However, a situation where a person would be adversely affected by the Board reversing a Department action is the type of scenario that *Schneiderwind* discussed. Mr. Duncan explained that these types of parties, those

affected by reversing a Department action, are the ones that need notice of the appeal, which are a limited number but could also be difficult to identify based on what is in the action. Mr. Duncan stated that it would be onerous on the Board to identify those persons who would be potentially affected by a ruling in favor of the appellant. Mr. Duncan suggested publishing the Notices of Appeals in the *Pennsylvania Bulletin*, similar to the process taken with Clean Streams Law appeals. The publication would include a brief description of the action, the permittee, if there is one, and the county the action is taking place in. Mr. Duncan stated that this publication should be adequate for people who would be affected by the Board's decision just like it is adequate notice to publish in the *Pennsylvania Bulletin* for people who may be affected by Department actions. Mr. Duncan conceded that it is a "one size fits all" solution but that the other option would be placing the onus on the Board which runs the risk of overlooking somebody who would be affected by the Board ruling in favor of the appellant.

Mr. Wolford responded that the subcommittee did not intend for notice to become automatic but that it approached the *Schneiderwind* problem by ensuring notice is provided and that the Board has the authority to issue an order to serve that affected person. Mr. Moorhead voiced his opinion that the proposed changes to § 1021.51(h), in combination with an order from the Board to notify an interested person, plus a certificate of service indicating that the interested person was served, would be sufficient to show on appeal that the interested person had their chance to participate. Mr. Moorhead described the Department's concerns with interested persons being labeled as parties in (h)(2)-(h)(4), in that once they come into an appeal it could broaden what they may be able to do.

Mr. Wein asked Judge Renwand if he felt that an order similar to the one described above that Judge Coleman issued would be consistent with what the subcommittee proposed in the other

subsections. Mr. Wein also asked the Committee if the proposals in section 1021.51(h) made it clear that the Board would be ordering an appellant to provide an interested party with a copy of the Notice of Appeal. Judge Renwand stated that he did not have an issue with the proposed changes or the Board issuing an order directing an appellant to serve an interested party. Judge Renwand stated that he did not understand the Department's concern regarding the difference between an intervenor and a party in terms of taking different actions.

Mr. Moorhead described that one of the Department's concerns is that the expansion of objections under an appeal would be broader by a person who has been brought in as a party. Mr. Moorhead explained that when the Department goes before the Commonwealth Court, the first thing it is asked is if the action is a final order by the Department, and, the Department must certify that the order is final in the petition to enforce. Mr. Moorhead stated that if a party can be added later, it raises the question whether the Department's action is final as to a particular person.

Mr. Wolford stated that his concern with a catchall solution is that there is no description as to the scope of intervention, as opposed to a petition to intervene, for which there is language in the current rules stating that the Board can limit the issues for the intervenor. Therefore, if a person comes in under (h)(4), their participation would be broader in scope than if that person were to file a petition to intervene.

Ms. Wesdock noted that the Committee had not yet discussed the actual changes made to section 1021.51. Ms. Wesdock suggested holding off on those discussions until the next meeting, anticipating the discussions would be lengthy. Mr. Wolford stated that there was an alternative approach the subcommittee had discussed regarding (h)(4). Mr. Wolford had suggested to the subcommittee to only substitute "persons" for "parties" which would allow the Board to take the approach that Judge Coleman used in issuing her order to serve the interested township. Ms.

Wesdock stated that this particular section of the rules is so complicated and complex that she hesitates to add more to it. Ms. Wesdock explained that while she believed the changes the subcommittee made were good, she did not feel it was necessary to go into a lot of detail about what an order the Board might issue would say. Ms. Wesdock suggested holding off on the discussion pertaining to (h)(4) until the next meeting, considering that the Department expressed concerns about that section. Mr. Moorhead explained that the Department did not object to the change in (h)(4) itself because subsection (4) acted as a different category than the other subsections under (h), and that the Board could direct how it chooses to go forward with interested persons.

Mr. Wein stated that the fundamental question that the Committee should think about for the next meeting is that if a person falls within the category of (h)(2) or (h)(3) and they intervene as a matter of right, what rights do they have as an intervenor?

Mr. Wolford cautioned that by limiting what someone can do as a matter of substance in a proceeding could introduce due process issues which circle back to the *Schneiderwind* dilemma. Mr. Wolford stated that he believed it should be left to the discretion of the Board as to what a party can or cannot raise based on evidentiary rulings but that he would be reluctant to write such limitations into a rule, explaining that doing so could give fodder to due process arguments as to when and how someone can intervene.

Judge Renwand explained that he envisioned notices being sent out toward the beginning of an appeal. He recalled that there have been times that the Board has allowed parties to enter into matters later in cases where they could be affected by Board rulings but the Board has limited the extent to which these parties could participate. Judge Renwand explained a particular instance where the United Mine Workers wanted to participate in a proceeding that was scheduled for a

hearing in two weeks time. The Board allowed their intervention but did not reopen discovery and limited their right to participate. The Board did not want to have duplicative questioning in that instance. Judge Renwand explained that what he would like to address is the situation when a party knows about an appeal but does not attempt to intervene but rather chooses to observe the matter from the background and in these instances, Judge Renwand wishes to establish on record that the Board provided them with notice and an opportunity to participate. Mr. Wein agreed with Judge Renwand, stating that the suggested changes are meant to have people put on early notice in the proceeding. Mr. Wein stated that the Committee should keep in mind the notion of early notice in these discussions, so that issues like the one Judge Renwand raised regarding the United Mine Workers coming into the matter just before a hearing could be avoided. Mr. Wein disagreed with Mr. Duncan's suggestion to solve notice issues by publishing the Notices of Appeals in the *Pennsylvania Bulletin* because most people do not read the *Bulletin*. Mr. Wein stated that he agreed with notice requirements when the Board feels it appropriate for an appellant to provide the Notice of Appeal to a person which will give that person a chance to participate as an intervenor or a party.

Sanctions

Mr. Wein noted that the Committee would not be completing all of the items on the agenda during the meeting and would not get to discuss sanctions. Ms. Wesdock stated that she had been asked to look at the Rules Committee minutes with regard to why certain language was put into the sanction rule. Ms. Wesdock reported that unfortunately the minutes do not go back that far and that such language must have been put into the sanction rule prior to the year 2000 which was when Ms. Wesdock had assumed taking the minutes.

Topics for the January 13, 2022 Meeting:

The next meeting of the Rules Committee is Thursday, January 13, 2022, at 10:00 a.m. Topics will include the following:

1) The Committee members will report back on the discussions that they had with their IT personnel and clients regarding ESI. Those discussing ESI with IT personnel will share the recommendations their IT Department made on how to improve a singular ESI plan for the Board's website.
2) The Department will report to the Committee after researching the question of whether it delegates any of its duties to any entities or agencies other than conservation districts.
3) The Committee will discuss their thoughts at the next meeting as to what rights a party has as an intervenor if they fall within the category of (h)(2) or (h)(3) under 25 Pa. Code § 1021.51.

Adjournment:

On the motion of Ms. Mosites, seconded by Mr. Moorhead, the meeting adjourned at 12:18 p.m.