

ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

Welcome from the Editor-in-Chief

Welcome to the EELS Newsletter's summer edition! Hopefully you have been able to find some time to enjoy the sunshine and warm weather. Along with the summer sun and heat comes a period of generally high energy and water use, as people run air conditioners, travel more frequently, and large operations and individuals utilize more water (and often fertilizers). This quarter, we've put together a special "staff-only" collection of articles, two of which touch on these issues. And as always, we have the latest on Marcellus Shale topics.

Senior Staff member Jon Johnson authored this quarter's first Featured Article. Jon's article raises a very relevant, but perhaps overlooked, question about Act 13's preemption language: if Act 13 preempts local zoning ordinances enacted under the Municipal Planning Code, does this include preempting statutes such as the Storm Water Management Act (SWMA)? Jon argues that while initially there is an apparent conflict, upon further analysis of Act 13 sections 3302-3304 and the SWMA, there is no true conflict.

In our second article, Associate Staff Member Barbara Grimaud provides an analysis of the constitutional challenges to Act 13 in *Robinson Township v. Commonwealth*. Barbara's article focuses specifically on Counts I-III of the complaint, which concern the interplay between the U.S. and Pennsylvania Constitutions and zoning.

Third, we turn to the issue of competitiveness in the Pennsylvania retail electric market. Associate Staff Member Charles Foster discusses the PA Public Utility Commission's recent efforts to increase competition through three default service models proposed by PUC staff at a March 2012 en banc hearing. Charles compares the Retail Energy Supply Association (RESA) and the Pennsylvania Office of Consumer Advocate's (OCA) comments, then analyzes the feasibility and potential complications with each of the three models.

In the fourth article, Associate Staff Member Brian Calabrese provides an update in this, his third article concerning runoff into the Chesapeake Bay Watershed. Brian's first two articles detailed the total maximum daily load (TMDL) for the Watershed and Pennsylvania's Nutrient Credit Trading (NCT)

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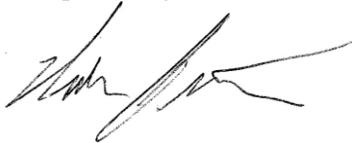
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Program as part of its Watershed Implementation Plan. This update highlights the difference between spot and forward auctions conducted by the Pennsylvania Infrastructure Investment Authority (PENNVEST). It also includes pricing and quantity figures for trades at the latest PENNVEST forward auction held in March 2012, and provides information about upcoming auctions.

Finally, I would like to take this brief opportunity to congratulate two members of the EELS Newsletter family. First, congratulations are in order for Senior Staff Member Matt McDonnell, who earned his Juris Doctor degree from Widener Law in May! Second, one of our advisors, Distinguished Professor John Dernbach of Widener Law, recently published a new book on sustainability, entitled [*Acting as if Tomorrow Matters*](#). Congratulations to you both on your accomplishments!

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.

Respectfully,



Brandon J. Pierce
Editor-in-Chief



Widener Law

NEWSLETTER TEAM

Editor-in-Chief

Brandon J. Pierce, Esq.
Law Clerk to the Honorable John W. Thompson, Jr.
Court of Common Pleas of York County
bjpierce9198@mail.widener.edu

Staff Authors and Editors

Jonathan W. Johnson, Esq.
Johnson Legal
jon@johnsonlegalservices.net
Legislative Developments Manager

Matthew J. McDonnell, J.D.
Widener Law, Class of 2012
mjmcdonnell@mail.widener.edu
Regulatory Developments & Major Policies Manager

Mark R. Wieder, Esq.
Counsel to Commissioner Wayne E. Gardner
Pennsylvania Public Utility Commission
marwieder@pa.gov
Court & EHB Opinions Manager

Barbara R. Grimaud
Widener Law, Class of 2013
brgrimaud@mail.widener.edu
Court Opinions, EHB Opinions

Brian P. Calabrese
Widener Law, Class of 2013
bpcalabrese@mail.widener.edu
Legislative Developments

Charles R. Foster, IV
Widener Law, Class of 2013
crfoster@mail.widener.edu
Regulatory Developments, Major DEP Policies

