

# ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

## Welcome from the Editor-in-Chief

Happy Holidays and welcome to the EELS Newsletter's winter edition! This quarter's publication brings to a close the second year of the reintroduced Environmental & Energy Law Section Newsletter. The Newsletter Staff and I would like to thank you, our readers, for your continued support and contributions to this publication. Without your readership, comments and suggestions, and of course, article submissions, this Newsletter couldn't exist.

As proof of your outstanding contributions, we have five Featured Articles this quarter. In the first article, Ms. Maryanne Wesdock presents an overview of the proposed amendments to the Environmental Hearing Board's Rules of Practice and Procedure. Her article includes a full copy of the amended Rules and solicits comments from practitioners. Our second article, written by Mr. Keith Coyle, explains how and why the Pipeline and Hazardous Materials Safety Administration is requiring utilities in densely populated and high consequence areas to confirm (and upgrade, where necessary) the maximum allowable operating pressure of its pipelines. In our third article, Ms. Anna Sewell highlights the pros and cons of the Working Lands for Wildlife program. Ms. Sewell uses two Pennsylvania species as a case study illustrating how the Program can work in conjunction with the Endangered Species Act to bring about conservation, but also explains the potential pitfalls of voluntary conservation programs. Fourth, Mr. Andrew Varcoe analyzes a recently decided U.S. Supreme Court case that presents a unique look at the Takings Clause. The *Arkansas Game and Fish Commission v. United States* case presents the issue of whether the federal government's "temporary" flooding of Arkansas Commission land constitutes a taking under the Fifth and Fourteenth Amendments. In our fifth and final article, Mr. Samuel Douglass explores the murky world of unconventional

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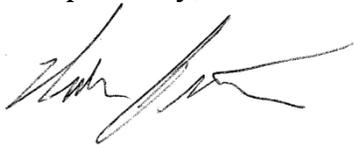
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gas and oil leases. Mr. Douglass indicates that much of the leased land may not begin producing royalty payments for tens of years, leaving landowners wondering what happened to their “promised” riches. He argues that one potential solution is meaningful “advance minimum royalty,” which could provide the landowner with some income while drilling is held in abeyance as reserves for future development.

Additionally, see [Page 4](#) for information about the **Environmental & Energy Law Section Summer Internship Scholarship** for those interested in a career in the environmental or energy fields. The Scholarship will provide an **\$8,000** summer stipend to a worthy law student who is working on a project or with an organization having some connection to environmental or energy issues.

Finally, special congratulations are in order for EELS staff member Matt McDonnell, who recently passed the Pennsylvania Bar Exam! As always, we at the Newsletter appreciate your readership, as well as any comments, suggestions, or **article submissions**. We are always working to make this publication truly yours and enjoy any opportunity to speak with our members about how to be more responsive to your needs. We can be contacted at [PBA-EELSnewsletter@mail.widener.edu](mailto:PBA-EELSnewsletter@mail.widener.edu). Again, we at the Newsletter wish you and your families a wonderful, safe, and happy holidays!

Respectfully,



Brandon J. Pierce  
*Editor-in-Chief*



**Widener Law**

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*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 University School of Law Environmental Law Center.*

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## SECTION ACCEPTING APPLICATIONS FOR SUMMER INTERNSHIP SCHOLARSHIP

The Environmental and Energy Law Section is currently accepting applications for its summer internship scholarship award. Each year the Section awards a stipend of \$8,000 to a law student who is pursuing a pro bono summer internship in the field of environmental and/or energy law. 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 environmental and/or energy law are eligible to apply.

The pro bono project proposed by an applicant must be with 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 a mentor to assist the student in completion of a project in the field of environmental or energy law.

Some of the previous awards have included the following:

- Internship with the City of Philadelphia which involved the creation of a multi-discipline energy reduction performance contracting model to be used by the City and other municipalities to facilitate energy reduction goals.
- Internship with the DEP Southwest Regional Office which involved the evaluation of real property interests held by the Clean Streams Foundation in trust for DEP.
- Internships with the EPA Region III Office and the Chesapeake Bay Foundation.

Applications are due on or before **February 22, 2013** and should be submitted to: Richard H. Friedman, Chair, PA Bar EEL Section Internship Committee, c/o McNees Wallace & Nurick LLC, P.O. Box 1166, 100 Pine Street, Harrisburg, PA 17108-1166; or [rfriedman@mwn.com](mailto:rfriedman@mwn.com). Questions may be directed to Mr. Friedman at (717) 237-5469 or [rfriedman@mwn.com](mailto:rfriedman@mwn.com).

