

THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

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WELCOME FROM THE EELS CHAIR

Hello Section Members! It is my great pleasure to have assumed the Chair of this active Section of the Pennsylvania Bar Association. I look forward to meeting and coming to know as many of you as I can over my two-year term, and I welcome any and all comments you may wish to provide to me. We have just completed our Self-Assessment and I encourage you to review it, particularly the suggestions we have to promote greater member involvement and substantive participation.

As I indicated in my comments at the Environmental Law Forum Annual Dinner, the Environmental and Energy Law Section is one of the finest, most collegial and effective sections in the PA Bar. Moreover, while the environmental playing field upon which our clients all operate, whether they be government, the private sector, NGOs or other individuals or organizations, is governed primarily by statutes, regulations, contracts or other agreements or policies, and the like, what really makes all of this work in my view is the relationships we all have established with each other to promote the interests of all of our clients in an effective, lawful and efficient way. Environmental

lawyers are a special breed who have necessarily become substantively educated on a host of scientific, policy, and/or related matters in order to develop the expertise to practice in this unique area. I commend all of you on your chosen vocation, and I look forward to building upon the fine work of my immediate predecessors, Rick Friedman and John Carroll, in promoting greater interaction and substantive excellence among us.

Please feel free to contact me at any time, and once again, I look forward to meeting and interacting with as many of you as I can.

Thank you.

Anderson Lee Hartzell
EELS Chair



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SPECIAL SECTION: PBA ENVIRONMENTAL & ENERGY LAW SECTION SELF-ASSESSMENT

This document has been prepared at the request of the Pennsylvania Bar Association as an effort to identify the strengths and areas for potential enhancement of the benefits, tools and other opportunities presented by membership in the Environment and Energy Law Section.

As noted in the Annual report submitted to the Bar Association last month, the EELS continues to offer significant value to its approximately 450 members for networking, substantive matters in environment and energy law in Pennsylvania, information-sharing on legislative and other initiatives, scholarship opportunity, and coordinated interaction with other bar associations.

In particular, the flagship effort of the Section has been its co-sponsorship of PBI's annual Environmental Law Forum. This two-day program has been recognized by the American Bar Association as its 2016 State or Local Bar Program of the Year. The sheer numbers in attendance, the extraordinary quality of the substantive and ethics CLE presentations, the positive and respectful social engagement opportunities, and the inclusiveness of the overall program for both junior and senior environment and energy lawyers has created its own sustainment momentum that may be unparalleled in other substantive areas of the PBA.

Beyond that, the Section Council's monthly calls provide opportunity to discuss pending legislative developments in the General Assembly and important legal issues facing the environmental law community and create new networking forums, among other matters. In addition, the Section's PLUS program (Pennsylvania Lawyers United for Sustainability) each year has welcomed new offices which desire to show their commitment to environmental sustainability by introducing energy savings, paper and waste reduction, recycling and environmentally friendly transportation and purchasing practices into their operations. The "e-newsletter" continues to be published on a quarterly basis offering opportunities for publication and for substantive education.

The Section also operates a pro-bono program in coordination with the Pennsylvania Environmental Hearing board and thereby open the doors of due process to potential clients who may not otherwise have the financial resources to proceed with an appeal of matters that affect them.

In short, the Section provides a robust opportunity for input, engagement, networking, environmental improvement, substantive learning and other activity which can enhance and support the careers of environmental and energy lawyers in Pennsylvania.

The following are suggestions for ways that the Section can continue to develop greater involvement and substantive participation.

- Creation of subcommittees or other opportunities for EELS members to participate in the work of the Section. At this point, the Council conducts virtually all of the work of the Section. For non-Council members to reap the full value of membership, Council needs to develop avenues for greater member participation.

SPECIAL SECTION: PBA ENVIRONMENTAL & ENERGY LAW SECTION SELF-ASSESSMENT

- Creation of more opportunities for substantive engagement as part of networking. The Section has sponsored after-work gatherings to present a forum to meet and greet other environment and energy lawyers or consultants. Including substantive discussion or lecture as a part of these events may spur greater participation of existing members and potential recruitment of others and may provide CLE opportunities. In addition, the Section should explore different locales for these kinds of events.
- New consideration of the scope of the Section. That is, there are other areas of law that are tangentially related to Environment and Energy Law that have discussion groups, committees or other communication networks. By connecting with these groups, the Section may be able to reach a broader potential participation through membership.
- Connect with the ABA Section of Environment, Energy and Resources. Unlike other substantive areas of law, the practice of environment and energy law involves both federal and state statutes, regulations, regulatory agencies and tribunals. While the EELS has primarily been focused on state matters, members would value greatly from interaction with the ABA's "sister" section.
- Including on the Section's website a job posting or other potential needs board.
- Survey environmental lawyers who are non-members to see what the Section can do to provide sufficient value and there by expand membership.

The Section appreciates the opportunity to provide this self-assessment and looks forward to reporting back to the PBA on implementation of the suggestions listed above.

May 18, 2017

Respectfully submitted,

Anderson Lee Hartzell
EELS Chair

COURT OPINIONS

Commonwealth Court

[EQT Production Company and ET Blue Grass Clearing, LLC v. Borough of Jefferson Hills, No. 1184 C.D. 2016 \(May 18, 2017\).](#)

The Borough of Jefferson Hills appealed from an order of the Court of Common Pleas of Allegheny County (common pleas) reversing the decision of the Borough Council of the Borough Of Jefferson Hills (Council) to deny the conditional use application of EQT Production Company and ET Blue Grass Clearing, LLC (the Applicants) to construct, operate, and maintain a natural gas pipeline production facility on an area of their property known as the Bickerton Well Site. The Council cited the applicants' alleged failure to satisfy Section 1003(a) of the Zoning Ordinance of the Borough of Jefferson Hills (Zoning Ordinance), which provides, "The use shall not endanger the public health, safety of welfare nor deteriorate the environment, as a result of being located on the property where it is proposed."

