

The Pennsylvania Environmental Hearing Board



Annual Report
January 2023

Pennsylvania Environmental Hearing Board



Message of Chief Judge and Chairman Thomas W. Renwand

Welcome! The Pennsylvania Environmental Hearing Board is pleased to present its 2022 Annual Report. The Report contains information and statistics from 2019-2022. Although the Covid-19 pandemic affected Board operations, I am happy to advise that the Board functioned very well. Hearings were held (albeit some by video) and Adjudications and Opinions were timely issued. The pandemic did not result in a backlog of Board cases and our case load is current.

We were one of the first tribunals in Pennsylvania to implement an electronic docketing system. We plan additional improvements to make practice before the Board better. Our continued commitment to embrace technology has been the bedrock of running an efficient operation, yielding positive outcomes, for litigants, as well as the general public. All the Board's Adjudications, Opinions, and Orders are readily and easily available to anyone with internet access, as are the vast majority of the filings of the parties in Board proceedings. Our electronic docket allows us to handle our case volumes in an orderly fashion, as well as providing transparency to the general public.

A Citizen's Guide to Practice Before the Environmental Hearing Board, explaining Board proceedings and requirements, has been developed. We believe it will be a useful resource to members of the public who represent themselves in cases before the Board. Our summer 2021 legal intern, Megan Rulli, provided invaluable assistance in researching, writing and developing this Guide.

In addition, the Board, in conjunction with the Environmental Bar, has enhanced our robust program to help litigants who cannot afford counsel obtain pro bono counsel if they qualify financially. The Board recognizes and thanks PBA Environmental and Energy Law Section Pro Bono Committee Chair, Attorney Thomas Duncan, who works tirelessly to administer this program, for his efforts in assuring that it helps as many people as possible. Likewise, we greatly appreciate the efforts of all the attorneys who volunteer their time in this worthwhile program which epitomizes the highest ideals of the legal profession.

In February 2022, the Board's Practice and Procedure Manual was substantially revised. This is a great aid to litigants practicing before the Board. The Board acknowledges and thanks Senior Counsel Maryanne Wesdock who directed and spent countless hours working on this project. She was ably assisted by Assistant Counsel Eric Delio.

In an effort to stay even more closely connected to the Environmental Bar, litigants, and the general public the Board now has a Twitter account. In this way all who have an interest can be aware of Adjudications and Opinions and other important matters before the Board.

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The Board's Environmental Rules Committee, which is comprised of nine attorneys and is chaired by Attorney Howard Wein, has been very productive. The Rules Committee meets six times a year and any proposals to improve practice before the Board are always welcome. A Rules package was approved and went into effect late this Fall which is explained in more detail in the body of the Report.

I also wish to acknowledge and thank Board Secretary Christine Walker for her efforts in producing the 2022 Annual Report. And I invite you to read more about the Board and its operations in the body of the Report.

Finally, thank you to my colleagues at the Board and our exceptional team of attorneys and administrative officers. Everyone at the Board plays a vital and important role in ensuring that the Board's operations are fair and just. It is my honor and privilege to work here.

Thomas W. Renwand
Chief Judge and Chairman
Pennsylvania Environmental Hearing Board

Pennsylvania Environmental Hearing Board



About the Board

Pennsylvania Environmental Hearing Board



Mission Statement

To safeguard the rights of Pennsylvania's citizens to due process of law and a clean environment through a timely disposition of appeals of actions taken by the Department of Environmental Protection and of certain enforcement actions instituted by the Department or by citizens.

Summary

The Pennsylvania Environmental Hearing Board (Board) is the statutorily established trial court of state-wide jurisdiction that hears certain types of environmental cases, including appeals of actions taken by the Pennsylvania Department of Environmental Protection (Department) and complaints for civil penalties assessed by the Department. The Board holds trials and issues adjudications, as well as legal opinions and orders. Trials before the Board are similar to non-jury civil trials before Common Pleas Courts or Federal District Courts. The Board consists of five judges appointed by the Governor and confirmed by the Senate. The Chief Judge and Chairman of the Board is The Honorable Thomas W. Renwand. The Board's website address is <http://ehb.courtapps.com/public/index.php>.

History

The Board was created as part of the Department of Environmental Resources by the Act of December 3, 1970, P.L. 834, 71 P.S. § 510-1 et seq. and began functioning on February 15, 1972. The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516, established the Board as an independent agency on January 1, 1989.

Since 1995 and the introduction of the Board's electronic docketing system, over 6000 new cases have been filed with the Board. The subject matter of the cases is varied and includes issues involving air pollution, water pollution, stream protection, surface and underground mining, oil and gas drilling, safe drinking water, dams and encroachments, sewage facilities planning and Marcellus shale drilling. The Board hears actions involving both permitting and enforcement and has the authority to assess civil penalties and to award attorney's fees where appropriate. Trials before the Board are often lengthy and involve scientific and technical expert testimony and evidence. The Board's review is *de novo*, which means that it decides a case based on the evidence presented at trial. Board adjudications contain detailed findings of fact, conclusions of law and discussion. The Board's decisions are published in annual volumes and may also be found on the Board's website at [EHB Reporters](#).

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Appeals of Board decisions are to the Commonwealth Court of Pennsylvania and, by allowance, to the Pennsylvania Supreme Court.

The Board has had a Procedural Rules Committee since its inception. Pursuant to the Environmental Hearing Board Act, the Committee consists of nine attorneys appointed by the Governor, legislative leaders, the Secretary of the Department of Environmental Protection and the Department's Citizens Advisory Council. The current Chairman of the Rules Committee is Howard J. Wein. The current Vice Chair of the Rules Committee is Philip L. Hinerman.

Offices of the Environmental Hearing Board

Pursuant to the Environmental Hearing Board Act, the Board is required to maintain offices and hearing rooms in both Harrisburg and Pittsburgh. The Board has also established offices and hearing rooms in Norristown (2004) and Erie (2013). The offices of the Board are located at:

Harrisburg:

2nd Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105

Norristown:

4th Floor, State Office Building
2 East Main Street
Norristown, PA 19401

Pittsburgh:

Suite 310, Piatt Place
301 Fifth Avenue
Pittsburgh, PA 15222

Erie:

403 Renaissance Centre
1001 State Street
Erie, PA 16501

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New Developments

Pennsylvania Environmental Hearing Board



What's New at the Board 2019 – 2022

Retirement of Judge Richard P. Mather, Sr.

After 11 years with the Board and over 30 years of service with the Commonwealth, Judge Richard P. Mather, Sr. retired on October 2, 2020. He was unanimously confirmed by the Senate and was sworn into office in October 2009. Prior to becoming a judge, Judge Mather was the Deputy Chief Counsel for the Department of Environmental Protection and served as the head of the Bureau of Regulatory Counsel for 18 years.

COVID-19 Impact

The COVID-19 pandemic had a significant impact on the Board and resulted in numerous changes to the Board's practice. In March 2020, the Board transitioned to temporary telework due to the mandatory closing of offices. During this time, the Board became fully functional while teleworking and began to hold virtual hearings and broadcast those hearings to the public via the web-conferencing software WebEx and the Board's own [YouTube channel](#). Following the re-opening of Commonwealth offices, the Board adopted a hybrid model for permanent telework where Board judges and staff work both at the Board's office locations and at alternate work locations.

A Citizen's Guide

The Board has developed a guide to aid citizens who are representing themselves in front of the Board. It provides a general overview of practices and procedures of the Board by explaining the steps of the appeal process and the basic requirements of each of those steps. The guide can be found on the Board's website at the following link: [Citizen's Guide](#)

Revised Forms

The Board has recently reorganized the format of its Notice of Appeal form. The revised form can be found in both pdf and Word formats at the following links: [NOA PDF Version](#) and [NOA Word Version](#).

The Board has also updated its Practice and Procedure Manual. The February 2022 Edition can be found [here](#).

Twitter Account

The Board has set up an official Twitter account. Postings include notices regarding issuance of adjudications, opinions and case termination orders, as well as general information. The Board's official Twitter account handle is [@PAEnvHearingBd](#).

