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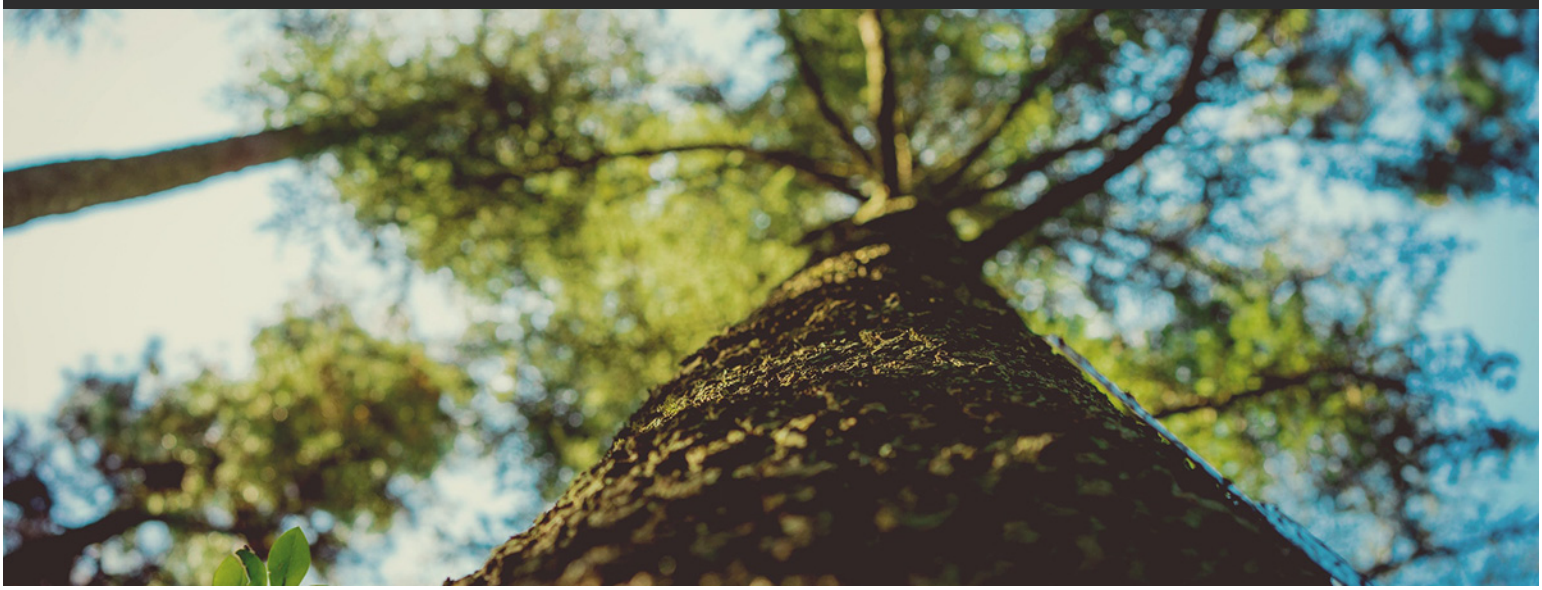
Environmental Cases in the Pennsylvania Appellate Courts in 2021



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COVID-19. Last year I observed: "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." The pandemic has caused the substantive and procedural limits on executive power established by the legislature potentially to frustrate the public health measures that the expert executive agencies may deem appropriate. That is a familiar problem in the environmental area as we continue to confront climate change without statutory tools specifically crafted for the task. Our Supreme Court, no conservative bastion by any means, recently ruled that the statutes and properly adopted regulations limit the authority of the Secretary of Health to impose a mask mandate in schools, and she could not order mask-wearing without a new regulation. See *Corman v. Acting Secretary Pennslyvania Department of Health*, No. 83 MAP 2021 (Pa. Dec. 23, 2021). Along parallel lines, as I write this on Jan. 7,

the Supreme Court is hearing argument on two sets of consolidated cases testing whether the federal Occupational Safety and Health Act authorizes imposition of a nationwide vaccination or testing mandate for large employers. See *National Federation Independence Business v. Department of Labor*, No. 21A244 (U.S. arg. Jan. 7, 2022); *Biden v. Missouri*, No. 21A240 (U.S. arg. Jan. 7, 2022).

Environmental Rights Amendment. Article I, Section 27, to the Pennsylvania Constitution has become a rather frequent issue in all sorts of environmental litigation.

The second and third sentences of the ERA 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 trust assets must be returned to the trust corpus. Accordingly, the Supreme Court decided that *all* proceeds from oil and gas leases on state land (bonuses, rents, fees and royalties) must be appropriated for conservation activities to restore the corpus. See *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 64 MAP 2019 (Pa. July 21, 2021). The August column in this series argued that perhaps the court got it wrong; the trust assets alienated may not be the oil and gas, but the surface resources that offer environmental "values."

