

*Pennsylvania Bar Institute  
Environmental Law Forum*

---

**LOCAL GOVERNMENTAL  
DECISIONMAKING AND THE  
ENVIRONMENTAL RIGHTS  
AMENDMENT IN PRACTICE**

**APRIL 2019**

Jordan B. Yeager, Curtin & Heefner LLP  
[jby@curtinheefner.com](mailto:jby@curtinheefner.com) [www.curtinheefner.com](http://www.curtinheefner.com)

1

**UGI Utilities, Inc. v. City of Reading, 179 A.3d  
624 (Pa. Commw. Ct. 2017)**

---

UGI Utilities challenged certain Reading ordinances. The Court agreed with the City that “Article 1, Section 27 can bar preemption of local regulation where the state statute or regulation on which preemption is based so completely removes environmental protections that it violates the state’s duties under that constitutional provision.”

The logo for Curtin & Heefner, featuring the letters 'C&H' in a stylized font with a horizontal line underneath, and the full name 'Curtin & Heefner' below it.

**Brockway Borough Muni. Auth. v. DEP,**  
**2015 EHB 221**

---

Challenge to an unconventional gas well permit on a water authority's property.

EHB: Constitutional protections require more than mere compliance with applicable status and regulations. Had to be a reduction of environmental incursions to a minimum and any environmental harm must clearly outweigh the benefits to be derived.

Both initial permits and renewal permits would be subject to the same constitutional standards.

**Tri-County Landfill, Inc. v. DEP, 2015 EHB 324**

---

Challenge by a landfill to DEP permitting decision.

EHB: A permit is appropriately denied if it does not comply with local zoning, noting the role of zoning ordinances in local environmental protection.

**Sludge-Free UMBT, Delaware Riverkeeper  
Network v. DEP, 2015 EHB 469**

---

Challenge to DEP approvals allowing sewage sludge on three farms in Northampton County.

EHB denied the DEP's and sludge company's motions for summary judgment: "Strict compliance with all regulatory requirements is not *necessarily* coextensive with a reasonable effort to reduce the environmental incursion to a minimum."

**Sludge-Free UMBT, Delaware Riverkeeper  
Network v. DEP, 2015 EHB 469 (cont'd)**

---

"Notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project."

The Company ultimately withdrew its application and the DEP withdrew its approvals.

### **Hudson v. DEP, 2015 EHB 719**

---

EHB granted local residents a stay of a DEP approval of a stormwater management permit for a large industrial hog breeding and gestation facility (“CAFO”).

EHB found that the permittee had provided no data to support the fact that its design was actually going to function properly, comply with the law, and protect the environment.

DEP must consider the environmental effects of the proposed action prior to acting.

The stay remains in place.

### **Snyder v. DEP, 2015 EHB 857**

---

Appeal of an air quality plan approval for a natural gas compressor station.

EHB denied the permittee’s motion to dismiss, reiterating that DEP has an obligation to consider local land use requirements and that compliance with the Environmental Rights Amendment can require more than simple compliance with statutes and regulations.

**Friends of Lackawanna v. DEP, 2016 EHB 641**  
**(Opinion and Order on Motion for  
Summary Judgment)**

---

Challenge of DEP's approval of a renewal permit for a 714 acre landfill.

EHB: DEP and the Board have a constitutional duty to consider the extent and nature of environmental impacts even if they would be otherwise permitted under statues and regulations.

See also, Pine Creek Valley Watershed Ass'n v. DEP, 2016 EHB 748.

**Ctr. for Coalfield Justice v. DEP, 2017 EHB 799**

---

EHB ruled in favor of community organizations in their challenge of a longwall coal mining panel permit near Ryerson Station State Park.

As a result, DEP could no longer approve longwall mining where mining was predicted to cause so much damage to the stream that the only "remediation" method was to destroy the existing streambed and "rebuild" it, effectively eliminating the stream as it previously existed.

**Ctr. for Coalfield Justice v. DEP, 2017 EHB 799**  
**(cont'd)**

---

Such action “cannot be said to meet DEP’s trustee responsibility under Article I, Section 27 and is clearly a state action taken contrary to the rights of citizens to pure water.”

EHB: Streams are “public natural resources” under the Environmental Rights Amendment.

Statutory and regulatory compliance is not coextensive with constitutional compliance.