Details regarding the application may be found at:

<http://www.pabar.org/public/sections/envco/2013%20Internship%20Notice.pdf>

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**FEATURED ARTICLES**

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*Proposed Amendments to EHB Rules of  
Practice and Procedure  
Maryanne Wesdock, Esquire*

The Environmental Hearing Board is proposing amendments to its Rules of Practice and Procedure, 25 Pa. Code Chapter 1021, that fall into the following categories:

- Mandatory electronic filing
- Responses to dispositive motions
- Revisions necessitated by changes in the law or in order to clarify an existing regulation

A copy of the proposed amendments is included at the end of this article. Publication in the Pennsylvania Bulletin is expected in the first quarter of 2013. [Read or download the full article here.](#)

*Federal Reporting Deadline Looms for Gas  
Transmission Line Operators  
Keith J. Coyle, Esquire*

The Pipeline and Hazardous Materials Safety Administration (PHMSA), the federal agency responsible for ensuring the safety of the nation's energy pipelines, has given gas transmission line operators until March 15, 2013, to determine whether they have sufficient records to confirm the maximum allowable operating pressure (MAOP) for segments located in densely populated and other high consequence areas. PHMSA imposed that deadline to comply with a mandate in the [Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90](#), the most recent reauthorization of the federal pipeline safety laws. [Read or download the full article here.](#)

*Working Lands for Wildlife: Will Voluntary  
Habitat Conservation Save Two Threatened  
Pennsylvania Species?  
Anna Sewell, Esquire*

On March 8, 2012, the U.S. Department of Agriculture's Natural Resources Conservation Service and the Department of the Interior's Fish and Wildlife Services revealed a new conservation program called [Working Lands for Wildlife](#). This federally funded partnership devotes 33 million dollars to voluntary landowner habitat conservation for seven target species, including two rare Pennsylvanian species, the bog turtle and the golden-winged warbler. In exchange for an agreement to improve habitats for one of these species, landowners receive a promise from regulating agencies that any incidental harm to the species caused by their habitat conservation practices will be exempt from penalties under the Endangered Species Act (hereinafter "ESA"). Landowners also receive some technical and financial assistance to support their conservation efforts. Although Working Lands for Wildlife provides these admirable new incentives for habitat conservation, the program could also be used to avoid ESA listings for currently unlisted species, like the golden-winged warbler. This article argues the program's potential costs and benefits to unlisted species should be carefully weighed, and the program cannot serve as a politically convenient procedure to abandon listing efforts. [Read or download the full article here.](#)

*Arkansas Game and Fish Commission v. United States (Dec, 4, 2012): Rejecting Bright-Line Rule, U.S. Supreme Court Holds That Temporary Government-Caused Flooding May Be a Compensable Taking, at Least in Some Circumstances*

*Andrew R. Varcoe, Esquire*

Thus far in the October 2012 Term, the U.S. Supreme Court has decided to hear two cases presenting takings law issues. This report focuses on the first of these two cases, [Arkansas Game and Fish Commission v. United States](#), which was decided in December 2012. The question presented in *Arkansas Game* was whether government actions that temporarily result in flooding can amount to takings of private property that trigger the right to just compensation under the Fifth Amendment. [Read or download the full article here.](#)

*PAY ME FOR MY WAITING!*

*They want it all – forever*

*While visions of sugar-plums danced in their heads...*

*Samuel L. Douglass, Esquire*

Landowners have visions of drill pads all over the place with half a dozen or so wells on each pad and dollars pouring into bank accounts. But it “ain’t necessarily so.” Few people outside the industry grasp the enormity of the reserves to be found in the Appalachian area. The land area to be exploited for hydrocarbons is huge. This is multiplied by the various layers of strata of the earth that promise rewards from drilling. And, although drilling has been fairly vigorous in the Northeast and Southwest corners of Pennsylvania, the attraction of oil and wet gas has drawn the bulk of producers’ land acquisition and drilling budgets to the west

where the product is currently more lucrative. All this leaves lessor-landowners, particularly in dry gas areas, without anticipated streams of royalty from production – perhaps for 30, 40 or even 100 years. A meaningful “advance minimum royalty,” as briefly outlined below, could provide the landowner with some income while drilling is held in abeyance as reserves for future development. And note that if production moves forward, no advance minimum royalty will be paid under the outlined proposal. [Read or download the full article here.](#)

## LEGISLATIVE DEVELOPMENTS

### Adopted Legislation

#### Mining

##### *Senate Bills*

[Act 147 of 2012](#) – (White, R – 41). Act 147 is an Act providing for indigenous mineral resource development; and imposing powers and duties on the Department of General Services and the State System of Higher Education. Senate Bill 367.

