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## THE EHB: DEP'S FRIEND OR FOE? ENVIRONMENTAL HEARING BOARD REVIEW

### I. INTRODUCTION

#### A. History of the Environmental Hearing Board

Environmental regulation in Pennsylvania began almost a century ago in conjunction with efforts to preserve "Penn's Woods."<sup>1</sup> General efforts to maintain the environment are important, but in the last few years air and land preservation have been most prevalent.<sup>2</sup> On December 3, 1970, the Environmental Hearing Board (EHB) was created as part of the Department of Environmental Resources.<sup>3</sup> The EHB serves as a buffer between regulators and the regulated, providing citizens a forum where they can challenge the actions of the Department of Environmental Protection (DEP).<sup>4</sup>

When the legislature established the DEP, it consolidated the powers and duties of several other departments, boards, and commissions, in the new department.<sup>5</sup> The legislature bifurcated the DEP into a legislative and a judicial branch.<sup>6</sup> The legislative arm, the Environmental Quality Board, was empowered to promulgate environmental regulations.<sup>7</sup> The judicial arm, the EHB, was delegated the distinct ability to hear and decide appeals concerning DEP actions.<sup>8</sup> In 1988, the Environmental Hearing Board Act completely separated the EHB from the DEP, making it an independent state agency.<sup>9</sup> This Act also increased the number of Board Members from three to five and required them to be full-time adminis-

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1. See Environmental Hearing Board, *History of the Environmental Hearing Board* [hereinafter *History*] (last visited Jan. 22, 2003), available at [http://www.ehb.verilaw.com/general/ehb\\_history.icl](http://www.ehb.verilaw.com/general/ehb_history.icl).

2. See General EHB Info, *Environmental Hearing Board Fiscal Year 2001-2002 Report* (discussing issues prevalent on court's docket) (last visited Mar. 26, 2003), available at [http://www.ehb.verilaw.com/general/ANNREPORT\\_01-02.pdf](http://www.ehb.verilaw.com/general/ANNREPORT_01-02.pdf).

3. See *History*, *supra* note 1. The DER is now commonly referred to as the Department of Environmental Protection (DEP). See *id.*

4. See *id.* (stating role of EHB). "The Department of Environmental Resources was changed to the Department of Environmental Protection by Act No. 1995-18 effective July 1, 1995", which also created the Department of Conservation and Natural Resources. See *id.*

5. See *id.* (explaining DEP's powers)

6. See *id.* (describing DEP's unique structure).

7. See *id.* (explaining EHB legislative branch's powers).

8. See *History*, *supra* note 1 (clarifying EHB judicial branch's powers).

9. See PA. STAT. ANN. tit. 35 §§ 7511-7516 (2003).

trative law judges with a minimum of five years of relevant legal experience.<sup>10</sup>

The EHB provides a forum for persons or corporations to challenge DEP actions.<sup>11</sup> "Although the EHB is not part of the judicial branch of government, it operates like a court."<sup>12</sup> Legal representation is required only for corporations, however the EHB urges all litigants to be represented by counsel because of the technical, scientific nature of environmental law.<sup>13</sup> The EHB's jurisdiction is limited because it can only review final actions of the DEP.<sup>14</sup> The DEP, however, administers approximately fifty statutes, and "nearly 10,000 cases have been filed" during the twenty-five years of its existence.<sup>15</sup> While most of these cases were withdrawn or settled, others proceeded to a final EHB decision.<sup>16</sup> Litigants in an EHB action have the right to appeal the EHB's decision to Commonwealth Court and from there, if permitted, to the Pennsylvania Supreme court.<sup>17</sup> "Pennsylvania appellate courts . . . recognize the EHB's unique expertise in environmental regulation and . . . generally defer to interpretations."<sup>18</sup> Of the 300 EHB cases subsequently decided by Pennsylvania Courts, the EHB decisions have been affirmed eighty percent of the time.<sup>19</sup> This approval rate reflects the

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10. *See id.* (becoming effective Jan. 1, 1989).

11. *See History, supra* note 1 (explaining EHB's power to review DEP actions).

12. *Id.* "Litigants file pleadings, motions and petitions, engage in discovery, take part in hearings and submit briefs." *Id.*

13. *See id.* (showing concern for litigants).

14. *See* William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1, 15 (1996) (listing EHB's jurisdiction and authority).

15. *See History, supra* note 1; *see also* General EHB Info, *Environmental Hearing Board Fiscal Year 2001-2002 Report* (last visited Mar. 26, 2003), available at [http://www.ehb.verilaw.com/general/ANNREPORT\\_01-02.pdf](http://www.ehb.verilaw.com/general/ANNREPORT_01-02.pdf).

The Board received 306 appeals from July 2001 through June 2002. *See id.* 293 appeals were filed during July 2000 through June 2001. *See id.* This may be compared with the 273 appeals filed during Fiscal Year 1999-2000. *See id.*

16. *See History, supra* note 1 (discussing outcome of EHB cases either as adjudications or settlements).

17. *See* Leslie Ann Malady, *Summaries of Selected Agencies*, 4 WIDENER J. PUB. L. 841, 844 (1995) (summarizing EHB's requirements, legislative process and appellate process).

18. *History, supra* note 1. "Because of its [unique] role in environmental regulation, the [EHB] becomes involved in many controversial issues." *Id.* "The regulated community may strongly oppose . . . [DEP] attempts to bring . . . [it] into compliance, arguing that the requirements are excessive, not based on scientific principles or financially disastrous." *Id.* "Individuals living near existing or proposed facilities may protest the issuance of Department [DEP] permits, arguing that the sites are unsuitable or that the permit conditions are not adequate." *Id.* "These highly controversial cases frequently occupy the . . . [EHB's] time for several years." *Id.*

19. *See id.* (recognizing that appellate courts usually uphold EHB decisions).

outstanding quality of the EHB's judicial work.<sup>20</sup> In accordance with its position as the "first link" in the judicial review chain, the EHB makes initial decisions involving the interpretation of many environmental laws and regulations.<sup>21</sup>

### B. Standard of Review

The EHB reviews cases *de novo*, which means that the EHB decides cases based upon the evidence before the board.<sup>22</sup> The evidence may differ from that considered by the DEP.<sup>23</sup> "If the [EHB] concludes that the . . . [DEP] abused its discretion, it possesses the authority to substitute its own discretion."<sup>24</sup> More often, however, the EHB remands the case to the DEP for corrected action.<sup>25</sup>

The evolution of the EHB's standard of review of cases stems from *Smedley v. DEP*,<sup>26</sup> where the EHB reviewed the abuse of discretion standard and determined that *de novo* review was more effective for adjudicating a case on its merits.<sup>27</sup> Prior to *Smedley*, the EHB reviewed cases using only an "abuse of discretion" standard.<sup>28</sup> The abuse of discretion standard seeks to insure that any action by the DEP against an appellant is not merely erroneous, but flagrantly wrong.<sup>29</sup> An appellant must prove several qualitative thresholds to successfully challenge an agency's action, including: "(1) bad faith or fraud; (2) a capricious action or an abuse of power; or (3) a

20. *See id.* (acknowledging quality of EHB's judicial work).

21. *See id.* (describing EHB's role in judicial process).

22. No. 97-253-K, 2001 WL 178234, at \*44 (Pa. Env. Hrg. Bd. Feb. 8, 2001) (noting EHB's standard of review).

The scope of . . . [EHB] review is *de novo* meaning that the Board is not limited to considering only evidence before the Department when it rendered its decision but . . . [it] will consider all relevant and admissible evidence presented . . . at the time of the hearing and will weigh all the evidence presented anew.

*Id.*

23. *See id.* (noting EHB's consideration of all relevant and admissible evidence, not only evidence DEP heard).

24. *See History, supra* note 1 (noting EHB's review powers). "The . . . [EHB] can issue orders superseding actions of the . . . [DEP]." Pa Environmental Hearing Board, *Welcome*, (last visited Oct. 1, 2003), available at <http://www.ehb.verilaw.com>.

25. *See History, supra* note 1 (describing EHB's usual course of action after review). Under some statutes, EHB has the authority to assess civil penalties and to award legal fees and expenses to litigants who qualify. *Id.*

26. *Smedley*, 2001 WL 178234.

27. *See id.* at \*14-18 (noting EHB's role as tribunal of first impression requires using *de novo*, standard of review).

28. *See id.* at \*16 (stating that EHB erroneously used abuse of discretion in earlier cases).

29. *See id.* at \*14 (citations omitted) (explaining appellant's burden of proof under abuse of discretion standard).

manifest and flagrant abuse of discretion or purely arbitrary action.”<sup>30</sup> Further, the appellant must show that the DEP erred “to the extent of having shown manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions.”<sup>31</sup>

In *Smedley*, the EHB noted that the Pennsylvania Legislature and the Commonwealth Court “unambiguously delineated that the . . . [EHB] is a traditional tribunal of first impression.”<sup>32</sup> In establishing a *de novo* standard of review, the EHB indicated that actions brought before it involve not just determining whether the action was so “egregiously wrong as to amount to being abusive or capricious,” but also require a determination based on evidence put before them.<sup>33</sup> Reviewing the evidentiary record allows the EHB to establish whether previous DEP findings were correct, and whether its actions were reasonable and in accordance with the law.<sup>34</sup>

Following the precedent in *Smedley*, the EHB applies a *de novo* standard of review to determine whether the DEP actions conform to the law, and are otherwise reasonable and appropriate.<sup>35</sup> When evaluating whether the DEP abused its discretion, the EHB examines whether the DEP action was unreasonable or capricious, and whether the DEP’s findings were correct.<sup>36</sup> The practice is “a mix of the EHB’s own rules of practice and procedure, the General Rules of Administrative Practice and Procedure and the Pennsylvania Rules of Civil Procedure.”<sup>37</sup>

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30. See *id.* (opining abuse of discretion standard involves more than demonstrable error in judgment).

31. See *Smedley*, 2001 WL 178234 at \*14 (citations omitted) (noting burden of proof under abuse of discretion).

32. See *id.* at \*15 (expressing EHB’s role as protector of procedural due process rights of those who prove they were injured by DEP action).

33. See *id.* at \*17 (indicating EHB’s *de novo* standard of review).

34. See *id.* (noting EHB’s standard of review is not merely whether abuse of discretion has occurred, but review of full evidentiary record from DEP’s finding and evidence heard by EHB).

35. See *id.* at \*14-18 (noting EHB’s proper standard of review is *de novo*, and setting forth applicable test under *de novo*). When a court exercises its discretion, the losing party must show clear abuse of power to win on appeal. *Id.* at \*16.

36. See *Smedley*, 2001 WL 178234 at \*17 (noting elements EHB examines in determining whether DEP abused discretion); see also Maxine M. Woelfling, *A Practical Guide to Litigation before the Environmental Hearing Board*, in PENNSYLVANIA ENVIRONMENTAL LAW & PRACTICE, 601, 606 (Terry R. Bossert & Joel R. Burcat eds., 2d ed. 15.1.2 1998) (noting EHB’s personal “abuse of discretion” standard when it reviews DEP actions).

37. See Woelfling, *supra* note 36, at 605 (noting that in situations where General Rules are inconsistent with EHB’s rules, EHB’s rules control).