Advisors

Andrew T. Bockis, Esq.
Saul Ewing LLP
abockis@saul.com

John W. Carroll, Esq.
Pepper Hamilton LLP
carrollj@pepperlaw.com

Advisors (continued)

Jennifer L. Cohen, Esq.
South Jersey Industries
jcohen@sjindustries.com

John C. Dernbach, Distinguished Professor
Director, Environmental Law Center
Widener School of Law
jcdernbach@widener.edu

Philip L. Hinerman, Esq.
Fox Rothschild LLP
phinerman@foxrothschild.com

Michael T. Shatto, Sections Administrator
Pennsylvania Bar Association
mshatto@pabar.org

Maxine M. Woelfling, Esq.
Morgan, Lewis & Bockius LLP
Mwoelfling@morganlewis.com

Matthew L. Wolford, Esq.
Wolford Law Firm
Chair, PBA Environmental & Energy Law Section
mlw@wolfordlaw.com

Institutional Support

Pennsylvania Bar Association Environmental & Energy Law Section

Widener University School of Law Environmental Law Center

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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.

LEGISLATIVE DEVELOPMENTS

Adopted Legislation

Air

Senate Bills:

[Act 27 of 2012](#) – (White, R – 41) SB304 is an act amending the Air Pollution Control Act, further providing for public review of State implementation plans. Act No. 27.

Pending Legislation

Energy Issues

Natural Gas

Senate Bills:

[Senate Bill 1514](#) – (Leach, D – 17) SB1514 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for hydraulic fracturing chemical disclosure requirements. SB1514 referred to Environmental Resources and Energy Committee on May 7, 2012 [Senate].

[Senate Bill 1519](#) – (Yudichak, D – 14) SB1519 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional gas well fee, further providing for distribution of fee. SB1519 referred to Environmental Resources and Energy Committee on May 11, 2012 [Senate].

House Bills:

[House Bill 2350](#) – (George, D – Clearfield) HB2350 is an act providing for the Injection Well Safe Water Act, for definitions, for disposal of waste in injection wells, for department duties, for permit conditions and for expiration. HB2350 referred to Environmental Resources and Energy Committee on Apr. 16, 2012 [House].

[House Bill 2320](#) – (Pickett, R – Bradford, Sullivan, Susquehanna) HB2320 is an act imposing duties on lessees of oil and natural gas leases; and providing for the recording of releases from oil and natural gas

leases and of affidavits of termination or cancellation. HB2320 referred to Environmental Resources and Energy Committee on Apr. 18, 2012 [House].

[House Bill 2307](#) – (Gibbons, D – Beaver, Butler, Lawrence) HB2307 is an act amending P.L.865, No.256 entitled "An act requiring rents and royalties from oil and gas leases of Commonwealth land to be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizing the Secretary of Forests and Waters to determine the need for and location of such projects and to acquire the necessary land," providing for transfer of funds to Fish Fund; and making editorial changes. HB2307 referred to Environmental Resources and Energy Committee on May 7, 2012 [House].

[House Bill 2312](#) – (Milne, R – Chester) HB2312 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for use of safety devices. HB2312 referred to Environmental Resources and Energy Committee on May 9, 2012 [House].

[House Bill 2399](#) – (Mirabito, D – Lycoming) HB2399 is an act amending Title 58 (Oil and Gas) and 72 (Taxation and Fiscal Affairs) of the Pennsylvania Consolidated Statutes, further providing for distribution of unconventional gas well fee; providing for the establishment, implementation and administration of the Marcellus Shale Job Creation Tax Credit; and imposing additional duties on the Department of Community and Economic Development. HB2399 referred to Environmental Resources and Energy Committee on May 21, 2012 [House].

[House Bill 2412](#) – (Dermody, D – Allegheny) HB2412 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in local ordinances relating to oil and gas operations, further providing for uniformity of local ordinances. HB2412 referred to Environmental Resources and Energy Committee on May 31, 2012 [House].

