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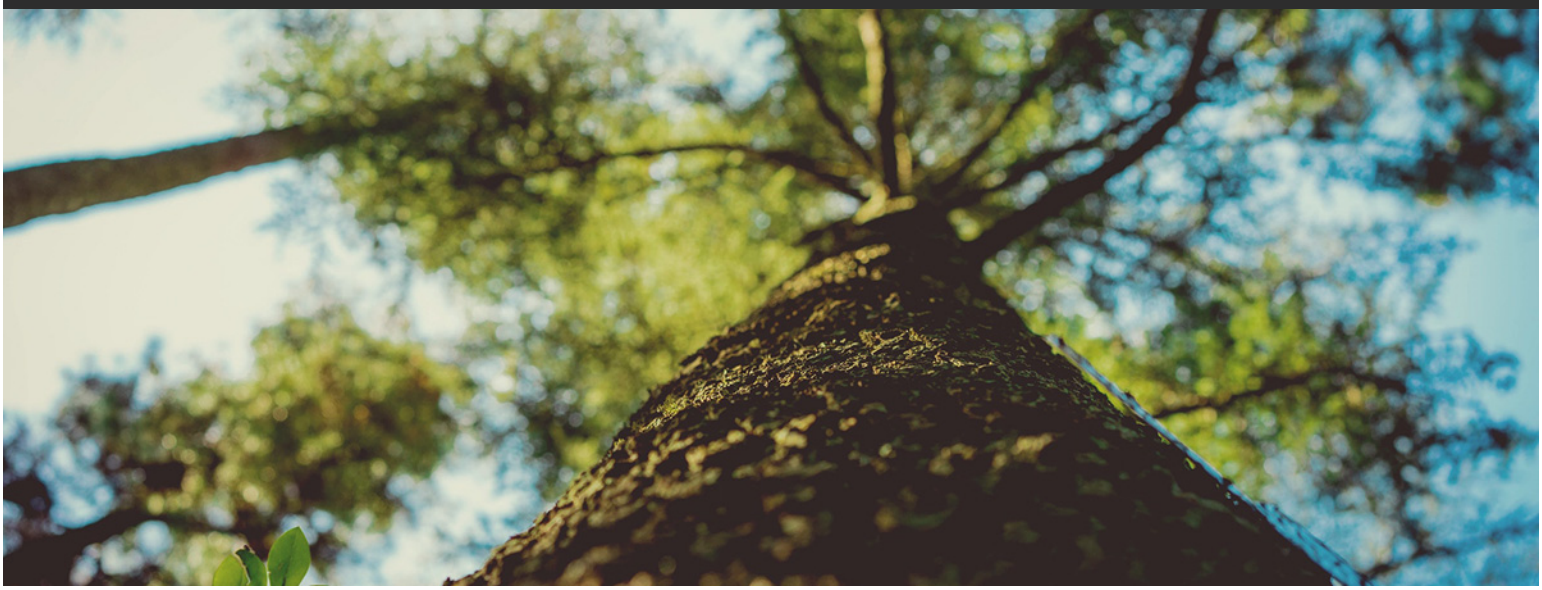
Another ERA Decision and Some Cautions About Making Government Work



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Last month, the Pennsylvania Commonwealth Court reiterated its general view of the Environmental Rights Amendment, Article I, Section 27, of the Pennsylvania Constitution. That court seems to believe that executive agencies must implement the ERA while "staying in lane." They may only engage in the evaluation of rules or permits using the procedures and under the standards established for them by statute or regulation. The ERA does not create additional procedures, although the absence of those procedures may make a statute or regulation unconstitutional.

Some, of which I am one, regard this view of the ERA as critical to having well-functioning government programs. That is very important generally, and specifically in this moment. But, the actual facts of the case, *Delaware Riverkeeper Network (DRN) v. Pennsylvania Department of Environmental Protection*, No. 285 M.D. 2019 (Pa. Commw. Ct. Jan. 12, 2021), highlight the risk that Pennsylvania is falling short of that goal.

