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2018]

STANDING UP FOR A CLEANER TOWN: HOW THE EHB'S
BROAD DEFINITION OF STANDING IN *FRIENDS OF
LACKAWANNA V. DEPARTMENT OF ENVIRONMENTAL
PROTECTION* EXPANDS CITIZENS' APPELLATE RIGHTS

I. INTRODUCTION: CLIMBING TRASH MOUNTAIN

The United States produces more trash than any other country, totaling approximately 1,609 pounds of trash per person every year.¹ Pennsylvania, by itself, created approximately 8.7 million tons of municipal waste in 2016.² Consequently, there are over thirty-five tons of trash per person in Pennsylvania landfills, making it the state with the second greatest amount of trash per person.³ This may be a result of Pennsylvania importing more trash from surrounding states than any other state.⁴

Municipal solid waste landfills receive household trash.⁵ In 2009, the continental United States contained approximately two thousand municipal solid waste landfills.⁶ Towns and areas of land in close proximity to municipal waste landfills are susceptible to odor pollution, truck traffic, and emission of potential toxic compounds.⁷ Taken together, these factors can have negative effects on individuals who live around the landfill and the environment surrounding the landfill.⁸

1. *Solid Waste and Landfill Facts*, UNIV. OF SOUTHERN INDIANA, <https://www.usi.edu/recycle/solid-waste-landfill-facts/> (last visited Oct. 10, 2017) (noting United States citizens, who total five percent of world's population, create forty percent of world's trash).

2. *Waste Facts*, PA WASTE INDUSTRIES ASS'N, <http://pawasteindustries.org/waste-industry/waste-facts> (last visited Oct. 10, 2017) (highlighting Pennsylvania produced approximately 1,360 pounds of trash per person).

3. Marielle Segarra, *Pennsylvania Ranks Second in Landfill Trash Per Capita*, WHY (Aug. 4, 2016), <https://why.org/articles/pennsylvania-ranks-second-in-landfill-trash-per-capita/> (citing data from Environmental Protection Agency's Greenhouse Gas Reporting Program explaining only Nevada has more trash in its landfills than Pennsylvania).

4. *Id.* (explaining Pennsylvania imports trash from New York and New Jersey).

5. *Municipal Solid Waste Landfills*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/landfills/municipal-solid-waste-landfills> (last visited Feb. 12, 2018) (defining municipal solid waste landfills).

6. *Id.* (explaining landfills are operated by state in which they are located).

7. See Segarra, *supra* note 3 (articulating negative impact of landfills including methane and carbon dioxide gases created by garbage decomposition).

8. See generally *id.* (discussing noise concerns, odor pollutants, and possibility of contaminated liquid from landfill leaking into groundwater and soil).

260 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

In *Friends of Lackawanna v. Department of Environmental Protection (Friends of Lackawanna)*,⁹ Pennsylvania's Environmental Hearing Board (EHB) recently acknowledged the importance of allowing citizens to come together to promote their environmental well-being.¹⁰ In taking this action, the EHB needed to decide: (1) whether Friends of Lackawanna (FOL) members had standing, (2) whether those members had an intimate enough relationship to FOL for the organization to have representational standing, (3) and whether FOL had organizational standing itself.¹¹ The EHB found standing in all three instances.¹²

The EHB also decided whether it had the ability to review Department of Environmental Protection (Department) decisions.¹³ The EHB decided that it has the ability to review the Department's decisions as a check on other branches of government.¹⁴ The EHB decision reaffirmed holdings in previous EHB cases.¹⁵ By relying on decisions and holdings from the Pennsylvania Commonwealth Court, the EHB correctly concluded that FOL had standing to bring the case and that the EHB had the right to review the case.¹⁶

II. FACTS: SOMETHING FOUL IN THE AIR

FOL appealed the Department's grant to the EHB, which renewed Keystone Sanitary Landfill, Inc.'s (Keystone) landfill operation permit in the City of Lackawanna for an additional ten years.¹⁷

9. No. 2015-063-L, 2016 WL 5001388 (Pa. Env'tl. Hearing Bd. Sept. 2, 2016).

10. *See id.* at *4 (citing *Borough of Roaring Spring v. Dep't of Env'tl. Prot.*, No. 2003-106-C, 2004 WL 3021161 (Pa. Env'tl. Hearing Bd. Dec. 21, 2004)) (explaining ability to file suit as organization is important defense to public injustice).

11. *Id.* at *1-3 (articulating Keystone's three arguments for FOL's lack of standing).

12. *Id.* at *3 (holding FOL members had standing, members had intimate enough relationship to organization for organization to have representational standing, and organization itself had standing).

13. *Id.* at *3, 6 (rejecting Keystone's argument that executive branch and courts do not have ability to review decision's compliance with ERA).

14. *Friends of Lackawanna*, 2016 WL 5001388, at *6-7 (concluding EHB must ensure Department has struck proper "balance between environmental and [] societal concerns, even after [] Legislature has initially spoken").

15. For a further discussion of instances where the EHB and courts recognized the ability of the EHB to review Department decisions, see *infra* note 187 and accompanying text.

16. *See infra* notes 120-125 (discussing proximity to landfill as means for standing in past EHB decisions); *see also infra* note 187 and accompanying text (concluding prior case law demonstrates EHB's duty to apply balancing test when reviewing Department decisions).

17. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (rejecting Keystone's argument that FOL did not have standing to bring suit and that EHB did not have authority to review appeal).

In *Friends of Lackawanna*, Keystone filed a motion for summary judgment, arguing: (1) FOL did not have standing and (2) the EHB did not have the ability to review FOL's claim that the Department acted contrary to its abilities under the Environmental Rights Act (ERA).¹⁸ Several FOL members either lived in or used the area around Keystone's landfill.¹⁹ They argued the landfill's operation resulted in "malodors, dust, bird droppings, truck traffic, and interference with aesthetic values."²⁰ FOL members were concerned for the health and safety of their families, citing fears of future landfill fires and possible groundwater contamination.²¹ As a result, individuals affiliated with FOL asserted that their use and enjoyment of the area surrounding the landfill would be further affected if the Department renewed Keystone's permit for ten years.²²

In response, Keystone argued even if those individuals living near the landfill had standing, their relationship with FOL was not intimate enough for the organization to have "representational standing."²³ Keystone's reasoning rested on its assertion that in order for FOL to have representational standing, the organization "must either have 'members' . . . or have persons associated with it that at least have 'indicia of membership.'"²⁴ FOL admitted that while

18. *Id.* at *1 (rejecting Keystone's arguments).

19. *Id.* at *2 (noting some FOL members lived half-mile from landfill).

20. *Id.* (viewing concerns of FOL in light most favorable to non-moving party); see generally *Malodour*, THE OXFORD ENGLISH DICTIONARY (2d ed. Vol. IX 1989) (defining malodour as "[a]n evil smell, a stench").

21. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (reviewing FOL's concerns over impact of landfill). During a prior hearing, FOL specifically claimed that over the past few years, Keystone's landfill has "begun accepting new waste streams, that . . . there have been multiple thermal events [at the landfill], and that there has been damage to some of the landfill's liners." *Friends of Lackawanna v. Dep't of Env't. Prot.*, No. 2015-063-L, 2015 WL 6687665, at *1 (Pa. Env't. Hearing Bd. Oct. 29, 2015). A thermal event is also known as a "subsurface heating event" and may result in landfill fires. See generally *Friends of Lackawanna*, 2016 WL 5001388, at *2; *Subsurface Heating Events at Solid Waste and Construction and Demolition Debris Landfills: Best Management Practices*, OHIO ENVTL. PROT. AGENCY 1 (2011), http://epa.ohio.gov/Portals/34/document/guidance/gd_subsurface_heating_events.pdf. Subsurface heating events can also cause "odors; smoke; toxic omissions; liner or cap damage; gas and leachate management structure damage; slope failure; ground water and/or surface water contamination; and disruption of landfill operations." *Id.*

22. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (articulating FOL's reason for appealing Keystone's permit renewal and grounds for standing).