[House Bill 2413](#) – (Hanna, D – Centre, Clinton) HB2413 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in

unconventional gas well fee, further providing for definitions, for fee, for administration, for well information, for duties of the Department of Environmental Protection and the Pennsylvania Public Utility Commission, for enforcement, for enforcement orders, for administrative penalties, for recordkeeping, for examinations, for distribution of fee and for Statewide initiatives; providing for duties of the Department of Revenue; and making editorial changes. HB2413 referred to Environmental Resources and Energy Committee on May 31, 2012 [House].

[House Bill 2414](#) – (Santarsiero, D – Bucks) HB2414 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in [development](#), further providing for well permits, for comments by municipalities and storage operators, for well location restrictions, for protection of water supplies, for well reporting requirements, for bonding and for criminal and civil penalties. HB2414 referred to Environmental Resources and Energy Committee on May 31, 2012 [House].

[House Bill 2415](#) – (Bradford, D – Montgomery) HB2415 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in [development](#), further providing for [hydraulic fracturing](#) chemical disclosure requirements. HB2415 referred to Environmental Resources and Energy Committee on May 31, 2012 [House].

[House Bill 2416](#) – (Mundy, D – Luzerne) HB2416 is an act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in [development](#), further providing for definitions, for well permits and for well location restrictions; and providing for disposal of wastewater from oil and gas activities targeting unconventional shale formations and for cumulative impacts study. HB2416 referred to Environmental Resources and Energy Committee on May 31, 2012 [House].

House Resolutions:

[House Resolution 593](#) – (White, D – 46) HR593 is a resolution encouraging corporations engaged in the Marcellus Shale industry in this Commonwealth to adopt a set of principles known as the "Marcellus Shale Principles." HR593 referred to Environmental Resources and Energy Committee on Feb. 29, 2012 [House].

[House Resolution 728](#) – (Hornaman, D – Erie) HR728 is a resolution urging the Congress of the United States to utilize findings compiled by the Oil and Gas Price Fraud Working Group to find a way to reduce the price of gasoline and diesel fuel in the United States. HR728 referred to Environmental Resources and Energy Committee on May 14, 2012 [House].

Oil

Senate Resolutions:

[Senate Resolution 265](#) – (Brubaker, R – 36) SR265 is a resolution urging the Congress of the United States to support continued and increased importation of Canadian oil. SR265 transmitted as directed, May 7, 2012 [Senate].

Biofuels

House Bills:

[House Bill 807](#) – (Sonney, D – Erie) HB807 is an act amending the Biofuel Development and In-State Production Incentive Act, further providing for definitions, for biodiesel content in diesel fuel sold for on-road use and for cellulosic ethanol content in gasoline; providing for blending, registration and other requirements; further providing for department authority and responsibility; providing for fees; establishing the Biofuel Development Account; and imposing penalties. HB807 was re-referred to the Appropriations Committee on May 1, 2012 [Senate].

Environmental Issues

Water

Senate Bills:

[Senate Bill 1380](#) – (Mensch, R – 24) SB1380 is an act amending The Clean Streams Law, providing for access by abutting landowners, for use of equal or superior alternative design measures, for pre-application grant of design waiver or waiver or variance requests, for offsite mitigation and funding, for use of non-fact-based assumptions, for permitted professional certifications and for recorded notice of post-construction storm water management best

management practices; and making an editorial change. SB1380 referred to Environmental Resources and Energy Committee on Feb. 29, 2012 [Senate].

House Bills:

[House Bill 2244](#) – (Major, R – Susquehanna, Wayne, Wyoming) HB2244 is an act providing for watershed disaster reconstruction. HB2244 referred to Environmental Resources and Energy Committee on Apr. 20, 2012 [Senate].

[House Bill 2359](#) – (Causer, R – Cameron, Mckean, Potter) HB2359 is an act amending the Dam Safety and Encroachments Act, further providing for definitions and for regulations and standards. HB2359 referred to Environmental Resources and Energy Committee on May 9, 2012 [House].

Air Quality

Senate Bills:

[Senate Bill 1386](#) – (Vogel, R – 47) SB 1386 is an act amending the Air Pollution Control Act, further providing for Environmental Quality Board; and repealing control of volatile organic compounds from gasoline-dispensing facilities. SB1386 was referred to Environmental Resources and Energy Committee on Mar. 12, 2012 [House].