The purpose of this Comment is to review and analyze recent trends in EHB decision-making.<sup>38</sup> Section I is a detailed account of EHB's history and the procedure it uses for reviewing cases.<sup>39</sup> Section II outlines the major areas of recent EHB litigation and analyzes those decisions.<sup>40</sup> Finally, Section III summarizes trends in EHB decision-making.<sup>41</sup>

## II. MAJOR AREAS OF LITIGATION

The subject matter of the cases filed with the EHB generally follows the trend of the statutes and regulations being enforced at any one time.<sup>42</sup> Consequently, early cases dealt primarily with water pollution and air pollution.<sup>43</sup> DEP legislation focused on encouraging municipalities to construct sewage systems and treatment plants, and to encourage industries to install water and air purification devices.<sup>44</sup> In recent years, the cases filed with the EHB have reflected the focus of the DEP on regulating solid waste (landfills and waste management), the surface mining of coal and non-coal minerals, and the procedural problems accompanying these issues.<sup>45</sup>

### A. Solid Waste

#### 1. Background

The Solid Waste Management Act (SWMA) is the leading Pennsylvania statute governing solid waste management.<sup>46</sup> The Pennsylvania legislature enacted SWMA in its current form on July 7, 1980, and it has seen little change since that time.<sup>47</sup> Prior to

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38. See *infra* notes 22-327 and accompanying text.

39. See *supra* notes 1-37 and accompanying text.

40. See *infra* notes 42-320 and accompanying text.

41. See *infra* notes 321-27 and accompanying text.

42. See History, *supra* note 1.

43. See General EHB Info, *Environmental Hearing Board Fiscal Year 2001-2002 Report* (discussing issues prevalent on court's docket) (last visited Mar. 26, 2003), available at [http://www.ehb.verilaw.com/general/ANNREPORT\\_01-02.pdf](http://www.ehb.verilaw.com/general/ANNREPORT_01-02.pdf).

44. See History, *supra* note 1.

45. See *id.* "Other subject areas include, for example, dams and encroachments, oil and gas, safe drinking water, storage tanks, stormwater management, underground coal mining, water allocations, and sewage facilities planning." *Id.*

46. See PA. STAT. ANN. tit. 35, §§ 6018.101-6018.1003 (1997); see also Bruce S. Katcher, *Solid Waste Management in Pennsylvania*, 4 DICK. J. ENVTL. L. & POL'Y 1, 1 (1994) (noting DEP is agency given primary responsibility for implementing SWMA).

47. See Katcher, *supra* note 46, at 1. The prior version of SWMA was enacted in 1968 in the Act of July 31, 1968, P.L. 788, No. 241, formerly codified at PA. STAT. ANN. tit. 35 § 6001-6017. See *id.*

SWMA, solid waste was regulated in Pennsylvania under the Clean Streams Law (CSL), which continues to play an important role in solid waste management matters affecting the quality of surface and ground waters in Pennsylvania.<sup>48</sup> SWMA regulates three types of solid waste—municipal, residual, and hazardous waste—and controls the permitting and enforcement provisions for all types of waste.<sup>49</sup>

Under SWMA, the first question is whether the material involved is waste.<sup>50</sup> Then, the DEP must consider the requirements imposed on waste management activities.<sup>51</sup> For example, notification requirements may require a regulated entity to notify the government of its identity and the nature of its regulated activity; only then can the entity obtain an identification number that is used for record-keeping and reporting purposes.<sup>52</sup> In addition, certain waste management activities require prior authorization by permit.<sup>53</sup> Permits and licenses are obtained from DEP.<sup>54</sup> To implement SWMA's rules and regulations, the legislature authorized the DEP to impose terms and conditions on permits and licenses.<sup>55</sup>

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48. *See id.* (citing PA. STAT. ANN. tit. 35 §§ 691.1-691.1001 (1993)).

49. *See id.* (recognizing three types of waste which are consolidated in three articles, Articles III, IV, and V). Enforcement provisions are consolidated in Articles V and VI. *See id.*

50. *See id.*; *see also* PA. STAT. ANN. tit. 35 § 6018.103 (defining solid waste as “[a]ny waste, including, but not limited to municipal, residual, or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials.”).

51. *See Katcher, supra* note 46, at 8.

For example, under the hazardous waste regulations, most generators, transporters, and owners and operators of treatment, storage, or disposal facilities may not engage in waste management activities without having received an identification number from the DE[P]. This identification number is obtained by filing a notification form including information concerning the identity of the regulated entity and the nature of its waste management activities. Large-quantity residual waste generators who do not have a hazardous waste identification number must obtain one from DE[P] for use in submitting biennial reports.

*Id.*

52. *See id.* at 8 (citing examples of various requirements imposed under SWMA).

53. *See id.* “Facilities that generate waste do not require a permit under SWMA for generation; however, municipal and residual waste processing and disposal facilities do require an SWMA permit prior to the commencement of construction or operation, as do hazardous waste treatment, storage, and disposal facilities.” *Id.*

54. *See id.* at 9. “Applications for permits are submitted to the regional DER office and applications for transportation licenses are submitted to DER’s central office in Harrisburg.” *Id.*

55. *See id.* (citing PA. STAT. ANN. tit. 35 § 6018.104(7)). This discusses how an agency can regulate its changes. *See id.*

The Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101) is another statute regulating solid waste in Pennsylvania.<sup>56</sup> It “primarily deals with: (1) the authority for and requirements imposed upon counties to plan for the management of municipal waste generated within their boundaries; (2) the authority of and limitations upon municipalities to regulate municipal waste activities; and (3) the program for municipal waste recycling within [Pennsylvania].”<sup>57</sup> “The Act also grants municipalities certain assistance in regulating landfills and resource recovery facilities within their boundaries.”<sup>58</sup>

## 2. Cases

Recent cases question the DEP and EHB’s authority to enforce regulations under SWMA.<sup>59</sup> In *Wurth v. DEP*,<sup>60</sup> the EHB denied a motion for summary judgment filed by third-party appellants in an appeal of the reissuance of a landfill permit from the City of Bethlehem to a private landfill operator.<sup>61</sup> The appellant contended that the DEP abused its discretion when it failed to use its regulatory authority to request additional information about the appellee’s permit.<sup>62</sup> The EHB held that the regulation gave the DEP authority to request the additional information but did not compel the DEP to use it.<sup>63</sup> The EHB relied on section 503 of SWMA, which defines the DEP’s authority and illustrates the extent of discretion it has in permit actions under the Act.<sup>64</sup> In subsequent years, *Wurth* served

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56. PA. STAT. ANN. tit. 53 §§ 4000.101-1904 (1988).

57. See Katcher, *supra* note 46, at 10 (listing purposes of Act 101).

58. See *id.* “Regulations adopted pursuant to Act 101 are found in the municipal waste regulations.” *Id.*

59. See *infra* notes 60-85 and accompanying text.

60. No. 98-179-MG, 2000 WL 294469 (Pa. Env. Hrg. Bd. Feb. 27, 2000).

61. See *id.* at \*1. The EHB held that “[t]he appellants failed to sustain their burden of demonstrating that they were entitled to judgment in their favor concerning their allegations that the Department [DEP] failed to appropriately consider the compliance history of the permit applicant, county and sub-county waste plans, recycling provisions, environmental assessment and public notice and comment.” *Id.*

62. See *id.* at \*4 (relying on apparent DEP authority under 25 Pa. Code § 271.3).

63. See *id.* (citing Throop Property Owner’s Ass’n v. DEP, EHB Docket No. 97-164-C (Opinion issued Dec. 22, 1999) for proposition that requests for additional information is left to DEP judgment of whether that information is necessary for proper evaluation).

64. See *id.* (finding support in 35 P.S. § 6018.503 for holding that DEP did not abuse discretion in reissuing appellee’s permit).



as an example of challenges to the DEP's authority involving the issuance of landfill permits under SWMA.<sup>65</sup>

Recently, in *Dauphin v. DEP*,<sup>66</sup> the EHB held that a guidance document requiring a landfill permittee to prove that the benefits of a proposed landfill expansion clearly outweigh the harm of expansion constitutes a procedurally defective regulation.<sup>67</sup> The EHB held that the DEP's reliance on the guidance document's balancing test was improper.<sup>68</sup> The EHB reached this conclusion even though the DEP has the authority under SWMA to enforce the guidance document.<sup>69</sup> The EHB remanded the permit application to the DEP for a review that did not rely on the balancing test contained in this guidance.<sup>70</sup>

A similar decision was made in the D.C. Circuit Court of Appeals in *Appalachian Power Co. v. Environmental Protection Agency (Power)*.<sup>71</sup> Electric power companies and trade associations representing the nation's chemical and petroleum industry challenged the validity of portions of an EPA document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs."<sup>72</sup> The Court of Appeals set aside the guidance document in its entirety, finding that certain guidance provisions expanded the scope of the statute and its regulations, and should have been subject to the rulemaking procedures required under federal law.<sup>73</sup>

In *Jefferson County Commissioners v. DEP*,<sup>74</sup> the EHB revoked a permit to construct and operate a municipal waste disposal facility.<sup>75</sup> Citing the facility's close proximity to an airport and the increased risk of bird strikes to aircraft, the EHB found the landfill's location created a harm to public safety.<sup>76</sup> After third-party appeal-

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65. See *infra* notes 66-90 and accompanying text (discussing other examples of authoritative challenges).

66. No. 99-190-L, 2000 WL 509409 (Pa. Env. Hrg. Bd. Apr. 27, 2000).

67. See *id.* at \*8. A guidance document is considered a regulation to help DEP personnel implement the law. See *id.*

68. See *id.* at \*1 (summarizing that because DEP found that Dauphin failed balancing test mandated by guidance document, it did not conduct technical review of permit application).

69. See 25 PA. CODE § 287.127(c) (2003) (outlining balancing test, but not mentioning guidance document).

70. See *Dauphin*, 2000 WL 509409, at \*8 (finding DEP's reliance on guidance document invalid because document lacks authority to promulgate policy).

71. 208 F.3d 1015 (D.C. Cir. 2000).

72. See *id.* at 1016 (detailing challenge to guidance document).

73. See *id.* at 1020 (showing disapproval for reliance on guidance document).

74. No. 95-097-C, 2002 WL 369819 (Pa. Env. Hrg. Bd. Feb. 28, 2002).

75. See *id.* at \*59-60 (finding insufficient evidence).

76. See *id.* at \*59. The EHB stated "the treatment of the bird hazard was illogical and unreasonable." *Id.*

lants met their burden of proof, the EHB held that the permittee failed to comply with various applicable statutory and regulatory provisions and that the DEP committed errors of law and acted unreasonably in issuing the landfill permit.<sup>77</sup>

*Jefferson's* analysis of the balancing test between public safety and permissible use coupled with *Dauphin's* holding that the balancing test was improper led to the EHB's decision in *Eagle Environmental II, L.P. and Chest Township v. DEP*.<sup>78</sup> In *Eagle*, the EHB denied a challenge to the validity of title 25, section 287.127(c) of the Pennsylvania Code.<sup>79</sup> *Eagle* argued that this regulation was unlawful because "the requirements imposed by the regulation are not within the authority granted the EHB or the DEP by SWMA or Act 101."<sup>80</sup> The EHB, however, reviewed the distinction between the authority of a rule adopted pursuant to an agency's legislative rule-making power along with the authority of a rule adopted through interpretive rule making power.<sup>81</sup> Following this review, the EHB determined that there was statutory authority for the regulation in the Solid Waste Management Act and Act 101.<sup>82</sup> Finally, the EHB examined whether this harms/benefit test was a reasonable means of implementing SWMA.<sup>83</sup> The EHB concluded that in order to effectuate the legislature's intention to implement article I, section 27 of the Pennsylvania Constitution<sup>84</sup> in the context of the landfill facility permit review process, the DEP must balance the economic and social effects resulting from the proposed permit.<sup>85</sup>

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77. *See id.* at \*60 (concluding that agency acted unreasonably in ignoring potential risk).

