

## *Environmental Cases in the Pa. Appellate Courts During 2016*

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The Pennsylvania appellate courts decided about two dozen cases that one could call "environmental" last year. A brief review follows that necessarily gives short shrift to some of these opinions. This review may also omit some cases, for which I apologize.

- Environmental Rights Amendment.

Since a Supreme Court plurality joined [Chief Justice Ronald Castille's opinion in Robinson Township v. Public Utility Commission, 83 A.3d 901](#) (Pa. 2013), the courts have tried to explain how Article I, Section 27, of the Pennsylvania Constitution, known as the Environmental Rights Amendment, applies to governmental decision-making. On March 9, the Supreme Court heard argument in [Pennsylvania Environmental Defense Foundation v. Wolf, 10 MAP 2015](#), a case that will elaborate on how the commonwealth must act when it is the trustee of public natural resources—public lands on which natural gas drilling has occurred—but the court has not yet ruled. The court did decide a follow-on appeal in Robinson Township, 104 MAP 2014 (Pa. Sept. 28, 2016), holding that the provisions of Act 13, the oil and gas amendments, addressing local land use that had not been invalidated in 2013 were not severable, and were therefore invalid. So too were the confidentiality limits placed on doctors, although on due process grounds. However, the Commonwealth Court held that the requirement of Act 13 that the Department of Environmental Protection (DEP) apply setbacks from public natural resources, 58 Pa. Cons. Stat. Section 3215(b), was only invalid insofar as the setback applied to waterbodies and drinking water sources, Section 3215(b)(6), and not to other natural resources, as in [Pennsylvania Independent Oil & Gas Association v. Department of Environmental Protection, 321 M.D. 2015](#) (Pa. Commw. Sept. 1, 2016).

Castille posited a broad balancing test of environmental harms and benefits against other harms and benefits under the Environmental Rights Amendment, but the Commonwealth Court has been clear that it considers itself bound to continue to apply the narrower three-part test of [Payne v. Kassab, 312 A.2d 86, 94](#) (Pa. Commw. 1973): compliance with law, reduction of environmental harm, and whether the environmental so outweighs other benefits as to make proceeding inappropriate. In [Funk v. Wolf, 144 A.3d 228](#) (Pa. Commw. 2016), a group of minors sought a mandamus to the DEP and the Environmental Quality Board to require studies of climate change and adoption of an appropriate regulatory response; the court held that the Environmental Rights Amendment does not impose mandatory obligations to regulate and the test is Payne. A neighbor objecting to a land use approval for a natural gas pipeline compressor station argued that the municipality could not properly apply a standard set-back under the [Environmental Rights Amendment in Kretschmann Farm v. Township of Sewickley, 131 A.3d 1044](#) (Pa. Commw. 2016). The court disagreed, saying that nothing in Article I, Section 27, precludes standard set-backs and that the township had satisfied Payne. The court also applied [Payne in Brockway Borough Municipal Authority v. Department of Environmental Protection, 131 A.3d 578](#) (Pa. Commw. 2016), to the DEP's grant of a gas well permit.

- Impacts of gas drilling.

Brockway involved a claim by the municipal water authority that drilling of one gas well had caused an Artesian water well to dry up for 29 hours, and that when it returned it had increased

turbidity. The authority asserted that those constituted a diminution of water quality under section 3218 of the Oil and Gas Act and that the turbidity constituted pollution prohibited by Section 401 of the Clean Streams Law. Accordingly, the authority objected to a permit for a second gas well on the same parcel. The Commonwealth Court affirmed the Environmental Hearing Board's conclusion that the gas well had merely reduced pressure in the water well temporarily, and that that was neither a diminution in the water source nor pollution.

[In Kiskadden v. Department of Environmental Protection, 1167 C.D. 2015](#) (Pa. Commw. Oct 26, 2016), a neighbor contended that his water well had been contaminated by natural gas drilling. The Environmental Hearing Board found that he had failed to prove a hydrological connection between the gas drilling and the water well, and the Commonwealth Court affirmed. [EQT Production v. Teska, 144 A.3d 201](#) (Pa. Super. 2016), rejected as not supported by expert testimony a claim that plugging a natural gas well would harm plaintiff's residential water well; plaintiff also wanted to retain free gas from the gas well.

- Stormwater.

[In Lincoln Investors v. King, 2646 C.D. 2015](#) (Pa. Commw. Dec. 22, 2016), a down gradient mall developer sought an injunction against and damages from upgradient residential developers under the Stormwater Management Act when the mall flooded repeatedly. For much of the period that had not been a county or municipal stormwater management plan. The court held that Section 15(b) of the act authorizes an injunction to require compliance with the standards of the Act, and does not require a local plan. However, Section 15(c)'s authorization of a claim for damages does require proof that the defendant failed to take the steps called for by the plan to maintain the pre-development rate and volume of stormwater, not just that the rate or volume exceeded the pre-development level.

[Valley Forge Chapter of Trout Unlimited v. Township of Tredyffrin, 161 M.D. 2016](#) (Pa. Commw. Dec. 20, 2016), overruled preliminary objections to a case claiming that the township had violated the Stormwater Management Act and the Municipalities Planning Code when the township settled a lawsuit with the Turnpike Commission on terms that the state statutory mandate would be pre-eminent over the local stormwater ordinance. Trout Unlimited seeks more stringent controls over certain roadwork on the turnpike in the township. [Kissane v. Town of McCandless, 133 A.3d 127](#) (Pa. Commw. 2016), holds that floodplain and stormwater ordinances are adopted under the Municipalities Planning Code. Therefore, ordinances adopted after submission of a land development application do not apply to that project. [BR v. Upper St. Clair, 138 A.3d 548](#) (Pa. Commw. 2016), also affirmed a municipal land use approval against a challenge that the proposed project would violate the township's stormwater management ordinance and the Flood Plain Management Act.