23. *Id.* at *3 (rejecting Keystone's motion for summary judgment based on finding that FOL had standing).

24. *Id.* (summarizing Keystone's argument that FOL must have "members" according to Pennsylvania Nonprofit Corporation Law); see generally 15 PA. CONS. STAT. § 5103 (2017) (defining "member" as "a person that has been given voting rights or other membership rights in a membership corporation by a bylaw adopted by the members").

262 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

their members were not “members,” as the Pennsylvania nonprofit corporation law defines it, their members did have an “indicia of membership.”²⁵ In addition, Keystone further asserted FOL did not have independent standing to file an appeal.²⁶

Keystone’s final argument focused on the Environmental Rights Act found in Article 1, Section 27 of the Pennsylvania Constitution, claiming “once the Legislature has passed an environmental statute, neither the Executive Branch nor the Courts have any further role to play with respect to the ERA.”²⁷ The EHB denied Keystone’s motion for summary judgment finding FOL had standing and also held that the EHB has the ability to review the Department’s decisions under the ERA.²⁸

III. DIGGING THROUGH STANDING AND THE ERA

The EHB previously addressed appeals where one party was comprised of citizens living within a close proximity to a landfill.²⁹ In such circumstances, the EHB considered the individuals’ proximity to the landfill and the anticipated negative effects of the landfill to determine if the individuals ultimately had standing.³⁰ When individuals appeal as part of an organization, the EHB previously held that an organization has standing if at least one of its members also has standing.³¹ Moreover, when litigants have standing to bring suit in environmental cases, the Environmental Rights Act (ERA) governs review of these cases.³²

25. *Friends of Lackawanna*, 2016 WL 5001388, at *3 (asserting formalistic standard set forth by Keystone has no support in case law).

26. *Id.* at *5 (discussing Keystone’s additional argument for lack of standing).

27. *Id.* at *6 (reiterating Keystone’s claim that FOL lacked representational standing).

28. *Id.* at *2-6 (holding FOL members had individual standing and FOL had representational standing); *see infra* note 88 and accompanying text (citing ERA); *see infra* note 96 and accompanying text (articulating three ways individuals may bring claims under ERA).

29. *See Tri-Cty. Landfill, Inc. v. Dep’t of Env’tl. Prot.*, No. 2013-185-L, 2014 WL 1045644, at *3 (Pa. Env’tl. Hearing Bd. Mar. 11, 2014) (noting petitioners lived, worked, and used land around proposed landfill and negative impact on their use of surrounding land); *Giordano v. Dep’t of Env’tl. Prot.*, No. 99-204-L, 2000 WL 1506957, at *1 (Pa. Env’tl. Hearing Bd. Oct. 4, 2000) (denying permittee’s motion to dismiss citizens’ appeal from issue of permit to expand local landfill).

30. *See Tri-Cty. Landfill*, 2014 WL 1045644, at *3 (considering petitioners use of land surrounding proposed landfill and projected effects).

31. *See infra* notes 72-74 and accompanying text (holding organization can have standing on behalf of members).

32. *See infra* note 88 and accompanying text (citing ERA).

A. Summary Judgment

The EHB will grant a motion for summary judgment in two scenarios.³³ First, the EHB will award summary judgment if “there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report[.]”³⁴ Summary judgment is only possible if the material facts of the case are undisputed by both parties.³⁵ In *Center for Coalfield Justice v. Department of Environmental Protection*,³⁶ the EHB denied a motion for summary judgment where the non-moving parties rejected a significant amount of the allegedly undisputed facts asserted by the moving party and provided exhibits to prove that the facts were actually in dispute.³⁷

The second situation in which the EHB will grant summary judgment is:

[I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues submitted to a jury.³⁸

Under this rule, summary judgment is appropriate when the record the burdened party presents does not contain adequate facts to establish that party's prima facie case.³⁹ In *Valley Creak Coalition v. Department of Environmental Protection*,⁴⁰ the EHB stated that their role in determining whether a party has made out a prima facie case is not to determine whether one party's evidence is more reliable than the other party's evidence.⁴¹ Rather, according to the

33. See PA. R. Civ. P. 1035.2 (outlining rules for summary judgment in Pennsylvania).

34. *Id.* (articulating first way summary judgment may be granted).

35. See *Ctr. for Coalfield Justice v. Dep't of Env'tl. Prot.*, No. 2014-072-B, 2016 WL 3388107, at *1 (Pa. Env'tl. Hearing Bd. June 6, 2016) (denying motion for summary judgment when parties dispute material facts).

36. No. 2014-072-B, 2016 WL 3388107 (Pa. Env'tl. Hearing Bd. June 6, 2016).

37. *Id.* at *2 (denying motion for summary judgment when two non-moving parties denied significant percentage of Center for Coalfield Justice's allegedly undisputed facts and provided over thirty exhibits in support of their argument).

38. PA. R. Civ. P. 1035.2(2) (explaining summary judgment will be granted if burdened party does not make out prima facie case).

39. *Id.* (noting summary judgment granted when facts presented are inadequate to support prima facie case).

40. No. 98-228-MG, 1999 WL 1295113 (Pa. Env'tl. Hearing Bd. Dec. 15, 1999).

41. *Id.* at *10 (articulating limit of EHB's duty when summary judgment order is filed).

264 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

EHB, their role is to determine if there are material disputes that necessitate a hearing.⁴²

When the court determines whether one of the two situations in which summary judgment is proper is present, “[T]he [EHB] must view the record in the light most favorable to the nonmoving party and all doubts as to the existence of a genuine issue of fact are to be resolved against the moving party.”⁴³ The motion will only be granted if it is “clear and free from doubt” that issues for trial exist.⁴⁴ The EHB, therefore, must examine all of the circumstances present and decide any existing disputed facts in favor of the non-moving party.⁴⁵

When a moving party files a motion for summary judgment challenging the non-moving party’s standing, the moving party has the burden of showing there is no genuine issue of material fact concerning whether the non-moving party has standing.⁴⁶ If the moving party “fail[s] to meet their burden of demonstrating by a preponderance of the evidence that they have standing to pursue [the] appeal” then the moving party’s motion will be denied.⁴⁷

B. Standing

When challenging standing, a moving party claims the non-moving party does not have a right to have their case decided on the merits.⁴⁸ The United States Constitution grants federal standing in two different scenarios: “Article III standing, which enforces the [United States] Constitution’s case or controversy requirement; and prudential standing, which embodies judicially self-imposed

42. *Id.* (describing what EHB’s duty is when summary judgment order is filed).

43. *Borough of Roaring Spring v. Dep’t of Env’tl. Prot.*, No. 2003-106-C, 2004 WL 3021161, at *3 (Pa. Env’tl. Hearing Bd. Dec. 21, 2004) (summarizing EHB’s role in evaluating summary judgment motions).

44. *Ctr. for Coalfield Justice v. Dep’t of Env’tl. Prot.*, No. 2014-072-B, 2016 WL 3388107, at *1 (Pa. Env’tl. Hearing Bd. June 6, 2016) (articulating requirement for summary judgment).

45. *Roaring Spring*, 2004 WL 3021161, at *2 (explaining how EHB must review motions for summary judgment).