78. No. 2001-198-MG, 2002 WL 648978 (Pa. Env. Hrg. Bd. Apr. 4, 2002) (finding balancing test must be reasonable in considerations).

79. *See id.* at \*2 (requiring applicant for residual waste landfill permit to identify social and economic benefits created by proposed landfill and to demonstrate that those benefits clearly outweigh known and potential environmental harms caused by project).

80. *See id.* at \*3 (arguing that regulation exceeds Commonwealth's police power and harms/benefit test is unconstitutionally vague).

81. *See id.* at \*5 (citing Housing Authority of the County of Chester v. Pennsylvania State Civil Service Comm'n, 556 Pa. 621, 634 (1999)).

82. *See id.* (upholding constitutionality of challenged regulation).

83. *See Eagle*, 2002 WL 648978 at \*6 (concluding that test, when reasonably implemented, passes court's scrutiny).

84. *See* PA. CONST., art. I, § 27. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and aesthetic value of the environment." *Id.*

85. *Eagle*, 2002 WL 648978 at \*10 (concluding regulation is reasonable means of implementation).

## CONCLUSION

Landfill permit applications are now subject to the test set forth in *Eagle*.<sup>86</sup> The harms/benefit test must be reasonably applied to implement regulations set forth in SWMA and Act 101.<sup>87</sup> The DEP cannot rely on a harms/benefit test within a guidance document because this reliance is outside the scope of their authority.<sup>88</sup> The EHB was careful not to allow the DEP to extend its authority beyond the scope of enforcing regulations.<sup>89</sup> These decisions demonstrate how the EHB checks and balances the DEP's authority.<sup>90</sup>

## B. Mining

1. *Background*

In "deep mining," burial deposits of coal are excavated through an underground shaft.<sup>91</sup> "Surface mining" is the process by which minerals are uncovered and extracted from the earth's surface.<sup>92</sup> In surface mining, the coal is reached by removing an overburden of soil and rocks, usually through a process called "strip mining."<sup>93</sup> Strip mining frequently leaves the surrounding land scarred and unusable.<sup>94</sup> Because strip mines cross state lines and span the breadth of the country, surface mining methods are adapted to operate in various topographies and regions.<sup>95</sup> Aesthetic considerations demand immediate attention, but the environmental costs resulting from strip mining are even more far-reaching.<sup>96</sup>

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86. See *supra* notes 84-85 and accompanying text.

87. See *supra* note 85 and accompanying text.

88. See *supra* notes 67-74 and accompanying text.

89. See *supra* notes 67-87 and accompanying text.

90. See *supra* notes 61-87 and accompanying text.

91. See Penina Kessler Lieber, *Pennsylvania Surface Mining Legislation: A Regulatory Mire*, 47 U. PITT. L. REV. 517, 518 (1986) (following with description that shafts are usually filled in after mining is completed).

92. See *id.* (defining "surface mining").

93. See *id.* "Heavy machinery is employed to uncover the mineral. Such machines range from mammoth shovels to bulldozers and augers, which displace the overburden in huge bites. At times blasting is necessary to open the surface." *Id.*

94. *Id.* Gashes and piles of deposited rock, aptly called spoils, scar the land. *Id.*

95. See Lieber, *supra* note 91, at 518-19. "Following strip mining, future land productivity, regardless of topography, is often nil absent prompt efforts to reclaim." *Id.* at 519.

96. *Id.* The environmental effects would be water pollution, widespread flooding, air pollution, non-productive topsoil, safety hazards, destruction of wildlife, and noise pollution. See *id.*

From the industrial perspective, surface mining possesses many advantages over deep mining.<sup>97</sup> Because surface-mined coal is not as finely textured as deep-mined coal, it is much easier to clean and prepare for the market.<sup>98</sup> In addition, recovery of surface coal is more successful; over ninety percent of the surface mineral deposit is recovered, as contrasted with less than fifty percent of deep coal.<sup>99</sup> Because of these compelling economic factors, the mining industry relies more heavily on surface mining and views environmental restraints as a threat to its success.<sup>100</sup>

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA).<sup>101</sup> SMCRA grants the “federal government oversight authority and responsibility for collecting and distributing funds while leaving the state in charge of developing its own specific program for reclamation of lands.”<sup>102</sup> Pennsylvania’s version of SMCRA is PaSMCRA.<sup>103</sup> This statute governs nonfederal reclamation claims in Pennsylvania.<sup>104</sup>

## 2. Cases

Mining regulations in Pennsylvania rely heavily on the interpretation of the DEP and ultimately the EHB.<sup>105</sup> The following cases illustrate the DEP interpretations of mining regulations and the EHB’s regulation of the DEP’s authority.<sup>106</sup> In *Blose v. DEP*,<sup>107</sup> the EHB sustained a third-party appeal on the ground that the DEP did not adhere to the regulations when it granted a surface coal mining permit.<sup>108</sup> The regulations required the permittee to sub-

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97. *Id.* “Both production and processing costs are significantly lower in strip mining.” *Id.*

98. *See id.* (allowing for economic advantage).

99. *See id.* (citing John D. Edgecomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299 (1983)).

100. *See* Lieber, *supra* note 91, at 519 n.12. Sixty percent of the nation’s coal was mined by this method in 1980. *See id.*

101. 30 U.S.C. §§ 1201-1328 (1994).

102. *See* Taofig Solola, *Pendelton v. U.S.: Direct Affirmative Act by the Federal Government Needed to Constitute a “Taking” Under the Surface Mining Control and Reclamation Act*, 8 U. BALT. J. ENVTL. L. 221, 222 (2001) (citing 30 U.S.C. §§ 1201-1328). States have taken the initiative to adopt their version of the federal act. *See id.* at 222.

103. *See* PA. STAT. ANN. tit. 52 § 1396.4 (2002).

104. *See id.* (detailing purpose and scope of statute).

105. *See infra* notes 107-134 and accompanying text.

106. *See infra* notes 112-139 and accompanying text.

107. No. 98-034-R, 2000 WL 294474 (Pa. Env. Hrg. Bd. Mar. 7, 2000).

108. *See id.* at \*15-16 (concluding that DEP’s interpretation is clearly contrary to plain meaning of language of regulations).

mit that mining would not be conducted within 300 feet of occupied dwellings.<sup>109</sup> Because the owners of dwellings within 300 feet of the boundaries would not waive this requirement, the applicant had to demonstrate that the coal mining activities could be feasibly accomplished.<sup>110</sup> The EHB held that the DEP erred in finding that surface coal mining activities could be feasibly accomplished where mining activities were proposed and remanded the permit for an alternative plan to be submitted.<sup>111</sup>

The authority of the EHB, however, is not always in conflict with the DEP's authority.<sup>112</sup> The EHB will defer to the DEP's interpretation of environmental regulations when it deems them to be reasonable.<sup>113</sup> In *Birdsboro v. DEP*,<sup>114</sup> the Commonwealth Court affirmed the EHB's approval of the issuance of a noncoal mining permit in an area which the DEP had designated as an exceptional value watershed, provided that the mine plan was redesigned to raise the floor of a section of the mine, and to split the mine into two geographic and temporal areas designated as Phase 1 and Phase 2.<sup>115</sup> Among other conditions of the DEP's approval, mining under Phase 2 could not proceed until after the Appellant produced evidence that Phase 1 mining did not damage wetlands, surface water or groundwater.<sup>116</sup> The Court affirmed the EHB's decision that the DEP had reasonably interpreted the regulations and did not err when it deferred full authorization for Phase 2 until Phase 1 was completed.<sup>117</sup>

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109. See *id.* at \*10-11 (defining "feasible" and explaining purpose of portions of statute).

110. See *id.* at \*12-13 (discussing waiver requirements).

111. See *id.* at \*15 (erring because DEP attempted to expand scope of regulations, which is outside of its authority and is clearly erroneous).

112. See *infra* notes 113-17 and accompanying text.

113. See *History, supra* note 1 (discussing EHB's power to hear and decide appeals from DEP actions).

114. 795 A.2d 444 (Pa. Commw. Ct. 2002).

115. See *id.* at 447-48 (rejecting all four of petitioner's claims); see also *id.* at 446 (listing changes to be made before receiving DEP's approval).

116. See *id.* at 448 (citing 25 PA. CODE § 77.126(a)(3) (1998), which states "[a] permit . . . will not be approved, unless . . . (3) the applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.").

117. See *id.* (upholding DEP's deferral of their approval for Phase 2 mining); see also *id.* at 449 (concluding appellant's due process rights were violated by authoring of adjudication by EHB member other than EHB member who conducted hearing and heard testimony of witnesses).

In addition to limiting the DEP's power, the EHB has the authority to interpret and limit regulations.<sup>118</sup> In *Consol v. DEP*,<sup>119</sup> the EHB faced the task of applying conflicting regulations in issuing two mining permits.<sup>120</sup> The EHB's resolution was to limit the DEP's interpretation of the Dam Safety and Encroachments Act (DSEA).<sup>121</sup> The EHB modified a condition in an underground mining permit revision that authorized development mining but required issuance of an additional permit before full extraction mining could proceed.<sup>122</sup> The EHB retained conditional language that made the issuance of that additional permit revision contingent upon compliance with regulations related to mining, water pollution and hydrologic balance requirements.<sup>123</sup> The EHB removed conditional language concerning the DSEA application and certain water discharge requirements.<sup>124</sup> The DSEA and its permitting regulations codified at title 25, chapter 105 of the Pennsylvania Code, do not apply to the subsidence impacts of underground mining beneath watercourses.<sup>125</sup> Furthermore, title 25, chapter 93 of the Pennsylvania Code does apply to "discharges"; it does not apply to the subsidence impacts of underground mining.<sup>126</sup> Instead, the CSL and the water-protection provisions of title 25, chapters 86 and 89 of the Pennsylvania Code apply.<sup>127</sup> Also, the DEP is not limited to the Bituminous Mine Subsidence and Land Conservation Act and Subchapter F of title 25, chapter 89 of the Pennsylvania Code,

118. See *id.* at 448-49 (noting legislative reasoning behind EHB's authority).

119. No. 2002-112-L, 2002 WL 31955394 (Pa. Env. Hrg. Bd. Dec. 31, 2002).

120. See *infra* notes 125-32 and accompanying text.

121. See *Consol*, 2002 WL 31955394, at \*4 (commenting that DSEA does not apply to subsidence impacts of underground mining).

122. See *id.* at \*7 (summarizing DEP's need for adherence to regulations prior to granting full-extraction mining permit).

123. See *id.* at \*6 (listing several regulations that require DEP to regulate possible pollution and alteration of hydrologic balance, which could result from changes in water now associated with full extraction mining).

124. See *id.* at \*2. The court commented "the Department does not have the authority under either the DSEA or the Clean Streams Law. . . ." *Id.*

125. See *Consol*, 2002 WL 31955394, at \*2-3 (explaining why these regulations do not extend to underground mining). "It is not, however, covered by the DSEA because it occurs beneath the watercourses, not in, along, across, or projecting into them." *Id.* at \*2.