In its decision, the Council determined Applicants complied with all of the general requirements for conditional uses found in the Zoning Ordinance, except for the above outlined provision. The Council concluded that the "burden never shifted to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land set forth in the Borough Zoning Ordinance," however it found objectors' testimony to be credible and persuasive such that it gave significant weight to their testimony. Council also considered the Environmental Rights Amendment (ERA) in rendering its decision to deny the conditional use application of the Applicants. Common pleas reversed without taking additional evidence and without addressing the ERA, concluding the Council erred in determining that (1) the Applicants did not meet their burden of proving entitlement to a conditional use; and that (2) the burden never shifted to the objectors to present substantial evidence

of any adverse impact on the public health, safety, and welfare.

In this appeal, the Court outlined that a conditional use, like a special exception, is not an exception to a municipality's zoning ordinance, but rather a use to which an applicant is entitled as a matter of right unless the municipal legislative body determines "that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use." Additionally, once the Applicants satisfied the specific, objective criteria for the conditional use, the burden shifted to the objectors in order to determine, by examining their testimony, whether objectors' testimony constitutes substantial evidence of a high degree of probability that Applicants' proposal would impose detrimental impacts exceeding those ordinarily to be expected from unconventional gas wells. The Court held objector's testimony was insufficient to meet their burden of proof to show that the development of the Bickerton Well Site would have an impact on public health, safety, and welfare beyond that normally associated with any other unconventional well site. Additionally, the Council's determination to augment the conditional use requirements with criteria based on the ERA is tantamount to an attempt to, *sub silentio*, abrogate the legislative determination that a conditional use for oil and gas drilling is consistent with municipal planning objectives and with the public health, safety and welfare, including protection of the environment.

[Snyder Brothers, Inc., v. Pa. PUC, No. 1043 C.D. 2015 \(March 29, 2017\).](#)

Snyder Brothers, Inc. (SBI) and intervenor Pennsylvania Independent Oil & Gas Association (PIOGA) (collectively, Petitioners) petition for review of the June 11, 2015 order of the Pennsylvania Public Utility Commission (Commission) denying their exceptions in part, granting them in part, and adopting as modified the initial decision and order of an administrative law judge (ALJ). The issue in this case involves statutory interpretation, specifically the definition of "stripper well" in Act 13, which unlike a "vertical gas well," does not

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have to pay impact fees. In relevant part, a “stripper well” is denoted as an “unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month...” The Court’s analysis revolved around whether the General Assembly (GA) intended the word “any” to mean “one” or “every.”

The Bureau of Investigation and Enforcement (I&E) filed a complaint, alleging SBI did not identify and pay impact fees on 24 wells in 2011 and 21 wells in 2012. In its answer, SBI claimed that the wells were stripper wells, not vertical wells, and thus not subject to impact fees. In the alternative, SBI argued that impact fees were a tax and that the term “any” in stripper well must be strictly construed in its favor as the taxpayer pursuant to section 1928(b)(3) of the Statutory Construction Act of 1972. The ALJ agreed with I&E that the definition of “stripper well” was ambiguous, citing four prior orders of the Commission, and also found the impact fee was not a tax because it did not raise revenue for the general funds of either the Commonwealth or municipalities, but the revenue is distributed to affected municipalities to offset the impact of drilling. The Commission found no error in the ALJ’s conclusion that impact fees are not taxes, and also determined that it was not required to construe the ambiguity in SBI’s favor because the statutory construction factors led to a definitive conclusion that the GA intended “any” to mean “all” or “every.”

In this appeal, Petitioners argue the Commission erred in its interpretation of the word “any” in the definition of “stripper well,” claiming it truly means “one,” or in the alternative, because the impact fees are bona fide taxes, the term must be construed in their favor as taxpayers under the Statutory Construction Act. The Court agreed with the Petitioners that the word “any” in the definition of “stripper well” is unambiguous and it clearly and plainly means what it says, “any month.” Nonetheless, the Court concluded in the alternative that Petitioners’ proposed interpretation is, at the very least, reasonable. Petitioners’

interpretation would not thwart or undermine the purpose of Act 13 or permit well producers to escape its requirements. The Court held the term “any” in the definition of “stripper well” unambiguously means “any” or “one” and not “all” or “every.” Alternatively, the Court concluded that analysis of the statutory construction factors did not resolve the ambiguity and that the ambiguity must be construed in favor of SBI, reversing the Commission’s conclusion that SBI violated Act 13 and owed impact fees for improperly listed stripper wells.

ENVIRONMENTAL HEARING BOARD

[Clean Air Council et. al. v. Pa DEP and Sunoco Pipeline, L.P., Permittee, Docket No. 2017-009-L \(March 3, 2017\) \(single judge opinion by J. La-buskes\)](#). This matter involves an appeal by Clean Air Council, the Delaware Riverkeeper Network and the Mountain Watershed Association challenging permits issued by the Department of Environmental Protection to Sunoco Pipeline, L.P. The permits authorize earthmoving work associated with the construction of two natural gas liquids pipelines known as the Mariner East 2 project. The Board denied the Permittee's motion to limit the testimony of two of the Appellants' experts at a supersedeas hearing because expert affidavits in support of a petition for supersedeas do not serve the same function as expert reports at a hearing on the merits. The purpose of affidavits in support of a petition for supersedeas, including expert affidavits, is to get petitioners in the door.