46. *See Empire Coal Mining & Dev. v. Dep’t of Env’tl. Res.*, 615 A.2d 829, 832 (Pa. Commw. Ct. 1992) (noting burden lies with moving party); *see also Greenfield Good Neighbors Grp., Inc. v. Dep’t of Env’tl. Prot.*, No. 2002-006-R, 2003 WL 22064746, at *11 (Pa. Env’tl. Hearing Bd. Aug. 20, 2003) (reiterating moving party must prove standing by preponderance of evidence).

47. *Greenfield Good Neighbors Grp.*, 2003 WL 22064746, at *11 (describing burden for challenging standing in summary judgment motion).

48. *Roaring Spring*, 2004 WL 3021161, at *4 (summarizing reasoning behind challenges to standing).

limits on the exercise of federal jurisdiction.”⁴⁹ This “judicially self-imposed limit[ation]” on jurisdiction bars “litigant[s] [from] raising another person’s legal rights,” “[general] grievances,” and complaints falling outside the “zone of interests protected by the law invoked.”⁵⁰ Pennsylvania’s standing requirements, however, differ from the federal system’s requirements.⁵¹ While the United States Supreme Court acknowledges that state courts do not have to strictly adopt the same standards as federal courts, the Pennsylvania Supreme Court has recognized and adopted a “prudential standing” doctrine modelled after the federal equivalent.⁵²

The Pennsylvania Supreme Court’s prudential standing doctrine acknowledges that standing requires a genuine controversy stemming from a party’s “sufficient interest” in the outcome of the case and, therefore, bars against the same three instances as the federal prudential standing doctrine.⁵³ The litigant is again prohibited from raising rights belonging to others or the rights of a general nature in Pennsylvania courts.⁵⁴ In general, standing is “conferred by statute” for Pennsylvania state administrative agencies, like the EHB.⁵⁵ In *Borough of Roaring Spring v. Department of Environmental*

49. *Id.* (requiring plaintiff to show injury in fact, injury as result of defendant’s action, and redressability). Article III of the United States Constitution states:

The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affected ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2.

50. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (articulating federal prudential standing doctrine).

51. *Roaring Spring*, 2004 WL 3021161, at *4 (explaining Pennsylvania courts are not held to federal standing requirements).

52. *Id.* at *5 (noting Pennsylvania Constitution is silent on standing); *see also* *Hous. Auth. of the Cty. of Chester v. Pa. State Civil Serv. Comm’n*, 556 Pa. 621, 631-32 (1999) (clarifying “unlike the standing requirement in the federal courts, the standing requirement which this Court has traditionally imposed does not ascend to the level of a Constitutional mandate”).

53. *Roaring Spring*, 2004 WL 3021161, at *5 (articulating policy reason behind Pennsylvania standing laws).

54. *See id.* (explaining requirements for bringing suit).

55. *Id.* (noting origin of standing requirements for EHB cases); *see* 35 PA. CONS. STAT. § 7514(c) (2017) (analyzing standing for appeals of Department decisions to EHB).

266 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

Protection (Roaring Spring),⁵⁶ the EHB determined that standing for an administrative appeal of a Department action is granted by the Environmental Hearing Board Act (EHB Act).⁵⁷ In the EHB Act the legislature codified an “adversely affected” standard for obtaining standing.⁵⁸

1. Individual Standing

For individuals to have standing in an administrative appeal of a Department action before the EHB, they must meet the “adversely affected” standard outlined by the legislature.⁵⁹ The EHB Act states, “[N]o action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [EHB] under [the EHB’s rules and procedures].”⁶⁰ The EHB Act, therefore, provides the right to appeal a Department decision if the decision has adversely impacted the party.⁶¹

In *Giordano v. Department of Environmental Protection (Giordano)*,⁶² the EHB held that appellants, who lived approximately two miles from appellee’s landfill, had standing because they were adversely affected by the landfill.⁶³ The EHB found the appellants suffered malodors at their residences due to the landfill’s close proximity, which interfered with the enjoyment of their property.⁶⁴

Similarly, in *Tri-County Landfill, Inc. v. Department of Environmental Protection (Tri-County Landfill)*,⁶⁵ the EHB found standing when petitioners presented evidence showing they lived, worked, and used the land around the proposed landfill.⁶⁶ Petitioners alleged the creation of a landfill in such a close proximity to where they lived

56. *Id.* (finding members had standing to bring suit challenging local mining permit).

57. *Id.* at *6 (explaining difference between appeals made directly to state courts and administrative appeals); *see generally* 2 PA. CONS. STAT. § 702 (2017) (outlining standing requirements for appeal of DEP actions to state courts).

58. *Roaring Spring*, 2004 WL 3021161, at *6 (articulating standard provided by legislature).

59. *Id.* (discussing requirement for appeal to EHB).

60. 35 PA. CONS. STAT. § 7514(c) (2017) (granting opportunity for appeal).

61. *See id.* (granting right to appeal to those adversely affected).

62. No. 99-204-L, 2000 WL 1506957 (Pa. Env’tl. Hearing Bd. Oct. 4, 2000).

63. *Id.* at *3 (holding appellants have standing when appellants lived approximately two miles from landfill).

64. *Id.* (noting complaints of malodors, litter, noise, and truck traffic as result of nearby landfill).

65. No. 2013-185-L, 2014 WL 1045644 (Pa. Env’tl. Hearing Bd. Mar. 11, 2014).

66. *Id.* at *3 (relying on EHB standard holding negative impact on person’s use and enjoyment of area qualifies as standing); *accord* *Giordano v. Dep’t of Env’tl. Prot.*, No. 99-204-L 2000 WL 1506957 (Pa. Env’tl. Hearing Bd. Oct. 4, 2000) (weigh-

and spent time would result in a negative “impact upon their economic and environmental well-being.”⁶⁷ The EHB did not consider whether the landfill would cause a negative impact on their lives since petitioners established it was “objectively reasonable” to believe the landfill threatened to cause adverse harm.⁶⁸ The EHB reaffirmed its holding that it is not necessary for petitioners to live in the affected area, although it is sufficient for petitioners to merely use the land in a recreational manner.⁶⁹ Petitioners, additionally, had standing even though others who were not involved in the lawsuit may have been similarly situated.⁷⁰

2. *Representational Standing*

In *Roaring Spring*,⁷¹ the EHB held an organization may have standing on behalf of its members or itself.⁷² Members of an organization can be represented by the organization if the “members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁷³ The organization’s members have standing to sue in their own right if the members are adversely affected.⁷⁴ The challenged action does not have to injure the organization itself so long as one member is negatively impacted and has “an interest in the litigation that is substantial, direct, and immediate.”⁷⁵

ing benefits and harms resulting from increase in landfill size including: proximity to landfill, odors, litter, noise, and traffic).

67. *Tri-Cty. Landfill, Inc. v. Dep’t of Env’t. Prot.*, No. 2013-185-L, 2014 WL 1045644, at *1 (Pa. Env’t. Hearing Bd. Mar. 11, 2014) (relying on petitioner’s detailed claims and viewing those claims in light most favorable to petitioner).

68. *Id.* at *3 (viewing petitioner’s claims in light most favorable to petitioner as required by summary judgment motions).

69. *Id.* (explaining recreational use of land sufficient for standing).

70. *Id.* (rejecting idea that petitioners lack standing when others not involved in suit are in similar situation).

71. No. 2003-106-C, 2004 WL 3021161, at *1 (Pa. Env’t. Hearing Bd. Dec. 21, 2014).

72. *Id.* at *7 (noting two ways organizations acquire standing).

73. *Friends of the Earth, Inc., v. Laidlaw Env’t. Servs., Inc.*, 528 U.S. 167, 181 (2000) (outlining requirements for representational standing).

74. 35 PA. CONS. STAT. § 7514(c) (2017) (granting right to appeal to those adversely affected).

