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I. INTRODUCTION

The Pennsylvania Legislature created the Environmental Hearing Board (EHB) in the 1970s as part of the Department of Environmental Resources. The EHB provides a forum for citizens to challenge actions of the Department of Environmental Protection (DEP). Originally, the DEP was split into two branches: one legislative, the Environmental Quality Board (EQB), and the other judicial, the EHB. Subsequently, in 1988 the Environmental Hearing Board Act separated the EHB from the DEP. The EHB now exists as a separate entity from the DEP and functions as a statutorily established trial court that only hears environmental cases.

This Note will take an initial look at the EHB and the standard of review that the EHB, the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court employ when deciding appeals of EHB decisions. Specifically, the recent case Eagle Environmental II, L.P. v. Commonwealth (Eagle) provides an understanding of the Pennsylvania Commonwealth and Supreme Court’s review of EHB decisions while focusing on one integral analysis of environmental law — the Harms/Benefits Test. In Eagle, the Pennsylvania Supreme Court affirmed the DEP’s decision of two consolidated

2. See id. (indicating EHB operates like court of law). The EHB encourages citizens to have counsel, even though representation is only required for corporations. See id. at 174.
3. See id. at 173 (describing history of EHB).
4. See id. (detailing roles of EQB and EHB). The EQB promulgated environmental regulations whereas the EHB heard and decided appeals regarding the DEP actions. See id.
5. See id. (indicating role of EHB). The EHB has statewide jurisdiction. See id.
6. For a complete analysis of the standard of review of the EHB, Pennsylvania Commonwealth Court and Pennsylvania Supreme Court, see infra notes 43-62 and accompanying text.
8. See id. at 871 (stating Harms/Benefits analysis weighs potential and real environmental, social and economic benefits versus harms and mitigation efforts).
cases.\textsuperscript{9} \textit{Eagle} concerns an appeal of the constitutionality of the DEP's consideration of the Harms/Benefits Test and the EHB's review of Harms/Benefits Test analysis.\textsuperscript{10} This Note reviews the Pennsylvania Supreme Court's analysis of the EHB decision in \textit{Eagle} regarding the Harms/Benefits Test. Part II of this Note details the facts, procedural history and holding of \textit{Eagle}.\textsuperscript{11} Part III briefly explains the background of the EHB, the Pennsylvania Supreme and Commonwealth Courts' standards and scopes of review, the basic considerations involved in the Harms/Benefits Test and brief backgrounds of both the Solid Waste Management Act (SWMA) and the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101).\textsuperscript{12} Part IV summarizes the analysis and reasoning that the Pennsylvania Supreme Court employed in \textit{Eagle}.\textsuperscript{13} Part V analyzes the Pennsylvania Supreme Court's opinion in light of the precedent.\textsuperscript{14} Finally, Part VI explores the potential impact of this decision.\textsuperscript{15}

\section*{II. Facts}

The challenges in this case concern two entities, Eagle Environmental II, L.P. (Eagle) and Tri-County Landfill (Tri-County), which were completing the same permit process with the EQB.\textsuperscript{16} One challenge in this case concerns Eagle's appeal of an application for a permit to construct and operate the Royal Oak Landfill, a residual waste landfill.\textsuperscript{17} In accordance with requirements set forth in state regulations, Eagle identified a number of benefits to the project, including both potential and actual short-term and real long-term benefits.\textsuperscript{18} Eagle also discussed the possible mitigation

\begin{itemize}
\item[$9.$] See id. (noting that Eagle and Tri-County merged into one appeal).
\item[$10.$] See id. at 876 (appealing from commonwealth court's order affirming EQB and constitutionality of regulation).
\item[$11.$] For a full discussion of facts and procedural history, see \textit{infra} notes 16-39 and accompanying text.
\item[$12.$] For a full discussion of background, see \textit{infra} notes 40-107 and accompanying text.
\item[$13.$] For a full discussion of court's analysis, see \textit{infra} notes 108-80 and accompanying text.
\item[$14.$] For a full analysis of court's opinion, see \textit{infra} notes 181-240 and accompanying text.
\item[$15.$] For a full discussion of impact of decision, see \textit{infra} notes 241-55 and accompanying text.
\item[$17.$] See id. at 876 (noting appeal concerns subsection (c), Harms/Benefits analysis, which Eagle claimed was unconstitutional).
\item[$18.$] See id. at 871-72 (listing potential short-term benefits as: disposal of debris in event of disaster; payments for health and safety training courses for landfill

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Efforts available for potential harms resulting from the landfill. In weighing the benefits and harms, the DEP found the benefits were greater and granted a conditional permit. Eagle followed with an appeal to the EHB.

Eagle also filed for summary judgment of Chest Township’s appeal claiming the Harms/Benefits Test was invalid, unconstitutional and the SWMA and Act 101 (collectively “the Acts”) did not have the authority to regulate. The EHB denied Eagle’s motion because the regulation was adopted according to the EQB’s legislative rule-making authority. After looking to the purposes of the Acts, the EHB concluded the regulation was within its authority.
The EHB also stated the Harms/Benefits Test did not violate the Pennsylvania Constitution.²⁵ In deciding this issue, the EHB determined that to breach the non-delegation doctrine the decision must be a basic policy choice that is passed to other agencies, which is not the role of the Harms/Benefits Test.²⁶ The EHB also concluded that the Harms/Benefits Test was within the Commonwealth's police power because it promoted public health and general well-being.²⁷ Finally, the EHB examined the potential vagueness of the statute and held it was sufficiently clear.²⁸

Tri-County’s challenge concerned a similar appeal.²⁹ Tri-County filed a “Substitute Repermitting Application” so it could construct a municipal waste landfill in Mercer County, near the Grove City Airport.³⁰ Tri-County followed the requisite procedure, and the DEP denied the permit because the harms outweighed the benefits.³¹ Tri-County followed with an appeal to the EHB for summary judgment, contesting the validity of the Harms/Benefits Test, which the EHB denied.³²

In affirming the EHB’s decision, the commonwealth court examined several factors.³³ The commonwealth court decided the Acts had the broad supervisory power of the EQB.³⁴ Next, the commonwealth court considered the legislative intent of Article I, section 27 of the Pennsylvania Constitution, which calls for the balancing of environmental concerns against social and economic

²⁵. See id. at 873-74 (referencing non-delegation doctrine, commonwealth police power and vagueness).
²⁶. See Eagle, 884 A.2d at 873-74 (holding legislature instead made basic policy decision to allow landfills that were restricted by comprehensive waste management program protecting public's health, safety and welfare and environment).
²⁷. See id. at 874 (noting police power may be used to protect public from harm and promote health and general well-being, which was underlying purpose of Harms/Benefits Test).
²⁸. See id. (indicating statute provided sufficient notice and could be narrowed upon consultation with DEP). The EHB also noted that in light of variables in permit process, a more specific regulation would be difficult to draft. See id.
²⁹. See id. at 875-76 (indicating similarities between two cases).
³⁰. See id. at 874-75 (stating regulation at issue here came to fruition while permit application was pending).
³¹. See Eagle, 884 A.2d at 875 (stating Tri-County laid out potential harms and benefits but DEP determined mitigation efforts for harms were lacking). The DEP's primary reason was the lack of mitigation effort for increased risk of aircraft striking birds that were attracted to food waste in landfill. See id.
³². See id. (denying appeal based on decision of Eagle's motion for summary judgment). The commonwealth court allowed Eagle to consolidate its appeal with Tri-County. See id.
³³. See id. (affirming EHB's decision on February 10, 2003).
³⁴. See id. (noting power of SWMA and Act 101 to utilize Harms/Benefits Test when considering health, safety and welfare).
concerns. Further, the lower court found in *Eagle* that the non-delegation doctrine was not violated nor was the doctrine unconstitutionally vague. Additionally, the test did not violate police power because of the benefits arising from the project.

As consolidated parties, Eagle and Tri-County appealed from the commonwealth court's order. The parties challenged the Harms/Benefits Test on the following bases: the regulation was not within the authority granted to the EQB; the authority granted to the EQB was a violation of the non-delegation doctrine of the Pennsylvania Constitution; the regulation was unconstitutionally vague; and the provision benefits went beyond the police power of the Commonwealth.

