COMMENTARY

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ENVIRONMENTAL LAW

Environmental Cases in the Pennsylvania Appellate Courts During 2015

This month, I offer a brief review of environmental issues considered by the Pennsylvania appellate courts last year.

Environmental Rights Amendment. Two years ago, a plurality of the Supreme Court invalidated many core provisions of the Oil and Gas Amendments of 2012 (Act 13) under Article I, Section 27, of the Pennsylvania Constitution as in *Robinson Township v. Pennsylvania Public Utility Commission*, 83 A.3d 901 (Pa. 2013). The plurality called for a balancing of environmental rights against other interests, rejecting the three-part test of *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. 1973), aff'd, 361 A.2d 263 (Pa. 1976), (compliance with law, reasonable effort to reduce environmental impacts, and no overwhelming environmental detriment compared with other benefits).

However, the Commonwealth Court continued to follow *Payne* in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Commw. 2015), a case challenging the disposition of the funds received by the commonwealth from leasing oil and gas rights on public lands. The Pennsylvania Environmental Defense Foundation (PEDF) appealed, and on Nov. 18, the Supreme Court ordered oral argument on "the proper standards for judicial review of government actions and legislation challenged under the Environmental Rights Amendment ... in light of Robinson Township ... " 10 MAP 2015 (Pa. filed Feb. 6, 2015).

In another case, the Commonwealth Court expressed additional reluctance to impose obligations under the Environmental Rights Amendment. "The omphalus of [*Feudale v. Aqua Commonwealth, Inc.*, 335 M.D. 2014 (Pa. Commw. July 22, 2015)] is a challenge to Aqua's waterline replacement project, for which Aqua sought and received the appropriate permit from the DEP." The court held that Aqua—a private party—could have no obligations under the amendment.

The Environmental Rights Amendment also had no impact on a challenge to the Board of Elections' decision to leave a proposed clean-air ordinance off the ballot in *Fegley v. Lehigh County Board of Elections*, 1905 C.D. 2014 (Pa. Commw. Sept. 15, 2015).

Pre-enforcement Review. In general, a regulated entity cannot challenge regulations until the regulator imposes them in a permit or enforcement action. However, when the regulation imposes consequences without enforcement, pre-enforcement review may be available, as in *Arsenal Coal v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984), which permitted a review of certain surface mining regulations. The *Arsenal Coal* exception may have become broader in 2015. If so, an issue exists as to whether failing to seek pre-enforcement review can be preclusive.

EQT Production v. Department of Environmental Protection, 15 MAP 2015 (Pa. Dec. 29, 2015), allowed a pre-enforcement challenge to the DEP's expressed policy that Clean Streams Law penalties accrue on each day that contamination from a spill remains in the soil, even though EQT could contest the penalty assessment in the Environmental Hearing Board. *PIOGA v. DEP,* 321 M.D. 2015 (Pa. Commw. Dec. 29, 2015), allowed PIOGA to seek a declaratory judgment that its members need not submit a public resources form or comply with the Pennsylvania Natural Diversity Inventory Policy for every unconventional oil or gas well application. An appeal to the Environmental Hearing Board, after a permit was denied, did not suffice because of the delay and cost of getting to that point.

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Timeliness of Appeal. *Harvilchuck v. DEP*, 117 A.3d 368 (Pa. Commw. 2015), holds that a third-party's 30-day time to appeal to the Environmental Hearing Board does not begin to run until one has actual knowledge of permit terms. An eFacts email is not notice.

Interlocutory Appeal. An oil and gas company did not have sufficient standing to protect the well services companies' fracking fluid trade secrets to take an interlocutory appeal under the collateral order doctrine in *Haney v. Range Resources-Appalachia*, 1130 WDA 2014 (Pa. Super. Apr. 14, 2015).

Mootness. A longwall coal mining permit condition required a pre-mining biological study. When the mining company complied, the DEP deleted the condition, mooting the miner's appeal to the Environmental Hearing Board in *Consol Pennsylvania Coal Company v. DEP,* 351 C.D. 2015 (Pa. Commw. Dec. 15, 2015).

Pre-Construction Review. The Sewage Facilities Act regulatory structure turns on being able to review projects before construction. Even if modifications to the second floor of a garage do not require any modifications to the sewage treatment system, the defendant had to apply before building, as in *Borough of Indian Lake v. Rohrich*, 22 C.D. 2015 (Pa. Commw. Aug 27, 2015).

