ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of January 13, 2022

Attendance:

The Environmental Hearing Board Rules Committee met by videoconference on Thursday, January 13, 2022, at 10:00 a.m. Chairman Howard Wein presided. The following members of the Rules Committee attended: Brian Clark, Tom Duncan, Phil Hinerman, Jean Mosites, Doug Moorhead and Matt Wolford. Attending on behalf of the Environmental Hearing Board (Board) were Chief Judge and Chairman Tom Renwand and Board Counsel Eric Delio, Alisha Hilfinger and Maryanne Wesdock. Ms. Wesdock and Ms. Hilfinger took the minutes.

Rules Package:

Mr. Wein provided a summary of the status of Final Form Rulemaking 106-13 (the rules package). Delivery of the rules package to legislative staff and the Independent Regulatory Review Commission (IRRC) was not able to be accomplished in December due to the holidays and scheduling issues. At this time, IRRC is holding only in-person hearings on rulemaking. The Board intends to proceed with delivery of the rules package in early spring.

Minutes of November 10, 2021 Meeting:

Mr. Wein thanked Ms. Hilfinger for preparing the minutes of the November 10, 2021 meeting. Ms. Mosites noted that the heading of the last section setting forth topics for the next meeting should read "January meeting" rather than "November meeting." With that correction, as well as an earlier correction pointed out by Judge Renwand, Ms. Mosites moved for the approval of the November 10, 2021 minutes. Mr. Wolford seconded. The motion passed. Mr. Clark abstained due to the fact that he had not attended the November meeting.

Citation of Environmental Hearing Board Decisions:

Judge Renwand explained that citations to Board decisions should be to the volumes of Board opinions and adjudications (the EHB Reporter) contained on the Board's website. This is not always done; in many instances, parties' briefs and memoranda of law cite to Lexis or Westlaw. The proper format for citing a Board decision is the following: *Name of Appellant v. DEP*, (year) EHB (page number). For example: *Range Resources – Appalachia, LLC v. DEP*, 2021 EHB 1. Although this is Board practice, there is no rule requiring it, and there is nothing in the Practice and Procedure Manual setting forth the proper format for citations.

Mr. Wein inquired about the proper citation for slip opinions. He asked whether it was permissible to cite to Lexis or Westlaw when the EHB Reporter for a particular year has not yet been published. Judge Renwand responded that it is permissible to cite to Lexis or Westlaw, but the citation should also conform to the Board's requirements, as follows: *Name of Appellant v. DEP*, EHB Docket Number (Adjudication or Type of Opinion issued (date)). For example: *King v. DEP*, EHB Docket No. 2021-102-L (Opinion and Order Dismissing Appeal issued January 24, 2022). Additionally, Judge Renwand stated that the citation to the slip opinion should not be used when the EHB Reporter for that year is available.

Mr. Wolford asked if all the EHB Reporters are online. Judge Renwand stated that they are, and Mr. Moorhead confirmed that the EHB Reporters on the Board's website begin with 1972. Mr. Wolford stated that he agreed with the suggestion to create a rule requiring citations to the EHB Reporters. He noted that it is sometimes difficult to locate a case if the citation is to Lexis and one only has access to Westlaw, or vice versa. Mr. Wein suggested that until the rule is finalized and promulgated, the Board could include the citation requirements in Prehearing Order No. 1 and in the Practice and Procedure Manual. Additionally, the Board sometimes issues orders requiring proper citation to EHB cases.

Ms. Stares and Mr. Moorhead pointed out that citations to EHB decisions in appellate briefs require a citation to Westlaw or Lexis. Mr. Moorhead noted that the Department uses Westlaw. Mr. Hinerman stated that the Pa Bar Association (PBA) offers a service to members called InCite, and it provides Lexis citations.[1]

Judge Renwand suggested that the Board draft a proposed rule on the proper citation for EHB decisions (both citations to the EHB reporter and slip opinions) and report back at the next meeting. Ms. Mosites asked if the Board would permit citations to both the EHB Reporters and Lexis or Westlaw, and Judge Renwand agreed with that suggestion. Mr. Wein suggested including language in the rule advising parties that it is acceptable to provide a citation to both the EHB Reporter and Lexis or Westlaw.

