

Pennsylvania Environmental Hearing Board applies new standard announced by Supreme Court in PEDF

On June 20, the Pennsylvania Supreme Court issued a decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF)* rejecting the long-standing test for analyzing claims brought under the Environmental Rights Amendment (ERA) contained in Article I, Section 27 of the Pennsylvania Constitution. In its decision, the court set aside the three-part test that was utilized in *Payne v. Kassab* and replaced it with a standard based on “the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” The court did not, however, provide a definitive test to be applied in the permitting context. On August 15, the Pennsylvania Environmental Hearing Board issued its first opinion interpreting and applying the new ERA standard in the permit appeal context. Other matters before the board raise claims under the ERA, the resolution of which will shape the contours of this evolving area of law.

Center for Coalfield Justice and Sierra Club v. DEP

In *Center for Coalfield Justice and Sierra Club v. DEP*, No. 2014-072-B, the Center for Coalfield Justice (CCJ) and Sierra Club filed third party appeals arguing that, in addition to violating the Clean Streams Law and the Mine Subsidence Act, the Department of Environmental Protection violated the ERA by issuing two longwall mining permit revisions to Consol Pennsylvania Coal Company, LLC. The first permit revision, Revision No. 180, allowed Consol to expand its longwall mining operation into areas adjacent to and underlying Ryerson Station State Park. Revision No. 180 specifically precluded Consol from mining under the Polen Run and Kent Run streams. The second permit revision, Revision No. 189, authorized Consol to conduct longwall mining under Polen Run. CCJ and Sierra Club claimed both revisions violated the ERA because the mining operations would impact the flow of the streams.

In a decision authored by Judge Steven Beckman, the board discussed the *PEDF* decision and applied a two-prong test based on the Pennsylvania Supreme Court’s opinion. Under the first prong, the board considered whether the department’s action

protected the rights granted to Pennsylvania citizens under the ERA. The ERA provides for: (i) the right to clean air and pure water, and to the preservation of natural, scenic, historic and aesthetic values of the environment; and (ii) common ownership by the people, including future generations, of Pennsylvania’s public natural resources. To determine whether the rights were adequately protected, the board analyzed whether the department considered the potential environmental effects of its permitting action and whether that action was likely to cause, or in fact did cause, unreasonable degradation or deterioration of the protected environmental resource. Where a potential impact was identified, the board then considered whether the impact was unreasonable. Under the second prong, the board considered whether the department complied with its trustee duties by prohibiting an unreasonable degradation, diminution and depletion of Pennsylvania’s public natural resources and by acting affirmatively to protect the environment.

The board first held that Revision No. 189 violated the ERA because the revision did not comply with the Clean Streams Law and the Mine Subsidence Act, stating “at a minimum, a Department permitting action that is not lawful under the statutes and regulations in place to protect the waters of the Commonwealth, cannot be said to meet the Department’s trustee responsibility under Article I, Section 27 and is clearly a state action taken contrary to the rights of citizens to pure water.” Applying the foregoing test, the board held that the Revision No. 180 issuance did not violate the ERA. Specifically, the board held that the department sufficiently considered the potential impact of Consol’s longwall mining operations, as evidenced by the multiple permit revisions, public hearing and comment period, and preclusion of mining under certain streams. The board further held that a temporary interruption of streamflow resulting from the mining permitted by Revision No. 180 was not unreasonable because those impacts were temporary and limited as compared to the benefits of the longwall mining industry on the general welfare and prosperity of Pennsylvania citizens. Finally, the board held that the department satisfied its trustee duties by acting to conserve

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and maintain the two streams under which it precluded Consol from mining. Consol appealed the decision to the Commonwealth Court on September 14, but the briefing has not yet begun.

Siri Lawson v. DEP and Hydro Transport LLC

On July 6, Warren County resident Siri Lawson appealed the department's approval of Hydro Transport LLC's plan to spread production or treated brine from conventional oil and gas operations for dust management on roads in Sugar Grove and Farmington townships in Warren County. She claims the department violated the ERA because the brine spreading approval omits operating requirements that are reasonably likely to protect the waters or the air of the Commonwealth. This appeal is pending with the board, with discovery to be completed by November 6. The case is docketed at 2017-051-B.

Delaware Riverkeeper Network v. DEP

On October 13, 2014, Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman appealed six unconventional drilling permits that were issued to R.E. Gas Development in Middlesex Township, Butler County. Appellants claimed the issuance of the permits violated the ERA because: (i) the wells were to be sited within a residential-agricultural zone that is an unsuitable area for natural gas development; and (ii) they authorized a nuisance. The board heard the case in December 2016. Post-hearing briefing closed in April 2017. On July 21, the board ordered the parties to submit supplemental post-hearing briefs discussing the new ERA standard under *PEDF*. In their post-hearing brief, appellants argued that *PEDF* requires the board to apply strict scrutiny to determine whether: (i) there is an intrusion of a fundamental right; (ii) if there is an intrusion, whether the department has a compelling interest in the intrusion; (iii) whether the department used the least restrictive means to achieve its purpose; and (iv) whether the department's purpose is consistent with the ERA. The department argued that the *PEDF* decision did not change the burden of proof and, under *PEDF*, the board must determine: (i) whether the issuance of the permits unreasonably impaired the appellants' rights under the ERA; and (ii) whether the issuance of the permits caused unreasonable degradation, diminution, and depletion of Pennsylvania's public natural resources. The appeal is docketed at 2014-142-B.

Friends of Lackawanna v. DEP and Keystone Sanitary Landfill

On May 7, 2015, appellant Friends of Lackawanna appealed an operating permit renewal issued to Keystone Sanitary Landfill, arguing that the renewal violated the ERA because it would impact groundwater and surface water. The hearing was held in January 2017. On June 27, the board allowed the parties to submit supplemental post-hearing briefs discussing the *PEDF* decision. In its supplemental brief, the appellant argued that the board must apply strict scrutiny and consider the following factors in assessing whether the department complied with the ERA: (i) whether degradation will occur; (ii) whether "some individuals benefit at the expense of others' right to a healthy

place to live;" (iii) whether the action will increase the "inequity of environmental burdens" encountered by the community; and (iv) whether there is sufficient information to determine the impacts. The department argued that the board must assess whether the department's actions "unreasonably impaired" the rights granted under the ERA. The case is docketed at 2015-063-L.

What's next?

The *Center for Coalfield Justice & Sierra Club v. DEP* appeal will be the first opportunity for the Commonwealth Court to review the board's application of the *PEDF* decision, in this case to a permitting decision by the department. While that appeal remains pending, the board's opinion will serve as the framework by which the cases summarized above and others will be adjudicated.

For more information regarding interpretation of the ERA in matters before the Environmental Hearing Board, contact Jean M. Mosites at 412-394-6468 or jmosites@babstcalland.com or Shannon DeHarde at 412-394-5432 or sdeharde@babstcalland.com.