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EDITORIAL STAFF

EDITORS-IN-CHIEF

Maxine M. Woelfling
Morgan, Lewis & Bockius LLP
One Commerce Square
417 Walnut Street
Harrisburg, PA 17101-1904
717.237.4065
717.237.4004 (Fax)
mwoelfling@morganlewis.com

Jennifer A. Smokelin
Reed Smith
435 Sixth Avenue
Pittsburgh, PA 15219
412.288.3016
412.288.3063 (FAX)
jsmokelin@reedsmith.com

Chad Wissinger
Klett Rooney Lieber & Schorling
One Oxford Centre, 40th Floor
Pittsburgh, PA 15219-6498
412.392.2000
412.392.2128 (FAX)
cawissinger@klettrooney.com

FEATURE EDITORS

G. Bryan Salzmann
1580 Gabler Road
P. O. Box 276
Chambersburg, PA 17201-0276
717.263.2121
717.264.8967 (FAX)
gbsalz@innernet.net
Appellate and Common Pleas Court Opinions

Jennifer A. Smokelin
EHB Opinions and Orders

Maxine M. Woelfling
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CHAIRMAN’S MESSAGE

Welcome to another issue of the Environmental, Mineral and Natural Resources Law Section’s newsletter. I want to encourage everyone to determine how this Section can best serve you, and then please share your thoughts!

Why Get Involved?

I have been involved in the Section for over eight years and have found it to be a wonderful way to learn of new developments in our field, to network with practitioners across the state, and most importantly, to meet the members of Pennsylvania’s environmental bar. Getting to know environmental professionals throughout the state, at the EHB, DEP, and in private practice, has been enjoyable and rewarding both personally and professionally. Pennsylvania’s environmental bar is actually a fun group of people! If you are already active in the Section, you know this. If not, I offer you my experiences to encourage you to check us out. Whether or not you have been involved in the past, the coming year offers many opportunities to utilize the Section for your professional needs -- be they CLE, networking or just getting to know potential adversaries or co-counsel.

It’s Easy to Get Involved

It is now easier than ever before to become involved in the Section’s activities and to learn of and share ideas regarding new opportunities.

Last year, the Section was reorganized to include a number of standing committees. These committees offer a quick and simple way to get involved in the Section. The five substantive committees are:

- Pollution Prevention and Permitting, chaired by Rick Friedman (rfriedman@mwn.com);
- Contamination and Land Recycling, chaired by Andy Hartzell (ahartzell@state.pa.us.);
- Minerals and Mining, chaired by Gene Dice (diceee@bipc.com);
- Land Use, Environmentally Sensitive Areas, and Development, chaired by Jack Embick (jembick@kdefe.com); and
- Environmental Litigation, chaired by Mark Freed (mfreed@langsamstevens.com).

These committees are responsible for:

- submitting an item for the Newsletter annually;
• creating (and hopefully maintaining) topical materials to be used for County Outreach or Public Outreach efforts;
• offering program ideas, and possible speakers, for the Environmental Law Forum; and
• any other activities that Committee members believe are appropriate and of interest to them.

If you are interested in joining any of these committees, please contact the respective chair or feel free to contact me directly. Starting in 2004, the committees will be scheduling bi-monthly or quarterly conference calls. Information on these conference calls will be circulated through our Section’s listserv.

Which brings me to the quickest and easiest way to learn about Section activities -- our website and listserv. Currently, our website offers access to past newsletters, meeting minutes, seminars likely to be of interest to members, and our online directory, through which members and non-members can search for environmental attorneys statewide by either name, firm, city, or county. In the coming year, we hope to be able to offer more up-to-date information and links through our website. If you are interested in working on the Section’s website, please contact me or our Website/Technology Coordinator, Marc Davies (davies@ballaerdspahr.com).

Most important, if you are not currently on our listserv, please sign up! (Don’t be nervous -- unsubscribing is as easy as subscribing.) At this point, our newsletter is distributed almost entirely through the listserv. Being on the listserv will also provide you with the most up-to-date information on Section activities and other topics/seminars likely to be of interest to environmental practitioners. To sign up simply go to www.pabar.org/listservform.shtml.

Starting in January 2004, a new service will be provided to the Section’s listserv subscribers -- they will receive immediate notice of new Environmental Hearing Board adjudications and opinions with web links to the opinions. We are excited to be able to offer Section members the easiest and quickest way to be kept apprised of new EHB adjudications and opinions.

County Outreach Efforts

An initiative that is being implemented this year is the Section’s County Outreach program. As a state bar association, we want to offer attorneys statewide continuing legal education opportunities on environmental issues. Consequently, we are partnering with County Bar Associations to offer programs on environmental topics. The first program will be a “lunch and learn seminar,” entitled “Addressing Environmental Contamination in Pennsylvania Real Estate Transactions,” at the Northampton County Bar Association on February 19, 2004. A similar program is being scheduled with the York County Bar Association for March 2004. If you are interested in presenting or participating in these or other upcoming county bar outreach programs, either contact the Section’s County Outreach Coordinator, Paul McIntyre (pncintyre@mgkflaw.com) or the chair of a substantive committee in which you are interested (many of the speakers will be selected from the Section’s substantive committees).
Environmental Law Forum

On March 31 and April 1, 2004, the Section will again be co-sponsoring the Environmental Law Forum with the Pennsylvania Bar Institute at the Harrisburg Hilton and Towers. The Forum is the premier Pennsylvania environmental seminar and is attended by over 300 attorneys each year. The Section also sells two levels of sponsorships for the Forum. The monies raised through the sponsorships are used to offer scholarships to two students from each of Pennsylvania’s law schools to attend the Forum.

Share Your Ideas

The increased funding that has resulted from the sale of Forum sponsorships and the circulation of the newsletter through e-mail enables the Section to offer even more programs and services for its members. We are exploring a number of possibilities, including an additional social event in the fall. What would you like to see offered by the Section? Please contact me with your ideas. I hope to hear from you soon.

Jill Hyman Kaplan, Chair

PBA Environmental, Mineral & Natural Resources Law Section
FEATURE ARTICLE

Changes to the Environmental Hearing Board
Rules of Practice and Procedure
By
MaryAnne Wesdock, Esq.
Senior Counsel
Environmental Hearing Board
And
Howard J. Wein, Esq.
Klett Rooney Lieber Schorling
Chair, Environmental Hearing Board
Procedural Rules Committee

Introduction

The Environmental Hearing Board (Board) Rules of Practice and Procedure underwent a number of revisions in 2002. In July of 2002, the rules were reorganized, and new rules were added to permit electronic filing and the withdrawal of appearance of counsel. A number of rules were also modified, including those dealing with motions, reconsideration, discovery, number of copies and certification of the record on appeal to Commonwealth Court. In November 2002, new rules on signing and special actions were added. In addition, revisions were made to the definition of “pleading” and the rules dealing with dispositive motions, pre-hearing procedure, termination of proceedings, attorney’s fees and costs and composition of the record on appeal to Commonwealth Court. These changes are described in more detail below:

Reorganization of the Rules

The most significant of the rule changes that took place in 2002 was a reorganization of the Board’s Rules of Practice and Procedure. This reorganization of the rules, which occurred after a great deal of discussion and thought by the Board’s Procedural Rules Committee, were designed to reflect the order in which they become relevant in a proceeding before the Board, in order to make them more user-friendly for practitioners as well as the public.