[City of Allentown v. Pa DEP, Docket No. 2016-144-M \(March 9, 2017\) \(single judge opinion by J. Mather\)](#). The Board previously issued an order on February 10, 2017 in which the Board granted in part and denied in part the Department's Motion to Stay Discovery because some of the discovery sought bears on the fact-specific jurisdictional arguments the Department makes in its Motion to Dismiss. In this action, the Board supports their prior issuance, stating all discovery which is not related to the jurisdictional issue raised by the Department in its Motion to Dismiss is stayed, granting limited discovery on those matters agreed upon by the parties to relate to the jurisdictional issue.

[Clean Air Council and Environmental Integrity Project v. Pa. DEP and Shell Chemical Appalachia, LLC, Permittee, Docket No. 2015-111-R \(March 10, 2017\) \(single judge opinion by J. Renwand\)](#). This was a matter of first impression before the Board. Petitioners seek to intervene in this matter to protect alleged confidential business information and trade secrets that are the subject of discovery requests propounded to Shell Chemical

by Appellants Clean Air Council and Environmental Integrity Project. Permittee has plans to construct a chemical plant that will use the ethane from the Marcellus Shale play to produce ethylene and polyethylene. Appellants are appealing DEP issuance of an Air Quality Plan Approval for the project. Following review of the Petitions to Intervene of Univation Technologies, LLC; Linda Engineering North America, Inc.; INEOS Sales (UK) Limited; and John Zink Company, LLC, and Appellants' opposing response, the Board granted the Petitions to Intervene, allowing Petitioners to intervene for the limited purpose of protecting their confidential information and trade secrets.

[Gary Rohanna v. Pa. DEP and Emerald Contura, LLC, Docket No. 2016-148-B \(March 14, 2017\) \(single judge opinion by J. Beckman\)](#). Rohanna filed Claim with the Department of Environmental Protection (Department) alleging damage to an in-ground pool liner and cracking of concrete around the pool due to mine subsidence from mining conducted by Emerald Contura, LLC (Contura). The Board denied Permittee Contura's motion to dismiss because it could not conclude based on the information before it that Contura is clearly entitled to judgment as a matter of law. The Board granted the Motion to Limit Issues, having jurisdiction to review Department actions, and accordingly limit the issues on appeal to those raised in the 2016 subsidence claim.

[Center for Coalfield Justice and Sierra Club v. Pa. DEP and Consol Pennsylvania Coal Company, LLC, Permittee, Docket No. 2016-155-B \(March 22, 2017\) \(single judge opinion by J. Beckman\)](#). Consol Pennsylvania Coal Company, LLC (Consol), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. The Board has a pending adjudication involving a challenge to Permit Revision Nos. 180 and 189 brought by the Center for Coalfield Justice and Sierra Club. The Board denied Consol Pennsylvania Coal Company, LLC's Motion for Expedited Hearing. The balance of factors the Board considers in deciding a request for an expedited

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hearing weigh against the Motion primarily because the proposed schedule is unworkable and would negatively impact both the parties opposing the Motion and the proper function of the Board. The Board stated it will balance the interest of the parties while considering the practical benefits and difficulties of expediting proceedings. The Board states balancing interests is, by its nature, unique to the facts and exigencies of each case and thus must proceed on a case by case basis.

[Ivan and Kathleen Dubrasky v. Pa. DEP and Hilcorp Energy Co., Permittee, Docket No. 2016-102-R \(March 24, 2017\) \(single judge opinion by J. Renwand\).](#) This matter involves a notice of appeal filed by Ivan and Kathleen Dubrasky (Appellants) with the Environmental Hearing Board (Board), challenging the issuance of a permit by the Pennsylvania Department of Environmental Protection (Department) to Hilcorp Energy Company (Hilcorp) for the Chrastina 8H well in Pulaski Township, Lawrence County. The Board denied the Permittee's Motion for Sanctions seeking dismissal of the appeal where the Appellants have made an attempt to answer the Permittee's interrogatories, even though the answers do not contain the amount of detail sought by the Permittee. The Board found the dismissal of the appeal too harsh, binding the Appellants to their answers at the hearing. The Board also found Appellants' allegation, after twice failing to answer the interrogatory seeking specific information about the allegation, as an abandonment of that allegation in their appeal.

[Heywood Becker v. Pa. DEP, Docket No. 2013-038-C \(April 10, 2017\) \(single judge opinion by J. Coleman\).](#) The primary disagreement between the parties in this matter is whether or not a regulated stream exists on the site—or existed before the site became destabilized—as the term “stream” is defined under Pennsylvania law. The Department argues that an intermittent stream existed on the property, that Becker rerouted the stream without an appropriate permit and with-

out implementing adequate erosion and sediment controls and BMPs, and that an intermittent stream still exists on the property despite having been rerouted. Becker first contended that there was no stream on the property, only a dry swale or storm channel. He argued in the alternative that, if there was a stream on the property, it was not intermittent or perennial but an ephemeral stream, and thus not a feature that is regulated by the Department. The Board dismissed an appeal of a Department order requiring an Appellant to, among other things, restore a stream channel that the Appellant had relocated without a permit and without implementing and maintaining erosion and sediment controls, and to stabilize the disturbed areas of the site resulting from the stream channel relocation.

