



# THE ENVIRONMENTAL & ENERGY LAW SECTION NEWSLETTER

Widener University  
Commonwealth Law School

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## WELCOME FROM THE EDITOR-IN-CHIEF

Welcome to the third edition of the 2015 PBA Environmental & Energy Law Section Newsletter. As Fall approaches and the seasons change, the environmental and energy landscape in Pennsylvania continue to change as well. The EELS Newsletter continues to be your resource chronicling those changes, and in this edition, we cover a number of important issues.

In our first Featured Article this month, guest author (and EELS Newsletter alum) Charles Foster presents an overview of the Clean Power Plan. Specifically, Mr. Foster discusses the rulemaking that is aimed at the proposed federal plan framework and proposed trading models for state implementation.

Newsletter Staff member Rachel Marlowe then provides a look at the history of the Delaware Water Gap National Recreation Area on its 50th Anniversary in our second Featured Article. Rachel's article delves into the checkered history of the Tocks Island Dam project, which was ultimately abandoned, but led to the creation of the Delaware Water Gap National Recreation Area as we know it today.

Additionally, this quarter's Newsletter includes a Special Section detailing the Environmental & Energy Law Section's Resolution for Government Action on Climate Change. The Special Section includes a message from EEL Section

Chair Richard Friedman introducing the Resolution, as well as a copy of the Resolution itself, and background about how the Resolution came to be. The Special Section also includes an article by section member Steve Harvey that provides his thoughts on climate change as a justice issue. Mr. Harvey's article submits that as a justice issue, lawyers are uniquely positioned to take a leadership role in pressing for action on climate change. He supports this position with a brief legal analysis of the standards for admitting scientific evidence in the courtroom, then provides some examples of that evidence.

As always, we at the Newsletter appreciate your readership, **and to help us celebrate our fifth year**, please consider providing us with 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 our email address at [PBA.EELSnewsletter@gmail.com](mailto:PBA.EELSnewsletter@gmail.com).

Respectfully,

Brandon J. Pierce  
Editor-in-Chief

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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.*

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## FEATURED ARTICLES

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### ***EPA Announces Federal Plan Rulemaking; Encourages States to Incorporate Proposed Trading Rules as Part of Implementation Plans***

*Charles R. Foster, IV, Esq.*

On August 3, 2015, the Environmental Protection Agency published the Clean Power Plan under authority from §111(d) of the Clean Air Act. This is the first ever national standard designed to regulate emissions of carbon dioxide from existing stationary sources, i.e. fossil fuel-fired power plants either in operation before, or under construction by, January 8, 2014, which, according to the EPA, make up 31% of the total greenhouse gas emissions in the U.S. The CPP aims to reduce CO2 emissions from the power sector by 32% from 2005 levels by 2030.

To achieve this goal, the EPA prepared emissions guidelines that set both interim and final CO2 performance rates for two subcategories of existing fossil fuel-fired electric generating units. These existing source performance standards were developed using the EPA's Best System for Emissions Reductions.

States have been given the opportunity to implement the CPP using either a State Measures plan or an Emissions Standard plan. The EPA has actively encouraged states to develop implementation plans, although some claim they will abstain from doing so. The EPA has also made it clear that states will not be penalized for refusing to enforce the CPP. If a state does not submit a plan or the EPA does not approve all or any part of a state implementation plan, then "the EPA will develop, implement, and enforce a federal plan to reduce CO2" from stationary sources in that state using a federal plan. To address this situation, the EPA is preparing a rulemaking made up of four separate actions, which this article discusses.

The purpose of this rulemaking is to create a federal plan framework based upon emissions trading for states without an implementation plan. It is also attempting to develop two approaches intended to serve as model trading rules for states to consider when developing implementation plans. This article focuses on each model trading approach. [Read or download the full article here.](#)

### ***A Reflection on 50 Years of the Delaware Water Gap and the History of the Tocks Island Dam Project***

*Rachel Marlowe, J.D.*

The Delaware Water Gap National Recreation Area was established September 1, 1965. In 2015, the Fiftieth Anniversary of this acquisition for the National Park Service, it is important to reflect on the rich legal and environmental history that led the area to this turning point. This article overviews and chronicles that checkered history. [Read or download the full article here.](#)

## SPECIAL SECTION: RESOLUTION ON CLIMATE CHANGE

### ***A Message from Richard Friedman, Chair, Pennsylvania Bar Association Environmental and Energy Law Section***

Readers:

The Environmental and Energy Law Section of the Pennsylvania Bar Association ("EELS" and "PBA") has adopted a Resolution on Climate Change and is asking that the PBA House of Delegates adopt the Resolution at its November 20, 2015 meeting. The Resolution, a copy of which can be found on [page 5](#) of this Newsletter, acknowledges the reality of climate change and calls for timely action to mitigate its harm by:

1. acknowledging the threat of global climate change caused by human activities;
2. adopting laws and policies that led to the substantial reduction of greenhouse gas emissions with consideration for the economic impacts of such measures;
3. promoting alternative energy sources and technologies; and
4. taking other reasonable measures to focus government at the international, national, state, and local levels on climate change and the need to reduce greenhouse gas emissions.

The Section's Resolution does not endorse any specific legal action, but rather highlights the need for action, where the alternative of inaction is not supportable as a viable option in response to this impending crisis.

If you would like additional background information on the issue please see this document, found on [page 17](#) of this Newsletter, and the source material citations contained within that background document. In addition, for one lawyer's perspective in support of the Section's Climate Change Resolution, please see the article in this edition of the EELS Newsletter by section member Stephen G. Harvey, found on [page 6](#).