For example, under the old system of numbering, the rule on “Discovery” fell after the rules on “Hearings.” Under the reorganized rules, the discovery rule has been moved to the section dealing with “Pre-Hearing Procedures and Pre-Hearing Conferences.” Additionally, under the old numbering system, the rules on “Prepayment of Penalties” were located near the end of the Board’s rules, even though the prepayment of penalties would occur much earlier in a proceeding before the Board. Under the new system of numbering, the rules on prepayment have been moved so that they immediately follow the rules pertaining to the filing of an appeal.

The reorganization of the rules is demonstrated in the cross-reference table that appears at the end of this article. The reorganized rules have been published in the Pennsylvania...
Code at Chapter 1021, Title 25 with a unified table of contents, rather than a separate table of contents by subchapter, in order to facilitate location of applicable rules. Copies of the Board’s Rules of Practice and Procedure and the Board’s Practice and Procedure Manual are available in bound-form at the Board’s Harrisburg office as well as on the website at www.ehb.verilaw.com.

**Electronic Filing**

Another significant change to the Board’s Rules of Practice and Procedure in 2002 was the implementation of electronic filing. This allows parties to file, serve and receive all legal documents except original process (notice of appeals and complaints) by electronic mail.¹ Electronic filing began as a pilot project in the Fall of 2000 under the direction of former Chairman George J. Miller. The pilot project proved successful and demonstrated that “e-filing” provides a benefit to the practicing bar as an efficient means of filing and service.

Attorneys may register for e-filing by completing and faxing to the Board a registration statement that appears on the Board’s website at www.ehb.verilaw.com. The website also contains instructions on how to file and serve documents electronically.

The new rules authorizing the electronic filing of documents are located at §§ 1021.32(d) through (f). Subsection (g) has also been amended to state that documents filed electronically (both by e-filing and fax) shall be deemed filed on the date received by the Board.² All other documents, i.e., those filed by U.S. mail, hand or other delivery, must be received by the Board’s Harrisburg office no later than 4:30 p.m. Eastern Time or they will be deemed filed on the following business day.³

The electronic service of documents is covered by §§ 1021.34(c) and 1021.35(a). Any attorney who has registered to file documents electronically may also serve and be served electronically. A registered attorney is permitted to withdraw the attorney’s registration statement for purposes of a specific case if the attorney or the client does not wish to receive electronic service in that particular case.

The rule on “Docket” at § 1021.41 has been revised to state that the Board will maintain a docket of proceedings on its website. When a document is filed electronically, the Board will electronically notify all attorneys in the proceeding.

**Withdrawal of Appearance**

A new rule on withdrawal of appearance has been added at § 1021.23. The Board’s prior rules contained no procedure to be followed where counsel wished to withdraw an appearance in a matter before the Board. The new rule allows an attorney to withdraw without

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¹ Additionally, documents exceeding 50 pages in length must also be filed in hard copy.

² The fact that a document has been filed by fax or email does not guarantee that it is received by the Board. Therefore it may be appropriate to follow up by checking the Board’s docket on its website.

³ Under the old rule, all documents, whether filed by fax or by mail or hand delivery, had to be received by the Board’s Harrisburg office no later than 4:30 p.m. or they were deemed filed the following business day.
leave of the Board if another attorney has entered or simultaneously enters an appearance for the party and the change of counsel does not delay the proceeding. Where no other attorney enters an appearance, the attorney wishing to withdraw must file a motion seeking leave of the Board. In ruling on such a motion, the Board will consider the following factors: the reasons why withdrawal is requested, any prejudice withdrawal may cause to the litigants, delay in resolution of the case and the effect of withdrawal on the efficient administration of justice. In the event withdrawal will result in a party being unrepresented by counsel, the withdrawing attorney must provide the Board with the name of a contact person for that party.

**Signing of Documents**

A new rule on the signing of legal documents has been added at § 1021.31. The purpose of this rule is to guarantee that documents filed with the Board are authentic and filed in good faith.

Section 1021.31 is modeled after Pa.R.C.P. 1023 and Fed.R.Civ.P. 11. Subsection (a) of the rule requires the signature of at least one attorney of record or, if a party is proceeding pro se, then the signature of the party, as well as the address and telephone number of the attorney or party filing the document. Subsections (b) and (c) require counsel or the party to represent that the document is being filed in good faith. Under this rule, the Board may impose sanctions on those who file documents in bad faith, which is determined in accordance with Pa.R.C.P. 1023.

**Dispositive Motions**

The Board’s rules on motions previously required that all motions, including dispositive motions, set forth in numbered paragraphs the facts in support of the motion and the relief requested. The effect of this requirement with regard to dispositive motions was that the motions and their corresponding responses and replies were often unnecessarily long. Litigants filing dispositive motions felt compelled to include both background and material facts. Consequently, opposing counsel was required to respond to facts that often bore little materiality to the relief requested but simply provided background information. This also resulted in parties filing supporting memoranda that were repetitive of their corresponding motions, responses and replies.

In an effort to make the rules pertaining to dispositive motions more manageable and meaningful, dispositive motions have been excluded from the purview of § 1021.91, which deals with motions in general. Dispositive motions are dealt with exclusively in § 1021.94. Paragraph (a) of that section sets forth the requirements for dispositive motions as follows: “Dispositive motions shall contain a concise statement of the relief requested, the reasons for granting that relief, and, where necessary, the material facts that support the relief sought.” Accordingly, background information and nonmaterial facts may appear in the supporting memorandum of law or brief, rather than in the motion, response or reply. This rule change is consistent with both federal and Pennsylvania practice, neither of which requires the exhaustive numbered paragraph approach for dispositive motions.
Motions in General

All motions, except dispositive motions, must now be accompanied by a proposed order, pursuant to revisions at § 1021.91 and 1021.92. The same is true for responses to motions, as well as requests for extensions and continuances.

In addition, the rules on motions have been revised to state that they supersede rather than supplement the General Rules of Administrative Practice and Procedure. This change is set forth in §§ 1021.91(h), 1021.92(h), 1021.93(e), 1021.94(g) and 1021.95(e).

Special Actions

The Board’s former rules contained procedures governing the filing of complaints by the Department of Environmental Protection (Department), e.g. in the case of a complaint for civil penalty. However, the rules contained no provision for complaints filed by other litigants against the Department pursuant to statutory authorization, such as § 5(f) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.505(f). The rules also contained no provision for matters transferred to the Board from other courts in the Commonwealth, such as claims of regulatory takings. Two new rules were added to address these situations: Section 1021.72 governs “complaints filed by other persons” and allows a person to institute an action against the Department by the filing of a complaint when authorized to do so by statute. Section 1021.73 governs “transferred matters” and requires the party who initiated the transferred action to file a complaint with the Board within the 30-day period in which the Board directs it to do so.

Section 1021.71, dealing with complaints filed by the Department was revised to state that the filing of a complaint commences an action. This revision was made in order to more closely track the language of the Pennsylvania Rules of Civil Procedure.

Finally, the definition of “pleading” was revised to include complaints or answers filed both by the Department and by persons other than the Department.

Pre-Hearing Procedure

The rule on pre-hearing procedure, at § 1021.101, has undergone a number of changes. This rule previously stated that discovery must be concluded within 90 days of the date of the pre-hearing order. It has been amended to clarify that discovery must be served within that timeframe reflecting current Board practice.

Deadlines for responding to expert interrogatories and filing dispositive motions have been modified accordingly. The party with the burden of proof must serve his answers to expert interrogatories within 150 days of the pre-hearing order, and the opposing party within 30 days thereafter. Dispositive motions in a case requiring expert testimony shall be filed within 210 days of the date of the pre-hearing order, and 180 days of the date of the pre-hearing order where no party intends to call an expert witness.
The manner in which a party may respond to expert interrogatories has also been modified. The responding party may either answer the interrogatories or serve an expert report along with a statement of qualifications.