[In Noto v. Millett, 362 MDA 2016](#) (Pa. Super. Oct. 19, 2016), the plaintiff sought tort damages, a declaratory judgment, and an injunction against a developer on the grounds that it had undersized a stormwater detention basin; plaintiff claimed the basin posed a risk of overtopping, and would cause flooding. The Superior Court held that the court of common pleas erred when on summary judgment it disregarded the plans for the basin—which showed it to be undersized as the result of a calculation error—and credited the assertion that the error had been corrected during construction. However, even if the basin were undersized, it would only pose a risk of flooding in the 10-year storm, an event with a 10 percent chance of occurring in any given year. Accordingly, it was not an immediate enough threat to support the lawsuit

Defendant Stone Valley Construction constructed a swale in [Waite v. CDG Properties, 896 MDA 2015](#) (Pa. Super. Aug. 15, 2016), and the swale caused stormwater to drown the plaintiff's trees. However, there was no evidence as to whether the swale was negligently designed, constructed, or maintained, and because Stone had only done the construction, a directed verdict in his favor was affirmed. More tragically, one plaintiff's daughter drowned in storm sewer overflow at an intersection and a church on the corner was flooded in [Praise Power & Deliverance Church v. Philadelphia, 623 C.D. 2015](#) (Pa. Commw. July 20, 2016). A municipality may not be held liable for having an inadequate storm sewer, but it may be liable for negligent maintenance, which was the case here.

- Contamination.

[A. Scott Enterprises v. Allentown, 55 MAP 206](#) (Pa. July 19, 2016), addressed a demand for penalties and attorney fees under a procurement contract. The underlying issue, however, was whether Scott could properly refuse to proceed with a job when the soil was contaminated with arsenic. The city knew that risk existed, and conducted no diligence. [McCormick v. PennDOT, 996 C.D. 2015](#) (Pa. Commw. July 11, 2016), rejected a claim for additional compensation for a detention pond authorized by a temporary construction easement. Pyrite in the rocks caused acid drainage, and the pond was also being used for pollution control, but the original easement contemplated that use.

- Air pollution.

After the plaintiff had obtained a preliminary injunction against operation of an outdoor wood-burning furnace because it caused an air pollution nuisance, the defendant erected a burn barrel on the property line and burned trash. A permanent injunction and punitive damages were appropriate, as in [Clark v. Fritz, 1085 MDA 2015](#) (Pa. Super. May 6, 2016). [Haney v. Range Resources-Appalachia, 257 WDA 205](#) (Pa. Super Ct. Jan. 29, 2016), was an effort by other neighbors to the same gas drilling property as Kiskadden to obtain air monitoring results taken by consultant URS at various other Range Resources sites. Range claimed URS as a consulting expert whose work would be subject to work product protections. However, URS had also been retained outside the litigation context, so the third-party subpoena issued.

- Alternative Energy Portfolio Standards Act.

Sunrise claimed that FirstEnergy had breached its contract by refusing to allow Sunrise net metering as a "customer generator" under the AEP SA. FirstEnergy argued that the PUC has jurisdiction to decide whether Sunrise met the definition, and so the court of common pleas did not. But because there is no statutorily established administrative remedy under the AEP SA, the courts do have jurisdiction as in [Sunrise Energy v. FirstEnergy, 1282 C.D. 2015](#) (Pa. Commw. Oct. 14, 2016).

- Waste.

[Ziegler v. City of Reading, 142 A.3d 119](#) (Pa. Commw. 2016), offers an exhaustive discussion of when a municipality may impose a curbside or other recycling fee under the Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101). [Berner v. Montour Township. ZHB, 133 A.3d 126](#) (Pa. Commw. 2016), affirms the grant of a special exception to permit a swine nursery. Objectors claimed that the Zoning Hearing Board had improperly held the township ordinance to be preempted by the Nutrient Management Act, but that is not what the ZHB had in fact decided.

- Enforcement procedure.

The DEP can note a violation on its on-line eFACTS system without issuing a notice of violation. Accordingly, the DEP properly rejected a Right To Know Law request for documents associated with the nonexistent [NOV. Butz v. Department of Environmental Protection, 142 A.3d 941](#) (Pa. Commw. 2016) (related to Kiskadden and Haney). An order denying a petition to reopen the record in the Environmental Hearing Board to introduce an alleged statement by a DEP employee helpful to a person alleged to have violated the Clean Streams Law is not a final order and is not within the collateral order doctrine; an appeal must await the final assessment of penalties, as in [Becker v. Department of Environmental Protection, 401 C.D. 2016](#) (Pa. Commw. Dec. 19, 2016).

When a landowner threatened criminal prosecution if a township sought to enter to maintain its sewer line by mowing and removing trees, and when the landowner erected a fence across the easement—even though fences are permitted—the township could sue for a declaratory judgment as to its rights under the easement in [Berwick Township v. O'Brien, 461 C.D. 2016](#) (Pa. Commw. Oct. 12, 2016). •

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