IN THE SUPREME COURT OF PENNSYLVANIA

No.: _____ Allocatur Docket 2021

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND SUNOCO PIPELINE L.P.
Respondents

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the final Order of the Commonwealth Court of Pennsylvania entered February 16, 2021 under No. 309 C.D. 2019, consolidated with No. 313 C.D. 2019, affirming the Order by the Environmental Hearing Board entered February 19, 2019 under EHB Docket No. 2016-073-L.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

REPORTS OF OPINIONS BELOW

Petitioners Clean Air Council, the Delaware Riverkeeper Network, and Mountain Watershed Association, Inc. file this Petition for Allowance of Appeal from the Order of the Commonwealth Court dated February 16, 2021, in accordance with Pennsylvania Rules of Appellate Procedure 1111–1122. The opinion below was entered in *Clean Air Council, the Delaware Riverkeeper Network, and Mountain Watershed Association, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, No. 309 C.D. 2019, and *Department of Environmental Protection v. Clean Air Council, the Delaware Riverkeeper Network, Mountain Watershed Association, Inc., and Sunoco Pipeline, L.P.*, No. 313 C.D. 2019, a consolidated case.[1]

A copy of the Opinion and Order entered February 16, 2021 is attached as Appendix A and is referenced herein as the "Opinion." The Opinion, through a four-judge majority, granted Sunoco's Application to Quash the appeal of the Pennsylvania Department of Environmental Protection ("DEP"), quashed DEP's appeal, and affirmed the Opinion and Order of the Environmental Hearing Board of the Commonwealth of Pennsylvania entered February 19, 2019 under EHB

[1] Petitioners, together with the Department of Environmental Protection, were the Designated Petitioners before the Commonwealth Court, while Sunoco Pipeline L.P. was an intervenor in the 309 C.D. 2019 case.

Docket No. 2016-073-L. That "EHB Opinion" is attached hereto as Appendix B.

In this case, Petitioners seek review of a novel and erroneous standard set by a majority of the Environmental Hearing Board ("EHB") for the awarding of attorney's fees and costs against a permittee in a third-party permit appeal brought under Section 307(b) of the Clean Streams Law.

This case also addresses a matter of substantial importance: whether a permittee can be held responsible for attorney's fees for a third-party appellant or whether the full responsibility lies with DEP, and hence, the taxpayers.

TEXT OF THE ORDER IN QUESTION

The Order of the Commonwealth Court of Pennsylvania entered February 16, 2021 at No. 309 C.D. 2019 provides in relevant part as follows:

> AND NOW, this 16th day of February, 2021, Sunoco Pipeline, L.P.'s Motion to Quash is GRANTED; the Department of Environmental Protection's above-captioned appeal is QUASHED; and the order of the Commonwealth of Pennsylvania, Department of Environmental Protection is AFFIRMED.

QUESTIONS PRESENTED

1. Did the Commonwealth Court err by reviewing a pure question of law using the abuse of discretion standard of review, rather than the legal error standard, contrary to *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007), *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1 (Pa. 2011), and *DEP v. Bethenergy Mines*, 758 A.2d 1168 (Pa. 2000)?

Suggested Answer: Yes. *Answer Below: No.*

2. Did the Commonwealth Court err in adopting a new standard for fee awards under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), where that standard sets aside this Court's holding in *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007) and ignores the text and purpose of the law?

Suggested Answer: Yes. *Answer Below: No.*

3. Did the Commonwealth Court err by basing its conclusions on material facts clearly contrary to the record?

Suggested Answer: Yes. *Answer Below: No.*

STATEMENT OF THE CASE

I. The Underlying Appeal

This case originated with Sunoco's application for permits under 25 Pa. Code Chapters 102 (erosion and sediment control) and 105 (water obstruction and encroachment) relating to the construction of pipelines to be part of Sunoco's Mariner East natural gas liquids transmission system. On February 13, 2017, DEP issued three Chapter 102 permits and 17 Chapter 105 permits for the pipeline project. (EHB Opinion pp. 1-2). Petitioners appealed each of the 20 permits. (Opinion p. 2). Meanwhile, Sunoco began work on the project. (*Id.*).

After Sunoco's construction under the permits kicked off with disastrous damage from its horizontal directional drilling ("HDD") operations, on July 19, 2017, Petitioners filed requests for a partial supersedeas and a temporary partial supersedeas seeking to halt those HDD activities. (*Id.*). On July 25, 2017, the EHB granted the application for a temporary partial supersedeas in part, halting much of Sunoco's construction. (*Id.*). Before the hearing on the partial supersedeas petition, all the parties submitted to the EHB a negotiated proposed stipulated order settling the petition, including substantive terms providing forward-looking relief. (EHB Opinion p. 2-3). The EHB approved the stipulated order, as slightly revised, on August 10, 2017. (*Id.*).

In April 2018, all the parties negotiated the settlement of another petition for partial supersedeas that Petitioners filed, also relating to drilling for pipeline installation and also providing forward-looking relief. (EHB Opinion p. 4). The EHB approved the settlement as a stipulated order after a hearing on April 16, 2018. (EHB Opinion pp. 4-5).

These two settlements and the associated orders altered the permits and required changes in Sunoco's activities under the permits:

> The corrected stipulated order contained several provisions related to Sunoco's ongoing HDD activities. For example, Sunoco was required to perform reevaluations of some of its HDD sites that were to include, as appropriate, additional geotechnical evaluations. The parties also agreed to revisions to several plans that are incorporated by reference into the Chapter 105 permits—the HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan (the "HDD Plan"); the Water Supply Assessment, Preparedness, Prevention and Contingency Plan; and the Void Mitigation Plan for Karst Terrain and Underground Mining. Sunoco agreed to abide by those plans, as revised.

(EHB Opinion pp. 3-4).

On July 26, 2018, Petitioners and DEP reached a final settlement of the appeal before the EHB, resulting in the withdrawal of the appeal on July 31, 2018. (EHB Opinion p. 5; R. 32a-47a). As part of the settlement, Petitioners agreed not to seek further reimbursement of attorney's fees or costs (to simplify, "fees") from DEP. (*Id.*). On August 30, 2018, Petitioners applied for fees from Sunoco related

to the first two settlements in the case, to which Sunoco was a party, and Sunoco applied for fees from Petitioners. (EHB Opinion pp. 5-6; *see* R. 1a- 30a). Petitioners have not sought fees relating to the settlement which did not involve Sunoco. (EHB Opinion pp. 5-6).

After Sunoco raised the issue of whether a party may recover fees from a permittee as a matter of law in its response to Petitioners' fee application, the parties (including DEP) submitted additional briefing on that issue. (EHB Opinion p. 6). The EHB heard oral argument *en banc* on January 18, 2019. (*Id.*).

II. The EHB Opinion

By Order dated February 19, 2019, in an Opinion authored by the Honorable Bernard A. Labuskes, Jr., a majority of the EHB denied both applications for fees. The majority relied on public policy arguments, *Lucchino v. Commonwealth*, 809 A.2d 264 (Pa. 2002), and other decisions to hold that fee liability could only be assigned to a permittee if the permittee engaged in bad faith or vexatious conduct (to simplify, "bad faith"). In contrast, fee liability can be assigned to DEP in all circumstances in which the EHB decides the applicant merits fees.[2]

[2] Here, that would be under the catalyst test, where the applicant shows that (1) the opposing party provided some of the benefit the fee-requesting party sought in the underlying suit, (2) the suit stated a genuine claim, and (3) the suit was a substantial or significant reason why the opposing party, voluntarily or otherwise, provided the benefit or partial benefit that the fee-requesting party sought in the underlying suit. *Upper Gwynedd Towamencin Mun. Auth. v. DEP*, 9 A.3d 255 at 264-265 (Pa. Cmwlth. 2010).

In a dissenting opinion, Judge Renwand engaged in statutory interpretation and analyzed the precedent from this Court, explaining that "if the Pennsylvania General Assembly had wanted the Board to apply a different standard in considering fee awards against a permittee than against the Department, I believe it would have stated so." (EHB Opinion p. 20) (Renwand, J., dissenting). Judge Renwand remarked,

> The majority offers no clear explanation or, more importantly, any legally-sound reasoning as to why the same standards applied against the Department should not be equally applied when considering a fee request against a permittee. ...
>
> [T]he Pennsylvania Supreme Court and Commonwealth Court have given the Board clear and specific direction on how we should evaluate an application for attorneys' fees and costs under Section 307(b) of the Clean Streams Law, and the courts have not hesitated to overturn the Board's rulings when we have taken an overly narrow approach. The courts have stated over and over again that the Board has broad discretion to award attorney's fees, and time and time again the Board has failed to heed this directive.

(*Id.* at pp. 19, 25, internal quotation marks and citation omitted). The dissent did not opine on what fees if any would be proper, had the standard for awarding fees been correct. (*Id.* at pp. 19-25).

The majority opinion recognized that Petitioners achieved some degree of success and that Sunoco "made significant concessions that resulted in substantial changes" in its construction due to Petitioners' litigation. (EHB Opinion pp. 11,

16). The dissent remarked that "There appears to be no question here that the Appellants secured changes to the design of the project and plans related to the permit application." (EHB Opinion p. 22) (Renwand, J. dissenting).

III. The Commonwealth Court Opinion

Petitioners filed a Petition for Review on March 20, 2019, seeking review of the EHB's novel standard for fee-shifting under the Clean Streams Law, and DEP filed a parallel Petition for Review on March 21, 2019. The parties briefed the matter in the parallel and consolidated appeals. Sunoco filed an Application to Quash DEP's appeal, claiming DEP lacked standing. In its February 16, 2021 opinion, the Commonwealth Court affirmed the EHB's decision and quashed DEP's appeal.

The Opinion makes some problematic assertions that are directly contradicted by the record. The first is when the majority states that "the EHB minority agreed that neither Objectors nor Sunoco was entitled to attorney's fees under the circumstances." (Opinion p. 5). In fact, Judge Renwand only agreed that Sunoco is not entitled to attorney's fees (because Petitioners "raised important issues of vital public concern that are very much in the public interest"), which is the entire extent of his concurrence. (*See* EHB Opinion pp. 19-25). Having thus established incorrectly that the Appellants had no real stake in the result of its decision, the Commonwealth Court recited the procedural history before turning to

the Application to Quash. The majority quashed DEP's appeal on the grounds that DEP did not "ever formally [seek] intervention in the attorney's fee and cost application proceedings," referring to the EHB proceedings in *Clean Air Council et al. v. DEP*, EHB Dkt. No. 2017-009, in which DEP had always been a party. (Opinion p. 7).

The majority then discussed the parties' arguments on the merits of the appeal, but did not address whether the EHB's decision constituted error of law. Rather, the majority articulated an abuse of discretion standard of review and then simply concluded that adoption of the bad faith standard was not an abuse of discretion:

> In the instant case, it was entirely within EHB's discretion, and eminently appropriate, to apply the instant bad faith standard in deciding whether or not to impose costs and fees upon a private party permittee. In sum, "our disagreement with the EHB's reasoning or result is not sufficient ground to overturn the EHB's decision," and "[w]e may not substitute our judgment for that of the EHB" in this regard.

(Opinion pp. 18-19).

A concurrence by Judge Brobson (to which Judge Jubilerer joined) disagreed with the majority on the adoption of a new bad faith standard, remarking that there was no reason why bad faith must be the only test the EHB may apply, and so "[he], therefore, cannot endorse it." (Opinion, Concurrence PKB-3). The

concurrence then discusses a different settlement agreement which was not the basis for the fee request, and bases its decision on that irrelevant settlement:

> Sunoco was not a party to the settlement agreement between Objectors and DEP that essentially ended Objectors' appeals. Moreover, Sunoco gave up nothing in the settlement or otherwise. Sunoco kept its permits, unaltered, as if Objectors had not even filed their appeals with the EHB. Under such circumstances, it would be manifestly unreasonable to order Sunoco, or any permittee, to pay Objectors' attorney's fees.

(Opinion, Concurrence PKB-4). Notably, both the majority and dissenting EHB Opinions found that Sunoco made significant concessions to Petitioners, contrary to Judge Brobson's statement. (EHB Opinion pp. 11, 16, and 22).

Finally, a dissenting opinion found the EHB's use of a bad faith standard to be an abuse of its discretion. (Opinion, Dissent EC-4). Critically, the dissent explained:

> Requiring a showing of bad faith in this kind of situation does not square with the public policy purpose underpinning Section 307(b)'s fee-shifting language. To state the obvious, a permittee necessarily plays a critical role in the permitting process, for without an initial permit application, there would be no reason for subsequent litigation initiated by a third party. It does not therefore seem reasonable that, in theory, the DEP could be saddled with fees and costs in response to inadvertent mistakes or good faith, negotiated compromises or settlements, while a permittee could get off scot-free under similar circumstances unless it has conducted itself in a dilatory, obdurate, or vexatious way.

(Opinion, Dissent EC-2).

