



Pennsylvania Environmental Hearing Board's Analysis of Oil and Gas Well Permitting and the Environmental Rights Amendment

On May 11, 2018, in *The Delaware Riverkeeper, et. al. v. DEP and R.E. Gas Development, LLC.*, the Pennsylvania Environmental Hearing Board issued an opinion upholding well permits and renewals issued by the Department of Environmental Protection in an appeal based in part on Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (ERA). EHB Dkt. No. 2014-142-B (consolidated with 2015-157-B) (May 11, 2018).

The ERA provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The Board previously addressed the ERA in *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill*, EHB Dkt. No. 2015-063-L (November 10, 2017) (*FOL*) and *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Dkt. No. 2014-072-B (August 15, 2017) (*CCJ*). In another matter involving the Center for Coalfield Justice and DEP permitting action with respect to proposed mining operations, the Board also analyzed the ERA in a decision denying a petition for supersedeas. *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Dkt. No. 2018-028-R (April 24, 2018). All of these cases analyze Department permitting decisions in light of the Pennsylvania Supreme Court's June 20, 2017 decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF)*, which established a standard of review based on the text of the ERA and Pennsylvania trust law principles.

Factual Background

In *Delaware Riverkeeper*, two citizens groups, the Delaware Riverkeeper and the Clean Air Council, along with several residents of Middlesex Township (collectively, Delaware Riverkeeper), appealed unconventional gas well permits and subsequent renewals issued to R.E. Gas Development, LLC (Rex). Among other arguments, Delaware Riverkeeper argued that the Department's issuance of the permits violated its constitutional obligations under the ERA.

May 16, 2018

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Following submission of the permit applications in April 2014, the Department reviewed whether the applications complied with relevant statutes and regulations, specifically the 2012 Oil and Gas Act and related regulations. During its review, the Department received numerous objections and comments, including those from a group of concerned citizens, Mars Parent Group. The Department and Rex reviewed the comments and participated in a Section 3251(a) conference with Mars Parent Group. Following the conference, Rex submitted a response to the Department outlining several actions it was willing to take to address public concerns.

The Department issued the permits on September 12, 2014 and included several special conditions to address the public concerns. Rex requested permit renewals in August 2015. Following the request, the Department became aware of potential abandoned wells near the proposed wellsite, which raised concerns of potential gas migration. The Department requested additional information from Rex, which provided a report summarizing its investigation of abandoned wells. The Department then renewed the permits.

Analysis

Writing for the Board, Judge Steven Beckman reiterated the standard for analyzing ERA challenges to permit actions by the Department set out in *CCJ* and *FOL*. The standard requires the Board to determine whether the Department considered the environmental effects of its permitting action and, second, whether the Department correctly concluded that its action will not result in unreasonable degradation, diminution, depletion or deterioration of the environment. Finally, the Board must determine whether the Department's action satisfied its trustee duties of prudence, loyalty and impartiality towards the beneficiaries of the natural resources affected by the permitting decision.

In claiming the Department did not properly consider the environmental effects of its decision to issue the permits, the Delaware Riverkeeper argued the review of Rex's application fell short of the review required in *CCJ*. However, the Board clarified that the analysis set out in *CCJ* "was not intended to suggest that there was some minimum requirement under Article 1, Section 27 governing the amount of review time that must be undertaken by the Department and the amount of information that must be considered by the Department. The Department's consideration of the environmental effect of its permitting actions is, we believe, intended to be a flexible standard based on the nature of the activity and the potential impact of the activity on the environmental interests protected under Article 1, Section 27." The Board stated that "[t]he fact that the consideration did not involve a full blown risk assessment and was not as extensive as Delaware Riverkeeper believes was necessary does not, in our opinion, violate the requirements of Article 1, Section 27." The Board found that the Department considered the environmental effects of its action satisfying its obligation under the ERA.

The Board next addressed whether the Department's decision to issue the permits resulted in the unreasonable degradation, diminution, depletion or deterioration of the environment. The Delaware Riverkeeper argued the development allowed by the permits would result in water contamination, fire and explosion risks and air emissions in violation of the ERA. The Board rejected this argument, finding the theories to be speculative, and that the Delaware Riverkeeper failed to meet its burden of proof regarding the likelihood of any theorized impacts.

Finally, the Board addressed the Department's trustee duties under the ERA, finding the Department's pre-action analysis to be consistent with its duties of prudence and impartiality. The Board stated "[o]ur understanding of the trustee responsibility does not require the Department to deny permits to any and all activity that will negatively impact the public natural resources and/or the people who use those resources" and that "[t]o hold otherwise would essentially prevent any permitting activity since it is nigh impossible to have development without some environmental impact." The Delaware Riverkeeper also argued the Department breached its duty of impartiality by "treating this wellsite as if it were no different than any other wellsite" because it failed to consider the children in proximity to the wellsite and the local air quality that was already degraded. The Board found the Department did not violate its duty of impartiality because it considered the interests of various beneficiaries of the public natural resources near the proposed site.

What's Next?

In *Delaware Riverkeeper*, the Board followed the ERA analytical approach taken in *CCJ* and *FOL*, 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. Consistent with Board decisions issued before *PEDF*, as well as the Pennsylvania Supreme Court decision in *Robinson Township v. Commonwealth*, the Board's opinion reaffirms that the ERA "should not be read as preventing all impacts to the environment nor does it call for a stagnant landscape."

Several other ERA questions remain pending before the Board. Babst Calland will continue tracking legislative, litigation and regulatory developments related to the ERA. For more information regarding 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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