

# THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

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## WELCOME FROM THE EELS CHAIR

Greetings to all environmental and energy law practitioners in the Section! I hope that your practices are all going well and that you are continuing to benefit from the collegiality that is a trademark of the environmental bar in general. I wanted to alert you to two things that your Council has been working on. First, we are presently scheduling a number of events around the Commonwealth that will provide an opportunity for Section members to get together with one another and others in the various local communities to hear speakers of interest, share some food and beverages of choice, and generally further the business of the bar. Some of these gatherings may include college students, law school students, and/or members of other environmental bar associations or organizations. Certain members of your Council have volunteered to organize these events, so please look for announcements in the not-too-distant future.

sustainable practices, so it seemed to your Council that we should invite a larger segment of the professional environmental arena to participate and thereby continue to practice what we preach. While I am communicating with an array of environmental consultants towards this end, I would also encourage readers of this Newsletter to contact any environmental consultants that you work with and mention this program to them. I would be happy to provide any needed information and otherwise answer any questions you or they may have.

Thank you, and please be well.

Anderson Lee Hartzell  
EELS Chair

Second, Council has decided that we should attempt to expand the PLUS program beyond legal practices and include the environmental consultant community. The PLUS program has shown great success in encouraging law offices to promote



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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 invalidates test for constitutionality of Commonwealth environmental actions and applies private trust law, leaving many unanswered questions***

*Kevin Barley, Esq.*

On June 20, 2017, the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("[PEDE](#)"), injected substantial uncertainty into environmental jurisprudence in Pennsylvania for the foreseeable future. For 44 years, Commonwealth courts and administrative bodies, including the Environmental Hearing Board, evaluated the constitutionality of Commonwealth actions under a three-part test established in *Payne v. Kassab*, 312 A.2d 86. The Payne Test has been under attack in recent years as groups challenged the constitutionality of various Commonwealth acts under Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment or "ERA"). Recent challenged acts include PADEP decisions to issue drill permits, ESCGP-2 permits and NPDES permits; municipal decisions to permit oil and gas development activity; and, at issue in *PEDE*, the broader use of royalties and other proceeds derived from leasing Commonwealth property for oil and gas development.

[Read or download the full article here.](#)



## COURT OPINIONS

## ENVIRONMENTAL HEARING BOARD

## Supreme Court of Pennsylvania

[Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 \(2017\).](#) The Pennsylvania Environmental Defense Foundation (PEDF) brought a declaratory judgment action against the Commonwealth, challenging, under the Environmental Rights Amendment (ERA), the constitutionality of a budget-related decision that resulted in additional oil-and-gas lease sales. Commonwealth Court granted summary relief to the Commonwealth and PEDF appealed. In this case, the Court reexamined the contours of the ERA, including overruling its previous precedent in determining how to apply the ERA. The issues in this case specifically arose out of the recent leasing of Commonwealth forest and park lands for Marcellus Shale gas extraction. [The Featured Article in this edition of the Newsletter provides a detailed legal update.](#)

[Roger Wetzel et. al. v. Pa. DEP et. al., Docket No. 2015-071-M \(June 7, 2017\) \(Adjudication\).](#) The Board (Judge Labuskes dissenting) sustained the appeal of the Appellants, Wetzel, who challenged the Department's approval of a Joint Act 537 Plan (official sewage facilities plan) initially submitted and initially supported by two Townships. Pa DEP is the agency empowered to administer and enforce the Pennsylvania Sewage Facilities Act, 35. P.S. § 750.1, et seq. and regulations promulgated thereunder. During the pendency of the appeal, one of the two Townships (Hegins Township) switched its position regarding support of the Joint Plan and, at the hearing, took the lead in challenging the Department's approval of its Joint Act 537 Plan. In the appeal, there were multiple arguments, including the Appellants and Hegins Township contention that the Joint Act 537 Plan did not include complete cost estimates and, if proper cost estimates were used, then given the alleged economic infeasibility, the Townships lacked the ability to implement the Plan. On this issue, the Board found that the Department's approval of the Joint Act 537 Plan was appropriate; the Plan is able to be implemented. Nonetheless, the Board reasoned that under applicable precedent, it is allowed to consider changed circumstances that happened since the Department took its action, under its de novo review. Ultimately, then, the Board determined that, under the Department's regulations (25 Pa. Code §§ 71.31(f) and 71.32(d)(4)), a municipality must make a commitment to implement its Act 537 Plan, and the Township's change in its support of the Plan during litigation undeniably represents a lack of required municipal commitment to implement its one time supported plan.

