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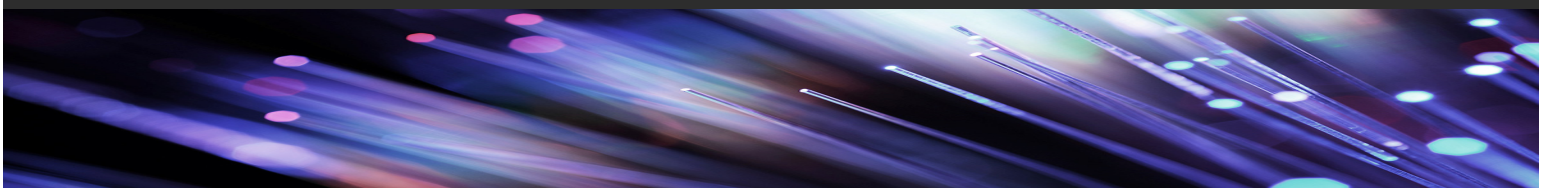
Environmental Cases in the Pennsylvania Appellate Courts During 2019



By my count, the three Pennsylvania appellate courts decided 27 environmental cases in 2019. Categorization is somewhat subjective, so I apologize for any omissions. For brevity, citations are truncated, and omitted years are 2019.

By David G. Mandelbaum | January 21, 2020 | The Legal Intelligencer

Environmental Rights Amendment

Since at least the Pennsylvania Supreme Court plurality's opinion in Robinson Township v. Public Utilities Commission, 83 A.3d 901 (Pa. 2013), the courts have begun to flesh out how the Environmental Rights Amendment (ERA) to the Pennsylvania Constitution, Pa. Const. art. I, Section 27, constrains or mandates governmental action. The Commonwealth Court will likely receive the majority of the appeals involving the ERA, and it decided four in the past year.

Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth, 214 A.3d 748 (Commw.), appeal pending, No. 64 MAP 2019 (Pa. filed Aug. 12), considered on remand that proceeds of oil and gas leasing by the commonwealth in state forests and parks had to be returned to the Pennsylvania Department of Conservation and Natural Resources (DCNR) as part of the corpus of the public trust, and which proceeds could be placed in the general fund. PEDF addresses the public trust rights established by the second and third sentences of the ERA. The court interestingly suggests that proceeds that would be distributable to the income beneficiary of a private trust were the oil and gas resources private may be appropriated however the governor and General Assembly choose, whereas proceeds that would belong to the owner of the remainder interest would have to be reinvested in the public natural resources. That is, the court suggests that the current-period services provided by public natural resources may not themselves be impressed with the public trust. We do not yet know whether that means, for example, that while a trout stream may be a public natural resource, the right to fish in it is not.

The court decided three cases having to do with the first-sentence right to "clean air," "pure water," and certain values of the environment. This sentence arguably imposes limitations or affirmative obligations on municipalities when they regulate land use. Delaware Riverkeeper Network v. Middlesex Towsnship Zoning Hearing Board, 2609 C.D. 2015 (Commw. June 26), upholds a municipal ordinance that permitted oil and gas activity in agricultural/residential zones because the governing body could legitimately conclude that gas wells are compatible with agricultural uses, and historically necessary economically for farmers; in a rural community, agriculture is not necessarily more like residential use. Although phrased as a trust case, In re Appeal of Andover Homeowners' Assocation, 1214 C.D. 2018 (Commw. Aug. 26), reiterates the court's view that agencies may not impose additional environmental review unless the underlying statute or ordinance authorizes that review. In Andover HOA, a pipeline would have arguably disturbed soil that might have been historically contaminated with arsenic. The zoning hearing board could properly grant land use approvals without an independent evaluation of the arsenic issue, instead relying on the Department of Environmental Protection (DEP) to regulate the contamination. Protect PT v. Penn Township Zoning Hearing Board, 1632 C.D. 2018 (Nov. 14), upholds a zoning ordinance that allows oil and gas activity; contrary to the assertion of the objectors, the ordinance requires the applicant to address the impacts of the proposed use on environmental values, and therefore the township had discharged whatever constitutional obligations it had.

Preemption of Local Regulation

The Nutrient Management Act preempts local regulation of manure management regulated under the state statute. Berner v. Montour Township Zoning Hearing Board, 39 MAP 2018 (Pa. Sept. 26), holds that farms small enough that they need not prepare nutrient management plans under the act are also protected from more stringent local requirements.