The Resolution was adopted by the EELS Council without any dissenting votes (two abstentions) and has been endorsed by the PBA Elder Law Section and Minority Bar Committee. As paraphrased from the background document:

*There is a growing awareness that climate change is one of the great challenges facing society today. It is right that the legal community should speak out on the need for the law to be developed to address the problem. The Section is optimistic that PBA members will support this effort, and that PBA's House of Delegates will adopt the Resolution For Government Action On Climate Change at its November 20, 2015 meeting.*

Sincerely,  
Richard Friedman

**SPECIAL SECTION: RESOLUTION ON CLIMATE CHANGE****PENNSYLVANIA BAR ASSOCIATION  
ENVIRONMENTAL AND ENERGY LAW SECTION****RESOLUTION FOR GOVERNMENT ACTION ON CLIMATE CHANGE**

**WHEREAS**, in the last quarter century, a scientific consensus has emerged that human activities, primarily those activities creating emissions of carbon dioxide and other greenhouse gases, have caused an enhanced greenhouse effect that is driving adverse changes in the global climate, including changes in air and water temperature and weather patterns that endanger humanity and will present significant challenges for humankind in the relatively near future; and

**WHEREAS**, reducing greenhouse gas emissions is critical to mitigating the harmful effects of climate change; and

**WHEREAS**, the scientific community has advised that timely action is necessary to mitigate the harm from climate change; and

**WHEREAS**, economically and technologically feasible means exist to reduce greenhouse gas emissions while promoting alternative energy sources and technologies that will mitigate climate change without harming the world economy, and likely generate additional economic opportunities; and

**WHEREAS**, the Pennsylvania Constitution, in the Environmental Rights Amendment, Article 1, Section 27, guarantees to "all of the people, including generations yet to come," "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment;" and

**WHEREAS**, lawyers should contribute solutions to the problem of global climate change through review and development of appropriate legislative and regulatory measures to effectively reduce greenhouse gas emissions, as well as voluntary measures to reduce the carbon footprint of our daily activities; and

**NOW THEREFORE, BE IT RESOLVED**, that the Pennsylvania Bar Association calls on the U.S. Congress and President, the Pennsylvania General Assembly and Governor, and the governments of the other States to take timely action to address threats posed by climate change by:

1. acknowledging the threat of global climate change caused by human activities,
2. adopting laws and policies that lead to substantial reduction of greenhouse gas emissions with consideration for the economic impacts of such measures,
3. promoting alternative energy sources and technologies, and
4. taking other reasonable measures to focus government at the international, national, state, and local levels on climate change and the need to reduce greenhouse gas emissions.

**AND BE IT FURTHER RESOLVED**, that the Pennsylvania Bar Association calls on all sectors of society, including all other associations of legal professionals, all lawyers, and all members of society, to use the powers at their disposal to address global climate change and participate in the review and development of appropriate policies to reduce greenhouse gas emissions.

**Respectfully Submitted,  
Richard H. Friedman, Chair  
Environmental and Energy Law Section**

**August 6, 2015**

## SPECIAL SECTION: RESOLUTION ON CLIMATE CHANGE

### ***Why Every Lawyer Should Care About Climate Change***

*Steve Harvey, Esq.*

On November 20, 2015, the House of Delegates of the Pennsylvania Bar Association will consider a resolution calling for government to acknowledge and act on the urgent problem of climate change caused by human activity. As a supporter of the resolution, I have been asked “why is this an issue for lawyers and the bar association?”

In my view it comes down to a question of justice, as the undeniable effects of climate change will include disruption of the life, liberty, and property of people in our country and throughout the world. Solutions are available. They need to be debated, adopted, and expressed in law. But social, political, and economic forces prevent many elected officials from even acknowledging the problem, much less pursuing solutions.

As a community of lawyers, one of our primary concerns should be furtherance of justice. Faced with one of the greatest challenges our society has ever faced, it is right that lawyers should speak out in favor of government action to address the challenge of climate change and the pursuit of solutions through law. This falls squarely within PBA’s mission: the advancement of jurisprudence, promotion of justice, protection of the disadvantaged, and advancement of proper legislation.

In June of 1963, President John F. Kennedy convened 244 leading lawyers from throughout the United States, including leaders from the state bars and the ABA, to a meeting at the White House where he asked for their support on civil rights through law. Days before that meeting, the President gave one of the most important speeches of his life, calling on “every American” to “stop and examine [their] conscience” on the subject of racial justice.

The need for action on civil rights in the summer of 1963 was undeniable. As President Kennedy recognized, “events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them.”

The need for action on climate change is now undeniable. Just as the support of the legal community was needed in 1963 on civil rights, so too is it now needed on climate change.

*The remainder of the article discusses why climate change is a justice issue and how lawyers are uniquely positioned to drive progress on this issue.*

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



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## COURT OPINIONS

### Commonwealth Court

[Harvilchuck v. DEP](#), No. 717 C.D. 2014 (June 2, 2015). The Commonwealth Court overturned a determination by the EHB that the Plaintiff's appeal to the EHB was untimely based on his having notice from DEP's eNOTICE and eFACTS webpage about the DEP-issued Permit that he was challenging. The Court stated that the eNOTICE e-mails and the eFACTS webpage that Plaintiff viewed on September 27, 2013, and September 30, 2013, did not contain adequate information for him to ascertain whether he was adversely affected and, consequently, whether he should file an appeal because they did not provide the contents of the Permit, or informed him that it was even issued by DEP.