[Stephen W. Klesic v. Pa. DEP, Docket No. 2015-150-M \(consolidated with 2015-169-M\) \(June 9, 2017\) \(Adjudication\).](#) Pa. DEP is the administrative agency with the authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380 and the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169. The actions were initially taken under the

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name of United Environmental Group, Inc. (UEG), but because of certain unique procedural issues and because UEG was no longer operating and was insolvent, the Board allowed President and principal shareholder to proceed *pro se* as the sole Appellant. The evidence established that UEG, a Pennsylvania corporation, operated a hazardous and residual waste treatment, storage, and disposal facility under an expired permit and in violation of, among other things, storage tank regulations (requiring in-service inspection for certain above-ground tanks every 10 years). After learning of UEG's insolvency, the Department attempted to rescind and revoke its civil penalty assessment and the Waste Order and dismiss the appeal. However, Appellant contested that action, arguing that he would remain subject to a new penalty assessment or waste order; the Board agreed, allowing the appeal by Appellant to proceed. Appellant's sole argument was that he was treated unfairly, with disparate treatment by the Department. The Board dismissed the Appellant's appeal of the Department's civil penalty assessment of \$15,000 and waste order. The Board found that: (1) the Department met its burden of demonstrating that the assessed civil penalty and the waste order were reasonable and amply supported by the evidence presented; (2) there was no dispute over the existence of the violations at the UEG; and (3), Appellant failed to show that either the civil penalty assessment or waste order was a result of selective or discriminatory enforcement on the part of the Department.

[Eric Ashley v. Pa. DEP and TCCC-Lancaster Holdings, LP, Permittee, Docket No. 2017-020-L \(June 9, 2017\) \(Five Judge Opinion\)](#). TCCC-Lancaster Holdings, LP (TCCC) applied to the Lancaster County Conservation District for coverage under the DEP's general permit authorizing stormwater discharges associated with construction activities (PAG-02) for TCCC's construction project in Manheim Township, Lancaster County, pursuant to Conservation District Law, 3 P.S. § 859(2)(a), and

25 Pa. Code § 102.41(a). Technical review of TCCC's post-construction stormwater management plan (PCSM plan) was conducted by Department personnel, and found to be sufficient in a Department memorandum sent to the Conservation District. Appellant, Ashley, did not appeal from the coverage approval, but rather filed appeal from the Department personnel's review memorandum, which he obtained via a Right to Know Law request. The Board dismissed appeal of the technical review memorandum because the memorandum merely embodied an interim decision made during the processing of a permit coverage application and was not a final action.

[United Environmental Group, Inc. v. Pa. DEP, Docket No. 2016-095-M \(June 15, 2017\) \(Single Judge Opinion by J. Mather\)](#). United Environmental Group (UEG) filed appeal in response to a notice of hazardous waste and residual waste permit bond forfeiture. UEG filed Notice of Appeal (NOA), and the Department filed a Motion for Summary Judgment. Appellant filed its Response, followed by the Department's Reply, which was shortly thereafter followed by the Appellant filing a Response to the Department's Reply. The Department filed a Motion to Strike the Appellant's "Response to Appellee's Reply to Appellant's Summary Judgment Response." The Board granted the Department's Motion to Strike, stating that Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Response is neither contemplated nor permitted under Rule 1021.94a without the Board's permission; that the Appellant neither sought nor received the Board's permission to file its Response; and that, even if the Board considered the arguments in the inappropriate filing it would not change the outcome. For this reason, the Board granted the Department's motion and struck Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Response.