75. *Pa. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) (holding representational standing exists when one member suffered injury); *see also* *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 341-42 (1977) (asserting “Commission cannot rely on . . . injuries” inflicted on members to confer standing on Commission); *Borough of Roaring Spring v. Dep’t of Env’t. Prot.*, No. 2003-106-C, 2004 WL 3021161, at *7 (Pa. Env’t. Hearing Bd. Dec. 21, 2004) (articu-

268 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

The federal courts and Pennsylvania state courts have attempted to further define who qualifies as a member capable of bringing a claim through an organization with representational standing.⁷⁶ In 1977, the United States Supreme Court defined “membership” for the purposes of determining an organization’s representational standing by adopting an “indicia of membership” test in *Hunt v. Washington State Apple Advertising Commission (Hunt)*.⁷⁷ The Court held members possess indicia of organizational membership when they elect members, serve on Commissions, and finance activities.⁷⁸

Following the United States Supreme Court’s decision in *Hunt*, the Pennsylvania Supreme Court decided *Pennsylvania Medical Society v. Department of Public Welfare (Pennsylvania Medical Society)*.⁷⁹ When determining if the appellants had representational standing, the Pennsylvania Supreme Court cited a 1975 United States Supreme Court case that held an organization has representational standing “in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate.”⁸⁰ The Pennsylvania Supreme Court’s decision in *Pennsylvania Medical Society* did not cite the Pennsylvania Supreme Court’s case, *Hunt*, or mention the “indicia of membership” test.⁸¹ The Pennsylvania Supreme Court, therefore, did not adopt *Hunt*’s membership test.⁸²

lating one member who will be adversely affected by future action confers standing).

76. *Hunt*, 432 U.S. at 344 (holding representational standing exists when members elected members of Commission, served on Commission, and financed Commission); *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (holding representational standing exists if organization alleges one member is suffering injury as result of challenged action); *Pa. Med. Soc’y*, 39 A.3d at 278 (citing *Warth v. Seldin*, 422 U.S. 490 (1975)) (explaining representational standing exists in absence of injury to organization itself if one member suffered injury as result of challenged action).

77. *See Hunt*, 432 U.S. at 344 (outlining strict membership definition for organization standing).

78. *Id.* (applying indicia of membership to determine if organization has representational standing for members).

79. *Pa. Med. Soc’y*, 39 A.3d at 278 (explaining association representing health care providers had standing because at least one member suffered injury).

80. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)) (articulating less strict membership requirement than that found in *Hunt*).

81. *See id.* (omitting citation to *Hunt* and instead citing *Warth*).

82. *See id.* (omitting citation to *Hunt* and instead relying on *Warth* to define representational standing).

In *Roaring Spring*, the EHB held Roaring Spring Area Citizens Coalition had representational standing.⁸³ The EHB considered the depositions presented by Roaring Spring Area Citizens Coalition, which demonstrated that members used the two streams in question recreationally.⁸⁴ The EHB explained “an aesthetic appreciation for an environmental resource is a cognizable interest for purposes of conferring standing on a person.”⁸⁵ Members’ recreational activities that can confer representational standing onto an organization include hiking, fishing, and general enjoyment of one’s private property.⁸⁶

C. The Environmental Rights Act

When the Pennsylvania Legislature crafted the ERA, its goal was to protect the people of Pennsylvania from government action that would result in unreasonable deterioration of the state’s public natural resources.⁸⁷ The ERA states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.⁸⁸

In *Funk v. Wolf (Funk)*,⁸⁹ the Pennsylvania Commonwealth Court determined the first sentence of the ERA’s goal bestows citizens with rights to the listed natural resources and prohibits the state

83. *Borough of Roaring Spring v. Dep’t of Env’tl. Prot.*, No. 2003-106-C, 2004 WL 3021161, at *12 (Pa. Env’tl. Hearing Bd. Dec. 21, 2004) (considering potential negative effects of mining on members, including aesthetic and recreational concerns, to determine members had standing to challenge mining permit).

84. *See id.* at *2 (considering depositions stating members fished in streams, walked along streams, and streams ran through members’ properties).

85. *Id.* at *9 (citing *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 86)) (explaining aesthetic appreciation sufficient for standing).

86. *Id.* (explaining petitioner’s history of fishing in streams and walking along streams amounted to aesthetic appreciation for standing purposes).

87. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953 (Pa. 2013) (discussing ERA requires potential environmental damage be balanced with societal concerns to determine reasonableness).

88. PA. CONST. art. I, § 27 (articulating Pennsylvania citizens’ rights to natural resources).

89. 144 A.3d 228 (Pa. Commw. Ct. 2016).

270 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

from interfering with those rights.⁹⁰ The last two sentences place the resources in the protection and trust of the Commonwealth.⁹¹

The Pennsylvania Supreme Court further analyzed the ERA's first clause in *Robinson Township v. Department of Environmental Protection (Robinson Township)*.⁹² In *Robinson Township*, individuals and associations petitioned for the review of oil and gas regulations, arguing the regulations violated the ERA.⁹³ The court held, "Clause one of [the ERA] requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features."⁹⁴ This requirement applies to all levels of the Pennsylvania government.⁹⁵

When bringing a claim under the ERA, a party may argue the government has overstepped its boundaries, the government has failed to meet its trustee obligations, or both.⁹⁶ When assessing the actions of the Commonwealth's departments and agencies, the court must be aware of the necessary balance between environmental protection and the state's development.⁹⁷ The Pennsylvania legislature enacted the ERA to preserve Pennsylvania's natural resources for the enjoyment of its citizens, not to prohibit the state's societal and economic development.⁹⁸

In *Payne v. Kassab (Payne I)*,⁹⁹ the Pennsylvania Commonwealth Court prescribed a three-part test for determining whether an individual or organization violated the ERA; this test was later affirmed by the Pennsylvania Supreme Court in *Payne v. Kassab (Payne II)*.¹⁰⁰ Accordingly, the EHB must first determine if the action was in

90. *Id.* at 233 (explaining first sentence of ERA).

91. *Id.* (resulting in Commonwealth as trustee of Pennsylvania's resources).

92. *See Robinson Twp.*, 83 A.3d at 953 (noting court must consider environmental effects of actions).

93. *Id.* at 915 (summarizing citizens' concerns).

94. *Id.* at 952 (reiterating each branch of government involved in protecting Pennsylvania's natural resources).

95. *Id.* (noting requirement applies to state and local government).

96. *Id.* at 950 (stating three ways individual may challenge action under balancing test).

97. *Funk v. Wolf*, 144 A.3d 228, 234 (Pa. Commw. Ct. 2016) (articulating two factors to be balanced when reviewing action under ERA).

98. *See Payne v. Kassab (Payne II)*, 361 A.2d 263, 273 (Pa. 1976) (summarizing reasoning behind ERA).

99. 312 A.2d 86 (Pa. Commw. Ct. 1973).

100. *Id.* at 94 (outlining "Payne test" for balancing environmental and societal concerns); *Payne II*, 361 A.2d, 273 n. 23 (Pa. 1976) (comparing test to §§ 11, 13 of Act 120, 71 P.S. 511, 513(a) which required all three prongs to be met for appellate review of Penn DOT actions); *but see Pa. Evtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) (rejecting *Payne* test one year after *Friends of Lackawanna*).

“compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources[.]”¹⁰¹ Second, the EHB looks at the record to see if it establishes facts showing the Department made a “reasonable effort” to ensure the action’s environmental harm was kept to a minimum.¹⁰² Third, the EHB weighs the “environmental harm which will result from the challenged decision or action [to determine if that harm] so clearly outweigh[s] the benefits to be derived therefrom that to proceed further would be an abuse of discretion[.]”¹⁰³

In *National Solid Wastes Management Association v. Casey (Casey)*,¹⁰⁴ the Pennsylvania Commonwealth Court granted a motion for summary judgment holding the governor’s executive order invalid.¹⁰⁵ In *Casey*, petitioner sought relief from the governor’s executive order that amended existing municipal waste landfill legislation.¹⁰⁶ The court reasoned, “While the General Assembly may . . . constitutionally delegate the power and authority to execute or administer a law, the prohibition against delegation of ‘legislative power’ requires that the *basic policy choices* be made by the General Assembly.”¹⁰⁷ The Pennsylvania Commonwealth Court determined that the governor did not have constitutional or statutory authority to issue the executive order because it virtually overruled all current legislation on the issue.¹⁰⁸ The court held the ERA did not give the

101. *Payne I*, 312 A.2d at 94 (articulating compliance prong of *Payne* test).

102. *Id.* (stating “reasonable effect” prong of *Payne* test).

103. *Id.* (describing balancing test); *see also* *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 468 (Pa. Commw. Ct. 2015) (listing requirements under *Payne* test). In *Feudale*, the Pennsylvania Commonwealth Court applied the *Payne* test to determine if the DEP wrongfully granted Aqua Pennsylvania, Inc. (Aqua) a National Pollutant Discharge Elimination System (NPDES) permit allowing Aqua to replace an underground waterline. *Id.* at 465-66. The court held *Feudale* failed to allege three specific issues: (1) respondents did not comply with applicable statutes and regulations, (2) respondents failed to minimize environmental impact, and (3) the projected environmental harm clearly outweighed the societal benefits. *Id.* The court dismissed *Feudale*’s motion for preliminary injunction to prevent the waterline from being replaced. *Id.*

104. 600 A.2d 260 (Pa. Commw. Ct. 1991).

105. *Id.* at 265 (explaining executive orders conflicting with legislation are invalid).

106. *Id.* at 262 (alleging Executive Order conflicted with Solid Waste Management Act and Municipal Waste Planning, Recycling, and Waste Reduction Act).

107. *Id.* at 264 (quoting *Blackwell v. State Ethics Comm’n*, 567 A.2d 630, 636-37 (Pa. 1989)) (emphasis in original) (describing General Assembly’s delegation of power abilities).

108. *Id.* at 265 (explaining Acts showed “General Assembly’s ‘clear intent to regulate’” all aspects of waste disposal).

272 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

governor authority to repeal a statute by issuing an executive order.¹⁰⁹

IV. THE EHB RECYCLES PAST PRECEDENT IN *FRIENDS OF LACKAWANNA*

The EHB ultimately held FOL members had individual standing to bring suit and those members had an intimate enough relationship with FOL for the organization to establish representational standing.¹¹⁰ Notwithstanding individual members of the organization not having standing, FOL had standing as an environmental organization.¹¹¹ The EHB also held that the EHB has the right to review Department decisions to ensure the Department is in compliance with the ERA.¹¹²

A. Standing

1. *Individual Standing*

The EHB denied Keystone's motion for summary judgment and asserted FOL lacked standing.¹¹³ The EHB first addressed Keystone's argument that individuals of FOL did not have standing to file an appeal of the EHB's decision to renew Keystone's lease for another ten-year period.¹¹⁴ Responding to this argument, the EHB stated "Appellants have standing if they credibly aver that they use the affected area and there is a realistic potential that their use of that area could be adversely affected by the challenged activity."¹¹⁵ The EHB used this definition of standing to determine that FOL members had standing.¹¹⁶

109. Nat'l Solid Wastes Mgmt. Ass'n v. Casey, 600 A.2d 260, 265 (Pa. Commw. Ct. 1991) (holding Executive Order invalid and unenforceable).

110. *Friends of Lackawanna v. Dep't of Env'tl. Prot.*, No. 2015-063-L, 2016 WL 5001388, at *3 (Pa. Env'tl. Hearing Bd. Sept. 2, 2016) (noting members' advancement of FOL's mission).

111. *Id.* at *5 (explaining standing threshold).

112. *Id.* at *6-7 (dismissing Keystone's position). Keystone argued that "[O]nce the Legislature has passed an environmental statute, neither the Executive Branch nor the Courts have any further role to play with respect to the ERA." *Id.* at *6.

113. *Id.* at *1 (summarizing Keystone's claims).

114. *Id.* at *3-4 (analyzing members' individual standing).

115. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (quoting *Funk v. Wolf*, 144 A.3d 228, 233 (Pa. Commw. Ct. 2016)) (articulating how to satisfy standing requirement). In *Friends of Lackawanna*, the court held that "once representational standing is established, it is not necessary that the organization have standing in its own right." *Id.* at *5.

116. *Friends of Lackawanna*, 2016 WL 5001388, at *3 (granting individual standing for FOL members).

Members claimed the landfill resulted in “malodors, dust, bird droppings, truck traffic, and interference with aesthetic values.”¹¹⁷ Individuals who lived in and used the area around the landfill developed health problems for themselves and their family.¹¹⁸ These concerns were the result of possible “landfill fires (i.e. thermal events), leaking leachate, [and] groundwater contamination”¹¹⁹ Members who lived less than one-half mile from the landfill claimed they suffered adverse economic and environmental effects from the landfill due to the limited use and enjoyment of the land.¹²⁰ The EHB relied on its decision in *Giordano*, holding the appellants had standing when they lived as far as two miles away from the landfill in question.¹²¹

The EHB viewed the record in the light most favorable to FOL as required during a motion for summary judgment.¹²² The EHB held “FOL members live and use the area around the Keystone Sanitary Landfill, that the landfill adversely affects their daily lives and their community, and that the Department’s action in renewing the permit extends these harms by allowing operations and associated problems to continue for another [ten] years.”¹²³ These facts, when taken together, provided FOL members individual standing.¹²⁴

117. *Id.* at *2 (discussing concerns of FOL members who live and use area around landfill). For an explanation of the term “malodor,” see *supra* note 20 and accompanying text.

118. See *Friends of Lackawanna*, 2016 WL 5001388, at *2 (noting FOL member’s connection to landfill).

119. *Id.* (listing effects of landfill on local environment). Leachate “form[s] when rain water filters through” landfill wastes. *Municipal Solid Waste Landfills*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/landfills/municipal-solid-waste-landfills> (last visited Feb. 12, 2018) (defining leachate). “When this liquid comes in contact with buried wastes, it leaches, or draws out, chemicals or constituents from those wastes.” *Id.* For more information on thermal events, see *supra* note 21 and accompanying text.

120. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (concluding direct impact on lives of FOL members when viewing claims in light most favorable to FOL).

121. See *Giordano v. Dep’t of Env’tl. Prot.*, No. 99-204-L, 2000 WL 1506957, at *3 (Pa. Env’tl. Hearing Bd. Oct. 4, 2000) (considering appellant’s complaints of “increased malodors, blowing litter, noise, vectors, and truck traffic” as result of size increase to nearby landfill).

122. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (denying Keystone’s motion for summary judgment when viewing facts in light most favorable to FOL); see *Borough of Roaring Spring v. Dep’t of Env’tl. Prot.*, No. 2003-106-C, 2004 WL 3021161, at *3 (Pa. Env’tl. Hearing Bd. Dec. 21, 2004) (explaining EHB must view record in light most favorable to nonmoving party during summary judgment motions).

123. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (reiterating appellants have standing when they live near and use land around landfill and are negatively impacted by landfill).

