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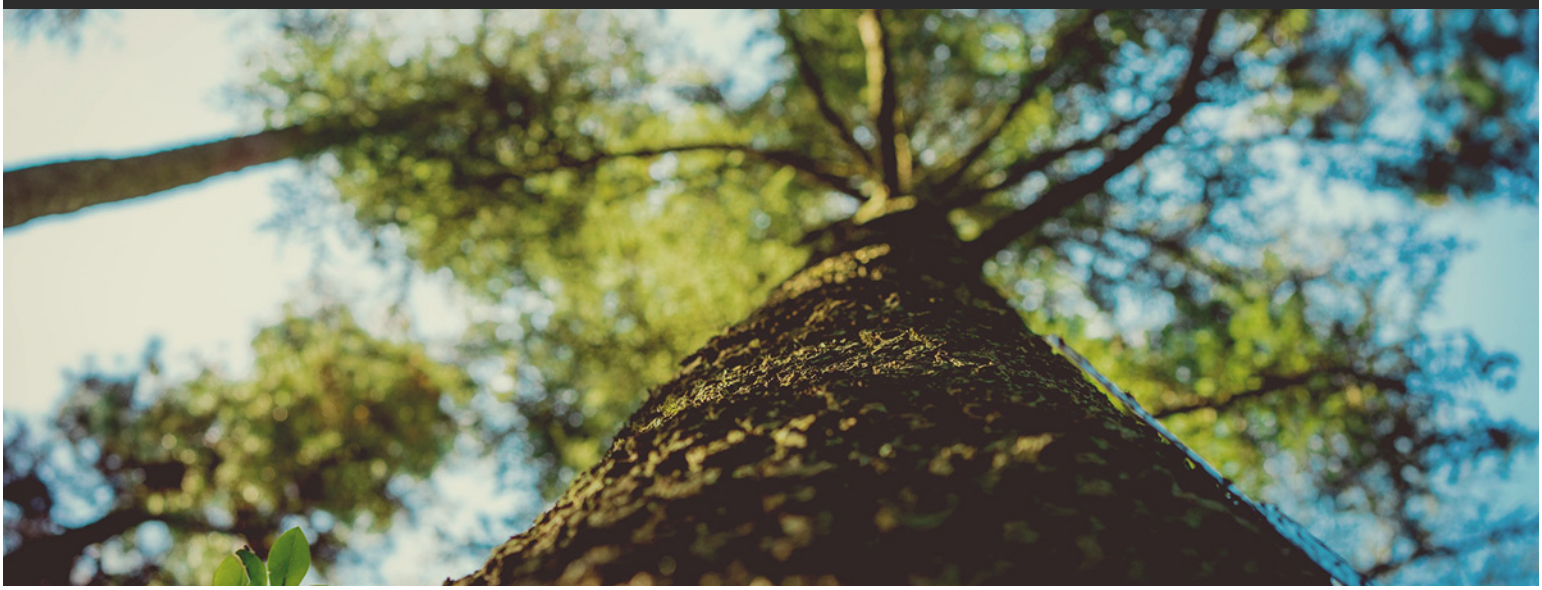
Will Climate Change Cause Storm Water Claims to Rain Down?



Storm water claims may be an emerging small-scale form of litigation driven by climate change. In Pennsylvania, like many parts of the country, a changing climate has increased the frequency of heavy rains and the intensity of rainfall events

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Storm water claims may be an emerging small-scale form of litigation driven by climate change. In Pennsylvania, like many parts of the country, a changing climate has increased the frequency of heavy rains and the intensity of rainfall events. More rain falls in shorter periods, and a storm with a 1% chance of occurring in a year (the hundred-year storm) has become larger.

The water has to go somewhere. Buildings, pavement and grading alter where the water can go and how fast it goes there. In cities, the streams into which the water originally flowed have often been enclosed as storm sewers. Indeed, you may have seen an interesting suggestion in the wake of the Ida flooding in New York that the city open up some of those sewers. See Sanderson, "Let the Streams Run Free," N.Y. Times, p. SR7 (Oct. 3, 2021).

When the storm water runs off, rather than infiltrates, it puts property down the hill at risk of flooding or damage. When the intensity or frequency of runoff changes, the design of the downgradient property may be overwhelmed. So, storm water runoff can lead to disputes between neighbors, to be sure much less

dramatic than the higher profile "climate change" lawsuits about carbon dioxide emissions or misrepresentations of their impacts.

This is familiar stuff. In Pennsylvania, counties have prepared storm water management plans for each watershed pursuant to the Storm Water Management Act, 32 Pa. Stat. Ann. Sections 680.1 to .17. Section 13 of the act imposes a duty on "any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics" to: implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required: to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

Most plans include language similar to Section 13(a)(1), and require anyone who alters or develops land to assure that the rate of runoff does not increase as the result of the development. Section 15 authorizes "any aggrieved person" to sue to abate a violation of Section 13, and "any person injured" by a violation of Section 13 specifically may recover damages.

And those suits are not uncommon, as the following three opinions from two weeks in July illustrate. See *Marcum v. Columbia Gas Transmission*, Civil Action No. 19-3873 (E.D. Pa. July 19, 2021); *Brandywine Village Associates v. East Brandywine Township Board of Supervisors*, No. 499 C.D. 2020 (Pa. Commw. Ct. July 20, 2021)(unreported); *Montgomery County Conservation District v. Bydalek*, No. 1103 C.D. 2019 (Pa. Commw. Ct. July 8, 2021).

There is a risk that they will become more common as intense storms make flooding or damage to downgradient property more frequent. Interestingly, they may also become more challenging to prosecute or to defend.

The Storm Water Management Act surely contemplates variable weather. Not every day is stormy. But it does not explicitly contemplate changing climate. Proof of violations (or nonviolations) of Section 13 tend to focus on expert testimony that building or grading in the past did or did not increase the frequency of flooding on downgradient neighboring properties over the time since the project. That was the issue in *Marcum*, which decided a *Daubert* challenge to the expert's testimony. The expert relied on observations of storm water runoff over a period of several years. But if the frequency and intensity of storms is changing perceptibly over the period in question, that evidence is more complicated. The expert has to answer the counterfactual question of what the runoff would have been had no development taken place, and cannot rely on pre-development observation alone to answer that question. The expert may need modeling.

High-profile climate litigation gets a lot of attention. Indeed, it has several times reached the Supreme Court. But there is lower-profile, retail litigation that may be driven by climate change. Storm water cases may be in that category.

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