##### *House Bills*

[Act 157 of 2012](#) – (Tobash, R – Berks, Schuylkill). Act 157 is an Act amending the Surface Mining Conservation and Reclamation Act, further providing for mining permit, reclamation plan and bond; and providing for land reclamation financial guarantees. House Bill 1813.

### Pending Legislation

#### Energy Issues

#### Natural Gas

##### *House Bills*

[House Bill 1659](#) – (Pyle, R – Armstrong, Indiana). HB1659 is an Act providing for the effective and thorough review of permit applications to the Department of Environmental Protection and other entities to ensure environmental protection and foster economic growth. HB1659 has been removed from table, Oct. 15, 2012 [House].

[House Bill 2675](#) – (Hanna, D – Centre, Clinton). HB2675 is an Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, further providing for distribution of fee and for Statewide initiatives; and establishing the Municipal Infrastructure Emergency Grant Program. HB2675 has been referred to the Environmental Resources and Energy Committee, October 17, 2012 [House].

[House Bill 2700](#) – (Marshall, R – Beaver). HB2700 is an Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well location restrictions. HB2700 has been referred to the Environmental Resources and Energy Committee, October 17, 2012 [House].

### Environmental Issues

#### Water

##### *Senate Bills*

[Senate Bill 1612](#) – (Waugh, R-28). SB1612 is an Act amending the Dam Safety and Encroachments Act, further providing for definitions, for proof of financial responsibility and for duties of owners. SB1612 has been referred to the Environmental Resources and Energy Committee, October 10, 2012 [Senate].

#### Mining

##### *House Resolutions*

[HR 869](#) – (George, D – Clearfield). HR869 is a Resolution urging the United States Congress to repeal Section 411(h) of the Surface Mining Control and Reclamation Act of 1977. HR869 referred to the Environmental Resources and Energy Committee, October 1, 2012 [House].

#### Land Use

##### *Senate Bills*

[Senate Bill 1346](#) – (Kasunic, D – 32). SB1346 is an Act amending Title 27 (Environmental Resources) of the Pennsylvania Consolidated Statutes, further providing for definitions, for eligibility and project inventory, for landowner liability limitation and exceptions, for project liability limitation and exceptions and for exceptions. SB1346 referred to the Environmental Resources and Energy Committee on Oct. 16, 2012 [House].

## REGULATORY DEVELOPMENTS

### Public Utility Commission

#### *Proposed Rulemakings*

#### [Establishing a Uniform Definition and Metrics for Unaccounted-for-Gas](#)

42 Pa.B. 6637, October 20, 2012

52 Pa. Code Ch. 59

The Pennsylvania Public Utility Commission, on June 7, 2012, adopted a proposed rulemaking order which establishes a uniform definition of Unaccounted-for-Gas ("UFG") and metrics for UFG. On June 7, 2012, the PUC issued a proposed regulation based on the joint report and input from industry representatives. The proposed regulation, which is directed at NGDCs, is drafted to create a consistent definition for UFG and a cap metric for maximum allowable recovery of UFG. Specifically, the proposed rulemaking aims to establish a uniform definition and methodology for the calculation and reporting of UFG within Pennsylvania. In addition, the proposed rulemaking proposes a maximum allowed recovery for UFG with year one allowing 5% of distribution losses; year two at 4.5%; year three at 4%; year four at 3.5%; and year five at 3%.

### Environmental Quality Board

#### *Rules and Regulations*

#### [Corrective Amendment to 25 Pa Code §93.9x](#)

42 Pa.B. 7412, December 8, 2012

25 Pa. Code Ch. 93

The Department of Environmental Protection (Department) has discovered a discrepancy between the agency text of 25 Pa. Code §93.9x (relating to Drainage List X) as deposited with the Legislative Reference Bureau and the official text as published at 30 Pa.B. 6059, 6106 (November 18, 2000) and as currently appearing in the *Pennsylvania Code*. The geographic coordinates in the listing for Lake Erie (Outer Erie Harbor and

Presque Isle Bay) were incorrectly published at 30 Pa.B. 6059, 6106. Therefore, under 45 Pa.C.S. §901: the Department has deposited with the Legislative Reference Bureau a corrective amendment to 25 Pa. Code § 93.9x. The corrective amendment to 25 Pa. Code §93.9x is effective as of November 18, 2000, the effective date of adoption of the final-form rulemaking amending this section.