### III. BACKGROUND

#### A. Environmental Hearing Board

The role of the EHB is to operate separately from the DEP as a trial court to hear environmental cases. The jurisdiction of the EHB is limited because it can only hear environmental cases that challenge final actions of the DEP. Additionally, cases decided by the EHB can be appealed to the Pennsylvania Commonwealth Court and then to the Pennsylvania Supreme Court.

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35. See id. (interpreting legislative intent by referencing Pennsylvania Constitution).
36. See *Eagle*, 884 A.2d at 875 (holding SWMA and Act 101's delegation of authority allowed for Harms/Benefits analysis was specific enough).
37. See id. (holding that all factors taken together indicate SWMA and Act 101 were not unconstitutional).
38. See id. at 876 (noting discontent with commonwealth court's decision to affirm EQB holding and constitutionality of regulation).
39. See id. (indicating issues on appeal).
42. See Hofmann & Horst, *supra* note 1, at 174 (discussing appeal order). Cases appealed from the EHB to the commonwealth court, like appeals from the Pennsylvania Court of Common Pleas, must follow specific guidelines. 25 Pa. Code § 1021 (2006). Appellants must file a notice of appeal within thirty days of issuance of other action of the DEP. See id. § 1021.52a. When the party is protesting an issuance of a permit, they must come forward with evidence to show, on the record produced before the EHB, that issuance of the permit was arbitrary or amounted to an abuse of discretion. See id. Additionally, on appeal, commonwealth court will not reevaluate the EHB's credibility determinations or reweigh this evidence. See id.
1 Standard of Review: EHB

There are differing standards of review in Pennsylvania for the EHB, the commonwealth court and the Supreme Court.\(^43\) The EHB reviews cases de novo, deciding cases based upon the evidence presented to the DEP.\(^44\) The de novo standard of review evolved from a notable case, Smedley v. DEP (Smedley).\(^45\) Before Smedley, courts used an abuse of discretion standard.\(^46\) The old standard required appellants to demonstrate the following: (1) bad faith or fraud; (2) capricious action or an abuse of power; or (3) manifest and flagrant abuse of discretion or purely arbitrary action.\(^47\) In other words, an appellant needed to show the DEP erred “to the extent of having shown manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions.”\(^48\)

The court in Smedley determined that the abuse of discretion standard was not suitable because it aimed to flag the DEP’s decisions as flagrantly wrong.\(^49\) The court rationalized that the prior methodology was imprudent unless the EHB acted as a tribunal of first impression.\(^50\) Instead of merely looking for the DEP’s pure

\(^{43}\) For a full discussion of the EHB’s differing standards of review, see infra notes 44–54 and accompanying text.

\(^{44}\) See Hofmann & Horst, supra note 1, at 175 (noting evidence may differ from what DEP considered that EHB determines that DEP abused discretion and thus can exercise own discretion).

\(^{45}\) See Smedley v. Dep’t of Envtl. Prot., No. 97-253-K, 2001 WL 178234 at *14 (Pa.Env.Hrg.Bd. Feb. 8, 2001) (reviewing abuse of discretion standard). Smedley involved an appeal of the issuance of permit allowing a modification to an air quality monitor under the Pennsylvania Air Pollution Control Act. See id. at *1. The permit modified an existing air quality permit to allow a prescribed quantity of Tire Derived Fuel (TDF) for coal as fuel in its two boilers at a paper manufacturing plant. See id. Smedley challenged the DEP’s grant of the permit because: (1) addition of TDF to the fuel stream could not qualify as a “minor operating permit modification;” (2) the addition of TDF would result in an increase of emissions of various contaminants, some linked to adverse health impacts; (3) the DEP erred by neglecting to require more testing before granting the modification; and (4) the DEP did not conduct a compliance history review before granting the modification. See id. Smedley asserted the modification would cause “air pollution” in violation of Article I, section 27 of the Pennsylvania Constitution. See id.

\(^{46}\) See id. at *14 (reviewing abuse of discretion standard).

\(^{47}\) See id. (outlining appellant’s burden). Smedley had the burden of proceeding and the burden of proof. See id.

\(^{48}\) See id. (showing abuse of discretion standard exceeded mere difference of opinion).

\(^{49}\) See id. (noting standard of review described by DEP was more appropriate when appellate court reviewed complete record generated either from lower court or specialized administrative agency).

\(^{50}\) See Smedley, 2001 WL 178234 at *14 (noting standard of review was adequate).
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abuse of discretion, the de novo standard of review evaluates the case anew and allows the EHB to substitute its decision for that of the prior decision-maker. In particular, the EHB takes a fresh look at the evidence to determine whether the DEP made a decision that was unreasonable or capricious based on the evidentiary record.

To reach its decision, the EHB cannot simply review the evidentiary record; it must consider all relevant evidence at issue, even if the evidence was not permitted at the time the DEP granted the permit. Nevertheless, the EHB does not have access to any evidentiary findings, as they are still bound by the primary rules of evidence, particularly relevancy.

2. Standard of Review: Pennsylvania Commonwealth Court

When the commonwealth court reviews EHB decisions, its review is limited to an assessment of whether the EHB committed a constitutional violation or error of law. It is within the province of the commonwealth court to determine if the EHB erred in its review of the DEP's decision. For instance, in Browning-Ferris Industries v. Commonwealth (Browning-Ferris), the commonwealth court reviewed an EHB decision for an error of law. The court then reviewed the evidence that the EHB previously examined and the EHB's analysis of the evidence.

51. See id. (re-deciding case based upon factual findings and evidentiary record).
52. See id. (stating review of evidentiary record allowed EHB to establish whether previous findings were correct and reasonable).
53. See Leatherwood, Inc. v. Dep't of Envtl. Prot., 819 A.2d 604, 610-11 (Pa. Commw. Ct. 2003) (noting that EHB is not appellate body with limited scope of review). The EHB's duty is to determine if the DEP's action can be sustained or supported by the new evidence. See id.
54. See id. at 611 (stressing that some evidence may not be permitted because not relevant).
56. See id. (referencing EHB's discretionary review standard of DEP decisions, specifically that EHB may substitute its discretion for DEP).
58. See id. at 153 (contesting EHB's conclusion that new present value of host fees paid to Berks County and New Morgan Borough was not benefit in Harms/Benefits Test).
59. See id. (finding evidence did not support EHB's conclusion that increase in host fees was not economic benefit). The EHB did not support its position with statutory or case law authority; accordingly, the commonwealth court concluded the EHB committed an error of law. See id.

The Supreme Court of Pennsylvania conducts a plenary review of the commonwealth court’s decisions. In decisions that review interpretations of statutes or the constitutionality of regulations, the supreme court does not limit itself to a mere review of the law but looks to the purpose and reasonable effect of the statute or regulation. In doing so, the court gives “great weight” to the agency’s interpretation of its enabling statute and will not overturn it unless the decision is clearly erroneous.

B. Municipal and Residual Waste Regulations

The EQB published final regulations concerning municipal and residual waste landfills, which promulgated environmental assessment criteria for facilities. The regulations require applicants who seek permits for municipal and residual waste facilities to identify potential and real environmental harms, as well as social and economic benefits. It is the DEP’s responsibility to assess an application according to the regulation and to approve an application if the benefits outweigh the harms.

