

THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

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WELCOME FROM THE EELS CHAIR

Thank you for reading this edition of our EELS Newsletter. As we begin 2017, I don't need a crystal ball to predict that it will be a year for change, especially in the areas of environmental and energy policy, enforcement and regulation. Your EELS Council, with the assistance of PBA staff, will be tracking these changes as they occur and provide EELS members with timely information to assist in their practices. Members should sign up for the EELS ListServ on the PBA EELS member website to receive timely notices. Where there is consensus, EELS will advocate for its members; where there is a plurality of opinion, EELS will strive to foster productive discussion among stakeholders. What will 2017 bring for you and your practice? Are you looking forward with anticipation or trepidation? Either way, join with your peers in the many activities of EELS to advance the profession and foster congeniality among those of us that have chosen this area of law as their avocation. Even consider writing an article for our next Newsletter.

Elsewhere in this Edition there is a notice for an opportunity for law students intending to practice in Pennsylvania to receive a stipend from EELS for Pro Bono summer experience in the area of environmental and energy law. Please circulate the opportunity and consider sponsoring (or partnering with a qualifying organization to sponsor) a candidate for the award.

Also, if you need a good New Year resolution, please consider volunteering for a Pro Bono matter before the Environmental Hearing Board. Contact EELS Pro Bono Committee Chair Tom Duncan at tduncan@blankrome.com to volunteer or learn more.

The next EELS PBA Section Day meeting is Thursday March 23, 2017, time TBD, at The Red Lion Hotel Harrisburg East, Harrisburg (formerly the Holiday Inn East, Swatara; 4751 Lindle Road, Harrisburg, PA 17111). We will invite presentations from Alexandra Chiaruttini, DEP Chief Counsel, and Audrey Minor, DCNR Chief Counsel. Please consider attending in person, or by phone.

Our EELS Annual Dinner Meeting will take place April 5, 2017, the evening of the first day of the Environmental Law Forum. The brief business meeting is when we elect new Council Members and Officers. Andy Hartzell will become your new Chair. If you have an interest in becoming a Council Member please let me know (rfriedman@mcneeslaw.com) and I will forward your name to the Nominating Committee. I look forward to seeing you all there.

Finally, I welcome each of your comments on how EELS can do a better job serving PA environmental and energy law practitioners. I also encourage you to participate in one of our many committees and programs. Contact me at rfriedman@mcneeslaw.com.

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

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

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

FEATURED ARTICLE***Juliana, et al v. United States, et al****Robert Bucher*

In June of 2015, a group of twenty-one plaintiffs, ranging in age from 8 to 19, initiated a suit in the United States District Court of Oregon, against the United States government in *Juliana, et al v. United States, et al*. The plaintiffs allege that the federal government knowingly “[...] permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, [...] deliberately allow[ing] atmospheric CO₂ concentrations to escalate to levels unprecedented in human history.” Further, the plaintiffs allege that as a result of these actions, the federal government has destabilized the climate system, “significantly endanger[ing the] plaintiffs, with the damage persisting for millennia.” The plaintiffs base their claims on substantive due process grounds, arguing that the government’s actions have and will continue to deprive them life, liberty, and property, and that government has violated its obligation to hold certain natural resources in trust for the people and for future generations. As a remedy, the plaintiffs seek: 1) a declaration that their constitutional and public trust rights have been violated; and 2) an order enjoining the defendants from violating those rights and directing defendants to develop a plan to reduce CO₂ emissions.

In response to the plaintiffs’ claims, the defendant federal government and a group of intervenors filed a motion to dismiss the complaint. The defendants moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. Oral argument on the motion was held and in April 2016, Magistrate Judge Coffin issued his Finding and Recommendation (“F&R”) in which he recommended the District Court deny the motion to dismiss. The defendants and intervenors filed objections in response to Judge Coffin’s F&R. Pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72, the objections were reviewed by District Judge Ann Aiken. On November 10, 2016, after reviewing the

objections of the defendants, Judge Aiken issued an Opinion and Order adopting Judge Coffin’s F&R and denying the defendants’ motion to dismiss. A brief discussion of Judge Aiken’s opinion and her reasoning for denying the motion to dismiss follows. [Read or download the full article here.](#)



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[Glenn J. Morrison v. Pa. DEP and Insurance Auto Auctions, Inc., Permittee, Docket No. 2016-009-L \(Consolidated with 2016-024-L\) \(October 4, 2016\) \(five judge opinion by J. Labuskes\).](#) The Board granted in part and denied in part the Department and permittee's summary judgment motions concerning a storm water discharge permit appealed by permittee's neighbor. Summary judgment was denied on a claim of the sufficiency of the public notice associated with the coverage determination and technical objections regarding approval of the permit, and further denied with regards to whether permittee obtained coverage under the appropriate permit. Summary judgment was granted where appellant failed to respond to certain challenges raised in the motions.

