COMMONWEALTH COURT OF PENNSYLVANIA

WEST ROCKHILL TOWNSHIP, Petitioner	:	
v.	:	1595 CD 2019
DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent	:	

BRIEF OF *AMICI CURIAE* CLEAN AIR COUNCIL, CITIZENS FOR PENNSYLVANIA'S FUTURE, FAIR SHAKE ENVIRONMENTAL LEGAL SERVICES, AND MOUNTAIN WATERSHED ASSOCIATION

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I. STATEMENT OF INTEREST

Amicus Clean Air Council (the "Council") is a tax-exempt non-profit organization established in 1967 under the laws of Pennsylvania, with a mission to protect everyone's right to a healthy environment. The Council has members throughout the Commonwealth. The Council fights to improve air quality across Pennsylvania through public education, community organizing, and legal action.

The Council frequently brings before the Environmental Hearing Board appeals of actions of the Pennsylvania Department of Environmental Protection (the "Department"). Currently, the Council has two such appeals, docketed at EHB Docket Nos. 2018-043 and 2018-057. The Council has also intervened in proceedings before the Federal Energy Regulatory Commission (FERC) relating to projects seeking approvals under the Natural Gas Act, such as the proceeding concerning the Adelphia Gateway Pipeline Project. *See* FERC Docket Nos. CP18-46-000 and CP18-46-001. The Council has a strong interest in the orderly workings of Natural Gas Act-related litigation and of the regulatory structures for review of Departmental actions.

Amicus Citizens for Pennsylvania's Future ("PennFuture") is a Pennsylvania tax-exempt non-profit organization whose mission includes protecting our air, water and land, and empowering citizens to build sustainable communities for

future generations. Since PennFuture's founding in 1998, protection of water resources and air quality across Pennsylvania has been a focus of the organization's legal, policy, and advocacy work. Members of PennFuture regularly use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania's environment. PennFuture appeals and intervenes in appeals of actions of the Department before the Environmental Hearing Board. PennFuture has a strong interest in protecting Pennsylvania's environment and upholding the appropriate regulatory structures for review of Departmental actions.

Amicus Fair Shake Environmental Legal Services ("Fair Shake") was incorporated under the laws of Pennsylvania in 2013 as the nation's first 501(c)(3) nonprofit law firm with a mission of increasing access to environmental justice. Fair Shake provides client-centered legal representation regardless of income to level the playing field for people of modest means. Fair Shake does not typically litigate or advocate on the organization's behalf, but instead advances client goals in each individual matter. Fair Shake regularly practices before the Environmental Hearing Board and is currently litigating a Department of Environmental Protection permitting decision docketed at EHB No. 2018-080. Whether representing third party appellants, defendants, or intervenors in a challenge to agency action, Fair Shake is interested in minimum due process for modest means

clients. In this context, due process means the opportunity for a *de novo* hearing before a decision-maker with specialized environmental expertise.

Amicus Mountain Watershed Association (MWA) is home to the Youghiogheny Riverkeeper. MWA is a Pennsylvania tax-exempt non-profit organization whose mission includes protecting, preserving, and restoring the Indian Creek and Greater Youghiogheny River Watersheds. Many of MWA's members use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania's environment. In addition, many of MWA's members live in close proximity to operations for extractive industries such as coal mining and Marcellus Shale drilling and are impacted by these operations in a multitude of ways. Since MWA's inception in 1994, the organization has brought several appeals before the Environmental Hearing Board regarding an array of issues that might threaten the environment and communities in the Youghiogheny River Watershed.

Pursuant to Pa.R.A.P. 531(b)(2), *Amici Curiae* disclose that no other person or entity other than *Amici Curiae* paid in whole or in part for the preparation of this *Amici Curiae* brief, nor authored in whole or in part this *Amici Curiae* brief.

