COMMENTARY

ENVIRONMENTAL LAW

BY JILLIAN C. KIRN
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KIRNJ@GTLAW.COM

'Arsenal Coal' Exception and the Status of Pre-Enforcement Reviews

In two decisions issued at the end of 2015, the Pennsylvania courts increased uncertainty regarding the breadth of the *Arsenal Coal* exception and status of pre-enforcement reviews. As a general rule, a regulated entity may only challenge regulations when the regulator imposes those regulations on the entity in a permit or enforcement action. In Pennsylvania, pre-enforcement review is not within the authority of the Environmental Hearing Board and the courts will only take on pre-enforcement reviews where the effect of the challenged regulations upon the industry regulated is direct and immediate, thereby establishing the justiciability of the challenge in advance of enforcement. The two opinions issued on Dec. 29, *EQT Production v. Department of Environmental Protection*, 15 MAP 2015 (Pa. Dec. 29, 2015) and *PIOGA v. Department of Environmental Protection*, 321 M.D. 2015 (Pa. Commw. Dec. 29, 2015), have the potential to expand the arsenal coal exception. If, in fact, the *Arsenal Coal* exception is broadened, it may simultaneously open a door to pre-enforcement challenges while shutting others on the grounds of preclusion, exhaustion, and finality.

In *Arsenal Coal v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984), 55 anthracite coal mine operators and producers appealed a comprehensive emergency recodification of regulations governing their industry, prior to the enforcement of the regulations against any of the parties. *Arsenal Coal* noted that, in the years prior to the appeal, the Pennsylvania General Assembly had enacted legislation clearly and specifically limiting the power of the board to make regulations affecting the anthracite coal industry.

On appeal from the Commonwealth Court, the Pennsylvania Supreme Court carved out an exception to the general ban on pre-enforcement justiciability, holding that a pre-enforcement challenge to environmental regulations that would impose new restrictions on surface coal mining was appropriate because the General Assembly had "clearly intended" to protect the industry from unnecessary upheaval.

To require *Arsenal Coal* to go through the administrative process was not merely burdensome but, based on the court's interpretation, went against the legislature's intent and therefore posed sufficient harm. *EQT Production v. DEP* appears to broaden the *Arsenal Coal* exception, finding sufficient harm for pre-enforcement review may exist not only in an instance of regulation that goes against legislative intent, but in instances where the DEP applies standard, and comparatively pedestrian, ongoing daily penalties.

In *EQT Production*, a natural gas fracking entity challenged civil penalties levied by the DEP for contamination caused by a leaking impoundment. EQT began a formal cleanup under Pennsylvania's Act 2 program. Subsequently, the DEP issued a civil penalty settlement demand under the Clean Streams Law for $1.27 million, $900,000 of which was related to ongoing violations. EQT argued that the Clean Streams Law does not provide for penalties that exceed those accrued during the period of the actual discharge and that Act 2 governed the remediation, rather than the Clean Streams Law.

Rather than appealing to the Environmental Hearing Board, EQT filed its appeal directly with the Commonwealth Court, seeking a declaratory judgment holding that the DEP's policy on "continuing-violation" penalties was disallowed under the Clean Streams Law. Shortly thereafter, the DEP filed a complaint for over $4.5 million in civil penalties with the Environmental Hearing Board and stated that the Environmental Hearing Board was the sole forum for the appeal.

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The Commonwealth Court agreed that the board had exclusive authority to determine appropriate penalties under the Clean Streams Law and held that EQT had failed to meet the prerequisites for a declaratory judgment action because it had not shown that an actual controversy existed that posed a direct and immediate threat to EQT's legal rights.

On appeal, the Pennsylvania Supreme Court overturned the Commonwealth Court's decision, holding that the case presented "a sufficient, actual controversy" which fell "within the class of disputes that are a proper subject of pre-enforcement review." The Pennsylvania Supreme Court identified EQT's "potential exposure to potent, ongoing civil penalties," and "the uncertainties facing [EQT] while under the threat of ballooning penalties under the DEP's ongoing-violation interpretation" as sufficient harm to entitle EQT to judicial review before the commonwealth courts.

Similarly, the Commonwealth Court found that the requirements for the *Arsenal Coal* standard were met in a trade associations pre-enforcement appeal of document submission requirements under Section 3215(c) of the Pennsylvania Oil and Gas Act (Act 13), 58 Pa. C.S. 3215(c).