House Bills:

[House Bill 2251](#) – (Saylor, R – York) HB2251 is an act amending the Air Pollution Control Act, further providing for definitions and for disposition of fees, fines and civil penalties; establishing the Keystone Vehicle Program; and making editorial changes. HB2251 referred to Environmental Resources and Energy Committee on Mar. 16, 2012 [House].

Waste

Senate Bills:

[Senate Bill 1398](#) – (Yudichak, D – 14) SB1398 is an Act amending the Storage Tank and Spill Prevention Act, further providing for Underground Storage Tank Environmental Cleanup Program and for

Underground Storage Tank Pollution Prevention Program. SB1398 Second consideration on [May 21, 2012](#) [Senate].

House Bills:

[House Bill 1934](#) – (Keller, R – Snyder, Union) HB1934 is an act amending the Municipal Waste Planning, Recycling and Waste Reduction Act, in recycling and waste reduction, further providing for municipal implementation of recycling programs. HB1934 referred to Environmental Resources and Energy Committee on Apr. 10, 2012 [Senate].

[House Bill 2278](#) – (Hanna, D – Centre, Clinton) HB2278 is an act known as the Land Recycling and Environmental Remediation Standards Act, further providing for powers and duties and for remediation standards. HB2278 referred to Environmental Resources and Energy Committee on Mar. 26, 2012 [House].

House Resolutions:

[House Resolution 438](#) – (Cruz, D – Philadelphia) HR438 is a resolution urging the City of Philadelphia to establish a year-round program providing for the safe removal and adequate disposal of illegally discarded waste tires. HR438 removed from table, Apr. 4, 2012 [House].

Mining

House Bills:

[House Bill 1813](#) – (Tobash, R – Berks, Schuylkill) HB1813 is an act amending the Act of May 31, 1945 (P.L.1198, No.418), known as the Surface Mining Conservation and Reclamation Act, further providing for mining permit, reclamation plan and bond; and providing for land reclamation financial guarantees. HB1813 re-referred to the Appropriations Committee on Mar. 13, 2012 [Senate].

Land Use

Senate Bills:

[Senate Bill 469](#) – (Argall, R – 29) SB469 amends the Act of February 2, 1966 (1965 P.L.1860, No.586),

REGULATORY DEVELOPMENTS

Public Utility Commission

Rules and Regulations:

[Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets](#)

42 Pa.B. 2159 April 14, 2012

52 Pa. Code Ch. 62

The Pennsylvania Public Utility Commission, on June 23, 2011, adopted a final rulemaking order which ensures that consumers of natural gas will be able to shop for gas that is marketed on a level playing field for all market participants. The purpose of this Revised Final Rulemaking Order is to remove barriers to retail competition in the market for natural gas supplies in the Commonwealth pursuant to the Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201—2212. This particular rulemaking reformulates the NGDCs' "price to compare" to better reflect all costs related to natural gas supply and procurement so that there will be a more accurate price to compare for shoppers, establishes permanent rules for NGDCs' purchase of receivables programs and ensures that the release, assignment or transfer of capacity by an NGDC is nondiscriminatory and at the applicable contract rate.

Notices:

[Act 129 Energy Efficiency and Conservation Program Phase II; Doc. No. M-2012-2289411](#)

42 Pa.B. 3044 May 26, 2012

At its May 10, 2012, public meeting, the Pennsylvania Public Utility Commission adopted and released for public comment a Tentative Implementation Order (Tentative Order) to begin the process of potentially establishing a Phase II for the Act 129 Energy Efficiency and Conservation (EE&C) Program. This Tentative Order proposes required consumption reductions for each electric distribution company as well as guidelines for implementing Phase II of the EE&C Program. The Tentative Order is on the Commission's web site at

<http://www.puc.state.pa.us/pcdocs/1176640.doc>.

entitled "An Act Encouraging Landowners to Make Land and Water Areas Available to the Public for Recreational Purposes by Limiting Liability in Connection Therewith, and Repealing Certain Acts," providing for a short title; further providing for definitions; and making editorial changes. SB469 passed on Oct. 25, 2011 [Senate]; Re-referred to the Rules Committee on Mar. 12, 2012 [House].