The first subsection of the regulations requires permits to indicate an analysis of potential impacts that the facility has on the “environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses and land use.” The following subsection requires the appli-
cant to describe potential and known environmental harms, to identify possible mitigation plans for the known or potential harms and to describe harms that cannot be mitigated.\textsuperscript{67} The last subsection sets forth the Harms/Benefits Test where the applicant must show how the benefits of the project clearly outweigh the known and potential environmental harms.\textsuperscript{68}

C. Harms/Benefits Test

The Harms/Benefits Test gives residents a voice in the permit process, but it also ensures there is a benefit to the community when landfills and other potentially harmful facilities are built.\textsuperscript{69} The test specifically balances the negative impact of a project on the surrounding community against any environmental, social or economic benefits gained.\textsuperscript{70} A permit is allowed if the benefits to the public outweigh any potential or known harms by a mere scintilla.\textsuperscript{71}

When determining the economic and social considerations, the courts have not yet established a set standard.\textsuperscript{72} Specifically, the courts consider social and economic conditions on a case-by-case basis.\textsuperscript{73} For instance, the commonwealth court in \textit{Browning-Ferris} examined whether a potential increase in host fees constituted an economic and social benefit.\textsuperscript{74} The court denied the contention

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  \item 67. \textit{See id.} (citing 25 Pa. Code §§ 271.127(b), 287.127(b)) (commenting that DEP reviews assessment and mitigation plans to determine if plans actually mitigate known or potential harms). The DEP also reviews mitigation proposals to ensure they "adequately protect the environment and the public health, safety and welfare." \textit{Id.}
  \item 68. \textit{See id.} (citing 25 Pa. Code §§ 271.127(c), 287.127(c)) (noting subsection at issue in this case). Benefits relied upon should be accounted for in detail, including both social, economic and environmental benefits, and harms must include both social and economic harms. \textit{See id.} The applicant must consider the harms and mitigation measures discussed in previous section in analysis. \textit{See id.}
  \item 69. \textit{See id.} (insinuating benefit of test).
  \item 70. \textit{See id.} (outlining factors to weigh).
  \item 72. \textit{See Eagle}, 884 A.2d at 877 (stating Harms/Benefits Test provides broad authority).
  \item 73. \textit{See id.} (suggesting strict standard not established).
  \item 74. \textit{See Browning-Ferris}, 819 A.2d at 154 (concerning landfill company that filed petition for review rescinding modification permit issued by DEP to landfill company allowing landfill to increase its average daily volume by 2000 tons per day and sustaining homeowners' appeal of issuance of modification permit, and homeowners' cross-petition for review).
\end{itemize}
that the fees could not be deemed a benefit because there was a lack of evidence showing where the fees would be expended.\footnote{See id. at 153-54 (stating DEP did not investigate how town or county would spend increased funds but since host fees clearly brought in economic gain, it could not be considered detriment).}

In \textit{Berks County v. Department of Environmental Protection (Berks County)},\footnote{894 A.2d 183 (Pa. 2006).} the commonwealth court explored a wide-range of benefits including, economic benefits to the Commonwealth, increased employment opportunities for citizens, environmental clean-up initiatives, charitable contributions and disposal benefits to the community.\footnote{See id. at 187 (listing benefits considered and accepted by DEP included: (1) host municipality benefit fee to Exeter Township; (2) recycling fees given to Commonwealth; (3) environmental stewardship fee paid to Commonwealth; (4) continued and additional employment opportunities at landfill; (5) landfill’s purchase of local and regional goods; (6) contribution of two acres of land and $275,000 for relocation of First Baptist Church and environmental clean-up of that site, contamination which was not caused by Landfill; (7) income and sales taxes to Commonwealth from landfill employees; (8) presentations to schools and tours of landfill facilities for students; (9) charitable contributions to local civil, social, athletic, educational, religious and community groups; (10) free township-wide spring clean-up for Exeter Township; (11) free disposal of “white goods” for Exeter Township residents; (12) property tax revenues; and (13) on-site recycling drop-off).} The benefits considered were not at issue in \textit{Berks County}, although some benefits went directly to the state without any indication of how the funds would be utilized.\footnote{See id. at 191-92 (appealing error in consideration of harms, not benefits).} As such, courts apply a case-by-case analysis of benefits deemed appropriate.\footnote{See id. (detailing general court analysis).} In this case, the court determined the state had not accounted for its economic return.\footnote{See id. (appealing error in consideration of harms, not benefits).}

Proposals must describe the known and potential environmental harms of the proposed project, as well as the mitigation plans.\footnote{See 25 Pa. Code § 287.127(b) (indicating requirements for permit proposal).} Courts assess the real and potential harms along with the mitigation efforts on a case-by-case basis.\footnote{See Leatherwood, Inc. v. Dept. of Envtl. Prot., 819 A.2d 604, 608 (Pa. Commw. Ct. 2003) (weighing factors).} In \textit{Leatherwood, Inc. v. Department of Environmental Protection (Leatherwood)},\footnote{819 A.2d 604 (Pa. Commw. Ct. 2003).} the DEP contemplated real and potential harms posed by a landfill located near an airport.\footnote{See id. (appealing EHB order revoking solid waste permit issued by DEP which allowed construction and operation of landfill near county airport because of known risk of bird/aircraft collisions).}

The commonwealth court and the DEP focused on the potential harm of aircrafts striking birds that were attracted to landfill.
The feasible mitigation efforts were not sufficient to lessen the risk of the potential bird hazard, and as a result, the EHB denied the permit and the commonwealth court affirmed its decision.\textsuperscript{86}

The Commonwealth must perform the Harms/Benefits balancing test according to Article I, section 27 of the Pennsylvania Constitution.\textsuperscript{87} Article I, section 27 provides:

The people have a right to clear 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.\textsuperscript{88}

State agencies can perform the process of balancing the benefits and harms.\textsuperscript{89} In \textit{Payne v. Kassab} (Payne),\textsuperscript{90} the Pennsylvania Supreme Court discussed, in reference to the allotment of authority, that the Amendment declares the Commonwealth is trustee of certain resources.\textsuperscript{91} Thus, the Commonwealth, by way of the Department of Transportation, has authority to approve and disapprove proposals affecting natural resources.\textsuperscript{92} The court referenced the Pennsylvania Constitution, which allows state departments to assess the harm, so long as it stays within the confines of the relevant statutes and regulations.\textsuperscript{93} The record demonstrated an effort to re-

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\textsuperscript{85.} See id. at 611 (indicating that mitigation efforts to address specific issue were essential).

\textsuperscript{86.} See id. at 610-15 (stating that Leatherwood's expert-prepared Bird Control Plan was not sufficient mitigation).

\textsuperscript{87.} See Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976) (stating Commonwealth has duty to protect environment and serve public).

\textsuperscript{88.} See PA. CONST. art. I, § 27.

\textsuperscript{89.} See Payne, 361 A.2d at 272 (noting court allowed Department of Transportation to consider several factors in decision).

\textsuperscript{90.} 361 A.2d 263 (Pa. 1976).

\textsuperscript{91.} See id. at 272 (seeking to halt street-widening project proposed by Pennsylvania Department of Transportation because they claimed it had adverse impact on area, that PennDot did not comply with Pennsylvania Constitution and project was impermissible revocation of dedicated public land). The lower court dismissed their complaint holding that the proposed use did not violate statutory dedications because the project was for the benefit of the public. See id.

\textsuperscript{92.} See id. (indicating Commonwealth had duty to decide whether River Street project was appropriate after taking into account effect on natural resources).

\textsuperscript{93.} See id. (referencing Pennsylvania Constitution).
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duce environmental harm, and the benefits clearly outweigh the harms.94

D. Solid Waste Management Act

The SWMA regulates solid waste, namely municipal residual and hazardous waste.95 The SWMA directs the DEP “to develop, prepare and modify the Pennsylvania Hazardous Waste Facilities Plan,” noting particularly, the plan “shall address the present and future needs for the treatment and disposal of hazardous waste in this Commonwealth.”96 The purpose of the SWMA is the following: (1) to establish a reliable program for solid waste management; (2) to encourage the development of resource recovery to manage solid waste, conserve resources and supply energy; (3) to require permits for disposal facilities; (4) to protect public health, safety and welfare from waste threats; (5) to provide a means to enforce provisions of the act; (6) to establish Pennsylvania Hazardous Waste Facilities Plan, addressing present and future needs concerning hazardous waste; (7) to develop an inventory of hazardous waste in the Commonwealth; (8) to project future sources of hazardous waste; (9) to provide methods of establishing hazardous waste facility sites; (10) to implement Article I, section 27 of the Pennsylvania Constitution; and (11) to utilize private enterprise to accomplish the above objectives.97

The SWMA has several criteria for citing hazardous waste treatment and disposal facilities.98 The criteria include the inventory and evaluation of sources of hazardous waste concentration, as well as current hazardous waste practices.99 In determining future facility needs, the SWMA evaluates existing treatment and disposal facilities, existing and projected generation of hazardous waste and the

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95. See Hofmann & Horst, supra note 1, at 178 (discussing role of SWMA in solid waste management).
98. See Pennsylvania Department of Environmental Protection, supra note 96 (noting requirement met by 1986 plan and regulations can be found at 25 PA. CODE § 269).
99. See id. (including types and quantities of hazardous waste as well as existing hazardous waste treatment and disposal facilities).
projected generation of hazardous waste outside the Commonwealth that is expected to be transported into storage treatment or disposal facilities inside the Commonwealth. The SWMA also analyzes methods, incentives and technologies for source reduction, detoxification, reuse and recovery of hazardous waste, as well as strategies for implementing these methods and technologies. The SWMA is also responsible for identifying additional hazardous waste treatment and disposal facilities.

E. Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101)

Act 101 concerns the authority for and requirements imposed upon counties planning for management of municipal waste generated within their boundaries as well as the authority and limitation of municipalities to regulate waste activities and the program for municipal waste recycling within Pennsylvania. Similar to the SWMA, the Pennsylvania statute sets forth a detailed account of thirteen purposes of Act 101. Overall, the purpose of Act 101 is to reach the following four goals: (1) reduce Pennsylvania’s generation of municipal waste; (2) recycle a certain percentage of waste generated; (3) procure and use recycled and recyclable materials in state government agencies; and (4) educate the public as to the benefits of recycling and waste reduction. Act 101 provides the benefits of recycling and waste reduction that include: reduced pollution risks; conservation of natural resources, energy and landfill

100. See id. (projecting hazardous waste).
101. See id. (discussing other duties of SWMA).
102. See id. (indicating additional duties of SWMA).
103. See Hofmann & Horst, supra note 1, at 179 (discussing Act 101).
104. See 53 PA. STAT. ANN. § 4000.102(b) (2005) (detailing purpose of Act 101). The purposes of Act 101 include: (1) to establish program to assist municipal waste management; (2) to encourage waste reduction; (3) to protect public health, safety and welfare from disposal of municipal waste; (4) to encourage effective means of implementation; (5) to utilize a private enterprise to accomplish objectives; (6) to implement a recycling fee for landfills to provide grants for recycling; (7) to establish a benefit fee for waste facilities that are permitted after implementation of Act; (8) to employ a site-specific post-closure fee for currently operating and future landfills for emergency action necessary to prevent adverse effects; (9) to set up a trust fund to ensure ample funds to cover clean-up costs; (10) to move the primary responsibility of development of municipal waste management plans to counties; (11) to require public agencies to aid and promote development of recycling; (12) to require particular regions to have recycling programs that return items to good use; (13) to implement Article I, Section 27 of Pennsylvania Constitution; and (14) increase department’s authority of regulation of daily waste volumes. See id.
105. See 53 PA. STAT. ANN. § 4000.102(c) (2005) (detailing goals of Act 101). Goals are as follows:
space; and reduced disposal costs. Thus, Act 101 serves to ensure that public health, safety and welfare are properly protected.

IV. NARRATIVE ANALYSIS

In Eagle, the Supreme Court of Pennsylvania agreed with the respective decisions of the Pennsylvania Commonwealth Court and the EHB, holding that the SWMA and Act 101 regulations were within the authority of the DEP, and there was no error in their decisions regarding the permits. In particular, the Harms/Benefits Test was within the authority granted by the Acts. Further, the Acts were constitutional because the Harms/Benefits Test did not violate the non-delegation doctrine. The court concluded the Harms/Benefits Test was not unconstitutionally vague.

(1) At least 25% of all municipal waste and source-separated recyclable materials generated in this Commonwealth on and after January 1, 1997, should be recycled.

(2) The weight or volume of municipal waste generated per capita in this Commonwealth on January 1, 1997, should, to the greatest extent practicable, be less than the weight or volume of municipal waste generated per capita on the effective date of this act.

(3) Each person living or working in this Commonwealth shall be taught the economic, environmental and energy value of recycling and waste reduction and shall be encouraged through a variety of means to participate in such activities.

(4) The Commonwealth should, to the greatest extent practicable, procure and use products and materials with recycled content and procure and use materials that are recyclable.

Id.

106. See id. § 4000.102 (detailing goals of Act 101).

107. See Hofmann & Horst, supra note 1, at 179 (detailing appeals that questioned DEP’s and EHB’s authority to enforce regulations).

108. See Eagle Envtl. II, L.P. v. Commonwealth, 884 A.2d 867, 873, 875 (Pa. 2005) (affirming commonwealth court decision). The two cases, Eagle and Tri-County, were consolidated for judicial economy because they were essentially challenging the same issues. See id. When Tri-County appealed the DEP’s decision to the EHB, it was denied based on Eagle’s successful motion for summary judgment. See id. The case was, however, certified for interlocutory appeal, and Eagle was permitted to consolidate its appeal with Tri-County. See id. Once in the commonwealth court, the EHB’s decision was affirmed, and Eagle and Tri-County appealed. See id. at 875-76.

109. See id. at 875-78 (pointing to authority granted in SWMA section 105 giving EQB broad power to adopt rules and regulations to accomplish purposes of Act).

110. See id. at 880-81 (specifying that Harms/Benefits Test was not policy choice).

111. See id. at 875, 882 (indicating that regulation provided entities with sufficient notice and was capable of being narrowed).
A. Is the Harms/Benefits Test Within Authority Granted by the Acts?

The EQB is authoritative because it is permitted to demand the balancing of social and economic benefits and may be allowed to expand its permitted authority. The EQB is authoritative because it is permitted to demand the balancing of social and economic benefits and may be allowed to expand its permitted authority. Here, appellants referenced Article I, section 27, indicating that it does not give the EQB the authority to demand that parties present the social and economic benefits to a project before obtaining a permit. Specifically, there is no requirement for balancing the benefits and harms. Not only was balancing not required, but the language in the statute was intended to limit powers of the Commonwealth, not expand them.

Appellants asserted a strict textual argument that if the legislature intended such a result, it would be clearly written in the statute. Appellants argued because the statute lacks language concerning social and economic benefits, the EQB’s authority must remain centered on the evaluation of a project’s potential impact on the environment, not the social and economic benefits. Appellants reasoned that if the statute were read to include social and economic benefits, then all environmental statutes could be stretched.

Appellants also contended that balancing is outside the agency’s power because the legislature, not the agency, is responsible for providing economic benefits and incentives to waste facilities. Appellants purported that the Harms/Benefits Test may allow the Acts to grant a permit application that should not be permitted because it is harmful. Overall, appellants maintained the Harms/Benefits Test was an overly broad policy, and if it was not

112. See Eagle, 884 A.2d at 876 (discussing appellants’ disagreement with EQB authority under Pennsylvania Constitution).
113. See id. (discussing appellants’ argument).
114. See id. at 877 (noting that legislature made basic policy choice for balancing impact of potential landfills on health, safety and environment).
115. See id. at 876-77 (arguing that Commonwealth’s balancing was expanding power over private property, which was specific to General Assembly).
116. See id. (laying out appellants’ argument regarding language of statute).
117. See Eagle, 884 A.2d at 877 (indicating appellants’ argument).
118. See id. (arguing EQB’s authority should be limited to regulations that evaluate potential impact on environment).
119. See id. (asserting that legislature provided limited economic benefits to communities in order to influence hosting of disposal facilities).
120. See id. (insinuating Acts misinterpret purpose of Harms/Benefits Test and allow project solely on economic and social benefit).
properly regulated, it would always find a social and economic value that outweighs the environmental harms.\textsuperscript{121}

