

THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

INSIDE THIS ISSUE:

<i>Newsletter Team</i>	3
PENNSYLVANIA SUPREME COURT RULES IN FAVOR OF OIL AND GAS COMPANY PURSUANT TO ESTOPPEL BY DEED <i>by Samantha Quinn Stewart</i>	4
<i>Sustainability Corner</i>	4
<i>Court Opinions</i>	5
<i>EHB Opinions</i>	7
<i>Legislative Developments</i>	11
<i>Regulatory Developments</i>	14



Widener University
Commonwealth Law School

WELCOME FROM THE EELS CHAIR

Welcome. Summer is upon us and the PBA Environmental & Energy Law Section (“EELS”) continues to be busy planning and doing. EELS is a very active section with leadership from many members, especially the 11 officers and representatives constituting EELS Council. Here are just some of the highlights.

EELS Council monitors legislation of likely interest to members and posts to the Section ListServ. (Instructions on how to sign up are on the PBA EELS Members Only portion of the website.) Most recently we advocated a position, adopted by PBA, on SB 413. The bill proposed consolidation of administrative hearing judges under one office. We asked that it be amended to exclude Environmental Hearing Board Judges (“EHB”). The proposal was well received by the bill’s sponsor and we understand that our amendment is likely to be added. In addition, we are cooperating with the EHB Judges in developing a position regarding possible rules changes allowing non-lawyers to appear on behalf of certain corporations, LLCs and incorporated associations; with one alternative under consideration being a pilot program extension of the EELS administered EHB pro-bono representation program. We welcome your thoughts on these topics.

EELS continues to monitor Climate Change and Sustainability issues for its members. Last November, the PBA House of Delegates adopted an EELS sponsored resolution calling for Government Action on Climate Change.

EELS has created and the PBA has implemented the PLUS program, a voluntary sustainability certification program for law firms. Michelle Skjoldal provides information about the program elsewhere in this Newsletter. More recently, we participated in a Bar Leaders Summit on Climate Change at Columbia Law School and learned of the efforts of many state environmental bars. For our part, we have established a new Climate Change/Sustainability Committee, chaired by Marty Siegel. This Committee is charged with developing substantive programs for member involvement. Initially, the Committee will consider engaging PBA and PBI to formalize their sustainability efforts. The Committee will also look at providing educational materials and programs to law firms and the general public on Climate Change and Sustainability best practices. If you are interested in participating as a member of the Committee, contact Marty at msiegel@stockandleader.com or me.

Twice each year (May and November) EELS meets in-person in Harrisburg as part of the PBA Section Day and Annual Meeting. More recently during our session, we have hosted the Chief Counsel of DEP and DCNR who provide us with updates and discussions on topics of interest to our members. We invite all our members to participate and provide topics for inclusion. (A conference phone line is also available.)

Council is also in the process of planning EELS networking receptions in Philadelphia, Harrisburg and Pittsburgh

THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

for late summer/early fall. We hope that all members will attend one or more receptions to get to know fellow members in a social setting.

Finally, I am pleased to announce that our nominated (by immediate past chair John Carroll) program, the Pennsylvania Bar Association/Pennsylvania Bar Institute's 20th annual Environmental Law Forum, was selected by the ABA as the recipient of its 2016 State or Local Bar Program of the Year Award. The award recognizes the best continuing legal education program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. PBA President Sara Austin has agreed to accept the award on the program's behalf at the ABA Annual Meeting in August. We especially thank and extend our gratitude to Stacey Thomas, the PBI Program Manager for this program since the beginning, for all her efforts and great work in making the ELF the premier program it is now recognized to be.

I welcome each of your comments on how we can do a better job serving PA environmental and energy law practitioners. I also encourage you to volunteer in one of our many programs. I can be reached at rfriedman@mcneeslaw.com.

Rick

Richard H. Friedman
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WELCOME FROM THE EDITOR-IN-CHIEF

Welcome to the summer edition of the 2016 PBA Environmental & Energy Law Section Newsletter! The days have gotten longer, the weather has heated up, and so have environmental and energy issues. This quarter, our featured article is authored by Ms. Samantha Quinn Stewart and summarizes the PA Supreme Court's treatment of *Shedden v. Anadarko E&P*. In this decision, the Court ruled in favor of Anadarko, pursuant to estoppel by deed. The Court affirmed Pennsylvania's well-established doctrine of estoppel by deed, illustrating the importance of a covenant of full title in an oil and gas lease and the deference Pennsylvania courts give to these covenants as to later acquired property.

As always, we at the Newsletter appreciate your readership. Please consider providing us with comments, suggestions, or article submissions. We are always working to make this publication truly yours and enjoy any opportunity to speak with our members about how to respond better to your needs. You can reach us at PBA.EELSnewsletter@gmail.com.

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What do you think? Do you want to contribute an article? Do you have an event to add to the Newsletter?

Send your material to our [email](#) address. Provide sufficient contact information. The editorial staff may make changes for format, length, and content only and in coordination with original author.

Disclaimer: Any views expressed by article authors are solely their own and do not reflect the views of the EELS Newsletter Team, the PBA Environmental & Energy Law Section, or the Widener Environmental Law Center.