[Bennington Investment Group, LLC v. Pa. DEP and Dillsburg Area Authority, Intervenor, Docket No. 2015-190-M \(April 17, 2017\) \(single judge opinion by J. Mather\).](#) The above captioned appeal was filed by Bennington Investment Group, LLC (Appellant) to challenge the Department's decision to deny its Private Request to Revise Official Plan. The Board denied the Appellant's Motion for Summary Judgment in this appeal due to the existence of genuine issues of material fact. Appellant is a development company that proposes to develop a 344-unit residential subdivision on 62.58 acres in Franklin Township, York County. The Department denied Appellant's Request to Review the Official Plan. The Board stated issues of material fact existed regarding whether the Department conducted the appropriate review of Appellant's Private Request to Revise Official Plan and the adequacy of the Franklin Township Act 537 Official Plan to meet Appellant's needs; a hearing is required to resolve the issues of material fact.

[Gary Rohanna v. Pa. DEP and Emerald Contura, LLC, Docket No. 2016-148-B \(April 25, 2017\) \(single judge opinion filed by J. Beckman\).](#) Rohanna filed Claim with the Department of Environmental Protection (Department) alleging dam-

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age to an in-ground pool liner and cracking of concrete around the pool due to mine subsidence from mining conducted by Emerald Contura, LLC (Contura). On March 14, 2017, the Board issued an Opinion and Order on the Motion to Dismiss or Limit Issues denying the Motion to Dismiss and granting the Motion to Limit Issues. Shortly after the Board issued its decision on Contura's Motion, the Department filed a Motion to Dismiss. The Board denied the Department's Motion to Dismiss where genuine issues of fact exist surrounding the timelines of this appeal. The Board could not conclude based on the information before it that the Department was clearly entitled to judgment as a matter of law.

[Timothy A. Keck v. Pa. DEP, Docket No. 2015-186-B \(consolidated with 2015-143-B\) \(April 28, 2017\) \(single judge opinion by J. Beckman\)](#). This matter involves the consolidated appeal of Timothy A. Keck of an August 24, 2015, administrative order and an October 26, 2015, administrative order by the Department of Environmental Protection (Department) alleging violations of the Clean Streams Law, the Oil and Gas Act and the Solid Waste Management Act, and requiring Mr. Keck to investigate and remediate the unpermitted discharges stemming from a June 2, 2014, oil and brine release. The Board found the administrative order issued by the Department, requiring Mr. Keck to investigate and possibly remediate a spill of oil and brine resulting from a well drilled and operated by Mr. Keck, was necessary and reasonable and consistent with law. The Board found the Department is authorized by statute, and supported by a preponderance of the evidence, that a spill of oil and brine that contaminated soils and waters of the Commonwealth was from a well and tank owned and operated by Mr. Keck, release of which occurred without a permit, in violation of the Oil and Gas Act, the Solid Waste Management Act, and the Clean Streams Law.

[City of Allentown v. Pa. DEP, Docket No. 2016-144-M \(May 2, 2017\) \(single judge opinion by J. Mather\)](#). The above captioned appeal was filed by the City of Allentown (Appellant) on October 21, 2016 in response to a letter from the United States Environmental Protection Agency Region III (EPA) that referenced a statement made during a meeting with Appellant, Department employees, and EPA representatives. On or around September 28, 2007, EPA issued a Findings of Violation, Order for Compliance and Request for Information to the Appellant. The Board denied Appellant's Motion to Compel because the Department has answered Appellant's Interrogatories satisfactorily and within the scope of the Board's March 9, 2017 Order, which allowed only limited discovery, and because the Appellant has presented no reason as to why the redacted sentence in an email between Department counsel and staff is not a privileged communication under Pa.R.C.P. Rule 4003.1.

[Penn Coal Land, Inc. v. Pa. DEP, Docket No. 2014-157-M \(consolidated with 2014-158-M, 2014-159-M\) \(May 2, 2017\) \(single judge opinion by J. Mather\)](#). The Appellant, Penn Coal Land, Inc., maintains and operates three active post-mining passive water treatment systems on three properties located in Summit Township, Somerset County. Each of these post-mining passive water treatment systems is authorized by an NPDES permit. The Board dismissed three appeals of NPDES permit renewals for discharges from three passive treatment systems Appellant maintains and operates for the purposes of post-mining passive water treatment systems. Penn Coal Land, Inc. maintained the Department lacked authority to impose additional effluent limitations beyond those set forth in 25 Pa. Code § 87.102(e)(3). The Board found the Department has the authority under 25 Pa. Code § 87.102(f) to revise or impose additional effluent limitations beyond those set forth in Section 87.102(e) to address new or revised treatment obligations that are required as a result of the development and approval of a TMDL.

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[M.C. Resource Development Company a/k/a M.C. Resources Development, Inc. v. Pa. DEP, Docket No. 2015-023-C \(May 2, 2017\) \(single judge opinion by J. Coleman\)](#). M.C. Resource Development Company a/k/a M.C. Resources Development, Inc. (MCRD) has appealed a January 28, 2015 letter from the Department of Environmental Protection (Department) revoking MCRD's Public Water Supply Permit No. 3546482, which authorizes the operation of Pine Valley Farms Spring No. 1 (Pine Valley Spring) as a bulk water hauling system located in East Brunswick Township, Schuylkill County. The permit was revoked because, according to the Department, MCRD no longer met the definition of a public water system under the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17. The Board denied the Appellant's motion to conduct limited discovery following a period of settlement discussions where the appellant has not demonstrated any good cause for reopening discovery or articulating any prejudice that would result from being denied another opportunity to conduct discovery in an appeal that was filed more than two years ago and was previously scheduled for a hearing.