[Senate Bill 1324](#) – (Yaw, R-23) SB1324 is an act amending Title 42 of the Pennsylvania Consolidated Statutes, in particular rights and immunities, providing for actions to quiet title involving subsurface rights. SB1324 referred to Judiciary Committee on Mar. 12, 2012 [House].

House Bills:

[House Bill 2228](#) – (Sonney, D – Erie) HB2228 is an act amending the Agricultural Area Security Law, further providing for definitions and for the purchase of agricultural conservation easements. HB2228 was referred to the Agricultural and Rural Affairs Committee on Feb. 29, 2012 [House].

[House Bill 2272](#) – (Davis, D – Bucks) HB2272 is an act providing for hearing on purchase of wetlands; and for notice of purchase of wetlands. HB2272 is referred to Environmental Resources and Energy Committee on Mar. 26, 2012 [House].

Industry

Senate Bills:

[Senate Bill 1431](#) – (Pileggi, R – 9) SB1431 is an act requiring environmental remediation in industrial closures; imposing functions on the Department of Community and Economic Development and the Department of Environmental Protection; and imposing penalties. SB1431 referred to Environmental Resources and Energy Committee on Feb. 27, 2012 [Senate].

Environmental Quality Board

Proposed Rulemakings:

[Dam Safety & Waterway Management Fees](#) [Coal Mining Fees](#)

42 Pa.B. 1228 March 10, 2012
25 Pa. Code Ch. 86

The Environmental Quality Board (Board) proposes to amend Chapter 86 (relating to surface and underground coal mining: general). The proposed rulemaking establishes a schedule of fees for coal mining activity permit applications. The proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*. The deadline for comment submission was April 9, 2012.

[Coal Mining Fees](#)

42 Pa.B. 1228 March 10, 2012
25 Pa. Code Ch. 86

The Environmental Quality Board proposes to amend Chapter 86 (relating to surface and underground coal mining: general). The proposed rulemaking establishes a schedule of fees for coal mining activity permit applications. The proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*. The deadline for comment submission was April 9, 2012.

Susquehanna River Basin Commission

Rules and Regulations:

[Review and Approval of Projects](#)

42 Pa.B. 2193 April 21, 2012
25 Pa. Code Ch. 806

This document contains final rules that would amend the project review regulations of the Susquehanna River Basin Commission (Commission) to include definitions for new terms and an amended definition; provide for administrative approval of interbasin transfers of flowback and production fluids between drilling pad sites that are isolated from the waters of the basin; provide for administrative approval of out-of-basin transfers of flowback or produced fluids from a Commission approved hydrocarbon development project to an out-of-basin treatment or disposal

facility; insert language authorizing renewal of expiring approvals, including Approvals by Rule (ABRs); delete specific references to geologic formations that may be the subject of natural gas development using hydrofracture stimulation and replace with a generic category—"unconventional natural gas development;" broaden the scope of ABRs issued to include hydrocarbon development of any kind utilizing the waters of the basin, not just unconventional natural gas well development; memorialize the current practice of requiring post-hydrofracture reporting; and provide further procedures for the approval of water sources utilized at projects subject to the ABR process. Effective April 1, 2012.

COURT OPINIONS

Supreme Court of Pennsylvania

[T.W. Phillips Gas and Oil Co. and PC Exploration, Inc. v. Jedlicka](#), No. 19 WAP 2009 (appeal from 964 A.2d 13 (Pa. Super. 2008) affirming No. 10362 CD 2005) (Mar. 26, 2012). Court affirms Superior Court's finding that operator used good faith judgment in determining whether oil and gas lease produced "in paying quantities." The Court held that when production on a well has been marginal or sporadic, "in paying quantities" shall be construed with reference to an operator's good faith judgment.

Superior Court of Pennsylvania

[Cassel-Hess v. Hoffer](#), No. 590 MDA 2011 (May 7, 2012). Court affirmed in part, vacated in part, and remanded trial court's order. The court affirmed trial court's order dismissing a nuisance claim concerning a mosquito-infested lake—which developed near Appellant's property due to Appellee filling in a tract of land with soil—because it was barred by the statute of limitations. Court also vacated and remanded trial court's order granting summary judgment to Appellee on the trespass claim because there was no evidence as to when the waters first encroached and there was a genuine issue of material fact as to whether Appellant's trespass claim was filed within the statute of limitations.