FEATURED ARTICLE***Pennsylvania Supreme Court Rules in Favor of Oil and Gas Company Pursuant to Estoppel by Deed****Samantha Quinn Stewart, Esq.*

On March 29, 2016, the Pennsylvania Supreme Court issued a unanimous opinion in *Shedden v. Anadarko E&P*, 103 MAP 2014, in favor of Defendant Anadarko E.&P. Company, LP (“Anadarko”). In this case, Plaintiffs Leo E. Shedden and Sandra L. Shedden (“Plaintiffs”) sought to invalidate Anadarko’s lease to one half of the oil and gas underlying their property on the basis that Plaintiffs did not own title to that half of the oil and gas, roughly thirty one acres of Plaintiffs’ sixty two acre parcel, when they signed a lease with Anadarko in 2006. The Pennsylvania Supreme Court affirmed the Superior Court’s decision that Anadarko held the oil and gas rights to Plaintiffs’ entire sixty two acre property pursuant to its lease. [Read or download the full article here.](#)

SUSTAINABILITY CORNER

In 2010, the PBA adopted the Pennsylvania Lawyers United for Sustainability (PLUS) Program, which provides Pennsylvania attorneys and law firms an opportunity to demonstrate publicly their commitment to environmental sustainability in their professional practices. The PLUS Program consists of guidelines offering suggestions and providing specific examples to program participants on how to make their law practices more sustainable. The guidelines cover five separate areas: (1) energy savings, (2) paper reduction, (3) recycling and waste reduction, (4) transportation and (5) sustainable purchasing. The PLUS Program is voluntary and self-monitored. Participating attorneys and law firms are asked to complete a pledge form indicating their commitment to implementing the PLUS Program guidelines into their practice. Initiatives such as the PLUS Program can strengthen the reputation of attorneys and law offices, and help them increase their efficiency, productivity and employee recruitment and retention. The Program can also help align law firms with the growing number of current and potential clients who are embracing sustainable practices in a meaningful way.

Examples of efforts by PLUS Program participants to make their law practices more sustainable include: using copier paper with at least 30% post-consumer recycled paper; encouraging employees to refrain from printing-out documents unnecessarily and utilize double-sided printing when printing is needed; using only glass glasses for cold beverages and only mugs for hot beverages (no paper or plastic); using citrus-based and low-toxicity cleaning and kitchen products; installing motion sensor light switches in all private offices where physically feasible; installing eco-friendly materials, such as carpeting, as part of office renovations; occupying a LEED accredited building; encouraging employees to participate in Bike to Work Week and Daylight Hour 2016.

The Section strongly encourages you to enroll in the PLUS Program, which only takes a few minutes: http://www.pabar.org/public/sections/ENV10/plu_sprogram.asp. The Section also invites you to share any thoughts on the Program by emailing Michelle Skjoldal at skjoldal@pepperlaw.com.

For more about sustainable law practice, [click here to view an article](#) written by EELS Editor-in-Chief Brandon Pierce for the Widener Law Spring 2012 magazine.

COURT OPINIONS

Supreme Court of Pennsylvania

[EQT Production Company v. DEP, No. 15 MAP 2015, and Appeal from the Order of the Commonwealth Court at No. 485 MD 2014 \(Dec. 29, 2015\)](#). The Supreme Court reversed and remanded to the Commonwealth Court, which had held that exclusive authority to determine an appropriate penalty for DEP violations was repositied in the Hearing Board. The Supreme Court held that the impact of DEP's threat of multi-million dollar penalties against EQT was sufficiently direct, immediate, and substantial to create a case or controversy justifying pre-enforcement judicial review via a declaratory judgment proceeding, and that exhaustion of administrative remedies relative to the issues of statutory interpretation that the company presented was unnecessary.

Under the facts of this case, EQT informed DEP of contaminated water due to hydraulic fracturing. DEP offered EQT a proposed monetary settlement. EQT disputed DEP's interpretation of the Clean Streams Law as imposing daily penalties and filed a complaint for declaratory judgment as an original jurisdiction proceeding in the Commonwealth Court, per the Declaratory Judgments Act. EQT asserted that it lacked any viable administrative remedy, while observing that DEP recently also had advanced its continuing violation interpretation in *DEP v. Sunoco Logistics Partners, LP*, EHB Dkt. No. 2014- 020-CP-R. Additionally, EQT averred that the legal question that it posed was adequately developed and ripe for judicial review; it would suffer direct, immediate, and substantial hardship if review was delayed; and the action would settle controversies otherwise indicative of immediate and inevitable litigation. DEP argued that declaratory relief should not be available to EQT because EQT did not exhaust administrative remedies and because the matter is exclusive to the jurisdiction of the EHB.

[Leo E. Shedden and Sandra L. Shedden v. Anadarko E. & P. Company, L.P., PA MD No. 103 MAP 2014, \(Mar. 29, 2016\)](#). Please see the Featured Article by Samantha Quinn Stewart, Esq. on page 3 of this edition of the Newsletter.