[Merck Sharp & Dohme Corp. v. Pa. DEP, Docket No. 2015-011-L \(Consolidated with 2015-123-L\) \(October 11, 2016\) \(five judge opinion by J. Labuskes\).](#) The Board granted a motion for partial summary judgment in favor of the Department in regards to their determination affecting Appellant's Preparedness, Prevention and Contingency Plan. The Board held that the Department did not err to the extent it concluded that it could not grant Appellant's interpretation of from the requirements of 25 Pa. Code Section 91.33.

[New Hope Crushed Stone & Lime Co. v. Pa. DEP, Solebury School and Solebury Twp., Intervenors, Docket No. 2016-028-L \(October 11, 2016\) \(five judge opinion by J. Labuskes\).](#) Intervenor's motion for reconsideration regarding a protective order from discovery requests was denied by the Board. The Board found that the Appellant did not present anything new or advance arguments in support of why they would need certain information from Intervenor to persuade them to overturn their previously granted protective order.

[Pine Creek Valley Watershed Association, Inc. v. Pa. DEP, and District Twp., and Longswamp Twp., Docket No. 2014-154-L \(October 21, 2016\) \(five judge adjudication by J. Labuskes\).](#) The Board dismissed Appellant's appeal from the Department's approval of a Township Act 537 plan revision because, *inter alia*, the plan satisfied the anti-degradation requirements as a matter of law, and the Department acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

[Whitehall Twp. v. Pa. DEP and Coplay Aggregates, Inc., Permittee, Docket No. 2015-109-M \(October 24, 2016\) \(single judge opinion by J. Mather\).](#) The Board issued a case management order and granted in part and denied certain discovery requests from Permittee. The Board denied the request to conduct a forensic examination of Appellant's computers because Permittee did not establish a basis to justify the extraordinary relief, but did grant request to search an individual's computer again.

[Richard Ralph Feudale v. Pa. DEP and Aqua Pa., Inc., Permittee, Docket No. 2016-110-C \(October 25, 2016\) \(five judge opinion by J. Coleman\).](#) The Board denied a petition to appeal *nunc pro tunc* where the petitioner had not demonstrated fraud, breakdown in the administrative process, or any unique and compelling non-negligent circumstances justifying the allowance of an untimely appeal of an NPDES permit issued in 2013 to Appellee.

[Annette Logan et. al. v. Pa. DEP, Perdue Agribusiness, LLC, Permittee, et. al., Docket No. 2016-091-L \(October 27, 2016\) \(single judge opinion by J. Labuskes\).](#) The matter arose from the Department issuing an Air Quality Plan to Appellee. The Board denied Permittee's amended motion to strike appellant's objections to nonparty subpoenas because it found that in substance it was a petition for reconsideration of an interlocutory order and the Permittee had failed to justify reconsideration.

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[Annette Logan et. al. v. Pa. DEP, Perdue Agribusiness, LLC, Permittee, et. al., Docket No. 2016-091-L \(October 28, 2016\) single judge opinion by J. Bernard A. Labuskes, Jr.](#) The Board found that Appellant's responses to interrogatories and document requests were adequate and in turn denied Permittee's motion to compel.

[Friends of Lackawanna v. Pa. DEP and Keystone Sanitary Landfill, Inc., Permittee, Docket No. 2015-063-L \(November 4, 2016\) \(single judge opinion by J. Labuskes\).](#) The Board denied the Appellant's motion in limine seeking to prevent a landfill's expert from opining regarding the application of a harms-benefit analysis to a permit renewal.