## ENVIRONMENTAL HEARING BOARD

[PQ Corporation v. Pa. DEP, Docket No. 2016-086-L \(June 27, 2017\) \(Single Judge Opinion by J. LaBuskes\)](#). PQ Corporation (PQ) has a Title V operating permit which authorizes the operation of its sodium silicate furnace at its facility in Chester, Pennsylvania. The Department renewed that permit; thereafter PQ timely filed this appeal objecting to emission limits and continuous monitoring requirements with respect to carbon monoxide, burner tip cooling monitoring and recordkeeping requirements, continuous flame pattern monitoring requirements, and nitrogen oxides emission and production reporting requirements. In a separate action, the Department issued a Plan Approval to PQ that authorized the construction and short-term operation of a replacement fuel oil supply skid for the furnace. None of the Title V conditions at issue in this appeal were changed by the Plan Approval. To the contrary, the Plan Approval repeated the conditions virtually verbatim. PQ did not file an appeal from the Plan Approval. The Department filed a motion to dismiss PQ's Title V renewal appeal as moot because the Plan Approval repeated the conditions in the permit that are at issue in that appeal and PQ did not appeal the Plan Approval. The Board denied the Department's motion to dismiss, finding that the Department's subsequent issuance of a plan approval authorizing construction and short-term operation of a replacement fuel oil supply skid for the furnace did not nullify the conditions at issue in the Title V permit (which were, in fact, reaffirmed in the Plan Approval); PQ's appeal is not moot.

[Emerald Contura, LLC v. Pa. DEP, Docket No. 2017-038-R \(consolidated with 2017-046-R\) \(June 27, 2017\) \(Single Judge Opinion by J. Renwand\)](#). Emerald Contura (Contura) appealed two orders issued by the Department following the release of stray methane gas in a residential neighborhood which require, among other things, Contura "submit a report, schedule, and abatement plan (Plan) to abate the public nuisance caused by the expression of methane gas in the

Area of Concern to the Department." Shortly thereafter, Contura filed an Application for a Temporary Supersedeas and a Supersedeas. Contura requested more time to investigate the source of the methane gas, before committing to abate the situation. The Board denied a Petition for Supersedeas following a hearing. The Board found that Appellant mining company failed to establish a likelihood of success on the merits or prove irreparable harm. Moreover, the Board could not rule out the likelihood of injury to the public, if it were to grant the Petition for Supersedeas.

[Sierra Club v. Pa. DEP and FirstEnergy Generation, LLC, Permittee, Docket No. 2015-093-R \(consolidated with 2015-159-R\) \(July 10, 2017\) \(Five Judge Opinion by J. Renwand\)](#). This matter involved the consolidated appeals filed by Sierra Club challenging the reissuance, renewal and minor modification of Solid Waste Permit No. 300370 issued by DEP to FirstEnergy Generation, LLC for the Hatfield's Ferry Landfill located in Greene County. The underlying issue involved First Energy's disposal of dewatered liquid flue gas desulfurization material not recycled into gypsum at a landfill. The Board granted Summary judgment to the Appellant on the issue of standing where two of its members had adequately averred that there is a reasonable potential they will be impacted by the action that is under appeal. The Board denied partial summary judgment to FirstEnergy on the basis of administrative finality. Summary judgment was granted to the Permittee with the support of the Department) on the question of whether the Department was required to apply the EPA rule on coal combustion residuals; it was not. Summary judgment was denied as to all other issues where questions of material fact remain (minor modification, adequacy of the bond, legal requirements for renewal and modification).

## ENVIRONMENTAL HEARING BOARD

[John E. Ritter v. Pa. DEP and Sullivan Township, Permittee, Docket No. 2015-166-M \(August 3, 2017\) \(Adjudication\)](#). The Board dismissed the Appellant's appeal of the Department's Plan Revision approval under the Sewage Facilities Act, 35 P.S. § 750.1, et seq., and the Administration of Sewage Facilities Planning Program Regulations, 25 Pa. Code § 71.1, et seq. Appellant's property was adjacent to the property subject to the revised plan. The Plan Revision allows for the development of a small flow treatment facility ("SFTF") which will discharge treated effluent to a small stormwater waterway before being directed to a nearby lake. The Board held that the Department acted reasonably and in accordance with the law when it approved the Plan Revision. Further, since the Appellant failed to file a Post-Hearing Brief as ordered by the Board, all issues from Appellant's case-in-chief were deemed waived. Since the Appellant had the burden of proof under the Board's Rules, his failure to file a Post-Hearing Brief as ordered provided an alternative basis to dismiss the appeal and grant the Department's Motion for Directed Adjudication.