Commonwealth Court

[Tinicum Township v. Allan J. Nowicki, River Road Quarry, LLC, Pennswood Hauling, LLC, and RRQ, LLC, No. 2114 C.D. 2014 \(Mar. 31, 2016\)](#). Appellant Nowicki appealed an injunction precluding his mulch operations, asserting that the mulching operations qualified under agricultural operations or forestry activities protected by Sections 107, 603 (f), and 603 (h) of the Pennsylvania Municipalities Planning Code (MPC) (Act of July 31, 1968, P.O. 805, as amended, 53 P.S. §§10107, 10603(f), (h), and Section 2 of the Right to Farm (RTF) Act. (Act of June 10, 1092, P.L. 454, as amended, 3 P.S. § 952.) The township zoning board (Board) held that the operation did not qualify under the MPC or RTF because none of the raw materials from the mulching operation were derived from the property itself, reasoning that hauling of wood produced elsewhere for further processing is not agricultural or forestry use.

The use in question, according to the Court, must have a connection to the land itself. This mulching operation resulted in a fifty yard long, twenty-five yard wide and twelve foot high mulch pile, causing noise, dust, and excessive traffic, which also presented a danger to public health in the event of flooding. Further, it permitted a landscaper to dump piles of soil and stone into the floodway of the Delaware River. The Court agreed with the trial court's holding that the mulching operation was not sufficiently connected to the land and held further that the preliminary injunction would not have been disturbed even if the argument was preserved for appeal.

[Ziegler, et al, Individually and on behalf of all similarly situated persons, v. City of Reading and Reading Area Water Authority, No. 10 C.D. 2015 \(Apr. 20, 2016\)](#). Appellants (Residents) appealed whether the City of Reading's curbside recycling fee is in violation of Act 101 (Municipal Waste Planning Recycling and Waste Reduction Act) and the Solid Waste Management Act (P.L. 380, Act of July 7, 1980 amended, 35 P.S. §§7018.101-6028.1003). Appellants claimed that at no time did the city request to be relieved of its Act 101 obligations because its recycling program costs are excessive.

COURT OPINIONS

The court referred to *Pennsylvania Independent Waste Haulers Association v. Northumberland County*, 885 Ad 1106, 111 (Pa.Cmwlth. 2005) *Northumberland County, appeal denied*, 917 A.2d 316 (Pa. 2006), which held that Act 101 preempted four counties and a Municipal Authority from imposing administrative fees on waste haulers to help fund recycling. The trial court determined that the City's fee made the recycling program sustainable, but did not address the purposes of Act 101 in terms of ultimate self-sufficiency and efficiency of the program. The Court held that in the absence of DEP input, and application of Act 101 purposes, the case is vacated and remanded to the trial court for further proceedings.

[Consol Pennsylvania Coal Company, LLC v. DEP, NO. 351 CD 2015 \(Dec. 15, 2015\)](#). The Commonwealth Court affirmed an order of the Environmental Hearing Board (EHB) that granted the DEP's motion to dismiss as moot Consol's appeal from the DEP's issuance of a permit revision. DEP required Consol, as part of the permit revision, to comply with a special condition in order to conduct longwall mining activities. Consol complied with this condition, but also filed an appeal with the EHB arguing against the imposition of DEP's special condition requirement. Thereafter, DEP issued another permit revision removing the special condition because Consol had met the condition. It then filed a motion to dismiss Consol's appeal as moot, claiming that because the special condition which was the subject of the appeal was removed, there existed no case or controversy for the EHB to adjudicate. The EHB granted DEP's motion to dismiss.

Consol appealed because it argued it may have to meet the special condition in the future, making it impractical for a permit applicant to be appealed because of financial pressure to begin mining operations. The Court held that Consol had not met its burden of proof to show that DEP exceeded its authority. The Court also found that Consol was not denied due process rights. The Court held that Consol had a remedy in the event DEP requires Consol to undertake additional monitoring, testing, or re-

parative measures in that Consol may appeal DEP's future orders at that time.

Superior Court

[Hall, et al. On Behalf of Themselves and All others Similarly Situated v. CNX Gas Company, LLC, In Its Own Right and As Successor-In-Interest to Consol Gas Company, LLC. 2016 PA Super 80 \(Apr. 7, 2016\)](#). The Superior Court affirmed the trial court's grant of summary judgment in favor of CNX Gas (CNX) and dismissed Appellants' claims. Two oil and gas leases, one in 1998 and another in 2002, entitled Hall Sr. and Hall Jr. to royalties while conferring upon CNX the right to drill, operate, and give Lessee the right "to use, free of cost, oil, gas and water produced on said land for its operations." The Hall lease required CNX to pay a one-eighth royalty to the Halls and the other lessors calculated upon the net amount realized at the point of sale. Appellants contended that CNX breached the lease in how it allocated the post-production costs, lost gas, and used gas. The Court found no such breach, referring to *T.W. Philips Gas and Oil Co. v. Jedicka*, 42, A.3d 261, 267 (Pa 2012) and stating that the Supreme Court recognizes oil and gas leases as governed by contract law. The Court found there was no ambiguity or missing allocation term in the Hall lease. Therefore, the Court granted summary judgment in favor of CNX.

[Loughman, et al v. Equitable Gas Company, LLC, et al. 2016 PA Super 71, \(Mar. 22, 2016\)](#). The Court affirmed the trial court's determination that an oil and gas lease did not terminate even after nearly half a century when no oil or gas has been produced. The lease, executed in 1966 between the deceased relatives of the Loughan family, was determined valid and not severable under the contract theory of the parties' intent, and, further, the disjunctive use of "or" is given its ordinary meaning and not considered as meaning "and." The Court held that the Loughman Lease shall continue during either production *or* storage, with storage being the presence of the gas underneath the ground.