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What's New at the Board 2019 – 2022

New Additions to the Board

Rich Finley, Administrative Officer I

Mr. Finley began working at the Board as an Administrative Officer I on December 7, 2020. He is based in the Board's Harrisburg headquarters. Mr. Finley assists in all matters related to the litigation functions of the Board, including preparation of orders, opinions and adjudications for issuance, handling matters related to filings and docketing, and preparation of cases for hearing.

Sarah L. Clark, Judge

Sarah L. Clark was nominated to the Board by Governor Tom Wolf in late 2022 to fill the vacancy left by Judge Mather's retirement. She was confirmed by the Senate on October 6, 2022, and officially started with the Board on November 19, 2022. Ms. Clark's full professional biography can be seen in the Judges and Personnel section of this report.

New Projects

eFiling and Docketing System

The Board is currently researching options for a new eFiling and docketing system. A Request for Information (RFI) was recently posted on the Commonwealth of Pennsylvania's eMarketplace to determine what options may be available. The Board is currently reviewing responses to the RFI and determining next steps in the procurement process.

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Personnel

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Judges



THOMAS W. RENWAND, Chief Judge and Chairman

Thomas W. Renwand has served on the Pennsylvania Environmental Hearing Board since 1995. He is based in Pittsburgh. In April 2007 he was named Acting Chairman and Chief Judge by Governor Edward Rendell and was appointed Chairman and Chief Judge in 2009. He is the longest-serving Chairman and Chief Judge in the Board's history. Under Judge Renwand's chairmanship, the Board has made significant advancements in its management of cases and filings, having been one of the first courts in the country to develop a fully electronic docket and adopt mandatory electronic filing. This has allowed for greater transparency and accessibility by the public to all documents filed with and issued by the Board. During his tenure on the Board, Judge Renwand has authored precedent-setting decisions in the field of environmental law and on issues such as prehearing procedure, expert witnesses and discovery. He is a strong advocate for ensuring that all parties receive due process and fair treatment before the Board, and he begins each hearing with the words, "Welcome to the friendly confines of the Environmental Hearing Board." In 2018, he was awarded the prestigious Administrative Law Award of the Pennsylvania Bar Association in recognition of his work and service to the citizens of Pennsylvania. Prior to his tenure on the Board, he was a partner and trial attorney with the Pittsburgh law firm of Meyer, Unkovic and Scott. He began his legal career in Erie with Knox McLaughlin Gornall & Sennett, P.C. Judge Renwand is a 1980 graduate of the University of Akron School of Law where he was Editor-in-Chief of the Law Review. He graduated with honors in 1977 from John Carroll University with a Bachelor of Arts in History.



MICHELLE A. COLEMAN, Judge

Michelle A. Coleman, a native of Philadelphia, received a B.A. in political science from Bryn Mawr College in 1977. She then attended New York University School of Law as a Root-Tilden Scholar and received her J.D. in 1980. As a member of the Root-Tilden Program, she traveled in the U.S. and was permitted to practice on the Navajo Reservation. She served with the NY Legal Aid Society as a public defender and with Community Legal Services representing the poor. After approximately two years in private practice, she accepted a position with the Pennsylvania Department of Environmental Resources and presented cases before the Environmental Hearing Board as well as Commonwealth and Federal Courts. Appointed to the Environmental Hearing Board in 1995 by Governor Ridge, she has served as a judge hearing cases and writing opinions in all aspects of environmental law throughout the state.

At present, she is active in legal support groups for parents of children with special needs. Judge Coleman teaches classes in which special needs children are involved participants and she has written plans to assist these children to continue to thrive in mainstream classes.

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BERNARD A. LABUSKES JR., Judge

Bernard A. Labuskes, Jr. was born and raised in Pittsburgh, Pennsylvania. He received his B.A. from Pennsylvania State University in 1979 and his J.D. from the University of Pittsburgh School of Law in 1982. He was a Senior Comments Editor of the University of Pittsburgh Law Review and a member of the Order of the Coif. He was a law clerk to the Honorable Charles Clark, Chief Judge, U.S. Court of Appeals, Fifth Circuit, from 1982 to 1983. He served as Assistant Counsel at the Pennsylvania Department of Environmental Resources from 1985 through 1987, where he focused on litigation and enforcement matters. Prior to his appointment to the Board, he was a partner and chair of the Environmental Practice Group of McNees, Wallace & Nurick in Harrisburg. He was appointed to the Environmental Hearing Board by Governor Ridge in November 1998 and became a member of the Board in January 1999.



STEVEN C. BECKMAN, Judge

Steven C. Beckman was appointed to the Environmental Hearing Board by Governor Corbett in 2012. He received his undergraduate degree from Wittenberg University in Springfield, Ohio in 1983. He next attended the University of North Carolina-Chapel Hill and earned a Masters Degree in Geology. Judge Beckman received his law degree from the University of Pittsburgh in 1993 and went to work at MacDonald Illig Jones and Britton LLP in Erie, Pennsylvania. In 1996, he was appointed by Governor Ridge to serve as the Regional Director for the Northwest Regional Office of the Department of Environmental Protections. In 2001, Judge Beckman left the DEP and returned to Macdonald Illig law firm where he was a partner and a member of the law firm's Environmental Law practice group until the time of his appointment to the Board.

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SARAH L. CLARK, Judge

Sarah L. Clark was appointed to the Environmental Hearing Board by Governor Tom Wolf in 2022. In January 2019, she was appointed Director of Legislative Affairs for the Pennsylvania Department of Transportation after serving in the same role at the Department of Environmental Protection since February 2015. Prior to joining the Wolf Administration, Judge Clark served on the Environmental Resources and Energy Committee for the Pennsylvania House of Representatives Democratic Caucus, first as Legal Counsel, then as Executive Director. Judge Clark is active in the American Bar Association Section of Environment, Energy and Resources where she was appointed Planning Committee Chair for the section's 2022 Spring Conference and serves as a mentor on the section's Leadership Development Program. She received her J.D. and a Certificate in Environmental Law, Science and Policy from the University of Pittsburgh School of Law, in which she also interned in the Environmental Law Clinic. She graduated *magna cum laude* with a B.A. in Art History and a dual major in Business Administration from the University of Pittsburgh.

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Counsel to the Board



MARYANNE WESDOCK, Senior Counsel to the Board

Ms. Wesdock is Senior Counsel to the Environmental Hearing Board and works directly with the Chairman and Chief Judge of the Board, the Honorable Thomas W. Renwand. As Senior Counsel, Ms. Wesdock has authored many of the Board's Adjudications and Opinions dealing with the most complex issues in the field of environmental law as well as practice before the Board. Ms. Wesdock is the Board's liaison to the Environmental Hearing Board Procedural Rules Committee and is responsible for handling revisions to the Board's rules through the regulatory process. She is the editor of the Board's Practice and Procedure Manual which is relied on by practitioners before the Board. She also supervises the Board's internship program and serves as a mentor to law students through the Pennsylvania Bar Association. In 2006, Ms. Wesdock was awarded the prestigious Environmental Law Lifetime Achievement Award by her peers at the Pennsylvania Bar Association Environmental and Energy Law Section in recognition of her work at the Board and her contributions to the Section. Ms. Wesdock is the Past Chair of both the Pennsylvania Bar Association Environmental and Energy Law Section and the Allegheny County Bar Association Environmental and Energy Law Section. Prior to joining the Board, she served as Assistant Corporate Counsel to Hanover Foods, Inc. She holds a Bachelor of Arts in Economics from Indiana University of Pennsylvania, where she graduated *summa cum laude* as valedictorian. She received her J.D., with honors, from the University of Pittsburgh School of Law.

ERIC J. DELIO, Assistant Counsel to the Board, joined the Environmental Hearing Board in 2013 as an Assistant Counsel to Judge Michelle A. Coleman and Judge Bernard A. Labuskes, Jr. He counsels the Board on complex issues in environmental law involving air quality, water quality, solid waste management, brownfield cleanups, mining, and oil and gas, among others. He also advises the Board on revisions to its rules of practice and procedure. He is a member of the Pennsylvania Office of General Counsel's Mediation Practice Group. He received his B.A. in English, Professional Writing from Mercyhurst University, and his J.D. from the University of Pittsburgh School of Law.