The court first disputed appellants' interpretation of the SWMA, noting this Act is to be interpreted broadly in order for it to serve its purpose.\textsuperscript{122} The court cited the applicable provisions mandating the purpose and goal of the Acts and their interaction with the applicable subsection of the pertinent Pennsylvania Code section, namely, the Harms/Benefits Test.\textsuperscript{123} The court also noted that the role of the DEP is to ensure that the mitigation efforts proposed by applicants do, in fact, mitigate the harms.\textsuperscript{124} Thus, the environment is "adequately protected."\textsuperscript{125} This means the Harms/Benefits Test would not be applied unless the first subsections were satisfied, significantly lowering the chance of applying the test inaccurately.\textsuperscript{126}

The court specified, however, that "adequate" protection did not mean that all harms were eliminated; it merely served as a threshold.\textsuperscript{127} Expressly, the goal of subsection (c) is to protect against potential economic losses from improper waste management.\textsuperscript{128} The court noted the contemplation of the economic implications of landfills was practical, considering the potential detrimental effects it may have on property value.\textsuperscript{129}

The Pennsylvania Constitution also emphasizes that the Harms/Benefits analysis is within the authority of the Acts.\textsuperscript{130} The court cited \textit{Payne} to reiterate that the inclusion of the Harms/Benefits Test, even without a specific holding, is within the authority of

\begin{itemize}
  \item \textsuperscript{121}. See \textit{id.} (indicating bias in favor of social and economic effects if considered by Acts, not legislature).
  \item \textsuperscript{122}. See \textit{Eagle}, 884 A.2d at 878 (noting SWMA to be liberally construed and overriding goal of SWMA and Act 101 was to establish state and local solid waste management programs that disposed of waste but also protected environment).
  \item \textsuperscript{123}. See \textit{id.} (referencing 25 PA. CODE §§ 271.127(c), 287.127(c)) (indicating that subsection (c) grants general authority to EQB to establish rules and regulations for purposes of SWMA and Act 101).
  \item \textsuperscript{124}. See \textit{id.} (reasoning that purposes of SWMA and Act 101 are carried out under statute and Harms/Benefits Test does not apply unless subsection (a) and (b) are properly satisfied).
  \item \textsuperscript{125}. See \textit{id.} (concluding requirements satisfied).
  \item \textsuperscript{126}. See \textit{id.} (explaining how court meets first subsection threshold).
  \item \textsuperscript{127}. See \textit{Eagle}, 884 A.2d at 878 (defining adequate protection).
  \item \textsuperscript{128}. See \textit{id.} (indicating legislative purpose was for EQB to consider economic issues while determining if waste permits should be allowed). Subsection (c) allows the DEP to assess both negative and positive economic and social implications versus environmental harms. \textit{See id.}
  \item \textsuperscript{129}. See \textit{id.} at 878 n.14 (noting practical legislative consideration beyond mere environmental impact).
  \item \textsuperscript{130}. See \textit{id.} at 879 (asserting implied inclusion).
\end{itemize}
WHO DECIDES THE STANDARD OF REVIEW?

the Acts under the Pennsylvania Constitution. Additionally, the EQB has suggested different considerations are to be taken into account when performing the balancing test. The DEP must consider such suggestions when evaluating permits under subsection (c) of the statute.

B. Does the Grant of Authority for the Harms/Benefits Test Violate the Non-Delegation Doctrine, Rendering the Acts Unconstitutional?

Appellants showed further concern that giving the DEP the authority of weighing harms and benefits will result in the unnecessary and uncontrolled discretionary power of the DEP. Appellants asserted the Acts were unconstitutional because they violated the non-delegation doctrine of the Pennsylvania Constitution. Specifically, the court held the Acts delegated a basic policy choice to the EQB, which was not permitted because landowners have a basic property right to use the land as they see fit. It was appellants' contention that the Harms/Benefits Test put the onus on property owners to prove a public use for their property, which is not a burden the owners should be expected to meet. Appellants also insisted that there was a lack of standards defining how the agency could adopt the Harms/Benefits Test and other regulations.

The court first discussed the heavy burden of persuasion appellants must surpass to prove the unconstitutionality of the Acts.

131. See id. (citing Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976)) (noting Pennsylvania Supreme Court affirmed commonwealth court’s decision that it did not violate duties as trustee under Article I, section 27 by complying with statutory requirements requiring Department of Transportation to weigh factors when widening road).

132. See id. at 879-80 (giving foundation for appellants’ argument).

133. See id. at 879 (holding Harms/Benefits Test was within authority of DEP under SWMA and Act 101).

134. See id. at 879-80 (giving foundation for appellants’ argument).

135. See id. (stating that non-delegation doctrine does not allow SWMA and Act 101 to delegate to EQB policy choices reserved by constitution).

136. See id. at 880 (stipulating owners have right to use own property however they want).

137. See id. at 880 (explaining how, in appellants' opinion, non-delegation doctrine was violated).

138. See id. (arguing additional contents of invalidity).

139. See id. (indicating presumption in favor of General Assembly's act and specifying that SWMA and Act 101 would not be held unconstitutional unless they “clearly, palpably and plainly” violated constitution).
This does not mean, however, that the General Assembly can delegate authority any way it sees fit: there are clear and strict restraints on its lawmaking ability.\textsuperscript{140} In particular, the court reasoned that the legislature cannot delegate the power to make any law to other branches of the government, but it is permitted to pass authority in execution of laws.\textsuperscript{141} Additionally, the court found that the legislature is allowed to designate duties to carry out legislative policy to specific agencies as well as establish the primary standards associated with a specific law.\textsuperscript{142} The power designated to agencies by the legislature is not without limitations.\textsuperscript{143} Specifically, the court reasoned that the legislature is in charge of basic policy choices and there must be standards that guide and restrain delegated authority.\textsuperscript{144}

In \textit{Eagle}, the court contended it was the legislature’s responsibility to make basic policy decisions as to whether landfills should be permitted.\textsuperscript{145} Specifically, it was the legislature’s duty to determine how the landfill industry would be regulated, namely by the SWMA and Act 101.\textsuperscript{146} Deciding how to regulate landfills, however, was not the legislature’s obligation, but rather the role delegated to the EQB.\textsuperscript{147} The regulation at issue here, the Harms/Benefits Test, is part of the EQB’s delegated duty to protect the “safety, health, welfare and property of the public,” in addition to protecting natural resources from the “public health hazards, environmental pollution, and economic loss” that would result upon improper waste disposal.\textsuperscript{148} Delegating such duty

\textsuperscript{140}. See id. (noting restrictions on General Assembly’s lawmaking power).
\textsuperscript{141}. See id. (stating authority of legislature to pass discretion to other agencies regarding implementation of laws).
\textsuperscript{142}. See \textit{Eagle}, 884 A.2d at 880 (maintaining legislature does enjoy some power to delegate authority).
\textsuperscript{143}. See id. (enumerating specific limitations on delegating power).
\textsuperscript{144}. See id. (indicating that agencies do not enjoy free reign).
\textsuperscript{145}. See id. (stating that although there are drawbacks and harms to landfills, they are of public necessity).
\textsuperscript{146}. See id. (noting other basic policy decisions made by legislature).
\textsuperscript{147}. See \textit{Eagle}, 884 A.2d at 880 (stating that EQB was responsible for setting forth specific rules and regulations that protected environment or public). The EQB made several regulations to serve this purpose; for example, it determined the thickness of liners of landfills and specifications of road construction near landfills. See id.
WHO DECIDES THE STANDARD OF REVIEW?

The court also addressed appellants’ argument that the Harms/Benefits Test altered the fundamental property rights of private citizens by requiring them to give public benefits for their private use. The Pennsylvania Supreme Court highlighted the flaw in the appellants’ reasoning because the land at issue was part of a highly regulated business, not merely private property. In addition, the regulation did not require the average private landowners to justify their use of property with proof of the benefits to personal improvements of their property. Instead, the requirements were imposed on private business owners operating a certain type of business embarking on a major project serving a public purpose, thereby validating the applicant’s duty to identify the harms and benefits.