REASONS FOR ALLOWANCE OF APPEAL

Petitioners seek this Court's review of a split decision by the Commonwealth Court that leaves the fee-shifting provision of the Clean Streams Law gutted. Commonwealth Court does this contrary to the clear intent of the General Assembly, contrary to this Court's earlier binding pronouncements, and based on mistakes of fact and errors of law. As a threshold matter, the Commonwealth Court applied the abuse of discretion standard of review despite the question being a matter of statutory interpretation. In the past, this Court has reviewed statutory interpretation using the error of law standard, which is what was required here. Only four of the seven reviewing Commonwealth Court judges agreed with the Environmental Hearing Board's "bad faith" standard for shifting fees to permittees in third-party appeals of DEP decisions, which was itself newly established in a split decision of the EHB. The EHB committed an error of law in assigning this new standard, unsupported by legislative intent and statutory language, and which leaves all third-party appellants, state government, and the Commonwealth's taxpayers ultimately holding the bag.

Under Pennsylvania Rule of Appellate Procedure 1114, this Court may grant allocatur when "the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court [...] on the same legal question," when "the question presented is one of first impression," when "the question presented is

one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court," and when "the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal." Pa.R.A.P. 1114(b)(2)–(4), (7). In this instance, all of those reasons apply.[3]

I. This is a matter of first impression.

Whether the Environmental Hearing Board's creation and the Commonwealth Court's affirmation of a strict, novel standard in determining attorney's fee awards against permittees in third-party permit appeals under Section 307(b) of the Pennsylvania Clean Streams Law usurped the role of the General Assembly and deviated from precedent is a matter of first impression for this Court. Hence, allowance of this appeal is appropriate under Pa.R.A.P. 1114(b)(3).

[3] Although Petitioners do not address it further below, Petitioners agree with DEP's position in its parallel petition for allowance of appeal of the quashal of case No. 313 C.D. 2019 that its appeal was wrongly quashed. Put simply, one need not independently intervene in a case to which one is already a full party, and no party or court has identified a rule or case which suggests otherwise.

II. The Commonwealth Court's application of the abuse of discretion standard for reviewing the EHB's newly articulated legal principles conflicts with this Court's holdings in *Solebury Twp. v. DEP, Samuel-Bassett v. Kia Motors Am., Inc.*, and *DEP v. Bethenergy Mines.*

The Commonwealth Court's use of the abuse of discretion standard for reviewing the newly created legal test conflicts with Supreme Court decisions establishing the standard for review of statutory interpretation and other purely legal matters: error of law.

Awards of attorney's fees for sanctionable conduct such as bad faith are based on the trial court's factual finding of bad faith, and thus are reviewable only for abuse of discretion. *Lucchino v. Commonwealth*, 809 A.2d 264, 269-270 (Pa. 2002); *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996). However, this Court has made clear that review of the EHB's *approach* to statutory fee decisions is a matter of statutory interpretation and the appropriate standard of review is error of law, not abuse of discretion. The *Solebury* decision illustrates this distinction.

In *Solebury*, this Court wrote, "As this matter presents questions of statutory interpretation, our standard of review is *de novo*. … In considering the propriety of an award of counsel fees, however, appellate review is limited to determining whether the award constituted an abuse of discretion." *Solebury Twp. v. DEP*, 928 A.2d 990, 997 n.8 (Pa. 2007). The *Solebury* Court reviewed the decision of the EHB to deny attorney's fees under Section 307(b) of the Clean Streams Law *de*

novo, not under an abuse of discretion standard, since the matter turned not on factual findings but on the Court's interpretation of the Clean Streams Law. *Id.* at 1003-05.

The Court concisely glossed its *Solebury* decision in the more recent decision in *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1 (Pa. 2011). The Court wrote that they "held that the Board's restrictive application of the narrow federal criteria was not supported by the plain language of the fee-shifting provision of the Pennsylvania statute." *Id.* at 56 n.42 (citing *Solebury*); *see also id.* at 51 (abuse of discretion standard applies to "the propriety of the amount awarded" under *Solebury*). This Court then reviewed the questions of how the fee-shifting statute is to be interpreted for error of law, and reviewed the trial court's decision as to the amount of the award for abuse of discretion. *Id.* at 51-57. *See also DEP v. Bethenergy Mines*, 758 A.2d 1168 (Pa. 2000) (reviewing EHB fee award under parallel fee-shifting provision in the Mine Subsidence Act for error of law rather than abuse of discretion, where the issue required interpretation of the fee-shifting provision).

The issue in this case is a purely legal question of statutory interpretation: does Section 307(b) of the Clean Streams Law support the EHB's newly held requirement to show bad faith before fees may be awarded from a permittee? This is precisely the type of question that this Court reviewed for error of law in

Solebury, which held that the standard under which the EHB denied fees "was too narrow in view of the broad language of Section 307 and the public policy favoring liberal construction of fee-shifting provisions." *Solebury Twp.*, 928 A.2d at 1005.

The Commonwealth Court here, however, assumed that because the EHB has discretion to adopt standards to evaluate fee-shifting, *Solebury Twp.*, 928 A.2d at 1004, that such standards are unconstrained by law. (Opinion p. 18). The majority opinion does not appear to question whether the EHB made a legal error. Rather, it articulates the standard of review as abuse of discretion, and affirms the order for the sole reason that it does not find EHB to have abused its discretion. (Opinion pp. 18-19). As explained above, this mistake puts the decision in direct conflict with *Solebury Township*, *Samuel-Bassett*, and *Bethenergy Mines*.

This mistake is even plainer in the concurring opinion of Judge Brobson. He writes, "There are no standards in this section or elsewhere to cabin the EHB's discretion." (Opinion, Concurrence PKB-2). Operating under that misunderstanding of the law, he then concludes that the EHB's unbridled discretion under the Clean Streams Law makes that law an unconstitutional delegation of the General Assembly's power. (*Id.*).[4] Indeed, Section 307(b) is not

[4] The concurrence nonetheless agreed that the result of denying fees should be upheld, based on a very basic misconception that Petitioners sought fees for the final settlement to which Sunoco was not a party, rather than the two earlier settlements to which it was. The majority also curiously only mentions the one irrelevant settlement in its factual recitation rather than the two on which

an unconstitutional delegation of power in part *because* this Court has ruled in *Solebury Township* and elsewhere that the EHB's discretion to set standards for grants of fee awards is subject to reversal for error of law just like all other legal conclusions by subordinate tribunals.

This Court should review this decision to restore the proper standard of review and ensure that errors of law greatly affecting the rights of litigants are not left forever out of reach of this Court's supervision. *See* Pa.R.A.P. 1114(b)(2).

III. The Commonwealth Court's adoption of the EHB's new standard for fee awards under Section 307(b) conflicts with this Court's substantive holding in *Solebury Twp. v. DEP.*

By affirming the EHB's Opinion and adopting a restrictive standard that hinders Pennsylvania's policy to liberally construe the Clean Streams Law fee-shifting provision, the Commonwealth Court's holding conflicts with this Court's decision in *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007).

In *Solebury Twp.*, this Court rejected an attempt by the EHB to implement a more restrictive standard for the awarding of fees where the EHB had not rendered a final ruling on the merits. The EHB had initially denied third-party appellants'

Petitioners based their fee application. (Opinion pp. 2-4). This basic misunderstanding of the facts appears to have swayed some of the judges and perhaps most of them. It is a serious error which this Court should address on review. However, because it is a factual error, it is not among the bases for allowance of appeal, and so Petitioners do not discuss it in greater depth herein.

applications for attorney's fees from multiple respondents under its reading of the fees test in *Kwalwasser v. Department of Environmental Resources*, 569 A.2d 422 (Pa. Cmwlth. 1990). *Solebury Twp. v. DEP*, 2004 EHB 153. The respondents, who would ultimately pay fees, were DEP and the permittee, which was the Pennsylvania Department of Transportation.

The Commonwealth Court then issued a decision reversing the EHB's narrow application of the *Kwalwasser* test, *Solebury Twp. v. DEP*, 863 A.2d 607 (Pa. Cmwlth. 2004), which this Court affirmed. *Solebury Twp. v. DEP*, 928 A.2d 990, 1004 (Pa. 2007). This Court held that fee-shifting provisions should be liberally interpreted "given Pennsylvania's strong policy to justly compensate parties who challenge agency actions..." *Id.* Upon remand from this Court back to the EHB, the third-party appellants were able to collect attorney's fees from both DEP *and the permittee* under Section 307(b) of the Clean Streams Law. *Solebury Twp. v. DEP*, 2008 EHB 658.

Solebury thus established two important points: First, that the EHB may not unduly restrict access to fees under the Clean Streams Law, and second, that collection of fees from permittees (and not just DEP) is permissible in the normal course. Regarding the latter point, the Commonwealth Court has split attorney's fees among private defendants under the Clean Streams Law as well. *Department*

of Environmental Resources v. PBS Coals, Inc., 677 A.2d 868 (Pa. Cmwlth. 1996).[5]

Regarding the first point, it is important to understand the General Assembly's purpose in establishing the fee-shifting provision and how this Court interpreted the law in light of that purpose and Pennsylvania policy.

The *Solebury* Court relied on the plain language of Section 307(b) and the policy it is meant to enact when it held that the EHB unduly constrained the shifting of fees to third-party appellants. *Solebury Twp.*, 928 A.2d at 1004. This is consistent with earlier precedent establishing that where the General Assembly includes a fee-shifting provision in a remedial statute, any discretionary award of fees should be made in a manner consistent with the aims and purposes of the statute. *Krebbs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006); *Krassnoski v. Rosey*, 684 A.2d 635, 639 (Pa. Super. 1996) (where counsel fees are authorized by statute, court should consider whether an award of fees would promote the purposes of the specific statute involved).

The remedial purpose of the Clean Streams Law is to protect Pennsylvania's waters. In the context of EHB appeals addressing Section 307(b), third-party

[5] The *PBS Coals* court ordered two private companies, Fetterolf Mining, Inc. and PBS Coals, Inc., to pay attorney's fees to the plaintiff. *Id.* at 870. Although the opinion does not reveal how the court determined the methodology for allocating fees between the two defendants, the prevailing party was able to collect attorney's fees from two private companies, both acting as defendants. *Id.*

appellants are the "chosen instrument" of the General Assembly to vindicate the important public interests at stake in the Clean Streams Law, by appealing agency actions which may not adequately protect our waters. *See* 35 P.S. § 691.307(b); *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). Indeed, this is precisely the reason for the higher standard for fee recovery against third-party appellants under Section 307(b). *Lucchino v. Commonwealth*, 809 A.2d 264, 270 (Pa. 2002) (acknowledging the "potential 'chilling effect' on the willingness of the ordinary citizen to pursue resolution of his disputes in the courts" where fees are available against third-party appellants even under a bad faith standard).

In contrast, the permittee in a third-party appeal defends the action which may harm Pennsylvania's waters. The EHB's decision to require bad faith before fees may be awarded from permittees has no grounding in the language of the statute or in the purpose or policy behind it. Permittees do not vindicate the policy purpose of the Clean Streams Law, as the permit allows them to pollute Pennsylvania's waters. As Judge Ceisler explained in her dissent, "Requiring a showing of bad faith in this kind of situation does not square with the public policy purpose underpinning Section 307(b)'s fee-shifting language." (Opinion, Dissent EC-2). The motivating force behind this Court's cautionary note in *Lucchino* on the danger of a "chilling effect" for potential appellants does not exist for

permittees. A potential permittee will not hesitate to apply for a permit based on speculation that DEP will abuse its discretion in issuing one, and a third party will then appeal it, and fees will then be awarded. (Opinion, Dissent EC-3 to EC-4).

In approving the EHB's new, heightened standard for shifting fees, the Commonwealth Court directly contravenes this Court's instruction to liberally construe the fee-shifting provision in order to further the purpose and intent of the Clean Streams Law. Because the majority opinion simply disregards the framework this Court set up in *Solebury* and earlier in *Lucchino*, this Court should review the Commonwealth Court's decision below. Pa.R.A.P. 1114(b)(2).

IV. The standard for attorney's fee awards under Section 307(b) of the Clean Streams Law is an issue of substantial public importance.

This case implicates an issue of substantial public importance: whether, under this new, harsher standard (which favors private interests while unduly burdening the public) third parties will continue to be sufficiently incentivized to bring meritorious cases. A second issue of substantial public importance is at stake: whether it was the drafters' intent that Pennsylvania taxpayers must bear the entire burden of a fee scheme created to encourage citizen enforcement against environmental threats, or whether some of that burden should fall on the regulated industry that is making the threat and which has benefited from the agency action.