#### [Coal Mining Fees](#)

42 Pa.B. 7013, November 10, 2012

25 Pa. Code Ch. 86

The Environmental Quality Board amends Chapter 86 (relating to surface and underground coal mining: general). The final-form rulemaking establishes a schedule of fees for coal mining activity permit applications. Section 4(a) of the Surface Mining Conservation and Reclamation Act states: "The department is authorized to charge and collect from persons a reasonable filing fee. Such fee shall not exceed the cost of reviewing, administering and enforcing such permit." The final-form regulations revise permit application review fees for coal mining activity permits. A schedule of fees for coal mining activity permit applications is included. This final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

#### [Noncoal Mining Fees](#)

42 Pa.B. 6536, October 13, 2012

25 Pa. Code Ch. 77

The Environmental Quality Board amends Chapter 77 (relating to noncoal mining). The final-form rulemaking incorporates amendments necessary to provide funding for the implementation of the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 3301—3326). This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*, except that the annual administration fee established under § 77.106(b) (relating to fees) will become effective on January 1, 2013, and will be applied to all mining licenses being renewed which have an expiration date occurring on or after January 1, 2013.

## COURT OPINIONS

### Commonwealth Court of Pennsylvania

[Beiler v. Buffalo Twp. Zoning Hearing Bd. \(ZHB\), et al.](#), No. 511 C.D. 2011 (Sept. 20, 2012); Daryl L. Beiler and Gina L. Beiler (Landowners) v. Buffalo Twp. Planning Comm'n and Buffalo Twp., No. 512 C.D. 2011 (Sept. 20, 2012). Court Affirms trial court Order denying Landowners' land use appeal from the decisions of the Buffalo Township Planning Commission and the ZHB, because Landowners did not satisfy their burden of proving that their business – transforming municipal bio-solids (also referred to as human sewage sludge) into a by-product for use in the agricultural, landfill, and mining sectors – would offer at least 25% of its services to the agricultural sector as required under the Buffalo Township Zoning Ordinance.

[Baratta, et al. v. Williams Twp. Bd. of Supervisors & Chrin Bros., Inc.](#), No. 1932 C.D. 2011 (Oct. 24, 2012). Court Affirms trial court Order upholding the Williams Township Board of Supervisor's conditional approval of a preliminary land development plan filed by Chrin Brothers, Inc. for the proposed expansion of its sanitary landfill, because the Board received a completed, mandatory Carbonate Ordinance Assessment Report from a licensed geologist in accordance with the Township's Sinkhole/Carbonate Regulations Ordinance, Ordinance # 2005-1.

[Baratta, et al. v. Williams Twp. Bd. of Supervisors & Chrin Brothers, Inc.](#), No. 1933 C.D. 2011 (Oct. 24, 2012). Court Affirms trial court Order determining that Williams Township Board of Supervisors complied with the procedural requirements in the enactment of three zoning ordinance amendments, as set forth in Sections 609 and 610 of the Pennsylvania Municipalities Planning Code, and the zoning ordinance amendments do not constitute unlawful contract zoning.

[Appeal of: William Peter R. Cross & Scannapieco Holding Co., LLC \(Landowners\) from the decision of the Zoning Hearing Bd. of Solebury Twp. \(ZHB\) Dated November 15, 2010](#), No. 2332 C.D. 2011 (Oct. 15, 2012). Court Affirms trial court Order upholding the ZHB's decision to prohibit the land use variance requested by Landowners, because Landowners failed to prove the properties could not be utilized for a permitted agricultural or forestry purpose, and the introduction of a prohibited residential use into a floodplain would expose additional residents to known flooding hazards and the risk of injury and death.

[Sayreville Seaport Ass'ns Acquisition Co., LLC v. DEP](#), No. 2391 C.D. 2011 (Nov. 15, 2012). Court Grants Sayreville's Petition for review of adjudication of the Environmental Hearing Board's (EHB) holding that Sayreville was precluded by statute and regulation from either disposing of soil with radioactive concerns or beneficially using it as regulated fill, because the two opinions of the DEP vacated by the EHB did not constitute an appealable decision or an action under the Environmental Hearing Board Act.

### Superior Court of Pennsylvania

[Ralston v. Ralston](#), No. 1796 WDA 2011 (October 24, 2012). Court affirmed in part and reversed in part an order that granted Appellee's motion for summary judgment and denied Appellant's motion for summary judgment. The case is an action to quiet title between Appellant who was conveyed property and Appellee who received the property through a vested interest. The Appellant sought direct control of the mineral rights in the deed because they were excepted through its express language, Appellee counterclaimed and sought a 5/7 ownership in those excepted rights.