Revisions to Prehearing Order No. 1 (PHO1):

Ms. Hilfinger prepared revisions to the Board's Prehearing Order No. 1 (PHO1) that were approved at the November 10, 2021 meeting. Ms. Mosites stated that she had no changes and she felt that the revisions accomplished what was discussed at the November meeting. The Committee members agreed. Mr. Wein suggested including a revision date on the final document.

Mr. Wein also suggested that the instructions accompanying the Notice of Appeal form on the Board's website should state that an appeal may be amended as of right within 20 days of filing the appeal, and thereafter may be amended with permission of the Board.

Sample ESI Plan:

During the last Rules Committee meeting, Ms. Mosites volunteered to continue her efforts to create a single comprehensive model ESI plan available on the Board's website. At the outset,

[1] Mr. Duncan stated that at a recent meeting of the PBA Environmental and Energy Law Section council, it was reported that EHB decisions were no longer being included with InCite. Ms. Wesdock reported that PBA has corrected the issue and EHB decisions are now included.

she noted that the disclaimer on the model plan is important so that parties realize that the terms of the plan are not carved in stone and are open to negotiation and change. Ms. Mosites explained her proposed revisions: First, she changed section 1(b) to state, "Discovery of ESI is of such a nature that an ESI plan is required for this Action." She explained that this update was meant to convey the concept that constructing an ESI plan is not mandatory and that it is up to the parties to decide when a plan is necessary. This change is consistent with a recent change made to the Board's Prehearing Order No. 1. Ms. Mosites suggested changing the term "electrical machine" to "electronic device" as the former term is outdated, and the latter is widely used and understood. Ms. Mosites explained that she incorporated brackets into her redline version of the model ESI plan. The brackets are meant to indicate to the parties that those sections are points of discussion and may not be necessary conditions to include in all cases. Ms. Mosites pointed to the section discussing custodians and described that an ESI plan does not always need an agreement with respect to custodians, depending on the complexity of the case. She explained that some of the model plans specified for the parties to name their five most significant custodians. Ms. Mosites felt that this language suggested to the parties that it was mandatory that they name 5 custodians; however, a party may not have that many custodians. Therefore, according to Ms. Mosites, this issue needs more flexibility. Additionally, she made two updates to the "Preservation" section of the model plan, adding "images" as a type of ESI file and "camera or video camera" as a type of storage location that could contain items subject to discovery.

Ms. Mosites recapped that at the last Committee meeting, Mr. Moorhead and Ms. Stares agreed to look into who is responsible for obtaining information from shared servers at the Department because it was not clear that custodians have the obligation to gather information from shared servers. In section 7, she added proposed language that provides that counsel for the parties

will assume the obligation to collect ESI from shared data sources. Mr. Moorhead reported that since the last meeting, he had inquired into the Department's shared data sources and there are many which are in use, including eFACTS and a program called OGRE that is used for oil and gas matters. He stated that the Department is beginning to scan all files onto "OnBase" in an attempt to move away from paper files. Because of these multiple sources, there was not a simple answer to Ms. Mosites' question regarding who is responsible for obtaining information from the shared data sources. Mr. Moorhead stated that he felt the language Ms. Mosites provided was helpful because currently there would be multiple custodians associated with the various shared sources, and, therefore, having counsel assume the obligation to obtain information from shared sources may make the most sense. He stated that the software "Relativity" has the ability to draw from multiple data sources. Mr. Moorhead said that he would continue to talk to the Department's IT personnel about the shared sources but felt that the language suggested by Ms. Mosites was reasonable and may be the best solution. Ms. Mosites appreciated the complexity of shared data sources, noting that it will be an issue that will likely evolve over time. She stated that her goal was to keep the language generic and to shift the responsibility to counsel since there is no clear direction for custodians.