The former rule governing the filing of pre-hearing memoranda required a party to provide a summary of the testimony of each expert witness he intended to call at hearing. The revised rule, at § 1021.104, allows a party to satisfy this requirement by filing answers to expert interrogatories and a copy of the expert report. In the absence of answers to expert interrogatories or an expert report, the party is required provide a summary of testimony, as under the old rule.

**Discovery**

The former rule on discovery stated that it supplemented 1 Pa. Code §§ 35.145—35.152 of the General Rules of Administrative Practice and Procedure (GRAPP) relating to depositions. Under GRAPP, depositions may be taken only with notice to and approval of the administrative agency or presiding officer. Since the Board does not require such notice or approval prior to the taking of a deposition, the rule on discovery at § 1021.102 has been revised to state that it supersedes rather than supplements GRAPP.

**Reconsideration**

The rules on reconsideration of final and interlocutory orders, located at §§ 1021.151 and 1021.152, have been amended to state that a party may file a memorandum of law in support of a petition for reconsideration or response thereto. This revision was made in recognition of the fact that parties have a very short period of time (10 days) in which to prepare a petition for reconsideration, so they may dispense with the necessity of preparing a supporting memorandum of law.

**Termination of Proceedings**

In § 1021.141(b), governing the withdrawal of appeals, the default presumption was that when an appeal was withdrawn it was done so with prejudice. This presented a problem particularly where a precautionary appeal had been filed and the parties were engaged in settlement negotiations. Litigants often faced the obstacle of negotiating the withdrawal of their appeal without prejudice to avoid the preclusive effect of the former rule. Because the former rule presented an unnecessary barrier to settlement, the Board has deleted the presumption that the withdrawal of an appeal is with prejudice in favor of determining the effect of the withdrawal of an appeal on a case-by-case basis. Practitioners must still consider, however, the effect of administrative finality in barring the litigation of similar issues in subsequent appeals.

**Attorneys Fees and Costs**

Act 138 of 2000, 27 Pa.C.S. § 7701 et seq., set forth new standards for the award of attorney’s fees and costs in mining appeals. In order to make the Board’s rules consistent with these new standards, §§ 1021.181-1021.184, dealing with “Attorney Fees and Costs Authorized by Statute Other than the Costs Act,” were revised to make them uniform with Act 138. Section
1021.182 sets forth what must be contained in an application for costs and fees filed under these sections, including a copy of the Board’s order; a statement of the basis on which the applicant claims to be entitled to costs and fees; an affidavit setting forth all reasonable costs and fees incurred including receipts or other evidence of the amount claimed; evidence regarding the hours expended on the case, the customary commercial rate for such services in the area, and the experience, reputation and ability of the individual performing the service; and the name of the party from whom costs and fees are sought.

In addition, the time for responding to an application for costs and fees has been extended from 15 to 30 days in accordance with Act 138.

Certified Records of Matters on Appeal to Commonwealth Court

The rule on “Composition of the Certified Record on Appeal to Commonwealth Court” at § 1021.201 underwent minor modifications. A section was added to deal with documents that are filed electronically. Subsection (d) provides that a paper copy of an electronic filing will be included in the certified record sent to the Commonwealth Court. In addition, two typographical errors were corrected. The old rule incorrectly referred to a “posthearing memorandum” rather than a “posthearing brief.” This error was corrected in the revised rule. In addition, the old rule incorrectly referenced “Pa.R.C.P. 1951.” This has been corrected to refer to “Pa.R.A.P. 1951.”

Conclusion

The Environmental Hearing Board Rules Committee has proposed a number of other revisions to the Rules of Practice and Procedure. These include amendments to the following rules: § 1021.32 (Filing) to allow the filing of documents at the Board’s Pittsburgh office; § 1021.34 (Service by a Party) to require service by overnight or personal delivery where a party has filed a document with the Board in that manner; § 1021.104 (Pre-hearing Memorandum) to state that a pre-hearing memorandum must not simply provide a list of exhibits the party intends to introduce at the hearing but also include copies of the exhibits and any other information as the Board may require; and § 1021.2 (Definitions) to change the definition of “Department” from “the Department of Environmental Resources” to “the Department of Environmental Protection or other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board.” These proposed amendments are likely to be submitted for public comment in 2004.
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RECOMMENDATIONS TO THE RENDELL ADMINISTRATION ON ENVIRONMENTAL AND NATURAL RESOURCES PRIORITIES

Prepared by
Robert B. McKinstry, Jr.
Maurice K. Goddard Professor of Forestry and Environmental Resources Conservation
The Pennsylvania State University

The mandate the people of Pennsylvania have given to the Rendell Administration provides the Governor a unique opportunity to advance issues that he deems critical to the health and welfare of the Commonwealth. Efforts to protect and enhance the Commonwealth’s environmental and natural resources should occupy a prominent position on that agenda and be advanced early in the Rendell Administration. This priority is not simply a moral concern but arises from practical considerations. The Commonwealth cannot sustain economic growth and development without a clean and healthy natural environment. Without this essential element of the quality of life, Pennsylvania will neither attract nonresidents nor retain our own “best and brightest.” The priority also arises from important moral considerations. The Commonwealth is the trustee for our natural resources, responsible for protecting and conserving those resources for all the people and future generations.

In order to help the Rendell Administration identify areas that should be brought to the forefront as priorities in environmental and natural resource conservation, Robert B. McKinstry, Jr., the Maurice K. Goddard Professor of Forestry and Environmental Resources Conservation at The Pennsylvania State University (“Goddard Chair”), consulted with a group of individuals identified at the end of this document from leading conservation groups, academic institutions, government, private industry, and private law firms. With the suggestions of these individuals, the Goddard Professor has identified priorities that might be implemented early in the Administration and issues that should be made a priority in the longer term. Those priorities are identified in the following sections of this document.

The views represented herein are solely those of the author, Robert B. McKinstry, Jr., and should not be deemed to represent the position of The Pennsylvania State University, of any of the individuals who assisted in this effort or any of the institutions with which those individuals are affiliated.

July 14, 2003
EXECUTIVE SUMMARY

Protection and stewardship of our natural and environmental resources are essential to the long term health and well being of the Commonwealth, its residents and its economy. Because of the deep interconnection between economic and environmental well-being, the Rendell Administration’s central governing principles should recognize the Commonwealth’s obligation, as a trustee, to protect and manage the environment to create a sustainable and high quality of life for those alive today as well as future generations. Pennsylvania has a long history of environmental stewardship and innovation that has served us well, starting with William Penn and early naturalists such as John Bartram and John James Audubon, continuing with Gifford Pinchot, the father of the conservation movement, and including the environmental innovations of leaders such as Maurice Goddard and, most recently, the many participants in the 21st Century Environment Commission.

The policies summarized below and described at greater length in the text that follows are recommended to help the Rendell Administration better meet its Constitutional obligation and continue this heritage of stewardship. The policies are not simply a list of ideas likely to benefit health and the environment. They seek to integrate issues such as land use, investment, finance, tax policy, government spending policy, transportation and education with policies for environmental and natural resource protection and use. The goal of such integration is to encourage those elements which improve the quality of our lives while discouraging activities or conditions that are wasteful, benefit the few at the cost of the many, or are detrimental to our health and welfare.