Commonwealth Court of Pennsylvania

[Butler v. Powers Estate, et al.](#), No. 760 MAL 2011 (Apr. 3, 2012). Court granted Petition for Allowance of Appeal of the issue of whether the Superior Court erred in remanding the case for the introduction of scientific and historic evidence about Marcellus Shale and natural gas in interpreting a deed reservation for “minerals.”

[Stephenson Grp. Natural Gas Co. v. Pa. DEP](#), No. 934 C.D. 2011 (Apr. 4, 2012). Court affirmed order of the Office of Open Records denying Stephenson’s appeal of DEP’s partial denial of its request for documents, specifically worksheets used to calculate civil penalties or fines, under the Pennsylvania Right-to-Know Law because the worksheets are related to a noncriminal investigation and the penalty calculation is not the ultimate penalty DEP will impose.

[Blue Mountain Pres. Ass’n, Inc. v. Pa. DEP](#), No. 1783 C.D. 2011 (Apr. 25, 2012). Court affirmed EHB’s adjudication and order dismissing Blue Mountain’s appeal because there was substantial evidence there would be no change to surface or subsurface discharges with the implementation of Alpine’s integrated stormwater management system.

[In re: Notice of Appeal from Twp. of Bradford Twp. Zoning Hearing Bd.](#), No. 1443 C.D. 2010 (May 9, 2012). Court reversed trial court’s order and held that operation of a compressor station is “gas production” as the term is used in the township’s zoning ordinance and is thus a permitted use.

[Twp. of West Carroll v. Wintz](#), No. 1325 C.D. 2011 (May 10, 2012). Court affirmed trial court’s order granting Township’s petition for injunctive relief which directed Wintz to cease and desist any conduct preventing maintenance of drainage ditches or preventing flow of water through the culvert to prevent damage to Sportsmen Dam Road.

ENVIRONMENTAL HEARING BOARD ADJUDICATIONS, OPINIONS AND ORDERS

[Berks Cnty. v. Pa. DEP and Exide Tech.](#), 2010-166-L. (Opinion and Order granting in part Exide’s Motion

for Summary Judgment, Mar. 16, 2012). Summary judgment granted in part because the DEP does not have authority to set requirements relating to the substances covered by the NAAQS in an operating permit outside the context of state implementation planning process absent exceptional circumstances.

[Berks Cnty. v. Pa. DEP and Exide Tech.](#), 2010-166-L. (Opinion and Order denying County’s Motion for Reconsideration on an order that denied a Motion to Compel, Mar. 20, 2012). Reconsideration denied because the Board’s inaccurate inference regarding the location where samples were sought is not an exceptional circumstance justifying reconsideration of an interlocutory order.

[New Hanover Twp. v. Pa. DEP and Gibraltar Rock, Inc.](#), 2010-185-M (consolidated with 2011-083-M, 2011-121-M, 2011-171-M, and 2012-025-M). (Opinion and Order denying New Hanover’s Motion for Summary Judgment, Mar. 26, 2012). Board denied motion because the record was limited as to the required facts and legal issues as to whether DEP’s decision to allow Gibraltar Rock to cease activities on its site without forfeiting its permit was lawful and reasonable.

[Concilus and Humes v. Pa. DEP and Crawford Renewable Energy, LLC.](#), 2011-167-R. (Opinion and Order denying Crawford’s Motion to Dismiss, Mar. 27, 2012). Board found dismissal of appeal would be a severe and unjustified penalty for Concilus not signing the Notice of Appeal, but Humes signed on Concilus’s behalf when neither were represented by counsel.

[Morris v. Pa. DEP and Cumberland Coal Res.](#), 2011-041-R. (Opinion and Order granting Cumberland’s Motion for Summary Judgment, Apr. 5, 2012). Board granted Motion for Summary Judgment against Morris for failure to respond to the Motion and address Cumberland’s arguments.