As explained above, Pennsylvania has a strong policy to liberally construe fee-shifting provisions such as Section 307(b) and to "justly compensate parties

who challenge agency actions." *Solebury Twp.*, 928 A.2d at 1004. These policies are promoted in order to encourage and compensate third parties who challenge permits for the benefit and health of Pennsylvania's residents and, in this case, clean streams and drinking water. The new, heightened standard for attorney's fee awards makes it harder for appellants to receive compensation for their efforts bringing meritorious cases. And a recent trend in EHB and Commonwealth Court decisions gives reason for real concern that the incentive structure the General Assembly put in place when enacting Section 307(b) is being chipped away. *See*, e.g., *Sierra Club v. DEP*, 211 A.3d 919 (Pa. Cmwlth. 2019) (affirming strict notion of causation requirement for fee award under the catalyst test in a case where EHB denied fees); *Gerhart v. DEP*, EHB Docket No. 2017-013-L (Opinion Jan. 7, 2020) (awarding about 5% of the requested fees where the EHB disagreed with the appellants' efforts to achieve stronger protections under the Clean Streams Law throughout the Commonwealth, because those stronger protections would not have exclusively benefited appellants); *Friends of Lackawanna v. DEP*, 2018 EHB 401 (awarding about 2% of the requested fees in large part because the appellant did not achieve the most ambitious of its goals in the appeal).

It cannot be said that the Department will just shoulder more of the burden of fees, leaving appellants in the same position. The EHB has made clear that it considers the burden on the taxpayers when deciding fee awards. *See*, e.g., *Gerhart*

v. DEP, EHB Docket No. 2017-013-L (Opinion Jan. 7, 2020) (referring repeatedly to the fairness to taxpayers to pay for attorney's fees and costs in the course of awarding about 5% of the requested fees); *Angela Cres Trust of June 25, 1998 v. DEP*, 2013 EHB 130 (same, in course of denying fee request). Having the recipients of agency permits justly bear some of that cost would free up the EHB to award fees, or a larger percentage of fees, in response to otherwise meritorious fee requests. On that point, Judge Ceisler rightly reasoned in her dissent:

> It does not therefore seem reasonable that, in theory, the DEP could be saddled with fees and costs in response to inadvertent mistakes or good faith, negotiated compromises or settlements, while a permittee could get off scot-free under similar circumstances unless it has conducted itself in a dilatory, obdurate, or vexatious way.

(Opinion, Dissent p. EC-2).

Judge Renwand likewise underscores in his dissent that the permittee is a critical party and well situated to bear the same costs that the state might. Judge Renwand states:

> According to Sunoco's rationale and that of the majority opinion, the entire burden of attorney's fees should fall on the shoulders of the taxpayers of the Commonwealth, even though the permittee directly benefits from the permitting process and, indeed, provides much of the information on which the Department relies in issuing permits. In fact, when permits are challenged, the permittee and the Department many times work closely in defending the permit before the Environmental Hearing Board. It is only

> appropriate then, if the law mandates an award of attorney's fees under the Clean Streams Law, that a permittee should shoulder at least some of its rightful responsibility.

(EHB Opinion p. 22)

By creating a new standard that burden the Commonwealth with fees almost exclusively, and then refuses to reward significant fees in order to protect the taxpayer, the Commonwealth Court has essentially neutered the fee-shifting provision to the point of extinction. This frustrates the General Assembly's public purpose in this remedial provision, and results in an unfair portion of the burden being placed on taxpayers. Therefore, this case raises issues of substantial public importance that this Court should address on review.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Honorable Court grant this Petition for Allowance of Appeal.

Respectfully submitted,

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Dated: March 18, 2021

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I, Alexander G. Bomstein, hereby certify that the word count for the foregoing Petition, exclusive of the cover page, table of contents, table of authorities, signature block, certificates, and appendices, as determined by Microsoft Word, is 5,263 words, and thus complies with the word limit set forth in Pa.R.A.P. 1115(f).

/s/ Alexander G. Bomstein
Alexander G. Bomstein, Esq.

Dated March 18, 2021

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

/s/ Alexander G. Bomstein
Alexander G. Bomstein, Esq.

Dated March 18, 2021

PROOF OF SERVICE

I, Alexander G. Bomstein, hereby certify that on March 18, 2021, the foregoing Petition was served upon the following by electronic service and email:

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Dated March 18, 2021

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc.,	:	
Petitioners	:	
v.	:	No. 309 C.D. 2019
Commonwealth of Pennsylvania, Department of Environmental Protection,	:	
Respondent	:	
Department of Environmental Protection,	:	
Petitioner	:	
v.	:	No. 313 C.D. 2019 Argued: June 10, 2020
Clean Air Council, The Delaware Riverkeeper Network, Mountain Watershed Association, Inc. and Sunoco Pipeline, L.P.,	:	
Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge[1]
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

[1] This case was assigned to the opinion writer before Judge Brobson succeeded Judge Leavitt as President Judge.

OPINION BY JUDGE WOJCIK FILED: February 16, 2021

In these consolidated appeals, the Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc. (collectively, Objectors), and the Department of Environmental Protection (DEP), petition for review of the orders of the Environmental Hearing Board (EHB) denying the fee applications of Objectors and Sunoco Pipeline, L.P. (Sunoco) filed pursuant to the provisions of The Clean Streams Law.[2] Also before the Court is Sunoco's Application to Quash DEP's appeal. We grant the Application to Quash, quash DEP's appeal, and affirm EHB's order.

On February 13, 2017, DEP granted a total of 20 permits to Sunoco, 3 for erosion and sediment control[3] and 17 for water obstruction and encroachment,[4]

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[2] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.1001.

[3] These are referred to as "Chapter 102" permits, granted under the provisions of Chapter 102 of DEP's regulations, 25 Pa. Code §§102.1-102.51. *See, e.g.*, *Becker v. Department of Environmental Protection* (Pa. Cmwlth., No. 560 C.D. 2017, filed December 1, 2017), slip op. at 15 ("Under The Clean Streams Law and its regulations promulgated at Chapter 102 of Title 25 of the Pennsylvania Code, [DEP] has the authority to issue orders to prevent the pollution of waters of the Commonwealth, which are defined very broadly to include . . . 'any and all rivers, streams . . . or parts thereof.' Section 1 of The Clean Streams Law, 35 P.S. §691.1[.]"); *Delaware County Community College v. Fox*, 342 A.2d 468, 479-80 (Pa. Cmwlth. 1975) (holding that DEP's regulations in Chapter 102 of the Pennsylvania Code, relating to erosion and sedimentation control, provide protection against secondary polluting effects should they become imminent).

[4] These are referred to as "Chapter 105" permits, granted under the provisions of Chapter 105 of DEP's regulations, 25 Pa. Code §§105.1-105.64. As we have previously explained:

> The [Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§693.1-693.27], similar to The Clean Streams Law, provides [DEP's] statutory authority for Chapter 105 regulations governing water obstructions and encroachments, the scope of which is broadly

(Footnote continued on next page...)

which Sunoco had sought relating to its plan to construct the Pennsylvania Pipeline Project also known as the Mariner East 2 natural gas pipeline. EHB Op. at 2. This decision was appealed to the EHB on February 14, 2017, by the Organizations, *id.*, which led to a series of additional appeals, filings, and negotiations resulting in a settlement agreement between Objectors and the DEP, which stated that it

> generally provides for the development or revision of [DEP] policies and procedures relating to future natural gas pipelines in consideration for [Objectors] withdrawing their appeal. The settlement provides for the establishment of a stakeholder group on pipeline construction, and for the online availability of pipeline permit applications and review documents. No part of the settlement altered any of the 20 permits under appeal, [a February 8, 2018 consent order and agreement between DEP and Sunoco], or the various other stipulated orders entered into by all the parties. [Objectors] received $27,500 in reimbursement of costs and attorney's fees from [DEP] in the settlement and

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(continued...)

> delineated to include "[a]ll water obstructions and encroachments . . . located in, along, across or projecting into **any watercourse**, floodway or body of water, whether temporary or permanent." Section 4 of the DSEA, 32 P.S. §693.4 (emphasis added).

Becker, slip op. at 16. *See also* Section 105.15(b) of DEP's regulations, 25 Pa. Code §105.15(b) ("For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. §1341), an applicant . . . shall prepare and submit to [DEP] for review, an environmental assessment containing the information required by subsection (a) for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth."); *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990, 999 (Pa. 2007) ("[W]e conclude that, at least under the circumstances presented in this case, challenges to The Clean Streams Law aspects of the issuance of Section 401 Certifications are 'proceedings pursuant to this act' for purposes of the fee-shifting provisions of Section 307 [of The Clean Streams Law].").

> agreed not to seek further reimbursement for fees and costs from [DEP].

Id. at 4. Sunoco was not a party to this settlement agreement. *Id.*

Objectors then filed an application for costs and fees with EHB, seeking to recover $228,246 from Sunoco for Objectors' efforts relating to certain segments of their EHB appeal and the costs incurred in the fee application process itself. EHB Op. at 5-6. Sunoco responded with an application of its own, requesting $298,906.12 in costs and fees from Objectors, in order to partially cover the expenses Sunoco had incurred by defending against the EHB appeal, as well as any costs and fees resulting from the fee application process. *Id.* at 6.

On February 19, 2019, in a divided opinion, EHB denied both applications. Noting that Section 307(b) of The Clean Streams Law[5] affords wide latitude to award costs and fees, the EHB majority stated that it applies a three-step process when a party seeks such compensation from DEP: "(1) [EHB determines] whether the fees have been incurred in a proceeding pursuant to The Clean Streams Law; (2) [EHB then determines] whether the applicant has satisfied the threshold criteria for an award; and (3) if those two prongs are satisfied, [EHB] then determine[s] the amount of the award." EHB Op. at 7.

However, the majority highlighted that different goals and responsibilities were involved in this matter, as the applications under consideration sought costs and fees from private parties, rather than from Commonwealth entities. EHB Op. at 7-8. The majority stated that "the standard

[5] 35 P.S. §691.307(b). Section 307(b) states, in relevant part: "The [EHB], upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to [The Clean Streams Law]."

for awarding fees against any private party need not be concomitant with the standard for fees against [DEP]." *Id.* at 8.

Accordingly, the majority held that it should impose a more stringent test, in which a private party could be liable for such costs and fees only if EHB found that the private party "engaged in dilatory, obdurate, vexatious, or bad faith conduct in the course of prosecuting or defending [an] appeal[to the EHB.]" EHB Op. at 10. The majority reasoned that this would protect permittees' rights to due process in the context of a third-party appeal and would not result in permittees being "dissuaded from vigorously protecting their interests in those proceedings in good faith." *Id.* at 9.

In support of this conclusion, the majority cited and discussed the Pennsylvania Supreme Court's opinion in *Lucchino v. Department of Environmental Protection*, 809 A.2d 264 (Pa. 2002), which affirmed EHB's use of a bad faith standard in determining whether to impose an award of costs and fees against a private individual. EHB Op. at 9-10.[6] Furthermore, the majority reasoned that, "[f]or purposes of the instant appeal, no other credible, workable alternative to the bad faith standard has been proposed." *Id.* at 10. Applying this standard to the facts herein, the majority found that neither Objectors, nor Sunoco, had operated in bad faith during the course of Objectors' appeal and, on that basis, denied their respective fee applications. *Id.* at 11-17.

In contrast, although the EHB minority agreed that neither Objectors nor Sunoco was entitled to attorney's fees under the circumstances, the minority

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[6] In *Lucchino*, the Supreme Court noted that EHB determined that the objector in that case had used the administrative appeal process in bad faith, to do nothing more than harass DEP and the affected permittee. 809 A.2d at 269.

disputed the propriety of using the bad faith test to evaluate such fee applications. EHB Op. at 19. The minority stated that there is no legal basis for applying a bad faith standard, nor for using different tests depending upon whether the application is lodged against a government entity or a private party. *Id.* at 19-21.

Rather, the minority maintained that Section 307(b) of The Clean Streams Law clearly and unambiguously establishes a uniform standard that permits EHB, upon request, to assess costs and fees at its discretion, without any need for a finding of bad faith. EHB Op. at 20. The minority distinguished *Lucchino* from this matter, arguing that while it read *Lucchino* as requiring the EHB to apply a bad faith standard when considering a fee application lodged against a third-party appellant, no such mandate exists for those directed towards permittees. *Id.* at 21.

In addition, the minority did not "believe that allowing attorney's fee awards against permittees [would] have a 'chilling effect' on permit applicants." EHB Op. at 21. The minority explained that this was so because the interests at play are different for permit applicants compared to likely third-party appellants, such as Objectors herein, who might otherwise be discouraged from making their voice heard if an appeal mounted in good faith could nonetheless result in a hefty financial penalty. *Id.* Furthermore, the minority noted that Section 307(b)'s fee-shifting provision is to be liberally construed. The minority determined that, given a permittee's role in the permitting process and any resultant appeals, "if the law mandates an award of attorney's fees under The Clean Streams Law [to the appellant], . . . a permittee should shoulder at least some of its rightful responsibility." *Id.* at 21-25.

Both Objectors and DEP separately appealed EHB's decision to this Court, and the appeals were consolidated. Subsequently, Sunoco intervened in the appeals and filed the Application to Quash seeking to quash DEP's appeal, arguing that DEP does not have standing to appeal the EHB's fee application decision. Application to Quash ¶¶1-5.

I.

Preliminarily, with respect to the Application to Quash, we note that DEP submitted a brief to EHB regarding permittee liability under Section 307(b) of The Clean Streams Law, and participated in oral argument before EHB. *See* DEP's Answer to Application ¶¶12-18. It appears that this was done with the assent of both Objectors and Sunoco. *Id.* However, the record of this case does not show that DEP ever formally sought intervention in the attorney's fee and cost application proceedings. *See* Section 4(e) of the Environmental Hearing Board Act[7] ("Intervention.--Any interested party may intervene in any matter pending before [EHB].").