C. IS THE HARM/BENEFITS TEST UNCONSTITUTIONALLY VAGUE?

A statute is deemed unconstitutionally vague when average people have differing interpretations of its meaning and purpose. Thus, a statute is unconstitutionally vague when the language does not make it apparent what the statute covers and how it imposes restrictions. Appellants’ third argument concerned the language of the Harms/Benefits Test. Appellants contended the subsection was unconstitutionally vague because the EQB did not define some terms and caused an arbitrary result. They argued that the applicants will not be able to designate adequately the harms and benefits or properly apply the test, and further, the DEP

149. See id. at 880-81 (noting delegating authority is constitutionally permissible when legislature makes basic policy choices and also explaining that legislature must create adequate standards that restrain agencies).

150. See id. at 881 (noting appellants’ argument regarding Harms/Benefits Test).

151. See id. (pointing out that appellants chose to subject themselves to regulations not equivalent to those of private landowners).

152. See Eagle, 884 A.2d at 881 (distinguishing between private property and private business property).

153. See id. (stressing that applicant must identify harms and benefits so DEP can properly evaluate project).


155. See id. (explaining standard for determining unconstitutional vagueness).

156. See Eagle, 884 A.2d at 881 (specifying that EQB did not define “benefit”, “harm” and “clearly outweigh”).
will not be able to offer any guidance. Additionally, appellants asserted there was no other aid for applicants or the DEP to assist in a less arbitrary outcome.

In response to their argument, the court cited the Due Process Clause of the United States Constitution and noted that a law is unconstitutionally vague when it fails to give citizens enough information to determine what is permitted conduct under the law. The court also noted which standard of review applied to the vagueness challenge depended on the nature of the statute at issue. More specifically, economic regulations, having a narrow subject matter, are subject to a less strict vagueness test. The court also expressed deference to civil enactments over criminal as well as regulations that do not inhibit constitutionally protected rights.

The Harms/Benefits Test, like economic regulations, applies to a narrow subject matter and thus, the vagueness standard is not as strict. Also, in areas where the Harms/Benefits Test is vague, there are numerous opportunities to modify and clarify specifics as issues arise. Furthermore, criminal penalties for violation of the Harms/Benefits Test are extreme and do not relate to the determination of actual harms and benefits. Appellants also failed to show the test was vague in all of its components. Given the common occurrence of balancing tests, the specific nature of the subject matter, and the broad application of the vagueness standard, the court concluded that the Harms/Benefits Test is not unconstitutionally vague.

157. See id. (indicating appellants' argument as to fault in Harms/Benefits Test language).
158. See id. (specifying that guidance documents are not binding regulations).
159. See id. (citing Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)) (mentioning that standard for proving statute as unconstitutionally vague requires complainant to show statute is "vague in all its applications").
160. See id. (discussing vagueness test).
161. See Eagle, 884 A.2d at 881 (attributing application of less strict vagueness test to fact that businesses are expected to consult legislation as action goes on when business has ability to clarify standards later).
162. See id. (indicating there is less to lose when statutes are vague).
163. See id. at 882 (associating Harms/Benefits Test with business regulations).
164. See id. (stressing flexibility of alteration at later date).
165. See id. (noting penalties related to Harms/Benefits determination are only civil).
166. See Eagle, 884 A.2d at 882 (indicating balancing tests are commonplace and specifics do not need to be explained).
167. See id. (keeping door open to later challenges of arbitrary application of regulation).
D. Does the Harms/Benefits Test Exceed the Reach of the Commonwealth’s Police Power?

The Commonwealth has particular power to regulate under state laws and legislation; however, this power is not all-encompassing and has limitations. The United States Supreme Court developed a three-part test to determine if a state’s actions exceed its police power. The test stipulates: (1) the public interest to require the state’s interference; (2) the means are reasonably necessary; and (3) the means are not overly oppressive. So long as the Commonwealth remains within the confines of the United States Supreme Court’s test, it will not exceed its police power.

The appellants’ final argument claimed the Commonwealth exceeded its police power because the Harms/Benefits Test served as a taxation on the industry, extending beyond the concern for the public’s welfare. Accordingly, appellants asserted the Harms/Benefits considerations were outside the scope of the EHB and exceeded the Commonwealth’s police power. The analysis, therefore, should be left to other agencies or municipalities.

The court maintained the appellants’ claim was without merit because they failed to meet their burden of proof. In fact, the Commonwealth’s police power allows for the “promot[ion] [of] the public health, morals or safety and the general well-being of the community.” To effectuate its standard, the court adopted the following test:

To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particu-

169. See id. (establishing police power test).
170. See id. (noting barriers of three-part test).
171. See id. (establishing police power test).
172. See id. (maintaining that Harms/Benefits Test does not fall under EHB’s responsibility).
173. See id. (recognizing conditions are aesthetic and should be considered by municipalities’ zoning regulations).
174. See id. (stressing heavy burden of proof needed to show Commonwealth surpassed its police power).
175. See id. (defining specifics of police power). The court noted further that even if exercise of police power upset residents, so long as performed reasonably, the court would not invalidate state actions. See id.
lar class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.\footnote{Eagle, 884 A.2d at 882 (citing Adams Sanitation Co., Inc. v. Commonwealth of Pa., Dep’t of Envd. Prot., 715 A.2d 390, 395 (Pa. 1998)) (referencing Lawton test). To prove a truly oppressive governmental action, the court must consider the “economic impact of regulation on the property holder and whether the governmental interference with property could be characterized as a physical intrusion.” Id.}

The court rejected appellants’ challenge of the second prong of the test because the argument was inaccurate.\footnote{See id. at 883 (dismissing appellants’ argument that second prong of test was incorrect because landfills providing public benefits was not necessary to protection of environment, public health, safety or welfare). The court noted the benefits analyzed under the Harms/Benefits Test could arise as by-products of project. See id.} In particular, the second prong of the test was warranted because benefits arise as natural by-products of particular projects, requiring a determination of any inherent harms and benefits.\footnote{See id. (noting industry is highly regulated and must examine all aspects before granting permits).} Thus, the determination fell within the Commonwealth’s police power and was duly necessary under the Harms/Benefits Test.\footnote{See id. (holding in favor of Commonwealth).}

V. CRITICAL ANALYSIS

A. Pennsylvania Supreme Court’s Plenary Review

When the Pennsylvania Supreme Court reviews an appeal from the commonwealth court, it adheres to a plenary standard of review.\footnote{See Southeastern Pennsylvania Transportation Authority v. Bd. of Revision of Taxes, 833 A.2d 710, 715 (Pa. 2003) (noting standard of review is de novo for questions of law).} Thus, the court is required to review the lower court’s entire record.\footnote{See id. (conducting plenary review).} Such a review requires the Pennsylvania Supreme Court to take the issues one-by-one and determine whether the appellate court committed an error of law.\footnote{See Phillips v. A-Best Prods. Co., 665 A.2d 1167, 1170-71 (Pa. 1995) (discussing standard of review).} The case at hand also concerned a pure question of law: specifically, whether the Harms/Benefits analysis by the DEP is valid under the Pennsylvania Constitution and the authority granted by the SWMA and Act 101.\footnote{See Eagle, 884 A.2d at 870 (noting overall issue).}
Upon review of the first issue, the court broke down the statute into its pertinent subsections, analyzing the purpose for each subsection. The court ensured the interpretation was consistent with the intended purpose. The court did not stop its analysis by merely determining the DEP properly interpreted the purpose of the statute, but it took a closer look at the actual balancing of harms and benefits. In particular, the court re-evaluated the relevant factors, assessing the economic and social harms. By performing its own balancing test, the court reconsidered the factors examined by the lower court and made its own determination of whether the harms outweighed the benefits. After conducting this analysis, the court concluded the balancing of a limited number of factors remained a power of the EQB.