ENVIRONMENTAL HEARING BOARD

[Raymond J. Slater, III v. DEP and David Wood, Permittee, Docket No. 2015-097-B, \(June 10, 2016\) \(5 judge opinion by J. Beckman\)](#). Appellant Slater appealed DEP's issuance of a State Water Obstruction and Encroachment Permit to David Wood. The Board dismissed the appeal on the grounds that Appellant failed to file a pre-hearing memorandum and failed to respond to a Rule to Show Cause. In accordance with 25 Pa. Code § 1021.161, the Board dismissed the appeal as an appropriate sanction for failure to comply with two Board orders.

[DEP v. EQT Production Company, Docket No. 2014-140-CP-L, \(June 9, 2016\) \(single judge opinion by J. Labuskes\)](#). The Board denied DEP's motion to compel discovery as untimely. EQT owns and operates a natural gas well in Tioga County. EQT stopped adding water to the 6 million gallon pit nearby when it was discovered to have holes. DEP is overseeing site cleanup. DEP filed a complaint asking the Board to impose a civil penalty of \$4,532,296 against EQT. EQT refused to produce reports and DEP submitted a motion to compel production of CEC and JLT reports. DEP filed a motion to compel discovery of the reports months after the Board had already granted extensions and DEP made no attempt to explain its late filing. The Board held that DEP's motion would delay the hearing and that the requested reports did not appear of critical importance to fair resolution in the matter such that justice compels their disclosure.

[Center for Coalfield Justice and Sierra Club v. DEP and Consol Pennsylvania Coal Company, LLC, Permittee, Docket No. 2014-072-B \(Consolidated with 2014-083-B and 2015-051-B, \(June 6, 2016\) \(single judge opinion by J. Beckman\)](#). The Board denied the Center for Coalfield Justice and Sierra Club's (CCJ/SC) Motion for Summary Judgment. CCJ/SC asserted that DEP acted contrary to law when it issued permits to Consol authorizing longwall mining in Greene County, Pennsylvania. The legal dispute centers on whether the impact to streams from the mining authorized by DEP's

permit revisions violated the Clean Streams Law and associated regulations. CCJ/SC argued, *inter alia*, that the permit revisions violate 35 P.S. § 691.611 (which make it unlawful for any person to cause water pollution) and that DEP improperly relied on Consol's mitigation plans. DEP argued that it did not abuse its discretion when it issued the permit revisions.

[Borough of St. Clair v. DEP and Blythe Township, Permittee, Docket No. 2015-017-L, \(June 6, 2016\) \(5 judge adjudication, J. Labuskes\)](#). The Board found that a surface mining permit did not need to be issued in conjunction with a landfill permit. This was the Board's third adjudication resulting from the Borough of St. Clair's (St. Clair) effort to prevent the opening of a new construction and demolition waste landfill known as the Blythe Recycling and Demolition Site (BRADS) Landfill. BRADS first submitted a permit application in 2004. In 2012, DEP issued Solid Waste Permit No. 101679 to Blythe for the landfill. St. Clair filed its first appeal on August 10, 2012, and the Board remanded the permit to DEP for review and to reissue the permit, if appropriate. *Borough of St. Clair v. DEP*, 2014 EB 76 (March 3, 2014). This appeal was St. Clair's appeal of the reissued permit to Blythe.

St. Clair provided evidence of, among other things, wind speeds and the inappropriate height installation of the RainWise station. The Board found that both pieces of evidence were related to air-quality modeling, which is not a requirement for the landfill permit. Blythe presented two experts who showed worst-case scenarios and demonstrated the BRADS Landfill proposed liner strength. St. Clair did not present any evidence concerning liner strength, but alleged the need for a surface mining permit for the excavation of the liner. The Board found that the landfill permit was properly issued to Blythe Township under 25 Pa. Code § 1021.122 (c) (2) and ordered the appeal dismissed.

ENVIRONMENTAL HEARING BOARD

[Chester Water Authority v. DEP and Old Dominion Electric Cooperative, Permittee, Docket No. 2015-064-L, \(May 11, 2016\) \(single judge opinion by J. Labuskes\).](#) Chester Water appealed DEP's April 9, 2015 issuance of NPDES Permit No. PA 0265951 to Old Dominion Electric Cooperative (Old Dominion) for its Wildcat Point Generating Facility, a new gas-fired power plant in Cecil County, Maryland. Both Chester Water and Old Dominion moved for summary judgment. Chester Water objected to the permit, which allowed bromide, haloacetic acid and total dissolved solids. Chester Water argued that DEP did not perform adequate analyses, while Old Dominion argued that DEP did perform adequate analyses. The Board found that both motions for summary judgment must be denied.