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[7] Act of July 13, 1988, P.L. 530, 35 P.S. §7514(e). Regarding the application of Section 4(e), we have stated:

> [I]n the context of intervention, the phrase "any interested party" actually means any person or entity interested, *i.e.*, concerned, in the proceedings before [EHB]. The interest required, of course, must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of [EHB]'s ultimate determination. *See* Black's Law Dictionary 730 (5th ed. 1979); *see also* [Section 101 of the Administrative Agency Law,] 2 Pa. C.S. §101[,] wherein a party is defined as "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding." To interpret this phrase any differently, under

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The traditional concept of standing "is rooted in the notion that for a party to maintain a challenge to an official order or action, he must be aggrieved in that his rights have been invaded or infringed." *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718, 719 (Pa. 1982). "[A] party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003). To that end, an individual's standing in a matter is normally contingent upon their ability to articulate an interest that is substantial, direct, and immediate. *See, e.g., Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975).

However, the notion of traditional standing does not apply when dealing with appeals from administrative agencies. Our Supreme Court has held:

> [B]y virtue of Section 702 of the Administrative Agency Law, [2 Pa. C.S. §702,] neither party status nor traditional aggrievement is necessary to challenge actions of an administrative agency. Rather, standing to appeal administrative decisions extends to "persons," including non-parties, who have a "direct interest" in the subject

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(continued...)

> these circumstances, would lead to an absurd and unreasonable result as well as render the [Environmental Hearing Board] Act's intervention provision ineffective; presumably, neither of which the legislature intended here. Section 1922(1), (2) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1), (2).

Browning-Ferris, Inc. v. Department of Environmental Resources, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991).

> matter, as distinguished from a "direct, immediate, and substantial" interest. [*Application of El Rancho Grande, Inc.*, 437 A.2d 1150, 1152 (Pa. 1981)] (quoting 2 Pa. C.S. §702). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *South Whitehall Township Police Service v. South Whitehall Township*, [555 A.2d 793, 795 (Pa. 1989)]. Although not the full equivalent of "direct, immediate, and substantial," the direct interest requirement retains the function of differentiating material interests that are discrete to some person or limited class of persons from more diffuse ones that are common among the citizenry.

Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board, 916 A.2d 624, 628 (Pa. 2007) (*Citizens*).

Nevertheless, this relaxed test for standing does not excuse a party from formally intervening at the administrative level. Mere participation, even rising to the level of filing a brief or engaging in oral argument before an administrative agency, is not enough to confer standing to a party in the absence of formal, approved intervention. As the Pennsylvania Supreme Court has observed:

> This conclusion is in accord with our finding in *Citizens* that permitting an appeal absent intervention in the proceedings before the [Pennsylvania Gaming Control] Board is "inconsistent with orderly rules of procedure and would foster untenable impracticalities in terms of the development of an essential record for consideration on appeal." 916 A.2d at 629. . . .
>
> Further, [p]etitioners' attempt to distinguish *Citizens* on the ground that the petitioners there chose not to intervene is unpersuasive. The salient fact in *Citizens* was simply that the petitioners did not intervene when they had the opportunity to do so. Moreover, the fact that [p]etitioners participated at the hearing without intervening does not afford them standing. *See Stanbro v. Zoning Hearing Board of Cranberry Township*, [566 A.2d 1285, 1287 (Pa. Cmwlth. 1989)] (holding that

> participation at the trial court level by filing a brief and participating in oral argument without intervention is insufficient to be accorded standing to appeal).

Society Hill Civic Association v. Pennsylvania Gaming Control Board, 928 A.2d 175, 183 (Pa. 2007) (footnote and emphasis omitted). Therefore, because DEP did not formally intervene before EHB, DEP does not have standing under the Administrative Agency Law to appeal EHB's decision denying Objectors' Application.

As a result, the only basis upon which DEP could possess standing in this matter would be pursuant to its statutory powers. In *Pennsylvania Game Commission v. Department of Environmental Resources*, 555 A.2d 812, 815 (Pa. 1989) (citation omitted), our Supreme Court discussed the nature of how an agency may possess legislatively established standing:

> Although our law of standing is generally articulated in terms of whether a would-be litigant has a "substantial interest" in the controverted matter, and whether he has been "aggrieved" or "adversely affected" by the action in question, we must remain mindful that the purpose of the "standing" requirement is to insure that a legal challenge is by a proper party. . . . The terms "substantial interest," "aggrieved[,]" and "adversely affected" are the general, usual guides in that regard, but they are not the only ones. For example, when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, *i.e.*, that it has "standing."

In that case, the Supreme Court considered the Pennsylvania Game Commission's statutory authority under the Game and Wildlife Code,[8] and concluded that it "has a substantial interest in the lands and wildlife under its control. This alone would be sufficient to give it standing to legally challenge any action which allegedly would have an adverse impact on those interests." 555 A.2d at 816. In addition, the Supreme Court noted that a specific provision of the Dam Safety and Encroachments Act (DSEA) "expressly gives the Commission the power to enforce th[at statute] where a violation of it would adversely impact upon the property under the Commission's control." *Id.* On this alternate basis, the Supreme Court "conclude[d] that the Commission had standing to raise the DSEA in its challenge to [the Department of Environmental Resources'[9]] issuance of [a] solid waste permit in this case." *Id.*

The General Assembly has expressly conferred upon DEP the authority to enforce The Clean Streams Law. *See* Section 1901-A(20) of The Administrative Code of 1929[10] ("The Department of Environmental Resources shall . . . continue to exercise the powers and perform the duties by law heretofore vested in and imposed upon . . . [t]he Department of Health by the act . . . known as 'The Clean Streams Law[.]'"). Specifically, under Section 5(5) of The Clean Streams Law, DEP has the power to "[r]eview and take appropriate action on all

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[8] 34 Pa. C.S. §§101-2965.

[9] DEP was formerly named the Department of Environmental Resources. *Adams Sanitation Co. v. Pennsylvania Department of Environmental Protection*, 683 A.2d 981, 982 n.1 (Pa. Cmwlth. 1996), *aff'd on other grounds*, 715 A.2d 390 (Pa. 1998).

[10] Act of April 9, 1929, P.L. 177, *as amended*, added by Act of December 3, 1970, P.L. 834, 71 P.S. §510-1(20).

permit applications submitted pursuant to the provisions of [The Clean Streams Law] and to issue, modify, suspend, limit, renew or revoke permits pursuant to [The Clean Streams Law] and to the rules and regulations of the [DEP]." 35 P.S. §691.5(5).

However, as noted above, DEP's interest herein is merely prospective, based on its concern that EHB's decision in this matter will enshrine the bad faith standard as the appropriate standard to be applied in all similar costs and fees application cases in the future. *See, e.g.*, DEP's Answer to Application ¶24 ("EHB's decision establishes precedent to be applied in future fees litigation under Section 307(b). Given the substantial impact the EHB's decision will have on attorney's fees litigation, [DEP] has an immediate need to determine the proper standard to apply.").

The competing fee applications herein were filed by, and directly affected, only Objectors and Sunoco; regardless of EHB's decision, there was no possibility that EHB would have imposed additional costs and fees on DEP in addition to those that it already agreed to as part of its settlement agreement with Objectors. Thus, neither the traditional concept of standing, nor the legislatively established standing outlined above, is broad enough to encompass a challenge rooted solely in the potential, prospective effects of the disposition of a fee application under The Clean Streams Law between private parties where, as here, DEP's authority or actions under The Clean Streams Law or the award of costs and fees against DEP thereunder are not implicated. Accordingly, the Application to Quash is granted and DEP's appeal is quashed.

II.

Turning to the merits of Objectors' appeal, Objectors first note that the standard for determining whether to award costs and fees to a party where a matter has been resolved without a decision on the merits is the "catalyst test," in which:

> (1) the applicant must show that the opposing party provided some of the benefit the fee-requesting party sought in the underlying suit, (2) the applicant must show that the suit stated a genuine claim, and (3) the applicant must show that the suit was a substantial or significant reason why the opposing party, voluntarily or otherwise, provided the benefit or partial benefit that the fee requesting party sought in the underlying suit.

Objectors' Brief at 9-10 (quoting *Upper Gwynedd Towamencin Municipal Authority v. Department of Environmental Protection*, 9 A.3d 255, 264-65 (Pa. Cmwlth. 2010)). Objectors argue that bad faith is not the only "workable" standard for this type of scenario, and that EHB erred by not using the catalyst test to evaluate the Organizations' fee application. *Id.* at 10-13. Moreover, Objectors state that EHB's use of the bad faith standard is, under the circumstances, not supported by the plain language of Section 307(b) of The Clean Streams Law, case law, or public policy considerations. *Id.* at 14-15, 20-24. Contrary to EHB's interpretation, Section 307(b) should be construed as neither requiring third-party appellants to prove bad faith conduct to recover costs and fees, nor mandating that EHB should review DEP's and permittees' actions using different standards when considering a fee application. *Id.* at 16-20.

Objectors then argue that the EHB majority misinterpreted *Lucchino*, asserting that "[t]he question *Lucchino* resolved was not whether bad faith was the right standard, but whether fees could be awarded against an appellant at all," and

that "[EHB] misunderstands the holding in *Lucchino*, which did not require or set a new standard but merely affirmed a fee award against an appellant." Objectors' Brief at 25. According to Objectors, the EHB majority's concerns about permittees' due process rights was entirely misplaced, especially because *Lucchino* did not mention due process concerns. Objectors' Brief at 26. Furthermore, Objectors point out that

> [t]he ["]chilling effect["] the [*Lucchino*] Court . . . was primarily concerned about is one that would disincentivize bringing meritorious appeals, not defending against them. 809 A.2d at 270. Permittees, being the beneficiary of the permit, will always have an interest in defending the permit. *Lucchino* also concerns guarding against frivolous suits, *id.*, but that is not an issue here.

Id.

In contrast, Sunoco asserts that EHB appropriately exercised its discretion in electing to apply a bad faith standard in evaluating the fee applications, rather than the catalyst test, arguing that this decision was supported by both case and statutory law. Sunoco's Brief at 17-36. In addition, Sunoco highlights its lack of involvement in the settlement between DEP and Objectors, through which DEP agreed to revise its permit review process and which effected no changes upon Sunoco's aforementioned permits. *Id.* at 34-35.

Also, according to Sunoco, a bad faith standard is warranted for several reasons related to public policy considerations. First, it is DEP's statutory responsibility to enforce The Clean Streams Law. Sunoco's Brief at 38-39. Second, on appeal, EHB reviews DEP's actions, rather than those of the permittee. *Id.* at 39-40. Third, the catalyst test is fact-intensive and difficult to consistently apply. *Id* at 40-41. Sunoco contends that using the catalyst test in this kind of

scenario would result in a greatly increased workload for EHB and would discourage settlements. *Id.* at 41-44. Sunoco claims that the catalyst test would be especially inappropriate for use here, because the complexity of this matter would require the EHB to conduct a lengthy and involved inquiry to determine the reasons for each of the actions taken and decisions made by the parties. *Id.* at 44-46.

Initially, as this Court has explained:

> Our review of EHB determinations under Section 307(b) of The Clean Streams Law is limited to determining whether the EHB abused its discretion. *Solebury Township v. Department of Environmental Protection*, [928 A.2d 990, 997 n.8 (Pa. 2007)]. In *Kwalwasser* [*v. Department of Environmental Resources*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990),[11]] we noted that our disagreement with the EHB's reasoning or result is

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[11] As the Pennsylvania Supreme Court has explained:

> In cases involving both Section 307 and Section 4(b) [of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.4(b), *superseded*, 27 Pa. C.S. §7708,] the EHB explained that, to determine whether an award of attorneys' fees is appropriate, courts have applied an analysis that has become known as the *Kwalwasser* test, according to which "(1) a final order must have been issued; (2) the applicant for the fees and expenses must be the prevailing party; (3) the applicant must have achieved some degree of success on the merits; and (4) the applicant must have made a substantial contribution to a full and final determination of the issues." *Big B. Mining Co. v. Department of Environmental Resources*, [624 A.2d 713, 715 (Pa. Cmwlth. 1993)] (citing [*Kwalwasser*]). The EHB determined that it was appropriate to apply this test to the present matter, as, in its view, there was no reason to apply different criteria for petitions solely under Section 307.

Solebury Township, 928 A.2d at 995.

> not sufficient ground to overturn the EHB's decision. We may not substitute our judgment for that of the EHB. [*Id.*] Rather, "[a]n abuse of discretion occurs if, in reaching a conclusion, the law is overridden or misapplied or the judgment exercised is manifestly unreasonable or is the result of partiality, prejudice, bias, or ill will." *Luzerne County Children & Youth Services v. Department of Human Services*, 203 A.3d 396, 398 (Pa. Cmwlth. 2019).

Sierra Club v. Department of Environmental Protection, 211 A.3d 919, 924-25 (Pa. Cmwlth. 2019).