DRN arose out of a petition the Delaware Riverkeeper Network submitted to the Environmental Quality Board years ago requesting that the EQB adopt a maximum contaminant level for perfluorooctanoic acid (PFOA). An MCL is the "drinking water standard" that not only would establish obligations under the Safe Drinking Water Act, but might also dictate cleanup levels under Act 2, the Hazardous Sites Cleanup Act, and the federal Comprehensive Environmental Response, Compensation, and Liability Act. When the EQB

did not respond, DRN sought a mandatory injunction in the Commonwealth Court, arguing, among other things, that the Environmental Rights Amendment and the Pennsylvania Safe Drinking Water Act imposed a nondiscretionary duty on either DEP or the EQB to establish that MCL.

The commonwealth filed preliminary objections on the ground that neither the Pennsylvania Safe Drinking Water Act nor the ERA establishes any mandatory duty for either DEP or the EQB to adopt any particular MCL or even any MCL at all. That nondiscretionary duty is a predicate for an injunction; it would allow a citizen suit under the Safe Drinking Water Act to enforce that duty.

DRN responded that the Environmental Rights Amendment to the Pennsylvania Constitution, Article I, Section 27, requires the EQB and DEP to consider certain values of the environment before taking any action and to act as a trustee for any public natural resources. Any fair evaluation of the values of clean water—to which the people have a right—would call for limits on the concentration of PFOA in that water when served up through a public water supply.

The Commonwealth Court agreed that there was no duty to adopt the limit, and sustained the Commonwealth's preliminary objections *except* on the issue of whether the EQB is obligated to act on the petition at all. DRN may pursue a declaration that the EQB has a duty to consider the petition and to grant or to deny it.

In the course of that ruling, the court reiterated its view that executive agencies may not take actions purportedly to comply with the Environmental Rights Amendment that are not consistent with the statutory scheme set out by the General Assembly. The General Assembly enacted the Safe Drinking Water Act. The act grants the EQB authority in its discretion to issue an MCL, but does not *require* it to do so, and accordingly does not authorize a citizen suit to require the EQB to do so. The Environmental Rights Amendment does not impose a separate obligation. It can either make the act unconstitutional because the act does not permit an evaluation of environmental values by some agency of the commonwealth, or it might make a specific application of the statute unconstitutional, but it does not call for the EQB to do something that the legislature has not called upon it to do. The plaintiff did not claim that the statute was unconstitutional, and therefore the EQB could not be enjoined to adopt an MCL.

This is a call for agencies to stay in lane. An executive agency cannot, on this view, embark on a standardless excursion into general evaluation of environmental harms and benefits. The agency must be authorized to do so, and then must exercise that authority within the bounds established by the legislature. In this way, the obligation to satisfy the Environmental Rights Amendment might be assigned to one agency, but not another, or it might be retained by the legislature, or the procedures for satisfying it might be constrained. See, *Cf. Funk v. Wolf,* 144 A.3d 228 (Pa. Cmwlth. 2016), aff'd mem., 158 A.3d 642 (Pa. 2017)(no obligation under the Environmental Rights Amendment to establish regulation of greenhouse gas emissions). An agency obligated to provide a hearing by the due process clause cannot simply declare itself authorized to hold a hearing; it must have statutory authority to do so and procedures so the hearing is not a freeform exercise. So too with the obligation to satisfy the duty to consider environmental values in government permitting and rulemaking. Anything else would be hard to administer.

Looking up from the process points, one is left asking whether there ought to be a regulatory standard for PFOA in the environment, what the standard should be, what media it should cover, and how it should be set. By all reports, if one analyzes environmental samples from virtually anywhere, one will find very low concentrations of perfluorinated compounds. Should they be cleaned up?

The ERA assures Pennsylvanians clean air, pure water, and certain values of the environment. The environment has to work well—or at least well enough—to support the economy and to provide quality of

life. A functioning environment requires functioning environmental protection programs. That is why the ERA establishes rights against the government. Even without a constitutional provision, many would demand both the functioning environment and the functioning environmental protection regulatory regime.

Pennsylvania has a particularly cumbersome process for adopting regulations, and intentionally so. Its architects distrusted new regulation, and so embedded a bias against any change. But that is only a good idea if no action is, if not better than action, even acceptable.

I do not profess a view as to whether adoption of a PFOA MCL is or is not a good idea. The chemical is widespread, but perhaps the cost of addressing it in the environment is unacceptable. In general, though, government has to be shown to work, especially in this political moment. Government has to be nimble in addressing conditions that make a lot of the environment risky. We have seen that with the pandemic, and we will see that (if we do not already) with changes in climate. Action has broad human and economic implications, but so does inaction.

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