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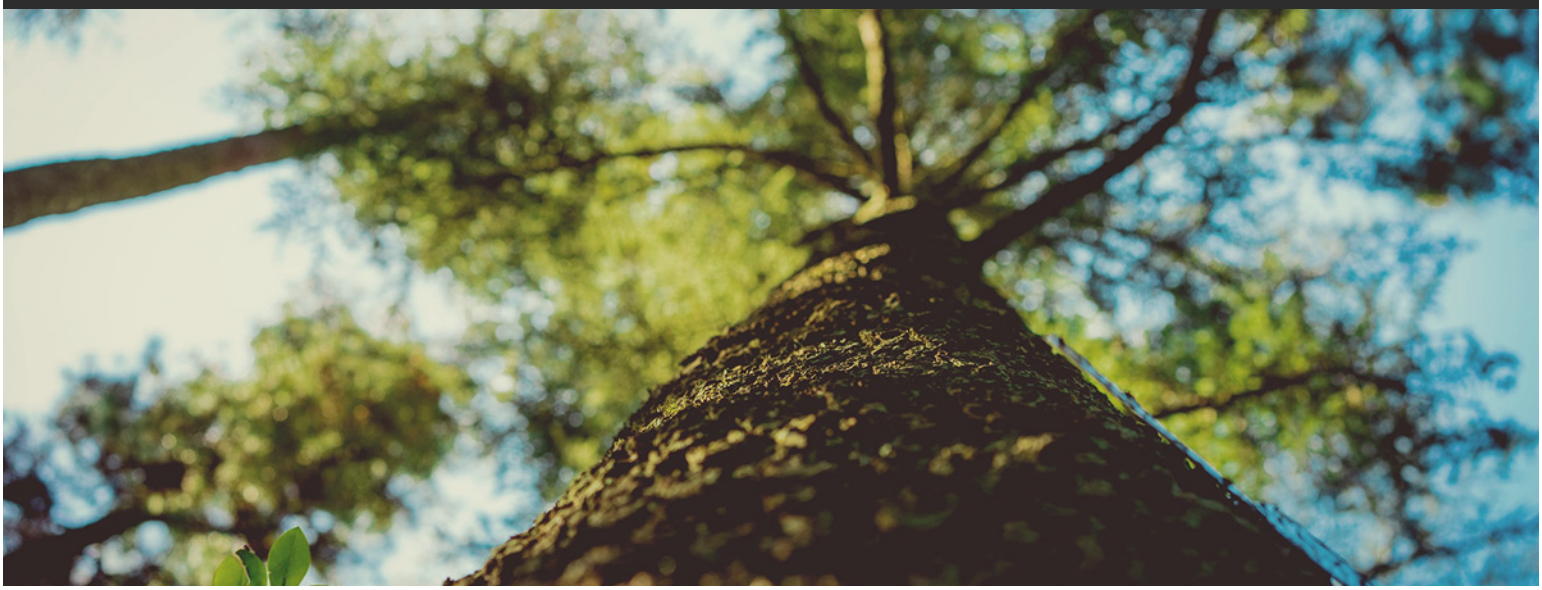
Environmental Cases in the Pennsylvania Appellate Courts in 2020



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COVID-19

The governmental response to the viral pandemic is either a response to an environmental problem or, perhaps, a dress rehearsal for economywide measures to mitigate and perhaps to adapt to climate change. Two cases this year addressed the constitutional limitations on executive action. *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020), upheld Gov. Tom Wolf's first executive shutdown order. When the General Assembly attempted to rescind his second order by resolution, that effort failed because the resolution had not been presented to the governor for signature or veto. See *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020).

Environmental Rights Amendment

In *Pennsylvania Environmental Defense Foundation v. Public Utility Commission*, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme Court held that the second and third sentences of Article I, Section 27, of the

Pennsylvania Constitution create a public trust with the public natural resources of the commonwealth as the corpus, "all the people" as the beneficiaries, and the commonwealth as the trustee. Proceeds from the sale of oil and gas underlying state forests—that is, sale of a public natural resource—must be returned to the trust corpus; other income can be put in the General Fund. This year, the Commonwealth Court held that some governmental functions of the Department of Conservation and Natural Resources might not be trust activities, and therefore the constitutionality of appropriations of royalty income to DCNR required fact-specific inquiry. However, there is no requirement that proceeds be spent on resources in the Marcellus Shale area; any public natural resources count as replenishment of the corpus. See *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 358 M.D. 2018 (Pa. Commw. Ct. Oct. 22, 2020) (unreported).

City of Lancaster v. Public Utility Commission (PUC), 224 A.3d 460 (Pa. Commw. Ct. 2020)(table), decides that municipalities could not raise a facial challenge under the environmental rights amendment to a PUC rule requiring gas meters to be outdoors in historic districts. Perhaps the PUC nonarbitrarily weighed historic and environmental values against safety interests.

In *Department of Environmental Protection v. Grant Township*, 225 A.3d 944 (Pa. Commw. Ct. 2020)(table), the DEP sought to invalidate as preempted by the amended Oil and Gas Act a ban on oil and gas waste disposal by underground injection under a local home rule charter. The township counterclaimed on the theory that the OGA could not preempt its local prohibition because the OGA itself was unconstitutional under the ERA. The court overruled the DEP's preliminary objections, and allowed the counterclaim to proceed.

Although not an ERA case, the was a further opinion in litigation over calculating the impact fee under the OGA. See *Snyder Bros. v. PUC*, 224 A.3d 450 (Pa. Commw. Ct. 2020)(unreported).