124. See *generally id.* (holding FOL members have standing to bring appeal).

2. *Representational Standing*

Next, the EHB addressed Keystone's argument that FOL lacked representational standing because individuals associated with FOL did not possess an intimate enough relationship to the organization.¹²⁵ Keystone alleged, "FOL[,] in order to have representational standing[,] must either have 'members' as that term is used in the Pennsylvania Nonprofit Corporation Law . . . or have persons associated with it that at least have 'indicia of membership.'"¹²⁶ The EHB rejected Keystone's membership definition, asserting the EHB has never adopted such a narrow definition.¹²⁷ Keystone derived its "indicia of membership" test from the United States Supreme Court case *Hunt*, which the Pennsylvania Supreme Court did not adopt.¹²⁸ Instead, in *Pennsylvania Medical Society*,¹²⁹ the Pennsylvania Supreme Court adopted the test from the United States Supreme Court case *Warth v. Seldin (Warth)*,¹³⁰ which took place before *Hunt* and also discussed representational standing.¹³¹ The Pennsylvania Supreme Court cited to *Warth* in *Pennsylvania Medical Society* as precedent and therefore, did not adopt the "indicia of membership" test.¹³²

The EHB also chose not to adopt the stricter membership definition and instead, asserted FOL did not need to adhere to such a stringent rule in order to have standing if its individual members "legitimately view[ed] themselves as constituents of the group."¹³³ Further, "[e]ven if FOL were nothing more than an informal, ad hoc group of like-minded individuals with standing who self-identify as members of the group, [the EHB] would have no difficulty in allowing the group to pursue the appeal."¹³⁴ As a result, the EHB

125. *Id.* at *3 (summarizing Keystone's second standing argument).

126. *Id.* (articulating Keystone's definition of "member"); see generally 15 PA. CONS. STAT. § 5103 (1988) (defining "member" as "[a] person that has been given voting rights or other membership rights in a membership corporation by a bylaw adopted by the members . . .").

127. *Friends of Lackawanna*, 2016 WL 5001388, at *3 (adopting broad definition of "membership").

128. *Id.* (acknowledging flaw in Keystone's standing argument).

129. 39 A.3d 267 (Pa. 2012).

130. 422 U.S. 490 (1975).

131. *Friends of Lackawanna*, 2016 WL 5001388, at *3 (describing precedent for broad definition of "membership").

132. *Id.* (reasoning Pennsylvania Supreme Court did not want to adopt strict definition of "membership" and, therefore, did not rely on *Hunt* in *Pennsylvania Medical Society*).

133. *Id.* (explaining broader membership definition applied by EHB).

134. *Id.* (noting EHB does not need to delve into details of corporate membership).

found no formal requirement for an organization to have representational standing.¹³⁵

The EHB relied on their reasoning in *Roaring Spring*, which held even if membership is informal, the ability to file suit as an organization is an important defense to public injustice.¹³⁶ The EHB found FOL members did have an intimate enough connection to the organization because they actively worked towards FOL's goals, they defined themselves as members, and there was no indication that the organization had been falsely created to gain standing.¹³⁷ Further, "[e]ven if the 'indicia of membership' test applied . . .," the EHB concluded FOL would satisfy the test.¹³⁸

Keystone's last standing argument rested on the assertion that FOL did not have any independent standing as an environmental organization.¹³⁹ The EHB relied on the Pennsylvania Commonwealth Court's ruling in *Funk*, holding, "[O]nce representational standing is established, it is not necessary that the organization have standing in its own right."¹⁴⁰ Since the EHB already recognized the individuals had standing and those individuals were FOL members, FOL had representational standing.¹⁴¹

The EHB went on to acknowledge that even if individual FOL members did not have standing, the organization itself had standing.¹⁴² The EHB explained "[a]n environmental organization has standing in its own right if its mission includes protection of the environment in the area affected by the Department's action."¹⁴³ Since FOL's mission is to "fight for a healthier community," including citizens' rights to clear air and pure water, the EHB classified the organization as an environmental group.¹⁴⁴ The EHB used this information to conclude there was a clear connection between

135. *See id.* (choosing not to adopt strict definition of representational standing).

136. *See Friends of Lackawanna*, 2016 WL 5001388, at *4 (relying on holding in *Roaring Spring* to find FOL members could confer standing onto organization).

137. *Id.* (explaining standing could be conferred from FOL members to organization).

138. *Id.* (concluding "indicia of membership" test did not apply).

139. *Id.* at *5 (arguing FOL did not meet requirements for representational standing).

140. *Id.* (relying on Pennsylvania Commonwealth Court's decision in *Funk* to conclude FOL members could confer standing onto organization).

141. *Friends of Lackawanna*, 2016 WL 5001388, at *5 (holding FOL had representational standing).

142. *Id.* (explaining FOL met requirements for standing as environmental organization).

143. *Id.* (noting standing requirement for environmental organization).

144. *Id.* (considering FOL donated time and resources towards improving area around Keystone's landfill).

276 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

FOL's mission and its effort to prevent Keystone's permit from being renewed.¹⁴⁵ Keystone's first argument for summary judgment was dismissed, finding FOL had representational standing and standing to bring its own suit.¹⁴⁶

B. ERA Compliance

The EHB next considered Keystone's argument that FOL's claim based on the ERA must be dismissed because the EHB does not have the authority to hear the appeal.¹⁴⁷ Keystone argued, "[O]nce the Legislature has passed an environmental statute, neither the Executive Branch nor the Courts have any further role to play with respect to the ERA."¹⁴⁸ Keystone's position was dismissed.¹⁴⁹

The EHB relied on the Pennsylvania Commonwealth Court's decision in *Funk* to find Keystone's argument improper.¹⁵⁰ The court in *Funk* explained, "[T]he ERA must be understood in the context of the structure of government and principles of separation of powers."¹⁵¹ While the General Assembly is tasked with "striking the balance" between environmental and societal interests when drafting legislation, the executive branch agencies and departments must also act in accordance with preserving public natural resources.¹⁵² In this particular context, when the Department is placed in a role requiring striking a balance between environmental and societal concerns, it is the role of the EHB to verify the Department has correctly done so.¹⁵³

Keystone relied on the Pennsylvania Commonwealth Court's decision in *Casey* to support its argument that the EHB could not review

145. *Id.* (noting FOL worked to prevent permit renewal in hopes of improving local environment which aligned with organization's goals).

146. *See Friends of Lackawanna*, 2016 WL 5001388, at *5 (explaining members' proximity to landfill and concerns amounted to standing which can be conferred to organization).

147. *See id.* at *6 (arguing EHB does not have right to review Department's decisions).

148. *Id.* (articulating Keystone's argument for why summary judgment should be granted).

149. *Id.* at *7 (pointing out ERA grants judiciary ability to review Department's actions to ensure correct balance is drawn between environmental and societal concerns).

150. *Id.* (explaining all branches are involved in execution of ERA); *see also Funk v. Wolf*, 144 A.3d 228, 235 (Pa. Commw. Ct. 2016) (noting judiciary has ability to review Department's decisions under ERA).

151. *Funk*, 144 A.3d at 235 (describing judiciary as check on General Assembly and agencies).

152. *See id.* (explaining ERA applies to all branches of Pennsylvania's government).

