

Sewage Law Potpourri

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"Come with us, ma'am — and if I were you, I'd get a good lawyer. No one's gonna buy that my-husband-was-only-hibernating story."

EHB and Court Developments

- *Stocker v. DEP*, 2022 WL 17371201, Environmental Hearing Board, November 18, 2022
 - Challenge to extension of public sewer to areas currently served by on-lot systems
 - Relied, in part, on findings by SEO of potential and suspected on-lot malfunctions
 - Someone challenging an approval of planning by DEP should rely upon something more than mere allegations of inadequate reviews or analysis

EHB and Court Decisions

- *Commonwealth v. Shoey*, 2020 WL 1130854, Commonwealth Court, March 9, 2020.
 - Does township OLDS plan apply to “vacant” properties?
 - “Over 20% of houses in the United States do not have access to a public sewer and rely on a septic system. Whichever system a structure is connected to is the system that ‘service’ the structure.”

EHB and Court Decisions

- *Oakes v. Richardson, 238 A.3d 533, Commonwealth Court, July 20, 2020*
 - Township contract codes enforcement officer sued in connection with death of toddler in swimming pool
 - Issue – Was codes enforcement officer entitled to governmental immunity?
 - Generally, yes
 - Free advice to SEOs – have municipality set fees, use municipal forms

EHB and Court Decisions

- *Pileggi v. Newtown Township*, 245 A.3d 377, Commonwealth Court. January 5, 2021
 - Pileggis asserted that Township's failure to approve their proposed sewage facility was an inverse condemnation of their property.
 - Wanted to construct their own treatment facility. Act 537 plan provided for on-lot systems.
 - "Act 537 does not vest Appellants with a statutory entitlement to have a sewer system of their choice."
 - Permit denial was not a taking.

What is Enforcement?

- Any action taken to prevent, stop, correct, or prosecute violations of the Sewage Facilities Act and related regulations.

Act 537

Pennsylvania Sewage Facilities Act With Index



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Sewage Facilities Act

Empowers DEP, local agencies, and SEOs to enforce the Act's provisions through civil and criminal penalties assessed by means of hearings and appeals.

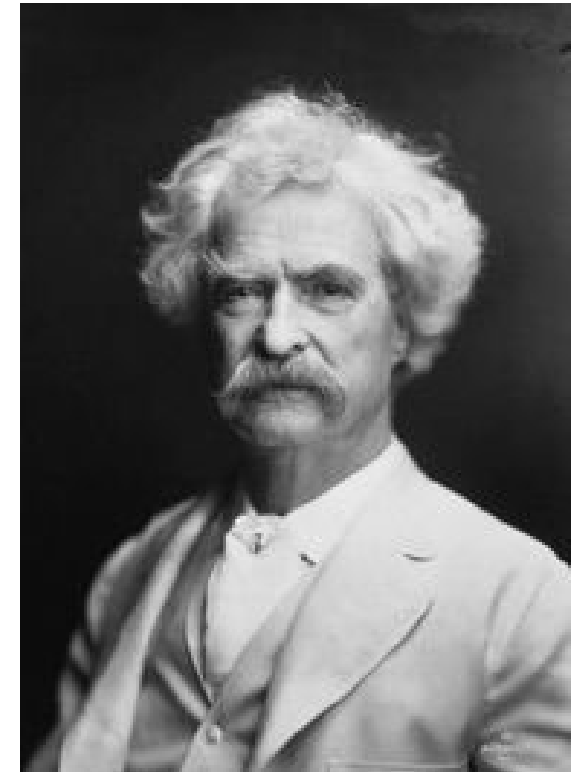
Any person who installs or constructs a system in violation of Act 537, the regulations, or the issued permit violates Act 537 is subject to prosecution.

Enforcement – Getting It Right

“Get your facts first, then you can distort them as you please.”

“Do the right thing. It will gratify some people and astonish the rest.”

-Mark Twain



Enforcement Options

- Summary offense
 - Applies to parties who violate rules and regulations, owns a property where there is a nuisance, or resists or interferes
 - Criminal in nature
 - \$500 - \$5000 daily penalty
 - Before district judge
 - Initiated by filing a non-traffic citation or private criminal complaint form
 - Standard – beyond a reasonable doubt

Enforcement Options

- Civil Penalties
 - Can be assessed for any violation of Act, rules or regulations
 - Can include costs of damages and cost of correcting violation
 - Notice and hearing before municipality
 - \$300 - \$2500 for each violation
 - If continuing violation – up to \$2500 per week
 - Standard - Preponderance of evidence

Enforcement Options

- Civil action to restrain violations
 - Brought in courts of common pleas
 - Intended to abate nuisances or violations of Act

Municipal Powers

- Section 8 of the SFA sets forth powers of local agencies
- Municipalities only have powers afforded them by the state
- Pre-emption – if the state has occupied the field, municipalities have limited authority to regulate. Limited preemption by SFA.
- Local ordinances cannot conflict with state law.

Municipal Powers

- “Accordingly, the township zoning ordinance, by barring all possibility of any approval of this proposed system for the PRD, solely on account of its private ownership, is clearly in conflict with the entire thrust of the state's regulatory scheme to permit or reject sewage systems on the basis of their actual technical compliance with sanitary standards.” *Council of Middletown Township v. Benham*, 496 A.2d 1293 (Cmwlth. Ct. 1985)

Examples of Difficult Access Issues

- No trespassing sign
- “Get the hell off my property”
- Firearms or pitchforks
- Insisting on a warrant
- Biosecurity areas



When a Warrant is Not Required

- Pervasively Regulated Businesses
- Plain View
- Abandoned Property
- Exigent Circumstances/Emergency
- Consent
- Open Fields

Access - Practical Tips

- When possible, contact property owner prior to inspection to get consent
- Do not provoke confrontation
- Leave when confronted with threat and consult with your supervisor or attorney
- Involve state police as necessary
- Use your common sense; safety is paramount

Influencing DEP



Statutes, Regulations, and Policy

- Statutes – passed by legislature, have force of law, generally more general than regulations, often authorize promulgation of regulations
- Regulations –promulgated by regulatory agencies, specific process with public notice and comment, also have force of law
- Policies – drafted by regulatory agency, usually set forth operating procedures or agency interpretation of statutes or regulations, do not have force of law, agencies can deviate from policies

Influencing DEP

Permits:

- Good engineering makes good permits
- Grease the skids
- Do your homework
- Be responsive
- Strategic use of attorneys
- Don't ask DEP to craft plan – be proactive
- Document everything

Influencing DEP

Enforcement Actions:

- Nature of action – order or civil penalty
- Process leading up to enforcement – you should never be surprised
 - Inspection reports
 - Notice of violations
 - Proposed CO&A or CACP

What Type of Records are Public?

- Final decision documents
- Permits
- Submissions by permit applicants
- Name, title and salary of public employees
- Emails, unless privileged or exempt

I Am a Government Contractor. Are My Records Subject to RTKL?

- Contracts and bids generally are, unless they contain business confidential or trade secret information
- Communications with government entity generally subject to RTKL
- Internal communications generally are not subject to RTKL
- Inform agency that a document contains confidential information when you provide it to the agency

Questions?



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