As indicated above, in disposing of the request for costs and fees, the EHB majority relied upon *Lucchino*, in which the Supreme Court affirmed EHB's use of a bad faith standard in determining whether to impose an award of costs and fees against a private individual objector. The Court stated, in relevant part:

> Although the EHB recognized that a citizen has a right to challenge agency actions that conflict with the law and directly affect the citizen, it properly found that the appeal here was an abuse of the administrative adjudicatory system because it did not challenge the [DEP]'s action, but was merely an attack on agency employees and officials. Where, as here, the record supports a tribunal's finding of fact that the conduct of the party was dilatory, obdurate, vexatious, or in bad faith, this Court will not disturb an award of counsel fees in the absence of an abuse of discretion. *Township of South Strabane v. Piecknick*, [686 A.2d 1297 (Pa. 1996)] (awarding counsel fees appropriate if record supports finding of fact that the conduct of the party was dilatory, obdurate, or vexatious). We find no abuse of discretion in this instance and an award of counsel fees is appropriate. We do not reach this decision lightly for, as [the objector] reminds us, any grant of attorney's fees against an individual litigant in a suit against his government has a potential "chilling effect" on the willingness of the ordinary citizen to pursue resolution of his disputes in the courts. However, recognizing that we must strike a delicate balance, it is equally important that

> this phrase not be employed to defeat the protections against frivolous suits afforded to a defendant.

809 A.2d at 269 (footnotes omitted).

Additionally, in *Solebury Township*, two townships sought review of EHB's order denying their request for costs and fees from DEP and the Department of Transportation (PennDOT), as a governmental permittee, in which EHB employed the catalyst test. EHB determined that the townships did not prevail in the matter as required by that test because DEP had rescinded the contested Section 401 Certifications under The Clean Water Act on PennDOT's request, and the case was ultimately dismissed as moot. In remanding the matter, the Court stated:

> [G]iven Pennsylvania's strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions, *see Lucchino*, [809 A.2d at 269], we agree with the [t]ownships that the EHB's narrow application of the *Kwalwasser* criteria in the present matter was erroneous.
>
> More specifically, the broad grant of discretion to the EHB in awarding attorney's fees under Section 307 renders [EHB's and PennDOT's] argument that a formal judgment is necessary to a finding that a party has prevailed with some degree of success on the merits untenable. Instead, we agree with the Commonwealth Court that the practical relief sought by the [t]ownships should be considered when characterizing them as prevailing parties for purposes of the *Kwalwasser* test. *Accord Buckhannon* [*Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 633 (2001)] (Ginsburg, J., dissenting) ("[W]here the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential."). In addition, the EHB's exclusive focus on the dismissal of the case as moot, without conducting a hearing or making further factual findings and legal conclusions, does not justify its

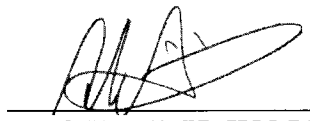
> holding that the [t]ownships did not achieve some degree of success on the merits and did not make a substantial contribution to the full and final determination of the issues.
>
> Finally, as *Lucchino* makes clear, the EHB may, in its discretion, award attorney's fees under Section 307 solely on the basis of a finding of bad faith or vexatious conduct, which is supported by the record, without reference to the *Kwalwasser* criteria. *See Lucchino*, [809 A.2d at 269-70]. In this regard, however, we agree with [EHB and PennDOT] that the Commonwealth Court erred by characterizing [their] conduct as vexatious on the undeveloped record before it. . . .
>
> Since we conclude that the EHB's application of the *Kwalwasser* criteria in the present matter was too narrow in view of the broad language of Section 307 and the public policy favoring liberal construction of fee-shifting provisions, we cannot determine the propriety of the EHB's denial of the [t]ownships' motion for attorney's fees under Section 307 on the present record. Accordingly, the order of the Commonwealth Court is vacated, and the matter is remanded to the EHB for further proceedings consistent with the above.

928 A.2d at 1004-05.

Based on the foregoing Supreme Court analyses, and contrary to Objectors' assertions, the catalyst test is not the sole and exclusive standard that EHB may employ in disposing of a request for costs and fees against a permittee under Section 307(b) of The Clean Streams Law. Indeed, we have specifically recognized that EHB's "broad discretion includes the authority to adopt standards by which [it] will evaluate applications for costs and fees." *Sierra Club*, 211 A.3d at 926. In the instant case, it was entirely within EHB's discretion, and eminently appropriate, to apply the instant bad faith standard in deciding whether or not to impose costs and fees upon a private party permittee. In sum, "our disagreement

with the EHB's reasoning or result is not sufficient ground to overturn the EHB's decision," and "[w]e may not substitute our judgment for that of the EHB" in this regard. *Id.* (citing *Kwalwasser*).

Accordingly, we grant Sunoco's Application to Quash DEP's appeal; we quash DEP's appeal; and we affirm EHB's order.



MICHAEL H. WOJCIK, Judge

Judge Fizzano Cannon did not participate in the decision of this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc.,	:	
Petitioners	:	
v.	:	No. 309 C.D. 2019
Commonwealth of Pennsylvania, Department of Environmental Protection,	:	
Respondent	:	
Department of Environmental Protection,	:	
Petitioner	:	
v.	:	No. 313 C.D. 2019
Clean Air Council, The Delaware Riverkeeper Network, Mountain Watershed Association, Inc. and Sunoco Pipeline, L.P.,	:	
Respondents	:	

ORDER

AND NOW, this 16th day of February, 2021, Sunoco Pipeline, L.P.'s Motion to Quash is GRANTED; the Department of Environmental Protection's above-captioned appeal is QUASHED; and the order of the Commonwealth of Pennsylvania, Department of Environmental Protection is AFFIRMED.

MICHAEL H. WOJCIK, Judge

Certified from the Record

FEB 16 2021

And Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc., Petitioners	:	
v.	:	No. 309 C.D. 2019
Commonwealth of Pennsylvania, Department of Environmental Protection, Respondent	:	
Department of Environmental Protection, Petitioner	:	
v.	:	No. 313 C.D. 2019
	:	Argued: June 10, 2020
Clean Air Council, The Delaware Riverkeeper Network, Mountain Watershed Association, Inc. and Sunoco Pipeline, L.P., Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING OPINION
BY JUDGE BROBSON **FILED: February 16, 2021**

I join in Part I of the majority opinion, dismissing the appeal of the Department of Environmental Protection (DEP) for lack of standing. I concur in the

result of Part II, that being affirmance of the decision of the Environmental Hearing Board (EHB) to deny the request by the Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc. (collectively, Objectors) for an order directing Sunoco Pipeline, L.P. (Sunoco) to pay the costs and fees that Objectors incurred in the administrative proceeding below.

I write separately for two reasons. First, I believe that *Amicus Curiae* the Pennsylvania Chamber of Business and Industry (Pa. Chamber) highlights a potential constitutional infirmity with respect to the fee-shifting provision at issue in this case—Section 307(b) of The Clean Streams Law.[1] In relevant part, Section 307(b) provides: "The [EHB], upon the request of any party, *may in its discretion* order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party . . . ." 35 P.S. § 691.307(b) (emphasis added). There are no standards in this section or elsewhere to cabin the EHB's discretion. Without standards, Section 307(b) of The Clean Streams Law may run afoul of Article II, Section 1 of the Pennsylvania Constitution, which vests within the General Assembly the exclusive authority to make laws.[2]

Where, in the exercise of its legislative power, the General Assembly delegates discretion to an agency to administer a particular law, two fundamental limitations must be satisfied for the law to withstand constitutional scrutiny: "First, . . . the General Assembly must make 'the basic policy choices,' and[,] second, the legislation must include 'adequate standards which will guide and restrain the exercise of the delegated administrative functions.'" *Protz v. Workers'*

---

[1] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.307(b).

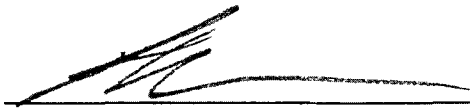
[2] "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. art. II, § 1.

Comp. Appeal Bd. (Derry Area Sch. Dist.), 161 A.3d 827, 834 (Pa. 2017) (quoting *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Cmwlth.*, 877 A.2d 383, 418 (Pa. 2005)). There is a substantial legal question as to whether either of these fundamental limitations are met with respect to the EHB's discretion to award fees under Section 307(b) of The Clean Streams Law. Nonetheless, the majority appropriately avoids addressing the issue in this case for two reasons. First, it is not among the issues presented to us by the parties on appeal. Second, the issue would more appropriately be addressed in a challenge to an EHB award of fees under Section 307(b) of The Clean Streams Law.

Putting aside the utter lack of any statutory standards, we must still review the EHB's exercise of discretion for abuse. *See Solebury Twp. v. Dep't of Env't Prot.*, 928 A.2d 990, 997 n.8 (Pa. 2007). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or *the judgment exercised is manifestly unreasonable*, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused." *Commonwealth v. Spiewak*, 617 A.2d 696, 699 n.4 (Pa. 1992) (emphasis added). Here, the EHB adopted a "bad faith standard," concluding that fees against a permittee would only be warranted where the permittee engaged in offensive conduct in the course of defending its appeal before the EHB. The majority holds that this bad faith standard was "eminently appropriate" in this case. (*Clean Air Council v. Dep't of Env't Prot.*, ___ A.3d ___, ___ (Pa. Cmwlth., Nos. 309 and 313 C.D. 2019, filed February 16, 2021), slip op. at 18.) While I agree, as the EHB is operating without legislative guardrails, I see no reason why "bad faith" must be the only test. I, therefore, cannot endorse it as such with

respect to the exercise of the EHB's discretion under Section 307(b) of The Clean Streams Law.

Rather, I would simply affirm the EHB's decision because there is absolutely no basis in the record upon which the EHB could have exercised its discretion below in such a way as to compel Sunoco to pay Objectors' legal fees under Section 307(b) of The Clean Streams Law. Sunoco was not a party to the settlement agreement between Objectors and DEP that essentially ended Objectors' appeals. Moreover, Sunoco gave up nothing in the settlement or otherwise. Sunoco kept its permits, unaltered, as if Objectors had not even filed their appeals with the EHB. Under such circumstances, it would be manifestly unreasonable to order Sunoco, or any permittee, to pay Objectors' attorney's fees. For this reason, I concur in the majority's decision to affirm the EHB's order.



P. KEVIN BROBSON, Judge

Judge Cohn Jubelirer joins in this concurring opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc., Petitioners	:	
v.	:	No. 309 C.D. 2019
Commonwealth of Pennsylvania, Department of Environmental Protection, Respondent	:	
Department of Environmental Protection, Petitioner	:	
v.	:	No. 313 C.D. 2019
Clean Air Council, The Delaware Riverkeeper Network, Mountain Watershed Association, Inc. and Sunoco Pipeline, L.P., Respondents	:	ARGUED: June 10, 2020

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE CEISLER FILED: February 16, 2021

I join the majority with regard to its disposition of Sunoco Pipeline, L.P.'s (Sunoco) Application to Quash the Department of Environmental Protection's (DEP) appeal. However, I must part ways from the majority regarding its

affirmation, in full, of the Environmental Hearing Board's (EHB) February 19, 2019 decision. As our Court has previously held:

> Under Section 307(b) of The Clean Streams Law, [Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.307(b),] the EHB has broad discretion to award or deny attorneys' fees and costs in a particular proceeding. [*Solebury Twp. v. Dep't of Env't Prot.*, 928 A.2d 990, 1003 (Pa. 2007)]. This broad discretion includes the authority to adopt standards by which the EHB will evaluate applications for costs and fees. *Id.* at 1004. Such standards, however, must be consistent with "Pennsylvania's strong public policy to justly compensate parties [that] challenge agency actions by liberally interpreting fee-shifting provisions." *Id.*

Sierra Club v. Dep't of Env't Prot., 211 A.3d 919, 926 (Pa. Cmwlth. 2019); *see also Lucchino v. Dep't of Env't Prot.*, 809 A.2d 264, 269 (Pa. 2002) (quoting *Tunison v. Com.*, 31 A.2d 521, 523 (Pa. 1943)) ("For reasons of public policy, Pennsylvania courts have construed . . . statutory sections [like Section 307(b)] liberally 'to justly compensate parties who have been obliged to incur necessary expenses in prosecuting lawful claims or in defending against unjust or unlawful ones.'").

Requiring a showing of bad faith in this kind of situation does not square with the public policy purpose underpinning Section 307(b)'s fee-shifting language. To state the obvious, a permittee necessarily plays a critical role in the permitting process, for without an initial permit application, there would be no reason for subsequent litigation initiated by a third party. It does not therefore seem reasonable that, in theory, the DEP could be saddled with fees and costs in response to inadvertent mistakes or good faith, negotiated compromises or settlements, while a permittee could get off scot-free under similar circumstances unless it has conducted itself in a dilatory, obdurate, or vexatious way.