Four areas require particular emphasis. First, the Rendell Administration should give priority to recommendations made here for improving the organization of the administration of Pennsylvania’s environmental and natural resource policy and for integrating social, economic, and environmental policy across the jurisdictional lines that divide both agencies and levels of government. These organizational recommendations seek to build upon the strengths of past efforts, such as the efforts of the 21st Century Environment Commission and the Pennsylvania Biodiversity Partnership, and to redress some of the fragmentation that has plagued environmental and land use policy in the past. Second and third, the Rendell Administration should help Pennsylvania become a national leader in adopting substantive programs to address the international issues of climate change and biodiversity. Fourth, it should craft innovative solutions to these and other issues that will make Pennsylvania a model for other states and inevitable federal responses, and take advantage of enterprising partnership and market-based solutions that will strengthen our economic base. The priority to be given these recommendations roughly follows the order in which they are addressed. Despite the emphasis given these recommendations, other recommendations to improve existing programs are also important and all recommendations are closely interrelated, consistent with the need to integrate policy across media, subject matter, and jurisdictional lines.
1. **The Rendell Administration Should Establish an Administrative Structure to Enable It and Local Governments to Manage Pennsylvania’s Resources More Effectively.**

The Rendell Administration should follow a number of other states in issuing an executive order adopting sustainable economic development as a guiding principle for integrating environmental, social and economic decision-making in the Commonwealth. This principle, which emerged from the 1992 Rio Earth Summit and which was the focus of the 2002 Johannesburg Earth Summit, seeks to encourage economic development of the type that can be sustained over the long run and to maximize the overall long-term value rather than investing in technologies that will detract from the value of life in other spheres or produce a boom and bust pattern of growth. Sustainable economic development seeks to encourage “smart growth” aimed at improving the quality of the growth which the Commonwealth encourages by directing development to technologies and industries that will produce a high quality of life and can be sustained in the long run (such as wind power, geothermal power, or hydrogen technology). Sustainable development seeks to consider economic, social and environmental policies together to assure that they are coordinated and do not work at cross purposes, as has occurred in the past in areas such as land use, transportation policy and urban policy. Several mechanisms can assist in this effort:

First, the Governor should designate a Director of Sustainable Economic Development within the Governor’s Office. The Director will be responsible for coordinating the sustainable economic development mandate, coordinating policy and supervising environmental planning using the staff of the Governor’s Green Government Council, a new Deputate of Policy and Planning in DEP and the Director of Policy within DCNR. The Administration has already taken action to appoint Joanne Denworth to integrate environmental, land use and natural resource policy. Her position can fulfill the role of the Director and should be given an adequate authority to fulfill this role.

Second, the Director of Sustainable Economic Development and the Secretaries of the environmental, natural resource, transportation and economic development agencies should be designated as the Governor’s Council on Sustainable Economic and Environmental Policy and should meet regularly to coordinate planning and policy. The existing Governor’s Green Government Council should be redesignated as this Council on Sustainable Economic and Environmental Policy and be given greater prominence in formulation and integration of economic, social and environmental policy.

Third, it is also important that the energy of public and private efforts invested in the development of the Report of the 21st Century Environment Commission be sustained and the results of that effort be implemented and adapted to changing conditions. The Director of Sustainable Economic Development, DEP and DCNR should work with the Environmental Quality Board to update the Statewide Environmental Master Plan to incorporate new developments, including the work of the 21st Century Environment Committee and the ongoing work of the Pennsylvania Biodiversity Partnership. More importantly, they should establish a process of continual environmental planning. That process must include the establishment and monitoring of a set of indicators of environmental quality and sustainable development, which
will be used to produce an annual “report card,” consistent with the recommendations of the 21st Century Environment Commission.

Fourth, the Commonwealth should organize its management systems to assure that its sustainable development policies are implemented. The Rendell Administration should consider having state administrative agencies review their management systems under the oversight of an independent third-party certification system, such as that of ISO 14001. This has already been done by DCNR’s Bureau of Forestry, which has certified its forestry and land management practices as sustainable by the Forest Stewardship Council (“FSC”) and by at least one Department of Transportation District, which is seeking certification under ISO 14001. Many private enterprises, including Kane Hardwood, a Collins Company (FSC), the P.H. Glatfelter Corporation (SFI and ISO14001), and Weyerhauser Corporation, have undertaken the certification effort as a means to improve their environmental management systems, thereby both improving compliance and increasing efficiency. Such an effort would be of equal value to public entities.

There are also a number of other actions whereby the current structure of environmental and natural resource administration at the state level could be improved.

- The Governor should appoint a panel to work with the legislature to reexamine the administrative and financial structure for protection and management of wildlife and other elements of biodiversity within the Commonwealth. This panel should examine all options to improve this management, including the possibility of improving efficiency by consolidating and expanding wildlife education, promotion and protection functions within a single wildlife agency situated within the Department of Conservation and Natural Resources, a cabinet level agency. The current divided structure of these agencies has resulted in wasteful duplication of services, left important areas such as invasive species and terrestrial invertebrates without state oversight, reduced the public transparency and accountability of some agencies, and resulted in creation of problems such as the overpopulation of deer in the Commonwealth. The use of the current commission structure for administration of the fish and wildlife agencies creates conflicts between administrative and policy making functions that reduce the effectiveness of administration. The narrow focus of the current commissions also gives disproportionate weight to the interests of narrow constituencies that can work at cross purposes with broader public goals.

- A Deputate of Policy and Planning should be established within DEP to coordinate planning with other agencies, across programs, across media and across regions, to achieve integrated solutions.

- The Governor should require regular meetings and coordination of policy among all environmental and natural resource agencies, and require monthly meetings of the Secretaries, Executive Directors (if applicable) and the executive staff responsible for policy and planning.
2. **The Rendell Administration Should Join with Neighboring States and Adopt and Implement Policies to Address Global Warming.**

There is a growing consensus among scientists that human activities have caused the climate of the earth to warm and that this warming trend will continue and increase. This warming trend may cause adverse impacts upon Pennsylvania, the extent of which are difficult to determine. Despite this consensus, the federal government has failed to make substantial progress in developing a meaningful program to limit and to reduce net emissions (emissions less sequestration) and increasing concentrations of greenhouse gas ("GHG") pollutants that cause this warming, thereby leaving responsibility for meeting our nation’s international obligations to the states. There is considerable opportunity for Pennsylvania to have a positive impact on this problem, because Pennsylvania alone is significantly contributing to the problem. In 1999, Pennsylvania emissions of six major categories of GHG pollutants - -carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride -- amounted to 79.8 million metric tons of carbon equivalent (Rose et al., 2002). Although Pennsylvania had only 4.4 percent of the U.S. population in 1999, it emitted 4.8 percent of the nation’s GHGs. Pennsylvania ranks *sixteenth in the world* in terms of carbon emissions (ahead of all but twelve countries and three other states) and has the second highest per capita emissions in the United States. (CCAP, 2002).

By taking action early, Pennsylvania can serve as a model for future federal action, thereby both giving Pennsylvania industry more time to adapt and generating demand for new products and services that Pennsylvania can provide to other parts of the nation when the inevitable federal program is implemented. As a framework for action, the Rendell Administration should endorse the Climate Change Action Plan that has been endorsed by the governors of the six New England states and five Canadian provinces as the foundation of goals and policies they will seek to implement to achieve the reductions in greenhouse gas emissions required by the Framework Convention on Climate Change and suggested in the Kyoto Protocol to that Convention. The Administration should also take immediate action to complete three projects that will fulfill central elements of that Plan. The Administration should complete the inventory of greenhouse gas emissions currently underway. The Administration should also proceed with the development of both a greenhouse gas reduction registry and a strategy for achieving greenhouse gas emission reductions, for which proposals were solicited by the last Administration but never funded. A registry is essential to protect the interests of responsible industry and local governments, like Philadelphia, who are moving to take early action to limit and/or sequester GHG emissions. It is for this reason that both California and New Jersey have established state registries.