Mr. Moorhead explained that there are two types of custodians – generic custodians and identified custodians. He recommended using the term "identified custodians" or "party custodians" to distinguish them from generic custodians. Ms. Mosites stated that she thought of custodians as those who have a laptop, phone or other device in their possession and who are instructed not to delete material on it. She did not believe shared data sources had a true custodian. Mr. Moorhead found this explanation of the term "custodian" helpful. Ms. Mosites asked if anyone felt there was a need to define "custodian" for clarification purposes. Mr. Moorhead provided an

example that in a permit appeal case, the Department would rely on the program manager and the permit engineer for almost all communications. He stated that in this instance, there could be duplications in communication, such as another engineer who may look at a portion of the permit, but the Department would use the primary engineer as the custodian. Mr. Moorhead described the subordinate engineer in his example as being a "lower case c custodian." Ms. Mosites disagreed and felt that both engineers would be "upper case C custodians." Mr. Moorhead suggested that this level of detail may not be necessary for the model ESI plan and that this issue is something that may be better left to negotiations among the parties. He explained that in many of the Department's cases there are potentially hundreds of custodians; in order to avoid duplicative information, the Department would prefer to narrow the definition of custodian so as to include only the people that most comprehensively maintain the records. Ms. Mosites pointed out that paragraph 5 uses the language "most significant custodians" which goes to Mr. Moorhead's concerns of duplicative information. Ms. Mosites commented that 15 people should not be named as custodians when many of them merely get copied on emails as a formality and never interact or make decisions on the matter.

Mr. Wein inquired as to why Ms. Mosites bracketed the whole of paragraph 5; he asked if the brackets indicate that the paragraph was optional or should be left up for discussion. Ms. Mosites explained that on the first page of her redline version, she included a note stating that the bracketed provisions are designated for discussion amongst counsel regarding the inclusion and the scope. Paragraph 5 is bracketed so that the parties can talk about whether to include the section, or whether they wish to identify custodians and how many they think they should identify.

Paragraph 8 of the model ESI plans on the website begins "Discovery requests that require a search or production of ESI shall be separate from other requests…" Ms. Mosites changed *shall*

to *may* in her revisions, explaining that because nearly everything is electronically stored, it would make it difficult to conduct separate ESI discovery from non-ESI discovery. Because both types of discovery overlap, it is too difficult to mandate their separation. Ms. Mosites asked for Mr. Moorhead's input, recalling that in her experience Department attorneys have been strict about separating ESI discovery from non-ESI discovery. Mr. Moorhead responded that he has seen the Department conduct discovery both ways and pointed to a recent case where there was extensive discovery and the Department agreed that discovery requests would include ESI. He stated that the Department prefers bright lines where discovery is separated into ESI versus non-ESI but understood Ms. Mosites' reasoning. Mr. Moorhead said that as the Department moves away from paper files and transitions its records onto OnBase, it should come to a point where electronic sources will be used for all discovery. Mr. Moorhead commented that the process of conducting electronic discovery is expensive for the Department and he would like to think about the substitute language that Ms. Mosites proposed.

Ms. Mosites explained her next change in paragraph 9, which describes the form and the time of production. Recognizing that the Pa. Rules of Civil Procedure set forth deadlines for responses to interrogatories and production of documents, she stated that she believed it could be left up to the parties to choose whether to produce ESI within a 45-day or 60-day deadline rather than mandate a 60-day deadline.

Ms. Mosites went on to explain the revisions she made in paragraph 10 which pertains to privilege logs. In that paragraph, she included a statement that parties are not required to include in the privilege log ESI in which outside counsel is copied. She stated that such an agreement is standard. Mr. Hinerman asked for clarification with regard to use of the term "outside counsel." Ms. Mosites said that she had taken the "outside counsel" language from the model plan on the

Board's website dealing with third-party appeals. She suggested revising the language simply to say "counsel" rather than "outside counsel." She reiterated her position that when correspondence includes counsel, it should not have to be included in the privilege log since it is already recognized that such correspondence is privileged. Mr. Hinerman disagreed, stating that sometimes when there are internal discussions people may copy their counsel as a matter of general routine, but that does not necessarily make the information privileged. He stated that the original intent of the model ESI plans was to give parties a starting point for discussion, and he felt that the language should be made clearer so that the parties have a better idea as to what they should discuss.