[Berner et. al. v. Montour Twp., Montour Board of Supervisors & Scott Sponenberg](#), No. 1543 C.D. 2014 (July 9, 2015). Appellants challenged a land development plan approved by the Township, on the ground that it violated the Township's Subdivision and Land Development Ordinance (SALDO) provisions. Appellants argued that the soil of the proposed swine nursery was unsuitable for the application of manure, and thus, violated the SALDO, which required a finding that "the development will not create adverse impact upon the environment" and that any such "hazardous condition" be remedied before approval. The Court disagreed, holding that the Township Supervisors had not abused their discretion in approving the plan because the SALDO provisions relied upon by the Appellant only applied to "hazardous conditions," and it was not shown that the soil presented such a condition.

[Huckleberry Associates, Inc., v. South Whitehall Twp. Zoning Hearing Board](#), No. 1748 C.D. 2014 (July 15, 2015). Huckleberry Associates appealed from an order of the Court of Common Pleas of Lehigh County affirming the decision of the South Whitehall Township Zoning Hearing Board (ZHB). The ZHB determined that Huckleberry's operation of a solid waste recycling facility violated the Townships Zoning Ordinance by creating a new impervious surface without obtaining a special exception. The Court upheld the ZHB's determination that

Huckleberry violated the Ordinance. It mainly reasoned that the Ordinance was not preempted by Pennsylvania statutes because the Ordinance was enacted pursuant to the MPC and thus was not superseded by the express language of the Noncoal Act. And second, this local land use ordinance governed *where* the regulated activity takes place, not *how* such activity is conducted, and as such, it would not be preempted by statute.

[Feudale v. Aqua Pennsylvania, Inc. & Department of Conservation and Natural Resources](#), No. 335 M.D. 2014 (July 22, 2015). Appellant alleged that the logging and reforestation activities undertaken by Aqua and DCNR affect a uniquely picturesque part of the Roaring Creek Tract, and that Aqua's plan would destroy a large swath of scenic forest and result in the degradation of the area's natural and historic aesthetic, which violated Pennsylvania's Environmental Rights Amendment and the History Code. Commonwealth Court, however, dismissed the claims because Appellant had not exhausted administrative remedies by filing first with the EHB, and he had failed to assert the manner in which the Defendants violated some statute or regulation, as is necessary under *Payne* test for claims brought under [Article I, Section 27](#) of the Pennsylvania Constitution. Here the Court noted that, although the plurality in *Robinson Township* took issue with this test, *Payne I* remains binding precedent on the Court until overruled by either a majority of the Supreme Court or an *en banc* panel of the Commonwealth Court.

[Dauphin County Industrial Development Authority v. Pennsylvania PUC](#), No. 1814 C.D. 2014 (Sept. 9, 2015). Dauphin County Development Authority petitioned for review of an order of the PUC approving pilot program proposed by PPL Electric Utilities Corporation. On appeal, the Development Authority first contended that the program does not comply with the mandate of Section 2807(f)(5) of the Public Utility Code, [66 Pa. C.S. §2807\(f\)\(5\)](#), which states that "the default service provider"—PPL in this case—"shall" offer Time-of-Use rates to all customers, regardless of whether those customers generate electricity. Given the clear mandate of the word "shall," the Court first held that the PUC was not en-

## COURT OPINIONS

titled to deference in interpreting the statute. And in conclusion, the Court held that the program violated that mandate because PPL did not offer time-of-Use rates to its customer-generators.

[Gorsline, et. al., v. Board of Supervisors of Fairfield Twp. v. Inflection Energy, LLC & Shaheen](#), No. 1735 C.D. 2014 (Sept. 14, 2015). Inflection Energy and the Shaheens appealed an order of the trial court that denied Inflection's application to construct and operate a natural gas well on land it has leased from the Shaheens. In so doing, the trial court set aside the order of the Board of Supervisors of Fairfield Township granting a conditional use permit for the well. First, the Court held that that Inflection's proposed use met the threshold requirements set forth in the Zoning Ordinance because the proposed well was similar to a "public service facility" and compatible with such uses permitted in that district. Second, the Court held that the trial court also erred in holding that Inflection's proposed use conflicted with the general purpose of the Zoning Ordinance, because the Ordinance specifically authorizes extraction of minerals. And third, there was no probative evidence offered to show how Inflection's proposed well will present a detriment to the health and safety of the neighborhood. The Court reiterated that a ZHB is entitled to deference in interpreting its own Ordinance.

### Superior Court

[Seneca Resources Corp. v. S & T Bank et. al., No. 2057 WDA 2014 \(Aug. 31, 2015\)](#). Defendants, Lessors of a gas lease, appealed the trial court's granting summary judgment to Seneca, the Lessee of 25,000 acres, some of which was undeveloped. Appellants argued that the trial court erred in holding (1) that the Lease was not severable as to the separately-defined "operated" and "unoperated" acreage under the express terms of the Lease; and (2) that it erred in refusing to apply Pennsylvania's doctrine of implied covenant to fully develop an oil and gas lease merely because the "operated" portion of the leased property was already under development at the inception of the Lease. First, the Superior Court held that lease was not severable as

to the undeveloped land. It reasoned that the intent of the parties to the original Lease was for the Lease to be entire and not severable because its consideration provisions included royalties, delay rentals, and storage rentals—relating to the undeveloped and developed acreage—and expressly stated that unoperated acreage may be converted to operated acreage "at any time in the future." Secondly, the Court held that there was no implied duty to further develop the land, while recognizing that because the premises was under production at the time of the entry of the Lease does not, in itself, invalidate the implied covenant. Rather, the Court reasoned that the Lease foreclosed a finding of a breach of the implied covenant to develop the unoperated acreage because it extended for an indefinite secondary term so long as gas was being produced (as it was here), and the parties stipulated that the drilling and operating requirements under the Lease were satisfied. Additionally, the Court noted that Appellants also received delay rentals on the unoperated acreage.

