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Memo

To: File

From: Brian Glass, Senior Attorney

Date: February 25, 2011

Re: SLAPP Suits, the Environmental Immunity Act, and the Pennsbury Case

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On January 19, 2011, in an opinion issued in a case called Pennsbury Village Associates, LLC v. McIntyre[1], the Pennsylvania Supreme Court offered its first interpretation of the state law commonly known as the Environmental Immunity Act[2]. The opinion was a disappointment for environmental advocates hoping for an interpretation of the Act that would safeguard and encourage public participation aimed at environmental protection.

SLAPP Suits and the Environmental Immunity Act

The Pennsylvania General Assembly enacted the Environmental Immunity Act in response to the problem of strategic lawsuits against public participation, also called "SLAPP suits". SLAPP suits are lawsuits that are brought to try to sidetrack or stop public participation. Because SLAPP suits can be extremely intimidating and expensive to defend, citizens often agree to abandon their public participation in order to settle these suits even when they have no merit. SLAPP suits have been particularly common in the environmental arena, where citizens are typically afforded a number of opportunities for public participation.[3]

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[1] No. 4 MAP 2009 (Pa. Jan. 19, 2011).

[2] 27 Pa.C.S. §§ 8301-8305.

[3] In the Preamble to the legislation that became the Environmental Immunity Act, the General Assembly found and declared that: "(1) It is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances. (2) It is in the public interest to empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the

The Environmental Immunity Act provides immunity (a complete defense to legal claims) to citizens who seek to enforce or implement environmental laws or regulations through lawsuits or communications, provided the allegations in those lawsuits or communications are "relevant or material to enforcement or implementation of an environmental law or regulation" and are (1) not "knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity"; (2) not "made for the sole purpose of interfering with existing or proposed business relationships"; or (3) not "later determined to be a wrongful use of process or an abuse of process."[4] The Act allows citizens to raise the immunity defense early in the proceedings and to take an immediate appeal of any denial of immunity.[5] Citizens who are successful in raising the immunity defense may recover their attorney fees and costs of litigation.[6]

The *Pennsbury* Case

In the Pennsbury case, a citizen raised the immunity defense after he was sued for communicating with public officials and seeking to encourage them to uphold certain deed restrictions and to oppose an access road that was planned to be built on conservation land. The lawsuit alleged that the citizen was prohibited from engaging in these communications because of a stipulation into which he had entered to settle earlier litigation.

In the Pennsbury opinion, the Pennsylvania Supreme Court held that citizens can contract away their rights to seek to enforce or implement environmental laws or regulations through lawsuits or communications, in which case they will not be protected by the immunity provided under the Environmental Immunity Act.[7] The existence of a settlement agreement restricting the rights of its parties to engage in public participation is an unusual fact that limits the general applicability of the court's holding. The court made several additional comments, however, that warrant the attention of environmental advocates.

First, the Court expressed its agreement with the trial court's finding that "potential worries about future storm water run-off 'cannot be equated with "the implementation or enforcement of environmental law and regulations."'"[8] This statement demonstrates a serious lack of understanding of the connection between stormwater runoff and water pollution that several federal, state and local environmental laws and regulations seek to address.[9]

Second, the Court appeared skeptical that communications seeking to enforce deed restrictions recorded for land conservation purposes could qualify for immunity under the Act.[10] This

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establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations." Act of December 20, 2000, No. 393, P.L. 980, 980.

[4] 27 Pa.C.S. § 8302.

[5] 27 Pa.C.S. § 8303.

[6] 27 Pa.C.S. § 7707.

[7] Pennsbury, No. 4 MAP 2009, slip op. at 14 (The Environmental Immunity Act's "protective reach is limited where pre-existing legal relationships manifest a party's intent not to participate in activity for which it would otherwise be shielded from liability, pursuant to anti-SLAPP legislation.").

[8] Id.

[9] See, e.g., 40 C.F.R. §§ 122.26, 122.30-122.37; Storm Water Management Act, 32 P.S. §§680.1-680.17.

[10] Pennsbury, slip op. at 14

skepticism fails to appreciate the critical roles that land conservation plays in environmental protection and that citizens play in enforcing that conservation and protection.[11]

Advocacy in the Wake of the *Pennsbury* Decision

Through its opinion in the Pennsbury case, the Pennsylvania Supreme Court appears to have signaled that it will take a very narrow view of the lawsuits and communications that are protected by the immunity provided under the Environmental Immunity Act.

In the wake of the Pennsbury decision, environmental advocates seeking to take full advantage of the immunity provided under the Act might consider the following precautions:

- *Ensure the accuracy of any statements you make.* Fact-check. Provide sources whenever possible (e.g., "EPA discusses the hazards of the chemical hexavalent chromium in its Toxicological Review issued in September 2010."). If you are uncertain about the accuracy of a statement, communicate your concern as a question (e.g., "Has DEP considered whether the discharge of the chemical hexavalent chromium would be hazardous to human health or the environment?").

- *Reference the environmental laws and regulations that you are seeking to enforce or implement.* Try to identify the environmental laws and regulations that govern the activity on which you are commenting. Refer to those laws and regulations in your statements (e.g., "I am testifying today because I am concerned that the issuance of this permit might violate the federal Clean Water Act and the Pennsylvania Clean Streams Law.")

- *Manage your expectations of the protections currently afforded under the Environmental Immunity Act.* Statements made to enforce or implement our bedrock environmental laws and regulations, like the federal Clean Water Act and Clean Air Act and the Pennsylvania Clean Streams Law and Air Pollution Control Act, are more likely to be protected under the Environmental Immunity Act than statements made to enforce or implement less-traditional environmental laws and regulations, like conservation and land use laws[12]. This does not mean that you should not participate in proceedings relating to these laws, or that your statements seeking to enforce or implement these laws are not protected

[11] See, e.g., Open Space Lands Act, 32 P.S. §§ 5001-5013 ("The Legislature finds that it is important to preserve open space and to meet needs for recreation, amenity, and conservation of natural resources, including farm land, forests, and a pure and adequate water supply."). The role that citizens play in enforcing use restrictions is well described in a brief submitted by the Pennsylvania Department of Conservation and Natural Resources in the Pennsbury case. Amicus Curiae Brief of DCNR, p. 11 ("Local citizen vigilance and efforts to alert local, county and State government officials responsible for enforcing use restrictions should not only be encouraged, but should be recognized as vital to effective implementation of the environmental laws governing these acquisitions.")

[12] See Penllyn Greene Assocs., L.P. v. Clouser, 890 A.2d 424, 435 (Pa. Cmwlth. 2005) ("this Court agrees with the trial court's conclusion that zoning appeals and land use appeals are not the type of action or litigation protected under the [Environmental Immunity] Act").

under different laws[13]; it simply means that they are less likely to be protected under the Environmental Immunity Act, and you should be aware of that fact.

Environmental advocates might also consider asking their state legislators to amend the Environmental Immunity Act to more broadly and clearly define the term "environmental law and regulation," which is not currently defined by the Act. A broad and clear definition of "environmental law and regulation" could help to ensure that efforts to enforce or implement even less-traditional environmental laws and regulations are afforded protection under the Environmental Immunity Act.

This paper should not be construed as legal advice or legal opinion on any specific facts or circumstances. The content is intended for general information purposes only. You are advised to consult a PennFuture or other lawyer regarding your specific legal situation.

[13] See, e.g., U.S. Const. amend. I; Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.").