Other Environmental Interaction With Land Use Regulation

In EQT Production v. Jefferson Hills, 208 A.3d 1010 (Pa.), objectors to approval of a well pad as a conditional use offered evidence of the negative impacts on neighbors from drilling and operation of natural gas wells in a neighboring municipality. (A conditional use is a site-specific zoning approval issued by the governing body.) The supervisors denied the conditional use, relying in part on that testimony, holding that the evidence of adverse effects elsewhere showed that EQT had not shown compliance with the objective criteria of the ordinance for issuance of a conditional use. The Common Pleas Court and the Commonwealth Court held that evidence from another location is inadmissible to prove impacts from this one. The Pennsylvania Supreme Court reversed, agreeing with the supervisors that this evidence proved the failure to meet the objective criteria protecting against adverse impacts on neighbors. The majority does not make clear how this could be true. If the proposed well would have the impacts typical of oil and gas wells generally, and the disputed evidence proved what those impacts would be, are those impacts not the impacts that the adoption of the ordinance approved?

Not all environmental cases have to do with oil and gas development. A landowner may obtain an easement by necessity across his neighbor's property if the easement is "strictly necessary" to obtain access. Environmental regulations may be taken into account in determining whether the easement is strictly necessary, even though absent the regulations access might not be impossible, see Bartkowski v. Ramondo, 60 MAP 2018 (Pa. Oct. 31). And in the poisonous shrubbery as crime category, a municipality may prohibit nonornamental, inedible, nonuseful plants taller than eight inches high, and then may enforce that ordinance against a property with a stand of pokeweed. The ordinance was not void for vagueness, see Commonwealth v. Jannini, 566 CD 2018 (Pa. Commw. Aug. 13).

Municipal Fees

Reading embedded its Act 101 Recycling Fee in a single pick-up fee assessed on each landowner. The fee was challenged because it allegedly yielded a surplus. The Commonwealth Court decided that the accounting had been done incorrectly by the city, and perhaps there had been an improper surplus, to be determined on remand, as in Ziegler v. Reading, 169 CD 2018 (Pa. Commw. Aug. 15).

West Chester University declined to pay a stormwater charge levied by the borough on the ground that the university is exempt from tax. The question whether the charge is a tax or a use charge could not be decided on preliminary objections in the nature of a demurrer, but would have to await factual development, see Borough of West Chester v. State System of Higher Education, 260 MD 2018 (Pa. Commw. July 15).

Judicial Review of Regulations

Generally, Pennsylvania courts do not allow judicial review of regulations until they are applied to a particular party in a permit or an enforcement action. However, Arsenal Coal v. Department Environmental Resources, 477 A.2d 1333 (Pa. 1984) (pre-enforcement challenge to strip mining regulations), set out a narrow exception that allows pre-enforcement review of regulations when the rules impose a direct and immediate impact on an industry by their very adoption. See also EQT Production v. Department of Environmental Protection, 130 A.3d 752 (Pa. 2015) (pre-enforcement challenge to penalty policy). Marcellus Shale Coal. v. Department of Environmental Protection, 573 MD 2016 (Pa. Commw. July 22), disposed of cross-applications for summary relief on the validity of various provisions of the DEP regulations governing unconventional oil and gas wells, 25 Pa. Code chap. 78a. Rules about location and design of wells were reviewable under Arsenal Coal, but spill response regulations were not. All rules that the court reviewed were upheld except those having to do with restoring drilling sites, which were not authorized by the Oil and Gas Act Amendments (Act 13).

By contrast, the DEP's redesignation of a stream as exceptional value did not impose the sort of immediate impact that would allow an appeal ahead of a permit denial or other action, as in Pocono Manor Investors v. Department of Environmental Protection, 212 A.3d 112 (Pa. Commw.).

Standing

How close a connection must a neighbor to an oil and gas operation have to object to a land use approval? Those within a half-mile of a proposed auxiliary building associated with a hydrocarbons pipeline had standing in Lorenzen v. West Cornwall Township Zoning Hearing Board, 851 CD 2018 (Pa. Commw. Oct. 23), because the structures might land on their homes if the pipeline blew up. On the other hand, a grandmother did not have standing to obtain party status to oppose a conditional use approval for a natural gas well to be located within one mile of her granddaughter's school in Worthington v. Mount Pleasant Township, 212 A.3d 582 (Pa. Commw.); she showed neither that she was the granddaughter's guardian nor that she would suffer more than the typical impact from benzene exposure.

A state senator did not have legislative standing to challenge PUC certificates issued to allow three pipelines based upon construction issues in the township he represented; he had disclaimed personal standing based upon proximity of his own home, see Sunoco Pipeline v. Dinniman, 1169 CD 2018 (Pa. Commw. Sept. 9). State senators did not have legislative standing to enforce the obligation imposed by Act 40 of 2017 upon the Environmental Quality Board to adopt regulations requiring compliance with the water quality standard for manganese, as in Scarnati v. Department of Environmental Protection, 186 MD 2019 (Pa. Commw. Nov. 12).