The Rendell Administration should work with the Legislature to integrate tax reform with market-based policies that will reduce greenhouse gas emissions and encourage energy efficiency. It could do so either by establishment of a broad-based greenhouse gas pollution emissions tax or by establishing a state cap on GHG emissions combined with a state auction of a portion of the permitted emissions and trading of emissions rights. The Commonwealth faces a budget shortfall and needs additional income to finance elimination of the capital franchise tax, reduction in real estate taxes, and increased funding for education. The revenues of a GHG tax or auction could support reductions in business and real estate taxes or the deficit reduction.
A GHG pollution emissions tax imposed on all sectors or a cap on GHG emissions coupled with an auction of the right to emit could generate income to satisfy these business tax and deficit reduction needs while reducing emissions. If a GHG pollution emissions tax of $25/ton of carbon equivalents emitted were imposed upon (1) all GHG emissions from permitted air pollution sources, (2) fossil fuels sold in the Commonwealth and not used in permitted emissions sources, and (3) electricity sales where the generation source is not taxed, such a tax would produce $1.75 billion in revenues for tax relief and deficit reduction. A tax set at this level would also (1) cause the Commonwealth to achieve the reductions proposed for the United States by the Kyoto Protocol without imposing regulatory restrictions which would harm industry, (2) encourage consumer reduction in emissions through the pricing mechanism and (3) create market incentives for new smart growth investments in the Commonwealth. The Commonwealth could choose to set the tax at a lower level and phase it in over a period of years to the level required to achieve the Kyoto emissions or at some higher level. This will allow industry and consumers to make adjustments and investments to reduce or avoid the tax before it becomes effective.

Instead of a GHG tax, the Commonwealth could establish a GHG cap, auction and trade program. That program would limit (1) GHG emissions from air pollution sources requiring a permit, (2) sales of fuels for uses generating unregulated emissions, and (3) sales of electricity generated with fossil fuels whose emissions are not otherwise subject to the cap and trade program. The cap would be set at a level of emissions equal to those that would have been required under Kyoto or at some other level or levels chosen by the Commonwealth. As is the case with the tax, the cap can be phased in, such that it is reduced over intervals of time. A cap, auction and trade program would require the emitter or the vendor to acquire through auction, trading or sequestration projects an emission credit in order to have the right to emit greenhouse gas pollution or sell unregulated fuel or electricity producing such emissions. Such a program would provide approximately half the revenue of a broad-based tax.

Whether a GHG pollution tax or a cap, auction and trade program is utilized, measures described in the text must be taken to assure that they are effective and will not disadvantage Pennsylvania industry. The program must extend to the consumer sector by applying to fuels and energy produced with fossil fuel that is not subject to an emissions tax to assure that (1) burdens are fairly distributed among all sectors, (2) the power of the market is brought to play to encourage conservation, replacement and reduction of fossil fuel demand, and (3) business tax burdens do not continue to discourage economic growth in Pennsylvania. Both the proposed tax and the cap, trade and auction alternative program would allow trading of credits for carbon sequestration and for reductions of untaxed pollutant emissions. Either the tax or the cap and auction would encourage investment in new emissions control technologies, new energy sources, and new energy conservation mechanisms that would strengthen Pennsylvania’s economy in the future by providing credits for the inevitable federal program while generating a market for innovations, goods and services that can be sold in other parts of the United States when that program becomes effective.
3. **The Rendell Administration Should Advance Policies to Conserve the Commonwealth’s Biodiversity While Promoting Sound Land Use and Preventing Sprawl.**

Sprawl development in eastern and southwestern Pennsylvania threatens Pennsylvania’s natural heritage while sapping the vitality of the Commonwealth’s cities, towns and rural economies. The Rendell Administration should encourage redevelopment of cities and towns to concentrate development there. It should and utilize transportation policy, open space management and acquisition policies, and consistency requirements for funding and permitting decisions to advance this goal. In deciding which areas to conserve in rural and other open space uses, the Administration should be guided by a plan based on the value of those areas for our natural heritage - - their value for conserving biodiversity. Pennsylvania should, therefore, join other states such as Delaware, Maryland, Massachusetts and Oregon in adopting a comprehensive program for conservation of its natural biological diversity integrated with its open space, land conservation and urban revitalization programs.

DCNR should be designated the lead agency to guide this biodiversity program, consistent with the recommendation of the 21st Century Environment Commission. DCNR has significant expertise in biodiversity conservation, advanced biodiversity programs (including PNDI, an Office of Biodiversity, a Biodiversity Advisory Committee and an Ecosystem Management Advisory Committee), and experience in managing state forests and parks for biodiversity conservation. The Governor should formalize this designation by Executive Order, which should also assign DCNR responsibility for gaps in our current system of biodiversity conservation, such as “orphan” taxa and invasive species. The Order should also further direct DCNR to continue its existing biodiversity programs.

Pennsylvania requires a strategic plan to guide biodiversity and open space conservation and smart growth. With the fragmentation of state and local government authority, a guide is necessary to make sure that state, local and private efforts do not work at cross purposes or waste resources. The Rendell Administration should continue to support the efforts of the Pennsylvania Biodiversity Partnership to bring all interested parties into the process of developing such a plan. Like the Maryland Greenlinks and the Massachusetts BioMap program, the plan to be developed should specify priorities for identifying, conserving and managing biologically important lands and areas that link them in a manner that will provide recreational amenities throughout the Commonwealth, connect habitats, and benefit both the quality of life and economic development in the Commonwealth.

The Rendell Administration should continue and expand support for other existing DCNR biodiversity programs. The Administration should continue the reform of PNDI, which should continue to serve as a central coordinating mechanism for biodiversity conservation at the state level. The Administration should also provide continued support of DCNR Bureau of Forestry’s sustainable planning efforts and certification and expansion of those or similar programs to all state land, DCNR’s Office of Biodiversity Conservation, urban forestry and parkland programs, PNDI, and continuing inventory and research.
The Rendell Administration should also support continued and expanded programs to protect lands valuable to biodiversity in areas most threatened by residential, industrial and commercial construction. Protection will require financial support for land or easement acquisition by public or private interests, which, in turn will require some expanded funding sources. Potential sources might include the $150 million state bond issue proposed during the campaign, an additional increase of the landfill tax, increased dedicated revenues from the cigarette tax and gambling revenues, and state income and estate tax credits supplementing the federal charitable income and estate tax deductions for donation of conservation easements. Protection of land will also require state support for the efforts of local governments to incorporate biodiversity conservation into their local land use planning, including use of the new authority for regional planning under the Municipalities Planning Code and through municipal acquisition of easements or land.

It is critical to provide support for rural economic development, strong forest and farm communities, and working rural lands. Working farms and forest lands should be protected through use and expansion of existing programs, such as Forest Legacy or expansion of the Agricultural Security Act to include working forest lands. Support for rural economic development projects coupled with biodiversity conservation in areas such as tourism, water supply and conservation can be provided using state incentives, such as loans, grants, enhanced access to tax exempt financing (for example, providing these activities for private activity bond volume caps) and identification of potential projects and project sites on or adjacent to state lands. The Commonwealth should also assure that easement terms, acquisitions and regulations do not unreasonably restrict rural uses of lands.