Mr. Clark stated that he did not feel the "outside counsel" language was appropriate. He suggested using the term "counsel of record." He noted that there could be outside counsel in various capacities, but the real focus should be the attorneys involved in the matter. Mr. Wein pointed out that there could be a situation where someone that is not listed as counsel of record could still be in a position to provide information that is a privileged communication. Ms. Mosites agreed with Mr. Wein on this point. Mr. Wein agreed with Mr. Clark that the word "outside" should be removed. He felt that from the Department's perspective, there may be situations where a counseling attorney is not listed in the matter before the Board, but no member of the Department's lawyer staff is "outside counsel" per se. Mr. Hinerman suggested revising the language to say that emails that are seeking or offering legal advice do not need to be included on the privilege log. Mr. Moorhead stated that he did not think the language should be limited to seeking advice because other privileges might exist. Ms. Mosites agreed.

Mr. Hinerman stated that the section regarding the privilege log serves more as a notice to guide the parties on what to talk about rather than mandating anything in particular. He explained that in most cases, parties do not seek out true attorney-client privilege materials. Mr. Duncan

noted that the provision at issue addresses what types of communication do not need to be listed on a privilege log. He stated that, in his experience, what typically occurs is that parties may agree that they do not need to list communications where the attorney is included in the "to" and "from" line of an email because such communications are generally recognized as privileged; however, where an attorney is "cc'd" on a communication, it may not be clear whether it is privileged information. When a party claims privilege for a communication where an attorney is included in the "cc" line, Mr. Duncan felt that such communication should be included in a privilege log because there may be some debate as to whether it is privileged information.

Ms. Mosites suggested inserting brackets in the last portion of the sentence of the subsection, which would read as follows: "parties are not required to include in their privilege logs ESI […]." She explained that this would leave it up to the parties to engage in a discussion around the matter. Mr. Wein felt that it would be better to bracket the entire subsection; otherwise, the bracket is not clear and does not carry meaning.

Mr. Hinerman suggested that the language should be made clearer regarding the specific privilege the section is targeting and suggested that the language could say "parties are not required to include any communications that are subject to the attorney client privilege." He acknowledged that attorneys may interpret the language differently and some may even take an aggressive approach, but at least the parties would have a better understanding about what needs to be discussed when negotiating an ESI plan. Judge Renwand asked if it was necessary to use that specific language, as it seemed to be getting into substantive law issues. Mr. Hinerman replied that he felt it was necessary and harkened back to earlier comments made by Mr. Duncan regarding the inclusion of attorney-client privileged communications in a privilege log. Mr. Wein added that the work product privilege would likely need to be included too. Judge Renwand reiterated that

he felt the language was treading into the territory of substantive law and did not see the utility of including the language in the model. Judge Renwand stated that if the parties are not able to work out those issues among themselves, they would then come to the Board to rule on the dispute. Mr. Moorhead stated that he remained in favor of leaving the privilege log subsection in the model plan with brackets around it to indicate it is a topic for the parties to discuss. He also believed it could be beneficial for the parties to engage in those discussions, as it may reduce the burden on what each party has to review and produce. He reminded the Committee that the subject of this discussion merely revolves around a model plan that parties may refer to if they choose to do so.

Mr. Wein suggested that the language Ms. Mosites added at the beginning of the model plan should be in bold so as to make it clear that the bracketed sections are for discussion purposes. Ms. Mosites recapped that she bolded the introductory sentence that explains that the bracketed provisions are for discussion, added brackets around subsection (v) under paragraph 10(a) and also removed the word "outside" from that subsection.

Mr. Wein recommended that if the Committee removes the existing model ESI plans from the Board's website and substitutes a single model, that substitution should be indicated on the Board's website. Ms. Mosites asked if anyone had any other suggestions or edits after receiving input from clients or IT departments. Ms. Mosites stated that she would circulate the model ESI plan with the edits agreed to. The Committee thanked Ms. Mosites for her hard work in constructing a single model ESI plan.