126. See *id.* at \*4 (defining "discharge" as addition of any pollutant to surface waters from "point source"). "A 'point source' is any discernable, confined and discrete conveyance. The subsidence impacts of underground mining cannot be said to be an addition of pollutants to surface waters from a discernable, confined, and discrete conveyance." *Id.*

127. See *id.* at \*5. The court said "[w]e conclude that the water-protection regulations promulgated pursuant to the Clean Streams Law and codified in 25 Pa. Code Chapters 86 and 89 apply to the subsidence impacts of underground mining on waters of the Commonwealth." *Id.*

for permitting and regulating the subsidence impacts of underground mining.<sup>128</sup>

The EHB continued to interpret regulations to achieve its objectives, raising eyebrows in *Lucchino v. DEP*.<sup>129</sup> In *Lucchino*, the Supreme Court of Pennsylvania affirmed the EHB's controversial decision directing an appellant to pay a permittee's costs and attorney's fees pursuant to section 4(b) of SMCRA and section 307(b) of the Clean Streams Law.<sup>130</sup> The EHB decision was affirmed because the EHB was mindful of the necessity to balance the potential "chilling effect" of any grant of attorney's fees against an individual litigant and the willingness of citizens to bring suits along with the importance of protecting against frivolous suits.<sup>131</sup> The Court stated the EHB's findings as the following: (1) that appellant had no basis for his appeal and was essentially using the process to harass the DEP and the Permittee; and (2) that the appellant lacked standing, as he would in no way be affected by the permit he sought to challenge were sufficient to warrant the award.<sup>132</sup> The Court further noted the Environmental Protection-Strategic Lawsuits Against Public Participation Act, enacted after the Court's grant of allocatur, defined the standard for the award of attorneys fees for the EHB.<sup>133</sup>

### 3. Conclusion

When the DEP oversteps its delegated authority in issuing mining permits, the EHB is quick to restrain it.<sup>134</sup> The EHB, however,

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128. See *id.* at \*6 (rejecting Consol's attempt to limit this chapter).

129. 809 A.2d 264 (Pa. 2002).

130. See *id.* at 269 (noting SMCRA's language "clearly vests broad discretion in the EHB to award costs and counsel fees.").

131. See *id.* at 270 (emphasizing necessity of balancing requirements and importance of protections against bad faith suits).

132. See *id.* at 269 (explaining how record demonstrates that suit was brought to harass).

133. See *id.* at 270 (acknowledging legislature's consideration of attorney's fees); see also 27 PA. CONS. STAT. § 7708(c)(4)(ii) (Supp. 2003). This section states:

Recipients of awards. – Appropriate costs and fees incurred for a proceeding concerning coal mining activities may be awarded:

(4) To a permittee from any party where the permittee demonstrates that the party, in bad faith and for the purpose of harassing or embarrassing the permittee:

(ii) participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

*Id.*

134. See *Blose*, 2000 WL 294474 at \*15 (demonstrating EHB's ability to restrain DEP's issuance of mining permit).

does not always overrule DEP permits.<sup>135</sup> Rather, the EHB focuses on the effects and interpretations of mining regulations.<sup>136</sup> The EHB is also careful to review the effects of its regulatory interpretation on possible litigants and the environment.<sup>137</sup> When necessary, the EHB uses its authority to reinforce or limit DEP decisions, while simultaneously balancing litigants' environmental interests.<sup>138</sup>

## C. Regulatory Takings

### 1. Background

The United States Constitution provides "no person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>139</sup> Similarly, the Takings Clause in the Pennsylvania Constitution provides "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."<sup>140</sup> The Pennsylvania Constitution also stipulates that "the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment."<sup>141</sup> Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.<sup>142</sup> The Commonwealth, as a trustee of these resources, shall conserve and maintain them for the benefit of all the people.<sup>143</sup>

Initially, the Takings Clause only applied when there was a direct appropriation of private property for public use.<sup>144</sup> This changed when the United States Supreme Court decided, in *Penn-*

135. See *Birdsboro*, 795 A.2d at 449 (upholding DEP decision).

136. See *infra* notes 115-17 and accompanying text (demonstrating complex analysis which EHB undergoes when reviewing DEP's decisions to grant mining permits).

137. See *id.* (showing concern for how delay for full-extraction mining allows environmental effects to be evaluated).

138. See *Birdsboro*, 795 A.2d at 448-49 (approving DEP's actions); *Blose*, 2000 WL 294474 at \*15 (rejecting DEP's opinion).

139. U.S. CONST. amend. V.

140. PA. CONST. art. I, § 10.

141. *Id.* § 27 (outlining rights of Pennsylvania citizens).

142. See *id.* (demonstrating state's interest in supporting citizens' rights in takings cases).

143. *Id.* (asserting Commonwealth's role in conserving natural resources for people within its boundaries).

144. See Brittany Adams, *From Lucas to Palazzolo: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225, 227 (2001) (discussing takings prior to *Lucas*).



*sylvania Coal v. Mahon*,<sup>145</sup> that a government regulation of private property may result in a compensatory taking.<sup>146</sup> The Court explained that regulations could be so intrusive that they have the same result as a direct appropriation of property.<sup>147</sup> When these types of regulations went “too far,” private property was compensable under the Fifth Amendment.<sup>148</sup>

The Supreme Court elaborated on its principle of a regulation going “too far” in *Penn Central Transportation Co. v. New York City*.<sup>149</sup> The Court explained that there is no set formula in determining how far is too far; instead, a court should look at the facts in the particular case and “engage in essentially ad hoc, factual inquiries” for each case.<sup>150</sup> There are three factors to consider in making this determination: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the government action.<sup>151</sup>

Further, in *Lucas v. South Carolina Coastal Council*,<sup>152</sup> the Supreme Court defined two instances where a regulation was compensable without the necessity of balancing the public and private interests.<sup>153</sup> First, if the regulation requires the owner to suffer a permanent physical invasion of property, he should be compensated, regardless of how minor the intrusion is or the public pur-

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145. 260 U.S. 393 (1922).

146. *See id.* at 415-16. The Court acknowledged, “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go — and if they go beyond the general rule. . . .” *Id.*

147. *See id.* at 416. Justice Holmes advised that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Id.*

148. *See id.* at 415-16 (providing little guidance as to meaning of “too far”).

149. 438 U.S. 104, 123-28 (1978).

150. *Id.* at 124 (noting that whether particular restriction will be rendered invalid by government’s failure to pay for any loss proximately caused by it largely depends upon particular circumstances in that case). “In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance.” *Id.*

151. *See id.* The consideration of these three factors became known as the *Penn Central* balancing test. *See id.*

152. 505 U.S. 1003 (1992).

153. *See id.* at 1014-15 (stating that “[i]n 70-odd years of succeeding ‘regulatory takings’ jurisprudence [following *Mahon*], we have generally eschewed any ‘set formula’ for determining how far is too far, preferring to ‘engag[e] in . . . essentially ad hoc, factual inquiries.’”).

pose behind it.<sup>154</sup> Second, a regulation that denies all economically beneficial or productive use of the land will be considered a compensable taking unless the State can “identify background principles of nuisance and property law that prohibit the uses [the property owner] . . . intends in the circumstances in which the property is presently found.”<sup>155</sup> Finally, the Court stated that when all economic value of the property was not lost, the analysis should follow the guidelines set out in *Penn Central*.<sup>156</sup> Pennsylvania courts and the EHB apply these tests when determining whether a regulation is a compensable taking.<sup>157</sup>

## 2. Cases

*Machipongo Land and Coal Co. v. DEP* is the most recent example of the application of the takings analysis in Pennsylvania.<sup>158</sup> The Supreme Court of Pennsylvania was asked to determine whether the designation of land as unsuitable for mining (“UFM”), pursuant to section 4.5 of the Pennsylvania Surface Mining Conservation and Reclamation Act, was so unduly oppressive so as to constitute a taking.<sup>159</sup> The Supreme Court reversed the Commonwealth Court’s determination that a regulatory taking occurred when the EHB determined that certain property was unsuitable for mining under SMCRA.<sup>160</sup>

The Court’s remand order first required the Commonwealth Court to define the horizontal extent of the property including the surface and mineral rights.<sup>161</sup> Second, the Court directed the Com-

154. See Adams, *supra* note 144, at 241 (discussing other courts’ interpretations of *Lucas* decision).

155. *Lucas*, 505 U.S. at 1031. “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere . . . in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Id.* at 1029.

156. See *id.* at 1019-20, n.8 (noting when regulation does not constitute total taking, *Penn Central* test is appropriate inquiry).

157. For a further discussion of the application of the *Penn Central* and *Lucas* tests in the Pennsylvania courts, see *infra* notes 159-83 and accompanying text.

158. 799 A.2d 751 (Pa. 2002).

159. See *id.* at 761 (discussing appellant’s argument that EQB’s regulation constituted regulatory taking of coal rights).

160. See *id.* at 774 (declining to adopt blanket rule that would prevent subsequent owner from asserting taking claim). The Commonwealth Court held that the coal estate in the designated area could be considered separately from the rest of the land for purposes of taking analysis and held that the owners had been deprived of all reasonable use of this coal estate. See *id.* The Supreme Court held that such a “vertical” separation of the interest in land was improper for takings analysis. See *id.*

161. See *Machipongo*, 799 A.2d at 768-69. Factors to be considered in determining relevant parcel are, without limitation, the following:

monwealth Court to determine whether a taking occurred under a *Lucas* analysis.<sup>162</sup> Under this test, regulations that deprive an owner of all economically beneficial or productive use of land are takings unless the use constitutes a public nuisance or are caused by the nature of the use, and the owner could have expected that the government might prohibit it.<sup>163</sup> In addition, such a taking would not occur if state property law independently prohibited the use.<sup>164</sup> Previously, the Supreme Court held that the *Lucas* test was satisfied where evidence showed that an owner's surface rights had independent value.<sup>165</sup> Third, the Court required the Commonwealth Court to conduct a *Penn Central* analysis to determine whether the regulation was a taking because it forced some people to bear public burdens which in all fairness and justice should be borne by the public.<sup>166</sup>

Finally, the Court's order required the Commonwealth Court to determine whether the proposed use was a nuisance or violation of state property law.<sup>167</sup> The Court stated that even if the proposed regulation prohibited all economically beneficial use of the land, there would be no taking if the use could be abated or prohibited by general principles of state property law.<sup>168</sup> The Court observed

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unity and continuity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owners investment backed-expectations; . . . and, the landowner's plans for development.

*Id.*

162. *See id.* at 769 (remanding case because record was unclear as to whether some owners of coal estate also owned surface estate).

163. *See id.* at 769-70 (citing *Lucas* and explaining process to conduct *Lucas* analysis).

164. *Id.* (citing *Lucas*, 505 U.S. at 1027).

165. *See id.* at 769-70 (holding because regulation does not deny property owners all economically beneficial use of property, regulation not considered taking under *Lucas* test).

166. *See Machipongo*, 799 A.2d at 775 (regarding issue of nuisance, case remanded to Commonwealth Court for traditional *Penn Central* taking analysis to determine if "property owners' activities would unreasonably interfere with . . . public right to unpolluted water[s]").