ALISHA M. HILFINGER, Assistant Counsel to the Board, holds a B.S. in Psychology from Penn State University and a J.D. from Case Western Reserve University School of Law where she was a Recipient of the Law and Leadership Scholarship. During law school, she worked as a summer associate at OGC Law, assisting in various civil litigation matters. Additionally, Alisha interned at Neighborhood Legal Services, working primarily with domestic abuse victims. After graduating, Alisha joined the Superior Court of Pennsylvania, clerking for the Honorable Deborah Kunselman. Pursuing her passion for environmental law, Alisha joined the Board in 2019 as the Assistant Counsel to the Honorable Steven C. Beckman.

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Secretary to the Board

CHRISTINE A. WALKER, ESQUIRE received her B.A. in Communications from Chatham College and her J.D. from Duquesne University School of Law, where she served on the Senior Staff of the Law Review and as Editorial Assistant of Juris. She is a recipient of Duquesne's Cali Excellence for the Future Award in Environmental Law. Christine began her career as Judicial Secretary to The Honorable S. Louis Farino on the Allegheny County Court of Common Pleas. She joined the Environmental Hearing Board in 2013 as Law Clerk to The Honorable Steven C. Beckman in Erie. She was appointed Secretary to the Environmental Hearing Board in October 2016, after having served as Acting Secretary since January 2016. Christine recently transferred from the Erie Office to Pittsburgh and lives in the Pittsburgh area.

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**Statistics: Appeals and Dispositions
2019 - 2022**

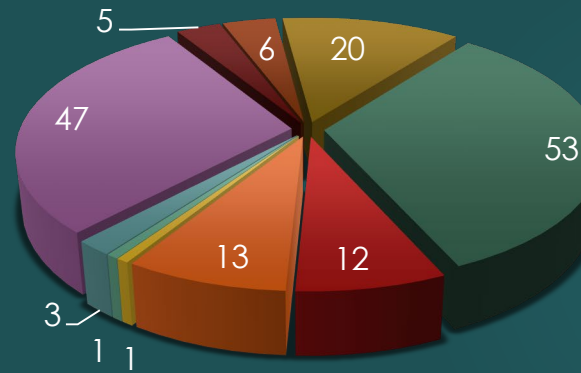
Pennsylvania Environmental Hearing Board



2019 Appeals and Dispositions

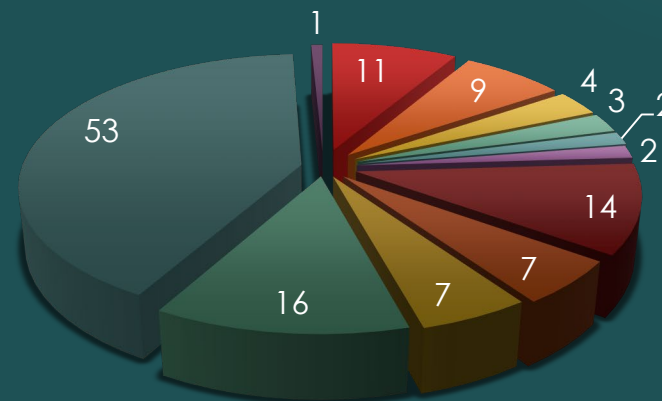
Number of New Appeals by Program

- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Quality



Number of Dispositions by Program

- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Quality
- None Specified



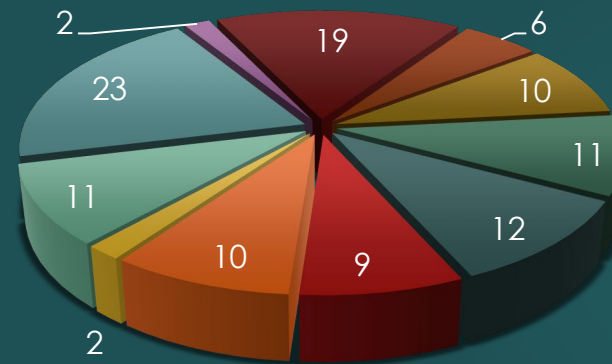
Pennsylvania Environmental Hearing Board



2020 Appeals and Dispositions

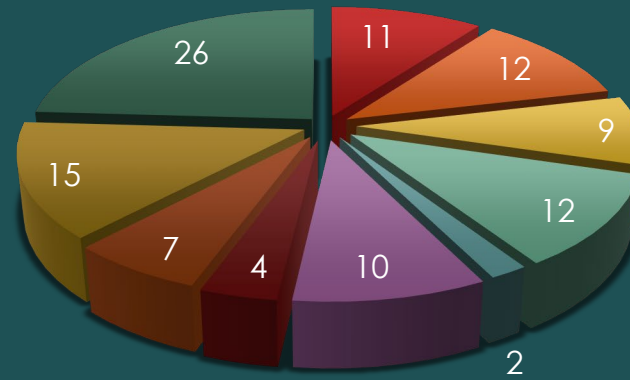
Number of New Appeals by Program

- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining



Number of Dispositions by Program

- Air Quality
- Dams & Water Ways
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Quality



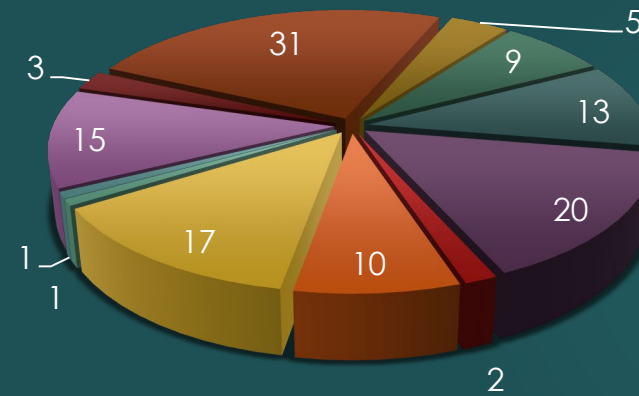
Pennsylvania Environmental Hearing Board



2021 Appeals and Dispositions

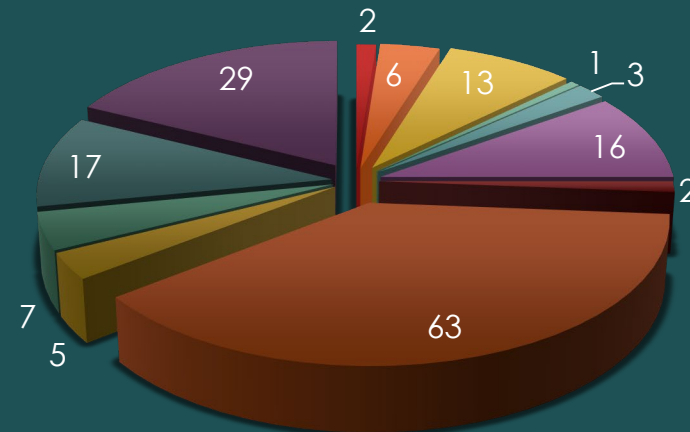
Number of New Appeals by Program

- Abandoned Mine Reclamation
- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Quality



Number of Dispositions by Program

- Abandoned Mine Reclamation
- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Quality



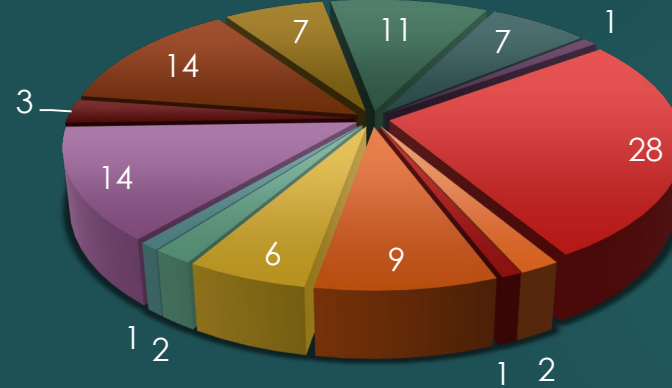
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2022 Appeals and Dispositions