4. Governor Rendell Should Continue the Progress Made in Use of Partnerships, Incentives and Enterprising or Market-based Solutions to Achieve Environmental Goals.

Working through partnerships and using incentives and market-based tools can achieve environmental goals more efficiently and effectively than sole reliance on regulatory commands, while reducing conflicts and costly litigation. These approaches are better suited to problems caused by many small acts of many individuals, such as non-point source pollution and many air pollution issues. Consistent with the recommendations of the 21st Century Environment Commission, the Rendell Administration should continue to expand reliance on these mechanisms.

The Rendell Administration should examine additional pollution taxes as a mechanism for integrating environmental improvement with tax reform and efforts to balance the budget. It can thereby replace taxes that inhibit productivity or growth with taxes that discourage wasteful and environmentally harmful activities. Pollution taxes that should be considered include the proposed tax on greenhouse gas pollution emissions, a further increase in the landfill waste disposal fee, a tax on litter generating substances similar to that imposed by New Jersey and taxes on hazardous or toxic materials in consumer products.

Actively involving the private sector in environmental improvement through partnerships will also achieve significant results. The Commonwealth land resource agencies should
affirmatively identify opportunities to establish partnerships to provide sites and tax exempt financing or further to encourage development of sustainable technologies such as wind power and projects which will promote tourism and conservation of open space that is valuable to biodiversity conservation. Partnership efforts such as PBP, PNDI and watershed groups should receive continued support. The Administration should explore the further use of pollutant trading as a mechanism for achieving greater pollution reduction at a lower cost. DEP should encourage integration of pollutant trading systems in development of TMDL implementation plans. The agency should assist in establishing registries that will record tradable reductions, and allow generation of multiple pollutant credits for trading in a single transaction. The Rendell Administration should work with the legislature to expand trading to achieve further reductions in air pollutants necessary to achieve further reductions in NOx and other ozone precursors and greenhouse gases and specifically to recognize a property right in emissions reductions recorded in the registries.

The Rendell Administration should acknowledge the importance of sensible, targeted enforcement and understandable, effective environmental standards in supporting market-based solutions and the efforts of corporate environmental managers by publicly announcing the importance of such efforts. The Administration might also explore the question of whether mechanisms such as an independent environmental enforcement task force or an Office of an Environmental Advocate would improve or detract from the quality of enforcement. The Administration must assure, however, that litigation and enforcement do not detract from the goal of environmental improvement and efficiency. To that end, the Rendell Administration should establish and measure goals based on environmental improvement and target compliance assistance first with expanded assistance to industry from Pennsylvania’s universities and colleges.

The Administration should further examine incentives for encouraging substantive environmental improvement beyond minimum compliance. For example, companies consistently achieving emissions reductions significantly below the applicable limits should be rewarded with reduced monitoring and reporting requirements. Organizations with third party certified environmental management systems may also be awarded with reduced monitoring, reporting and inspections.

Consensual resolution should be encouraged in lieu of litigation. The Rendell Administration should establish an Office of Environmental and Natural Resource Mediation to assist in the consensual resolution of environmental disputes through the involvement of independent third parties. The Administration should also make a commitment to submit all environmental and natural resource disputes to mediation whenever mediation is requested and at all significant stages of any appeal or litigation regarding environmental or natural resource issues.
5. **The Rendell Administration Should Continue to Improve Existing Programs for Protection of Air and Water Quality, Environmental Cleanup, Control of Toxics and Waste, and Promotion of Environmental and Natural Resource Research and Education.**

The Rendell Administration should also continue the Commonwealth’s progress in improving existing environmental protection programs.

**Water.** Pennsylvania’s industrial and recreational economies depend on its wealth of water resources. The Administration should continue to achieve an integrated approach to management and protection of the Commonwealth’s water resources. Integration of consideration of water quantity and water quality is an important task that remains incomplete. Industrial and municipal point source dischargers can face excessive regulation where base stream flows are reduced by overuse of ground and surface waters or by excessive impervious surface that reduces groundwater infiltration. Reduction of base flows also impairs aquatic habitats. Because dilution may often be the solution to pollution where in-stream water quality is concerned, the regulatory structure for water quantity must be integrated with the regulatory structure for water quality under state law, as it is and has been for decades, under the Delaware River Basin Compact. To complete this task, the Rendell Administration should implement the Water Resources Act immediately and begin gathering information and planning efforts that can assist such integration. The Administration should further begin development of water resources legislation with substantive content calling for contemporaneous consideration of quantity and quality. Development of legislation should occur as a part of the planning process called for by the new Water Resources Act and should be integrated into the continuous water quality planning process under the Clean Water Act and Clean Streams Law.

The Administration should complete an accurate assessment of water quality in Pennsylvania and, where adequate and sufficient data demonstrate impairment by specific pollutants, establish TMDLs. The Administration should proceed to develop TMDL implementation plans that assure improvements in water quality and employ trading programs that will create economic incentives to reduce non-point source contamination. DEP should revise its policy on development of TMDLs to require simultaneous consideration of point, sources, non-point sources, and implementation plans simultaneously and at the time allocations are first made. Trading opportunities can then be built into these TMDL implementation plans, and should routinely be incorporated in the implementation plans as they are created.

Finally, the Administration should turn its attention to support the Commonwealth’s water quality infrastructure. To do so, the Administration should support both (1) a bond issue to upgrade the Commonwealth’s water and sewer infrastructure, and (2) enactment of pending legislation to protect the quality of private well water relied upon by many residents of the Commonwealth.

**Mining and Abandoned Minelands.** The legacy of unwise mining practices in the past remains a continuing problem, and the Commonwealth requires billions of dollars to reclaim lands and waters contaminated by mining. The Rendell Administration should take full advantage of existing funding under the Abandoned Mine Reclamation Fund to reclaim these
lands and waters. The Rendell Administration might also explore whether CERCLA Superfund monies could be used to provide additional sources of revenue to reclaim land and waters adversely affected by releases of AMD and other hazardous substances associated with mining without invoking the time consuming and often costly demands for cost recovery and litigation which might create deterrents to existing enterprising remediation efforts, such as remining and waste coal energy projects. The Administration should further develop mechanisms to encourage voluntary minelands reclamation. As a first step, the Administration should examine mechanisms to remove barriers to use of fly ash and sewage sludge, which might otherwise be wastes, for reclamation. The Administration should further develop “blackfields” legislation extending the voluntary cleanup and redevelopment incentives incorporated in Pennsylvania’s Act 2 brownfields program to abandoned minelands.

**Air.** Although Pennsylvania has made great strides in air quality improvement, the quality of its air remains unhealthful in many areas. Ozone and acid rain associated with nitrogen oxides and emissions of certain heavy metals threaten the health of humans and of our lakes, streams and soils. The Administration should work to improve the quality of our air by implementing the enhanced vehicle inspection and maintenance (“I/M”) program throughout the commonwealth and encouraging energy efficiency and use of public transportation.