[Vosburg v. NBC Seventh Realty Corp. & Pittston Area Industrial Development Corp., No. 1552 MDA 2014 \(Sept. 2, 2015\)](#). Defendants appealed a trial court determination that they interfered with Plaintiff's "mineral" rights when they extracted rock to build a gravel road on their property. They argued that term "mineral" in a private deed reservation did not include rock on the basis that rock is within the scientific understanding of "mineral," and where the reservation referred to "coal and other minerals" the parties to the deed did not intend to include quarried "rock" in the reservation. Relying on the deed language, the Court held that the reservation only encompassed "minerals beneath the surface" but not quarried stones. In doing so, it rejected the trial court's reliance on the scientific definition of "minerals" and focused instead on the common meaning of the term to determine the parties' intent, in light of the language of the reservation. It further reasoned that the reservation did not exclude the right to quarry stone because the language stated that "no buildings erected on said land, or field under cultivation, will be disturbed by said mining."



## ENVIRONMENTAL HEARING BOARD

[Pa. Waste, LLC v. Commonwealth, DEP](#) – EHB Docket No. 2015-056-M (Issued: June 4, 2015) (Opinion and Order Granting Clearfield County's Petition to Intervene). Pa. Waste filed an appeal before the EHB, challenging a DEP decision to deny Pa. Waste's Application for the Camp Hope Run Municipal Waste Landfill. Clearfield County filed a Petition to intervene in support of DEP's denial. EHB granted the Petition to Intervene, finding the County had a direct and immediate interest in the action, based on the Pennsylvania Supreme Court's decision in, *Robinson Twp. v. Cmwlth.*, 83 A.3d, 919-21 (Pa. 2013), which held that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, as well as the quality of life of its citizens. Here, EHB reasoned that the County had a sufficient interest in the action because preventing odor, litter, noise, traffic and pollution from the landfill was hardly a remote interest.

[Russell v. Commonwealth, DEP](#) – EHB Docket No. 2014-031-B (Issued: June 10, 2015) (Adjudication Reducing the Civil Penalty Against Appellant). EHB reduced a civil penalty against the Appellant from \$17,162.00 to \$7,881.00, imposed for his failing to obey two DEP administrative orders pertaining to his allegedly violating the Pennsylvania Safe Drinking Water Act (SDWA). EHB reduced the penalty assessed by DEP because it found Mr. Russell's culpability to be only negligent, instead of reckless or deliberate. EHB reasoned as such because Mr. Russell did not have direct control over the property that was the subject of the SDWA violation.

[Kiskadden v. Commonwealth, DEP & Range Resources Appalachia, LLC, Permittee](#) – EHB Docket No. 2011-149-R (Issued: June 12, 2015) (Adjudication Dismissing Appeal). Mr. Kiskadden filed an appeal challenging a DEP determination that natural gas drilling activities conducted by Range Resources at its Yeager site in Washington County did not pollute his water supply. EHB found that Appellant had not met his burden of proving by a preponderance of the evidence that his water well was impacted by the drilling operations, even though Range failed to report several spills and leaks about a half-mile from Appellant's property,

because Appellant's expert evidence was insufficient to show a hydrological connection between the contaminated area and his well. It reasoned that Appellant's expert's findings were hard to follow, conclusory, and not based on first-hand knowledge of the site, as compared to Range's countervailing experts.

[Lester v. Commonwealth, DEP](#) – EHB Docket No. 2014-025-B (Issued: June 24, 2015) (Adjudication Dismissing Appeal). Andrew Lester appealed a 2014 administrative order by DEP directing him as one of the "operators" to permanently close four underground storage tanks, pursuant to the Storage Tank and Spill Prevention Act ("Act"). Even though Appellant had no ownership interest in the property, EHB held that he was an "operator" under the Act, which defines such as "[a]ny person who manages, supervises, alters, controls or has responsibility for the operation of a storage tank." [35 P.S. § 6021.103](#). Because Appellant identified himself as the operator on various forms and took actions consistent with exercising control over and responsibility for the tanks (more than a mere employee), EHB reasoned he was an operator.

[Beaver Valley Slag, Inc. & Bet-Tech International, Inc. v. Commonwealth, DEP](#) – EHB Docket No. 2014-147-R (Issued: June 29, 2015) (Opinion and Order Denying DEP's Motion to Dismiss). Appellants appealed a DEP letter rejecting Appellants' proposals and directing them to submit a plan to DEP within 60 days detailing how they intend to comply with the pH effluent limitations. EHB held that the letter was an appealable final action over which it has jurisdiction because it expressed a final determination that affected the obligations of the Appellants.

[Merck Sharp & Dohme Corp. v. Commonwealth, DEP](#) – EHB Docket No. 2015-011-L (Issued: July 14, 2015) (Opinion and Order Denying DEP's Partial Motion to Dismiss). EHB denied DEP's motion for partial dismissal because DEP's disapproval of a Permittee's Preparedness, Prevention and Contingency Plan in connection with DEP's issuance of an industrial stormwater NPDES permit because such actions from DEP are final and appealable.