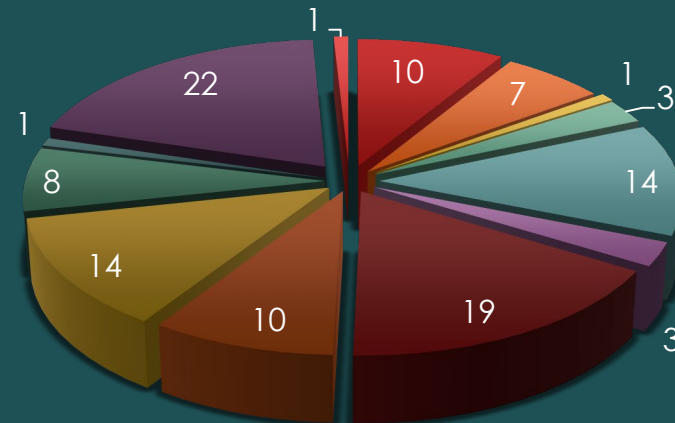
Number of New Appeals by Program

- Abandoned Mine Reclamation
- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Allocations
- Water Quality
- None Specified



Number of Dispositions by Program

- Air Quality
- Dams & Water Ways
- Hazardous Waste
- Mine Safety
- Miscellaneous
- Non-Coal Mining
- Oil & Gas
- Safe Drinking Water
- Solid Waste
- Surface Mining
- Water Allocations
- Water Quality
- None Specified



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Summaries of Selected Decisions 2019 - 2022

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Selected Decisions 2019 - 2022

Kopko v. DEP and Range Resources-Appalachia, LLC, 2019 EHB 179

Issued by Judge Richard P. Mather, Sr., February 5, 2019

A majority of the Board denied a permittee's motion to dismiss an appeal of the Department of Environmental Protection's approval of sediment and erosion control general permit coverage in connection with the permittee's gas well activities in Washington County. Chief Judge Renwand and Judge Beckman concurred in the result but would have found that the appellant could not use his appeal of the general permit coverage to challenge the well permit or future drilling permits.

Friends of York County Family Farms v. DEP and Hillandale Gettysburg, LLP, 2019 EHB 662, and Montgomery Township Friends of Family Farms v. DEP and Herbruck's Poultry Ranch, Inc., 2019 EHB 673

Issued by Chief Judge Thomas W. Renwand, November 4, 2019

In these appeals, two citizens groups challenged the Department of Environmental Protection's (Department's) authorization of coverage under the NPDES general permit for concentrated animal feeding operations (PAG-12). The appellants challenged the Department's new model for authorizing coverage under the PAG-12, which allowed continuation of coverage under the general permit with the filing of an annual report, rather than submission of a Notice of Intent as had been previously required. The appellants contended that the Department's new process was a violation of its NPDES regulations at 25 Pa. Code § 92a.23. Although the Board did not find the Department's argument in defense of the new process persuasive, it declined to grant summary judgment, finding that more factual development was necessary.

Protect PT v. DEP and Apex Energy (PA), LLC, 2020 EHB 27

Issued by Chief Judge Thomas W. Renwand, January 30, 2020

In this appeal of unconventional gas well permits by a citizens group, the Board granted partial summary judgment to the Department of Environmental Protection (Department) and permittee on the question of whether the Department complied with its obligation to ensure protection of threatened and endangered species and whether an emergency response plan was required prior to issuance of the permits. The appellants also argued that the issuance of the permits violated Article I, Section 27 of the Pennsylvania Constitution, but the Board declined to address this question in the context of a summary judgment motion.

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Selected Decisions 2019 - 2022

Morrison v. DEP, 2020 EHB 220, Opinion and Order on Motion for Partial Summary Judgment, reconsideration denied, 2020 EHB 287
Issued by Judge Michelle A. Coleman, May 13, 2020 and June 10, 2020

The Board granted in part a motion for summary judgment filed by the Permittee on the basis of administrative finality. The appeal involved three minor amendments to the Department's prior approval of coverage to the Permittee under general permit PAG-02 for stormwater discharges associated with construction activities at an auto salvage lot. The Board found that one of the Appellant's objections to the permit amendments had been raised in the Appellant's earlier appeal of the original approval of coverage under the permit. That objection involved a claim that the Permittee was utilizing the Appellant's land for its construction activities without the Appellant's permission. However, in the Appellant's earlier appeal, the Board held that the Appellant had raised and then abandoned that same objection by not addressing it in response to a motion for summary judgment filed in that appeal. The Board held that the issue related to the original permit coverage approval and not the minor amendments and was thus barred by administrative finality from being litigated in the current appeal. The Board denied the Appellant's petition for reconsideration because it did not demonstrate any compelling or persuasive reasons justifying reconsideration or show any inconsistency of our earlier Opinion and Order with the facts.

Fryer Excavating, LLC v. DEP, 2020 EHB 270
Issued by Chief Judge Thomas W. Renwand, May 27, 2020

The Board granted an appellant company's petition to file its appeal of a civil penalty assessment *nunc pro tunc* following the declaration of an emergency due to the Covid-19 pandemic. The appellant sought to file its appeal one day past the 30-day appeal deadline, asserting that it had missed the deadline "as a result of the Covid-19 pandemic, the declaration of a state of emergency both locally and statewide, and the mandated closure of all non-essential business" including the offices of both the appellant and its attorney. In granting the petition, the Board held, "We find that the declaration of emergency conditions and the unforeseeable and sudden closure of businesses in the face of a global pandemic presents...an extraordinary and compelling circumstance" justifying the grant of an appeal *nunc pro tunc*.

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Selected Decisions 2019 - 2022

Food and Water Watch v. DEP and Keystone Protein Co., 2020 EHB 229, aff'd, No. 565 C.D. 2020, No. 621 C.D. 2020, No. 627 C.D. 2020 (Pa. Cmwlth. April 12, 2021)

Issued by Chief Judge Thomas W. Renwand, May 21, 2020

A majority of the Board found that the appellant had standing as the representative of its members to challenge the Department of Environmental Protection's (Department) issuance of an NPDES permit. The permit authorized the discharge of treated wastewater resulting from the permittee's poultry processing and rendering operation in Lebanon County. With regard to the merits of the case, the Board found that the Department had authority under both federal and state law to issue an NPDES permit that included nutrient credit trading provisions. Judge Labuskes concurred in the result but disagreed that the appellant had standing. The Commonwealth Court affirmed the decision of the Board.

Pennsylvania General Energy Co. v. DEP, 2021 EHB 7

Issued by Chief Judge Thomas W. Renwand, January 15, 2021

The Board granted a host municipality's petition to intervene in a company's appeal of the Department of Environmental Protection's rescission of a permit authorizing the injection of oil and gas waste fluids in Grant Township, Indiana County. The Board determined that Grant Township, as the host municipality, was an interested party.

PennEnvironment, Earthworks and Environmental Integrity Project v. DEP and MarkWest Liberty Midstream and Resources, LLC, 2021 EHB 17

Issued by Chief Judge Thomas W. Renwand, January 19, 2021

This appeal involved a challenge by three environmental groups to the Department of Environmental Protection's (Department) issuance of a permit for the operation of a natural gas compressor station by MarkWest Liberty Midstream and Resources (MarkWest). MarkWest moved for summary judgment on the basis that the appeal was untimely because it was filed more than 30 days after actual notice to the attorney for Environmental Integrity Project, but within 30 days of publication in the *Pennsylvania Bulletin*. A majority of the Board found that under Section 10.2 of the Air Pollution Control Act, the appeal period began to run on the date of actual notice. Therefore, the

Pennsylvania Environmental Hearing Board



Selected Decisions 2019 - 2022

(PennEnvironment, Earthworks and Environmental Integrity Project cont'd) appeal of Environmental Integrity Project was untimely. MarkWest further argued that notice to Environmental Integrity's attorney constituted notice to all the appellants because the attorney had submitted comments on behalf of all appellants. However, the Board found that it was not clear that notice to Environmental Integrity's attorney constituted notice to the other two environmental groups. Because summary judgment may only be granted where there is no question of material fact or law, the appeal of the other two appellants was allowed to proceed.