Furthermore, *Lucchino* is distinguishable from the instant matter. While the Supreme Court took no issue with the EHB's use of a bad faith standard in that matter, the context was different. There, the EHB was faced with a private individual, whose challenge to the DEP's issuance of various permits was nothing more than a malicious attack upon the DEP and the affected permittee. *Lucchino*, 809 A.2d at 269. "[T]he EHB recognized that a citizen has a right to challenge agency actions that conflict with the law and directly affect the citizen" and therefore elected to require a higher burden of proof to justify an award of costs and fees in such a situation. *Id.* at 269-70. Implicitly, the EHB recognized that to do otherwise, by setting a lower bar for such awards, would likely dissuade people from exercising their right to challenge permit approvals, due to the prospective financial repercussions. The Supreme Court agreed with the EHB, stating:

> [A]ny grant of attorney's fees against an individual litigant in a suit against his government, has a potential "chilling effect" on the willingness of the ordinary citizen to pursue resolution of his disputes in the courts. However, recognizing that we must strike a delicate balance, it is equally important that this [concern] not be employed to defeat the protections against frivolous suits afforded to a defendant.

Id. at 270. Here, however, there is no concern about impinging upon such rights, as it is a permittee, *i.e.*, Sunoco, rather than an objector, which is the subject of the at-issue fee application. As such, a standard lower than "bad faith" in this situation would have no effect on Sunoco's ability or desire to challenge permitting actions taken by the DEP. This lower standard could theoretically impact a permittee's initial decision to exercise its property rights, due to a permittee's need to factor in the possibility, however remote, of such costs and fees. Such a concern is nevertheless too attenuated to justify using a bad faith requirement, as there is no

guarantee that a permit application will be approved upon review by the DEP (a review process that should minimize the risk of litigation, if done properly), or that a given permitting decision will be subsequently challenged by a third party.

The EHB's use of a bad faith standard to evaluate Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc.'s joint fee application was thus an abuse of discretion. It follows, then, that the EHB's February 19, 2019 decision should be vacated in part, as well as that this matter should be remanded to the EHB for further proceedings, so that it can use a proper standard to evaluate this fee application. Therefore, I respectfully dissent from the majority, to the extent it concluded otherwise.

Ellen Ceisler

ELLEN CEISLER, Judge

APPENDIX B

E-FILED
02/19/2019
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: February 19, 2019**

OPINION AND ORDER ON
APPLICATIONS FOR COSTS AND FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an application for attorney's fees submitted by appellants seeking to recover fees from a permittee for work done in connection with two petitions for partial supersedeas. The Board also denies an application for fees submitted by a permittee seeking to recover fees from the appellants for work performed in the final months leading up to the hearing on the merits, which was never held. There was no bad faith or vexatious conduct on the part of either side.

O P I N I O N

Before the Board are competing applications for costs and fees filed by the Appellants (Clean Air Council, the Delaware Riverkeeper Network, and Mountain Watershed Association, Inc.), and Sunoco Pipeline, L.P. ("Sunoco"). On February 13, 2017, the Department of

Opinion of the Board by Judge Labuskes, joined by Judge Coleman, Judge Mather, and Judge Beckman. Opinion Concurring in Part and Dissenting in Part by Chief Judge Renwand.

Environmental Protection (the "Department") issued to Sunoco three Chapter 102 erosion and sediment control permits under 25 Pa. Code Chapter 102 and seventeen Chapter 105 water obstruction and encroachment permits under 25 Pa. Code Chapter 105 authorizing the construction of Sunoco's Mariner East 2 pipeline project. The Appellants filed a notice of appeal objecting to the issuance of each of the 20 permits. On February 14, 2017, the Appellants filed their first petition for supersedeas and an application for temporary supersedeas seeking an immediate halt to all activity authorized under the permits. On February 17, 2017, the Board issued an Order denying the application for temporary supersedeas and scheduling an evidentiary hearing on the supersedeas petition. The hearing on the petition for supersedeas lasted three days and concluded on March 3, 2017. Upon conclusion of the hearing, the parties requested that the Board rule from the bench and the presiding judge denied the petition for supersedeas.

On July 19, 2017, the Appellants filed a second petition and application, this time for a partial supersedeas and a temporary partial supersedeas, seeking an immediate halt to horizontal directional drilling ("HDD") activities authorized under the permits because of what the Appellants averred were numerous spills and inadvertent returns of drilling fluids that had occurred during HDD activities up to that point. On July 25, 2017, the Board granted the Appellants' application for temporary partial supersedeas in part and scheduled a hearing on the petition for partial supersedeas. Prior to the scheduled hearing, the parties negotiated an agreement to resolve the application for temporary partial supersedeas and petition for partial supersedeas. On August 8, 2017, the parties submitted to the Board a proposed stipulated order setting forth the terms and conditions of their agreement. The following day, the Board signed and approved the stipulated order, but only after we deleted language pertaining to the Board retaining jurisdiction over enforcement of the order. The parties prepared a revised agreement

that corrected certain inaccuracies in exhibits attached to the stipulated order and also incorporated the Board's change in what came to be referred to as the "corrected stipulated order," which we entered on August 10, 2017.

The corrected stipulated order contained several provisions related to Sunoco's ongoing HDD activities. For example, Sunoco was required to perform reevaluations of some of its HDD sites that were to include, as appropriate, additional geotechnical evaluations. The parties also agreed to revisions to several plans that are incorporated by reference into the Chapter 105 permits—the HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan (the "HDD Plan"); the Water Supply Assessment, Preparedness, Prevention and Contingency Plan; and the Void Mitigation Plan for Karst Terrain and Underground Mining. Sunoco agreed to abide by those plans, as revised.

On October 27, 2017, the Appellants filed a motion for summary judgment, seeking judgment on three issues that the Appellants argued were controlling issues in the appeal that should prompt the Board to invalidate Sunoco's permits. The Appellants' arguments related to (1) the "water dependency" of the Mariner East 2 pipeline (and all pipelines) in being permitted to encroach upon exceptional value (EV) wetlands, (2) the Department's allegedly improper application of the antidegradation requirements and analysis of the existing uses of the EV wetlands crossed by the pipeline, and (3) Sunoco's alleged failure to submit required letters from all municipalities and counties crossed by the pipeline. We denied the Appellants' motion on all three issues (Opinion and Order, Jan. 8, 2018), and denied a subsequent request from the Appellants to certify that denial for interlocutory appeal to the Commonwealth Court (Opinion and Order, Feb. 2, 2018). At around the same time, Sunoco filed a motion for partial summary judgment. Although we denied the motion in an Order, we included language recognizing that

the Appellants had irrevocably waived some of their objections in the appeal. We then scheduled the hearing on the merits for blocks of days in June, August, and September 2018. We amended that schedule in response to an unopposed request from the Appellants so that the hearing was rescheduled to begin on August 1, 2018.

On February 28, 2018, the Appellants filed a separate appeal of a Consent Order and Agreement (COA) entered into between the Department and Sunoco on February 8, 2018. *See* EHB Docket No. 2018-023-L. The Appellants complained in that appeal that the COA effected revisions to the HDD Plan that had been previously revised in August 2017 as part of the corrected stipulated order issued by the Board resolving the Appellants' second petition for supersedeas. The Appellants were not involved in the discussions precipitating those revisions.[1] Concurrently, the Appellants also filed a complaint for injunctive relief in the Commonwealth Court seeking to have the Court enforce the August 2017 settlement agreement reached before the Board in accordance with the Appellants' interpretation of that agreement.

On March 23, 2018, the Appellants filed a petition for partial supersedeas in the appeal of the COA, the third petition overall, asking the Board to supersede the COA to the extent it was inconsistent with the corrected stipulated order. We *sua sponte* consolidated the appeal of the COA with the appeal of the permits on April 2, 2018 and scheduled a hearing on the petition for partial supersedeas for April 16, 2018. Prior to the hearing, the parties filed yet another proposed stipulated order with further revisions to the HDD Plan. The proposed order provided that the Appellants would withdraw their supersedeas petition in the consolidated appeal, and the appeal of the COA would be withdrawn in its entirety. We held a hearing on April 16 to determine whether the latest proposed stipulated order truly reflected the mutual agreement of the parties

[1] The HDD Plan had also been revised by the Department in December 2017, apparently following consultation with the Appellants but not Sunoco. The Board was not involved in nor aware of any revisions to the HDD Plan referenced in our corrected stipulated order.

and that it was otherwise fair, reasonable, and in the public interest. Having been satisfied by the parties' presentations at the hearing, we issued a stipulated order on April 16 and closed out the appeal of the COA docketed at 2018-023-L.

Thereafter, all parties filed their pre-hearing memoranda according to the schedule set in the original appeal of the permits. Motions in limine were filed by all parties. During our pre-hearing conference call on July 26, 2018, we were told that the Appellants and the Department were finalizing a settlement agreement and the hearing on the merits scheduled to begin on August 1 would not be necessary. Sunoco was apparently not involved in the latest discussions between the Appellants and the Department. We declined the request to postpone the hearing. The Department and the Appellants were nevertheless able to settle the matter. Their stipulation of settlement generally provides for the development or revision of Department policies and procedures relating to future natural gas pipelines in consideration for the Appellants withdrawing their appeal. The settlement provides for the establishment of a stakeholder group on pipeline construction, and for the online availability of pipeline permit applications and review documents. No part of the settlement altered any of the 20 permits under appeal, the COA, or the various other stipulated orders entered into by all the parties. The Appellants received $27,500 in reimbursement of costs and attorney's fees from the Department in the settlement and agreed not to seek further reimbursement for fees and costs from the Department. The Appellants withdrew their appeal on July 31, 2018, and we issued an Order on the same day acknowledging the withdrawal and cancelling the hearing. The instant applications for costs and fees followed.

The Appellants seek a total of $228,246.00 in fees and costs *from Sunoco* for their work related to the July 2017 partial supersedeas leading up to the corrected stipulated order, the

March 2018 partial supersedeas leading up to the additional stipulated order, and the proceedings pertaining to the fees applications. The Appellants are not seeking to recover fees for any work performed outside of those three segments of the appeal. Sunoco is seeking to recover $298,906.12 in fees and costs *from the Appellants* for its work in the appeal from April 17, 2018 until July 31, 2018, plus any fees incurred in the course of the fees application proceedings. After the responses to the applications were filed, we held a conference call with the parties to find out what they desired in terms of additional briefing on the applications, if any. *See* 25 Pa. Code § 1021.184(a) (parties may file briefs in accordance with a schedule established by the Board). Neither the Appellants nor Sunoco requested any further briefing, but the Department, which had not filed a response to either application, asked to submit a brief on the issue of whether a party may recover fees from a permittee as a matter of law, which was raised by Sunoco as an issue in its response to the Appellants' application. We issued an Order allowing the Department to file a brief on that issue within 30 days, and allowed any other party to file a response to that brief. The Appellants and Sunoco filed additional briefs in response to the Department's brief. The Department filed a request for oral argument, which we granted. *En banc* oral argument was held before the Board on January 18, 2019. The applications are now ripe for disposition. For the reasons discussed below, we find that neither the Appellants nor Sunoco is entitled to recover costs and fees in this matter.

Section 307(b) of the Clean Streams Law provides in part that the Board, "upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b). Section 307(b) provides the Board with "broad discretion" to award fees in appropriate proceedings. *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1003 (Pa.

2007); *Lucchino v. Dep't of Envtl. Prot.*, 809 A.2d 264, 285 (Pa. 2002). When a party seeks reimbursement for fees from the Department, we employ a three-prong analysis: (1) whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law; (2) whether the applicant has satisfied the threshold criteria for an award; and (3) if those two prongs are satisfied, we then determine the amount of the award. *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764, 774-75, *aff'd*, No. 66 C.D. 2014 (Pa. Cmwlth. Dec. 23, 2014); *Angela Cres Trust v. DEP*, 2013 EHB 130, 134. However, the matter before us does not involve an award of fees against the Department. Rather, the Appellants and Sunoco are seeking fees from each other, a less common situation. And although fees are occasionally sought from unsuccessful appellants in third-party permit appeals, it is rarer for fees to be sought from a permittee. Indeed, Sunoco in its briefs seemed to argue that a permittee can *never* be ordered to pay fees as a matter of law. But Sunoco dramatically narrowed that position at oral argument and unequivocally acknowledged that there may be circumstances in which it is appropriate to require a permittee to reimburse another party's fees. It cited bad faith litigation as a possible example of such a circumstance.

That said, there is no dispute in this case that the Board has the authority under Section 307(b) to order one private party to pay another private party's costs and attorney's fees reasonably incurred by such party in proceedings pursuant to the Clean Streams Law.[2] Indeed, our Supreme Court has so held. *See Lucchino, supra*, 809 A.2d 264 (Pa. 2002) (appellant can be ordered to pay permittee's fees). *See also Solebury Twp., supra*, 928 A.2d 990, 1005 (Pa. 2007) (reaffirming bad faith/vexatious conduct standard). The question then becomes: under what circumstances should a private party be responsible for paying another private party's fees, and

[2] There is also no dispute that this appeal is a proceeding pursuant to the Clean Streams Law.

should different considerations come into play for awarding fees against private parties (as opposed to the Department) or different types of private parties (e.g. appellants and permittees)?

