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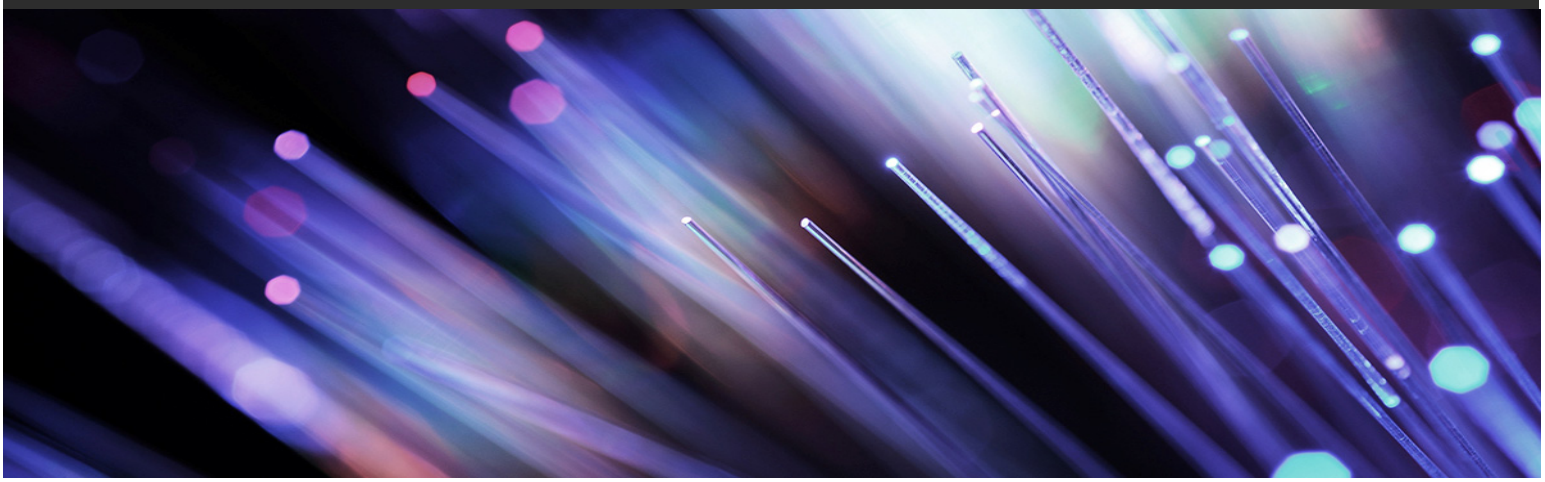
Significant Environmental Cases in Pa. Courts During 2018 (Part 2)



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Editor's note: This is the second in a two-part series.

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Enforcement

EQT Production v. Department of Environmental Protection, 181 A.3d 1128 (Pa. 2018), received considerable attention for considering the question whether the DEP may assess a daily penalty for each day that contamination remains in soils and migrates to groundwater, or whether the only violation subject to a penalty occurs at the time of the original release to the environment. In this case, the initial release was leakage from a lined impoundment used to receive produced water from completion of a natural gas well. The Pennsylvania Supreme Court decided that the mere presence in soils was not a discharge to groundwater under the Clean Streams Law; DEP had to prove an actual discharge on each day. The Supreme Court remanded to the Environmental Hearing Board for that purpose. The EHB assessed penalties, the

bulk of which were for the period after the time the impoundment was drained (so it could no longer leak), but before the subbase had been excavated and removed. On appeal from the EHB, the Commonwealth Court affirmed the assessment, holding that daily releases from the soil to the groundwater could be proven by expert testimony, see *EQT Production v. DEP*, No. 844 CD 2017 (Pa. Commw. Ct. Sept. 10, 2018). The court also affirmed application of a "merger rule" under which the EHB would assess only one daily penalty for the same act, even though it might violate multiple statutory or regulatory obligations.

The DEP brought an action in the court of common pleas to enforce a consent agreement under which the defendant promised to remove solid waste from the site of a former composting facility in *Commonwealth, Department of Environmental Protection v. Green 'N Grow Composting*, No. 367 CD 2018 (Pa. Commw. Ct. Dec. 31, 2018). Among other things, the Commonwealth Court held that the definition of "solid waste" in the Solid Waste Management Act was specific enough to support the enforcement action; the defendant knew what it was required to remove.

Oil and Gas Act

The Environmental Quality Board adopted new regulations directed at unconventional oil and gas activity, 25 Pa. Code chap. 78a. They included a requirement that the DEP evaluate certain features (such as others' nearby abandoned wells) and require setbacks from others (such as schoolyards) in permitting a well. Some of those requirements were not called for specifically by Act 13. Accordingly, the Commonwealth Court preliminarily enjoined enforcement of those provisions, which injunction was affirmed, see *Marcellus Shale Coalition v. Department of Environmental Protection*, 185 A.3d 985 (Pa. 2018). The Supreme Court there raised a question whether the DEP has authority to protect private resources or to call for investigations on private property other than that of the permittee unless an actual incident has occurred. On the merits, the commonwealth invalidated those portions of the regulations, see *Marcellus Shale Coalition v. Department of Environmental Protection*, No. 573 MD 2016 (Pa. Commw. Ct. Aug. 23, 2018), *appeal quashed*, No. 54 MAP 2018 (Pa. Nov. 28, 2018).