153. *See id.* (noting judiciary's role in regard to EHB).

the Department's decision and its compliance with the ERA.¹⁵⁴ The EHB found Keystone's reliance improper because the court in *Casey* ultimately found agencies could not disregard requirements assigned to them by the ERA.¹⁵⁵ The EHB reasoned that a contrary interpretation would be inconsistent with many of the courts more recent decisions concerning the ERA.¹⁵⁶ The EHB's role, as assigned to it by the ERA, is to consider the "environmental effect of any proposed action."¹⁵⁷ The EHB, therefore, has the ability to review the Department's decisions.¹⁵⁸

The EHB held that it should apply the three-part test laid out in *Payne I* when it reviews the Department's decisions.¹⁵⁹ Keystone's argument implied that compliance with only the first prong of *Payne I*'s three-part test was necessary, but the EHB rejected this argument and held all three parts of the test are necessary.¹⁶⁰ Dismissing Keystone's last argument, the EHB found it is within their ability to review Department decisions by applying a balancing test.¹⁶¹

V. EHB'S DECISION IN *FRIENDS OF LACKAWANNA* CONTAINS NO MALODORS

Considering prior case law, the EHB properly decided *Friends of Lackawanna*.¹⁶² The key issue rested on whether FOL had standing to appeal the Department's decision to renew Keystone's permit.¹⁶³

154. *Friends of Lackawanna*, 2016 WL 5001388, at *7 (explaining Keystone incorrectly interpreted Pennsylvania Commonwealth Court's holding in *Casey*).

155. *Id.* at *7 (rejecting Keystone's interpretation of court's holding in *Casey*); Nat'l Solid Wastes Mgmt. Ass'n v. Casey, 600 A.2d 260, 265 (Pa. Commw. Ct. 1991) (explaining executive orders that conflict with legislation are invalid).

156. *See infra* note 187 (referencing cases in which courts held EHB has ability to review Department decisions).

157. *Friends of Lackawanna*, 2016 WL 5001388, at *7 (quoting *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 467 (Pa. Commw. Ct. 2015)) (reiterating it is EHB's job to apply balancing test).

158. *See Friends of Lackawanna*, 2016 WL 5001388, at *7-8 (noting EHB must ensure Department's actions comply with ERA).

159. *Id.* at *7 (applying test to determine if action complies with ERA); *see generally supra* notes 99-103 and accompanying text (describing application of *Payne* test); *but see* Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017) (rejecting *Payne* test one year after *Friends of Lackawanna*).

160. *Friends of Lackawanna*, 2016 WL 5001388, at *8 (explaining application of all three prongs is necessary).

161. *Id.* (asserting EHB must weigh environmental and societal concerns).

162. *See infra* note 187 and accompanying text (citing cases similar to *Friends of Lackawanna*).

163. *Friends of Lackawanna*, 2016 WL 5001388, at *1-5 (summarizing Keystone's argument that FOL members lacked standing, did not have intimate enough relationship to FOL, and that FOL did not have standing in itself).

278 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

The EHB correctly held FOL members, and the organization itself, had standing to appeal and that the EHB had the authority to review the appeal by relying on settled principles.¹⁶⁴

A. Proximity to Landfill as the Road to Standing

The EHB correctly held individual FOL members had standing to appeal the Department's decision.¹⁶⁵ In *Tri-County Landfill*, appellants were in a similar situation as FOL members.¹⁶⁶ In both cases, appellants alleged they lived, worked, and participated in activities within close proximity of the landfill and demonstrated how the presence of a landfill within such close proximity would negatively impact their well-being.¹⁶⁷ In *Tri-County Landfill*, the EHB also stated they have consistently held "it is the person's use of the area and whether the project threatens that use by, e.g., lessening the aesthetic and recreational value of the area that qualifies for purposes of standing."¹⁶⁸ The EHB's decision in *Friends of Lackawanna* is consistent with its prior holding in *Tri-County Landfill* because both cases were decided upon the notion that appellants' use and enjoyment of the land, which will be affected and lessened by the presence of a landfill, granted them standing to appeal the Department's decisions.¹⁶⁹

In *Friends of Lackawanna*, the EHB took into account how close appellants lived to the landfill.¹⁷⁰ This decision is consistent with their earlier analysis of standing in *Giordano*.¹⁷¹ FOL members lived

164. *See id.* (noting FOL members were adversely affected by landfill and self-identified as FOL members).

165. *See infra* notes 166-173 and accompanying text (comparing facts in *Friends of Lackawanna* and other EHB and Pennsylvania Commonwealth Court cases to show similarities).

166. *See supra* notes 66-67 (noting petitioners lived, worked, and used land near proposed landfill); *cf. Friends of Lackawanna*, 2016 WL 5001388, at *2 (pointing out FOL members live in and use area around landfill).

167. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (noting FOL members live and use area around landfill and landfill adversely affects their lives); *cf. Tri-Cty. Landfill, Inc. v. Dep't of Env'tl. Prot.*, No. 2013-185-L, 2014 WL 1045644, at *2 (Pa. Env'tl. Hearing Bd. Mar. 11, 2014) (citing appellant's claim that landfill will have detrimental impact on their economic and environmental well-being).

168. *Tri-Cty. Landfill*, 2014 WL 1045644, at *3 (emphasis in original) (explaining effect on aesthetic and recreational use of land is grounds for standing).

169. *See id.* (noting petitioners had standing when they lived, worked, and used land around proposed landfill); *Friends of Lackawanna*, 2016 WL 5001388, at *2 (explaining FOL members had standing when they live and use area around landfill).

170. *Friends of Lackawanna*, 2016 WL 5001388, at *2 (noting some members live less than half-mile from landfill).

171. *Giordano v. Dep't of Env'tl. Prot.*, No. 99-204-L, 2000 WL 1506957, at *3 (Pa. Env'tl. Hearing Bd. Oct. 4, 2000) (explaining appellants have standing when

even closer to the landfill than did appellants in *Giordano*, some living less than one half mile from the landfill.¹⁷² The EHB, therefore, correctly held if appellants in *Giordano* had standing to appeal based on the proximity of their homes to the landfill and the negative consequences they experienced as a result of its presence, appellants in FOL who lived even closer to a landfill and claimed to suffer some of the same negative effects also had standing.¹⁷³

B. Broad Interpretation of Membership

The EHB properly rejected Keystone's narrow standard for representational standing because the standard was never adopted by the Pennsylvania Supreme Court or the EHB.¹⁷⁴ Keystone derived its "indicia of membership" test from the United States Supreme Court.¹⁷⁵ The Pennsylvania Supreme Court, however, did not adopt the United States Supreme Court's "indicia of membership" test in *Pennsylvania Medical Society*.¹⁷⁶ Instead, the Pennsylvania Supreme Court relied on *Warth*, which contained a broader membership definition.¹⁷⁷ The EHB, therefore, correctly concluded there was no formal test of membership to be applied in *Friends of Lackawanna*.¹⁷⁸

landfill's malodors, litter, noise, and truck traffic negatively affected appellants living two miles from landfill).

172. See *Friends of Lackawanna*, 2016 WL 5001388, at *2 (noting some FOL members live less than half-mile from landfill); cf. *Giordano*, 2000 WL 1506957, at *3 (explaining appellants lived approximately two miles from landfill).

173. See *supra* note 172 and accompanying text (comparing proximity of individuals to landfill and holding individuals have standing when they live within close proximity of landfill).

174. *Friends of Lackawanna*, 2016 WL 5001388, at *3 (explaining Pennsylvania Supreme Court chose not to adopt strict organization standing test articulated in *Hunt*); See *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) (relying on *Warth v. Seldin*, 422 U.S. 490 (1975) to define membership); See generally *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977) (applying strict definition of "membership"); *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (explaining association has representational standing if, in absence of injury to itself, at least one member has suffered injury).

175. See *Hunt*, 432 U.S. at 342-44 (applying strict definition of "membership" to determine if association had standing conferred by members).

176. *Pa. Med. Soc'y*, 39 A.3d 267, 278 (Pa. 2012) (relying on *Warth v. Seldin*, 422 U.S. 490 (1975) to define membership because strict definition limits ability of organizations and members).

177. *Id.* at 278 (relying on *Warth v. Seldin*, 422 U.S. 490, 511 (1975)) (explaining association has representational standing if, in absence of injury to itself, at least one member has suffered injury).