Penn Township Municipal Authority v. DEP, 2021 EHB 72

Issued by Judge Michelle A. Coleman, March 8, 2021

The Board granted in part a motion in limine filed by the Appellant to the extent that it sought to preclude the Department from utilizing expert witnesses at the upcoming hearing on the merits. The Department failed to disclose the substance of its expert witnesses' testimony or identify some of its experts in response to the Appellant's interrogatories in discovery. The Board held that providing the substance of an expert's testimony for the first time in the party's pre-hearing memorandum is not permissible under the Rules of Civil Procedure if that information was sought in discovery. The Board reiterated that parties must comply with both the Rules of Civil Procedure and the Board's own Rules regarding expert witnesses. The Board determined that the Appellant would have been severely prejudiced if it had to prepare to examine ten expert witnesses in the final weeks leading up to the hearing.

PBS Coals, Inc., v. DEP, 2021 EHB 104

Issued by Judge Steven C. Beckman, March 30, 2021

The Board denied the Appellant's Petition for Supersedeas where it found that evidence presented at the supersedeas hearing supported the Department's determination that the Appellant's injection of sludge into a mine resulted in the exceedances of the permit limits for iron levels. The Board found that the Appellant's argument that alternative factors other than its coal refuse disposal practices were the cause of the iron loading exceedances was unlikely to prevail on the merits of the appeal.

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Selected Decisions 2019 - 2022

Range Resources – Appalachia, LLC v. DEP, 2021 EHB 137 **Issued by Chief Judge Thomas W. Renwand, May 4, 2021**

The Board granted Range Resource’s motion to depose a Department of Environmental Protection (Department) rebuttal witness outside the discovery period. Range had not previously deposed the witness because it in good faith believed he was not going to be called as a witness at trial, either on direct or in rebuttal. The Board found there was no prejudice to the Department in allowing Range to depose the witness since a hearing had not yet been scheduled. In granting Range’s motion, the Board explained that discovery is “a process whereby parties can obtain information about each other’s case as efficiently and economically as possible in order to gauge the strength and weakness of their own case and that of their opponents. This process operates more effectively and proceeds more efficiently when parties are forthcoming in identifying all witnesses and documents relevant to a case.”

Clearfield County v. DEP, 2021 EHB 144, Opinion and Order on Motion for Summary Judgment, affirmed, 283 A.3d 1275 (Pa. Cmwlth. 2022)

Issued by Judge Bernard A. Labuskes, Jr., June 10, 2021

The Board granted an Appellant county’s motion for summary judgment in an appeal of a permit for the construction and operation of a municipal waste landfill within its boundaries. The Permittee’s application for the landfill did not contain any meaningful information regarding the origin of the waste to be disposed of at the facility, as required by 25 Pa. Code § 273.112. The Board rejected the Department’s interpretation that “origin” means the same thing as “types of waste” and the Board instead interpreted the term “origin” in accordance with its plain meaning of where the waste would be coming from. The Board found that knowing the origin of waste is fundamental to rational waste planning under Act 101. The Board also determined that the Permittee had not undertaken an analysis of alternative locations for the proposed landfill as required by Act 101, and that the Department did not comply with the requirement in the Solid Waste Management Act to publish in the *Pennsylvania Bulletin* its justification for overriding the county’s recommendation to disapprove the landfill permit. The Board rejected the Department’s argument that all of these deficiencies could be cured by way of the Board’s *de novo* review because foundational aspects of the application analysis were absent and could not be adequately replicated at a merits hearing before the Board. The permit was vacated and remanded back to the Department.

Pennsylvania Environmental Hearing Board



Selected Decisions 2019 - 2022

Williams v. DEP, 2021 EHB 232, Adjudication; Opinion and Order on Application for Fees and Costs (issued May 11, 2022) **Issued by Judge Michelle A. Coleman, September 17, 2021 and May 11, 2022**

In an Adjudication, the Environmental Hearing Board remanded an NPDES permit back to the Department for a project to subdivide three residential lots into eight residential lots. The Department and the Conservation District did not appropriately consider or apply the riparian forest buffer provisions at 25 Pa. Code § 102.14, which require a permittee to protect an existing riparian forest buffer, convert an existing riparian buffer to a riparian forest buffer, or establish a new riparian forest buffer for any stream within 150 feet of the project site. This was not done for a stream near the project site or for another stream on the project site not previously identified by the Department and the Permittee. Nor did the Permittee alternatively demonstrate that other best management practices offered substantially equivalent protection as a riparian forest buffer. In a subsequent Opinion and Order on the Appellant's application for attorney's fees and costs, the Board deferred ruling on the application until after the conclusion of the remand proceedings, although the Board cautioned that it could resume proceedings on the fees application if the remand process went on too long. Chief Judge Renwand dissented, arguing that the Board should not wait to decide the fees application.

Telegraphis v. DEP, 2021 EHB 279 **Issued by Judge Steven C. Beckman, November 4, 2021**

In this appeal, the Board held that the Appellant was eligible for coverage under the Bituminous Mine Subsidence and Land Conservation Act. Guided by the principles of statutory interpretation, examining the specific statutory and regulatory language, and accounting for the overall purpose of the Act, the Board determined that the Department's requirement that a commercial building be in place at the time of nearest mining in order to be eligible for coverage was not supported by the statutory or regulatory language. The Board remanded the matter back to the Department to make a determination as to whether the building in question suffered damage due to mine subsidence.

Pennsylvania Environmental Hearing Board



Selected Decisions 2019 - 2022

***Muth v. DEP and Eureka Resources, LLC*, EHB Docket No. 2022-015-B (Opinion and Order on Motion to Dismiss issued June 3, 2022)
Issued by Chief Judge Thomas W. Renwand, June 3, 2022**

The Board held that a state senator did not have standing to bring an appeal of an NPDES permit on behalf of residents who live and work in the vicinity of a proposed oil and gas liquid waste treatment facility. The Board further held that the Environmental Rights Amendment of the Pennsylvania Constitution grants no special standing to an individual legislator to appeal actions of the Department of Environmental Protection in her role as an elected official. The Board deferred ruling on the question of individual standing until further discovery was conducted.

***Carlisle Pike Self Storage v. DEP*, EHB Docket No. 2021-072-L, Opinion in Support of Order Granting Motion in Limine (issued June 6, 2022)**

Issued by Judge Bernard A. Labuskes, Jr., June 6, 2022

The Board granted a motion in limine precluding the Appellants from utilizing two expert witnesses who worked at a consulting firm that had also been retained by the Commonwealth to provide services regarding the same pipeline project that was the involved in the Appellants' appeal before the Board. The Department and the consulting firm had worked closely on the pipeline project for years while exchanging confidential information, and the working relationship between the firm and the Department was still ongoing. Other employees of the consulting firm had previously testified on behalf of the Department in a hearing in another appeal before the Board. The Board did not view itself as having the responsibility to oversee the ethical rules governing professional engineers or geologists, or to enforce any public utility security statutes or the contract between the consulting firm and the Commonwealth. However, the Board found that it had an independent responsibility to maintain the integrity of its proceedings and to ensure public confidence in its decisions. Therefore, the Board disqualified the two expert witnesses from participating in the appeal.

Pennsylvania Environmental Hearing Board



Selected Decisions 2019 - 2022

***Telegraphis v. DEP*, EHB Docket No. 2020-012-B (Opinion and Order on Appellant’s Petition for Award of Legal Fees and Costs issued June 28, 2022)**

Issued by Judge Steven C. Beckman, June 28, 2022

In an issue of first impression, the Board denied the Appellant’s petition for attorneys’ fees and costs because it was not timely filed under the Costs for Mining Proceedings law (“Costs Law”). See 27 Pa. C.S. § 7708. The Costs Law provided that a petition for the award of costs and fees must be filed with the Board within 30 days of the date an adjudication of the Board becomes final. The appellant argued that his petition was timely because the Board’s order which remanded the case to the Department, making it interlocutory in nature rather than final. The Board rejected that argument and concluded that even with a remand, the best approach for the Board was to treat its adjudications as final when issued when determining the timeliness of a fee petition under the Costs Law.