II. ARGUMENT

Amici urge the Commonwealth Court to grant the Petition for Review of Petitioner West Rockhill Township ("West Rockhill"), reversing the Environmental Hearing Board's ("Board") dismissal of its appeal for lack of jurisdiction. For the reasons set forth in West Rockhill's Brief, the Board erred as a matter of law in misconstruing precedent of the Third Circuit Court of Appeals in concluding the Board lacked jurisdiction over the appeal. As set forth below, the Board's error has broad and likely unintended implications in federalizing control over state regulatory decisions and undoing the Pennsylvania General Assembly's specialized and *de novo* review framework for appeal of Departmental decisions. Such sweeping changes in the law violate the express statutory intent of the General Assembly and reach far beyond the bounds of the Board's limited powers as a quasi-judicial agency.

A. The Board's decision makes the validity of Departmental determinations a matter of federal, not Commonwealth, control, contrary to the Third Circuit and the Supreme Court's holdings in *Miller v. SEPTA*.

At the crux of the Board's decision is its reading of certain Third Circuit Court of Appeals decisions. There are several decisions that the Board refers to as

"the *Delaware Riverkeeper* cases."[1] These cases stand for the principle that if a party has commenced a civil action under the Natural Gas Act in the circuit court of appeals, that circuit court will have exclusive jurisdiction to hear it. The Third Circuit, citing the *Delaware Riverkeeper* cases, expanded upon that area of law in *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018). There, it concluded that "the conferral of 'original and exclusive jurisdiction' to the federal Courts of Appeals is limited to 'civil action[s'] … a 'civil action' refers only to civil cases brought in courts of law or equity and does not refer to hearings or other quasi-judicial proceedings before administrative agencies." *Twp. of Bordentown*, 903 F.3d at 266-67. The Third Circuit in *Township of Bordentown* discussed the *Delaware Riverkeeper* cases at length and described them as coming to the same conclusion: that appeal to the Environmental Hearing Board was available if the petitioners had chosen it and not the Third Circuit as the forum. *Id.* at 268-269.

Notwithstanding this clear ruling, the Board dismissed the *Bordentown* decision without further comment as follows: "Although the Opinion [in *Delaware Riverkeeper III*] is labeled 'NOT PRECEDENTIAL,' it tends to remove any doubt that the *Delaware Riverkeeper* cases apply in Pennsylvania notwithstanding the

[1] *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 783 Fed. Appx. 124 (3d Cir. 2019); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648 (2019) ("*Delaware Riverkeeper III*"); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 870 F.3d 171 (3d Cir. 2017); and *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360 (3d Cir. 2016).

Court's arguably inconsistent statements with respect to New Jersey proceedings at issue in *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018)." Based on this reasoning, the Board declared itself without jurisdiction and dismissed the appeal.

In so ruling without analyzing the "arguably inconsistent statements" in *Township of Bordentown*, the Board actually violated the law reaffirmed by several of the Third Circuit opinions the Board relied on. The "NOT PRECEDENTIAL" decision the Board cited to principally explained that "[p]arties can appeal any Department decision to Pennsylvania's Environmental Hearing Board," precisely contrary to the Board's holding. *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 783 F. App'x 124, 126 (3d Cir. 2019).

The Board's dismissal of the appeal also puts it at odds with statute and precedent from this Court and the Supreme Court. "The board has the power ***and duty*** to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the department." Environmental Hearing Board Act, Section 4(a) (emphasis added). That is the role of the Board. "Pennsylvania's environmental administration is divided among three entities: DEP, which enforces environmental laws and regulations; the EQB, which is a rulemaking body; and the Environmental Hearing Board, an adjudicative entity tasked with resolving

disputed matters." *Marcellus Shale Coal. v. DEP*, 185 A.3d 985, 985 n.1 (Pa. 2018).

