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Does Environmental Enforcement Against Individuals Make Sense?

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David G. Mandelbaum

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Environmental enforcement is the effort by the government to get regulated entities to comply with the environmental laws and to remedy violations. Distinguish it from activities like permitting that declare the standards but do not enforce them.

If environmental enforcement were directed to obtaining changes in environmental quality in the real world, one might expect that the targets of environmental enforcement would be in a position — were the enforcement successful — to have significant impacts on environmental quality affecting many people or large areas.

One would not expect to see individuals as regular targets of environmental enforcement, although, to be sure, a single person might have control over a lot of land or a particular polluting condition. One would expect entities that do a significant amount of air emission or water discharge or even earth disturbance to be businesses. Even if that expectation were wrong, one would not expect impecunious individuals to be able to do much damage, or, if they did, to be able to do much repair. Therefore, enforcing against a person with no assets and seeking affirmative relief — not just the cessation of some conduct — would not be where one would expect any environmental regulator to be focused.

Through September 8, 162 appeals have been filed in the Environmental Hearing Board. Of those, 86 — slightly more than half — have an individual as an appellant. Many of those individual appellants are really environmental enforcers themselves. They have filed a third-party appeal of the grant to another person of a permit or approval of a Sewage Facilities Act plan. Others have appealed from a determination by the

Department of Environmental Protection that oil and gas activity has not caused contamination of their water supplies or that coal mining has not caused subsidence on their properties. The numbers are skewed by a few sets of third-party appeals by a group of neighbors, each of which filed his or her own case.

Some of the 86 appeals by individuals are from permit decisions that the department made on the individuals' own applications. In one case, an individual has appealed the grant of a permit to another individual.

However, in 19 of the 162 appeals filed so far this year in the EHB, an individual has sought review of an enforcement order issued to him or her by the department. If 19 does not seem like a high number, consider that those are just the enforcement actions by the department that an individual has chosen to litigate. Only 76 appeals have been brought by businesses, municipalities, environmental advocacy groups and, in one case, the Pennsylvania Game Commission combined.

Maybe individuals are inherently more litigious, but one wonders why there would be 19 litigable enforcement cases by individuals in just eight months.

The EHB and the environmental and energy law section of the Pennsylvania Bar Association have a pro bono program. When an individual appeals to the EHB, he or she may appear pro se. Any litigant other than an individual must appear by counsel. That requirement applies to corporations and groups.

The pro bono program, in part, allows the board to facilitate compliance with its expressed preference that parties appear by counsel. Having lawyers just makes things go more smoothly.

Thus, Section 24 of the board's Rules of Practice and Procedure authorizes the secretary to the board (akin to the clerk or prothonotary) to refer any pro se litigant to the Pennsylvania Bar Association or a county bar association for appointment of pro bono counsel if that litigant meets the financial criteria established by the bar association.

EHB Judge Steven Beckman recently described the program in Schlafke v. Department of Environmental Protection, No. 2012-186-B (Pa. Envtl Hearing Bd. July 15, 2013). Section 24 does not create rights in litigants to counsel, nor does it establish a nondiscretionary duty for the secretary.

Lawyers would typically think that an environmental pro bono assignment would conventionally be on behalf of an environmental advocate. Lawyers would think of themselves taking on a third-party appeal in which a citizen seeks to vindicate public environmental rights. Thus, one might expect that Section 24 of the board's rules would allow appointment of pro bono counsel for organizations like neighborhood or watershed groups.

Indeed, Rule of Professional Conduct 6.1 would allow an attorney to count such a representation of an organization toward the lawyer's satisfaction of the aspirational requirement to provide pro bono services: "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations." However, under the board's rules, the board does not refer or vet organizations, just people.

Some of the individual appellants in enforcement cases represent themselves. Some of those have been referred to the pro bono program and have qualified. That means that they have incomes no more than 125 percent of the poverty level.

What can someone in those circumstances do to affect environmental quality?

That is not to say that an impecunious person may not have violated the law. It does not take a lot of money to throw things in a stream, to strip vegetation from a hillside or to spill contaminants on the ground. As a practical matter, though, what can someone without resources do about it afterward?

Pennsylvania has opportunities to use its environmental legacy to its advantage. We can, if we choose, use our 83,000 miles of rivers and streams, our 11 million acres of forest, the largest in-city park in the United States and countless other environmental amenities to enhance the lives of Pennsylvanians. We can also use that endowment to attract tourists, visitors, new residents and new businesses. We can use the environment to make people better off.

Vindicating principle does not make people better off, nor does preserving the integrity of a regulatory program. What matters are environmental quality outcomes. Litigants and citizens must demand that everything the regulators do furthers environmental quality outcomes. There is no profit in throwing resources at debating points.

Do not mistake my position. This is not a call for deregulation or lax enforcement. This is a call for picking the fights that matter. Enforcement is expensive. It should be brought where it has an impact. Maybe pursuing individuals makes sense. Maybe even pursuing individuals without money makes sense. But the agencies ought to be able to explain why — if not to all of us, then to a tribunal.

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