167. *See id.* at 775 (finding that without expert technical study, further mining in UMF area had (1) high potential to cause increases in dissolved solid and metal concentrations in Gross Run adversely affecting use of stream as auxiliary water supply; or (2) had significant potential to disrupt hydrolytic balance causing decreases in net alkalinity of discharges, destroying wild trout habitat). In addition, the court lacked authority to prevent property owners from mining the land. *See id.*

168. *See id.* at 774-75 (determining that "government is not required to pay property owners to refrain from taking action on their land which would have the effect of polluting public waters.").

that an acceptable use present when the property was purchased may become unacceptable over time; as a result, the owner's expectations of the lawfulness of that use may no longer be reasonable.<sup>169</sup> Referring to the common law of nuisance and the provisions of the Clean Streams Law defining a nuisance, the Court said that if the owner's proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation.<sup>170</sup>

The EHB adopted the *Machipongo* takings analysis in *Davailus v. DEP*.<sup>171</sup> For years, the *Davailus* claimants lawfully harvested peat from wetlands on their property.<sup>172</sup> In 1991, however, the EHB upheld the DEP's denial of the claimants' permit application, and the EHB upheld that denial in an adjudication.<sup>173</sup> On appeal, the Court of Common Pleas transferred the case to the EHB for determination of whether there had been a compensable taking as a result of the permit denial; the EHB held that no compensable taking occurred.<sup>174</sup> The EHB defined the property in question as the claimants' entire parcel, not merely the subset of wetlands on the parcel that were affected by the permit denial.<sup>175</sup> This was not a *Lucas* taking because the permit denial left the claimants with property that had already provided, and continued to retain, substantial value.<sup>176</sup> In its *Penn Central* analysis, the EHB found that the permit denial was not unduly oppressive because it only interfered with some of the claimants' investment-backed expectations.<sup>177</sup> In denying the permit, the EHB was careful to follow the *Machipongo* tak-

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169. See *id.* at 773 (determining that reasonableness of property owner's proposed mining is factual inquiry, but when proposed mining might unreasonably interfere with right of general public, it is issue of law).

170. See *id.* at 775 (concluding, "[i]ndeed, despite our conviction that private property rights are to be strongly protected, we are struck by the impropriety of taking action that would require the General Assembly to pay someone not to pollute public water or destroy public fisheries.").

171. No. 96-253-L, 2003 WL 360512 (Pa. Env. Hrg. Bd. Feb. 6, 2003).

172. See *id.* at \*6. In the mid-1980s, the Department advised the claimants that they would need to stop further harvesting unless they obtained an encroachments permit. See *id.*

173. See *id.* (citing *Davailus v. DEP*, 1991 EHB 1191) (explaining procedural history).

174. See *id.* (reaching this conclusion because claimants' peat operation would not necessarily have violated state law or constituted nuisance).

175. See *id.* at \*18 (defining entire area as parcel against which takings tests are to be applied).

176. See *Davailus*, 2003 WL 360512 at \*24. "Unless the governmental action deprives the landowner of all economically beneficial use of its property, it does not constitute a *Lucas* taking." *Id.*

177. See *id.* at \*27-31. The claimants were permitted to remove a significant portion of the peat from the property prior to the permit denial, the property has

ings analysis in conjunction with the environmental concerns about the wetlands.<sup>178</sup>

### 3. Conclusion

In *Davailus*, the EHB strictly adhered to the *Penn Central* and *Lucas* takings analysis outlined in *Machipongo*.<sup>179</sup> The Supreme Court's decisions provided heavy precedent for all courts to follow, including the EHB. Moreover, in *Machipongo*, the EHB demonstrated how to analyze parcels of land as a single entity and not separate vertical or horizontal tracts, and outlined all the steps necessary to conduct a takings analysis.<sup>180</sup> In *Davailus*, this analysis was significant because it led to a determination that there was no taking, which meant that the permit denial was not unreasonable.<sup>181</sup> While the EHB relied on its own interpretation of state regulations in determining whether to grant or deny permit applications, the *Machipongo* analysis was significant in the *Davailus* court's determination that a taking had not occurred.<sup>182</sup> The *Davailus* court determined that the individual tracts of land constituted one parcel and, therefore, under the *Lucas* and *Penn Central* analysis, no taking had occurred, and the permit denial was lawful.<sup>183</sup>

## D. Sewage

### 1. Background

The Pennsylvania Sewage Facilities Act (SFA)<sup>184</sup> and its regulations provide the DEP with the ability to regulate all aspects of

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provided and retains substantial value, and the permit denial promoted the vital public interest in the preservation of wetlands habitat. *See id.*

178. *Id.* at \*31 (commenting "[t]here is simply no question here that the permit denial was reasonably related to the protection of the general welfare, and that the general welfare was promoted by preventing the irreversible loss of valuable wetlands habitat and the species that rely on that habitat.").

179. *See id.* at \*24-31 (discussing *Lucas* and *Penn Central* and following the Pennsylvania Supreme Court's analysis in *Machipongo*).

180. For a further discussion of the Supreme Court's holding in *Machipongo*, see *supra* notes 158-70 and accompanying text.

181. For a further discussion of the EHB's holding in *Davailus*, see *supra* notes 171-78 and accompanying text.

182. *See Davailus*, 2003 WL 360512 at \*12 (using exact language from *Machipongo* to begin discussion and then continuing to defer to *Machipongo's* precedent).

183. For a further discussion of the EHB's holding in *Davailus*, see *supra* notes 171-78 and accompanying text.

184. Sewage Facilities Act of Jan. 24, 1966, P.L. 1535, No. 537 (1965), as amended; 35 P.S. § 750.1 et seq.

Pennsylvania's sewage facilities.<sup>185</sup> In addition to planning requirements, the Act also outlines on-lot septic system design and construction requirements.<sup>186</sup> The SFA authorizes the DEP to manage subdivisions from two-lot developments to complex commercial projects.<sup>187</sup> Although its primary focus is sewage facilities planning, the SFA also deals with environmental considerations such as wetlands impact, historic resources and endangered species.<sup>188</sup> To obtain the DEP's approval under SFA, a sewage facility must resolve potential environmental harms.<sup>189</sup>

SFA requires each municipality in the state to employ a current, comprehensive sewage facilities plan and ensure its implementation.<sup>190</sup> In addition, SFA requires each official plan to define municipal areas where community sewage systems exist, or are planned within the next ten years and to identify areas experiencing sewage problems.<sup>191</sup> Additional requirements include: (1) identifying wetlands in the planning areas; (2) providing a map analysis of soils and geologic features; and (3) identifying sources of potable water supply, including aquifer yield for ground water supplies.<sup>192</sup> The DEP has broad authority under SFA "to issue orders, to revoke permits and to approve or deny plan revision requests."<sup>193</sup>

To review an official plan, the DEP must either perform or review an environmental assessment which meets the requirements of article I, section 27 of the Pennsylvania Constitution.<sup>194</sup> In *Payne v.*

185. Eugene E. Dice, *Sewage Facilities*, PENNSYLVANIA ENVIRONMENTAL LAW & PRACTICE (Terry R. Bossert & Joel R. Burcat eds., 1999) (noting Act establishes broad-ranging planning requirements be implemented by every municipality).

186. *See id.* (including septic systems for private residences and other commercial projects).

187. *See id.* (providing for multi-use commercial/residential projects).

188. *See id.* (noting review and approval by DEP are necessary).

189. *See id.* (opining power to regulate land development more significant than local regulation under Municipalities Planning Code); *see also* 25 PA. CODE § 71.21(a)(5) (2000). The Environmental Quality Board adopted changes to chapters 71 and 73 of Title 25 of the Pennsylvania Code, comprising the Sewage Facilities Act regulations in November 1997. *See id.*

190. *See Dice, supra* note 185, at 122 (noting that plan is often referred to as "Official Plan" or "537 Plan").

191. *See id.* (opining all existing or approved subdivisions must be located within plan).

192. *See id.* (noting plan must also have time schedule, proposed methods of financing any planned community sewage systems, and be approved by appropriate municipal planning agencies, including one with area-wide jurisdiction).

193. *See id.* at 132 (outlining DEP's authority to revoke or suspend sewage enforcement officer for cause).

194. *See id.* at 137 (noting Environmental Amendment held to be self executing, *citing* DER v. National Gettysburg Battlefied Tower, Inc., 302 A.2d 886 (Pa. Commw. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973)).

*Kassab*,<sup>195</sup> the EHB established a three-pronged test for agency review of projects that may adversely affect the environment.<sup>196</sup> First, the project must comply with all laws and regulations protecting natural resources.<sup>197</sup> If the project complies with the first prong, the EHB must determine whether the project would result in any adverse environmental impact.<sup>198</sup> Finally, if any environmental impact remains after minimizing original impacts, the agency must perform a balancing analysis.<sup>199</sup> The analysis serves to “determine whether the social and economic benefit of the project outweighs the potential environmental harm.”<sup>200</sup> The DEP must independently verify compliance, and cannot rely on the discretion of the municipality.<sup>201</sup>

## 2. Cases

In *Wurth v. Commonwealth*, a permittee and the City of Bethlehem entered into a purchase agreement to buy the Bethlehem Landfill from the city.<sup>202</sup> The permittee submitted an application and was granted a reissuance of the solid waste disposal permit for the Bethlehem Landfill.<sup>203</sup> Appellants then filed a notice of appeal, which listed twelve objections to the permit’s reissuance.<sup>204</sup> The EHB permitted the City of Bethlehem to intervene.<sup>205</sup> After the

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195. 312 A.2d 86, 97 (Pa. Commw. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976) (holding street-widening project necessitating taking half acre of River Commission was permissible).

196. *See Dice*, *supra* note 185, at 137 (noting three prong test encompasses all environmental state agencies and test is applicable to all plan revisions); *see also Payne*, 312 A.2d at 94 (discussing three-prong test).

197. *See Dice*, *supra* note 185, at 137 (asserting “consistency requirements” create method of encouraging project consistency with other environmental laws and standards); *see also Payne*, 312 A.2d at 94 (discussing first prong of test).

198. *See Dice*, *supra* note 185, at 137 (noting if such adverse impact exists, it must be minimized); *see also Payne*, 312 A.2d at 95 (discussing second prong of test).

199. *Payne*, 312 A.2d at 96 (discussing third prong of test).

200. *See Dice*, *supra* note 185, at 137 (describing Sewage Facilities Act).

201. *See id.* (reporting failure to do so could result in reversal as matter of law).

202. No. 98-179-MG, 2000 WL 294469, at \*1 (Pa. Env. Hrg. Bd. Feb. 29, 2000) (reissuing permit to permittee on July 17, 1998).

203. *See id.* (explaining application submitted pursuant to Solid Waste Management Act, PA. STAT. ANN. tit. 35 §§ 6018.101-6018.1003 (2003) (originally enacted as Act of July 7, 1980, PA. PUB. L. No. 380)).