When considering the second issue, the court first examined the legislative intent, back-tracking to look at the reasoning behind the regulation before considering its application to the issue. The court determined the legislature gave the EQB the specific authority to deal with landfills and the environment. Because the regulation at issue was within the EQB's authority, the court determined there was no violation of the non-delegation doctrine. Again, the court did not stray from the plenary standard as it re-assessed the basis for determination back to the legislative intent of

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185. See id. at 878 (identifying purpose for subsections (a), (b) and (c), with focus on subsection (c)—Harms/Benefits Test).
186. See id. (addressing concern that Harms/Benefits Test would be improperly applied and mitigation measures would not “adequately protect” environment).
187. See id. at 878-79 (indicating relevant factors need to be examined without considering how DEP and EQB previously considered factors).
188. See id. at 878 n.14 (noting legislature intended EHB to consider impact of harms). The court highlighted as among the harms the possible drop in property value offset by increased jobs, business and tax benefits. See id.
189. See Eagle, 884 A.2d at 878 n.14 (stating EQB has duty to enact regulations protecting natural resources from inappropriate solid waste practices).
190. See id. at 878-79 (indicating EQB required to establish “flexible and effective means to implement and enforce provisions” of SWMA and Act 101 through balancing tests).
191. See id. at 879-80 (discussing whether grant of authority for Harms/Benefits Test violated non-delegation doctrine).
192. See id. (noting legislature did not have specific rules on how to protect environment and explaining that responsibility was left to EQB). The EQB is responsible for regulations dealing with specifics of landfills. See id. The EQB received from legislative outline “necessary conditions” for conducting balancing tests. See id.
193. See id. at 880 (specifying EQB has responsibility to protect “safety, health, welfare and property of the public” and Commonwealth’s natural resources from “public health hazards, environmental pollution and economic loss”).
the regulation and the EQB’s role. If the court had failed to re-examine the legislature’s intent when developing the regulation, there would be room to argue the court abused its discretion and did not properly apply a plenary standard.

The court also applied a plenary standard of review in analyzing the third issue. Again, the court went back to the source and re-evaluated its purpose before examining the specifics of the issue. The application of the standard differed in this issue because the analysis rested on general policy rather than information in the record. The court relied on appellants’ failure to uphold their burden of demonstrating the test was wholly vague. The court did not stray from the plenary standard in re-affirming the previous analysis.

Not surprisingly, in the fourth issue, the court again did not fail to apply a plenary standard of review. The court cited the burden of proof, noting the appellants failed to meet the requisite burden. Appellants did provide evidence to support their argument, but the evidence was not sufficient. The court based its analysis on the root meaning and purpose of the Harms/Benefits Test, as it had earlier determined. If the court had merely used

194. See Eagle, 884 A.2d at 880-81 (referencing court’s analysis focusing on EQB’s duty and authority).
195. See id. (considering different result if court did not follow appropriate standards).
196. See id. at 881-82 (noting court’s analysis of issue).
197. See id. at 881 (reviewing whether Harms/Benefits Test is unconstitutionally vague). The Pennsylvania Supreme Court examined Due Process Clause of the United States Constitution and U.S. Supreme Court’s standards for evaluating vagueness. See id.
198. See id. at 882 (noting issue was very narrow regarding regulation in question).
199. See Eagle, 884 A.2d at 882 (stating appellants were unable to show vagueness of test in all applications). The Pennsylvania Supreme Court noted the balancing test is commonly used and terms easily understood. See id. With this understanding, the court found there was no vagueness in the actual concept of the test. See id.
200. See id. at 881-82 (highlighting court’s holding on issue). Had the court not re-evaluated legislative standards and proper analysis of regulation, the court would err in its review. See id.
201. See id. at 882 (outlining standard of review facing court).
202. See id. (noting appellants had heavy burden). Police power affords the Commonwealth authority over public health, morals and safety and will only be overturned if unreasonable or arbitrary. See id.
203. See id. at 883 (supplying evidence that landfills needed to provide benefits to environment). The court found an evaluation of harms and benefits was necessary to evaluate if dangers would be highly outweighed. See id.
204. See Eagle, 884 A.2d at 877-78 (referencing evaluation of Harms/Benefits Test in light of regulatory authority).
the lower court's definition of the meaning and purpose, it would have erred in its analysis. 205

B. DEP Advantage on Appeal

A thorough analysis of *Eagle* and several other decisions advancing from the DEP through the EHB suggest there is a presumption in favor of the EHB when it affirms a DEP decision. 206 For instance, in *Berks County*, the EHB affirmed the DEP's modification to a permit, and the commonwealth court agreed. 207 Also, in *Mock v. Department of Environmental Resources*, the commonwealth court affirmed the EHB's decision to deny the petitioners' application to construct an auto repair shop on their land. 208 Further, the court did not affirm only the DEP decisions striking down applications, but also the decisions granting a permit. 209 One example does ex-

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205. See *id.* at 883 (postulating alternative outcome). The court conducted an independent investigation. See *id.*

206. For a complete analysis of the DEP advantage on appeal, see infra notes 206-16 and accompanying text.

207. See *Berks County v. Dep't of Envtl. Prot.*, 894 A.2d 183, 204 (Pa. Commw. Ct. 2006) (holding that DEP's failure to complete harms/benefits analysis before technical review had no material effect on grant of permit application). The case involved a landfill that, prior to the permit at issue, was authorized to accept specific average daily volume. *Id.* at 185-86. When the landfill was almost up to capacity it sought to increase the proposed disposal area. See *id.* The DEP issued a major modification to the permit and approved an increase in height and average and daily volumes and required the landfill to provide all of the benefits that it described in its application. See *id.* at 206. The EHB held that the timing of the technical review, which was completed prior to the harms/benefits analysis, was within the DEP's province. See *id.* at 188.

208. See *Mock v. Dep't. of Envtl. Res.*, 623 A.2d 940, 941 (Pa. Commw. Ct. 1993) (holding that although petitioners might have been prevented from enjoying most profitable use of their property, reduction in value was not enough to find taking). The case concerned a landowner's application to fill wetlands on landowner's property for the purpose of constructing an auto repair shop. See *id.* at 941-43. The EHB upheld denial of petitioners' permit and the commonwealth court affirmed, holding that there was no unconstitutional taking. See *id.* at 943-45. The court found that petitioners did not prove that their land was valueless after the permit denial. See *id.*

209. See *Butler Twp. Bd. of Supervisors v. Dep't of Envtl. Res.*, 513 A.2d 508, 513-14 (Pa. Commw. Ct. 1986) (holding respondent clearly committed to reasonable efforts to minimize present and future environmental damage associated with project). In *Butler Township*, the appellants, city and township board, challenged an EHB decision that dismissed a challenge from an order of respondent Department of Environmental Resources. See *id.* at 509-10. Respondent required appellant township board and several surrounding municipalities and authorities to enter into an agreement to provide for the construction of a regional sewage treatment plant at a specific site within appellant township board's boundaries. See *id.* at 511-12. Appellants argued that the environmental harm that would result from the sewage treatment plant outweighed the benefits derived from the plant. See *id.*
The decision in Eagle remains consistent with the above observation. The EHB affirmed the DEP's decision of both Eagle and Tri-County, which the Pennsylvania Supreme Court subsequently affirmed. Although the Pennsylvania Supreme Court employs a plenary review, the above decisions are evidence of an obvious trend. Such a trend calls into question the review process of the EHB, asking the appropriate question of whether review is even necessary if the DEP's decision remains on appeal. Much like the appeals discussed in the cases above, the instant appeal in Eagle has a substantive basis. The continual affirmation of the DEP's decision suggests an appeal of procedural error seems to be a petitioner's best option to overcome the DEP. If true, petitioners face a heavy burden when appealing the DEP's decision.

C. Harms/Benefits Test

The Harms/Benefits Test is utilized in this area of environmental law to determine whether a specific project should be al-

210. See Browning-Ferris Indus. v. Dept. of Envtl. Prot., 819 A.2d 148, 153-54 (Pa. Commw. Ct. 2003) (holding EHB erred in review of DEP's decision to grant petitioners' permit modification application). The case concerned an increase in net present value of host fees paid to the county and borough where faster payment of host fees economically benefited the county and borough. See id. at 150-51. The EHB suggested that the increase would not further the legislatively intended incentive to municipalities to host facilities, as any benefits would be cancelled out by local costs and inconveniences. See id. at 151-52. The commonwealth court determined this proposition was not supported by substantial evidence. See id. at 153-54. Thus, the DEP properly conducted the harms/benefits analysis, and there was no evidence that the DEP abused its discretion in determining that the benefits from the permit modification outweighed the harms. See id. Further, the landowners' contention that the EHB erred in failing to rescind the permit modification on procedural grounds was rejected because the DEP did not err by failing to enforce any procedural requirements not in effect at the time of its action. See id. at 154.