## ENVIRONMENTAL HEARING BOARD

Tri-Realty Co. v. Commonwealth, DEP & Ursinus College, Permittee – EHB Docket No. 2014-107-L. EHB ruled on several evidentiary and pretrial issues in this case: [Opinion and Order Denying Motion to Compel Entry on Property](#) (July 7, 2015) (finding a sufficient number of test wells already existed on the property); [Opinion and Order Granting Motions for Protective Order and to Quash Subpoenas](#) (July 9, 2015) (finding the discovery requests at issue were disproportionate to any showing of need); [Opinion and Order Granting and Denying in Part Motion to Compel Depositions](#) (July 17, 2015) (finding the incremental burden of allowing most of the discovery was slight when compared to the efforts already expended by the parties).

[Peckham v. Commonwealth, DEP](#) – EHB Docket No. 2014-074-B (Issued: Aug. 31, 2015) (Adjudication Dismissing Appeal). Appellants appealed a DEP administrative order directing him to permanently close a compartmentalized underground storage tank to address alleged violations of the Storage Tank Act. EHB held that DEP exercised lawful discretion when it determined that permanently closing one compartment of the storage tank without closing the other was technically impossible. It found DEP's expert testimony credible and uncontroverted by the Appellant.

[Wilson v. Commonwealth, DEP & Newton Township, Permittee](#) – EHB Docket No. 2013-192-M (Consolidated with 2013-200-M) (Issued: Aug. 31, 2015) (Adjudication Dismissing Appeal). Appellant appealed DEP's approval of the Township's "2013 Updated Plan" to address sewage needs in the Crum Creek Basin. EHB dismissed the Appellant's challenge, finding she did not meet her burden to show that DEP's approval of the Plan was inappropriate or otherwise not in conformance with law.

[Hudson et. al. v. Commonwealth, DEP & CFC Fulton Properties, LLC, Permittee](#) – EHB Docket No. 2015-096-L (Issued: Sept. 1, 2015) (Opinion in Support of Granting Supersedeas). Neighbors of Fulton Properties' proposed Swine Farm appealed the Farm's stormwater permit. After finding that DEP approved the permit without requiring Fulton to conduct appropriate infiltration and geotechnical stud-

ies to demonstrate its system would meet regulatory criteria and be protective of the environment, the EHB held that Appellants had a strong likelihood of success on the merits of their claim that DEP did not comply with applicable regulatory requirements. Because no data was provided or site test performed, EHB found that DEP approved the permit without the proper "[p]redevelopment site characterization and assessment of soil and geology including appropriate infiltration and geotechnical studies that identify location and depths of test sites and methods used," as required by [25 Pa. Code § 102.8\(g\)\(1\)](#). It thus granted Appellants' petition for supersedeas to halt the Plan from moving forward until a full adjudication on the merits.

[Citizens for Pennsylvania's Future v. Commonwealth, DEP & Anadarko E&P Onshore, LLC, Permittee](#) – EHB Docket No. 2014-117-B (Issued: Sept. 10, 2015) (Opinion and Order Denying Respondents' Motion for Summary Judgment). Respondents jointly moved for summary judgment, arguing that the Appellant citizen association group did not have standing to challenge Anadarko's permit to conduct earth disturbance activities associated with gas exploration in the Frozen Run Watershed. EHB disagreed, holding that, because one group member used the Watershed for recreation, the record adequately demonstrated that the permitted activities presented a realistic potential harm to a group member's aesthetic and recreational interests, which was enough to convey standing to the entire association.

[Borough of St. Clair v. Commonwealth, DEP & Blythe Twp., Permittee](#) – EHB Docket No. 2015-017-L (Issued Sept. 15m 2015) (Opinion and Order on Motion in Limine). Borough of St. Clair filed an appeal from DEP's reissuance of a solid waste permit to Blythe Township authorizing the construction and operation of the BRADS Landfill in the Township. St. Clair filed a motion *in limine* to exclude the written report of a deceased expert, based on it being hearsay, and also argued that any witnesses called by the Township or DEP should be prohibited from simply incorporating the Report's expert conclusions. EHB agreed to prohibit using the Report for the truth of the matter asserted or to allow other experts to par-

## ENVIRONMENTAL HEARING BOARD

## LEGISLATIVE DEVELOPMENTS

rot its conclusions. EHB, however, allowed the Report to be admitted as part of the record of the permitting process for other reasons because it was incorporated into the permit under appeal and thus was part of DEP's record of decision.

[Friends of Lackawanna v. Commonwealth, DEP & Keystone Sanitary Landfill, Inc., Permittee](#) – EHB Docket No. 2015-063-L (Issued Sept. 16, 2015) (Opinion and Order Granting and Denying in Part Landfill's Motion to Compel). After Appellant organization challenged the Landfill's permit, Landfill filed a Motion to Compel answers to six interrogatories, seeking the identities of everyone who partook in preparing the appeal, those who reviewed DEP documents, all the members and officers of the Association, and anyone else that Association knew possessed discoverable evidence relating to the factual averments in the Appeal. EHB held all but one answer was irrelevant and denied the motion to compel answers, except for those answers relating to persons having knowledge that was the basis for the factual averments in the Appeal. According to EHB, identities of document revisers, association members or officers were irrelevant to deciding the main issue—whether DEP acted reasonably and in accordance with the law when it issued the permit.