[M.C. Resource Development Company a/k/a/M.C. Resources Development, Inc. v. DEP, Docket No. 2015-023-C, \(May 9, 2016\) \(single judge opinion by J. Coleman\).](#) The Board denied Appellant M.C. Resource Development Company's (MCRD) motion for partial summary judgment because Appellant did not establish as a matter of law that its interpretation of a public water system definition under the Pennsylvania Safe Drinking Water Act was correct. MCRD appealed DEP's revocation of their public water supply permit. MCRD filed a petition for supersedeas and application for temporary *supersedeas*, which the Board granted following a conference call with the parties. MCRD was allowed to operate, as there was no record of environmental harm; however significant economic harm to MCRD was demonstrated. Further, the Board was not convinced of MCRD's claim of equitable estoppel and found that issues such as whether DEP has changed positions on permit conditions would need further development at the hearing on the merits. The Board denied MCRD and DEP motions for summary judgment and denied MCRD's motion to strike DEP's cross-motion as moot.

[Donald Sebastianelli, Samuel Sebastianelli, Timothy Seamans, Richard Dembroski, Fr. William Pickard, Allison Petryk and Alexander Lotorto v. DEP and Lackawanna Energy Center, LLC, Permittee, Docket No. 2016-012-L, May 2, 2016 \(5 judge opinion by J. Labuskes\).](#) The Board granted in part and denied in part a motion to dismiss filed by the Permittee. The Board held that DEP did not have an obligation to evaluate a new power plant plan in the context of any future requirements mandated by Pennsylvania's implementation of the federal Clean Power Plan (CPP). The Board accepted the non-moving party's version of events as true. Sebastianelli, et al, appealed DEP's Air Quality Plan Approval No. 35-00069A to Lackawanna Energy Center, LLC for the construction and operation of a natural gas fired power production in Lackawanna County. Lackawanna moved to dismiss Objections 6, 7, and 8 in the appeal. Objection 6 involved the power plant's structural integrity due to landfills, mine shafts, and tunnels. Objection 7 noted that the final CPP rule was issued prior to Lackawanna's approval and should have triggered further review. Objection 8 stated DEP's action was arbitrary and capricious. The Board dismissed Objection 7 and denied Permittee's motion to dismiss in all other respects.

[Wayne K. Baker, v. DEP and Amerikohl Mining, Inc., Permittee, Docket No. 2014-151-R, \(Mar. 23, 2016\) \(5 judge adjudication by J. Renwand\).](#) This matter involved a Stage 1 bond release by DEP for surface coal mining by Amerikohl on property owned by Appellant Baker. Mr. Baker contended that a Stage 1 bond release should not have been granted based on allegations that Amerikohl dumped waste oil and illegally buried solid waste at the site. The Board ordered the appeal dismissed. The Board found that the discovery of some evidence of filters, rags and a bucket, without further evidence of widespread disposal, did not warrant the overturning of DEP's Stage 1 bond release approval.

ENVIRONMENTAL HEARING BOARD

[Wayne K. Baker v. DEP and Amerikohl Mining, Inc., Permittee, Docket No. 2014 101-R, \(Apr. 20, 2016\) \(5 judge opinion by J. Renwand\)](#). The Board denied Baker's petition for reconsideration for not meeting burden of proof criteria in 25 Pa. Code § 1021.152. Baker argued that the Board was requiring proof of "widespread contamination" more than "de minimus." The Board held that the burden of proof (by a preponderance of evidence) required by §1021.122 (c) (2) had not been met by Baker in proving that DEP abused its discretion in approving the release. Specifically, Baker objected to Amerikohl's expert's methodology, which was typically used with permit applications and not bond release. The Board held that when faced with conflicting expert testimony, the Board chose to assign a higher degree of reliability to the expert who utilized methodology set forth in regulations, 25 Pa. Code § 87.54(a)(21). Finally, disagreement with Code methodology was not a basis for reconsideration.

[Roger Wetzel, William Wolfgang, Randy Shadle, Kenneth W. Richter, Kenneth Graham and Harty Mausser v. DEP and Hegins Township and Hubley Township, Permittees, Docket No. 2015-071-M, \(April 15, 2016\), \(single judge opinion by J. Mather\)](#). The Board denied Appellants' motion *in limine*, filed on the eve of trial, to exclude Permittee's expert witness evidence. The Board disagreed with Appellants' claim that Permittee's unanswered discovery requests were reason enough to exclude the expert evidence and that the expert evidence would prejudice Appellants. The Board found, as grounds for denying the motion *in limine*, that Appellants did not file a motion to compel compliance with the discovery requests. The Board relied on *CMV Sewage Co. Inc. v. DEP, 2010 EHB 725* and *McGinnis v. DEP, 2010 EHB 489* and found that the degree of prejudice suffered by the parties is the controlling factor, and in this case, Appellants did not explain how they would be prejudiced.

[Tri-Realty Company v. DEP and Ursinus College, Docket No. 2015-195-B \(consolidated with 2016-013-B\) \(April 14, 2016\) \(single judge opinion by J. Beckman\)](#). The Board denied Tri-Realty's motion for partial summary judgment and granted in part Ursinus' motion for summary judgment pertaining to the definition of "site" and denied the remaining motion. The case resulted from a release of underground tank heating oil on Ursinus' campus. The release contaminated groundwater on the campus and Tri-Realty's adjacent College Arms Apartments. Both Motions sought a decision on what constitutes "site." Tri-Realty argued the site was restricted to Ursinus campus and not Tri-Realty's property. The Court found that "site" includes "all areas in close proximity to the contamination . . . for implementation of remediation activities". Ursinus argued that Tri-Realty's appeal was barred by administrative finality, but the Board relied on legislative purpose and upheld Tri-Realty's right to appeal the 2015 Cleanup Plan's approval.