212. See id. (discussing procedure).

213. For a complete analysis of plenary review, see supra notes 60-62 and accompanying text.

214. See Eagle, 884 A.2d at 876 (discussing appeal of Harms/Benefits Test).


216. See Eagle, 884 A.2d at 876 (noting grounds for appeal).
The DEP, the EHB and the courts are left to weigh the social and economic considerations the applicants present and to make an overall evaluation of the benefit or detriment of a specific project. The problem with such an evaluation is the lack of set standards existing for the agency or court to consider because traditionally decisions are viewed on a case-by-case basis. This poses a problem because such decisions end up being truly subjective and benefits are often construed in the eye of the beholder. In other words, proper and effective social and economic considerations in one case may not be applicable to the next case.

The Pennsylvania Commonwealth Court in *Leatherwood* considered the harms and benefits of having a landfill near an airport. In accordance with the SWMA regulations, Leatherwood provided a detailed analysis of potential impacts of the facility. When the EHB and the commonwealth court considered the application, the most important factor was the potential for bird/aircraft collisions. Thus, the focus was on several experts' accounts and opinions regarding the likelihood of collisions occurring as a result of birds being attracted to the landfill. The specificity of the evaluation focused the EHB and the court on one major potential harm and that was the basis of determining whether the landfill should be permitted.

In *Eagle*, however, the Pennsylvania Supreme Court did not focus on a specific harm, like the bird/aircraft collision. As a re-
suit, the EHB did not have a factor to focus on while making its
determination of the validity of the permit; rather, it had to make
an evaluation as a whole. 228 Although such an approach is not im-
proper, it can prove to be arbitrary because the significance of one
harm or one benefit may be entirely reflective of the specific views
of whoever is evaluating the standard. Additionally, so long as the
EHB does not abuse its discretion and its determination is not
outside the overall scope of social, economic and environmental
considerations, the decision will be affirmed. 229

In Eagle, the DEP permitted approval of the application be-
cause the benefits outweighed the harms. 230 The DEP allowed the
permit because the harms were only potential while the benefits
were real. 231 This determination, though not invalid, is trouble-
some because the DEP decided real benefits outweighed potential
harms even though the magnitude of a potential harm could out-
weigh a real benefit. 232 In Eagle, the potential harm of malfunction
of the leachate treatment plant could possibly have detrimental ef-
fects that would far outweigh the current real benefits. 233 Neverthe-
less, because this was only a potential harm and not a real harm, the
DEP decided it did not carry enough weight. 234 If, however, there
was a previous decision or standard noting the importance of
proper operation of the leachate treatment plant, the DEP would
give this potential harm greater consideration. 235 Thus, in the ab-
sence of clear standards, the reliance on a case-by-case analysis al-
 lows for more arbitrary determinations of what weight should be
given to harms and benefits. 236

On the other hand, there have been cases arising under the
EHB, Pennsylvania Commonwealth Court and Pennsylvania Su-
preme Court that supply factors to consider in applying the
Harms/Benefits Test to municipal and residual landfill opera-

228. See id. (evaluating all harms and benefits together).
(Pa. 1997) (detailing subsections with emphasis on Harms/Benefits Test).
230. See id. at 872 (noting that harms were only potentialities).
231. See id. (referencing reasoning of decision).
232. See Eagle, 884 A.2d at 872 (citing potential harm of malfunction
of leachate treatment plant compared to real benefits of debris disposal and pay-
ments for specific programs).
233. See id. (addressing harms and mitigation efforts).
234. See id. (noting DEP's partial reliance on harms status as potential support
in decision).
235. See id. (speculating on change in DEP's decision).
236. See id. (considering effect of case-by-case analysis).
WHO DECIDES THE STANDARD OF REVIEW?

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VI. IMPACT

The purpose of the Harms/Benefits Test is to act as a mechanism where the DEP can balance the impact a project will have on the environment and surrounding community to gain a greater understanding of the effect of a proposed project. Given the varying possibilities of particular harms and benefits in each application, a definitive list of specific harms and benefits warranting an approval or disapproval of an application does not exist. Thus, the DEP considers social and economic conditions on a case-by-case basis.

Although examining the social and economic considerations on a case-by-case basis gives the DEP and courts leeway to examine factors that had not been previously anticipated, it does not provide applicants with any guidance as to what types of factors are warranted. Although the legislature has not stated specific harms will automatically warrant a denial, there is no bar set as to which benefits are highly favored, leaving applicants unguided when submitting their application.


238. See Berks County, 894 A.2d at 186-87 (listing harms and benefits); Browning-Ferris, 819 A.2d at 151-52 (dividing Harms/Benefits into landfill capacity, disposal space availability, miscellaneous community and economic benefits, odors, other harms and host fees).

239. For a full discussion of the approach in Eagle, see supra notes 230-34 and accompanying text.

240. See Eagle, 884 A.2d at 887 (Newman, J. dissenting) (commenting on social and economic harms categories).

241. See Browning-Ferris, 819 A.2d at 154 (citing 25 Pa. Code § 271.127(c) (2005)) (noting that to grant permit, benefits to public must outweigh, by mere scintilla, any potential or known harms, so long as by requisite degree of certainty).

242. See Eagle, 884 A.2d at 878 (suggesting strict standard not established).

243. See id. (suggesting strict standard not established).

244. For a complete analysis of factors, see supra notes 217-40 and accompanying text.

245. See Paula Reed Ward, Trails to Trash - Landfill Proposal Displaces Recreational Plans in Centre County, Pa., PITTSBURGH POST - GAZETTE, October 24, 2004, at
The court's analysis of the harms and benefits in *Eagle*, for example, placed considerable emphasis on the possible malfunction of a leachate treatment plant. The emphasis placed on such a distinct factor shows that applicants have no way to measure what the DEP and courts will focus on and thus cannot tailor their applications accordingly. The only possible gauge an applicant has are previous applications submitted for similar permits. But, as each piece of land is different and as environmental priorities change, even the most similar projects may not be sufficient to help applicants. Over time utilization of such a methodology presents the danger of becoming an ad-hoc approach because no identifiable standards are established.

Further, the DEP and reviewing courts have the potential to create an arbitrary standard, evaluating benefits and harms on a case-by-case basis. As discussed in Part V, the DEP and courts are capable of placing varying weights on certain harms and benefits. Without the knowledge of how specific harms and benefits will be weighed, applicants are not aware of the proper burden of proof. Also, applicants have no guidance as to whether their benefits will translate to the DEP as actual benefits outweighing the harms. Overall, the lack of such knowledge not only creates an uncertain burden on applicants, but it gives the DEP an unfair advantage to set the applicable standard arbitrarily. To avoid such an outcome, the legislature and courts should come to a balance where standards are defined but are not overly restrictive, because without

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246. *See Eagle*, 884 A.2d at 872 (identifying harms and benefits to proposed project and mitigation efforts for real and potential harms). The DEP, and subsequently, the court, determined the benefits exceeded the harms and granted the permit. *See id.*

247. *See id.* (stating mitigation of potential harm satisfied).

248. *See generally id.* (speculating evaluation standard).

249. *See generally id.* (evaluating difficult task present when comparing two separate projects).

250. For a complete critique of the Harms/Benefits Test, see *supra* notes 217-40 and accompanying text.

251. *See id.* at 877 (referencing broad standard).

252. For a complete discussion of consideration of harms and benefits by the DEP and courts, see *supra* notes 69-94 and accompanying text.

253. *See Eagle*, 884 A.2d at 871 (specifying that each harm must have mitigation plan).

254. *See id.* at 871-72 (discussing balancing process).

255. *See generally id.* (considering applicants' knowledge).
such guidance, the final decision lies truly in the hands of the initial DEP decision-maker.

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