[West Buffalo Twp. Concerned Citizens v. Commonwealth, DEP & Martin, Permittee](#) – EHB Docket No. 2014-078-L (Issued: Sept. 28, 2015) (Opinion and Order Denying Respondents' Motion to Dismiss as Moot). After Concerned Citizens challenged the Permit of a concentrated animal feeding operation, the Permit was transferred to a different Permittee. That transfer prompted the Respondents to have the case dismissed as moot. EHB did not dismiss the case as moot, stating that Respondents' argument incorrectly conflated the naming of a new Permittee with the issuance of a new permit, where only a new permit could make the case moot. As such, the EHB also held that it retained jurisdiction to hear the Appeal.

## Adopted Legislation

### Environmental Issues

#### *Forestry*

#### Senate Resolutions

[Senate Resolution 55](#) (Hutchinson, R-21) will establish a forestry task force to study issues concerning the renewal and management of this Commonwealth's forests; providing for an advisory committee; and directing the Joint Legislative Air and Water Pollution Control and Conservation Committee to provide administrative support to the task force. The forestry task force will look to improve the forests and provide long-term management strategies. It will be a bicameral and bipartisan committee. It will consider such issues as: invasive species, local government interaction, timber harvest, and development of a state management plan. This Resolution was adopted on September 17, 2015.

## Proposed Legislation

### Energy Issues

#### *Alternative Energy*

#### Senate Bills

[Senate Bill 844](#) (Vogel R, 47) would amend Title 66 (Public Utilities) to repeal prior limitations on the amount of electrical power that could be produced from biologically derived methane as imposed by P.L. 1672, No. 213. Additionally, the bill specifically states that, notwithstanding any other law, the Public Utility Commission may not limit the production of electrical power derived from biologically derived methane gas. This Bill was referred to Consumer Protection and Professional Licensure on May 28, 2015. House Bill 1349 also addresses this issue.

#### House Bills

[House Bill 1269](#) (Sonney, R-Erie) would allow the Department of General services to lease certain submersed lands in Erie county for the development

## LEGISLATIVE DEVELOPMENTS

and operation of alternative energies and the establishment of a fund to which each operator of a large scale energy system will pay a two percent royalty of gross revenues of the system which will be paid to Erie County, Pennsylvania Fish and Boat Commission, Department of Environmental Protection, and the Conservation District Fund. This Bill was referred to the State Government on June 1, 2015.

[House Bill 1349](#) (Zimmerman, R-Lancaster) would amend Title 66 (Public Utilities) to repeal prior limitations on the amount of electrical power that could be produced from biologically derived methane as imposed by P.L. 1672, No. 213. Additionally, the bill specifically states that, notwithstanding any other law, the Public Utility Commission may not limit the production of electrical power derived from biologically derived methane gas. This Bill was referred to Local Government on June 24, 2015. Senate Bill 844 also addresses this issue.

[House Bill 1354](#) (Moul, R-Adams) would amend P.L.1672, No. 213 (Alternative Energy Portfolio Standards Act) to amend the definition of "Alternative Energy Sources" to include natural gas. Additionally, the definition of "Tier II alternative energy source" includes energy derived from natural gas. This Bill was referred to Environmental Resources and Energy on June 24, 2015.

### *Coal*

#### *Senate Bills*

[Senate Bill 368](#) (White R-41) would amend an act known as the Tax Reform Code of 1971, providing for a coal refuse energy and reclamation tax credit. This bill was re-referred to Appropriations, June 25, 2015.

#### *House Bills*

[House Bill 1370](#) (Gibbons, D- Beaver, Butler, Lawrence) would amend the Tax Reform Code of 1971 and creates a coal refuse energy and reclamation tax credit in recognition of the significant and tangible benefits to the environment and savings in Common-

wealth funds provided by eligible facilities in reclaiming coal refuse piles and previously mined lands. This Bill was referred to Environmental Resources and Energy on June 29, 2015.

### *Energy Efficiency*

#### *Senate Bills*

[Senate Bill 805](#) (Boscola D, 18) would amend Title 66 (Public Utilities) by adding a subsection that would require electrical distribution companies to submit a new reduction in consumption plan every three years. Additionally, large energy customers will have the ability to opt-out of the plan but will be required to forgo funding available under the plan and will re-except from paying the cost recovery charge. This Bill was referred to Consumer Protection and Professional Licensure on May 14, 2015.

### *Oil and Natural Gas*

#### *Senate Bills*

[Senate Bill 875](#) (Bartolotta, R-46) would provide for the use of treated mine water from oil and gas development. This bill would propose two limits on the treated mine water. First, an oil and gas company would not be held liable for the treatment of mine water if they acquire the water for well development. This would remain the responsibility of the mine operator. Second, a mine operator who offers the treated water would not be held liable for its offsite use. This bill was re-referred to Appropriations on July 22, 2015.

[Senate Bill 886](#) (Hutchinson R, 21) would assist and encourage the creation of affordable energy development zones and provide temporary relief from certain taxes within the zone. These zones are expected to relieve economically distressed rural areas of the Commonwealth by allowing incentives for new business development in areas with a large supply of natural gas and will provide a base upon which new businesses and existing business grow and expand the economic viability of the



## LEGISLATIVE DEVELOPMENTS

area. This Bill was referred to Community, Economic and Recreational Development on July 10, 2105.

[Senate Bill 953](#) (Greenleaf, R-12) would expand natural gas infrastructure throughout Pennsylvania through competitive sealed bidding and be titled the "Natural Gas Infrastructure Expansion and Access Act." This Bill was referred to Environmental Resources and Energy on July 16, 2015.