[PQ Corp. v. Pa. DEP, Docket No. 2015-198-L \(November 17, 2016\) \(five judge opinion by J. Labuskes\).](#) This case is an appeal of a civil penalty assessment for air emission exceedances. The Board granted in part the Department's motion for partial summary judgment in terms of Appellant's liability for hourly CO exceedances, hourly NOx exceedances, opacity exceedances, and data availability violations, and denied in all other respects. Further, the Board denied Appellant's motion for partial summary judgment because the Appellant did not establish the Department's penalty was unreasonable as a matter of law.

[Robert W. Diehl, Jr. et. al. v. Pa. DEP and Angelina Gathering Co., LLC, Intervenor, Docket No. 2016-099-M \(December 1, 2016\) \(single judge opinion by J. Mather\).](#) The Board denied a motion to dismiss filed by an Intervenor in the action finding the matter at this stage is not free from doubt and should proceed accordingly. The issue in the matter arose from drilling activities allegedly affecting the Plaintiffs' spring. The DEP issued a letter stating that no further investigation was needed because it appeared the spring was returning to normal levels.

[Clean Air Council et. al. v. Pa. DEP and Shell Chemical Appalachia, LLC, Docket No. 2015-111-R \(December 2, 2016\) \(single judge opinion by J. Renwad\).](#) The Board granted Appellant's Motion to Compel regarding interrogatories and requests for production on Appellee. Further, the Board denied Appellee's Motion for Protective Order while granting Appellee more time to craft a more narrow Motion in line with Pennsylvania law. The issue in the matter concerns plan approval for Appellee's Air Quality Plan for a petrochemical complex.

[Donald E. Longenecker et. al. v. Pa. DEP and East Earl Twp. and Borough of Terre Hill, Permittees, Docket No. 2015-163-L \(December 7, 2016\) \(five judge opinion by J. Labuskes\).](#) The Board denied Appellee's Petition for fees and costs in response to Appellant's withdrawal of their appeal. Appellee sought compensation pursuant to the Clean Streams Law, which allows the awarding of fees and costs for matters brought pursuant to the Clean Streams Law. The Board found that the prior proceedings (involving an Act 537 plan) only tangentially referenced the Clean Streams Law, it was not a proceeding under the Clean Streams Law that would trigger the award of fees and costs.

LEGISLATIVE DEVELOPMENTS

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Please note that the 2015 - 2016 Session of the General Assembly has ended.

Adopted Legislation

Energy Issues

Administrative

[Act No. 160](#) (Baker, R-20) amends the act referred to as the Underground Utility Line Protection Law. The legislation transfers enforcement authority from the Department of Labor and Industry to the Pennsylvania Public Utility Commission (PUC), which is consistent with the PUC's current regulatory obligations and with recommendations by the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Governor's Pipeline Infrastructure Task Force. Additionally, the legislation removes existing exemptions related to municipalities, the Department of Transportation and the extraction of natural resources in order to ensure that the Commonwealth continues to receive certain federal safety grants. It also provides for mapping of lines and facilities, establishes a damage prevention committee, places additional duties on facility owners, excavators and project owners, and provides for assessments, fees and penalties. The act was approved by the Governor on November 4, 2016.

Department of Environmental Protection

[Suspension of Enforcement: Stage II Vapor Recovery Requirements](#)

46 Pa.B. 7204, November 12, 2016

Effective November 12, 2016, enforcement of vapor recovery relating to control of volatile organic compounds from gasoline dispensing facilities is suspended with regard to the addition of new gasoline dispensers and dispenser replacements at affected gasoline dispensing facilities.

[Delaware River Pipeline Relocation Project](#)

46 Pa.B. 7391, November 19, 2016

The Coastal Resources Management Program has received notice that the Paulsboro Natural Gas Pipeline Company, LLC is proposing the Delaware River Pipeline Relocation Project seeking authorization from the Federal Energy Regulatory Commission and the United States Army Corps of Engineers to replace, in part, and abandon, in part, an existing smaller diameter natural gas pipeline with approximately 2.6 miles of new 12-inch and 24-inch pipeline; including approximately 8,550 feet of pipeline crossing beneath the Delaware River by means of horizontal directional drilling. This project is subject to Department review for Federal consistency because it is a Federal license and permit activity and will have reasonably foreseeable effects on the Commonwealth's coastal resources or uses.

