Environmental Cases in the Pennsylvania Appellate Courts During 2017

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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

The second and third sentences of Article I, section 27, of the Pennsylvania Constitution ("ERA") establishes a trust of "public natural resources" held by the Commonwealth for the benefit of "all the people." In *Pa. Envt'l Def. Foundation v. Wolf*, 161 A.3d 911 (Pa. 2017), the Supreme Court held that the ERA required proceeds from sale of the trust corpus (oil and gas leases in state forests) to be returned to the trust, and not appropriated to the General Fund. The court endorsed the plurality opinion in *Robinson Twp. v. PUC*, 83 A.3d 901 (Pa. 2013), and disapproved the analysis under *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. 1973), *aff'd* 361 A.2d 263 (Pa. 1976). The Court made some statements not necessary to the decision to the effect that the first sentence of the ERA calls for agencies of the Commonwealth to conduct an environmental review before taking any action, and to refrain from acting if the adverse impacts on the environment would be unreasonable. Further, the Court said that the duties of the Commonwealth as trustee were those of a *private* trustee.

The Commonwealth Court has been more hostile to ERA claims. *Del. Riverkeeper Network v. Middlesex Twp. ZHB*, No. 1229 C.D. 2015 (Pa. Commw. June 7, 2017), rejected an ERA and Due Process challenge to adoption of a land use ordinance permitting oil and gas activities in certain zones. Indeed, prior to the June decision in *PEDF*, the Supreme Court agreed that the Commonwealth Court had properly sustained preliminary objections to a lawsuit by minors seeking a mandamus to require the Commonwealth to establish a greenhouse gas emission regulatory scheme. *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. 2016), *aff'd mem.*, 158 A.3d 642 (Pa. 2017).

Before *PEDF*, the Commonwealth Court avoided decisions on the merits in: (i) *Clean Air Council v. Dept. of Labor & Indus.*, 165 A.3d 1056 (Pa. Commw. 2017), denying standing to an environmental group seeking to challenge under the ERA the decision *not* to adopt energy efficiency standards in building code guidance; (ii) *Baker v. DEP*, No. 633 C.D. 2016 (Pa. Commw. Mar. 2, 2017), denying as waived a third-party challenge to release of a surface mining bond under the ERA because not raised in the Environmental Hearing Board; and (iii) *United Refining*

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Co. v. DEP, 163 A.3d 1125 (Pa. Commw. 2017), denying as waived a third-party ERA challenge to an oil and gas well permit.

The Supreme Court cited *PEDF* heavily in the school funding case, *Wm. Penn School Dist. v. Dept. of Educ.*, No. 46 MAP 2015 (Pa. Sept. 28, 2017). That decision may be instructive on the Court's view of private remedies for constitutional violations.

Disagreement exists over whether after *PEDF* an executive agency may graft additional procedures onto those authorized by statute and regulations before issuing a permit or taking other action. The Commonwealth Court seems skeptical. *EQT Prod'n Co. v. Boro. of Jefferson Hills*, 162 A.3d 554 (Pa. Commw. 2017), decided before *PEDF*, rejected the proposition that a municipal governing body on a conditional use application for natural gas facilities was permitted by the ERA to "augment the conditional use requirements." After *PEDF*, the court held that the ERA did not save a local historic protection ordinance requiring indoor meters from preemption by PUC rules. *UGI Util., Inc. v. Reading*, No. 499 M.D. 2015 (Pa. Commw. Nov. 21, 2017).

Due Process and Takings

Sewer backups during hydraulic overloads caused plaintiff's house to be uninhabitable. At times, to protect against a backup, the sewer authority would plug up her sewer. Even though the backups were sporadic, they could nevertheless constitute an uncompensated taking. *In re Mountaintop Area Jt. San. Auth.*, 166 A.3d 553 (Pa. Commw. 2017). On the other hand, an enforcement order to bring abandoned tanks into compliance with the Storage Tank Act is not an uncompensated taking. *Lester v. DEP*, 153 A.3d 445 (Pa. Commw. 2017).

Variances save land use ordinances from becoming uncompensated takings. *Appeal of Huttner*, No. 52 C.D. 2017 (Pa. Commw. Dec. 11, 2017), involved an application for a dimensional variance justified, in part, by the claim that portions of a parcel could not be developed because they were "environmentally sensitive areas." The applicant showed no legal restriction, however.

Due process protects against exclusionary zoning. The municipality in *Del. Riverkeeper Network* permitted oil and gas activities in some areas in order to save its zoning ordinance from an exclusionary zoning challenge. DRKN then brought (unsuccessfully) the reverse due process challenge: that the ordinance was too permissive.

The Commonwealth Court offered guidance on condemnation and valuation for a natural gas pipeline in *In re Condemnation by Sunoco Pipeline L.P.*, 167 A.3d 307 (Pa. Commw. 2017).

Enforcement Remedies

EQT Prod'n Co. v. DEP, 153 A.3d 424 (Pa. Commw. 2017), holds that daily penalties do not continue to run under the Clean Streams Law from the time of an unpermitted discharge to groundwater and the time it is cleaned up. Otherwise, Act 2 would make no sense. *Baker*

similarly holds that Act 2 determines whether discharges of oil waste violate the Clean Streams Law.

Lester affirmed issuance of a penalty assessment and compliance order under the Storage Tank Act to the son of the owner of a closed gas station. The son had no interest in the tanks or the gas station; he did operate an automotive repair shop on the property and signed the tank registration form as the "operator." *Becker v. DEP*, No. 560 C.D. 2017 (Pa. Commw. Dec. 1, 2017), affirms issuance of a Dam Safety and Encroachment Act remedial order to a former owner of real estate divested in a tax sale.