### House Bills

[House Bill 1321](#) and [House Bill 1363](#) (DiGirolamo, R-Bucks) would amend the Tax Reform Code of 1971 by adding Article XI-E, Natural Gas Drilling Tax investment, providing definitions and imposition of a three and two-tenths tax starting June 30, 2016, and the establishment of a fund and amounts to be transferred each year to the fund as well as permissible distributions from the fund. These Bills were referred to Environmental Resources and Energy on June 11 and 29, 2015, respectively.

[House Bill 1536](#) (Petri, R-Bucks) would amend the Tax Reform Code of 1971 by adding Article XVI-C, Unconventional Natural Gas Severance Tax, providing definitions and imposition of a five percent tax starting June 30, 2016, and the establishment of a fund and amounts to be transferred each year to the fund as well as permissible distributions from the fund. Additionally, the Article XVI-D, Unconventional Gas Well Employment Tax Credit would allow an entity to apply for a tax credit for each new job created in the Commonwealth. This Bill was referred to Environmental Resources and Energy on September 4, 2015.

[House Bill 1517](#) (Nesbit, R-Butler/Mercer) would change the maximum amount of grants available in the Marcellus Legacy Fund such that it shall not exceed \$10,000,000 from fiscal years 2015-2016 through 2017-2018. This Bill was referred to Environmental Resources and Energy on September 8, 2015.

## Environmental Issues

### *Waste*

### Senate Bills

[Senate Bill 513](#) (McGarrigle, R-26) would amend the act of July 7, 1980 (P.L.380, No.97), known as the Solid Waste Management Act, in residual waste, further providing for transportation of residual waste. This Bill would make it possible to truck leachate when necessary. Senate Bill 513 was previously introduced as Senate Bill 1481. This last action on this Bill occurred on July 22, 2015.

### House Bills

[House Bill 48](#) (Godshall, R Montgomery) would amend Title 27 (Environmental Resources) by adding Chapter 33 – Water Well Construction Standards, which provides definitions and standards for construction and decommissioning of water wells. This Bill was re-reported as committed on July 21, 2015.



## REGULATORY DEVELOPMENTS

### Department of Conservation and Natural Resources

#### Execution of Oil and Gas Leases for Publicly-Owned Streambeds

45 Pa.B. 4251, August 1, 2015

45 Pa.B. 5595, September 12, 2015

The Department of Conservation and Natural Resources executed two leases on publicly owned stream beds. See the following links for further details regarding these leases.

[Lease #1](#)

[Lease #2](#)

### Department of Environmental Protection

#### [Draft Nonpoint Source Management Plan—2014 Update; Availability for Public Comment](#)

45 Pa.B. 3277, June 20, 2015

The DEP has provided its draft Nonpoint Source Management Plan—2014 Update for public comment. The Management Plan includes a narrative description of significant efforts taking place to address nonpoint source pollution, and milestones set to demonstrate progress in addressing this non-point source pollution.

#### [Availability of the National Pollutant Discharge Elimination System General Permit for Discharges from Hydrostatic Testing of Tanks and Pipelines \(PAG-10\)](#)

45 Pa.B. 3775, July 11, 2015

The DEP informed the public of the availability of the National Pollution Discharge Elimination System (NPDES) PAG-10 General Permit for Discharges from Hydrostatic Testing of Tanks and Pipelines (PAG-10). The General Permit will become effective at 12 a.m. on July 11, 2015.

#### [Availability of Draft Modification of Residual Waste General Permit WMGR052](#)

45 Pa.B. 4839, August 15, 2015

The DEP announced the availability of a proposed permit modification under the Solid Waste Management Act (35 P.S. §§ 6018.101—6018.1003), the Municipal Waste Planning, Recycling and Waste Reduction Act (53 P.S. §§ 4000.101—4000.1904) and residual waste regulations for a general permit to operate residual waste processing facilities and the beneficial use of residual waste other than coal ash. General Permit Number WMGR052 authorizes processing by blending of flue gas desulfurization (FGD) sludge, coal ash and lime to form low permeability cementitious material for beneficial use.

#### [DEP is holding listening sessions for public input on the Clean Power Plan](#)

The DEP is holding fourteen listening sessions to allow the public to voice their views about Pennsylvania's plan to reduce carbon emissions. The full schedule of listening sessions can be found at the link above. The DEP is also accepting public comments through November 12, 2015, at [this link](#).

## REGULATORY DEVELOPMENTS

### Environmental Quality Board

1396.19b) to account for the addition of section 19.2 of the SMCRA (52 P.S. § 1396.19b.

#### Proposed Rulemaking

[Control of Volatile Organic Compound Emissions from Automobile and Light-Duty Truck Assembly Coating Operations and Heavier Vehicle Coating Operations](#)

And

[Control of Volatile Organic Compound Emissions from Miscellaneous Metal Parts Surface Coating Processes, Miscellaneous Plastic Parts Surface Coating Processes and Pleasure Craft Surface Coatings](#)

45 Pa.B. 4351 and 4366, August 8, 2015

The EQB proposes to amend Chapter 129 (relating to standards for sources) to read as set forth in Annex A. The proposed rulemaking would add § 129.52e and § 129.52d, relating to control of VOC emissions from automobile, light-duty truck, and miscellaneous parts coating operations (such as primer and top-coat application), to adopt reasonably available control technology (RACT) requirements and RACT emission limitations for stationary sources of volatile organic compound (VOC) emissions.