204. *See id.* Appellants seek judgment in their favor on each of their objections to the action of the DEP. The permittee seeks dismissal of the appeal on the basis that none of the appellants have standing to appeal and also seeks judgment in its favor on each of the objections raised by the appellants. *See id.*

205. *See id.*

close of discovery, the permittee and the appellants filed motions for summary judgment.<sup>206</sup>

The EHB noted that summary judgment is appropriate only in cases where there is no genuine issue of material fact.<sup>207</sup> "To prove that there are no material facts in dispute, the moving party must support its factual averments with evidence from the record."<sup>208</sup> Further, a non-moving party bears the burden of resisting a motion for summary judgment.<sup>209</sup> Noting these standards, the EHB considered the motions, and denied the third party appellants' motion for summary judgment.<sup>210</sup> Appellants failed to demonstrate a direct injury to one of their interests.<sup>211</sup> Consequently, the EHB granted the permittee's motion seeking dismissal of the appeal.<sup>212</sup>

The appeal filed in *Dauphin Meadows, Inc. v. DEP*<sup>213</sup> dealt with a request for site modification that arose from the denial of Dauphin Meadows, Inc.'s application for a permit to expand its township landfill.<sup>214</sup> The guidance document filed by Dauphin Meadows had to prove that the benefits of landfill expansion clearly outweighed

206. *See id.* at \*1-2 (explaining EHB's consideration of motions for summary judgment governed by Pennsylvania Rules of Civil Procedure, 25 PA. CODE §§ 1035.1-1035).

207. *See Wurth*, 2000 WL 294469 at \*2 (expressing moving party has heavy burden to demonstrate it is clearly entitled to judgment in its favor as matter of law); *see also* *Kilgore v. City of Philadelphia*, 717 A.2d 514, 515-16 (Pa. 1998) (noting judgment only granted in clearest cases which are free from doubt).

208. *See Wurth*, 2000 WL 294469 at \*2. "The record for the purposes of summary judgment is defined as the pleadings, depositions, answers to interrogatories, admissions and affidavits as well as signed reports of expert witnesses." *Id.*

209. *See id.*

A party may not simply rest upon the allegations or denials of the pleading but must file a response clearly identifying one or more issues of fact arising from evidence in the record which controverts the evidence cited in support of the motion, and shows that there is genuine issue for hearing.

*Id.*

210. *See id.* at \*2-9 (considering motions).

211. *See id.* at \*1 (expressing DEP failed to appropriately consider compliance history of permit applicant, county and sub-county waste plans, recycling provisions, leachate storage, needs analysis, environmental assessment and public notice and comment).

212. *See id.* "There is insufficient evidence in the record which shows that the permit reissuance caused a direct injury to an interest of the individual and organizational appellants." *Id.* Further, the court noted that general interest in protecting the environment without demonstrating specifically how interest is impacted cannot support standing. *See id.* at \*11 (*citing* *Chestnut Ridge Conservancy v. DEP*, 1997 EHB 45).

213. *See Dauphin Meadows v. DEP*, No. 99-190-L, 2000 WL 509409 (Pa. Env. Hrg. Bd. Apr. 27, 2000).

214. *See id.* at \*1 (explaining events preceding appeal).



the harms of expansion.<sup>215</sup> In analyzing this document, the DEP used a balancing test.<sup>216</sup> The EHB determined that reliance on a balancing test was improper. The EHB remanded the permit application for further review, which would not rely on the document's balancing test.<sup>217</sup> The EHB denied Dauphin's appeal because Dauphin Meadows failed to demonstrate that departure from the regulations in effect at the time of the DEP's final action was appropriate.<sup>218</sup>

In *Ainjar Trust v. Commonwealth*,<sup>219</sup> the EHB denied an appeal by a neighboring landowner who objected to the approval of a sewage planning module for a residential housing development.<sup>220</sup> Specifically, the EHB held that the appellant failed to prove that environmental harm would result from the plan's approval.<sup>221</sup> The EHB modified the DEP's approval, deleting reference to thirty equivalent dwelling units (EDUs) for a clubhouse that had been eliminated from the development plan prior to its review.<sup>222</sup> Provided that the regulation gave adequate public participation and knowledge of the proposal, the proposed module was sufficient.<sup>223</sup>

In *Eisenhardt v. DEP*,<sup>224</sup> the EHB addressed the issue of temporary sewage measures, denying a sewage facility's planning module.<sup>225</sup> Specifically, the module proposed using holding tanks as an interim method of sewage disposal for a commercial land development project until the expansion of a sewage treatment plant.<sup>226</sup>

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215. See *id.* (noting benefits did not clearly outweigh cumulative effect of known and potential environmental harms).

216. See *id.* (noting "[DEP] found that Dauphin Meadows had failed [ ] balancing test").

217. See *id.* (granting motion for summary judgment).

218. See *Dauphin Meadows*, No. 99-190-L, 2000 WL 509409 at \*1 (expressing that ruling does not require permittee to affirmatively demonstrate that benefits clearly outweigh harms).

219. No. 99-248-K, 2001 WL 1335018 (Pa. Env. Hrg. Bd. Oct. 10, 2001) (refusing to shift burden to appellee DEP and intervener housing developer).

220. See *id.* at \*1. The tract is commonly referred to as "Margaret's Grove". See *id.* at \*11.

221. See *id.* at \*15 (concluding, "even if the plan is deficient and needs revision, section 71.32(f)(3) provides that a new module is not required to be denied on that basis.").

222. See *id.* at \*35 (pending appeal with Commonwealth Court).

223. See *id.* (conveying that module is consistent with Department's Chapter 94 Municipal Wasteload Management regulations, and public notice/public participation concerning module was adequate).

224. No. 2000-109-MG, 2001 WL 681292 (Pa. Env. Hrg. Bd. June 4, 2001).

225. See *id.* at \*1.

226. See *id.* "Department's regulations for new land development planning require that the planning [documents] include a 'written commitment' from the owner of the sewage facilities to provide service to the proposed project." *Id.*

The sewage facility's planning module was remanded to the DEP because the plan lacked the proper commitment to provide sewage disposal upon completion of a sewage treatment plant expansion.<sup>227</sup> The EHB held that neither planning documents from the water authority's engineer nor the module's intention to provide the required sewage service was sufficient.<sup>228</sup>

In *Stevens v. DEP*,<sup>229</sup> an appeal brought by landowners living adjacent to a sewage sludge site, the EHB upheld the procedures and standards the DEP used to review the site's suitability.<sup>230</sup> The EHB rejected the argument that the site could not be reviewed in accordance with procedures applicable under the general permit for the beneficial use of sludge.<sup>231</sup> A precise determination of the amount of sludge previously applied to the site was impossible, but the permittee was granted use of the site because it was adequately investigated.<sup>232</sup> Stevens' failed attempt to question the procedure by which the DEP regulated sewage sludge makes this case significant.<sup>233</sup>

In *Perkasie Borough Authority v. DEP*,<sup>234</sup> the EHB granted a joint motion for partial summary judgment in a case involving two local municipal sewage treatment facilities.<sup>235</sup> Although involved in an inter-municipal agreement to contract their sewage treatment to a regional facility, Perkasie attempted to establish its own facility.<sup>236</sup>

227. *See id.* (including interim use of holding tanks for commercial real estate development).

228. *See id.* at \*6. The owner of receiving sewer must provide Department with some sort of pledge that sewage service will be provided for proposed project. *See id.*

229. No. 2000-030-L, 2002 WL 407774 (Pa. Env. Hrg. Bd. Mar. 7, 2002).

230. *See id.* at \*9 (conveying Stevens failed to show by preponderance of evidence that Department's approval of use of WTMA farm was unlawful or otherwise unreasonable and inappropriate).

231. *See id.* (opining regulations expressly authorize general permits).

232. *See id.* (expressing Stevens bore burden of proving by preponderance of evidence that DEP acted unlawfully in approving use of WTMA farm for land application of Authority's sewage sludge).

233. *See id.* at \*4 (discussing site review procedure).

Among other things, the Stevens contend that the Department lacks authority to issue letter approvals for the use of a specific site, and even if the Department has the requisite authority, such letter approvals are actually permits that should be, but are not, issued in accordance with all of the regulatory requirements applicable to the issuance of permits under statute or regulation.

*Id.*

234. No. 2001-267-K, 2002 WL 31114993 (Pa. Env. Hrg. Bd. Sept. 17, 2002).

235. *See id.* at \*1.

236. *See id.* (noting municipal water organizations Hilltown Township Water and Sewer Authority (HTWSA) and Perkasie Borough Authority (PBA) as representative parties).

The EHB determined that the appellant was precluded from asserting that the facility was unnecessary, and pursuant to the doctrine of administrative finality they were unable to succeed.<sup>237</sup> Instead, the EHB found that the sewage should be directed to the existing treatment plant where the Act 537 Sewage Facilities Plan provided for the new plant's construction and the Part I/NPDES permit had already been granted.<sup>238</sup> In addition, the EHB denied appellant's cross-motion for summary judgment alleging that the contemplated plant would not meet its permitted effluent limitations.<sup>239</sup>

### 3. Conclusion

In *Patterson v. DEP*,<sup>240</sup> the DEP approved a sewage facility's plan submitted under SFA despite its inconsistency with the local comprehensive plan.<sup>241</sup> In *Patterson*, the EHB determined that local comprehensive plans are "abstract and recommendatory" and "unreasonable."<sup>242</sup> The Commonwealth Court affirmed the EHB's ruling by holding that under DEP regulations, county plans should be considered only advisory.<sup>243</sup> The Commonwealth Court's rationale in *Patterson* may become problematic for local municipalities.<sup>244</sup> Due to inconsistent standards set by state and federal agencies, local plans designed for local municipalities may set more rigid standards of safety and efficiency.<sup>245</sup> Outlining a "clear inconsistency"

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237. *See id.*

238. *See id.* (noting appeal of facility's Part II/Water Quality Management Permit). The complaint "was allegedly based on the erroneous conclusion in 1993 that the Pennridge [sewage] facilities were suffering from [overload]." *Id.* at \*12.

239. *See Perkasi*, 2002 WL 31114993 at \*13 (expressing cross-motion for summary judgment focuses in part on erroneous argument that DEP inappropriately approved for construction of new water treatment plant and better sewage facilities planning, which calls for use of existing Pennridge facilities).

240. No. 94-347MR, 1996 WL 273901 (Pa. Env. Hrg. Bd. May 14, 1996).

241. *See Dice*, *supra* note 185, at 127.

242. *See id.* (noting local plans subservant to state guidelines). EHB held that sewage facility plan revisions cannot be terminated by a comprehensive plan set forth by local township or county. *See id.*

243. *See County of Adams v. DEP*, 687 A.2d 1222, 1225 (Pa. Commw. Ct. 1997) (citing holding).

244. *See generally* Ellen Z. Harrison & Malaika M. Eaton, *The Role of Municipalities in Regulating the Land Application of Sewage Sludge and Septage*, 41 NAT. RESOURCES J. 77 (Winter 2001).

245. *See id.* "As a result of concern over the inability of state and federal agencies to provide consistent enforcement of rules . . . local ordinances frequently supply enforcement provisions." *Id.* at 77.

between plans may result in municipalities encountering unfit facilities that do not meet local needs.<sup>246</sup>

Many of the sewage cases the EHB reviewed dealt with a general perceived harm stemming from lack of specific harm and speculation on future harm.<sup>247</sup> By enforcing stricter statewide information requirements, commonwealth citizens become more knowledgeable of the potential for future harm, allowing the EHB to rule more on cases involving actual harm. This would reduce the number of frivolous cases brought by uninformed citizens alleging perceived harms, and provide local municipalities with more leeway for more localized regulation, encouraging an efficient level of localized participation.<sup>248</sup>

## E. Procedure

### 1. Background

The EHB has the authority to adopt rules of practice and procedure for its proceedings.<sup>249</sup> The EHB Rules Committee advises the EHB on proposed rules.<sup>250</sup> Rules and regulations are established by a majority vote of the EHB members, and are subject to the provisions of the Commonwealth Documents Law,<sup>251</sup> the Regulatory Review Act<sup>252</sup> and Commonwealth Congressional Committees.<sup>253</sup> Rules relating to the commencement of appeals, expert

246. See Dice, *supra* note 185, at 128; see also generally *Talbot County, Md. v. Skipper*, 620 A.2d 880 (Md. 1993) (noting several states with lesser home rule allowances denied municipalities full authority in arenas such as Pennsylvania).