Notice/Schneiderwind Issue:

This issue has been discussed extensively at prior Rules Committee meetings, and a subcommittee was created, consisting of Mr. Wein, Mr. Wolford, Ms. Stares, Mr. Moorhead, Mr. Delio and Ms. Wesdock, to recommend changes to the Board's rules. The issue is twofold:

1) Ensuring that persons who may be impacted by the outcome of an appeal receive notice of the appeal, i.e., the "notice issue."
2) Ensuring that persons whose rights may be adjudicated in an action before the Board are given the opportunity to participate as parties to that action, i.e., the "*Schneiderwind* issue."[2]

The Committee revisited its prior discussion of recommended changes to the definitions section of the Board's rules. The definition of "Department" reads as follows: "The Department of Environmental Protection or other boards, commissions or agencies whose decisions are appealable to the Board." In subcommittee discussions, it was noted that County Conservation Districts are sometimes delegated to take action on behalf of the Department. The Committee discussed whether to add "its delegated agents" to the definition. 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 certain permitting matters in Erie County. He noted that the Department's authority to delegate certain actions is not always explicitly set forth by statute. Ms. Mosites inquired whether the delegations are set forth in a Memorandum of Agreement or Memorandum of Understanding, and Mr. Moorhead confirmed that in some cases they are. Mr. Wolford suggested using the phrase "authorized agent," rather than "delegated agent."

Mr. Delio explained that the discussion regarding the definition of "Department" originated due to his suggested revision to the definition of "permittee." The current definition of permittee is as follows: "The recipient of a permit, license, approval or certification in a third-party appeal." He had suggested eliminating the reference to "third-party appeal" and adding "issued by the

[2] Referring to the holding of the Commonwealth Court in *Department of Environmental Protection v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005).

Department." At that suggestion, some members of the subcommittee felt it might be necessary to revise the definition of "Department" to include entities to which the Department may have delegated its authority or authorized to act on its behalf. Mr. Clark stated that the term "delegate" assumes that one is acting with statutory authority. He felt that the use of the term "authorized" was a better approach.

Ms. Stares suggested including "County Conservation District" in the definition of Department. Mr. Wolford pointed out that the problem with this approach is that there may be other authorized agents in addition to Conservation Districts. For example, Mr. Wein pointed out that the Allegheny County Health Department has been delegated to handle the issuance of air permits and Alcosan has been delegated to review pretreatment permits in Allegheny County. Mr. Moorhead asked whether county health departments would fall under the category of "agency." Mr. Wolford felt that a county health department was a "department" not an "agency." Ms. Stares suggested that the phrase "appealable to the Board" should cover every entity who acts on behalf of the Department and whose actions are appealable to the Board. Ms. Mosites agreed. Mr. Duncan suggested using the term "governmental entities."

Judge Renwand raised the following question: When a Conservation District makes a decision does it contain language stating that the action is appealable to the Board? Mr. Moorhead stated that he did not know but would find out.

On the motion of Mr. Wolford, seconded by Ms. Stares, the Committee voted to approve the following revision to the definition of "Department" in 25 Pa. Code § 1021.2: "The Department of Environmental Protection or other ~~boards, commissions or agencies~~ governmental entities whose decisions are appealable to the Board."

The Committee next considered a revision to the definition of "permittee." The current definition in 25 Pa. Code § 1021.2 reads as follows: "The recipient of a permit, license, approval or certification in a third-party appeal." On the motion of Mr. Hinerman, seconded by Ms. Mosites, the Committee voted to revise the definition as follows: "The recipient of a permit, license, approval or certification ~~in a third-party appeal~~ issued by the Department."

The definition of "third-party appeal" in 25 Pa. Code § 1021.2 was also revised. The current definition reads as follows: "The appeal of an action by a person who is not the recipient of the action." On the motion of Mr. Wolford, seconded by Mr. Clark, the Committee approved the following revision: "The appeal of an action by a person ~~who is not the recipient of the action~~ to whom the action is not directed or issued."

