



The Pennsylvania Environmental Hearing Board's Second Analysis of the Environmental Rights Amendment

On November 13, 2017, the Pennsylvania Environmental Hearing Board issued its second opinion analyzing Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment, in light of the Pennsylvania Supreme Court's June 20, 2017 decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF)*. In *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill*, EHB Dkt. No. 2015-063-L (November 10, 2017) the EHB applied the principles set out in *PEDF* and upheld a landfill permit renewal.

In its *PEDF* decision, the Pennsylvania Supreme Court established a new standard of review based on the text of the ERA and Pennsylvania trust law principles but did not provide a definitive test regarding how the ERA is to be applied in the permitting context. Earlier this year, on August 15, 2017, the EHB issued its first opinion interpreting and applying the new ERA standard in a third-party appeal of longwall mining permit revisions issued to Consol Pennsylvania Coal Company in *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Dkt. No. 2014-072-B (*August 15, 2017*) (CCJ). The EHB reviewed the Department of Environmental Protection's consideration of the potential environmental effects of its permitting action and whether the activity authorized by the permit was likely to cause, or in fact did cause, unreasonable degradation or deterioration of a public natural resource.

Friends of Lackawanna Decision

In *Friends of Lackawanna*, a citizens group, the Friends of Lackawanna (FOL), appealed a landfill permit renewal issued to Keystone Sanitary Landfill. Keystone has been operating a permitted landfill for more than 30 years, with the Department renewing its permit several times over that period, most recently in 2015. FOL appealed the 2015 permit renewal, arguing that the Department did not fulfill its responsibilities under the ERA because the landfill is adversely affecting groundwater and the Department's review of Keystone's operations and compliance history was inadequate. The record before the EHB showed that elevated levels of contaminants that could reasonably be attributed to landfill operations had been detected in groundwater monitoring wells since at least 2002. Between 2003 and 2016, the Department asked Keystone by letter and informal requests to assess the contamination, but DEP did not take any formal action until issuing a Notice of Violation in November, 2016, within a week of the EHB hearing. The Department did not impose conditions in the renewed permit regarding groundwater conditions, past compliance issues, or odor complaints from neighbors.

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Writing for the Board and citing its earlier *CCJ* decision, Judge Bernard A. Labuskes stated that the proper standard for the Board to review DEP's decision is to determine, first, whether the Department considered the environmental effects of its permitting action and, second, whether the Department correctly determined that any degradation, diminution, depletion or deterioration of the environment is reasonable or unreasonable.

The EHB concluded that the ERA applies to landfill permit renewals, and therefore the Department must act in accordance with its constitutional responsibilities under the ERA when reviewing a renewal application. The EHB concluded that the Department's decision to renew Keystone's permit without including a condition addressing groundwater contamination was unreasonable and violated the Department's trustee obligations under the ERA. The Department had an obligation to take "meaningful steps" to protect the groundwater under Keystone's property because, according to the Board, groundwater is a public natural resource entitled to protection under the ERA. The EHB amended Keystone's permit to add a condition requiring Keystone to prepare and submit a groundwater assessment plan to the Department within 60 days in accordance with the municipal waste regulations.

The EHB also found that odor associated with the landfill did not cause an unreasonable degradation of the environment. The EHB stated that landfill odors are subject to evaluation and control under the Pennsylvania Constitution in view of the right to clean air as expressed in the ERA, but found that FOL did not prove that the Department's alleged failure to respond to odor complaints from neighbors resulted in an unreasonable degradation of the air. The EHB did note, however, that the ERA "requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day operating in such close proximity to densely populated areas."

What's Next?

The General Assembly has enacted many environmental laws to implement the ERA and the Department is required to act within the scope of those laws to achieve their purposes. The EHB has been evaluating ERA challenges to the Department's environmental permitting actions for many years, an evaluation that has always considered whether the permits would allow undue adverse impacts on the environment. Both EHB cases decided since *PEDF* take a similar approach to such review following *PEDF* – examining the record to evaluate both the Department's consideration of the effect of the permitted activity on public natural resources, as well as the actual or potential adverse effects of the permitted activity on the environment. It seems unlikely that a case will be presented where the contours of the ERA analysis depart from these two fundamental components of EHB review. The question is under what circumstances, if any, the outcome of such review will differ under the "new" *PEDF* standard.

Several other matters remain pending in front of the Environmental Hearing Board that raise issues under the ERA. Babst Calland will continue tracking legislative, litigation and regulatory developments related to the ERA. For more information regarding issues or interpretation of the ERA, please contact Kevin J. Garber at 412-394-5404 or kgarber@babstcalland.com, or Jean M. Mosites at 412-394-6468 or jmosites@babstcalland.com.

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