***Clean Air Council et al. v. DEP and Renovo Energy Center, LLC*, EHB Docket No. 2021-055-R (Opinion and Order on Appellants’ Motion for Partial Summary Judgment issued August 29, 2022)**

Issued by Chief Judge Thomas W. Renwand, August 29, 2022

This appeal by three environmental groups challenged the Department of Environmental Protection’s issuance of an air quality plan approval for construction and operation of an electric power plant in Clinton County. The Board granted the appellants’ motion for partial summary judgment on the limited issues of whether the plan met air quality standards for sulfur dioxide and volatile organic compounds.

Pennsylvania Environmental Hearing Board



Selected Decisions 2019 - 2022

***Hudson v. DEP*, EHB Docket No. 2022-055-L, Order and Opinions in Support of Granting and Denying Petition for Leave to Appeal Nunc Pro Tunc (issued September 27, 2022), appealed to the Commonwealth Court at Docket No. 1153 C.D. 2022
Issued by Judge Bernard A. Labuskes, Jr., September 27, 2022**

The Board was unable to reach a majority on the question of whether it should allow a petition to appeal nunc pro tunc. The prospective Appellants did not see the notice of issuance of a renewal of a nutrient management plan published in the *Pennsylvania Bulletin* because the Appellants claimed that the notice was different than those of prior approvals for the same facility and the search terms used by the prospective Appellants to scan the Bulletin did not pick up the most recent approval. Because at the time the Board consisted of only four judges, and the judges were evenly divided on the issue, the Board issued an Order stating that by operation of law the status quo was maintained, and therefore, the petition was denied. The judges who supported denying the petition argued that the prospective Appellants had not shown any breakdown in the Board's operations or any unique and compelling circumstances that would justify nunc pro tunc relief; the prospective Appellants simply did not read the *Pennsylvania Bulletin*, and if they had read the *Bulletin* instead of relying on search terms that did not include the name of the Permittee, they would have clearly seen the notice of the approval. The judges who supported granting the petition argued that it was not unreasonable for the prospective Appellants to rely on using terms to search the *Bulletin* when those search terms in the past resulted in finding the relevant permit approvals; the judges would have granted the petition on a finding of non-negligent circumstances on behalf of the prospective Appellants.

***Muth v. DEP and Eureka Resources, LLC*, EHB Docket No. 2022-015-B (Opinion and Order on Permittee's Motion for Summary Judgment issued November 9, 2022), *appeal pending*, 1346 CD 2022
Issued by Judge Steven C. Beckman, November 9, 2022**

In this appeal of an NPDES permit by a state senator, the Board granted summary judgment to the permittee on the question of whether the senator had individual standing to pursue the appeal. The Board found that the senator did not have a substantial, immediate and direct interest in the subject matter of the appeal and that it was incumbent on her to bring forth record evidence sufficient to demonstrate she was aggrieved by the Department's action and that the challenged activity had some realistic potential to affect her and her use of the resource.

Pennsylvania Environmental Hearing Board



Rules Committee

Pennsylvania Environmental Hearing Board



Rules Committee

Statutory Provisions

The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, established the Environmental Hearing Board Rules Committee. The Committee consists of nine attorneys who are in good standing before the Bar of the Supreme Court of Pennsylvania and who have practiced before the Board for a minimum of three years or who have comparable experience. 35 P.S. § 7515(a).

The membership shall consist of the following appointments:

- One member by the President pro tempore
- One member by the Minority Leader of the Senate
- One member by the Speaker of the House of Representatives
- One member by the Minority Leader of the House of Representatives
- One member by the Chairman of the Citizens Advisory Counsel to the Department of Environmental Protection
- Two members by the Governor, upon the advice of the Pennsylvania Bar Association
- Two members by the Secretary of the Department of Environmental Protection

Id.

The members shall serve two-year terms and may be reappointed for additional terms. *Id.*

The Committee reviews and makes recommendations to the Board regarding the procedural rules for matters brought before the Board. 35 P.S. § 7515(c).

Rules Committee Meeting Minutes can be found at the following link: [Rules Committee Meeting Minutes](#)

Pennsylvania Environmental Hearing Board



Rules Committee

CHAIRMAN

Howard J. Wein has served as the chair of the Rules Committee for more than a decade. He is a shareholder with Buchanan Ingersoll & Rooney, PC and a member of the firm's Environmental Practice Group in its Energy Law Section resident in its Pittsburgh office. Mr. Wein began his legal career as Assistant Attorney General and later served as Assistant Counsel for the Pennsylvania Department of Environmental Resources, entering private practice in 1986. Mr. Wein's environmental practice has focused on transactional, counseling and litigation matters involving a wide variety of important water quality, waste management, Brownfields redevelopment, energy & natural resources issues including mining and oil & gas matters, and air quality matters at both the state and federal levels. Mr. Wein has successfully litigated and resolved complex environmental matters involving the Pennsylvania Department of Environmental Protection ("DEP") and the United States Environmental Protection Agency ("USEPA") by negotiating consent agreements with DER and USEPA. He has served in a number of leadership positions including as Chairman of the Allegheny County Bar Association's Environmental & Energy Law Section, Chairman of the Pennsylvania Bar Association's Environmental, Mineral and Natural Resources Law ("EMNRL") Section and as the Section's delegate to the PBA. In 2009, Mr. Wein was honored by the PBA EMNRL Section by being named the recipient of its Environmental Achievement Award. In addition, Mr. Wein served on Governor Tom Ridge's Transition Team Study Group on Environmental issues as well as on Governor Ed Rendell's Transition Team. Mr. Wein is also the President of the Board of Directors of Construction Junction, a non-profit organization in Pittsburgh dedicated to the reuse of used and surplus building materials.

VICE-CHAIR

Philip L. Hinerman is a member of the Environmental Law Group of Fox Rothschild, LLP. He has extensive experience in environmental regulatory litigation. Mr. Hinerman also provides advice to both buyers and sellers in acquisitions and real estate matters and assists companies in developing effective environmental programs and policies. He has also served as multi-party joint defense counsel in litigation regarding the Metcoa Recovery Facility, Novak Sanitary Landfill, Pt. Refinery Mercury Site and the Malvern TCE Site. Previously, Mr. Hinerman was associate corporate counsel with Leaseway Transportation Corporation. While there, he developed the company's environmental program and supervised all environmental litigation and regulatory matters. Mr. Hinerman is a former chair of the Environmental Law Section of the Pennsylvania Bar Association. Mr. Hinerman is a member of the board of directors of the Pennsylvania Environmental Council and a founding director of the Delaware Valley Green Building Council. He serves on the Pennsylvania Bar Association's Task Force on Multi-jurisdictional Practice of Law. His interest in wines has led Mr. Hinerman to obtain a diploma in Wines and Spirits from the Wine & Spirits Education Trust, based in London. The WSET promotes, provides and develops education and training in wine and spirits. He is also a Certified Specialist in Wines by the Society of Wine Educators. Mr. Hinerman received his J.D. from Washington & Lee University School of Law in 1979 and his A.B. cum laude from Marshall University in 1975.

Pennsylvania Environmental Hearing Board



Rules Committee

MEMBERS

Brian J. Clark is a shareholder and chairs the Environmental Practice Group at Buchanan Ingersoll & Rooney PC. Mr. Clark has been a member of the Environmental Hearing Board Rules Committee since its inception in 1989. He has a diverse practice that spans over 30 years and covers three primary areas: environmental counseling, administrative and toxic tort litigation and government relations. Mr. Clark represents clients in a variety of complex energy transactions, permitting compliance issues, litigation involving oil and gas producers and midstream companies, and transactions involving Brownfield properties for commercial, industrial and energy clients ranging from family-owned businesses to Fortune 100 companies. He counsels energy clients on corporate governance and environmental permits, as well as state funding sources. As the former Majority Counsel to the Pennsylvania Senate Environmental Resources and Energy Committee, he was involved in drafting various environmental statutes. Mr. Clark also served on the Pennsylvania Department of Environmental Resources' Environmental Quality Board, a former President of the Pennsylvania Resources Council, Chairman of the Environmental Affairs Committee of the Pennsylvania Chamber of Business and Industry, board member of the Pennsylvania Parks & Forests Foundation and the Heritage Conservancy and is also a member of the Environmental Law Section of the Pennsylvania Bar Association. Mr. Clark is an active lecturer on a variety of environmental topics for PBI, the Pennsylvania Chamber of Business and Industry, and other industry and civil organizations. Mr. Clark received his J.D. from the Dickinson School of Law and his B.A. from the Pennsylvania State University.