178. See *supra* notes 79-81 and accompanying text (quoting *Pa. Med. Soc'y v. Dep't of Pub. Welfare*) (relying on *Warth v. Seldin* to define membership); *supra* notes 128-132 and accompanying text (explaining Pennsylvania Supreme Court chose not to adopt strict membership definition articulated by United States Supreme Court and instead chose to adopt broader definition from prior case).

280 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

This premise is further supported by the EHB's decision in *Roaring Spring*.¹⁷⁹ There, the EHB reasoned that strictly defining "membership" would result in unnecessary delays and would place a hardship on local citizen groups and unincorporated associations.¹⁸⁰ Such a strict definition should not be imposed because citizen groups tend to be comprised of a loose structure of individuals working towards a common goal and serving an important public interest function.¹⁸¹ Here, FOL members were able to demonstrate a sufficient connection to the organization to qualify as members under the EHB's broad membership definition.¹⁸²

C. EHB's Responsibilities Under the ERA

The EHB correctly dismissed Keystone's argument asserting the EHB did not have the authority to review environmental statutes passed by the Legislature.¹⁸³ In stating that the ERA "requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features," the Pennsylvania Supreme Court in *Robinson Township* held each branch of government is involved in protecting Pennsylvania's natural resources.¹⁸⁴ Keystone incorrectly relied on the Pennsylvania Commonwealth Court's decision in *Casey*.¹⁸⁵ The Pennsylvania Commonwealth Court's decision in *Casey* did not find that agencies could disregard their duties under the ERA—a finding that would be inconsistent with both the Pennsylvania Commonwealth Court and EHB decisions.¹⁸⁶ Here, the EHB correctly

179. See *Borough of Roaring Spring v. Dep't of Env'tl. Prot.*, No. 2003-106-C, 2004 WL 3021161, at *11 (Pa. Env'tl. Hearing Bd. Dec. 21, 2004) (explaining appellant had standing to appeal nonoil surface mining permit amendment allowing permittee to mine at lower depth).

180. *Id.* (noting defining "membership" would be time-consuming).

181. *Id.* (pointing out while these loose associations may not be formal, they can still serve important function).

182. *Friends of Lackawanna v. Dep't of Env'tl. Prot.*, No. 2015-063-L, 2016 WL 5001388, at *3 (Pa. Env'tl. Hearing Bd. Sept. 2, 2016) (noting FOL members actively worked toward organization's goals and publicly held themselves out as members).

183. See *infra* notes 184-187 (analyzing Pennsylvania Commonwealth Court decisions regarding review of Department decisions).

184. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) (articulating authority to interpret duties conferred by Pennsylvania Constitution rests with judiciary).

185. See *Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 600 A.2d 260, 265 (Pa. Commw. Ct. 1991) (explaining ERA did not give Governor authority to amend legislation regarding disposal of solid waste through Executive Order).

186. See, e.g., *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) (citing case holding contrary Keystone's interpretation of *Casey*).

interpreted the holdings in prior case law and found its responsibility is to ensure the Department correctly balances citizens' environmental and societal concerns.¹⁸⁷

VI. IMPACT

The EHB's decision broadly interpreted standing, membership, and its own ability to review other government branches' environmental decisions.¹⁸⁸ Beginning with standing, the EHB's decision suggests that affected people living and using impacted land have the ability to appeal.¹⁸⁹ While the EHB's decision is in line with past EHB holdings, it suggests that in the future, a town's citizens may have the ability to appeal Department decisions as long as those citizens live in or use the area in question.¹⁹⁰ This is especially true if those citizens bring suit as an organization, which is interpreted broadly under the EHB's membership definition.¹⁹¹ The EHB's decision greatly expands the number of people who can appeal Department decisions that have an environmental effect within a particular area.¹⁹²

187. *Id.* (explaining ERA requires each branch of government to consider environmental effect of action on protected resources); *accord* *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 468 (Pa. Commw. Ct. 2015) (quoting *Robinson Township*); *Funk v. Wolf*, 144 A.3d 228, 233 (Pa. Commw. Ct. 2016) (noting courts assessing Department actions must remain aware of balance between environmental and societal concerns).

188. *See supra* note 115 and accompanying text (articulating individual standing requirements); *see supra* notes 127-131 and accompanying text (rejecting narrow membership definition and holding standing exists even if organization is informal); *see supra* note 153 and accompanying text (noting EHB has ability to review Department decisions).

189. *See supra* note 115 and accompanying text (explaining appellants have standing if they use land and there is "realistic potential" that use could be negatively affected); *see supra* note 122 and accompanying text (reiterating appellants living two miles from landfill had standing); *see supra* note 124 and accompanying text (explaining FOL members had standing when they lived and used land around landfill and they would be negatively affected by Department's decision).

190. *See supra* notes 166-170 and accompanying text (describing similarities between *Tri-City Landfill* and *Friends of Lackawanna*); *see supra* notes 172-176 (discussing similarities between *Giordano* and *Friends of Lackawanna*); *see supra* note 115 accompanying text (noting appellants have standing if they use land and there is "realistic potential" that use could be negatively affected); *see supra* note 120 and accompanying text (explaining standing exists when appellants lived less than half mile from potential cause of adverse effects); *see supra* note 121 and accompanying text (noting standing exists when appellants lived two miles from potential cause of adverse effects).

191. *See supra* notes 127-135 and accompanying text (rejecting narrow membership definition and holding standing exists even if organization is informal); *see supra* note 140 and accompanying text (explaining if representation standing exists, there is no need to evaluate representational standing).

192. *See supra* notes 62-64 and accompanying text (explaining appellants had standing when they lived two miles from landfill and alleged to have suffered nega-

282 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXIX: p. 259

The EHB followed precedent holding the EHB has the ability to review Department decisions to ensure it correctly balanced environmental and societal concerns.¹⁹³ In *Friends of Lackawanna*, the EHB found the test created in *Payne I* is the correct test to apply when reviewing Department decisions.¹⁹⁴ In 2017, the Pennsylvania Supreme Court rejected this test in *Pennsylvania Environmental Defense Foundation v. Department of Environmental Protection*,¹⁹⁵ determining the test improperly ignored the value of the ERA.¹⁹⁶ The court held the proper standard of judicial review is a strict reading of the ERA's text.¹⁹⁷ While the Pennsylvania Supreme Court recently changed the test the EHB would apply in future situations similar to *Friends of Lackawanna*, the litigants' ability to bring a case and the EHB's ability to review the case, as determined in *Friends of Lackawanna* still stands.¹⁹⁸ Overall, the EHB's decision in *Friends of Lackawanna* may make it easier for organizations and citizens to bring grievances relating to environmental decisions in the area where they live or work before the EHB.¹⁹⁹

Zoey H. Lee*

tive effects); *see supra* notes 65-70 and accompanying text (summarizing appellants had standing when they lived and worked near landfill as long as appellants' complaints were "objectively reasonable"); *see supra* notes 70-75 (discussing organization had standing on behalf of members as long as one member has standing).

193. *See supra* notes 157, 164 and accompanying text (stating EHB has ability to review Department decisions).

194. *See supra* note 159 and accompanying text (explaining EHB should apply all three prongs of *Payne* test when evaluating ERA compliance); *but see supra* note 100 (noting *Payne* test has been overruled by Pennsylvania Supreme Court).

195. 161 A.3d 911 (Pa. 2017).

196. *Id.* at 930 (criticizing *Payne* test as ill-fitted).

197. *Id.* (rejecting *Payne* test).

198. *See supra* note 195 (rejecting *Payne* test).

199. *See supra* note 188 (describing broad holding in *Friends of Lackawanna*).

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