Initially, the standard for awarding fees against any private party need not be concomitant with the standard for fees against the Department. *Cf.* 27 Pa.C.S. § 7708(c) (setting different standards in coal mining cases); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 n.12 (1983) ("We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. Differing abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act likely would justify exercising special care regarding the award of fees against private parties.") Different rights and circumstances are at play between the government and private parties. It is the Department's responsibility to issue defensible permits and it is the Department's action that we review. *See* 35 P.S. § 691.5 (Department's duty to implement and enforce the Clean Streams Law). Importantly, we review the permit as issued, not the application submitted by the permittee. 35 P.S. § 7514(a) (defining Board's jurisdiction to hold hearings and issue adjudications on orders, permits, licenses, or decisions of the Department). *See also O'Reilly v. DEP*, 2001 EHB 19, 51 (Board's objective is to determine whether issuance of final permit was appropriate, not to dwell on immaterial errors in the application process). Focusing on the permit application as opposed to the permit itself is not entirely consistent with our *de novo* review. *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476-77 (Board is not limited to considering what the Department considered when it made its decision and deferring to the Department's factual findings would violate Board's responsibility to conduct a *de novo* review). *See also Friends of Lackawanna v. DEP*, 2018 EHB 401, 417 (it is ultimately the Department's responsibility to scrutinize permit applications to ensure that they comply with the law before issuing the permit). Any relief that the Board can

award must relate to the Department's action, so even when a permittee agrees to something beneficial to the appellant in the course of settlement discussions, the Department must still approve of it if the benefit is tied to the action (e.g. the HDD plans in this case).

In *Lucchino*, the Supreme Court upheld a bad faith standard for awarding fees against a private party appellant. The Court held that, where "the record supports a tribunal's finding of fact that the conduct of the party was dilatory, obdurate, vexatious, or in bad faith," an award of fees will not be disturbed by an appellate court absent an abuse of discretion. *Id.*, 809 A.2d at 269-70. *See also Solebury Twp., supra*, (same).[3] The Court in *Lucchino* did not limit its holding to fee awards against appellants, and we see no compelling reason to establish different standards for different private litigants. The standard for awarding fees should not vary depending upon whether the private party who engaged in bad faith litigation was an appellant, permittee, intervenor, or any other private party involved in a third-party appeal of a Department-issued permit. A heightened standard is appropriate for fee awards against appellants so as to avoid chilling constitutional rights to due process. *Lucchino*, 809 A.2d at 270. A heightened standard is just as appropriate for fee awards against permittees because, as private parties, permittees are just as entitled to unfettered access to due process. Indeed, under the Board's rules, permittees have no choice but to be a party in third-party permit appeals, 25 Pa. Code § 1021.51(i), and they should not be dissuaded from vigorously protecting their interests in those proceedings in good faith. A permittee's right to defend an appeal is entitled to the same consideration as an appellant's right to pursue an appeal. *See generally White Twp. v. DEP*, 2005 EHB 611, 614 ("The purpose underlying the Rule [an earlier version of 25 Pa. Code § 1021.51(i)] is to protect the due process rights of appellees when their permits are challenged. A system which allows

[3] The Court in *Solebury Twp.* also held that fees may be awarded solely on the basis of bad faith or vexatious conduct without reference to any threshold criteria that would otherwise apply. *Id.*, 928 A.2d at 1005.

third parties to attack permits without providing an opportunity for the Permittee to participate fully in the case would suffer serious constitutional problems.").[4] Thus, we hold that if either the Appellants or Sunoco engaged in dilatory, obdurate, vexatious, or bad faith conduct in the course of prosecuting or defending the appeal, we may in our discretion order them to pay an appropriate amount of the opposing party's reasonably incurred costs and fees in this Clean Streams Law proceeding.

For purposes of the instant appeal, no other credible, workable alternative to the bad faith standard has been proposed. All of the parties contend, and we agree, that it is not possible to conceive of every possible scenario where a fee award might be appropriate. The Department has presented a series of hypotheticals where an award might be appropriate, but we are charged with deciding the third-party appeal of a permit that did not result in an Adjudication, and not a series of hypothetical scenarios. We do not wish to entirely rule out the possibility that fees might be awarded against a permittee where, for example, an Adjudication after a hearing on the merits reveals that a permittee engaged in fraud or something akin to gross negligence in the permit application process. But such a standard would be unworkable in this catalyst case where deciding whether there was such fraud or something akin to gross negligence would require a fact-finding hearing no less involved than a hearing on the merits, which is precisely what the parties wanted to avoid when they settled the case.[5] *See Upper Gwynedd Towamencin Mun.*

[4] We note as a point of interest that, under the statute governing attorney's fees in proceedings concerning coal mining activities, a private party initiating or participating in such a proceeding apparently may only recover fees from a permittee in cases involving enforcement actions. 27 Pa.C.S. § 7708(c)(1). The standard for a permittee recovering fees "from any party" is the bad faith standard. *Id.*, § 7708(c)(4). The Clean Streams Law does not have such limiting language.

[5] For example, the Department and Appellants say Sunoco made what ultimately turned out to be inaccurate predictions in its applications about the likelihood of inadvertent returns of drilling fluids during HDD activities. First, inaccurate predictions are not the same as fraud. But also, how are we to decide whether they were inaccurate based upon information available at the time? At a minimum we would need expert testimony from hydrogeologists. This sort of protracted, backward-looking, otherwise

Auth. v. Dep't of Envtl. Prot., 9 A.3d 255, 264-65 (Pa. Cmwlth. 2010) (discussing catalyst analysis for fee awards in cases that do not reach a final resolution on the merits). In the instant case, the bad faith standard is the appropriate basis for the exercise of our discretion.[6]

With the bad faith standard in mind and turning to the Appellants' application for fees from Sunoco, the Appellants have not alleged that Sunoco litigated in bad faith or that it engaged in dilatory, obdurate, or vexatious conduct in defending the appeal. Nor could they. Sunoco made significant concessions that resulted in substantial changes in its HDD practices in both the corrected stipulated order and the order resolving the third petition for supersedeas. The Board was closely involved in all aspects of this case and we never detected anything approaching bad faith or vexatious conduct on Sunoco's part. Accordingly, no fees are awarded against Sunoco.

Turning to Sunoco's application for fees against the Appellants, Sunoco acknowledges that the Appellants acted in good faith when they filed their notice of appeal in February 2017 to challenge the twenty permits issued by the Department for the pipeline project. It does not point to any bad faith until after April 16, 2018, the date on which the Board held an evidentiary hearing and entered the stipulated order that dismissed Appellants' petition for partial supersedeas filed in the appeal from the COA and approved further revisions to the HDD Plan.[7] After that fateful date, however, Sunoco argues that continued prosecution of the appeal amounted to bad faith. In other words, Sunoco believes the Appellants were required to settle or

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pointless exercise hardly seems to be in the parties' or the public's interest or a wise use of the Board's resources.

[6] The Department argues that shared responsibility for fees will incentivize permittees to submit better permit applications. This is a policy argument better suited for the Legislature. Nevertheless, we cannot help wondering whether the distant threat of attorney's fees in a third-party appeal adds any real marginal incentive to a party seeking permits for a multi-billion dollar project. Any incentivizing is at best a zero-sum game; sharing fee responsibility with permittees at least theoretically disincentivizes the Department to do a good job and issue defensible permits.

[7] Sunoco does complain about some of the Appellants' conduct in discovery occurring well before April 2018, but it does not appear to specifically allege bad faith for that conduct.

withdraw their entire appeal as of April 16, 2018. Anything less constituted pure harassment in Sunoco's view.

Sunoco points to the fact that the Appellants' final settlement was only with the Department and only involved programmatic changes regarding the Department's review of future pipeline permits. (In this contention Sunoco fails to mention that the Appellants had already obtained Sunoco's agreement to implement dramatic changes to its HDD practices.) The Appellants could not have realized such changes through an Adjudication from the Board, says Sunoco. The Appellants also continued to try (unsuccessfully) to extract additional concessions from Sunoco in earlier settlement discussions that Sunoco believes the Board could not have awarded in an Adjudication (e.g. restoration projects). Sunoco complains that the Appellants did not have any expert witnesses lined up for the merits hearing, and notes they did not conduct any fact discovery on Sunoco (as opposed to the Department). The Appellants did not prevail on their motion for summary judgment, Sunoco remarks (although they did not entirely lose either). Seemingly, in Sunoco's view, the Appellants' case was falling apart, so they were *required* to settle. To Sunoco, "it was clear" that the Appellants no longer had any intention of pursuing their appeal after April 16, 2018.

We will assume for current purposes that fees can be awarded against an appellant in an appeal initiated in good faith based upon bad faith that arises during the course of the litigation, although the case law might suggest otherwise. *See Friends of Lackawanna, supra*, 2018 EHB at 418 ("in seeking fees from a third-party appellant, we have required that a permittee show that the appellant *brought the appeal* in bad faith.") (emphasis added); *Lyons v. DEP*, 2011 EHB 447, 449 ("The only circumstance that we can currently imagine where such an award might be appropriate is a case where the appellant's appeal was frivolous or *brought* in bad faith.")

(emphasis added); *Lucchino v. DEP*, 1998 EHB 556, 561 ("The right to petition the courts does not protect abuse of the judicial process through the *initiation* of baseless litigation.") (emphasis added); *Alice Water Protection Ass'n v. DEP*, 1997 EHB 840, 851 ("we hold that in order for a permittee to recover attorney's fees from an appellant under Section 4(b) of the Pennsylvania Surface Mining Act or Section 307(b) of the Clean Streams Law…it must demonstrate that the appeal was *brought* in bad faith.") (emphasis added).

We find no basis to conclude that the Appellants' appeal was initiated or continued for the purpose of harassing Sunoco or that any of the Appellants' behavior was improper or dishonest or in bad faith. We find nothing untoward about continuing to pursue the appeal before reaching a final settlement within days of the scheduled hearing on the merits. It is certainly not uncommon for cases to settle on the courthouse steps, and indeed, we more frequently see cases settle as the hearing date nears than perhaps at any other point in the appeal. Deadlines are a source of motivation to get things done in litigation as much as in any other area of life. If settling shortly before trial were concomitant with bad faith, we suspect we would have claims for fees against appellants in dozens of cases on that basis alone. Additionally, we see nothing amounting to bad faith in the Appellants' settlement activity. The entire nature of settlement involves concessions, moving off of previously held positions, asking for items that might be beyond what the court or Board could itself award, and a give-and-take between the negotiating parties. With that there is also a certain amount of posturing to try to obtain the best possible outcome for a client's interests. We have no interest whatsoever, and indeed think it would be arguably improper, getting into a "he said, she said" analysis of actual settlement negotiations between counsel. Nothing here strikes us as being beyond typical conduct in negotiations. Nothing comes close to approaching bad faith or vexatious conduct.

Despite Sunoco's complaints that it was unnecessarily burdened by having to undertake hearing preparations for a case that settled, we note that all indications suggest that the Department and the Appellants also continued to prepare for the hearing with what appears to be the prudent thought that, if settlement were unsuccessful, the hearing would continue as scheduled. The Board had indicated that there would be no further extensions of the hearing date. The Appellants continued to prepare for the hearing up until they withdrew their appeal. They filed a prehearing memorandum consisting of 410 paragraphs and including more than 500 exhibits. They also filed a motion in limine regarding three of Sunoco's expert witnesses. A new attorney was added to their team. There were documented conversations among the parties regarding the order of witnesses. The Appellants indicated their intention to serve subpoenas. Sunoco's suggestion that this was all just a ruse is not credible. There is nothing inherently unfair or improper about pursuing settlement while continuing with hearing preparations. We think that likely happens in a number of cases both before this Board and any other tribunal.

Further, we are not persuaded by Sunoco's contention that settlement terms must necessarily be tied to the relief one could obtain before the Board in order for the party pursuing settlement to be continuing the appeal in good faith. It is not uncommon for parties to seek relief that cannot strictly be obtained in a potential adjudication of a legal matter. Although the Board cannot award damages, it is not unheard of for settlements between parties to involve some sort of, e.g., monetary compensation. Settlements are essentially a type of bargained-for contract. A third-party appellant may seek money or equitable relief in a settlement in consideration for the withdrawal of the appeal. *See In re Larsen*, 616 A.2d 529, 595 (Pa. 1992) ("One of the strengths of the legal system -- definitive, precedential rulings to promote clarity, certainty, and order -- may actually be dysfunctional for the creation of innovative and idiosyncratic solutions to

problems that may never reach judicial resolution. *To the extent that negotiations in the shadow of the court are limited by conceptions of what the court would do, negotiation may present no real, substantive alternative to trial….The limited remedial imagination of courts, when extended to negotiation, narrows not only what items might be distributed but also how those items might be apportioned*." (quoting Menkel-Meadow, *Toward Another View of Legal Negotiation*, 31 UCLA L. Rev. 754, 790-91 (1984)) (emphasis in opinion)). We also see nothing wrong with the Appellants' behavior in discovery and how that may have influenced their hearing preparations. The decision to not have expert testimony is an element of a party's litigation strategy, whatever the wisdom of that strategy may be. At least some of the Appellants' surviving claims were largely legal in nature. Even if Sunoco is correct and the Appellants' case was weakening, the Appellants needed to preserve their issues for appeal.