247. See generally *supra* note 230 and accompanying text; see also generally *supra* note 225 and accompanying text.

248. See Harrison, *supra* note 244, at 79 (conveying states have adopted laws that preclude municipalities from exceeding state standards); see also William Goldfarb et al., *Unsafe Sewage Sludge or Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals*, 26 B.C. ENVTL. AFF. L. REV. 687, 713-17 (1999).

249. See *id.*; see also 25 PA. CODE § 1021.1 a-d (2002).

250. See generally Dice, *supra* note 185 (noting committee established by EHB Act 35 PA. CONS. STAT. § 7515(a) (2002)). The rules committee has nine members and meets bi-monthly. Members include the Chairman of the EHB, sitting ex officio; three members appointed by the General Assembly; two members appointed by the Secretary of DEP; two members appointed by the governor, upon recommendation of the Pennsylvania Bar Assoc.; and one member appointed by DEP's Citizens Advisory Council.

251. The Act of July 31, 1968 PA. LAWS 769, as amended, 45 PA. CONS. STAT. § 1201 1-5 (2002).

252. The Act of June 25, 1982 PA. LAWS 633, as amended, 71 PA. CONS. STAT. § 745.1 et seq.

253. See Woefling, *supra* note 36 (outlining review by House and Senate Environmental Resources and Energy Committee).

reports and burden of proof, are some examples of the EHB's flexible procedural standards.<sup>254</sup>

## F. Standing

### 1. Background

Standing is defined as "a party's right to make a legal claim or seek judicial enforcement of a duty or right."<sup>255</sup> For an appellant to have standing, he must satisfy the "aggrieved party" test set forth in *William Penn Parking Garage v. DEP*.<sup>256</sup> Under a *William Penn* analysis, a party has standing if their interest is impacted in a substantial, direct and immediate manner.<sup>257</sup> Further, a direct interest "means that the person claiming to be aggrieved must show causation of the harm to their interest by the matter of which they complain."<sup>258</sup>

### 2. Cases

In *Smedley*, the EHB held that a person exposed to air emissions emanating from a paper manufacturing plant had standing.<sup>259</sup> *Smedley* appealed the DEP's grant of a minor modification to an operating permit allowing the paper manufacturing plant to add a component of tire-derived fuel for its two boilers.<sup>260</sup> The EHB ruled against the appellant because of his failure to demonstrate that the minor modification would increase the emissions of any contaminant.<sup>261</sup> The appellant was unsuccessful in his overall claim

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254. See *id.* at 606-08 (stating official notice, termination of proceedings, and composition of certified record on appeal also added).

255. BLACK'S LAW DICTIONARY 661 (2d pocket ed. 2001).

256. See *Smedley*, 2001 WL 178234, at \*18 (Pa. Env. Hrg. Bd. Feb. 8, 2001) (citing *William Penn Parking Garage v. DEP*, 346 A.2d 269, 280 (Pa. Commw. Ct. 1975)).

257. See *William Penn Parking Garage*, 346 A.2d at 280 (Pa. Commw. Ct. 1975). "[T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance — there must be some discernable adverse effect to some interest other than the abstract interest of all citizens, in having others comply with the law." *Id.* at 282.

258. See *id.* The record demonstrates that *Smedley* met the aggrieved party standing test outlined in *William Penn Parking Garage*. See *id.*

259. See *Smedley*, 2001 WL 178234 at \*15 (explaining EHB protects procedural due process rights of persons who allege and can prove they were adversely affected by action of DEP).

260. See *id.* at \*20-21 (conveying that *Smedley's* expert witness testimony ultimately failed to convince EHB that there would be increase in dioxin emissions resulting from modification).

261. See *id.* at \*18-19 (noting record showed *Smedley* was exposed to and came into contact with emissions from IP plant and was within "zone of interests").

against the plant because he was unable to fulfill his preponderance burden, not for lack of standing.<sup>262</sup>

In *Triggs v. DEP*,<sup>263</sup> the EHB denied a motion for summary judgment based on standing in an appeal from the DEP's issuance of a natural gas plan approval under the Air Pollution Control Act.<sup>264</sup> The appellant's comments in the public participation process prior to the plan's approval indicated that he thought he had a reasonable, real-world concern that he would be adversely affected by the DEP's action.<sup>265</sup> The EHB found that the appellant possibly had a direct and immediate interest because he lived approximately fifty miles from the facility, and wind carries ozone far from its original source.<sup>266</sup> The EHB believed the standing provision was a legislative exception to traditional standing principles where the person had a "reasonable real-world concern that he will be adversely affected by the Department's action."<sup>267</sup>

In *Ziviello v. Commonwealth of Pa. State Conservation Commission*,<sup>268</sup> the EHB denied two summary judgments filed in an appeal of the approval of a plan to develop and operate a hog farm.<sup>269</sup> The EHB ruled that the third-party appellants had standing where appellants alleged that the permittees' conduct could potentially cause illness from misapplication of manure or incorrect nitrogen concentration estimates, and could cause groundwater contamina-

262. See generally *id.* (outlining Smedley's inability to demonstrate minor modification would negatively affect his interests).

263. No. 2000-240-MG, 2001 WL 543872 (Pa. Env. Hrg. Bd. May 3, 2001).

264. See *id.* at \*1 (challenging DEP's determination of emission limits for Nitrous Oxides, volatile organic compounds (VOCs), carbon oxides and hazardous air pollutants).

265. See *id.* at \*2 (expressing that persons who participated in "public comment process for plan approval or permit shall have the right, within [thirty] days from actual or constructive notice of the action, to appeal the action to the Hearing Board."). The court also noted that appellant's place of residence was fifty miles away from and downwind of plant. *Id.* at \*3.

266. See *id.* at \*3.

It is not clear whether the special standing provision in the Air Pollution Control Act should be considered to be completely amendatory of the Environmental Hearing Board Act, or whether these provisions must somehow be read together to impose the requirements that the Appellant demonstrate that he will be adversely affected by the Department's action.

*Id.* (quoting EHB).

267. See *id.* (denying motion for summary judgment).

268. No. 99-185-R, 2000 WL 1177682 (Pa. Env. Hrg. Bd. July 31, 2000).

269. *Id.* at \*1-2 (noting permittees claimed lack of standing). "Appellants did not plead any facts in their Notice of Appeal that alleged substantial, direct, and immediate interests." *Id.* at \*3.

tion and runoff onto property frequented by the appellants.<sup>270</sup> The EHB noted that the family whose residence is located beside a manure importer listed on the plan, and two tracts scheduled to receive manure from the proposed hog farm, had a substantial interest.<sup>271</sup>

In *Wurth*, the EHB granted the permittee's motion seeking dismissal of the appeal because it found that the appellants lacked standing.<sup>272</sup> The EHB opined that appellants failed to sustain their burden of showing they deserved a judgment in their favor, which concerned allegations that DEP failed to appropriately consider the compliance history of the landfill permit applicant.<sup>273</sup> The EHB determined that the evidence did not conclusively show that the permit reissuance caused a direct injury to the appellants' interest.<sup>274</sup> A primary issue in this case, as with other standing cases, evolved out of the appellants' generalized grievances.<sup>275</sup>

### 3. Conclusion

Under the National Environmental Policy Act of 1969 (NEPA),<sup>276</sup> the requirements for standing are less stringent than those enforced by the EHB.<sup>277</sup> Under NEPA, the "injury in fact" requirements are adjusted for plaintiffs raising procedural issues.<sup>278</sup> While plaintiffs must show a "concrete interest" at stake, they do not need to show an imminent substantive environmental harm.<sup>279</sup>

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270. See *id.* at \*3 (noting record demonstrates risks to appellants). The EHB rules do not require an appellant "to aver facts sufficient to show he or she has standing" in the notice of appeal. See *id.* (noting EHB standing rule).

271. See *id.* (stating proposed hog farm would be 300 yards from residence).

272. See *Wurth v. DEP*, No. 98-179-MG, 2000 WL 294469, at \*1 (Pa. Env. Hrg. Bd. Feb. 29, 2000) (expressing insufficient evidence to demonstrate permit reissuance would cause direct injury to interest of appellants).

273. See *id.* (explaining why summary judgment denied).

274. See *id.* (citing court's conclusion). The permittee argued that because the whole city of Bethlehem shared appellants' interests, those interests were too broad to be substantial under *William Penn* test. *Id.* at \*11.

275. See generally *id.* EHB noted that "[e]ach of the interests articulated by the Appellants are those which affect them as citizens rather than as individuals and as such are best addressed by the legislative process rather than by the judicial process." *Id.* at \*11.

276. 42 U.S.C. § 4331 (1994) (outlining standing requirement).

277. See *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (establishing necessary standing requirements for individuals asserting claims of locations suffering environmental impact).

278. See *id.* at 679 n.3 (noting plaintiffs must still show "concrete interest").

279. See *id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992). "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for . . . immediacy.").

The Supreme Court interpreted “imminent” to mean that injury is “certainly impending,” which in some cases has been loosely construed to mean “in this lifetime.”<sup>280</sup> The Constitution’s Article III “standing” clause also adjusted the “injury in fact” requirement for environmental plaintiffs raising procedural issues.<sup>281</sup> In linking the petitioner with the proposed action, the EHB adheres to standing’s imminence requirement more strictly than other courts.<sup>282</sup>

The district court in *Cantrell v. City of Long Beach* held that “injury in fact” requirements adjusted for plaintiffs raising procedural issues.<sup>283</sup> The court also found that a bird watching group’s “zone of interest” protected by NEPA included preserving the historic buildings and natural environment of an old navy yard, and preventing adverse environmental effects from the buildings’ proposed location.<sup>284</sup> The court noted that a plaintiff asserting a procedural injury must show that “‘the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.’”<sup>285</sup>

## G. Intervention

### 1. Background

Section 4(e) of the EHB Act allows “any interested party” to intervene in a matter pending before the EHB.<sup>286</sup> The Commonwealth Court interpreted section 4 to require an intervening party to demonstrate the EHB’s determination will financially impact them.<sup>287</sup> Flowing directly from the issue of standing, a party may intervene in an EHB proceeding if their interests are “substantial, direct, and immediate.”<sup>288</sup> Petitions to intervene require petitioner

280. See *Lujan*, 504 U.S. at 564 n.2 (discussing meaning of imminence).

281. See *Cantrell*, 241 F.3d at 679, n.3 (noting adjustment for procedural issues).

282. See *infra* note 301 and accompanying text (including “substantial and direct” and “immediate” as prerequisites for imminence).

283. See *Cantrell*, 241 F.3d at 679 n.3 (citing *Lujan*, 504 U.S. at 572 n.7). “[O]ne living adjacent to the site. . . of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement. . . even though the dam will not be completed for many years.” *Id.*

284. See *id.* at 679 (citing 42 U.S.C. § 4331(b)(4)).

285. See *id.* (citing *Lujan*, 504 U.S. at 573 n.8 (quoting text)).

286. 35 PA. CONS. STAT. ANN § 7514(e) (2003) (setting out jurisdictional requirements).