[Northampton Bucks County Municipal Authority v. Pa. DEP and Bucks County Water and Sewer Authority, Intervenor, Docket No. 2016-106-L \(August 9, 2017\) \(Single Judge Opinion by J. LaBuskes\)](#). This matter relates to a relationship created between Bucks County Water and Sewer Authority and Northampton Bucks County Municipal Authority regarding the conveyance and treatment of sewage in the Neshaminy Interceptor sewer line, which is part of Bucks's sewer system. Bucks and Northampton entered into an agreement in 1965 for the conveyance of Northampton's wastewater to Philadelphia through Bucks's system via the Neshaminy Interceptor. In 2012, based on Bucks's Chapter 94 annual report, the Department determined that a hydraulic overload was projected in portions of the Neshaminy Interceptor and at the Totem Road Pump Station, which receives flows from the

Neshaminy Interceptor. In a settlement agreement between Bucks and the Department, entered into on March 10, 2014, the Department agreed that it would accept Bucks's corrective action plan (CAP) and connection management plan (CMP) and provide a process for future changes to CMP. Subsequent revisions to the CMP accepted by the Department required Northampton to revise its 537 Plan and enter into supplement agreements with Bucks, before additional sewer connections would be approved. This appeal stems from the Department's June 14, 2016 letter. Northampton says that the Department's actions have had the effect of forcing it to sign a take-it-or-leave-it contract that has been presented to it by Bucks that will impose nonnegotiable penalties if Northampton exceeds specified flow limits. Ultimately, the Board decided that the propriety of the Department's determinations as set forth in various letters cannot be entirely resolved as a matter of law based upon undisputed facts, and therefore it denied the parties motions for summary judgment. However, the Board determined it would retain jurisdiction in the appeal because the letter(s) appears to be a final, appealable action. Furthermore, the Board stated that the scope of the appeal may be broader than it otherwise might have been because the Board dismissed earlier appeals involving the same matters without prejudice.

[B&R Resources, LLC and Richard F. Campola v. Pa. DEP, Docket No. 2015-095-B \(August 9, 2017\) \(Adjudication\)](#). The Board found the Administrative Order issued to B&R Resources, LLC and Richard F. Campola by the Department requiring the plugging of abandoned wells under the Oil and Gas Act is lawful and reasonable. Richard F. Campola is individually liable for the violations identified in the Administrative Order and for complying with the requirements of the Administrative Order under the participation theory. Mr. Campola had actual knowledge of the violations, and intentionally neglected to remedy the violations de-

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spite having both the duty to act and the authority to act to address the violations.

[Center for Coalfield Justice and Sierra Club v. Pa. DEP and Consol Pennsylvania Coal Company, LLC, Docket No. 2014-072-B \(consolidated with 2014-083-B and 2015-051-B\) \(August 15, 2017\) \(Adjudication\).](#)

The Board denied in part and granted in part the consolidated appeals of the Center for Coalfield Justice and the Sierra Club challenging the Department's issuance of Permit Revisions No. 180 and No. 189 to Consol Pennsylvania Coal Company, LLC for longwall mining in the Bailey Mine Eastern Expansion Area. The Center for Coalfield Justice and the Sierra Club failed to demonstrate by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 180 was unreasonable or in violation of the relevant statutes and regulations or Article I, Section 27 of the Pennsylvania Constitution. The anticipated and actual impacts to the streams from the longwall mining authorized by Permit Revision No. 180 did not rise to the level of impairing the streams in the permit revision area. The Center for Coalfield Justice and the Sierra Club did demonstrate by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 189 was unreasonable and in violation of the relevant statutes and regulations and Article I, Section 27 of the Pennsylvania Constitution. The anticipated and actual impacts to Polen Run from the longwall mining authorized by Permit Revision No. 189 impaired Polen Run and caused the pollution of Polen Run under 25 Pa. Code § 86.37(a)(3).

[Paul Lynch Investments, Inc. v. Pa. DEP, Docket No. 2016-014-B \(August 29, 2017\) \(Adjudication\).](#)

The Board upheld a civil penalty assessment of \$9,000 for violations of the Storage Tank and Spill Prevention Act after Lynch Investments appealed the finding of five violations of the Tank Act. Lynch Investments also unsuccessfully asserted that it lacked the ability to prepay the civil penalty or post the re-

quired bond. Lynch's failure to file a response to the Department's summary judgment motion resulted in the Board granting summary judgment, as a matter of law, on Lynch's liability for the underlying violations and rejecting any claim that the penalty was barred by the statute of limitations. After a hearing on the issue of the penalty assessment, the Board, dismissed the appeal, holding that the penalty amount was lawful, and a reasonable and appropriate exercise of the Department's discretion.