Mr. Delio next discussed changes to 25 Pa. Code § 1021.51 proposed by the subcommittee. In Section 1021.51(f)(1)(iv), dealing with the electronic filing of a notice of appeal, the subcommittee suggested eliminating the reference to "third-party appeal" and replacing "recipient of the action" with "potentially adversely affected persons" 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~~ 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 ~~recipient~~ person.

In Section 1021.51(f)(2)(vi), dealing with the conventional filing of a notice of appeal, the subcommittee proposed the following changes:

> The appellant shall, concurrent with or prior to the filing of a notice of appeal, serve a copy on each of the following in the same manner in which the notice of appeal is filed with the Board:
>
> (A) The office of the Department issuing the Departmental action.

(B) The Office of Chief Counsel of the Department.

(C) ~~In a third-party appeal, the recipient of the action~~. Any potentially adversely affected person as identified in (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 ~~recipient~~ person.

In Section 1021.51(h) the subcommittee proposed the following changes:

(h) For purposes of this section, ~~"recipient of the action"~~ a potentially adversely affected person includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) Any affected or potentially adversely affected municipality, its municipal authority and the proponent of the decision, when applicable, in appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.5 and 750.7).

(3) A mining company, well operator, or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested ~~parties~~ persons as ordered by the Board.

The subcommittee proposed changes to Section 1021.51(i) and (j) as follows:

(i) The service upon the recipient of a permit, license, approval, certification or order, as required under subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the ~~third-party~~ appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention). The recipient of a permit, license, approval, certification or order who is added to an appeal under this section shall still comply with §§ 1021.21 and 1021.22 (relating to representation; and notice of appearance).

(j) Other ~~recipients of an action~~ potentially adversely affected persons under subsection (h) (2), (3) or (4) may intervene as of ~~course~~ right in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81.

Finally, the subcommittee proposed the following changes to the Comment to Section 1021.51:

> If a ~~recipient of an action~~ potentially adversely affected person under subsection (h)(2), (3) or (4) elects not to intervene following service of notice of an appeal or notice by the Board that the ~~recipient's~~ person's rights may be affected by an appeal, the ~~recipient's~~ person's right to appeal from the Board's adjudication in the matter may be adversely affected. This comment is added in response to the Commonwealth Court's ruling in ~~*Schneiderwind v. DEP*~~ *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005).[3]

The Rules Committee thanked Mr. Delio for providing a draft of the proposed revisions to the rules. Mr. Delio explained that the subcommittee expressed some concern that the phrase "potentially adversely affected person" was cumbersome, but it accurately captured the category of persons who might require notice. Mr. Duncan expressed concern that the term might be too broad. He pointed out that if a host municipality appeals a decision of the Department under the Sewage Facilities Act, every municipality located downstream of the sewage treatment plant could be "potentially adversely affected." He raised a concern that this language may put a burden on an appellant to identify persons who may not be known to the appellant. Mr. Wolford explained the reasoning behind the new language. In one case he represented a municipality that received an adverse decision from the Department. The municipality appealed the decision. Mr. Wolford pointed out that if the Board were to reverse the Department's decision, other municipalities would be affected by that decision. For that reason, he felt that they should be made aware of the appeal.

Ms. Wesdock stated that the Board's intention was not to place an extra burden on appellants to notify all persons who could be potentially adversely affected by an appeal. The

[3] Following the November 10, 2021 meeting, Mr. Duncan pointed out a correction to the citation to the *Schneiderwind* case in the Comment to Section 1021.51. The Comment currently cites the case as *Schneiderwind v. DEP*. The correct citation is *DEP v. Schneiderwind*.

intention was simply to ask appellants to notify the Board of any persons they were aware of who could be adversely affected by the outcome of an appeal, and then the burden was on the Board to determine whether that person should receive notice of the appeal. The purpose of providing notice to such persons was in order to comply with the Commonwealth Court's directive in *DEP v. Schneiderwind.*