[The Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki, Anthony Lapin and JoAnn Groman v. DEP and R.E. Gas Development, LLC, Docket No. 2014-412-B \(Consolidated with 2015-157-B\), \(Mar. 22, 2016\) \(single- judge opinion by J. Beckman\)](#). The Board denied Permittee's Motion in *Limine* to strike an expert report. The Board found that in balancing the concerns of credibility with the desire to prevent waste of time and cumulative evidence that excluding the expert testimony of Mr. Fisher would in essence extend findings from a super-sedeas hearing (a prediction based on a limited record), amounting to a final ruling on Appellants' case.

ENVIRONMENTAL HEARING BOARD

[Glenn J. Morrison, M.D. v. DEP, EHB Docket No. 2016-009-L \(Consolidated with 2016-024-L\), \(Mar. 22, 2016\) \(single judge opinion by J. Labuskes\)](#). The Board denied a *pro se* appellant's motion for injunction because the Board is not empowered to grant injunctions. Appellant Morrison appealed the informal hearing result, consolidated into earlier docket. Appellant contended that fluids from vehicles leak onto his property from the adjacent salvage yard and sought to have Insurance Auto Auctions prohibited from moving or storing vehicles and to have all vehicles moved off the property. The Board found that Morrison provided insufficient support for any emergency relief given a balancing of harms.

[Stephen W. Klesic v. DEP, EHB Docket No. 2015-150-M \(Consolidated with 2015-169-M\), \(Mar. 21, 2016\) \(single judge opinion by J. Mather\)](#). The Board denied DEP's motion to dismiss. Mr. Klesic filed an appeal on behalf of United Environmental Group (UEG) objecting to a DEP civil penalty assessment for alleged violations of the Storage Tank and Spill Prevention Act on UEG's property. The Board instructed Mr. Klesic to obtain counsel in accordance with 25 Pa. Code § 1021.21(b), which requires corporations to be represented, but granted his request to proceed *pro se* to represent his individual interests in the appeal of the DEP's civil penalty assessment and order.

[Thomas J. Kazmierczak, Sr. v. DEP and Environmental & Recycling Services, Inc., Permittee, EHB Docket No. 2015 -062-C, \(Mar. 18, 2016\) \(5 judge opinion by J. Coleman\)](#). The Board denied Appellant Kazmierczak's motion for summary judgment, as well as DEP's motion for summary judgment. The Board also granted in part and denied in part Environmental & Recycling Services' (ERSI) motion for summary judgment. Kazmierczak appealed the DEP's approval of a minor modification to the permit for a waste landfill processing facility operated by ERSI. DEP had issued approval for the minor modifications involving submission plans for material storage,

information for recycled materials markets and relocation of a wood grinder. Appellant contended that ERSI's location and processing at the landfill was not permitted because of a zoning conflict and that the permit modification should have been a major, not minor, modification. The Board held that it was appropriate for DEP to assess permit modification, including changes in local land use, but if there was a land use conflict, as that is a matter for the zoning hearing board. The Board agreed that the minor permit modification was appropriate.

[422 Auto Sales, Inc. v. DEP, EHB Docket No. 2015-081-R, \(Mar. 15, 2016\) \(5 judge opinion by J. Renwand\)](#). The Board dismissed the appeal of 422 Auto Sales for failure to comply with orders of the Board. The matter involves the filing of an appeal, in the form of a handwritten letter, by 422 Auto Sales, Inc. on May 11, 2015. The Board held that it was unclear what DEP action was being appealed. 422 Auto Sales had been ordered twice to provide further information in order for the Board to proceed with the appeal, but it did not respond. The Board referenced requirements that a notice of appeal include first, a copy of the action being appealed, second, specific objections to the action in numbered paragraphs, and third, proof that Appellant served a copy of the appeal on the DEP Office of Chief Counsel and program office that took the action being appealed.

[Winfield Scott Lea III, v. DEP, EHB Docket No. 2015-178-R, \(Mar. 10, 2016\) \(5 judge opinion by J. Renwand\)](#). The Board dismissed Mr. Lea's appeal due to failure to comply with two Board orders directing him to perfect his appeal. Specifically, Mr. Lea cited documents, which referenced amounts and numbers of contaminants he claimed were attached to the appeal, documenting his objection that the mining caused his water quality to deteriorate. The Board found no papers attached to the appeal and after two requests for the missing information, there was no response by Mr. Lea. The Board held that failure to comply with a Board order requiring Appellant to perfect his appeal risks dismissal of the appeal.

ENVIRONMENTAL HEARING BOARD

LEGISLATIVE DEVELOPMENTS

[Sierra Club v. DEP and FirstEnergy Generation, LLC, Permittee, EHB Docket NO. 2015-093-R \(Consolidated with 2015-159-R\), \(Mar. 10, 2016\) \(5 judge opinion by J. Renwand\)](#). Appellant Sierra Club filed extensive objections in its Notice of Appeal and Amendments, after which FirstEnergy filed an Answer and Response. Sierra Club then filed a Motion to Strike the Answer and Response. The Board held that although FirstEnergy raised policy considerations, the Board's Rules Committee would better address these. Further, the Board held that actions under appeal are those taken by DEP, which did not file any Answer and Response to Sierra Club's Notice of Appeal and Amendments. The Board found that FirstEnergy's detailed filing of 1,058 pages was appropriate after discovery and prior to hearing.