[Lancaster Against Pipelines et. al. v. Pa. DEP and Transcontinental Gas Pipe Line Company, LLC, Permittee, Docket No. 2016-075-L \(consolidated with 2016-076-L and 2016-078-L\) \(May 10, 2017\) \(single judge opinion by J. Labuskes\)](#). On April 5, 2016, the Pennsylvania Department of Environmental Protection (Department) issued a Water Quality Certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), to Transcontinental Gas Pipe Line Company, LLC (Transco). The Department certified among other things that the construction, operation, and maintenance of Transco's Atlantic Sunrise Pipeline Project complies with the Commonwealth's water quality standards, provided that Transco obtained and complied with some yet-to-be-issued state permits. A jurisdictional issue arose in this proceeding due to the certification at issue involving an interstate natural gas pipeline subject to regulation by the Federal Energy Regulator-

Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717z. The Board found it has jurisdiction in an appeal from the Department of Environmental Protection's issuance of a Water Quality Certification pursuant to Section 401 of the Clean Water Act.

[Joseph W. Sokol v. Pa. DEP and Rosebud Mining Company, Permittee, Docket No. 2016-025-B \(May 11, 2017\) \(single judge opinion by J. Beckman\)](#). This matter involves an appeal of a Department of Environmental Protection (Department) January 19, 2016 Determination Letter that mining conducted by Rosebud Mining Company (Rosebud) did not affect the water supply of Joseph W. Sokol. The Board denied Motion to Strike Appellant's Cross Motion for Summary Judgment filed by the Department and Permittee where the opposing parties have been given an opportunity to respond to the Cross Motion, and there is no resulting prejudice to the parties.

[New Hope Crushed Stone and Lime Company v. Pa. DEP and Solebury School, Intervenor, Docket No. 2016-132-L \(May 24, 2017\) \(single judge opinion by J. Labuskes\)](#). New Hope Crushed Stone and Lime Company (New Hope) filed this appeal from a compliance order issued to it on or about August 26, 2016 by the Department of Environmental Protection (Department) regarding a stone quarry it operates in Solebury Township, Bucks County. Solebury School, a private school with a campus located immediately adjacent to the quarry property, has intervened on the side of the Department. The order finds that New Hope has failed to conduct enough "reclamation and abatement" to satisfy the minimum standards outlined in a letter that the Department previously sent to New Hope dated January 29, 2016. In this action, the Board granted a motion to compel a quarry to respond to discovery requests in the quarry's appeal from a compliance order directing it to, among other things, meet its obligations for reclamation and abatement of a public nuisance following the Department's previous notification

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sent to New Hope outlining minimum standards of reclamation and abatement.

[Bradley and Amy Simon v. Pa. DEP and Sunoco Pipeline, L.P., Permittee, Docket No. 2017-019-L \(May 25, 2017\) \(single judge opinion by J. Labuskes\)](#). The Board issued an Opinion in support of a previous Order granting in part a petition for supersedeas of an erosion and sediment control permit for earth disturbance associated with the construction and installation of two natural gas liquids pipelines. Petitioner presented evidence of significant erosion and sediment control failures on his property along during an earlier pipeline project by the same permittee along the same route. Based on those facts and petitioners unique property conditions, the Board superseded the permit as it pertains to the area of the petitioner's property to the limited extent that it was inconsistent with additional precautions that the Board imposed.

[Pa. DEP v. EQT Production Company, Docket No. 2014-140-CP-L \(May 26, 2017\) \(single judge opinion by J. Labuskes\)](#). This matter commenced when the Department of Environmental Protection (Department) filed a complaint for civil penalties against EQT Production Company (EQT) in October 2014 alleging that EQT had violated the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, when it had unpermitted releases from its impoundment at its facility in Duncan and Morris Townships, Tioga County. The Department sought in excess of \$4.5 million in penalties. In this action, the Board assessed a civil penalty of \$1,137,295.76 against EQT Production Company, the operator of an impoundment used to store industrial waste from gas drilling operations for its violation of the Clean Streams Law and a regulation promulgated thereunder.

[The Delaware Riverkeeper Network and Maya K Van Rossum, The Delaware Riverkeeper v. Pa. DEP and Transcontinental Gas Pipe Line Company, LLC, Docket No. 2015-060-M \(June, 2, 2017\) \(single judge opinion by J. Mather\)](#). The above captioned appeal was filed by the Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper (Appellant) on May 5, 2015 in response to the Department's grant of two 401 Water Quality Certifications – Permits No. EA 40-013 and EA 45-002 – to Transcontinental Gas Pipe Line Company, LLC (Permittee) on April 6, 2015. The Board agreed to terminate Appellant's appeal in the above-captioned matter in light of the Appellant's March 24, 2017 letter and following a conference call with the Parties on May 16, 2017. The Board nonetheless noted that it did not decide to terminate the appeal for lack of jurisdiction. The Board believed that it would have jurisdiction over this appeal.

LEGISLATIVE DEVELOPMENTS

Proposed Legislation

Energy Issues

Administrative

Senate Bills

[Senate Bill 561](#) (DiSanto, R-15) would amend the Regulatory Review Act, further providing for proposed regulations and procedures for review and for final-form regulations for economically significant regulations. The act seeks to require the General Assembly and the Governor to approve all regulations with an economic impact or cost to the Commonwealth, to its political subdivisions, and to the private sector exceeding \$1 million. This legislation aims to strengthen political accountability for regulatory policy and protect our economy from undue burdens on business and job creation. The bill was referred to Appropriations in the Senate on May 24, 2017.