Gail M. Conner is the founder and President of G&C Environmental Services, Inc. (G&C). She provides legal services related to environmental law, real estate transactions and contracts. Ms. Conner was appointed in 2005 and reappointed in 2008 to the Citizens Advisory Council of the Department of Environmental Protection (CAC) from which she also served on the Environmental Quality Board, Air Quality Technical Advisory Committee and Mercury Rulemaking Work Group. She served on the CAC for 8 years from 2005 to 2013. Ms. Conner has performed environmental consulting and regulatory compliance work for more than 25 years. She served as a Peer Review expert for the U.S. Environmental Protection Agency (EPA), with expertise in asbestos science, demolition engineering, monitoring, industrial hygiene, and human health risk. She also performs peer review for the Federal Aviation Administration Capacity Enhancement Program for air quality, hazardous waste and Environmental Justice. Prior to founding G&C Environmental Services, Ms. Conner served as a scientist for an engineering firm and in several environmental roles for the State of Wisconsin, including State Asbestos Coordinator for the Wisconsin Department of Industry, Labor and Human Relations, where she assisted in the development of the Wisconsin Asbestos Policy and legislation. Ms. Conner also worked for the Wisconsin Department of Natural Resources, Bureau of Air Management and was responsible for training programs for field inspection and enforcement staff. Ms. Conner received her J.D. from Widener University School of Law in Wilmington, Delaware and her B.S. in Biology/ Education from the University of Wisconsin-Madison.

Pennsylvania Environmental Hearing Board



Rules Committee

Thomas M. Duncan is an attorney with the environmental and energy law firm of Manko, Gold, Katcher & Fox, LLP, where he concentrates on environmental regulatory counseling, transactional matters, and environmental litigation. Tom represents and counsels a broad range of clients and has litigated cases before state and federal courts, the Pennsylvania Environmental Hearing Board, and the Pennsylvania Public Utility Commission. Prior to joining the firm, Tom served as an assistant counsel to the Pennsylvania Environmental Hearing Board and as an attorney with an environmental nonprofit organization. In law school, Tom was a law clerk for the U.S. Environmental Protection Agency and a legal intern for the Pennsylvania Department of Environmental Protection. Upon graduation, he received Villanova's Public Interest Fellowship Program Award. Tom currently serves on the Council of the Pennsylvania Bar Association's Environmental and Energy Law Section and has chaired the Section's Pro Bono Committee since 2015. Tom is also on the Executive Committee of the Delaware Valley Environmental American Inn of Court and chairs its Membership Committee. In addition, he serves on the Board of the Lower Merion Conservancy and has served as an appointed member of East Bradford Township's Environmental Advisory Council. He received his undergraduate degree from the University of Maryland and his Juris Doctorate degree from the Villanova University School of Law.

Jean Mosites is a shareholder in the Environmental, Energy and Natural Resources, and the Public Sector groups of Babst Calland in Pittsburgh, PA. Her practice includes client counseling on environmental compliance in the energy sector, resolving liabilities under federal and state remediation programs, as well as administrative appeals and environmental litigation in state and federal courts. She has represented clients in numerous matters before the Pennsylvania Environmental Hearing Board. Ms. Mosites graduated from the University of Pittsburgh with a B.A. in Political Science and a M.A. in International Relations. She graduated magna cum laude from Duquesne University School of Law, where she was the Executive Comment Editor for Duquesne Law Review. Ms. Mosites is an adjunct professor of law at the Duquesne University School of Law. She is rated by Martindale-Hubbell as AV Preeminent, Peer Rated for the Highest Level of Professional Excellence and is listed for inclusion in The Best Lawyers in America© for Environmental Law. Ms. Mosites currently serves on the Pennsylvania Bar Association's Environmental and Energy Law Section Council. She frequently plans and presents Pennsylvania Bar Institute CLE programs on environmental and oil and gas law. She has also published articles and participated in numerous panel discussions and training seminars addressing a variety of environmental topics for the private sector.

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Diana Stares is Chief Counsel of the Pennsylvania Department of Environmental Protection. Previously, she held the position of Litigation Coordinator of the Department's Office of Chief Counsel. Ms. Stares also served as Regional Counsel for the Department's Southwest Regional Office and as a Supervising Attorney and Assistant Counsel for that Office. From 2011 to 2016, she served as the inaugural Director of the Center for Energy Policy and Management at Washington & Jefferson College. Ms. Stares received a J.D. from Duquesne University School of Law and a B.A. from Hofstra University.

Matthew L. Wolford practices law as a solo practitioner in Erie, PA, where he concentrates on environmental matters. Before going into private practice, he served as an Assistant Counsel and Regional Counsel for the Pennsylvania Department of Environmental Protection ("DEP"). Prior to joining DEP, he served as a prosecutor with the PA Office of Attorney General ("OAG"), Environmental Crimes Section; and as a civil litigation attorney for the OAG's Torts Litigation Section. He also served as a Special Prosecutor of environmental crimes for both the OAG and the U.S. Attorney for the Western District of Pennsylvania. He is a regular lecturer for the Pennsylvania Bar Institute and has lectured for the U.S. EPA (National Enforcement Training Institute), the DEP, the PA Fish and Boat Commission, PA's Minor Judiciary, and the Erie County Bar Association. He is an Adjunct Professor at Gannon University in Erie, PA, where he teaches a course on environmental law. He is also a Committee Member of the State Water Plan Statewide and Great Lakes Regional Committees and serves on the Boards of several environmental organizations in the Erie area. He received his undergraduate degree from the Pennsylvania State University and his Juris Doctorate degree from the Temple University School of Law and is a member of the Erie County and Pennsylvania Bar Associations.

Douglas G. Moorhead is the Regional Counsel for the Northwest Office of the Pennsylvania Department of Environmental Protection's Office of Chief Counsel. He supervises an office of eight attorneys and two legal assistants engaged in all aspects of counseling, litigation and appellate advocacy for the Department's Northwest Office, the Northwest District Office of Oil and Gas Management, and the Eastern District Office of Oil and Gas Management. Prior to being appointed Regional Counsel in 2016, Doug served as a supervising attorney and assistant counsel in the Northwest office beginning in 2001. In that time, he has a broad range of litigation experience before the Environmental Hearing Board including, Oil and Gas, Air Quality, and Environmental Cleanup matters. He began his career as an attorney specializing in environmental and land use law in private practice in Annapolis, Maryland after working as a clerk in the United States Environmental Protection Agency's Office of Administrative Law Judges. Doug is also a mediator for the Pennsylvania Office of General Counsel. He has been an adjunct professor at Thiel College and Mercyhurst University, teaching undergraduate courses in environmental law. Doug has also made presentations for the Pennsylvania Bar Institute's Environmental Law Forum on Air Quality and Environmental Cleanup topics. He is a graduate of the University of Maryland School of Law and holds a BA in Criminal Justice from Edinboro University of Pennsylvania.

Pennsylvania Environmental Hearing Board



Rules Committee

Dawn M. Herb is the Regional Counsel for the Southcentral Office of the Pennsylvania Department of Environmental Protection's Office of Chief Counsel. Dawn supervises an office of ten attorneys and two legal office administrators engaged in all aspects of counseling, litigation and appellate advocacy for the Department's Southcentral Office, the Bureau of Laboratories, and three district mining offices. Prior to being appointed Regional Counsel in 2018, Dawn was an assistant counsel in the Northcentral office beginning in 1994. Since starting with the Office of Chief Counsel, Dawn has attained a broad range of litigation experience before the Environmental Hearing Board, the Commonwealth Court of Pennsylvania, and district magistrates. Dawn is also a trained mediator through the Pennsylvania Office of General Counsel's Mediation Program. Dawn has participated as a presenter for the Pennsylvania Bar Institute's Environmental Law Forum on Air Quality and Clean Water topics. Dawn received her J.D. and Masters of Studies in Environmental Law from Vermont Law School and obtained a B.A. and Environmental Studies Certificate from Dickinson College.

**Dawn M. Herb was appointed to the Rules Committee effective January 1, 2023. She is replacing Diana Stares who stepped down from the Rules Committee at the end of December 2022.