Ms. Mosites asked if "potentially adversely affected persons" already fell under the category of "proponent of the decision" as currently set forth in Section 1021.51(h)(2). Mr. Wolford expressed his opinion that they did not fall under that category and explained that in the case he referenced earlier the other municipalities weren't involved at all. Mr. Moorhead pointed out that the municipalities in that case did comment on the matter before the Department. Mr. Moorhead felt that "any affected municipality" would cover the situation described by Mr. Wolford. He agreed with Mr. Duncan that the term "potentially adversely affected person" may be overly broad. Mr. Wolford pointed out that the other municipalities were not "affected" by the Department's action but could be "affected" by the Board's decision if the Board were to reverse the Department. Judge Renwand noted that providing notice to any such affected entity provides them with an opportunity to seek to intervene and, thus, removes the practical problem of *Schneiderwind.* Without some sort of notice, such affected entities can argue that they had no notice of the proceeding or opportunity to participate.

Mr. Wein suggested moving the "potentially adversely affected" language to (h)(4) ("as ordered by the Board"), but Judge Renwand raised a concern that the Board is not going to know who is potentially adversely affected to the degree that the appellant does. Judge Renwand stated that he understood the concern raised by Mr. Duncan. However, he felt that it was in the best interest of the appellant to treat "potentially adversely affected" as broadly as possible so as to

avoid someone later challenging the Board's decision by claiming they did not have notice. Mr. Wein pointed out that under Section 1021.51(h)(4) the Board makes the decision as to who should receive notice and/or participate in the appeal.

Ms. Stares objected to "potentially adversely affected persons" being given a right to intervene. She felt that such persons should be required to file a petition to intervene and demonstrate that they meet the requirements for intervention set forth in Section 1021.81. Mr. Moorhead agreed with the sentiment expressed by Ms. Stares. He raised a concern that using the language "potentially adversely affected" might open the door to a claim that a person has the right to intervene. He pointed out that there may be persons who are interested in the case but who would not meet the requirements for intervention. Ms. Wesdock agreed that the Board did not intend to give someone an automatic right to intervene simply because they were potentially adversely affected by an appeal. Mr. Wolford pointed to the language of Section 1021.51(h)(4) which allows a person to intervene by simply filing an entry of appearance when they are deemed to be an "interested" person "as ordered by the Board." He asked whether that language gives the person an automatic right to intervene. He noted the difference between intervention as of right and permissive intervention. Mr. Moorhead pointed out that anyone included under Section 1021.51(h)(2) is permitted to intervene "as of course" under subsection (j) simply by filing an entry of appearance. Therefore, any expansion of (h)(2) creates an automatic right of intervention for such persons covered by (h)(2). Judge Renwand suggested leaving the question of intervention up to the Board, i.e., letting the Board decide if such person has the right to intervene. Mr. Wolford suggested changing the language of (h)(2) through (h)(4) to state that such persons have the right to seek intervention, and he suggested cross referencing Section 1021.81, the rule on intervention. Mr. Delio pointed out that the problem with that approach was that it would prevent entities who

should automatically be able to enter an appeal from being able to do so. For example, in an appeal of a private request for an Act 537 Amendment, the affected municipality could not automatically enter the appeal but would need to file a petition to intervene. Likewise, in an appeal of the denial of a subsidence claim, the mining company could not automatically intervene but would need to petition the Board to enter the case. The language of Sections 1021.51(h)(2)-(4) and (j) had been drafted to allow such entities the automatic right to enter a case without having to file a petition to intervene.

Mr. Delio pointed out that he was aware of the Board invoking Section 1021.51(h)(4) only three times in eight years. He provided an example of when it was utilized in one of Judge Coleman's cases: That case involved an action under the Sewage Facilities Act, and the Board identified a potentially affected person – a township - who did not fall within the language of (h)(2) or (h)(3). The Board directed the appellant to serve a copy of the appeal on the township and provided the township with the opportunity to participate in the appeal. He emphasized that (h)(4) is rarely used. It was never intended to be used to bring in the entire universe of interested persons. Mr. Moorhead recognized that any amendments to Section 1021.51(h)(2)-(4) would need to ensure a balance between intervention as of right and intervention by permission. Ms. Wesdock agreed and explained that (h)(4) was added solely to address the rare situation of an entity that should be allowed to intervene as of right but was inadvertently omitted from the list set forth in (h)(2) and (h)(3). Mr. Delio noted that the proposed changes to Section 1021.51 were intended to clarify the language, not to expand intervention as of right.