#### Rules and Regulations

[Land Reclamation Financial Guarantees and Bioenergy Crop Bonding](#)

45 Pa.B. 4904, August 22, 2015

The EQB has added §§ 86.162b and 86.162c (relating to Land Reclamation Financial Guarantees and Bioenergy Crop Bonding). Sections 86.162b and 86.162c implement the act of July 5, 2012 (P. L. 918, No. 95) (Act 95) and the act of October 24, 2012 (P. L. 1276, No. 157) (Act 157). The Board also amends Chapters 77, 86—90 and 211 to correct citations to the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P.S. §§ 1396.1—

### Public Utility Commission

[Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources—Technical Reference Manual 2016 Update](#)

45 Pa.B. 3956, July 18, 2015

The PUC on July 8, 2015, adopted the 2016 version of the Energy-Efficiency and DSM Rules for Pennsylvania's Alternative Energy Portfolio Standard, Technical Reference Manual. The Technical Reference manual is found [here](#).

## EXECUTIVE DEVELOPMENTS

### [Regulatory Agenda of the Governor's Office](#)

45 Pa.B. 4063, July 25, 2015

The Governor's office has published an agenda of regulations under review and development. Some of these regulations under review have environmental significance. See the above link for more details about which rules and regulations may be subject to change in the near future.



Widener University  
Commonwealth Law School

## BACKGROUND

### Proposed PBA Resolution on Climate Change

The PBA Bylaws mandate that the “Section on Environmental and Energy Law shall take as its province the development and practical working of the law of this Commonwealth and the United States relating to the environment, ecology and mineral and natural resources, including air, water and land.”<sup>1</sup>

In accordance with this mandate, the Section on Environmental and Energy Law has recently discussed the subject of climate change and the need for the development of laws to protect society from the harm it has caused and will continue to cause unless strong measures are taken to reduce greenhouse gas emissions as well as other measures to address this undeniable problem.

On March 25, 2015, at a regularly scheduled meeting, the Section received a presentation from Stephen G. Harvey and Yolanda Pagano, both Pennsylvania lawyers, about a newly founded organization, A Call to the Bar: Lawyers for Common Sense on Climate Change ([www.calltothebar.org](http://www.calltothebar.org)). A Call to the Bar is a Pennsylvania non-profit organization that seeks to enlist the support of the legal community for government action on climate change through the development of laws to reduce greenhouse gas emissions. Steve and Yolanda were joined by John C. Dernbach, a Distinguished Professor of Law at Widener University Law School and a nationally recognized expert on sustainable development and climate change.

Steve, Yolanda, and John made a persuasive argument that the PBA should pass a resolution recognizing the undeniable scientific facts about climate change<sup>2</sup> and the need for strong government action through law to protect society. Three leading bar associations have already passed strong statements calling for government action on climate change.

- The American Bar Association passed a resolution in 2008<sup>3</sup>
- The New York City Bar Association passed a Statement of Principles in 2009<sup>4</sup>

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<sup>1</sup> PBA Bylaws, Article VI, Section 636.

<sup>2</sup> There are numerous authoritative sources for information about the science of climate change, including a 2014 Joint Report from the Royal Society and National Academy of Sciences, which is available online at <http://nas-sites.org/americasclimatechoices/events/a-discussion-on-climate-change-evidence-and-causes/>. Also, there are numerous links to sources at [www.calltothebar.org](http://www.calltothebar.org).

<sup>3</sup> [http://www.americanbar.org/content/dam/aba/directories/policy/2008\\_my\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_109.authcheckdam.pdf).

<sup>4</sup> <http://www.nycbar.org/pdf/report/uploads/20071828-ClimateChangeMitigationandAdaptationPrinciples.pdf>

- The Philadelphia Bar Associations passed a resolution in 2014<sup>5</sup>

A Call to the Bar is working with other bar associations around the country and expects that numerous bar associations including student bar associations will pass similar resolutions in coming months.

This is a particularly auspicious time for the legal community to be heard on this issue, because of the upcoming visit to the United States by Pope Francis. He is expected to address the subject of climate change and sustainable development in an address to a joint session of Congress and the United Nations General Assembly in the last week of September. Then in December the United Nations is holding a Climate Change Conference in Paris that many hope will culminate in a new international agreement on fighting climate change.

At the conclusion of the presentation on March 25, after spirited discussion, the Section voted to draft a resolution on climate change similar to the resolution passed by the Philadelphia Bar Association, with the specific language to be approved by the Section's Council.

Following the March 25 meeting, the leadership of the Section worked on the draft of a proposed resolution. A draft was circulated to the members of the Section Council for comments, one member submitted comments, and the draft was revised.

On August 6, 2015, at a regularly scheduled meeting of the Section Council, the revised draft was discussed and approved, with several members abstaining but no votes in opposition. A copy of the resolution as approved by the Section's Council is attached.

If anyone has any questions or would like to discuss the resolution, they should contact Section chair Richard Friedman, at 717.237.5469/ RFriedman@mwn.com.

There is a growing awareness that climate change is one of the great challenges facing society today. It is right that the legal community should speak out on the need for the law to be developed to address the problem. The Section is optimistic that the other sections and committees will support the resolution, that the PBA Board of Governors will also approve it, and that the PBA House of Delegates will adopt it on November 20, 2015.

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<sup>5</sup> [http://www.philadelphiabar.org/page/ResJune14\\_3](http://www.philadelphiabar.org/page/ResJune14_3)