Successive Owners and an Obligation to Restore a Stream

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Earlier this month, the Commonwealth Court decided a case focused primarily on what constitutes a "watercourse" or "stream" under the Dam Safety and Encroachments Act. However, the court considered whether the Department of Environmental Protection properly ordered a *former* owner to restore damage to the stream at issue. *Becker v. Dep't of Envt'l Prot'n*, No. 560 C.D. 2017 (Pa. Commw. Ct. Dec. 1, 2017). In so doing, the court had some interesting things to say. These may be just a few lines in an unreported opinion, so one should perhaps not overreact. But, they warrant a little thought.

Mr. Becker's case had to do with some regrading and installation of a gravel driveway on a 0.13-acre property containing a single house in Bucks County. A channel crossed the property. The earth disturbance and material handling came within 50 feet of that channel, but Mr. Becker did not use any erosion and sediment control measures, nor did he have an erosion and sediment control plan or permit under chapter 102 of DEP's regulations. 25 Pa. Code chap. 102; *see also id.* chap. 105 (regarding stream encroachment).

Mr. Becker claimed that the channel did not constitute a "watercourse" or "stream" under section 3 of the Dam Safety and Encroachments Act, 32 Pa. Stat. Ann. § 693.3. From there he reasoned, and the Commonwealth Court seemed to accept, that a channel that did not constitute a "stream" could not be a "water of the Commonwealth" for purposes of the Clean Streams Law, 35 Pa. Stat. Ann. §§ 691.1 to .1001. Accordingly, Mr. Becker reasoned, DEP could not have properly regulated erosion and sediment pollution into the channel under chapter 102.

Readers will see some parallel here to the current debate over a definition of "waters of the United States" for purposes of the federal Clean Water Act. However, this is not really the same set of issues. The Clean Water Act prohibits discharges of pollutants without a permit. 33 U.S.C. § 1311(a). A "discharge of a pollutant" is the addition of a pollutant to "navigable waters" from a point source. 33 U.S.C. § 1362(12). "Navigable waters" are then defined in the very same section to mean the "waters of the United States." Arguably, then, Congress intended the notion of navigability to be baked into the definition of "waters of the United States," for Constitutional reasons if nothing else.

There is no such implicit or explicit limitation on the regulatory jurisdiction of the Commonwealth under the Clean Streams Law or the Dam Safety and Encroachment Act. However, an encroachment has to be an encroachment on something; that is, there has to be a defined physical feature that is the "watercourse" or the "stream" such that activities that might be conducted elsewhere without regulation are subject to controls if they encroach. Further, sediment pollution has to be pollution to a similarly discrete waterbody, else the existence of dirt particles anywhere would be subject to regulation. A defined bed and banks and at least intermittent water flow makes a channel a "watercourse" or "stream" for purposes of the Dam Safety and Encroachments Act. 32 Pa. Stat. Ann. § 693.3.

The Court did not consider whether a channel that did not constitute a "watercourse" or "stream" could nevertheless constitute a "water of the Commonwealth" for purposes of chapter 102. It did consider whether a channel with defined bed and banks could nevertheless convey water so infrequently as not to be a stream. Intermittent streams constitute waters of the Commonwealth. The court did not recognize any category of channels that convey water sometimes, but so rarely that they are not even intermittent; the court held that the statutes do not recognize a category of "ephemeral" streams that are not subject to regulation.

So, given that the channel on the property constituted a stream, the court upheld the determination that Mr. Becker had violated chapter 102 (and presumably chapter 105) and that the stream had to be restored. However, the case presents the question of whether Mr. Becker ought to have been the person subject to a compliance order.

After the County Conservation District had issued a notice of violation to Mr. Becker, but before DEP issued the compliance order, the County conducted a tax upset sale of the property. A tax upset sale under the Real Estate Tax Sale Law, 72 Pa. Stat. Ann. §§ 5860.101 to .803, conveys tax delinquent property subject to all preexisting liens and encumbrances other than the tax liens incorporated into the upset price. *Id.* §§ 5860.605, .609. If the highest bid does not meet the upset price, then the sale does not go through at that time.