Oil and Gas

House Bills

[House Bill 1054](#) (Sturla, D-96) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, providing for natural gas severance tax; and establishing the Severance Tax Restricted Account. Under the amendment, extraction companies would be allowed to deduct the current Marcellus impact fee liability, as established in Act 13 of 2012, from the severance tax due. Companies would also be able to recoup capital costs for wells drilled before applying the tax on the gas from the well. Additionally, producers could deduct post-production costs when computing the tax, up to 12.5% of the gross value for contracts with lessors who otherwise would have had borne post production costs, in exchange for making that part of the contract null and void. The bill was referred to Environmental Resources and Energy in the House on April 3, 2017.

[House Bill 1283](#) (Snyder, D-50) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for definitions. Specifically, the bill seeks to amend the definition of “stripper well” in order to make it consistent with a recent Commonwealth Court ruling. The bill was referred to Environmental Resources and Energy in the House on April 25, 2017.

[House Bill 1350](#) (Dush, R-66) would amend the Oil and Gas Lease Act, further providing for definitions. Specifically, the bill seeks to amend the definition of “Royalty at the wellhead” the amendment is intended to clear up issues for royalty-holders. The bill was referred to Environmental Resources and Energy in the House on May 8, 2017.

[House Bill 1427](#) (O’Brien, D-175) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, providing for hydraulic fracturing fluid tracer. The amendment would require operators of oil and gas wells to include a fluid tracer in their hydraulic fracturing operations so that a source of groundwater contamination can easily be traced to its source. The bill was referred to Environmental Resources and Energy in the House on May 22, 2017.

[House Bill 1530](#) (Everett, R-64) would amend the Dormant Oil and Gas Act, providing for oil and gas estate abandonment, for preservation of interests in oil and gas and for applicability. The bill seeks to provide for the return of oil and gas rights to a surface owner if an interest in the oil or gas owned by a person other than the owner of the surface property is deemed abandoned following 20 years of dormancy. The bill was referred to Environmental Resources and Energy in the House on June 12, 2017.

LEGISLATIVE DEVELOPMENTS

Environmental Issues

Administrative

House Bills

[House Bill 1352](#) (Bloom, R-199) would create the Expedited Environmental Protection Act. The act would allow for expedited reviews of permit applications submitted by professional engineers and review timeframes for actions on all permit applications. The bill was referred to Environmental Resources and Energy in the House on May 9, 2017.

[House Bill 1353](#) (Bloom, R-199) would create the Fairness in Environmental Protection Permitting Act. Specifically, the Act would require that in any instance where DEP formally communicates to a project applicant that an application is lacking information needed to make a decision (such as granting a permit or authorization) or is deficient with respect to complying with relevant statutory or regulatory criteria, DEP shall clearly and concisely state in writing what information or data is lacking and/or what corrections must be made to the application. The bill was referred to Environmental Resources and Energy in the House on May 9, 2017.

[House Bill 1494](#) (Rapp, R-65) would amend the Conservation and Natural Resources Act, in Department of Conservation and Natural Resources, further allowing the Commonwealth to enter into agreements with the Federal Government for the sale of timber. The bill was recommitted to Rules in the House on June 12, 2017.

Agriculture

[House Bill 1053](#) (Sturla, D-96) would amend the Farmland and Forest Land Assessment Act of 1974, to require that those seeking preferential assess-

ment for agricultural land in the Clean and Green Program have submitted an Agricultural Erosion and Sediment Control Plan, Manure Management Plan, National Pollutant Discharge System Permit for Concentrated Animal Feeding Operations and a Nutrient Management Plan. Those seeking preferential assessment for forestland would only be required to obtain an Erosion and Sediment Control Plan. The bill was referred to Agricultural and Rural Affairs in the House on April 3, 2017.

Land Use

Senate Bills

[Senate Bill 667](#) (Stefano, R-32) would amend the Urban Redevelopment Law, further providing for powers of an authority. The legislation would grant redevelopment authorities the same powers currently allotted to land banks through the Pennsylvania Land Bank Act. This proposal will in no way eliminate the ability of a community to create a land bank or affect existing land banks in any way. The bill received its first consideration in the Senate on May 24, 2017.

Waste

Senate Bills

[Senate Bill 497](#) (Vogel, R-47) would amend the Solid Waste Management Act, in general provisions, further providing for definitions. The legislation would eliminate the waste designation for steel slag when it is being sold in the stream of commerce and is not a discarded material. The act aims to eliminate the waste distinction for slag steel helping to ease the regulatory burden on the slag industry, thereby helping to encourage the use of this sustainable and environmentally safe material. The bill received its second consideration in the Senate on May 24, 2017.

LEGISLATIVE DEVELOPMENTS

[Senate Bill 649](#) (Yudichak, D-14) would amend the Storage Tank and Spill Prevention Act, in financial provisions, further providing for Underground Storage Tank Environmental Cleanup Program, for Underground Storage Tank Pollution Prevention Program and for investigation and closure costs. More specifically the bill seeks to: 1) Extend the sunsets of the Environmental Cleanup and the Pollution Prevention Programs by five years, to June 30, 2022. 2) Increase the cap for a popular program within the Environmental Cleanup Program dedicated to aiding homeowners with underground heating oil tanks, from \$500,000 to \$750,000. 3) Reduce the annual allocation to the Pollution Prevention Program from \$1 million to \$350,000, due to decreased need. 4) Increase amount of reimbursement that DEP may request from the USTIF board for program activities, including inspection and enforcement, from \$3 million to \$7 million, in order to avoid increases in program fees. The bill received its first consideration in the Senate on May 22, 2017.