Proposed Legislation

Energy Issues

Administrative

Senate Bills

[Senate Bill 1241](#) (Hughes, D-7) would make appropriations from a restricted revenue account within the General Fund and from federal augmentation funds to the Pennsylvania Public Utility Commission for the fiscal year July 1, 2016, to June 30, 2017. The PUC would receive \$71,101,000 from the Commonwealth and \$2,680,000 from the federal government. This bill was referred to Appropriations in the Senate on May 11, 2016.

Alternative Energy

Senate Bills

[Senate Bill 805](#) (Boscola, D-18) would amend Title 66 (Public Utilities) by permitting large industrial and commercial users to opt out of utility energy efficiency and conservation programs. This bill was re-referred to Appropriations in the Senate on June 6, 2016.

[Senate Bill 1195](#) (White, R-41) would amend the act of October 22, 2014 (P.L.2873, No.175), known as the Pennsylvania Greenhouse Gas Regulation Implementation Act, further providing for definitions and for the submission of a state plan to regulate carbon dioxide emissions for existing stationary sources as part of the Clean Power Plan, prior to submitting the State plan to the U.S. EPA for approval. This bill was signed in the House on June 15, 2016.

LEGISLATIVE DEVELOPMENTS

House Bills

[House Bill 2040](#) (Keller, R-85) would amend the act of November 30, 2004 (P.L.1672, No.213), known as the Alternative Energy Portfolio Standards Act, which, requires that increasing percentages of electricity sold in PA be generated through alternative energy sources like solar energy. The amendment would further provide that if an electric distribution company or supplier sells electricity in any other state and is subject to renewable energy portfolio requirements in that state, they shall list any such requirement and indicate how it satisfied those renewable energy portfolio requirements. This bill was referred to Commerce in the House on May 23, 2016.

Oil and Natural Gas

Senate Bills

[Senate Bill 279](#) (Hutchinson, R-21) would establish the Pennsylvania Grade Crude Development Advisory Council and provide for duties of the Council and the DEP, for administrative support and for regulation of conventional oil and gas wells. This bill was signed in the House on June 15, 2016.

House Bills

[House Bill 2103](#) (Sturla, D-96) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, providing for a natural gas severance tax, and establishing the Severance Tax Restricted Account. This bill was referred to Environmental Resources and Energy in the House on May 25, 2016.

[House Bill 2165](#) (McCarter, D-154) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee providing for the imposition of a natural gas severance tax, for penalties, and for criminal acts, among others. The bill was referred to Environmental Resources and Energy in the House on June 15, 2016.

Environmental Issues

Administrative

Senate Resolutions

[Senate Resolution 385](#) (Brooks, R-50) is a Resolution directing the Joint State Government Commission to conduct a study to analyze and identify which environmental laws and regulations of the Commonwealth have more stringent standards than federal law requires. This resolution was referred to Environmental Resources and Energy in the Senate on June 6, 2016.

House Bills

[House Bill 1956](#) (Harper, R-61) would amend Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes, in public improvements, utilities and services, providing for public notice and public meeting requirements before a municipality can sell or lease its water or sewer systems. This bill was referred to Appropriations in the House on May 3, 2016.

Agriculture

Senate Bills

[Senate Bill 50](#) (Schwank, D-11) would amend and establish an industrial hemp industry in the Commonwealth; conferring powers and imposing duties on the Department of Agriculture and the Legislative Reference Bureau; prescribing penalties; and establishing an account. This bill was referred to Agricultural and Rural Affairs in the House on March 17, 2016.

House Bills

[House Bill 967](#) (Diamond, R-102) would amend Title 3 (Agriculture) of the Pennsylvania Consolidated Statutes, providing for industrial hemp research; imposing powers and duties on the De-

LEGISLATIVE DEVELOPMENTS

partment of Agriculture and the Legislative Reference Bureau; imposing criminal and civil penalties; abrogating a regulation; and making a related repeal. This bill was referred to Agriculture and Rural Affairs in the Senate on April 12, 2016.

Land Use

Senate Bills

[Senate Bill 20](#) (Fontana, D-42) would amend Title 68 (Real and Personal Property) of the Pennsylvania Consolidated Statutes, in seller disclosures, further providing for disclosure of lead in paint and water in homes built before 1978. This bill was referred to Urban Affairs and Housing in the Senate on May 17, 2016

House Bills

[House Bill 544](#) (Moul, R-91) would amend the act of February 2, 1966 (1965 P.L.1860, No.586), entitled "An act encouraging landowners to make land and water areas available to the public for recreational purposes by limiting liability in connection therewith, and repealing certain acts," making recreational users liable for property damage; and providing for attorney fees and court costs. This bill was referred to Environmental Resources and Energy in the Senate on April 20, 2016.

Waste

House Bills

[House Bill 2089](#) (Bloom, R-199) would amend the act of November 23, 2010 (P.L.1083, No.108), known as the Covered Device Recycling Act, providing a waiver for consumers residing in municipalities located more than five miles from the nearest recycling facility approved to collect and process electronics for recycling. This bill was referred to Environmental Resources and Energy in the House on May 23, 2016.