[Rosebud Mining Co. v. Pa. DEP](#), 2012-036-L (consolidated with 2012-038-L). (Opinion in Support of Order Denying Supersedeas, Apr. 6, 2012). Board found that it was very unlikely Petitioner would prevail on its theory that the belting currently used meets the requirement of a “suitable insulating material” as what is required by the Bituminous Coal Mine Safety Act.

[Pa. DEP v. White Oak Reserve Ltd. P'ship & ELG Inc. Gen. Partner, Vaguard Dev. Corp., et al.](#),

2011-060-CP-L. (Opinion and Order granting DEP's Motion for Default Judgment, Apr. 10, 2012). Board assessed civil penalties against Defendant that failed to answer DEP's complaint for civil penalties in violation of 25 Pa. Code § 1021.74 which requires an answer within 30 days of service of complaint.

[Pa. DEP v. Klecha](#), 2011-021-CP-C. (Opinion and Order granting DEP's Motion for Sanctions, Apr. 11, 2012). Klecha was precluded from introducing any evidence at the hearing, including any expert testimony, sought by DEP in its unanswered discovery requests.

[Grief Packaging, LLC v. Pa. DEP](#), 2012-023-L (consolidated with 2012-042-L). (Opinion in Support of Order Denying Petition for Supersedeas, Apr. 12, 2012). Board denied Grief's petition because it must still comply with its permit which regulated its emission capture system unless and until the appeal reverses DEP's denial of modification.

[Pa. DEP v. Stambaugh](#), 2008-146-CP-C. (Adjudication Following Remand, Apr. 18, 2012).

On remand from the Commonwealth Court, the Board fined the Stambaughs \$13,844 for negligently, although not wantonly, constructing a silo trench on their property without a liner, which rendered two neighbors' water unpotable.

[Ranudo v. Pa. DEP](#), 2010-098-C. (Opinion and Order Dismissing Appeal, Apr. 24, 2012). Board dismissed Roll Rite Tire Center's appeal for failure to comply with Board's requirement that a corporation must be represented by an attorney at all stages of the proceeding after filing an appeal.

[McGinnis v. DEP and Eighty-Four Mining, Inc.](#), 2007-197-R (consolidated with 2007-228-R and 2008-190-R). (Adjudication, Apr. 30, 2012). Board dismissed appeal and found that although the underground mining caused the McGinnis pond to shift, pond is still able to maintain its pre-mining uses.

[Taylor Land Cleaning, Inc. and Taylor v. Pa. DEP](#), 2007-188-R (consolidated with 2008-039-R, 2009-089-R, and 2010-017-R). (Adjudication, May 4, 2012). Board found the civil penalties under the PA Solid Waste Management reasonable—\$42,500 against Taylor Land Clearing Inc. and \$56,300 against Robert

Taylor—when Taylor caused and allowed illegal dumping and failed to take reasonable steps to clean the site for two and a half years.

[KH Real Estate, LLC v. Pa. DEP](#), 2010-189-R. (Opinion and Order granting DEP's Motion for Sanctions, May 7, 2012). Board granted DEP's Motion for Sanctions and dismissed appeal when KH Real Estate did not comply with Board's Orders to retain counsel and answer discovery and showed a lack of intent to pursue the appeal.

[Lower Salford Twp. Authority v. Pa. DEP](#), 2005-100-L. (Opinion and Order on Remand denying Attorney's Fees Application, May 10, 2012). Attorney fees were denied because Lower Salford Township did not show that some conduct on part of DEP was a significant factor in EPA's decision to withdraw the TMDL for nutrients in Skippack Creek.

[Kiskadden v. Pa. DEP and Range Resources](#), 2011-149-R. (Opinion and Order denying DEP's Motion to Dismiss, May 16, 2012). Board found DEP's determination as to whether a permittee's activities affected the water supply is appealable to the Board since it is an action that adversely affected Kiskadden.

[Kiskadden v. Pa. DEP](#), 2011-149-R. (Opinion and Order granting DEP's Motion for Protective Order, May 17, 2012). Board barred the deposition of the Assistant Counsel of the Office of Chief Counsel of DEP on the basis of the attorney-client privilege and the attorney work product doctrine.