[Senate Bill 143](#) (Yaw, R-23) would amend the Storage Tank and Spill Prevention Act, in financial provisions, further providing for Underground Storage Tank Indemnification Board. Specifically, the amendment would remove legislation remove Middle Atlantic Truck Stop Operators from the statutory Board-makeup and replace them with the Pennsylvania Food Merchants Association (PFMA). The bill was referred to Environmental Resources and Energy in the House on May 19, 2017.

House Bills

[House Bill 927](#) (Rader, R-176) would amend the act of July 28, 1988 (P.L.556, No.101), known as the Municipal Waste Planning, Recycling and Waste Reduction Act, in recycling and waste reduction. The bill would relax the mandates on municipalities to have curbside leaf pick up programs. Currently, the Municipalities Waste Planning, Recycling and Waste Reduction Act mandates that all municipalities that have a population greater than

10,000 people or more than 5,000 people with a population density of more than 300 people per square mile must provide curbside leaf pick up to their residents. The bill was referred to Local Government in the House on March 22, 2017.

[House Bill 1279](#) (Flynn, D-113) would amend the Covered Device Recycling Act, in duties of manufacturers and retailers, further providing for manufacturer plan and reporting. The amendment would require manufacturers to recycle a larger number of covered devices per year to make up for the growing number of devices being discarded ever year. The bill was referred to Environmental Resources and Energy in the House on April 24, 2017.

[House Bill 1503](#) (Hanna, D-76) would amend the Solid Waste Management Act, in applications and permits, providing for public comment; providing for prohibitions of the discharge of sewer sludge. The bill would prohibit the land application of sewage sludge within 300 feet of a public drinking water source and in source water protection areas. The bill was referred to Environmental Resources and Energy in the House on June 6, 2017.

Water

Senate Bills

[Senate Bill 705](#) (Killion, R-5) would amend Title 27 (Environmental Resources) of the Pennsylvania Consolidated Statutes, in environmental stewardship and watershed protection, further providing for legislative findings on watershed pollution, for the Environmental Stewardship Fund, for agencies and for Commonwealth indebtedness and establishing duties for the Department of Community and Economic Development, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission and the Pennsylvania Historical and Museum Commission. The bill was referred to Environmental Resources and Energy in the House on May 24, 2017.

LEGISLATIVE DEVELOPMENTS*House Bills*

[House Bill 914](#) (Everett, R-84) would amend Title 8 (Boroughs and Incorporated Towns) of the Pennsylvania Consolidated Statutes, in storm sewers and watercourses, further providing for authority of boroughs. The bill would amend the Borough Code, First Class Township Code and Third Class City Code to authorize them to assess fees for storm water management activities and facilities without the need to establish a municipal authority. The bill was laid on the table in the House on May 10, 2017.

[House Bill 915](#) (Everett, R-84) would amend the act of June 24, 1931 (P.L.1206, No.331), known as The First Class Township Code, providing for storm water management plans and facilities. The bill was laid on the table in the House on May 10, 2017.

[House Bill 916](#) (Everett, R-84) would amend Title 11 (Cities) of the Pennsylvania Consolidated Statutes, in watercourses, flood protection projects and storm water systems, further providing for establishing and changing watercourses, flood protection projects and storm water systems and for assessment of benefits and liens. The bill was laid on the table in the House on May 10, 2017.

[House Bill 1060](#) (Sturla, D-96) would amend The Clean Streams Law, in scope and purpose, repealing provisions relating to fences along streams. The amendment would repeal Section 702 of the Pennsylvania Clean Streams Law. Currently, section 702 forbids any laws or regulations to be passed to require farmers to build a fence along a stream for the purpose of keeping farm livestock out. The bill was referred to Environmental Resources and Energy in the House on April 3, 2017.

REGULATORY DEVELOPMENTS**Department of Conservation and Natural Resources**[Execution of Oil and Gas Lease for Publicly-Owned Streambeds](#)

47 Pa.B. 2190, April 15, 2017

The Department of Conservation and Natural Resources and EQT Production Company have executed two oil and gas leases allowing for the development of oil and natural gas below and between the ordinary low water marks by means of directional, including horizontal, drilling. The lease is for Streambed Tract 2032 on the Monongahela River encompassing a total of 553 acres of submerged lands located in Washington and Allegheny Counties; and Streambed Tract 2030 on Tenmile Creek encompassing a total of 79.55 acres of submerged lands located in Greene and Washington Counties.

Department of Environmental Protection[Public Comment to Develop State Plan to Improve Water Quality in Chesapeake Bay Watershed Counties](#)

47 Pa.B. 3154, June 3, 2017

The Department of Environmental Protection is currently working to develop the Commonwealth's Phase 3 Watershed Implementation Plan (WIP) for the Chesapeake Bay. The Commonwealth is mandated by the EPA to reduce nitrogen, phosphorus and sediment levels in waterways in the Chesapeake Bay watershed counties by 2025. In light of the Commonwealth's failure to meet both its Phase 1 and 2 goals, the EPA is conducting a midpoint assessment, the results of which will define how the Commonwealth designs its Phase 3 WIP. Public input is specifically being sought to determine what initiatives are needed in agriculture, forestry,

REGULATORY DEVELOPMENTS

funding, local planning, stormwater and wastewater to improve the health of local streams, rivers and lakes. Interested persons are invited to submit written comments regarding the Commonwealth's Phase 3 WIP through Friday, July 7, 2017.