Contamination. *Harley-Davidson v. Springettsbury Township*, 82 MAP 2014 (Pa. Sept. 29, 2015), a property tax assessment case, lays out a framework for valuing property damage caused by contamination, and in particular seems to endorse a diminution in property value for "stigma" over and above any actual costs. In that case, persons other than the property owner had to pay for the cleanup under a consent decree. *DEP v. Spangler,* 109 A.3d 321 (Pa. Commw. 2015), affirms an order granting DEP access under the Hazardous Sites Cleanup Act to investigate and to clean up tanks of heating oil and gasoline left open on Spangler's property.

Negligence. *Hogan v. Lower Bucks Joint Municipal Authority*, 1462 C.D. 2014 (Pa. Commw. Aug. 26, 2015), considers a claim for flooding caused by assertedly negligent cleanout of a storm sewer.

Trespass. The DEP issued permits to Woloschuk to build storm-water structures to tie into Kusher's sewer. Woloschuk's construction dumped debris on Kusher's property. Kusher had not consented to the work. The DEP was not an indispensable party to Kusher's trespass action. *Kusher v. Woloschuk*, 114 A.3d 900 (Pa. Commw. 2015).

Preemption of Land Use Regulation. *Huckleberry Associations v. South Whitehall Township*, ZHB, 120 A.3d 1110 (Pa. Commw. 2015), holds that conversion of an old mine used to stockpile leaves to a biosoils operation accepting food waste is subject to land-use regulation notwithstanding the preemption in the Noncoal Surface Mining Act and the Solid Waste Management Act. The municipality may regulate "where" but not "how" the operation proceeds. Similarly, *Berner v. Montour Township*, 120 A.3d 433 (Pa. Commw. 2015), holds that the Nutrient Management Act does not preempt "where-not-how" regulation of a swine manure management facility under a subdivision and land development ordinance. But, the Noncoal Surface Mining Act preempted a storm water ordinance in *Gibraltar Rock v. New Hanover Township*, 118 A.3d 461 (Pa. Commw. 2015).

Protection from Tort Liability. *Gilbert v. Synagro Central*, 121 MAP 2014 (Pa. Dec. 21, 2015), addresses whether the Right to Farm Act provides a statute of repose barring nuisance actions commenced more than one year after a farmer begins spreading biosolids. The court, not a jury, has to decide whether the spreading was categorically a "normal agricultural operation." The defendant's care determines whether the spreading is a nuisance, not whether the suit is barred. *Glencannon Homes Association v. North Strabane Township*, 116 A.3d 706 (Pa. Commw. 2015), affirmed application of the Public School Tort Claims Act limitations on liability to a claim that construction of a sports complex caused violations of the Stormwater Management Act by silting up the association's stormwater basin.

Act 101. Clearfield County solicited "voluntary" financial assistance with its recycling program from applicants to be the designated solid waste disposal facility under Act 101. A disappointed applicant appealed the DEP's approval. A hearing was required to determine whether the assistance is more like avoided program costs or an impermissible fee, as in *Waste Management v. DEP*, 107 A.3d 273 (Pa. Commw. 2015).

Environmental Contractual Obligations. After a manufacturer closed and demolished its plant, it could terminate its obligation to pay a share of the fixed costs of a municipal wastewater treatment plant. *Wyeth Pharmaceuticals v. Borough of West Chester*, 2116 C.D. 2014 (Pa. Commw. Nov. 5, 2015). In a dispute between Maxatawny and Kutztown under an intermunicipal agreement, Kutztown's engineer's evaluation of capacity sent to his client was not a certification by Kutztown that a private developer and Maxatawny could use to support a sewage-planning module for new development in Maxatawny, in *Maxatawny Township v. DEP,* 2369 C.D. 2014 (Pa. Commw. Oct. 16, 2015). New Garden did not have to reimburse Avondale for the costs of replacing sewer pipe based on the terms of their agreement in *Borough of Avondale v. New Garden Township*, 111 A.3d 817 (Pa. Commw. 2015). If a DEP permit only allowed a pit to be reclaimed using coal refuse, then the contract cannot be read to allow it to be used to dispose of ash, in *Rausch Creek Land v. Porter Associations,* 1078 MDA 2014 (Pa. Super. May 8, 2015). In *Borough of St. Clair v. Blythe Township*, 112 A.3d 701 (Pa. Commw. 2015), St. Clair opposed development of a landfill by the township under a contract with FKV. St. Clair challenged the validity of the contract, but it did not have standing because the harms it alleged were from the anticipated operation of the landfill, not from the contract. •

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