Harms/Benefits Analysis

DEP is not required to consider harms that will flow from granting a landfill permit under the Solid Waste Management Act in the event that the operator fails financially. DEP does not require submission of a business plan, and is not well-situated to review one. *Boro. of St. Clair v. DEP*, No. 1026 C.D. 2016 (Pa. Commw. July 7, 2017), *alloc. denied*, No. 517 MAL 2017 (Pa. Dec. 6, 2017). Note that the "harms/benefits" analysis implements the ERA in solid waste permitting matters.

Definitional Issues

DEP improperly treated a natural gas well owned by one affiliate as part of the same air pollution source as a processing facility owned by another affiliate. Their ultimate common parent could "influence" decisions, but that did not mean the facilities were under "common control." *Seneca Res. Corp. v. DEP*, No. 116 C.D. 2016 (Pa. Commw. June 2, 2017), *alloc. denied*, No. 446 MAL 2017 (Pa. Dec. 13, 2017).

Becker concerned an encroachment on a small channel crossing a small residential property caused when a property owner improved his driveway. Nevertheless, a channel with defined bed and banks is a "watercourse" or "stream" for purposes of the Dam Safety and Encroachments Act.

A "stripper well" is exempt from paying impact fees under the Oil and Gas Act Amendments known as Act 13. A stripper well does not produce more than a certain threshold in "any" month. Thus, a well that does not produce that much gas in a single month is a "stripper well" in that year. *Snyder Bros., Inc. v. PUC*, 157 A.3d 1018 (Pa. Commw. 2017).

Administrative Procedure

United Refining Co., 163 A.3d 1125, is the Commonwealth Court's latest effort to explain *de novo* review under a deferential standard in the Environmental Hearing Board. United brought a third-party challenge to a neighbor's oil and gas well permit, asserting that DEP had not considered certain risks posed by drilling in proximity to a preexisting tank and groundwater contamination plume. United need not show that exacerbation of groundwater pollution would occur more likely than not; United only needed to show that DEP's grant of the permit was arbitrary. However, the arbitrariness is judged on the record made at the EHB hearing;

DEP's permit may be not-arbitrary based on evidence that DEP did not have before it at the time it acted.

A challenge to a supersedeas of a coal mining permit renewal issued by the EHB cannot be challenged by the permittee if it becomes moot. *Consol Pa. Coal Co. v. DEP*, No. 112 C.D. 2017 (Pa. Commw. Aug. 2, 2017). By contrast, one does not preserve the right to appeal to the EHB *nunc pro tunc* by bringing an inappropriate challenge to a permit in the court of common pleas. *Feudale v. DEP*, No. 1905 C.D. 2016 (Pa. Commw. July 17, 2017).

A surface owner claimed that an oil and gas lease had terminated. A consent order and agreement between the purported lessee and DEP that found the defendant to be the lessee did not support summary judgment against the surface owner. The surface owner was not a party to the consent order. *Montgomery v. R. Oil & Gas Enterprises, Inc.*, No. 1165 WDA 2015 (Pa. Super. Mar. 17, 2017).

Warrantless searches of trash trucks during a random inspection program set up at a landfill do not violate a driver's Fourth Amendment rights. *Commw. v. Maguire*, 2017 Pa. Super. 351 (Nov. 6, 2017).

Nuisance

An upgradient landowner has an implied easement to discharge stormwater to the downgradient property at its natural rate and location; a nuisance only arises if there is a change in rate or location. So, in *Waite v. CDG Props., LLC*, 160 A.3d 257 (Pa. Super. 2017), the downgradient owner could recover not only damages, but an injunction, when the upgradient owner put the stormwater through a swale and the swale malfunctioned, causing trees to die. But in *Imhoff v. Deemer*, No. 303 WDA 2017 (Pa. Super. Dec. 12, 2017), plaintiffs did not show a change in rate or location of stormwater flow arising from a new horse barn. *Kusher v. Woloschuk*, No. 1205 WDA 2016 (Pa. Super. June 9, 2017), was a claim by the *upgradient* landowner who claimed to have been damaged by work done to connect a stormwater pipe to one already installed; the fear was that the downgradient pipe would cause backups. The trespass from excavation was *de minimis*.

The Right to Farm Act bars private nuisance claims arising from "normal agricultural operations" that were previously established and have not changed. Spreading "food production wastes" from a slaughterhouse on fields is normal, like land application of biosolids. Sporadic notices of violation from DEP do not remove the operation from this protection. *Branton v. Nicholas Meat, LLC*, 159 A.3d 540 (Pa. Super. 2017).

Local Regulation

Huttner, *UGI*, *Del. Riverkeeper Network*, and *EQT v. Jefferson Hills* all involved municipal regulation for environmental purposes. In addition, *Delchester Developers, L.P. v. ZHB of London Grove*, 161 A.3d 1081 (Pa. Commw. 2017), considered the zoning hearing board's jurisdiction to consider a facial challenge to a stormwater management ordinance. Because the stormwater ordinance was not a "land use ordinance" adopted under the Municipalities

Planning Code – even though it used certain land use tools – the ZHB did not have jurisdiction. Finally, local regulators could not deny a permit to remove certain trees based on a hearing subject to overly restrictive evidentiary limitations. *Bassett v. Edgeworth Shade Tree Comm'n*, No. 145 C.D. 2016 (Pa. Commw. Jan. 24, 2017).•