The Commonwealth Court then accepted the proposition that the ERA obligation to restore the trust corpus had to confer standing on DEP and other agencies to pursue common law claims against successors to the manufacturer of PCBs for damages associated with releases of PCBs in Pennsylvania. See *Commonwealth v. Monsanto,* No. 668 M.D. 2020 (Pa. Commw. Ct. Dec. 30, 2021)(en banc). As Judge (now Justice) Kevin Brobson noted in a concurrence, the ERA may demand restitution, but the statutes authorizing claims for cleanup and natural resource damages—the Hazardous Sites Cleanup Act and the Clean Streams Law—do not authorize claims against these defendants; sale of a product that is spilled by someone else does not make one liable. How then can the ERA create a right to seek other recovery?

In *Delaware Riverkeeper Network v. DEP*, No. 525 M.D. 2017 (Pa. Commw. Ct. Aug. 3, 2021), plaintiffs contended that the ERA required DEP to procure a different cleanup under HSCA for the Bishop Tube Site, but they were denied summary judgment.

Separately, in *Pennsylvania Environmental Defense Foundation v. DCNR*, No. 609 M.D. 2019 (Pa. Commw. Ct. Aug. 6, 2021), PEDF challenged the 2016 State Forest Plan under the ERA because the plan contemplated exploitation of mineral resources in state forests. The plan is not a binding norm, however, and the ERA does not require revisions of policy documents. In *Delaware Riverkeeper Network v. DEP*, No. 285 M.D. 2019 (Pa. Commw. Ct. Jan. 12, 2021), appeal denied, No. 38 MM 2021 (Pa. Sept. 9, 2021), DRKN claimed that the ERA required the EQB to adopt a drinking water standard for at least some perfluoroalkyl substances (PFAS). The court disagreed, and also found that the Pennsylvania Safe Drinking Water Act did not establish a nondiscretionary duty of either DEP or the EQB to do so.

Some have argued that the ERA might require approval of a project that had environmental benefits. See *Gibraltar Rock v. DEP*, No. 500 C.D. 2020 (Pa. Commw. Ct. June 30, 2021), appeal granted, No. 441 MAL 2021 (Pa. Nov. 2, 2021), involved a long-running dispute over permits for a quarry. The DEP ultimately rescinded the quarry's mining and NPDES permits because an adjacent site required cleanup under HSCA and there was a dispute over whether the quarrying would draw contaminated groundwater into the excavation. The quarry agreed to install sentinel wells upgradient of the quarry and to treat any contaminated groundwater that reached its site. The Commonwealth Court reversed the rescission for a number of reasons including that ending the quarry operation would remove it from the HSCA cleanup and therefore potentially violate the DEP's obligations under the ERA.

NEPA and Infrastructure Funding. Anticipating additional federal support for infrastructure projects, *Montgomery County Transportation Authority v. 106 Dekalb,* No. 1837 C.D. 2019 (Pa. Commw. Ct. Apr. 20, 2021), may be of interest. There, a landowner alleged that the county had chosen a route for an extension of a bike trail specifically to facilitate review under the National Environmental Policy Act and not under the criteria of governing state law. The court held that the premise was not true, and so did not decide whether that sort of NEPA-focused tailoring might be permissible.

Standing. In *Food & Water Watch v. DEP*, No. 565 C.D. 2020 (Pa. Commw. Ct. Apr. 12, 2021), appellants challenged the use of pollutant trading among NPDES permittees to achieve the Chesapeake Bay total maximum daily load; each permittee had to achieve the water quality standards in its receiving stream. A person has standing because he is affected by the discharging facility, even though a change to the challenged trading condition would not result in a change to the water quality in the water body used by that person.

Enforcement. *DEP v. B&R Resources,* No. 291 C.D. 2020 (Pa. Commw. Ct. Dec. 6, 2021), addressed personal liability. The DEP ordered B&R to cap it abandoned oil and gas wells. B&R did not comply for lack of resources. The DEP then sought performance from B&R's owner. He was liable on a "participation" theory for the work that B&R could have performed had he directed it to do so. The decision here had to do with the accounting.

Cleanup. *Gibraltar Rock*, *Monsanto*, and *DRKN v. DEP*, all addressed the cleanup programs. In addition, *Constitution Drive Partners v. DEP*, 247 A.3d 1198 (Pa. Commw. Ct. 2021), considered the prospective purchaser agreement tangentially at issue in *DRKN v. DEP*. A state PPA is effectively a settlement of HSCA claims under Section 1113. That agreement must be made available for public comment after it is drafted but *before* it becomes effective, which may make that tool too time-consuming to use in the context of a transaction.