[Quehanna Wild Area Nuclear Site; Notice of Proposed Settlement](#)

46 Pa.B. 7597, December 3, 2016

The Department of Environmental Protection has entered into a proposed settlement with Lockheed Martin Corporation for the reimbursement of costs incurred by the Commonwealth for response actions taken at the Quehanna Wild Area Nuclear Site

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in Clearfield County. The costs were incurred due to the location of a facility at which radioactive materials were processed, stored, handled and, more recently, remediated under Federal licenses from the Atomic Energy Commission and Nuclear Regulatory Commission.

[Request for Applications for Watershed Protection and Restoration Grants through the Growing Greener Plus Program](#)

46 Pa.B. 7047, November 5, 2016

Funding is available for watershed protection and restoration projects conducted by counties, authorities and other municipalities; county conservation districts; watershed organizations recognized by the Department who promote local watershed conservation efforts; councils of governments; and other authorized organizations involved in the restoration and protection of the environment in this Commonwealth. The deadline for submitting applications to the Department's Growing Greener Grants Center is January 13, 2017.

[Pennsylvania State Clean Diesel Grant Program: Opening of the Grant Application Acceptance Period](#)

46 Pa.B. 7203, November 12, 2016

Funding is available through the Pennsylvania State Clean Diesel Grant Program for eligible diesel emission reduction projects that will improve air quality and protect public health and the environment in this Commonwealth by reducing emissions from diesel-powered vehicles and engines. The grant is an opportunity to apply for \$519,824 in funding for private or public entities operating diesel-powered fleets throughout the Commonwealth. Ideal projects will replace, repower or retrofit fleet diesel-powered highway and nonroad vehicles, engines and equipment. Applications were due by December 28, 2016.

Environmental Quality Board

[Performance Standards at Oil and Gas Well Sites](#)

46 Pa.B. 6431, October 8, 2016

Performance standards are set for surface activities associated with the development of unconventional wells and to prevent and minimize spills and releases to the environment to ensure protection of the waters of the Commonwealth, public health and safety, and the environment. Major regulatory updates include public resource impact screening, water supply replacement standards, waste management and disposal, and establishing identification and select monitoring of wells located proximal to hydraulic fracturing activities.

[Control of Volatile Organic Compound Emissions - Automobile Coating Operations](#)

46 Pa.B. 6743, October 22, 2016

This rulemaking adopts reasonably available control technology requirements and emission limitations for stationary sources of volatile organic compound emissions from automobile and light-duty truck assembly coating operations and heavier vehicle coating, as well as emissions from additional coatings applied during the vehicle assembly process and related cleaning activities.

[Control of Volatile Organic Compound Emissions - Pleasure Craft Surface Coatings](#)

46 Pa.B. 6758, October 22, 2016

This rulemaking mirrors the one set forth at 46 Pa.B. 6743, but extends the regulation to the surface coating of miscellaneous metal parts or products, miscellaneous plastic parts or products, automotive and transportation plastic parts, business machine plastic parts, pleasure craft (recreational boats), and bodies or body parts for new heavier vehicles, and surface coating performed on a separate coating line at an automobile and light-duty truck assembly coating facility on which coatings

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are applied to other parts intended for use in new automobiles or new light-duty trucks or to after-market repair or replacement parts for automobiles or light-duty trucks.

[Remining Requirements](#)

46 Pa.B. 6780, October 22, 2016

The remining program allows for liability protection for remining operations conducted on abandoned mine lands with existing pollutional discharges by enabling the determination of the pollution baseline at a site and setting effluent limitations accordingly. This rulemaking updates the current methods of determining the pollution baseline consistent with federal regulations and sets forth minimum requirements for remining areas with pollutional discharges.

Executive Board

[Reorganization of the Department of Environmental Protection](#)

46 Pa.B. 6539, October 15, 2016

The Executive Board approved a reorganization of the Department of Environmental Protection effective September 29, 2016.