Pennsylvania Environmental Hearing Board



**Rule Changes: 52 Pa.B. 6534
Saturday, October 22, 2022**

Pennsylvania Environmental Hearing Board



2022 Rule Changes

RULES AND REGULATIONS

TITLE 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA.CODE CH. 1021]

PRACTICE AND PROCEDURE

[52 Pa.B. 6534]

[Saturday, October 22, 2022]

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedure) to read as set forth in Annex A. The amendments to Chapter 1021 modify the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the final regulations at its meeting on August 3, 2021.

Effective Date

This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

Contact Person

For further information, contact Maryanne Wesdock, Senior Counsel, Environmental Hearing Board at mwesdaock@pa.gov, (412) 565-5245, or Suite 310, Piatt Place, 301 Fifth Avenue, Pittsburgh, PA 15222. If information concerning this notice is required in an alternative form, contact Christine Walker, Secretary to the Board, at christiw@pa.gov or (814) 871-2573. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

Statutory Authority

The Board has the authority under section 5(c) of the Environmental Hearing Board Act (act) (35 P.S. § 7515(c)) to adopt regulations pertaining to practice and procedure before the Board.

Pennsylvania Environmental Hearing Board



2022 Rule Changes

Comments and Revisions to Proposed Rulemaking

The proposed rulemaking amendments were adopted by the Board at its meeting of December 4, 2019, and published at 51 Pa.B. 2166 (April 17, 2021), with a 30-day public comment period. A comment was submitted by the Independent Regulatory Review Commission (IRRC). The comment and the Board's response were discussed at a public meeting of the Board's Rules Committee held by videoconference on July 8, 2021. In response to the comment received on the proposed rulemaking, a draft final-form rulemaking was prepared. A summary of the comment and Board's response is set forth as follows:

§ 1021.32. Filing

IRRC questioned the Board's decision to add a comment to § 1021.32 (relating to filing) notifying attorneys and pro se appellants who register for electronic filing (eFiling) that they may not eFile until their registration has been approved by the Board. IRRC noted that for the provision to be binding and enforceable, it was required to be part of the regulation, not a comment. IRRC suggested that the Board consider adding the provision to this final-form rulemaking or explain why it was unnecessary to do so. In response, the Board explained that the comment was meant to be explanatory, not directive, and was intended to notify eFiling registrants that if they register during non-business hours, they will be unable to access the eFiling system until the registration is accepted on the next business day. The Board agreed with IRRC that the comment, as drafted, appeared to provide a directive to registrants to abstain from eFiling until their registration is accepted. Therefore, it redrafted the comment to clarify that the comment was simply intended to notify registrants that they will not be able to access the eFiling system until their registration has been accepted; acceptance of the eFiling registration is a ministerial function performed by staff during business hours.

Sunset Date

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an ongoing basis by the Board and the Rules Committee.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 26, 2021, the Board submitted a copy of the notice of proposed rulemaking, published at 51 Pa.B. 2166, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

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Under section 5(c) of the Regulatory Review Act, the Board shall submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, no comments were received from either of the legislative committees or the public regarding the proposed regulations.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 15, 2021, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 16, 2022, and approved the final-form rulemaking.

Findings

The Board finds that:

- (1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law, and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).
- (2) These regulations are necessary and appropriate for administration of the act.

Order

- (1) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.21, 1021.32, 1021.34, 1021.35, 1021.51, 1021.53a, 1021.94a, 1021.106 and 1021.131 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (2) The Chairperson of the Board shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel for review and approval as to legality and form, as required by law.
- (3) The Chairperson of the Board shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee, and IRRC, as required by law.

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(4) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

THOMAS W. RENWAND,
Chairperson and Chief Judge

(Editor's Note: See 52 Pa.B. 3740 (July 2, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 106-13 remains valid for the final adoption of the subject regulations.

ANNEX A

TITLE 25. ENVIRONMENTAL PROTECTION PART IX. ENVIRONMENTAL HEARING BOARD CHAPTER 1021. PRACTICE AND PROCEDURE

PRELIMINARY PROVISIONS

REPRESENTATION

§ 1021.21. Representation.

(b) Corporations shall be represented by an attorney of record.

(c) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel if the Board determines that they are not merely appearing on their own behalf.

(c.1) Parties may be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion pro hac vice filed by an attorney in this Commonwealth.

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(d) Subsections (a)—(c.1) supersede 1 Pa. Code §§ 31.21—31.23 (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings).

Comment: Payment of the Interest on Lawyers Trust Account fee under 204 Pa. Code § 81.505(a) (relating to fees) is not required as a condition to pro hac vice admission in a proceeding before the Board.

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

(c) *Electronic filing*

(11) Documents may be electronically filed in Microsoft Word format, PDF format or other formats as the Board may permit. The electronic filing provider automatically converts uploaded documents not already in PDF format to PDF format. A document may exceed page limitation rules if the additional pages result solely from the electronic conversion by the electronic filing provider.

(f) *Format of filing.* Failure to comply with subsection (c)(5), (d)(5) or (e)(4) will not result in dismissal of a filing, but the Board may request that the party resubmit the document in proper form.

Comment: Attorneys and pro se appellants who register for electronic filing will be unable to file electronically until they receive a confirmation email advising them that they have been approved for electronic filing. If registration occurs during non-business hours, the confirmation will not occur until the next business day. Until such confirmation occurs, a registrant has the option of filing by means other than electronic filing to ensure timely filing.

§ 1021.34. Service by a party.

(a) Notices of appeal shall be served as provided in § 1021.51 (relating to commencement, form and content). Complaints filed by the Department will be served as provided in § 1021.71(b) (relating to complaints filed by the Department).

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§ 1021.35. Date of service.

- (b) For the sole purpose of computing the deadlines under this chapter for responding to documents:
- (3) Documents served by mail shall be deemed served 3 calendar days after the date of actual service.

FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

- (c) The notice of appeal must set forth the name, mailing address, e-mail address and telephone number of the appellant. The notice of appeal shall be signed by at least one attorney in the attorney's individual name or by the appellant(s).

§ 1021.53a. Nunc pro tunc appeals.

- (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.
- (b) A person seeking to appeal nunc pro tunc shall file a petition to appeal nunc pro tunc. If filed after a dispositive motion that seeks to dismiss an appeal as untimely, the filing of the petition stays the deadlines for filing a response or reply concerning the motion. The Board will issue deadlines for filing a response and reply if the Board grants the petition and the dispositive motion addresses issues in addition to untimeliness.
- (c) The petition to appeal nunc pro tunc shall comply with the requirements set forth for "motions" under § 1021.91 (relating to general), and, in addition, shall include the following:
 - (1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.
 - (2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

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- (3) Copies of all documents and a list of all witnesses that the potential appellant relies upon in support of the petition to appeal nunc pro tunc.
- (4) Legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.
- (5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of the person or persons, that the facts are verified as true and correct subject to the penalties for unsworn falsification to authorities, under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).
- (6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in paragraph (5), an explanation of why the affidavit or verification was omitted.
- (d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for "responses" under § 1021.91. Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.
- (e) A memorandum of law in support of the petition or response may be filed with the petition or response.
- (f) The potential appellant may not file a reply unless the Board orders otherwise.
- (g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate.
- (h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.
- (i) If the petition to appeal nunc pro tunc is denied, the notice of appeal will be dismissed as untimely.

Pennsylvania Environmental Hearing Board



2022 Rule Changes

MOTIONS

§ 1021.94a. Summary judgment motions.

(h) *Length of brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion may not exceed 30 pages. If the Board grants leave to file a brief in excess of 30 pages, the brief shall contain a table of contents.

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.106. Voluntary mediation.

At the end of the initial stay, the parties shall jointly file a report, prepared and signed by the mediator, setting forth whether the mediation has been successful or has a likelihood of success if the mediation process continues to proceed. The parties may request an additional stay if necessary to complete the mediation process.

POSTHEARING PROCEDURES

§ 1021.131. Posthearing briefs.

The initial posthearing brief of each party shall contain a table of contents, proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law.

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**Full revisions can be viewed at [Pennsylvania Bulletin](#).