Ms. Stares expressed the concern that by expanding the scope of persons who must receive notice of an appeal, it could act to expand the scope of appeals before the Board since such notice would act as an invitation to intervene (either by right or by permission). Mr. Wolford noted that

intervention under (h)(4) would still need to be ordered by the Board; it did not provide anyone with an automatic right to intervene. However, Mr. Moorhead pointed out that the proposed revision to subsection (j) would allow "potentially adversely affected persons" to "intervene as of right," and he suggested that the use of "potentially adversely affected" may not be appropriate in that subsection.

Mr. Moorhead posed the following question: If the Board orders an appellant to provide notice of an appeal to an entity, does the Board believe that entity has the right to intervene? Ms. Wesdock felt it was an excellent question and stated that she did not believe it was the Board's intent that providing notice of an appeal in the types of situations described by Mr. Wolford created an automatic right to intervene in the appeal. She felt that intervention as of right is limited to the type of situation described in *Schniederwind.* Mr. Delio provided an example of a case where the Board ordered notice because it believed the person receiving notice had a right to intervene: That case involved an appeal by an oil and gas company from a determination finding the company responsible for contaminating a landowner's water supply. Because the landowner was not a person who fell under the categories set forth in (h)(2) and (h)(3), the Board ordered notice to the landowner under (h)(4). In that case, the Board ordered notice because it believed the landowner had the right to intervene. However, Mr. Delio agreed that it was not the Board's intention that anyone who receives notice of an appeal has an automatic right to intervene in the appeal. Mr. Wolford suggested revising subsection (j) to require approval under subsection (h)(4) before a potentially adversely affected person may intervene in an appeal.

Ms. Stares addressed the scenario described earlier by Mr. Wolford, in which he believed that municipalities that could be adversely affected by an appeal of a Department decision should receive notice of the appeal. Rather than addressing that situation in subsection (h)(2), Ms. Stares

asked whether it could be addressed under (h)(4) (i.e. "other interested persons [parties] as ordered by the Board.") Mr. Wolford agreed that it could be addressed under (h)(4), but only if the appellant brings it to the Board's attention. He cautioned that not every appellant will notify the Board of entities that may be adversely affected by the Board's decision. He would rather have a rule in place that puts the onus on the appellant to notify the Board. Mr. Moorhead stated that he believed the language of (h)(2) could be narrowed and he offered to prepare a draft.

Ms. Wesdock also suggested that the Board should review Section 1021.51(h)(2)-(4) and (j) internally to determine what, if any, changes may be needed. Mr. Wein also pointed out that Mr. Wolford had noted that changes were needed to the Board's notice of appeal form. He further suggested that the subcommittee tasked with revising Section 1021.51 should reconvene prior to the March Rules Committee meeting.

Therefore, the following actions will be taken for the March Rules Committee meeting:

1) Mr. Moorhead will propose new revisions to Section 1021.51(h)(2).

2) Ms. Wesdock, Mr. Delio and Judge Renwand will take a closer look at Sections 1021.51(h)(2)-(4) and (j) and discuss what the Board is trying to accomplish via any proposed revisions to those sections.

3) After items number 1 and 2 have been completed, Ms. Wesdock will schedule a conference call of the subcommittee tasked with proposing changes to Section 1021.51.

Next Meeting:

The next meeting of the Rules Committee was originally scheduled for Thursday, March 10, 2022 at 10:00 a.m. but has been rescheduled to Wednesday, March 23, 2022, at 10:00 a.m. due to conflicts in Mr. Wein's and Ms. Wesdock's schedules.

Adjournment:

The meeting adjourned at 12:24 p.m. on the motion of Mr. Wolford, seconded by Mr. Moorhead.