[City of Allentown v. Pa. DEP, Docket No. 2016-144-M \(September 1, 2017\) \(Five Judge Opinion\).](#)

The City of Allentown, Appellant, filed an appeal in response to a letter from the U.S. EPA Region III that referenced an oral statement made during an earlier meeting with the Appellant, Department employees, and EPA representatives. The Department contested on the basis that the letter was not a final decision that is subject to review. The Board granted the Department's Motion to Dismiss for several reasons. First, the written statement that Appellant challenged (confirming an oral statement by a Department Program Manager made earlier) is found in a letter from the United States Environmental Protection Agency, and not in a letter from the Department. Second, the statement is merely the Department's interpretation of its own regulations and is not ripe until the Department makes its permit decision. Third, the Appellant's challenge to the oral statement interpreting its own regulation is not timely, and even if it were timely, the oral statement is not an order or directive. Next, the Appellant's challenge to the Department's interpretation of its regulation arose in the context of an application for a permit modification that the Appellant had not yet submitted to the Department for review and approval. The Board lacks jurisdiction to evaluate the challenge to the Department's interpretation of a regulation that the Appellant wants to litigate before the Department makes a decision on the permit modification application that was not yet filed. Finally the Board rejected Appel-

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lant's argument that the Clean Streams Law provides an independent basis for jurisdiction over such oral declarations.

[Russell and Pauline Hummel v. Pa. DEP and King Coal Sales, Inc., Permittee, Docket No. 2015-172-M \(September 1, 2017\) \(Adjudication\).](#) The Pennsylvania Environmental Hearing Board dismissed the appeal filed by Mr. and Mrs. Russell and Pauline Hummel challenging the approval of the Department's Stage II Bond Release granted to King Coal Sales, Inc. for a portion of its Surface Coal Mining Permit No. 17050108 ("King Coal SMP") which is also known as the Knight Operation. The Appellants, who have the burden of proof in this appeal, have not demonstrated that the southeastern 5.6 acre portion of the King Coal SMP that is on property owned by the Appellants was not eligible for Stage II Bond Release.

[PQ Corporation v. Pa. DEP, Docket No. 2015-198-L \(September 6, 2017\) \(Adjudication\).](#) In certain Title V clean air act permits, the Department retains the authority to require continuous emissions monitoring systems (CEMS) and continuous opacity monitoring systems (COMS), as opposed to stack testing for data submissions. Before CEMS/COMS may be used for compliance purposes it must pass a three-phase certification. In this instance, it took 59 months to certify CEMS/COMS and after it was certified, the Department required PQ to submit retroactive CEMS/COMS data for approximately 31 months before the CEMS/COMS was certified. The Department then used this data to calculate non-compliance penalties for the period, assessing a penalty of \$1,545,741. PQ appealed the penalty assessment, arguing that the permit specified that stack testing was to be used for monitoring (and any penalty calculation) until such time as the CEMS/COMS were certified. The Board held that CEMS/COMS could not be used retroactively to calculate penalties before they become certified and that any penalty calculation must conform to the permit method, stack testing in this

case. As a result, the Board reduced the penalty to \$215,258. The Board upheld the Department's assessment for PQ's other violations.

[Siri Lawson v. Pa. DEP and Hydro Transport LLC, Permittee, Docket No. 2017-051-B \(September 6, 2017\) \(single judge opinion by J. Beckman\).](#) Lawson appealed the Department approval authorizing brine spreading by Hydro Transport LLC (Hydro) for dust control in Sugar Grove and Farmington Townships in Warren County. Hydro is a Pennsylvania LLC engaged in providing services for the oil and gas industry, including, but not limited to, the hauling and spreading of brine. Lawson contends, among other things, that: (1) DEP approval constitutes an approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth and; (2) fails to impose adequate operating requirement to protect waters of the Commonwealth or prevent air quality deterioration in violation of Article I, Section 27 of the Pennsylvania Constitution. This action addresses two petitions to intervene filed in this appeal. The Board granted Farmington Township's petition to intervene in a third party appeal of a brine spreading plan authorized to take place within the township. The Board found that Farmington Township has a substantial, direct, and immediate interest in the outcome of the appeal. (The contract between the Township and Hydro is contingent upon Department approval.) (In a separate opinion, the Board later denied a petition to intervene by the Pennsylvania Grade Crude Oil Coalition, finding that the Coalition had not demonstrated a direct, immediate, and substantial interest in the appeal.