The Administration has joined fellow states in litigation challenging EPA’s recently promulgated New Source Review regulations. However, the Administration should go beyond this step to take a positive role in seeking an air protection regime which is simpler and more cost effective and will include both the administrative reforms in air permitting contained in the challenged regulations and the legislative changes that will assure cleaner air. The Rendell Administration should encourage Pennsylvania’s federal legislators to support legislation reforming New Source Review to remove the current complicated rules and to impose new, lower emissions limitations or “caps” on all permitted sources of four pollutants (nitrogen oxides, sulfur dioxide, mercury and greenhouse gases) with the opportunity for emissions reduction trading. The Administration should not seek to overturn the New Source Review regulatory reforms. Rather, the Administration should seek a resolution to the litigation which would delay the regulations’ effective date until either (1) federal legislation reducing emissions limitations or establishing a cap and trade system is in place or (2) a state has included requirements in its SIP that will result in statewide emissions reductions that would be equivalent to those achieved by installation of state-of-the-art pollution control technology in existing sources. It is imperative that regulated industries be given flexibility in how these reductions should be achieved. This could best be achieved by imposing an overall cap on emissions from all regulated sources, providing emissions allowances based on emission rates that would be achieved with state-of-the-art technology, and allowing the caps to be achieved through pollutant trading. This should be accomplished in Pennsylvania under the trading program being implemented within the ozone transport region in connection with the ozone SIP call. The Administration should work with its legislators to assure that similar requirements are imposed uniformly in all states pursuant to new federal legislation.

**Energy and Resource Conservation and Research.** It is important to assure that the Commonwealth makes good, sensible use of its resources to prevent environmental problems and to achieve sustainable economic growth and development. Sound energy development is
central to this task and integrally related to mitigation of climate change and air pollution. The Rendell Administration should promote sound energy development through requirements for mandatory peak metering and billing with interval rates, and use of telemetric remote shut-off or control. It should further promote energy conservation and limit energy demand by encouraging of construction of green buildings in both the public and private sectors. Encouragement of projects to co-generate electricity at existing heating and process steam plants through state tax credits and construction of co-generation projects at public buildings will further promote energy efficiency and pollution reduction. The Administration should also promote investment in new plants and technologies by the adoption of rules or legislation establishing a renewable energy portfolio standard (‘RPS’), as states such as Massachusetts, New Jersey and California have already done.

The Commonwealth should establish a new, increased recycling goal to continue progress in that area. It should further consider a ban on intentional introduction of mercury into products to assist recycling and prevent release of that toxic substance into air, water or soil.

Finally, the Administration should encourage integration of research and development efforts on innovative programs to protect the environment and sustainable economic development at our colleges and universities. These might include the proposed Goddard Center and PCIEP, and environmental and natural resource education programs. Focusing on innovative energy research programs such as hydrogen fuel technologies and alternative energy generation technologies can assist the commonwealth in improving the environment and the economy simultaneously and sustainably.

The full text of the report is available at http://goddard.cas.psu.edu/environmental%20priorities.pdf
Motion for Summary Judgment; Appeal of Department’s Approval of Sewage Facilities Planning Decision; Adverse Economic Impact; Environmental Impact; Department’s Procedural Requirements.

This is a dispute over a decision by the Department of Environmental Protection approving a sewage facilities plan. A neighboring municipality appealed the approval decision to the Board. The Department moved for summary judgment on three objections raised in the appellant’s complaint: (1) that the Department failed to consider the plan’s economic impact; (2) that the Department failed to fully consider the potential environmental impact; and (3) that the Department failed to follow procedural requirements by not conducting a hearing and not responding to public comments. The Board denied all three summary judgment motions, finding evidence sufficient to establish a prima facie case on the issues of adverse economic impact and potential environmental impact. As to whether the Department followed procedural requirements, the Board noted that given the absence of express statutory or regulatory requirements, the appellant’s argument might be a “stretch.” However, the Board was unwilling to grant summary judgment and hold, as a matter of law, that there are not circumstances that would require the Department to hold a public meeting or respond to public comment.

Southwest Delaware County Municipal Authority & Aston Township v. Commonwealth of Pennsylvania, Department of Environmental Protection, and Bethel Township and Upper Chichester Township, Permittees, EHB Docket No. 2002-255-L (June 2, 2003).

Motion in Limine; Expert Testimony; Reasonably Available Control Technology (RACT); RACT Penalty; BEN Model; Pa.R.E. 703.

At issue in this case is a penalty against Sunoco for a delay in installing Reasonably Available Control Technology (RACT). The Department moved to exclude from evidence the Expert Report of Sunoco’s economics expert. Because such reports are not typically entered into evidence, and the evidence at issue is more properly the testimony of the expert, the Board treated the motion as one to exclude expert testimony. The Board denied the Motion in Limine on the grounds that it sets forth a “script for cross-examination, not grounds for exclusion.” The Board held that a basic argument, by itself, that an expert opinion is flawed is insufficient grounds for excluding expert testimony. Here, the Motion in Limine was insufficient in that it was directed towards issues of weight, and not issues of admissibility.

**Petition for Reconsideration of Final Order; Motion to Withdraw Appeal**

The Board, having previously granted a Motion to Withdraw Appeal filed by the Solicitor for the City of Erie, here denies a Petition for Reconsideration filed by an attorney hired by City Council and purporting to represent the City of Erie. The Board noted that the reconsideration of a final order is an extraordinary remedy. Since the arguments set forth in this Petition had already been addressed by the Board in the original Motion to Withdraw Appeal, the Board chose not to grant reconsideration.


**Motion to Dismiss; Noncoal Surface Mining Permit; NPDES Permit; Appealed Permit Relinquished; Mootness**

In a case involving a township appealing a decision by the Department to grant a Noncoal Surface Mining Permit to a quarry owner, the Board granted the quarry owner’s Motion to Dismiss on grounds of mootness where the owner had sold the land covered by the permit to the Commonwealth of Pennsylvania Department of Conservation and Natural Resources and had relinquished the permit at issue back to the Department. The Board rejected the township’s argument that the case involved issues of public importance and that it would suffer a detriment without the Board’s decision. The Board noted that in cases where an appealed permit is relinquished, the Board is no longer able to grant effective relief. Furthermore, since the Board’s failure to reach a decision will not lead to environmental damages, the township’s argument on the issue of public importance was rejected.

Tinicum Township v Commonwealth of Pennsylvania, Department of Environmental Protection and Delaware Valley Concrete Co., Inc., EHB Docket # 2001-263-L (June 18, 2003).

**Motion to Dismiss; Untimely Appeal; Service by Certified Mail; 30 Day Appeal Period**

The Board denied the Department’s Motion to Dismiss in a case involving an Administrative Order directing a mining company to take steps to correct water quality degradation. The Department moved to dismiss on the grounds that the mining company’s appeal was untimely. The Board held that when the Department issues an order there must be no doubt as to when the 30-days appeal clock starts. The Board concluded that the advance copy personally delivered to the company’s president could have reasonably been interpreted as a draft, non-final, conditional document, and this conclusion was strongly supported by the Department’s one-week delay in serving the original Administrative Order by certified mail.

**Petition to Intervene; UMWA; Miner Safety**

The Department issued two compliance orders to a mining operation that had evacuated miners using battery-operated equipment during a ventilation-fan stoppage. The UMWA sought to intervene in the appeal. While the Board noted that, generally, any interested party may intervene in a matter before the Board, they denied UMWA’s Petition to Intervene on grounds that UMWA failed to show a direct interest in the outcome of the appeal, and failed to explain with specificity what issues it would pursue if allowed to intervene. The Board concluded that UMWA’s sole basis for intervention was that it was prosecuting a separate and unrelated appeal before the Board involving similar issues. UMWA’s interest, therefore, extends only to the precedential value of the instant case. This is an indirect interest, insufficient to support a Petition to Intervene.