Citizen Suits

Osevala v. Gaudette, No. 1329 C.D. 2019 (Pa. Commw. Ct. Oct. 9, 2020), involved a claim under the citizen suit provisions of the Storm Water Management Act and the Flood Plain Management Act. The plaintiffs claimed that filling on the defendants' property to construct a hockey camp caused flooding. The Common Pleas Court erred by holding that the plaintiffs ought to have sought a ruling from the township zoning hearing board first to establish a violation of the flood plain and stormwater management ordinances.

A claim for damages (rather than an injunction) under Section 15(c) of the Storm Water Management Act does require a predicate showing of a modification to land in violation of the requirements of Section 13 including that certain land development be in conformity with a storm water management plan; it does not require a municipal finding of that violation. See *Department of Transportation v. A&R Development,* 225 A.3d 944 (Pa. Commw. Ct. 2020).

Enforcement

Philadelphia v. Joyce, No. 896 C.D. 2019 (Pa. Commw. Ct. Dec. 4, 2020)(unreported), rejected a constitutional challenge to cumulative penalties imposed under city ordinances for failure to demolish a derelict building. Burglars broke in and spilled PCBs from electrical equipment requiring a (slow) cleanup under federal supervision, but that was no defense.

Act 2 and Contract Claims

Schluth v. Krishavtar, No. 2013 EDA 2019 (Pa. Super. Ct. June 30, 2020)(nonprecedential), involved a sale by Schluth of a gas station. During transactional diligence, the parties found contamination and escrowed funds for cleanup by the seller after closing. The agreement called for achievement of an Act 2 standard, without an environmental covenant, within two years. However, the contamination had migrated and some had to remain under a site-specific standard. That called for a covenant to maintain the pavement and not to install a potable water well, both conditions independently imposed by city ordinance. The cleanup took longer than two years. The buyer refused to pay on a mortgage taken back by the seller. Notwithstanding the delay and the covenant, the court allowed foreclosure.

A Statute of Limitations Cautionary Tale

Some courts will hold parties to drawing nonobvious technical conclusions from contamination conditions for purposes of the statute of limitations. In another gas station case, *Austin James Association v. Musser*, No. 332 MDA 2019 (Pa. Super. Ct. Jan. 14, 2020)(nonprecedential), the tanks leaked. The owner recovered $3 million from the Underground Storage Tank Indemnification Fund. After an unsuccessful first cleanup effort, in 2003 the owner entered into a fixed price to closure agreement with the plaintiff. The plaintiff did not know that a diesel spill had also occurred, and that made the job longer and more expensive. By 2006 or 2007, the project had gone on longer than expected for gasoline contamination. Nevertheless, the plaintiff finished the job and brought suit for unjust enrichment (the value of the cleanup beyond the expected gasoline cleanup) in 2014. Had plaintiff reviewed the DEP file, it would have been aware of the diesel spill, and it was on notice to do so more than four years before 2014; the court affirmed a grant of summary judgment on limitations grounds.

Navigability

Beishline v. Commonwealth, No. 719 C.D. 2019 (Pa. Commw. Ct. June 12, 2020), is a procedural case holding that one can obtain a declaration that a stream that one purports to own is not traditionally navigable and therefore not available to the public by filing a "caveat" in the DCED Board of Property. The opinion includes a nice discussion of what navigability means.

Rule of Capture

Briggs v. Southwestern Energy Production, 224 A.3d 334 (Pa. 2020), was closely watched. An "unconventional" oil or gas well targeting a shale formation will have a horizontal well bore within the formation, and the formation will be hydraulically stimulated—or "fracked"—by forcing fluid into the rock to make fractures through which the hydrocarbon can seep. The "rule of capture" makes the oil or gas that comes out of the wellhead the property of the owner of the well, even if the well drew the hydrocarbons from a neighboring property, provided the well itself does not cross a property line. The Pennsylvania Superior Court had ruled that fractures that crossed a property boundary could be a trespass. The Supreme Court ruled that, in general, a fracture would not cause a trespass. There may be some situations in which a trespass claim might be appropriate if the fracture were engineered to cross into neighboring property.

Zoning and Environmental Impacts

Protect PT v. Penn Township Zoning Hearing Board, No. 575 C.D. 2019 (Pa. Commw. Ct. July 6, 2020)(unreported), is a further challenge by an environmental group to oil and gas development in Penn Township under the land use ordinances and the environmental rights amendment. In this case, the group objected to a special exception granted for a multiple-well pad in a "rural/residential" zone. But this use met the objective criteria for the special exception and would not have an unusual adverse impact. The court caution that "RR" zoning is *not* primarily about residential use.

Heisler's Egg Farm v. Walker Township Zoning Hearing Board, No. 780 C.D. 2017 (Pa. Commw. Ct. May 28, 2020), avoided deciding whether the Nutrient Management Act preempted denial of a special exception because of concern over odor and vermin associated with egg wash water. The court found a failure to show that the water wells drilled for the purpose of expanding the egg farm would have been adequate.

In *Friends of Lackawanna v. Dunmore Boro. ZHB*, 227 A.3d 37 (Pa. Commw. Ct. 2020), a landfill owner sought and obtained a preliminary opinion from the zoning officer that the height restriction of the zoning ordinance did not apply to a landfill. Neighbors appealed. The ZHB and the trial court agreed that a landfill is not subject to a height limitation, but the appellate court held that there is no jurisdiction to appeal a preliminary opinion—essentially advice to allow for design of the project—and so dismissed the appeal.

AEPS

Hommrich v. Public Utility Commission, No. 674 M.D. 2016 (Pa. Commw. Ct. May 12, 2020), invalidated the PUC's imposition of applicability standards for net-metering under the Alternative Energy Portfolio Standards Act—that is, the standards for being able to force a sale of alternative energy from the customer back to the utility. This case was the subject of Jillian Kirn's column in this series on June 18, 2020.

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