287. See 35 PA. CONS. STAT. ANN § 7514(e) at n.14 (noting test similar to “standing” on appeal).

288. See *Connors v. State Conservation Comm’n*, No. 99-138-L, 1999 WL 695262 at \*2 (Pa. Env. Hrg. Bd. Aug. 20, 1999) (noting citizens’ group was allowed to intervene on appeal). *Id.* at \*3.



to state the reasons behind intervention, including: (1) why its interests are greater than those of the general public, (2) how its interests will be affected by the EHB's decision, and (3) issues of evidence or legal arguments which will be presented.<sup>289</sup> The EHB's order granting intervention may specify the issues as to which intervention is allowed, but need not enlarge other appellate issues.<sup>290</sup> A party wishing to intervene should carefully consider their role in the proceeding, because all intervenors are treated as any other party once intervention is granted, and must adhere to the EHB's ruling and comply with its orders.<sup>291</sup>

## 2. Cases

The EHB outlined the general principles required for petitions to intervene in *Consol Pa. Coal Co. v. DEP*.<sup>292</sup> In *Consol Pa. Coal*, the EHB denied without prejudice a conservation group's petition to intervene because the group's petition was not verified.<sup>293</sup> Section 4(e) of the EHB Act<sup>294</sup> permits any interested party to intervene in any matter pending before the EHB.<sup>295</sup> The party seeking intervention must stand to gain or lose because of the EHB's determination.<sup>296</sup> The case is important because it reinforces the principle that an individual has standing, and is entitled to intervene, if that individual is among those who have been, or are likely to be, adversely affected.<sup>297</sup>

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289. See *id.* at \*2 (noting organizational standing requires involvement of at least one of organization's members).

290. See *id.* at \*4 (stating why argument might be precluded).

291. See generally *id.* (opining intervention is not means to raise new issues). *Id.* at \*4.

292. No. 2002-112-L, 2002 WL 31355282 at \*2 (Pa. Env. Hrg. Bd. Oct. 10, 2002) (noting *Consol* argued right to intervene was not present). *Id.* at \*1.

293. See *id.* at \*3 (noting *Consol* argued that citizens' group does not have sufficient interest in proceeding). *Id.* at \*1.

294. 35 PA. CONS. STAT. ANN. § 7514(e) (2003) (discussing intervention).

295. See *id.*; see also *P.H. Glatfelter Co. v. DEP*, No. 2000-194-L, 2000 WL 1721772 at \*1 (Pa. Env. Hrg. Bd. Oct. 13, 2000) (expressing that Commonwealth Court interpreted "any interested party" to mean "any person or entity interested, i.e., concerned, in the proceedings before the Board.>").

296. See *Consol Pa. Coal Co.*, No. 2002-112-L, 2002 WL 3135582 at \*1; see also *P.H. Glatfelter*, 2000 WL 1721772 at \*2 (recognizing that gaining or losing due to EHB's determination means party has standing and, if party has standing, they have to be allowed to intervene).

297. See *Consol*, 2002 WL 3135582 at \*2 (noting "whether intervenor will add anything new to proceedings is irrelevant"); see also *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 178-79 (2000).

In *PH Glatfelter Co. v. DEP*,<sup>298</sup> the EHB permitted citizens to intervene in a paper mill's appeal stemming from the water discharge regulations in the mill's NPDES permit.<sup>299</sup> The EHB noted that the citizens' and environmental groups' use and enjoyment of a stream may be adversely affected by the mill's discharge, therefore, granting their petition to intervene.<sup>300</sup> This case is significant because it allows an organization to intervene solely because one of its members had a substantial, direct and immediate interest in intervention.<sup>301</sup>

In *Giordano v. DEP*,<sup>302</sup> the EHB permitted a township located approximately two miles from a landfill to intervene on behalf of a husband and wife, appealing the DEP's approval of a major modification to a landfill's permit.<sup>303</sup> Though the township was a bordering municipality, the EHB allowed the intervention because the residents complained of noise and traffic problems associated with increased operations at the landfill. Furthermore, the citizens raised a reasonable concern for ground water affect decreasing property values.<sup>304</sup> Nevertheless, the EHB placed significant limitations on the township's right to participate because the township filed their petition one year after the appeal, only a few months prior to the evidentiary hearing.<sup>305</sup> The court found that the township's interests, however, were important enough to allow them to intervene.<sup>306</sup> This case demonstrates the EHB's flexibility in intervention because the EHB allowed merit-based interests to outweigh procedural faults.<sup>307</sup>

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298. *P.H. Glatfelter Co.*, No. 2000-194-L, 2000 WL 1721772 (Pa. Env. Hrg. Bd. Oct. 13, 2000).

299. *See id.* at \*1. The petitioners' use for canoeing and recreational activities indicates a substantial interest. *See id.* at \*3-4.

300. *See id.* at \*2 (pointing out that petitioners said improving color of stream would increase use and enjoyment of stream).

301. *See id.* at \*3 (recognizing that an "[o]rganization has the right to intervene if at least one of its members has the right").

302. No. 99-204-L, 2000 WL 1506951 (Pa. Env. Hrg. Bd. Sept. 26, 2000).

303. *See id.* at \*1. The Township adequately alleged that it has been negatively affected by the modification. *See id.* at \*2.

304. *See id.* at \*2 (noting "host municipality has standing to appeal actions relating to a permit for a waste disposal facility within its borders").

305. *See id.* at \*4 (discussing limitations on discovery and participation in evidentiary hearing).

306. *See id.* at \*3 (rejecting landfill's argument that petition should be denied because it did not meet requirement that party has to file appeal within thirty days).

307. *See Giordano*, 2000 WL 15069, at \*2 (noting that if landfill's argument is correct, no party would ever have right to intervene after thirty days).

In *Pa. Game Commission v. DEP*,<sup>308</sup> the Fish Commission sought intervention on the grounds that it had a greater interest in this matter than the general public.<sup>309</sup> The Fish Commission is entrusted with the protection of the state's fish population and water supply, and participated during the DEP's review of the application.<sup>310</sup> The EHB allowed the Fish Commission to intervene, noting that a party may intervene when its interests are "substantial, direct, and immediate."<sup>311</sup> Furthermore, the EHB ruled that any state agency is permitted to intervene in another agency's appeal.<sup>312</sup>

### 3. Conclusion

Intervention evolved from the standards of standing, so as a result, the intervention requirements are reflective of the leniency shown by the federal district court in *Cantrall*.<sup>313</sup> An intervening party is not held to the immediacy prong of standing that the EHB follows, but rather is permitted the more lenient "zone of interest" test that does not necessitate strict time or proximity.<sup>314</sup>

The proximity of injury requirement may result in potential problems for environmental groups within the Commonwealth asserting environmental claims that may not "imminently" threaten them, but nonetheless may damage the ecosystem.<sup>315</sup> Furthermore, "[T]he Board has also held many times that standing can not be conferred when an appellant alleges a general interest in protecting the environment, but fails to specifically demonstrate how that

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308. No. 2000-067-R, 2000 WL 885853 (Pa. Env. Hrg. Bd. June 19, 2000).

309. See *id.* at \*1 (discussing fact that it is agency that protects and preserves fish population and fish habitat).

310. See *id.* (noting that Fish Commission has jurisdiction over "protection, preservation and management of fish" in Commonwealth).

311. See *id.* (quoting *Borough of Glendon v. Dep't of Env'tl. Resources*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992)) (expressing that Fish Commission is interested party because they are government agency and because they were involved throughout process).

312. See *id.* at \*2 (intervening party may introduce evidence and present arguments on all issues raised in petition).

313. See generally *Giordano v. DEP*, No. 99-204-L, 2000 WL 1506951, at \*1 (Pa. Env. Hrg. Bd. Sept. 26, 2000) (expressing that interest necessary to establish standing must be more than general interest in proceedings; it must be that individual or entity seeking intervention will gain or lose because of EHB's ultimate determination).

314. See *Smedley v. DEP*, No. 97-253-K, 2001 WL 178234, at \*18 (Pa. Env. Hrg. Bd. Feb. 8, 2001) (noting that Smedley qualifies for standing because he proved that he had interest greater than general public).

315. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 528 U.S. 167, 180 (2000) (observing that party has to show injury to himself or herself and not just injury to environment).

interest is adversely impacted by the Department's action."<sup>316</sup> Under NEPA, federal "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity."<sup>317</sup> Further, the general standing requirements are less stringent in relation to plaintiffs' direct interest when it coincides with the alleged environmental impact.<sup>318</sup> A relaxed interpretation of standing's immediacy requirement is best for the state's environmental resources. Therefore, the environment's inability to litigate on its own behalf may ensure that environmental guardian groups can intervene.<sup>319</sup>

III. CONCLUSION

The United States government was founded on a system of checks and balances.<sup>320</sup> These principles have matriculated into state governments and are the foundation of the relationship between the EHB and DEP.<sup>321</sup> Due to this unique relationship, it is necessary to examine the powers given to each.<sup>322</sup> The DEP has the power to promulgate regulations in order to effectuate the purposes of the Commonwealth's environmental acts.<sup>323</sup> The EHB has the power to limit the scope of DEP decisions and to control pol-

316. See *Wurth v. DEP*, No. 98-179-MG, 2000 WL 294469, at \*11 (Pa. Env. Hrg. Bd. Feb. 29, 2000) (discussing standing).

317. See *Friends of the Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In this case, the Supreme Court held that affiants had reasonable concerns about how the affects of discharge directly affected recreational, aesthetic and economic interests. *Id.* at 183-84.

318. See *id.* at 169.

[A]n association has standing to bring suit on behalf of the association's where, (1) the members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, (3) and neither the claim asserted nor the relief requested requires individual members in the lawsuit.

*Id.*

319. See *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001). (The court noted that "[t]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992))).

320. For a further discussion of checks and balances, see U.S. CONST. and *supra* notes 11-21 and accompanying text.

321. For a further discussion of the foundation of the relationship between the EHB and DEP, see *supra* notes 11-21 and accompanying text.

322. For a further discussion of the powers of the EHB and DEP, see *supra* notes 7-21, 59-80, 105-38, 158-78, 202-48, 259-85, 292-312, and accompanying text.

323. See *Eagle Envtl. II, L.P. and Chest Township v. DEP*, No. 2001-198-MG, 2002 WL 648978, at \*7 (Pa. Env. Hrg. Bd. Apr. 4, 2002) (finding balancing test must be reasonable in considerations).

icy.<sup>324</sup> These challenges to the DEP's authority required careful review of legislative history and the powers inherent in the acts.<sup>325</sup> The EHB was careful to limit the DEP's authority, and to still reach reasonable solutions.<sup>326</sup>

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324. For a further discussion of EHB's power, see *supra* notes 59-80, 105-38, 158-78, 202-48, 259-85, 292-312, and accompanying text.

325. For a further discussion of the EHB's power, see *supra* notes 59-80, 105-38, 158-78, 202-48, 259-85, 292-312, and accompanying text.

326. For a further discussion of the EHB limiting the DEP's authority, see *supra* notes 59-80, 105-38, 158-78, 202-48, 259-85, 292-312, and accompanying text.