The clear Pennsylvania law on the matter could only be overruled by federal pre-emption, which is what the Board relied on. However, federal pre-emption is not easily or lightly found:

> Similarly, given that this Court's powers are derived from the citizens of Pennsylvania, we do not lightly set aside their existing rights or remedies in deference to uncertain federal law, particularly where doing so would leave Pennsylvania citizens without any remedy at all in an area where a remedy otherwise might obtain. Thus, independent of the teaching of the High Court, there is good reason for this Court to be certain of federal congressional intent before allowing federal law to divest Pennsylvanians of the rights and remedies afforded under the laws of this Commonwealth. Thus, this Court has held: "concepts of federalism and state sovereignty make clear that in discerning whether Congress intended to preempt state law, there is a presumption against preemption[,]" as we also require a clear manifestation of congressional intent to preempt. *Dooner v. DiDonato*, 601 Pa. 209, 971 A.2d 1187, 1194 (Pa. 2009). We have emphasized that, even where federal law contains an express preemption clause, our duty is to further inquire as to the scope and substance of any displacement of our state laws. *Id.* at 1193.

Miller v. SEPTA, 103 A.3d 1225, 1236 (Pa. 2014).

The *Bordentown* and *Delaware Riverkeeper* decisions are consistent: There is an absolute right to appeal Departmental decisions to the Environmental Hearing

Board, unless the potential appellant has already waived that right by commencing a civil action in federal court. West Rockhill exercised and did not waive its right to appeal. Even if this Court were to discern some difficulty in harmonizing the *Bordentown* and *Delaware Riverkeeper* decisions, there can be no question that the "clean manifestation of congressional intent to preempt" that *Miller* requires is lacking. Therefore, under the binding precedent of *Miller*, the Board's decision must be reversed.

B. The Board's decision undermines the specialized review framework the General Assembly intended the EHB to perform.

The Board's finding of no jurisdiction in the appeal below has broad implications for the scope and nature of review available to potential parties in cases involving Natural Gas Act facilities. In dismissing West Rockhill's appeal, the Board erroneously created a new rule withholding from parties their rights to due process and significant fact-finding opportunities, as well as preventing a tribunal with specialized expertise from hearing cases within the scope of that expertise. This rule undercuts the framework the General Assembly put in place when it created the Environmental Hearing Board.

The General Assembly designed the Environmental Hearing Board as a type of what are sometimes broadly called "environmental appeal boards," or "EABs."

> In general, governments create EABs in recognition of the fact that courts are not suited or trained to handle particular technical or scientific issues or certain programmatic policy questions, such as giving effect to environmental preservation or goals of sustainable development. EABs offer speedier and less expensive results without jeopardizing principles of fairness and justice. The greatest advantage is that specialized EABs can be created with their own expertise.

William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England*, 21 Colum. J. Envtl. L. 1. The Board is precisely such an EAB. Unlike federal circuit court judges, Board judges must have five years of practice before administrative agencies or equivalent experience. Environmental Hearing Board Act, HB 1432, 1987-1988 Session ("EHB Act"), at Section 3(e)(2). Board judges develop "specialized expertise" due to their exclusive review of the technical matters brought before the Board. *See EQT Prod. Co. v. DEP*, 130 A.3d 752, 759 (Pa. 2015); *Pennsylvania Trout v. DEP*, 863 A.2d 93, 110 (Pa. Cmwlth. 2004) (the Board "enjoys expertise in the subject matter"); *Wheeling Pittsburgh Steel Corp. v. DEP*, 2008 EHB 338, 352 ("because the Board has specialized expertise in the interpretation of environmental regulations, it is not placed in the same position as a reviewing court"). The benefit of having a specialized tribunal with environmental expertise hearing exclusively environmental appeals is self-evident.

Also unlike the federal circuit courts of appeal, the Board "is not an appellate body with a limited scope of review attempting to determine if [the Department's] action can be supported by the evidence received at [the Department's] fact finding hearing." *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Rather, the Board's duty is to determine if the Department's permit decision is valid based on whatever evidence may be gathered and presented to the Board. *Id; see also DEP v. N. Am. Refractories Co.*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002). As a consequence, "when an appeal is taken from [the Department] to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law." *Warren Sand & Gravel*, 341 A.2d at 565.