**Friends of Lackawanna v. DEP, 2017 EHB 1123**  
**(Adjudication)**

---

EHB found that a permit renewal for a landfill was improper due to an approximately 14-year unresolved groundwater contamination inquiry.

The state “may not sanction the use of private property that will impermissibly infringe upon the constitutional rights of others.”

**Clean Air Council, Delaware Riverkeeper Network, et al v. DEP, EHB Dkt. No. 2017-009-L (Opinion and Order on Motion for Summary Judgment, January 1, 2018)**

---

Challenge to erosion and sedimentation permits and water encroachment permits issued for the Sunoco/Energy Transfer Partners Mariner East 2 pipeline project.

EHB: DEP “has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding.”

**Standing to Appeal from Local Land Use Decisions**

---

“A person who wishes to contest a zoning approval can initiate an appeal or challenge if he is a ‘person aggrieved.’” *Walters v. Zoning Hearing Bd. of City of Easton*, 125 A.3d 479, 482 (Pa. Commw. Ct. 2015).

“[A]ggrieved” when used in terms of standing is generally understood to mean that the person has a substantial, direct and immediate interest in the claim sought to be litigated.” *Spahn*, 602 Pa. at 112.

## Standing to Appeal from Local Land Use Decisions

---

“In order to be substantial, there must be some discernible effect on some interest other than the abstract interest all citizens have in the outcome of the proceedings.”

*Spahn*, 602 Pa. at 115.

## Standing

---

“[I]t is immediate if that causal connection is not remote or speculative.”

*Fumo v. City of Philadelphia*, 601 Pa. 322, 337, 972 A.2d 487, 496 (2009); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 197, 346 A.2d 269, 283 (1975).



## Standing

“Juxtaposed against the federal standards, the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction, whereas a lack of standing in the federal arena is directly correlated to the ability of the court to maintain jurisdiction over the action.”

*Armstead v. Zoning Bd. Of Adjustment of City of Phila.*,  
115 A.3d 390 (Pa. Commw. Ct. 2015).

## Standing

“[I]n Pennsylvania there is a constitutional right of every person who finds it necessary or desirable to resort to the courts for protection of legally recognized interests to have justice administered without sale, denial or delay. Pennsylvania courts are much more expansive in finding standing than their federal counterparts.”

*Armstead v. Zoning Bd. Of Adjustment of City of Phila.*,  
115 A.3d 390 (Pa. Commw. Ct. 2015).

## Standing

“The law ... has recognized that users of nearby land understandably have an interest in the proper implementation of land planning policies through zoning, in relation to the benefits to be gained, not only with respect to the land value of a titleholder, but also with respect to the enjoyment of the land by a user of it, whether in connection with residential occupancy or business operation.”

*Active Amusement Co. v. Zoning Bd. of Adjustment*, 84 Pa. Commw. Ct. 538, 545, 479 A.2d 697, 701 (1984).

## **SLAPP Immunity**

### Strategic Lawsuits Against Public Participation

Environmental Immunity Act - 27 Pa.C.S.A. §8302(a)

- Except as provided in subsection (b), a person that, pursuant to Federal or State law,
- files an action in the courts of this Commonwealth
- to enforce an environmental law or regulation or that
- makes an oral or written communication to a government agency
- relating to enforcement or implementation of an environmental law or regulation
- shall be immune from civil liability in any resulting legal proceeding for damages
- where the action or communication is aimed at procuring favorable governmental action

**SLAPP Immunity**  
Strategic Lawsuits Against Public Participation

---

“Governmental agency” includes “political subdivisions or their departments, commissions, boards, agencies or authorities.”

27 Pa.C.S.A. §8301.

**SLAPP Immunity**  
Strategic Lawsuits Against Public Participation

---

Zoning “focuses on the orderly development and regulation of land use, consistent with local demographic and *environmental concerns*.”

- *Robinson Twp.*, 623 Pa. at 615

“[L]ocal zoning laws should be considered ‘applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources.’” - *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324.

Jordan B. Yeager

---

Curtin & Heefner LLP  
Doylestown, PA  
267-898-0570

[jby@curtinheefner.com](mailto:jby@curtinheefner.com)

Twitter: @jordanyeager  
[www.linkedin.com/in/jordanyeager](http://www.linkedin.com/in/jordanyeager)

[www.curtinheefner.com](http://www.curtinheefner.com)

23  
  
Curtin & Heefner