[New Hope Crushed Stone & Lime Company v. Pa. DEP et. al., Interveners, Docket No. 2016-028-L \(September 7, 2017\) \(Adjudication\).](#) New Hope Crushed Stone and Lime Company is a Pennsylvania corporation that owns and operates a limestone quarry with its principle place of business located in Solebury Township, Pennsylvania. The

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Board previously issued an Adjudication in 2014 determining the quarry's mining and dewatering of the water table was creating a public nuisance by causing numerous sinkholes to open up around a school campus and other surrounding properties. The DEP is the agency entrusted with the duty and authority to administer and enforce the Non-coal Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 3301-3326, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. The Board dismissed the stone quarry's appeal of a Department letter amending the stone quarry's reclamation plan. The Board held that Department's modifications to hasten reclamation efforts in order to expeditiously abate the propagation of sinkholes in the area caused by the quarry were consistent with prior administratively final compliance orders, and were reasonable and in accordance with the law.

[Benner Township Water Authority v. Pa. DEP and Borough of Bellefonte, Docket No. 2016-042-M \(September 19, 2017\) \(Single Judge Opinion by J. Mather\)](#). In April 2016, Appellant filed an appeal of the Department's issuance of a general permit to the Borough of Bellefonte that would allow the Borough to apply biosolids to land near Benner Township. Appellant's concern was that biosolids and contaminants would migrate into Appellant's well recharge area and its supplying aquifer due to the areas fractured bedrock, lack of overlying soil, and land gradient. The Board denied Benner Township Water Authority's Motion for Summary Judgment. The Board found 25 Pa. Code § 275.312 is not applicable to general permits issued pursuant to Chapter 271. In addition, the Board found significant issues of material fact regarding the Department's review, whether the Department complied with 25 Pa. Code §§ 271.915 (f) (agronomic rate), 271.902(g) (protection of water supply), and 271.913(h) (soil sampling), and whether it acted arbitrarily in its approval of the Borough of Bellefonte's application to apply biosolids to land in Benner Township.

[Green Global Machine, LLC v. Pa. DEP, Docket No. 2017-052-M \(September 28, 2017\) \(Five Judge Opinion\)](#). Appellant filed an appeal of a Department letter notifying Appellant of the suspension of its permit for the 221 Mine and of the Department's intent to forfeit the bonds associated with the mine. The Board granted the Department's Motion to Dismiss appeal because the record reflects that Appellants' Notice of Appeal ("NOA") was filed at least two (2) days outside of the 30-day appeal period mandated by 25 Pa. Code § 1021.52(a)(1). The Appellant's filing of the appeal was untimely and the Board lacks jurisdiction over the appeal.

## LEGISLATIVE DEVELOPMENTS

### Adopted Legislation

#### Environmental Issues

[Act 26 of 2017](#) (Yaw, R-23) authorizes the use of any alternate on-lot sewage system to satisfy site suitability requirements. Previously, only those on-lot systems approved by regulation could be readily used, with alternative systems subject to a less-certain approval process.

Under the new law, PADEP is tasked with establishing performance standards for alternate on-lot systems in consultation with the Sewage Advisory Committee.

[Act 32 of 2017](#) (Scarnati, R-25) amended the Bituminous Mine Subsidence and Land Conservation Act, providing for new procedures in planned subsidence and retroactivity when applying for a permit near surface waters. The bill (Senate Bill 624) was signed into law on July 22, 2017.

### Proposed Legislation

#### Energy Issues

##### *Oil and Gas*

##### House Bills

[House Bill 1601](#) (Hanna, D-76) would amend the Pennsylvania Consolidated Statutes, in Oil and Gas Lease Fund, further providing for definitions, establishing the Public Natural Resources Trust Fund and further providing for funds; and making related repeals. The Public Natural Resources Trust Fund would receive income from oil and gas developed on public land and direct it as follows: First, investments would be made through existing, highly successful programs such as public natural resources and public land conserva-

tion and recreation under the purview of the Pennsylvania Departments of Conservation and Natural Resources, Environmental Protection and Agriculture. Second, a portion of royalty income would be invested by setting it aside in a special account managed by the State Treasurer. Deposits would only be made when royalty payments to the Oil and Gas Lease Fund exceed \$70 million per year. This provision takes into consideration budget realities while at the same time setting up the mechanism to build the Public Natural Resources Trust Fund when gas production and prices are robust. The Bill was referred to Environmental Resources and Energy in the House on June 22, 2017.