[State Farm Fire and Casualty Insurance Co. v. PECO](#), No. 1664 EDA 2011 [October 3, 2012] Court affirms in part and vacates in part trial court's orders denying State Farm's motion for

Partial Summary Judgment and granting PECO's motion for Partial Summary Judgment. State Farm challenges the trial court's interpretation of the limitation of liability clause in PECO's public utility tariff as restricting the amount of recovery by State Farm. The appeal arises from a case filed by insured subrogors of State Farm who experienced damage to their home as a result of a surge of lightning circulating their home and causing damage through their PECO electric meter.

ENVIRONMENTAL HEARING  
BOARD ADJUDICATIONS, OPINIONS  
AND ORDERS

[PaDEP v. Colombo d/b/a Glenburn Services](#) – 2011—114-CP-C. (Opinion and Order Granting Department's Motion for Sanctions, September 27, 2012). After failing to respond to repeated discovery requests, motion to compel, and this motion, Defendant is precluded from introducing any evidence at the hearing regarding matters on which the Department sought discovery including the preclusion of any expert testimony on Defendant's behalf.

[Hostetter and East Nottingham Twp. v. PaDEP](#) – 2012-059-M. (Opinion and Order Granting Petition to Intervene, October 16, 2012). The Board will grant a petition to intervene where the "person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination."

[PaDEP v. Shultz and Friend, d/b/a Shorty and Dave's Used Truck Parts](#) – 2011-105-CP-C. (Opinion and Order Denying Department's Motion *In Limine*, October 22, 2012). The Department never requested the Board to determine the sufficiency of the answer or objection; rather it went straight to asking the Board to establish liability for the underlying violations which were subject to the assessment of civil penalty and to preclude the Defendants from providing certain evidence at hearing.

[Kiskadden v. PaDEP and Range Resources-Appalachia, LLC](#) – 2011-149-R. (Opinion and Order Denying Motion to Enforce/Ensure "Litigation Hold" on the Yeager Drill Site and for Expedited Consideration Thereof, November 6, 2012). The Board never issued an Order prohibiting Permittee from conducting operations at the Yeager Drill Site, therefore there is no Board order to "enforce/ensure."

[American Manufacturing Co., Inc. v. PaDEP and INM Technologies, Inc.](#) – 2012-054-L. (Opinion and Order Denying Department's Motion to Dismiss, November 21, 2012). A motion to dismiss an EHB appeal is the rough equivalent of a motion for judgment on the pleadings in the sense that the motion is ordinarily decided based solely upon the facts stated or otherwise apparent in the notice of appeal itself. *Hendryx v. DEP*, 2011 EHB 127, 129; *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 421 n.7. Although there is a limited exception to this rule when EHB jurisdiction is at issue, *Hendryx*, 2011 EHB at 129, the Department's arguments in this case do not pertain to the Board's jurisdiction.

[Berks County v. PaDEP and Exide Technologies](#) – 2010-166-L. (Adjudication, November 26, 2012). The Board found that the Department erred by failing to properly determine whether the permittee's fugitive emissions could be permitted notwithstanding the general prohibition against such emissions in 25 Pa. Code § 123.1. The Title V permit was remanded for review by the Department for it to make an appropriate finding in the first instance.

[International Asbestos Testing Laboratories v. PaDEP](#) – 2012-111-M. (Opinion and Order Granting Department's Motion to Dismiss, November 29, 2012). The Board dismissed the appeal when the Appellant corporation failed to obtain counsel as required by 25 Pa. Code § 1021.21 and the Appellant failed to respond to the Department's motion.

[PaDEP v. Shultz and Friend, d/b/a Shorty and Dave's Used Truck Parts](#) - 2011-105-CP-C. (Opinion and Order on Denying Defendant's Motion for Summary Judgment, December 5, 2012). After review of the state records, no record of the incorporation or fictitious name to that corporation are on record, therefore there is a dispute of a material fact and summary judgment is not appropriate.

[Barton, Valenti, Helper and Cressona Borough Authority v. PaDEP and Grand Land, L.P.](#) - 2011-074-L. (Opinion and Order Granting Department's Motion to Dismiss, December 7, 2012). The appeal was not initiated within 30 days of publication of the notice of permit issuance in the Pennsylvania Bulletin, the Board lacks jurisdiction to hear the appeal and it must be dismissed.



**Widener Law**