Public Utility Commission

[Implementation of the Alternative Energy Portfolio Standards Act of 2004](#)

46 Pa.B. 7277, November 19, 2016

The Alternative Energy Portfolio Standards Act of 2004 establishes alternative energy portfolio standards for electric distribution companies and electric generation suppliers operating in Pennsylvania. Both must supply 18 percent of their retail electric sales using alternative energy resources by 2021, meeting said requirement through the purchase of alternative energy credits in amounts cor-

responding to the percentage of retail electric sales required from alternative energy sources. The Commission has previously implemented rulemakings to implement the Act; thus, the purpose of this notice is to announce revisions of its regulations pertaining to the net metering, interconnection, and portfolio standards.



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2017 SUMMER INTERNSHIP IN ENVIRONMENTAL AND/OR ENERGY LAW

The Environmental and Energy Law Section of the Pennsylvania Bar Association is awarding one or more law students a **\$10,000** stipend to allow for a pro bono summer internship in the field of environmental and/or energy law ("EEL"). The selected law student recipient(s) will be awarded \$10,000.00 (paid in three installments) starting with commencement of the internship in support of an unpaid, pro bono project of the student's choosing in the field of EEL performed during an 8-week period in the summer of 2017. First- or second-year law students or third-year night law students, who are residents of Pennsylvania or who indicate their intention to practice law in Pennsylvania, and who demonstrate an interest in pursuing a career in the field of EEL, are eligible for consideration.

Application Process: Timely submit your application by e-mail to: Richard H. Friedman, Chair, PA Bar EEL Section Internship Committee, c/o McNees Wallace & Nurick LLC, 100 Pine Street, Harrisburg, PA 17101; or rfriedman@mwn.com. Questions can be directed to Mr. Friedman at (717) 237-5469 or rfriedman@mwn.com. **Your application, due on or before 5 PM on February 24, 2017**, must consist of:

- Description of the proposed work, period of internship, and anticipated work product (1-2 pages);
- Short letter from a not-for-profit public interest organization or government agency providing a statement of its mission and indicating its willingness to provide a lawyer's supervision for a volunteer summer internship opportunity in the field of EEL, confirming that funding is not otherwise available for the position, and designating an individual to serve as the student's mentor (including telephone contact information for the mentor, whom the Committee may contact). This letter may also include and to that extent, substitute for, the information in the first bullet, above;
- Student's narrative addressing the criteria set forth in the Program Description and Criteria section below (not to exceed 5 pages);

Also include:

- Your contact information;
- Resume and transcripts (law school and undergraduate);
- Short (2-3 page) writing sample (excerpt from longer document is acceptable);
and
- Short (< 1 page) statement demonstrating interest in the field of EEL and/or reasons why you wish to pursue a career in this field; and Statement of Pennsylvania residency and/or short (< 1 page) statement demonstrating commitment to working as an EEL lawyer in Pennsylvania.

[See reverse/2nd page for additional information]

Program Description and Criteria:

The pro bono project proposed by an applicant for the internship must be supported by a not-for-profit public interest or charitable organization, educational institution, and/or a local, state or federal government agency that agrees to provide oversight and supervision of the student and an attorney mentor to assist the student in completion of a project in the field of EEL. Students applying must demonstrate that the organization or agency for which they are applying meets these criteria, that the organization or agency has an internship opportunity available, that the organization or agency will appropriately supervise the intern's work, and that the organization or agency would not otherwise provide a salary for the internship position.

In making its selection, the Section's Internship Committee may consider the following factors: academic achievement; the student's demonstration of interest in the field of EEL, as evidenced by his or her academic studies, work or volunteer experience and interests; commitment to working as an EEL lawyer in Pennsylvania; benefits of the proposed pro bono project to the candidate, organization, general public and field of EEL; and financial need.

The Internship Committee may also consider the following factors related to the proposed project: relationship of the organization's mission to the field of EEL; relationship of the proposed work to the mission of the organization; potential impact and longevity of the proposed work on the organization and/or its constituency.

The Internship Committee may also consider any other factors it determines are appropriate in making its selection. An interview may be required of finalists.

Required Participation in Section Activities:

Following completion of the internship, the student must prepare a 4-6 page report and evaluation of his or her internship experience. The report may be circulated to EELS section members and others. In addition, the student will be awarded scholarships to attend the Annual Environmental Law Forums presented by the Pennsylvania Bar Institute in April 2017 and 2018 and, at the discretion of the Section Chair, will give a brief (less than 5 minute) presentation of his or her internship experience to the Section at the Annual Meeting and Dinner during the 2018 Forum.