[House Bill 1624](#) (Dean, D-153) would amend the Tax Reform Code of 1971, providing for an education reinvestment severance tax, for minimum royalty for unconventional oil or gas well products and for a remedy for failure to pay the minimum royalty on unconventional oil or gas wells. The Bill was referred to Environmental Resources and Energy in the House on June 26, 2017.

[House Bill 1625](#) (Santora, R-163) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, specifically the unconventional gas well fee. The bill would create a natural gas severance tax on unconventional operations in Pennsylvania. The bill would create a variable rate for this new tax depending upon the average Pennsylvania hub price for the prior calendar year. When the average price is between: \$0.00 and \$2.50 per unit, the tax is 3% per unit; \$2.51 and \$3.00 per unit, the tax is 4% per unit; more than \$3.00 per unit, the tax is 5% per unit. The Bill was referred to Environmental Resources and Energy in the House on June 28, 2017.

[House Bill 1626](#) (Miccarelli, R-162) would amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, specifically the unconventional gas well fee. The bill would create a natural gas sever-

## LEGISLATIVE DEVELOPMENTS

ance tax on unconventional operations in Pennsylvania. The legislation provides for a tax rate between 3.5% and 7% of the value of the gas, adjusted annually. The annually adjusted rate would be determined by dividing the average PA hub price by the average between the NYMEX and Henry Hub prices. The Bill was referred to Environmental Resources and Energy in the House on June 28, 2017.

### Environmental Issues

#### *Administrative*

##### House Bills

[House Bill 1550](#) (Klunk, R-169) would amend the Agricultural Area Security Law, further providing for purchase of agricultural conservation easements. The easements would allow for easier subdivision of preserved farmland and other agricultural properties so that farmers can more easily convey property to future generations and construct residences. The bill was referred to Agricultural and Rural Affairs in the House on July 6, 2017.

[House Bill 1818](#) (McCarter, D-154) would create an act providing for labeling, signage and restrictions on sales and use relating to neonicotinoid pesticides. Specifically, this legislation would prohibit the sale of seeds or plants that have been treated with neonicotinoids, unless they bear a label or are located in close proximity to a sign bearing a warning of the possible dangers of using neonicotinoids. This legislation would also prohibit the sale of neonicotinoids at a retail location unless the retailer also sells restricted-use pesticides, and would further prohibit an individual from applying neonicotinoids unless the individual is a farmer, veterinarian, or licensed pesticide applicator. The Bill was referred to Environmental Resources and Energy in the House on September 25, 2017.

#### *Waste*

##### Senate Bills

[House Bill 1640](#) (O'Neill, R-29) would amend the Hazardous Sites Cleanup Act, to allow the governor to make a declaration of disaster emergency, consistent with his powers to do so under Title 35 (Health and Safety), naming any affected community a "special drinking water resource-impacted community" for any area where analyses indicate the presence of PFOA or PFOS in ground-water or surface water measured at or exceeding 15 parts per trillion. and thereby such areas would then be eligible for PENNVEST grants. The Bill was referred to Environmental Resources and Energy in the House on June 29, 2017.

## REGULATORY DEVELOPMENTS

### Department of Environmental Protection

#### [Availability of the 2016 Integrated Water Quality Monitoring and Assessment Report](#)

47 Pa.B. 4594, August 5, 2017

The Department of Environmental Protection is providing the 2016 Integrated Water Quality Monitoring and Assessment Report to the United States Environmental Protection Agency for review and approval. The Report is available to the public and includes both a narrative description of the Commonwealth's water quality management programs (formerly the Federal Clean Water Act section 305 (b) Report) and waterbody-specific lists depicting the status of Commonwealth surface waters as required by section 303(d) of the Federal Clean Water Act (33 U.S.C.A. § 1313(d)). The Integrated Report establishes five categories for listing the assessed waterbodies. Waterbodies that do not meet water quality standards and that require a Total Maximum Daily Load are placed on Category 5 of the Integrated Report waterbody list.