DEP issued an order to Mr. Becker after the tax upset sale. Once it learned of the tax upset sale, it also issued an order to the buyer. After some starting and stopping, the buyer had not managed to complete the required restoration.

The Commonwealth Court held that the Environmental Hearing Board ought not have affirmed the compliance order to Mr. Becker in the form in which it was issued because the Board had not accounted for Mr. Becker's need for access to the property and a separate compliance order issued to the buyer. Specifically, the court wrote:

> the [Environmental Hearing] Board's order is affirmed but we remand the matter to the Board for the limited purpose of either imposing on Becker an alternative remedy – e.g., imposing on him the cost of remediation – or obtaining permission from [the buyer] to permit the work to be done, as well as coordinating enforcement of the two separate, final orders.

Section 20 of the Dam Safety and Encroachments Act authorizes DEP to order, among other things, "persons to cease any activity which is in violation of the provisions of this act." 32 Pa. Stat. Ann. § 693.20. Even if section 20 were to be read to authorize an administrative order for restoration, nothing in section 20 authorizes imposition of the costs of restoration. That authority is in section 19, *id.* § 693.20, and requires institution of a lawsuit. Indeed, research has not discovered any reported opinion imposing the costs of restoration under section 20. *Cf., e.g., Borough of Jefferson v. Century III Assoc.*, 444 A.2d 665 (Pa. 1982)(allowing private

claim against Commonwealth for abatement, if it can be pleaded); *Odette's, Inc. v. Dep't of Cons. & Nat. Res.*, 699 A.2d 775 (Pa. Commw. Ct. 1997)(private rights of action to seek abatement).

Section 610 of the Clean Streams Law authorizes DEP to issue administrative orders to prevent or to abate violations, including violations caused by conditions on land unrelated to a current operation. 35 Pa. Stat. Ann. § 691.610. However, section 610 includes no authority for an administrative order imposing the costs of restoration on the ordered party. To the extent that relief is available at all under the Clean Streams Law, it would be under section 601 providing for judicial remedies. 35 Pa. Stat. Ann. § 691.601.

Accordingly, the Environmental Hearing Board – which hears appeals from DEP orders – does not seem to have jurisdiction to impose "the cost of remediation" on anyone for violations of the erosion and sediment control regulations (that is, chapter 102) or the stream encroachment regulations (that is, chapter 105).

Moreover, the Commonwealth Court seems to suggest that the Board could involuntarily join the buyer to Mr. Becker's appeal to coordinate DEP's two compliance orders. The buyer had appealed, but his appeal was denied. The Board rules include no provision for third-party practice or involuntary joinder. *See* 25 Pa. Code chap. 1021. It is not apparent how this coordination could occur.

Finally, any coordination of obligations or sharing of costs between parties would require some way to determine an equitable allocation between them. No statute authorizes the Board to make that allocation. One would ordinarily expect the two private parties to litigate their relative responsibility with each other in a court, not in the Board. Indeed, the fair allocation between them in this case is not obvious. Mr. Becker seems to have caused the violation; one might say that he ought to bear the costs. On the other hand, he was displaced involuntarily by the buyer in a tax sale, and conventionally in Pennsylvania, that buyer would have no claim against his or her seller under the doctrine of *caveat emptor* (except in the case of a builder-vendor of a new home).

The joinder and allocation problems could potentially arise with regularity. For example, appeals from wastewater discharge ("NPDES") permits to water-quality limited streams, especially streams subject to a total maximum daily load are inherently problems requiring third-party joinder and allocation.

The Commonwealth Court seemed to have assumed that the Board had available to it tools to help resolve Mr. Becker's case. Those tools might make perfect sense to give the Board. How to resolve matters like Mr. Becker's when the Board does *not* have those tools is a bit of a puzzle.•

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