[Proposed Annual Monitoring Network Plan for Allegheny County](#)

47 Pa.B. 3047, May 27, 2017

State and local air pollution control agencies are required to adopt and submit to the United States Environmental Protection Agency Regional Administrator an Annual Monitoring Network Plan (AMNP) by July 1, 2017. The AMNP provides for the establishment and maintenance of an air quality surveillance system that consists of a network of monitoring stations. The Allegheny County Health Department is the local air pollution control agency for Allegheny County. Allegheny County has an air monitoring network of 14 air monitoring stations that house instruments that measure ambient levels of air pollutants. Persons wishing to file comments on the proposed AMNP must submit comments by June 27, 2017.

[Nutrient Credit Trading Program; Credit Certification](#)

47 Pa.B. 2253, April 15, 2017

The Department of Environmental Protection intends to approve a mass certification of pollutant reduction activities by point source discharges with annual mass load effluent limitations in a National Pollutant Discharge Elimination System permit to generate credits pursuant to the Nutrient Credit Trading Program within the Commonwealth portion of the Chesapeake Bay watershed. Effective October 1, 2017, to be eligible to generate credits for sale, discharges must demonstrate treated yearly effluent concentrations below 6.0 mg/L total nitrogen and 0.8 mg/L total phosphorous in accordance with the procedures described in the Phase 2

WIP Nutrient Trading Supplement. When stringent effluent limitations are established the permittee may be eligible to generate credits. This point source certification will expire on September 30, 2019.

[Draft Pennsylvania Lake Erie Phosphorus Reduction Domestic Action Plan Issued](#)

47 Pa.B. 3045, May 27, 2017

The Commonwealth is one of eight United States state governments with coastline and contributing tributaries to the Great Lakes, and one of five states that shares jurisdictional responsibilities for water quality in the Lake Erie Basin. New phosphorus reduction targets were adopted formally in February 2016 to address over-nutrication problems in Lake Erie. The EPA is required to issue a final plan comprised of the integrated state plans by February 2018. The Department of Environmental Protection is accepting comments on the draft Pennsylvania Lake Erie Phosphorus Reduction Domestic Action Plan created to assist in the elimination of nutrient pollution in Lake Erie. Interested persons are invited to submit written comments regarding the draft Plan through Monday, June 26, 2017.

[Alternative Fuels Incentive Program Grant Opportunity](#)

47 Pa.B. 3043, May 27, 2017

The Department of Environmental Protection announces an opportunity to apply for grants under the Alternative Fuels Incentive Grant (AFIG) Program to improve air quality in the Commonwealth. The Department is seeking applications for innovative, advanced fuel and vehicle technology projects that will result in cleaner advanced alternative transportation within the Commonwealth. Approximately five million dollars in grants will be available for school districts, municipal authorities, political subdivisions, nonprofit entities, corporations, limited liability companies or partnerships incor-

REGULATORY DEVELOPMENTS

porated or registered in the Commonwealth. The application period opens on May 27, 2017, and will remain open throughout 2017.

[Draft Beneficiary Mitigation Plan Relating to the Volkswagen Settlement](#)

47 Pa.B. 2946, May 20, 2017

The Commonwealth has been identified as a potential Beneficiary of the partial consent decree approved by the United States District Court for the Northern District of California on October 25, 2016, in the case called *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 15-MD-2672-CRB (JSC). The Commonwealth is currently allocated a total of \$118,569,539.52 dollars to be used in vehicular emission reduction projects. The Department is seeking public input on the draft Beneficiary Mitigation Plan through July 5, 2017, and will hold listening sessions according to the following schedule: June 5, 2017, June 7, 2017, June 13, 2017, June 15, 2017, June 22, 2017, and June 23, 2017.

[Revised Designation Recommendations for the 2015 Ozone Standards](#)

47 Pa.B. 2387, April 22, 2017

On October 1, 2015, the United States Environmental Protection Agency lowered primary and secondary National Ambient Air Quality Standards (NAAQS) for ozone to 70 parts per billion. The Department of Environmental Protection submitted newly certified air quality monitoring data for 2016 to the EPA on February 28, 2017. Based on the newer air quality monitoring data, the Department recommended to the EPA that Indiana County and the seven-county Pittsburgh-Beaver Valley area, which includes Allegheny, Armstrong, Beaver, Butler, Fayette, Washington and Westmoreland Counties, be designated as attainment areas, rather than nonattainment areas, because they are now measuring attainment of the 2015 ozone NAAQS. The other two areas, Lebanon County and the Philadel-

phia area, recommended in 2016 to be designated as nonattainment areas still monitor nonattainment of the 2015 ozone NAAQS.

Environmental Quality Board

[Acceptance of Rulemaking Petition for Study: Marsh Creek](#)

47 Pa.B. 2443, April 29, 2017

On March 21, 2017, the Environmental Quality Board accepted a rulemaking petition for study, submitted by French and Pickering Creeks Conservation Trust, requesting the redesignation of Marsh Creek in Chester County from High Quality Waters—Trout Stocking, Migratory Fishes to Exceptional Value Waters. The Department of Environmental Protection is required to publish a notice of intent to assess candidate waters. The Department's assessment notice for this rulemaking petition will appear in a future issue of the Pennsylvania Bulletin.

[Acceptance of Rulemaking Petition for Study: Delaware River](#)

47 Pa.B. 2977, May 27, 2017

On May 17, 2017, the Environmental Quality Board accepted a rulemaking petition for study, submitted by the Delaware Riverkeeper Network, requesting the amendment of 25 Pa. Code § 93.9e to upgrade the existing and designated uses of Zones 3 and 4 of the Delaware River to include fish propagation for the warm water fishes use and fish maintenance and propagation for the migratory fishes.



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