Permits and Appeals From Them

Sunoco Partners Marketing & Terminals v. Clean Air Council, 145 CD 2019 (Pa. Commw. Oct. 1), was an appeal by the permittee from a decision by the Environmental Hearing Board to remand an air pollution plan approval (that is, permit to construct) to the DEP for further consideration of whether the project ought to be aggregated with earlier projects for purposes of determining whether the facility was a major source. The remand was, of course, an interlocutory order, it left DEP discretion so was not appealable as of right under Appellate Rule 311(f)(1), and did not decide an issue that required appeal in order to allow review under Rule 311(f)(2).

Section 307(b) of the Clean Streams Law allows a prevailing appellant from issuance of a permit to recover its attorney's fees. In Sierra Club v. Department of Environmental Protection, 563 CD 2018 (Pa. Commw. June 11), the third-party appellant had challenged issuance of Clean Streams Law permits for a gas-fired power plant. The permit conditions were so stringent that the permittee reconsidered the design of the plant during the pendency of the appeal, and ultimately was able to eliminate the wastewater discharge. That mooted the appeal and the Sierra Club could not show that the appeal—as opposed to the underlying permit conditions – provided the "catalyst" for the redesign.

With all the development of pipelines and power lines subject to PUC regulation, issues arise as to whether the appropriate regulator for ordinary environmental matters ought to be the DEP or the PUC. Indeed, when it comes to pesticides and herbicides, perhaps the regulator ought to be the Department of Agriculture, as in West Penn Power v. PUC, 1548 CD 2018 (Pa. Commw. Oct. 2), faced that question in an appeal by a landowner from the PUC's approval of the use of herbicides on cut vegetation in a right of way, and then punted. The landowner offered no expert testimony and mistakenly thought the herbicide would be sprayed—rather than painted —on the cut stems, so the PUC was an adequate regulator to deny the landowner's complaint.

A declaratory judgment action against a county conservation district belongs in the court of common pleas, not Commonwealth Court because the conservation district is a local, not commonwealth, entity, see Finan v. Pike County Conservation District, 209 A.3d 1108 (Pa. Commw.). An emergency water supply interconnection was not improper in Red Lion Municipal Authority v. PUC, 186 CD 2019 (Pa. Commw. Oct. 29).

Enforcement Appeals

Ordinarily one may not appeal the assessment of a civil penalty without prepaying the penalty. Churchill Community Development v. Allegheny County Health Department, 208 CD 2019 (Pa. Commw. Dec. 27), clarified the exception to that rule for an impecunious defendants; it may appeal without prepayment if it has no assets or revenue that would allow it to raise the penalty amount quickly without impairing the business. That case involved a $1.5 million penalty for improper asbestos removal assessed by ACHD.

Other Jurisdictional Issues

In John H. Ball & Son v. Morrow, 1654 WDA 2018 (Pa. Super. Aug. 12), the parties disputed ownership of an abandoned gas well. The DEP can direct the owner to plug the well, but that does not mean that only the DEP can determine who owns a well, and the issue can be tried.

A private party contended that Norristown had committed to keep a culvert in repair in documents from a 1960s flood control project. But one cannot obtain a writ of mandamus to enforce a contractual obligation of a municipality, see Cognata v. Norristown, 1326 CD 2018 (Pa. Commw. July 23).

The Common Pleas Court cannot decide whether a coal mining permit will be available on preliminary objections in a case about taking of the coal estate. That determination should be made by the board of view, see PBS Coals v. Department of Transportation, 206 A.3d 1201 (Pa. Commw.).

In Becker v. Adams County Tax Claim Bureau, 184 MD 2016 (Pa. Commw. Oct. 23), the plaintiff bought an industrial property at a tax sale free of liens. The DEP conducted a cleanup under the Hazardous Sites Cleanup Act, demolishing a foundry on the property. The plaintiff sought damages from the DEP, but there is no waiver of sovereign immunity that would allow the plaintiff to sue in either the Common Pleas Court or the Commonwealth Court.

Limitations Period

Heller v. Century 21 Smith Hourigan Group, 1626 MDA 2016 (Pa. Super. July 3), was a claim by the purchaser of a property against the broker and agent who sold it to him, alleging contamination. A neighboring excavation company had apparently spilled oil from its trucks on the property. The plaintiff waived his right to inspect when he bought, but saw some evidence of petroleum some years later in 2006 and more clearly in 2010 and 2011. The DEP tested and found TPH in 2013. The two-year limitations period began to run in 2010 or 2011 at the latest, and the suit was time-barred; one does not have to wait for analytical results confirmed by the agency.

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