Shrom v. Pennsylvania Underground Storage Tank Indemnity Fund Board, 637 C.D. 2020 (Pa. Commw. Ct. Aug. 5, 2021), held that the USTIF has to reimburse Shrom for response to a leaking tank left by Shrom's tenant even though the registration fee was in arrears at the time the leak was discovered. The annual per gallon fee was paid. The policy that the registration had to be paid up was a "binding norm" not adopted as a regulation, and the regulations only required the "Section 705" fee to be paid for coverage.

Prevailing Party Fees Under the Clean Streams Law. Section 307 of the Clean Streams Law allows a prevailing party in an appeal to seek its fees. See *Clean Air Council v. DEP*, 245 A.3d 1207 (Pa. Commw. 2021), appeal granted, Nos. 131 MAL 2021 (Pa. Oct. 5, 2021), addresses a claim by a third-party appellant to recover fees from the permittee, as opposed to from DEP. While DEP must pay fees when the appellant was a "catalyst" for a change in the permit, private parties may only recover from each other if one of them acted in bad faith. See also *DEP v. Gerhart*, 250 A.3d 259 (Pa. Commw. 2021)(table).

Pipelines and EHB Jurisdiction. The DEP's issuance of a plan approval for a compression station under the Air Pollution Control Act is final for purposes of judicial review. That review is proper in the federal court of appeals under the Natural Gas Act. However, that does not mean that the *administrative* appeal to the EHB is not also proper. The EHB erred when it dismissed two separate appeals. See *Cole v. DEP*, No. 1577 C.D. 2019 (Pa. Commw. Ct. June 15, 2021); *West Rockhill Township v. DEP*, No. 1595 C.D. 2019 (Pa. Commw. Ct. June 15, 2021). In another oil and gas pipeline case, a county cannot challenge a DEP approval to use the "trench method" to install the pipeline by seeking to enforce a term of an easement the county granted; instead, the county must appeal the DEP permit to the EHB. See *Kichline v. Sunoco Pipeline,* 247 A.3d 1182 (Pa. Commw. Ct. 2021)(table)

Takings and Eminent Domain. *Miller v. Indian Lake*, No. 1269 C.D. 2020 (Pa. Commw. Ct. Nov. 16, 2021), affirmed a jury verdict valuing the taking of a right to flood behind a dam by an additional five vertical feet. The jury relied on the town's expert appraiser. He had no comparable sales after imposition of the increased easement, but instead testified that the likelihood of the increased easement ever being needed was so low based on weather data that it had no value. comparable sales subject to the increased easement. No other expert testified. The dam was raised at the DEP's insistence, so the risk could hardly have been zero.

If you cannot show that you can get a mining permit, a road that cuts off access to your coal is not a taking. See *PBS Coals v. Department of Transportation*, 244 A.3d 386 (Pa. 2021). If a municipality denies approval for a package sewage treatment plant with a stream discharge and insists that a development use on-lot sewage systems, it is not a taking, but an exercise of police power regulation. See *Pileggi v. Newtown Township*, 245 A.3d 377 (Pa. Commw. Ct. 2021).

Privilege. Neighbors of a proposed shopping center represented to DEP that the developer could not feasibly connect to public sewer. The developer sued, claiming that representation was fraudulent. The neighbors asserted that the statements were made on advice of counsel. That waived the privilege as to statements by counsel to the neighbors. See *Carlino E. Brandywine v. Brandywine Village Association*, 2021 Pa. Super. 147 (July 23, 2021); see also *Brandywine Village Association v. East Brandywine Township Board of Supervisors*, No. 499 C.D. 2020 (Pa. Commw. Ct. July 20, 2021)(related land use appeal). Other professional responsibility issues were addressed in the litigation by the Commonwealth attempting to recover costs of the failed Harrisburg incinerator, *Commonwealth v. RBC Capital Markets,* No. 368 M.D. 2018 (Pa. Commw. Ct. Sept. 9, 2021)

Sovereign Immunity. A conservation district is immune from suit claiming that it negligently regulated stormwater control and new development; the Stormwater Management Act does not waive that immunity because the conservation district is neither a "landowner" nor a "developer." See *Montgomery County Conservation District v. Bydalek*, No. 1103 C.D. 2019 (Pa. Commw. Ct. July 8, 2021). Sovereign immunity waivers were narrowly construed in a dispute over use of grant payments to cover lease payments rather than acquisition costs for two compressed natural gas stations. See *U.S. Venture v. Commonwealth*, No. 51 MAP 2020 (Pa. July 21, 2021).

Act 101. The county prevailed against a challenge to its termination of a landfill as the exclusive waste disposal facility under Act 101, but at the same time insisted that the landfill operator pay the host municipality fee. See *New Morgan Landfill v. Berks County Solid Waste Management Authority*, No. 149 C.D. 2020 (Pa. Commw. Ct. Oct. 15, 2021). Bidding for a recycling center to comply with Act 101 was at issue in *Troiano v. Farley*, No. 1730 C.D. 2019 (Pa. Commw. Ct. May 28, 2021).

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