Water

House Bills

[House Bill 2079](#) (Gergely, D-35) would establish the Pennsylvania Low-Income Water and Wastewater Assistance Program and the Pennsylvania Low-Income Water and Wastewater Assistance Fund in order to ensure clean water is supplied to low-income families in Pennsylvania. This bill was referred to Health in the House on May 23, 2016.

REGULATORY DEVELOPMENTS

Department of Environmental Protection

[Proposed Conditional State Water Quality Certification for the Army Corps of Engineers Pennsylvania State Programmatic General Permit](#)

46 Pa.B. 2737, May 28, 2016

The Baltimore, Philadelphia and Pittsburgh Districts of the Army Corps of Engineers, under the authority of section 404(e) of the Clean Water Act, issued a final Pennsylvania State Programmatic General Permit-5 (PASPGP-5) for a 5-year period, effective July 1, 2016. The PASPGP-5 will replace the PASPGP-4 permit as the general permit allowing applicants to obtain both Corps section 404 permits and State water obstruction and encroachment permits through a joint application for the majority of projects requiring these permits.

[Limited Suspension of Ban on Commercial Fuel Oil Sulphur Standards](#)

46 Pa.B. 2474, May 14, 2016

Due to the unusually warm winter of 2015-2016 and a subsequent excess of No. 2 fuel oil, the DEP announced that beginning July 1, 2016, and ending December 31, 2016, the DEP will suspend enforcement of the 500 parts per million (ppm) sulfur fuel content requirement for No. 2 and lighter commercial fuel oil for certain "distributors" and "retail outlets," as defined in 25 Pa. Code § 121.1. The suspension is only applicable to commercial fuels received by the distributor prior to May 14, 2016, with up to a 5,000 ppm Sulphur content.

[Reissuance of NPDES General Permit for Stormwater Associated with Mining Activities](#)

46 Pa.B. 1859, April 9, 2016

The DEP announced the reissuance of the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Associated with Mining Activities, expiring February 12, 2021. Un-

der 25 Pa. Code § 92a.54, a general permit is justified when the mining operations are: 1) substantially similar in scope and site conditions, particularly pertaining to the use of common Best Management Practices for erosion and sedimentation control; 2) will potentially discharge the same type of pollutant; 3) require the same effluent limitations or operating conditions; and 4) the operations do not have the potential to cause significant adverse environmental impact from stormwater discharges.

[Availability of Technical Guidance for Active Coal Mines](#)

46 Pa.B. 3030, June 11, 2016

New guidance has been issued by the Bureau of Mining Programs clarifying the procedure for obtaining approval to use waste materials in mine reclamation on sites covered under a coal mining permit. Revised guidance has been released regarding procedures for authorizing incidental and necessary coal extraction, coal refuse removal and utilization of excess spoil from an active mine for reclaiming abandoned mine lands under a government-financed construction contract.

[Pennsylvania's 2016 Annual Ambient Air Monitoring Network Plan](#)

46 Pa.B. 3140, June 18, 2016

Under 40 CFR 58.10, state and local air quality monitoring agencies must adopt annual plans and make the plan available for public inspection. Upon close of the comment period July 18, 2016, the plan will be submitted to the EPA's Regional Authority by July 1, 2017. The plan must address compliance with federal requirements and a statement of purpose for each monitoring site.

REGULATORY DEVELOPMENTS

[Proposed Annual Air Quality Monitoring Plan for Philadelphia](#)

46 Pa.B. 2376, May 7, 2016

Philadelphia has a network of 11 air monitoring stations throughout the city to monitor ambient air quality. The stations are monitored and run by Air Management Services under the Department of Public Health. An Annual Monitoring Network Plan must be adopted and submitted to the EPA's Regional Authority outlining the jurisdiction's establishment and maintenance of the air quality surveillance system. The plan must be available for public comment 30 days prior to submission to EPA.

[Pennsylvania Alternative Fuels Incentive Grant Program](#)

46 Pa.B. 3328, June 25, 2016

Grants remain available to Commonwealth residents under the Alternative Fuel Vehicle Rebate Program to encourage and assist individuals with the incremental costs of purchasing an alternative fuel vehicle. The rebates range from \$500 for an electric motor or scooter, up to \$2,000 for a plug-in electric vehicle. To qualify for the rebate, the alternative fuel vehicle must be registered in the Commonwealth and be operated primarily within the Commonwealth. The rebate will be offered on a first-come, first-served basis in the order in which they are received. Rebate request forms and required documentation must be submitted to the DEP no later than 6 months after the vehicle is purchased.

Environmental Quality Board

[Additional Requirements for Major Air Pollution Sources](#)

46 Pa.B. 2036, April 23, 2016

The EQB amended Chapters 121 and 129 (relating to general provisions; and standards for sources) to adopt presumptive reasonably available control technology (RACT) requirements and emission limitations for certain major stationary sources of oxides of nitrogen (NO_x) and volatile organic compound emissions. The final-form rulemaking also provides for a petition process for an alternative compliance schedule, a facility-wide or system-wide NO_x emissions averaging plan provision, an alternative RACT proposal petition process, and compliance demonstration and recordkeeping requirements.



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