[Paul Lynch Investments, Inc. v. Pa. DEP](#), 2010-151-M. (Adjudication, May 18, 2012). Board dismissed appeal and upheld civil penalty of \$5,000 against Paul Lynch Investments for engaging in demolition activities of a portion of a facility before conducting an inspection for asbestos and without providing notice to DEP.

FEATURED ARTICLES

Reconciling Preemption Issues Between Act 13 and the Storm Water Management Act
by Jon W. Johnson, Esquire

The recent passage of the Act 13 amendments to the Oil & Gas Act (Act 13) has created a fair amount of debate and at least one legal challenge. At the time of

this writing, seven municipalities have challenged portions of the amendments, stating that some sections of Act 13 unconstitutionally override local zoning ordinances. On April 11, 2012, Senior Judge Keith Quigley for the Commonwealth Court issued a preliminary injunction regarding section 33 of Act 13 for a period of 120 days.

Interestingly, a possible preemption issue may exist as municipalities, industry and the courts attempt to understand and reconcile sections 3302-3304 of Act 13 with other environmental statutes, such as the Storm Water Management Act (SWMA). This article argues that the early consensus that Act 13 preempts all local ordinances may be premature particularly when examining sections 3302-3304 of Act 13 and the SWMA. This article examines whether an actual conflict exists and whether Act 13 preempts local ordinances created pursuant to the authority provided for in the SWMA. [Read the full article here.](#)

Constitutional Challenges to Oil and Gas Law Amendment (Act 13)
Robinson Township v. Commonwealth
by Barbara R. Grimaud

This year, seven Pennsylvania municipalities filed suit in Commonwealth Court challenging the constitutionality of Act 13, the recent amendment to Pennsylvania's Oil and Gas Act. Generally, Act 13 includes guidance on the unconventional gas well fee, Oil and Gas Lease Fund, Natural Gas Energy Development Program, development of oil and gas resources, local ordinances relating to oil and gas operations, and responsibility for the fee. Most notable to date is the court's preliminary injunction issued April 11, 2012 which (1) prevents Act 13 from preempting pre-existing local ordinances and (2) enjoins Section 3309 for 120 days, as discussed in section III of this article.

This article is limited to the petitioning municipalities' Counts I, II & III, which assert Act 13 violates the United States and Pennsylvania Constitutions by arguing (1) Pennsylvania's General Assembly is attempting unconstitutional statewide zoning; (2) Act 13 unconstitutionally creates zoning districts; and (3) "Act 13 prevents municipalities from meeting their constitutional and statutory obligation to-protect the health, safety, morals or welfare of local communities through zoning regulations." These arguments, in

relation to Chapter 33, which cover the regulation of local ordinances relating to oil and gas operations, are addressed under the constitutional requirements of a zoning ordinance and under the standard of whether it "clearly, palpably, and plainly" violates the United States and Pennsylvania Constitutions. This article then discusses the court's preliminary injunction.

[Read the full article here.](#)

PUC Holds En Banc Hearing Seeking Comments Pertaining to Competitive Market For Retail Electricity in Pennsylvania
by Charles Foster

In March of 2012, the Pennsylvania Public Utility Commission ("PUC") held an en banc hearing seeking comments on its Investigation of Pennsylvania's Retail Electricity Market. The purpose of this hearing was to permit interested parties to participate in the investigation to highlight or summarize positions on key issues that the PUC plans to address as part of a Long-Range Work Plan to promote electric retail competition. The primary focus of testimony at the hearing concerned three potential PUC staff-produced default service models. These models are relevant specifically for electric generation suppliers ("EGS") and would affect EGS's in their role as service providers to non-shopping and returning customers.

[Read the full article here.](#)

Nutrient Trading Update
by Brian P. Calabrese

The Pennsylvania Infrastructure Investment Authority (PENNVEST) and the Department of Environmental Protection (DEP), along with financial information services company Markit, recently held a nutrient credit auction in March 2012 for the sale and purchase of nutrient credits in Pennsylvania's Chesapeake Bay Watershed. The auction resulted in the trade of over 145,000 nutrient credits for the Susquehanna Watershed, providing the nutrient credit purchasers a cost-effective method to meet their nutrient reduction quotas. [Read the full article here.](#)



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