Act 13 allows a county to impose an impact fee on vertical unconventional natural gas wells capable of producing 90,000 cubic yards of gas in "any" month. That means in any single month, not every month, as in *Snyder Bros., v. Pennsylvania Public Utility Commission*, No. 47 WAP 2017 (Pa. Dec. 28, 2018).

Administrative Procedure and Appeals

Those who oppose issuance of a permit often seek additional time to submit adverse comments to the permitting agency. If the agency denies the extension and the permit ultimately issues, *Clean Air Council v. County of Allegheny*, No. 515 CD 2018 (Pa. Commw. Ct. Nov. 19, 2018), holds that a separate appeal from the denial of the extension would be moot. Presumably, a sufficiently egregious denial of an extension would create a procedural infirmity in the subsequent grant of the permit, however.

In *New Hope Crushed Stone & Lime v. Department of Environmental Protection*, No. 1373 CD 2017 (Pa. Commw. Ct. July 18, 2018) (unreported), a neighbor appealed issuance of a permit amendment, and the EHB agreed. The permittee then withdrew the requested amendment. In a subsequent appeal about a reclamation plan, the earlier decision of the EHB was preclusive on the issues decided.

Several cases in the northeastern states have challenged state water quality certifications under the Clean Water Act for interstate gas pipelines regulated by the Federal Energy Regulatory Commission. Courts have disagreed over whether review of the grant or denial of a water quality certification is through the state appellate process or in the federal courts of appeal. *Delaware Riverkeeper Network v. Department of Environmental Protection*, No. 1571 CD 2017 (Pa. Commw. Ct. Aug. 1, 2018) (unreported), affirmed the

EHB's denial of DRN's effort to appeal a water quality certification nunc pro tunc. DRN had filed a petition for review in the U.S. Court of Appeals for the Third Circuit, as the DEP's issuance letter had directed, but legal developments made clear that review might be in the EHB. Even so, the Commonwealth Court held that DRN was as knowledgeable as anyone on this area of law, and did not qualify to file a late appeal.

Last year saw some litigation over the scope of relief in *Pennsylvania Environmental Defense Foundation v. Wolf*, 181 A.3d 1153 (Pa. 2018), one of the two recent Supreme Court cases that reanimated the ERA. The Supreme Court refused to entertain an interlocutory appeal from the decision on remand on procedural grounds.

Claims Between Successive Owners, Lessors/Lessees, Contractors and Neighbors

James and John Flick bought a strip shopping center from William and Joanne Salerno, and Salerno indemnified Flick for claims due to pre-closing conditions. Some time later, a neighboring business claimed that contamination on the center caused groundwater contamination under the neighboring property. The Salernos neither indemnified nor defended. The limitations period on Flick's breach of contract claim began to run at the neighbor's demand, not the payment of a settlement to the neighbor. Also, because Flick had asserted a Clean Streams Law claim against Salerno that failed, Salerno was entitled to attorney fees, see *Flick v. Salerno*, No. 1966 EDA 2016 (Pa. Super. Ct. Sept. 11, 2018)(not precedential).

A lessee breaches a lease when it quits, even though the building was moldy, because the lessor proved the mold was present at the time of leasing, see *Davis v. Borough of Montrose*, No. 1210 MDA 2017 (Pa. Super. Ct. Aug. 13, 2018). A contractor who allegedly failed to perform on a contract to monitor and to repair a home heating oil tank that leaked may not be sued in negligence because, under the "gist of the action" doctrine, it is a breach of contract claim, as in *Weiss v. Fritch,* No. 2332 EDA 2017 (Pa. Super. Ct. Apr. 25, 2018).

Environmental litigation among neighbors is, of course, common. *Protect PT, Berner, Ankiewicz, Azoulay, Friends of the Lackawanna,* and *Cogan House Township* are examples. In addition, in *Frieder v. Hazzouri*, No. 1911 MDA 2017 (Pa. Super. Ct. Nov. 5, 2018), Leonard Frieder claimed that Albert Hazzouri had done work without complying with DEP earth disturbance regulations, damaged Frieder's property, settled with Frieder with a promise to comply with the DEP's rules, and then promptly breached. The particular issue decided by the Superior Court had to do with jurisdiction over interlocutory discovery appeals. *Schwartz v. Chester County Agricultural Land Preservation Board*, 180 A.3d 510 (Pa. Commw. Ct. 2018), denied standing to neighbors attempting to enforce a conservation easement to stop development of a composting operation; the neighbors were not named in the easement.

Valuation

McCloskey v. Pennsylvania Public Utility Commission, No. 1624 CD 2017 (Pa. Commw. Ct. Oct. 11, 2018), values a municipal wastewater system for acquisition under the PUC's rules. *Appeal of Smith*, No. 1093 CD 2017 (Pa. Commw. Ct. June 13, 2018)(unreported), affirmed rejection of evidence that the risk of natural gas pipeline explosion resulted in a percentage diminution in the value of the property from which an easement was taken for the right of way; no empirical evidence existed to quantify that diminution.

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