In *PIOGA v. DEP*, the Pennsylvania Independent Oil & Gas Association, or PIOGA, a trade association whose members conduct oil and gas exploration, drilling, production in Pennsylvania, sought a declaratory judgment that its members need not submit a public resources form or comply with the Pennsylvania Natural Diversity Inventory Policy for unconventional oil or gas well applications. In its petition, PIOGA argued that the DEP should be prohibited from applying and enforcing the requirements of Act 13 on well permit applicants because the Pennsylvania Supreme Court enjoined the application and enforcement of that provision in *Robinson Township v. Commonwealth,* 83 A.3d 901 (Pa. 2013). The DEP argued that PIOGA's allegations were too general and did not demonstrate the direct and immediate harm necessary for standing, particularly because DEP had not denied any of the permits of PIOGA members in the 18 months since *Robinson Township*. PIOGA argued that waiting to appeal to the Environmental Hearing Board after a permit was denied was an unacceptable alternative due to the delay and cost entailed.

Citing *Arsenal Coal* and its progeny, the Commonwealth Court held that *PIOGA* was indistinguishable from *Arsenal Coal* and that because the administrative process would cause immediate and actual harm prior to the actual enforcement of the challenged regulation *PIOGA*'s pre-enforcement claim was justiciable. Certainly, the facts of *PIOGA* are distinguishable from those in *Arsenal Coal* but the courts' recent decisions suggest that the justiciability of pre-enforcement appeals does not rely on the exceptional nature of the factual circumstances. Instead, sufficient harm may arise simply from the delay of the permitting and administrative appeal process itself.

As a result of *EQT Production* and *PIOGA*, the questions of when and where to appeal are not easily answered. Usually, the appropriate time for an appeal is after the DEP has issue d a permit. Similarly, the appropriate venue is generally the Environmental Hearing Board.

While the recent decisions may open the door to earlier appeals in the commonwealth courts, they also may raise issues of administrative finality. Under Pennsylvania law, the doctrine of administrative finality amounts to the application of collateral estoppel principles to agency decisions, as in *Delaware Riverkeeper v. DEP*, 879 A.2d 351 (Pa. Cmwlth. 2005). Under that doctrine, in the event that an act creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement, that remedy is exclusive and must be strictly pursued. If one fails to exhaust her statutory remedy, she is precluded from raising an issue which could have and should have been raised in the proceeding afforded by that remedy.

The Commonwealth Court has held that while no one is required to appeal, a failure to appeal does not preserve the right to raise those issues at "some indefinite future time in some indefinite future proceedings," as in *DER v. Wheeling-Pittsburgh Steel*, 22 Pa.Commw. 280 (1975). Under the Pennsylvania Environmental Hearing Board Act, no action of DEP adversely affecting an entity is final until that person has had the opportunity to appeal the action to the Environmental Hearing Board. However, the pre-enforcement conclusions reached in *EQT Production* and *PIOGA* suggest that an entity's opportunity to appeal may occur prior to the permit being issued.

As a result of the December 2015 decisions, not only is it not obvious when an entity can and should appeal, but it is also not clear what venue is appropriate. If a regulated entity aims to preempt any administrative finality concerns by filing a pre-enforcement petition for a declaratory judgment from the commonwealth courts, it will find itself needing to meet the standard of "direct and immediate" harm cited by both the Commonwealth Court and the Supreme Court.

The test is subjective and a party may easily find itself having wasted substantial resources and undermining judicial economy. However, if a regulated entity waits until a permit is issued under the objectionable regulations, it may find itself without a venue and facing the argument that the time to appeal the regulations has passed.

While the potential for a broadened interpretation of *Arsenal* is apparent, the Pennsylvania Supreme Court noted that it may have decided *EQT Production* differently if the DEP had filed its Environmental Hearing Board action before EQT filed its declaratory judgment action before the Commonwealth Court. Though it reserved judgment on that issue, the court did acknowledge the timing issue, stating in a footnote that it was "hesitant to foster races to the respective judicial and quasi-judicial tribunals." The case has been remanded to the Commonwealth Court, making *EQT Production* a case to watch for additional clarification and interpretation of pre-enforcement review and the *Arsenal Coal* exception. •

Jillian C. Kirn, an associate at Greenberg Traurig, focuses her practice on environmental and energy matters. She represents clients in litigation in state and federal courts and works on behalf of developers and corporations in connection with the acquisition, transfer, financing, and sale of contaminated real estate.