#### [Planning Grant Awards under Section 901 of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act 101 of 1988](#)

47 Pa.B. 4770, August 12, 2017

The Department of Environmental Protection announced the award of grants to Lebanon County and Elk County under section 901 of the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101) (53 P.S. § 4000.901) and section 208 of the Small Business and Household Pollution Prevention Act (Act 190) (35 P.S. § 6029.208). Planning grants are awarded for approved costs relating to the preparation of municipal waste management plans and related studies, surveys, investigations, inquiries, research and analysis, including those related to siting, environmental mediation, education programs on pollution prevention and household hazardous waste and providing technical assistance to small businesses for pollution prevention.

#### [Alternative Fuel Vehicle Rebate Program; Revisions](#)

47 Pa.B. 5857, September 16, 2017

The Department of Environmental Protection announces the continued availability of grants to Commonwealth residents under the Alternative Fuel Vehicle (AFV) Rebate Program to assist individuals with the incremental costs of purchasing an AFV. To qualify for the rebate, the AFV must be registered and primarily operated in this Commonwealth. The rebate will be offered on a first-come, first-served basis in the order in which applications are received. Rebate request forms and required documentation must be submitted to the Department no later than 6 months after the vehicle is purchased. Approximately 500 rebates at all levels will be available. The Program will be offered until the Program moneys are exhausted, or December 31, 2017, whichever occurs first.

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

47 Pa.B. 6127, September 30, 2017

The Department of Environmental Protection finalized the Pennsylvania Lake Erie Phosphorus Reduction Domestic Action Plan to assist in the elimination of nutrient pollution in Lake Erie. The Commonwealth is one of eight state governments with coastline and contributing tributaries to the Great Lakes, and one of five states that share jurisdictional responsibilities for water quality in the Lake Erie Basin. New phosphorus reduction targets for Lake Erie were formally adopted by the parties in February 2016 to address over-nutrication problems identified within Lake Erie. The United States Environmental Protection Agency will coordinate and integrate each state-written plan. The United States and Canada are bound to complete these plans by the end of 2018.

## REGULATORY DEVELOPMENTS

### [Pennsylvania's 2017 Annual Ambient Air Monitoring Network Plan](#)

47 Pa.B. 3652, July 1, 2017

The Department of Environmental Protection is seeking public comment on Pennsylvania's 2017 Annual Ambient Air Monitoring Network Plan. The Plan has been updated to address changes that have been made in the Commonwealth's ambient air monitoring network and to identify changes that are anticipated to occur in the remainder of 2017 and in 2018. The United States Environmental Protection Agency requires state and local agencies to enhance air monitoring to "improve public health protection and better inform the public about air quality in their communities." Under 40 CFR 58.10 (relating to annual monitoring network plan and periodic network assessment), air quality state and local monitoring agencies must adopt an annual air monitoring network plan and make the plan available for public inspection. The plan, which is due July 1, 2017, must include a statement of purpose for each monitor and evidence that siting and operation of each monitor meets Federal requirements.

### Environmental Quality Board

#### [Acceptance of Rulemaking Petition for Study](#)

47 Pa.B. 4986, August 26, 2017

The Environmental Quality Board has accepted a rulemaking petition for study, submitted by the Delaware Riverkeeper Network, requesting the amendment of 25 Pa. Code Chapter 109 (relating to safe drinking water) to establish a maximum contaminant level for Perfluoro-octanoic Acid not to exceed six parts per trillion. Under the Board's acceptance of the petition, the Department of Environmental Protection will prepare a report evaluating the petition. This report will include a recommendation on whether the Board should proceed with a proposed rulemaking and, if so, the process that the Department would need to undertake to develop a proposed rulemaking.

### [Safe Drinking Water; General Update and Fees](#)

47 Pa.B. 4986, August 26, 2017

The Environmental Quality Board proposes a rulemaking to amend Chapter 109 (relating to safe drinking water) to incorporate three components: (1) the remaining general update provisions of the proposed Revised Total Coliform Rule; (2) review permit fees to fill the funding gap (\$7.5 million); and (3) establish the regulatory basis for issuing general permits, clarify noncommunity water systems permit requirements, and address concerns regarding gaps in the monitoring, reporting and tracking of back-up sources of supply. Collectively, this proposed rulemaking will provide for the increased protection of public health by every public water system in this Commonwealth as one or more of these proposed amendments will apply to all 8,521 public water systems in this Commonwealth.



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