*TJS Mining, Inc. v Commonwealth of Pennsylvania, Department of Environmental Protection, EHB Docket No. 2002-136-L (July 2, 2003).*

**Motion to Dismiss for Summary Judgment; Jurisdiction; Mootness; Non Pros; Pa. R. Civ. P 1035.3(d)**

The Department approved a pilot study for the proposed introduction of landfill leachate flow into publicly-owned wastewater treatment works. A resident, pro se, appealed the decision to the Board. The appellant resident failed to respond to the Department’s Motion for Summary Judgment. The Board granted the motion pursuant to Pa. R. Civ. P. 1035.3(d) (summary judgment against a party who does not respond to a motion against it). In so holding, the Board deferred on addressing the legal issues raised on appeal that might create precedent in the context of “empty-chair” litigation.


**Motion to Withdraw Appeal; Standing; Executive Power**

In an appeal of a Department decision to issue a permit for the operation of a fluoridation facility, the Board granted a Motion to Withdraw Appeal by the city solicitor. The appeal was filed in the name of the City of Erie by an attorney hired by City Council, purportedly to represent the City. The Board held that the City Counsel could have had its own interest represented in the appeal, but could not file under the name of the City of Erie. Such an action must be brought by the City Solicitor as directed or authorized by the Mayor. City Council may not usurp the executive power of the Mayor by passing a resolution and hiring counsel to represent the City.

**Motion to Dismiss; Challenge to Contract Award**

This case involves an appeal of a Department decision that a particular corporation was not eligible to enter into a grant-funded contract with a township to perform a waste-tire remediation project. The Board denied the Department’s Motion for Summary Judgment, holding that the Department had mischaracterized the appeal as a “disappointed bidder’s challenge to a contract award.” The Board noted that the corporation did not challenge the actual awarding of the bid, but merely the Department’s determination of ineligibility. The Board refused to grant summary judgment where the issue is a potential government-imposed contract bar.


**Motion to Dismiss; Appealable Issues; Administrative Finality**

A chemical company was charged with violation of the Clean Streams Law and Solid Waste Management Act. The Department directed the company to take a number of steps to clean up the contamination resulting from the company’s operations. The company submitted a proposed conceptual cleanup plan, and then a revised version of the plan. The Department rejected the plan, and the company appealed that decision to the Board. The Department moved to dismiss on the grounds that the decision was not appealable. The Board denied the motion, holding that where a letter is “definitive enough to possibly support a claim of administrative finality, it is likely that it is definitive enough to constitute an appealable action.”


**Motion to Dismiss; Timely Appeal; Nunc Pro Tunc**

In this case the Department sought to forfeit bonds securing the proper operation of a surface mining facility. The Department issued a written notice to the mining company that the bonds would be forfeited due to the company’s failure to correct violations of the mining operation. The mining company sought to appeal and served the Department within the 30-day period for appeal. The company did not, however, file the appeal with the Board during the 30-day period. The Board held that the appeal was untimely and that absent “unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal,” the Board cannot exercise its jurisdiction.
Petition to Intervene; Untimely Petition; Prejudice

A school district sought to intervene in an appeal from a water obstruction and encroachment permit issued by the Department. The Board denied the Motion to Intervene on the grounds that it was untimely. The School district had filed its motion one month before the scheduled hearing. The Board held that granting the motion would be unfair and prejudicial to the parties as there was insufficient time before the hearing to conduct adequate discovery. The Board also noted that the intervention would be unfair to the Permittee, who had sought an expedited hearing.

Petition for Reconsideration En Banc; Reconsideration of Interlocutory Orders; 25 Pa. Code § 1021.151

The Board denied a petition from the Department to reconsider its Motion to Dismiss in a case that involved an appeal from a company the Department determined was ineligible for consideration for a grant-funded, waste-tire remediation project. The Board determined, under the standard for reconsideration in 25 Pa. Code § 1021.151, that the Department did not provide compelling, persuasive reasons for reconsideration, and failed to show extraordinary circumstances to warrant interlocutory reconsideration.

Request for Extension of Time to Obtain Counsel; Corporations; Section 1021.21 – Representation

The Department ordered a corporation to plug wells and reclaim well sites pursuant to the Pennsylvania Oil and Gas Act. The corporation appealed the order through counsel. Counsel for the corporation was permitted to withdraw because they were not being paid. The Board twice issued orders to the corporation to obtain counsel, pursuant to the Board’s Rules of Practice and Procedure, which require corporations to be represented by counsel in proceedings before the Board. The second order demanded the corporation retain counsel by August 26 if it wished to continue the appeal. On August 26, the President of the corporation


submitted a letter to the Board requesting a 30 day extension. The Board granted an extension of 14 days.

### ENVIRONMENTAL LAW FORUM 2004

#### Wednesday, March 31, 2004

<table>
<thead>
<tr>
<th>Time</th>
<th>CLE</th>
<th>Programs</th>
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<tbody>
<tr>
<td>8:00 – 9:00</td>
<td>0</td>
<td>Registration; continental breakfast</td>
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<tr>
<td>9:00 – 9:15</td>
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<td>Welcome from Section, Introductions, and CLE Information</td>
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<tr>
<td>9:00 – 9:30</td>
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<td>DEP Secretary Opening Remarks—McGinty</td>
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<td>9:30 – 9:45</td>
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<td>Travel</td>
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<td>9:45 – 11:15</td>
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<td>Federal &amp; State Issues (cross-fire)</td>
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<td></td>
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<td>Manko (M), Voltaggio, Schaeffer</td>
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<td>1½</td>
<td>Corporate Counsel Panel</td>
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<td>Kurland (M), Schultz, Zaepfel, Pfeifer</td>
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<td>11:15 – 11:30</td>
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<td>Travel</td>
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<tr>
<td>11:30 – 12:30</td>
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<td>Int’l Environmental Law Issues</td>
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<td>12:30 – 1:45</td>
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<td>Lunch &amp; Travel</td>
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<td>Municipal Enforcement of Environmental Law</td>
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<td>2:45 – 3:00</td>
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<td>3:00 – 4:00</td>
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<td>4:00 – 4:15</td>
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<td>Fitzpatrick, Hanger</td>
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<td>4:15 – 5:15</td>
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<td>Ethics</td>
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<td>Barnett</td>
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<td>5:30 – 7:00</td>
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<td>Reception – Sponsored by the PBA Environmental Minerals and Natural Resources Section</td>
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<td>(The Section’s Annual Dinner to follow)</td>
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* - Suggest schedule program for larger room.
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<thead>
<tr>
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<th>Programs</th>
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<tr>
<td>7:30 – 8:30</td>
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<td>Registration; continental breakfast</td>
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<td><strong>Track 1: Litigation</strong></td>
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<td>8:30 – 10:15</td>
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<td>Litigation Update¹ (includes cit. suits, class actions, common law claims and NRD)</td>
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<td>A. Miller (M), Buchele, Naugle</td>
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<td><strong>Track 2: Real Estate Development</strong></td>
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<td>Developers’ Dilemma¹ (includes E&amp;S, wetlands, Sewage Fac., etc.)</td>
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<td>Garber (M), Rosenthal, Rinde, Cigan</td>
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<td><strong>Track 3: Update</strong></td>
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<td>Solid Waste Update¹ (includes safe fill)</td>
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<td><strong>Track 4: Skills</strong></td>
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<td>Obtaining Permits¹</td>
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<td>11:30 – 1:00</td>
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<td>Luncheon with Keynote Address from DEP Chief Counsel—Bedrin</td>
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<td>1:00 – 2:00</td>
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<td>2:00 – 2:15</td>
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<td>2:15 – 3:15</td>
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<td>Embick (M), Ubinger</td>
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<td>Grayfields and Mining Update</td>
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<td>3:30 – 4:30</td>
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¹ Includes 15 minutes for Welcome from Section, Introductions, and CLE info.