De novo review is not necessarily a boon to appellants as opposed to permittees or the Department. Sometimes later-gathered evidence will reveal weakness in the Department's action. *See*, e.g., *Center for Coalfield Justice v. DEP*, 2017 EHB 38, 55 (relying on extensive evidence at multi-day hearing in support of partial grant of supersedeas). At other times, later-gathered evidence will support the Department's action. *See*, e.g., *Delaware Riverkeeper Network v. DEP*, 2018 EHB 447, 477-489 (relying on evidence of environmental issues

actually caused by the permitted activity in denying appeal). But *de novo* review is a crucial component of due process that the Board has taken away here.

> The Pennsylvania Legislature and the Commonwealth Court have unambiguously delineated that the Board is a judicial tribunal of first impression. The Board protects the procedural due process rights of persons who allege and can prove that they are adversely affected by an action of DEP, a governmental agency.

Smedley v. DEP, 2001 EHB 131, 156-157. These rights include the right to conduct discovery, present additional evidence, subpoena witnesses, examine witnesses, and present cases orally. *Id.* at 157.

West Rockhill, and future potential litigants such as *Amici*, will not receive *de novo* review in federal court. West Rockhill, and future potential litigants such as *Amici*, will be restricted to making their cases based on the limited administrative record that the Department took. This is contrary to the General Assembly's will and overturns decades of practice. *See* Environmental Hearing Board Act, HB 1432, 1987-1988 Session.

West Rockhill's appeal involves a permit issued for specialized natural gas compression and metering equipment, which the Board is best equipped to understand and evaluate based on its expertise in environmental control technology. Among other objections, for example, West Rockhill objects that technology for reducing emissions at the facility was unreasonably ignored by the

Department, and that the Department did not comply with provisions of the Pennsylvania Constitution. It has a right to develop those theories based on additional information in a Commonwealth tribunal of first impression. West Rockhill's case is emblematic of other appeals the General Assembly designated for hearing by the Board, which similarly require the Board's expertise and its procedures.

This Court should reverse the decision below in order to ensure that the General Assembly's framework for appeals of Department decisions is preserved.

C. The Board lacked power to make such sweeping changes to the administrative process.

The Board overstepped its authority in dismissing West Rockhill's appeal because it lacks the power to change its jurisdiction and mandate. The powers of the Board as set by the Pennsylvania General Assembly are clear and finite: It must hold hearings and issue adjudications pursuant to the Environmental Hearing Board Act, determining whether the Departmental action in question is a proper exercise of authority. *DEP v. N. Am. Refractories Co.*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002). The General Assembly did not invest the Board, as an adjudicative actor, with the power to play a role in policy-making. *Id*. at 466.

In dismissing West Rockhill's permit appeal and denying it the *de novo* review of an administrative quasi-judicial tribunal, the Board shrank its own

jurisdiction and narrowed its own mandate. Should the Board's dismissal stand, it will be federal courts outside the reach of Commonwealth policymakers and courts that decide whether and how Pennsylvania can issue permits. Only the General Assembly or the U.S. Congress can make such policy decisions.

Because the Board overreached in deciding to narrow its own jurisdiction, this Court should reverse the decision below.

III. CONCLUSION

The Environmental Hearing Board's decision below not only violates the clear letter of the law, but also severely undermines the integrity of the procedures the General Assembly put in place to review actions of the Department of Environmental Protection. Courts cannot find pre-emption of state law without a clear manifestation of Congressional intent which is entirely lacking here. The Board overstepped its authority in undermining the General Assembly's framework.

As litigants before the Board, and for the foregoing reasons, *Amici Curiae* respectfully request that the Commonwealth Court grant West Rockhill Township's Petition for Review and reverse the Environmental Hearing Board's dismissal of the appeal below.

Respectfully submitted,

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Word Count Certification

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 2797 words, exclusive of the cover page, table of contents, signature blocks, and certifications.

DATE: January 27, 2020 /s/ *Alexander G. Bomstein*
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Pa.R.A.P. 127 Confidentiality Certification

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

DATE: January 27, 2020 /s/ *Alexander G. Bomstein*
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