Even accepting all of Sunoco's assertions as true, there is nothing in them that shows that the Appellants had no goal other than to harass, embarrass, or annoy Sunoco, or that the Appellants were behaving in a corrupt or inappropriate way during the litigation after April 16, 2018. All the conduct detailed by Sunoco stands in stark contrast to that in *Lucchino v. DEP*, 1998 EHB 1070, 1082, where we did award fees to a permittee against an appellant because the appellant had exhibited bad faith "at the time he filed his appeal and throughout th[e] action." That award was eventually upheld by our Supreme Court, where it summarized the appellant's bad faith as follows:

> Lucchino lacked standing because he was not even remotely affected by the Department permit he sought to challenge, but filed his appeal anyway merely to harass. He candidly admitted in his deposition that the permitted coal removal would not affect either him or his property, and that dust, noise or pollution from the removal operation would not reach him. He stated that his appeal was not directed at stopping the permitted coal removal, which he had voted in favor of in his capacity as a township supervisor, but instead was directed at Department personnel, whom Lucchino accused of violating the law.

Lucchino, 809 A.2d at 269. Lucchino's appeal was not a challenge to the action taken by the Department, "but was merely an attack on agency employees and officials." *Id.* We have nothing remotely close to that situation here. Instead, Sunoco has compiled a list of rather hyperbolic complaints about the Appellants' litigation strategy, which is nowhere near the sort of conduct that can be characterized as vexatious or obdurate.

Sunoco appears to be forgetting one fundamental point: unless the Appellants could resolve their differences with the Department **and** Sunoco, they needed to proceed to a hearing. The Appellants needed to keep their appeal alive against Sunoco **and** the Department in order to obtain the concessions they were seeking from the Department. The Appellants had already obtained substantial concessions in the field from Sunoco, but there is no mechanism for simply dropping Sunoco from the case. The fact that some of the negotiations in the final stretch were only with the Department does not equate to a finding of bad faith. Sunoco says the Appellants were fighting a losing cause. However, we believe they were pursuing legitimate arguments to the very end that did not necessarily require expert testimony. For all we know, the Appellants may have settled more because installation of the pipeline was all but completed than because they viewed their arguments as anything less than good faith challenges to the Department's actions. As with Sunoco, we detect nothing even remotely approaching bad faith or vexatious conduct in the Appellants' continuing prosecution of their appeal up to the time of the hearing on the merits.

Accordingly, we issue the Order that follows.

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 19th day of February, 2019, it is hereby ordered that the Appellants' and Permittee's applications for costs and fees are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

*** Chief Judge and Chairman Thomas W. Renwand files an Opinion Concurring in Part and Dissenting in Part, which is attached.**

DATED: February 19, 2019

c: For DEP, General Law Division:
Attention: Maria Tolentino
(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

OPINION OF CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND
CONCURRING IN PART AND DISSENTING IN PART

I respectfully concur in part and dissent in part in the majority opinion. I fully agree that no attorney's fees should be awarded against the Appellants in this appeal. The majority is correct that the Appellants raised important issues of vital public concern that are very much in the public interest.

Where I part company with my esteemed colleagues is on the question of when attorney's fees may be awarded against a permittee and the standard to be applied under Section 307(b) of the Clean Streams Law. According to the majority's view, attorney's fees may be awarded to an appellant against a permittee only when the latter has engaged in conduct that is vexatious or amounts to bad faith. This is a much higher standard than that applied against the Department of Environmental Protection when awarding fees. The majority offers no clear explanation or, more importantly, any legally-sound reasoning as to why the same standards applied against the Department should not be equally applied when considering a fee request against a permittee.

The majority opinion seems to state that while the Board has broad discretion to award attorney's fees against the Department, such awards against permittees should be rarely, if ever,

permitted, noting that "although fees are occasionally sought from unsuccessful appellants in third-party permit appeals, it is rarer for fees to be sought from a permittee." Majority Opinion at page 7.[1] However, Section 307(b) of the Clean Streams Law makes no such distinction. With regard to the awarding of attorney's fees, Section 307(b) says simply:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act.

35 P.S. § 691.307(b). The language of Section 307(b) does not differentiate between private parties and the Department. It authorizes the Board to exercise our discretion and award fees to "any party" whenever such fees have been "reasonably incurred by such party in proceedings pursuant to this act." *Id.* Likewise, Section 307(b) does not shield any parties from fee liability. When the words of a statute are clear and free from ambiguity, we may not ignore the plain language of the statute under the pretext of pursuing its spirit. 1 Pa. C.S. § 1921(b).

In my view, if the Pennsylvania General Assembly had wanted the Board to apply a different standard in considering fee awards against a permittee than against the Department, I believe it would have stated so, as it did in Act 2000-138, 27 Pa. C.S. § 7708 (Costs for mining proceedings), which sets forth the standards for attorney's fee awards in surface coal mining cases. Act 138 clearly envisions attorney's fee awards against a permittee and establishes a less strict standard than for fee awards against appellants. While attorney's fees may be awarded against an appellant only where it has engaged in bad faith or behavior for the purpose of harassing or embarrassing the permittee, Act 138 permits awards against a permittee upon a finding that a violation of a statute, regulation or permit occurred or an imminent hazard existed

[1] One reason that fees are rarely sought from a permittee might stem from the fact that the Board has never awarded fees against a permittee.

and the party seeking the award made a substantial contribution to the determination of the issues. 27 Pa. C.S. § 7708(c)(1) and (4).

I agree with the majority that, even when the language of a statute does not set out different standards for fee awards, the courts have applied a higher standard when reviewing fee petitions brought against an appellant on the basis that, to do otherwise, would have "a potential 'chilling effect' on the willingness of the ordinary citizen to pursue resolution of his disputes in the courts." *Lucchino v. Dep't of Environmental Protection*, 809 A. 2d 264, 270 (Pa. 2002). Robust public involvement in environmental issues, including permit decisions, may have beneficial environmental and health impacts benefiting the citizens of Pennsylvania. Thus, even though Section 307(b) of the Clean Streams Law contains no such language requiring higher scrutiny for petitions filed against an appellant, we are required to do so under the case law established by our higher courts. I am aware of no such case law by the Commonwealth Court or Supreme Court requiring a stricter standard of scrutiny for an attorney's fee award against a permittee, and the majority opinion cites none. Nor do I believe that allowing attorney's fee awards against permittees will have a "chilling effect" on permit applicants.

Sunoco correctly points out that the Board has been loath to award attorney's fees against a permittee in the past, citing *Jay Township v. DER*, 1987 EHB 36; *Township of Harmar v. DER*, 1994 EHB 1107; and, most recently, *Friends of Lackawanna v. DEP*, 2018 EHB 401. In *Friends of Lackawanna*, the appellant did not seek attorney's fees against the permittee, and the Board was reluctant to grant such an award where it was not requested. Here, the Appellants have filed a petition seeking an award of attorney's fees and costs against Sunoco which has enabled us to look at this important issue anew. As to *Jay Township* and *Township of Harmar*, those cases were decided prior to the Pennsylvania Supreme Court's instructive holding in *Solebury Township v. Dep't of Environmental Protection,* 928 A.2d 990 (Pa. 2007), requiring the Board to

apply less rigid standards for recovery of fee awards under Section 307(b) of the Clean Streams Law. Indeed, in *Solebury Township*, the Court recognized the "broad language of Section 307 and the public policy favoring liberal construction of fee-shifting provisions." *Id.* at 1005. The standard set forth in *Jay Township* and *Township of Harmar* is no longer valid.

Sunoco argues that allowing a fee award against a permittee will cause the Department to "abrogate its legal responsibility" and "dis-incentivize the Department from carefully reviewing permit applications." (Sunoco Brief, p. 1.) This is a disingenuous argument since the Department also shares in the risk of an attorney's fee award by a successful third-party appellant. Allowing fees against a permittee does not abrogate the duties and responsibilities of the Department in reviewing permit applications and issuing environmentally sound permits.

Sunoco further argues that there has been no success on the merits because there was no decision by the Board suspending the permits. However, as the Court held in *Solebury Township*, a hearing or formal judgment on the merits is not a prerequisite to a finding that a party has prevailed with some degree of success on the merits. *Id*. at 1004. There appears to be no question here that the Appellants secured changes to the design of the project and plans related to the permit application.

According to Sunoco's rationale and that of the majority opinion, the entire burden of attorney's fees should fall on the shoulders of the taxpayers of the Commonwealth, even though the permittee directly benefits from the permitting process and, indeed, provides much of the information on which the Department relies in issuing permits. In fact, when permits are challenged, the permittee and the Department many times work closely in defending the permit before the Environmental Hearing Board. It is only appropriate then, if the law mandates an award of attorney's fees under the Clean Streams Law, that a permittee should shoulder at least some of its rightful responsibility. Of course, when a fee petition is brought against a permittee,

the permittee will be accorded its full panoply of due process rights in challenging this responsibility. This is more than fair. The permittee is not a disinterested party. Indeed, this appeal illustrates that fact. Even though many hard-working Department professionals spent thousands of hours reviewing the permit application and accompanying information and crafting a permit that they believed to be in accordance with the law, the Department still had to rely heavily on the professional judgment of Sunoco's experts and consultants. In many instances, this reliance was completely justified, but the record also shows that problems unfortunately did occur.

Although I agree with my colleagues that the responsibility for issuing a permit falls on the Department, it is the responsibility of the permit applicant to submit complete and accurate permit applications, and it is reasonable for the Department to rely on this information. I agree with the Department that its "duty is not to replicate studies. . .but to verify that the applicant has completed these studies and to assess, based upon the application provided and the permit reviewer's professional judgment, whether those studies were done appropriately and provide adequate information to proceed." (Department's Brief, p. 20.) As aptly stated by the Appellants, "It is neither realistic nor desirable that responsibility for ensuring the accuracy of every detail of every permit application should rest solely with the Department; such a process would require tremendous resources that have never been available to the Department, and would greatly delay the review of permit applications." (Appellants' Brief, p. 2.) Moreover, whenever an appeal is taken from the issuance of a permit, the Board's review is *de novo*. This means that both an appellant and a permittee may introduce evidence at the hearing before the Board that was not available to the Department when it conducted its review. As stated earlier, the permittee shares in the responsibility for ensuring that a permit is based on the most accurate and complete data, and, as such, should not be shielded from a fee award when that permit is

challenged. The taxpayers of this Commonwealth should not bear the sole burden for such an award.

The Board's jurisdiction regarding the Department's review and issuance of permits is triggered when the Department takes a final action, which occurred in this case when it issued the permits under appeal. The provisions of the Environmental Hearing Board Act establishing the Board's jurisdiction do not in any way shield a permittee for liability under Section 307(b) of the Clean Streams Law. The fact that the Board's jurisdiction is not triggered by the filing of the permit application has no bearing on the Board's consideration of a fee petition against a permittee after a permit has been issued and timely appealed.

As the Department correctly points out in its excellent and scholarly brief, a determination that fees can only be awarded against the Commonwealth ignores the intent of the General Assembly to favor the public interest as against any private interest. 1 Pa.C.S. § 1922(5). According to the majority, when an appellant successfully challenges the issuance of a permit, the Board should hold only the Department responsible for its errors, even when those errors may have been the joint responsibility of the permittee. I agree with the Department that, if the Board also held permittees responsible for errors or shortcomings proven to be their responsibility (or joint responsibility), permittees "will have ample incentive to be fully engaged in the permitting process and defense of an application, which will result in better permit applications, fewer fee awards, and, more importantly, cleaner streams." (Department's Brief, p. 16.)

A critical component of a model regulatory program is meaningful citizen participation. Citizens often have information that is developed in cases before the Board that was not available to either the Department or the permittee. However, the Department makes clear that the General Assembly has not allocated any funds to the Department for the payment of fee

awards assessed pursuant to Section 307(b) of the Clean Streams Law. Instead, those awards are paid from the Clean Water Fund. A strong public policy argument can be made for allocating at least some responsibility for payment of attorney's fees to a permittee. This recognizes the significant role that a permittee plays both in the permitting process and in proceedings before the Board and further recognizes the financial benefit that permittees receive from the issuance of a permit.

As I stated in *Sierra Club v. DEP and Lackawanna Energy Center, LLC*, 2018 EHB 297, (Renwand, C.J., dissenting), the Pennsylvania Supreme Court and Commonwealth Court have given the Board "clear and specific direction on how we should evaluate an application for attorneys' fees and costs under Section 307(b) of the Clean Streams Law," and the courts have not hesitated to overturn the Board's rulings when we have taken an overly narrow approach. *Id.* at 308. The courts have stated over and over again that the Board has broad discretion to award attorney's fees, and time and time again the Board has failed to heed this directive. In my opinion, my colleagues have, once again, applied an overly restrictive interpretation to Section 307(b) without any legal basis for doing so.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: February 19, 2019

APPENDIX C

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 35 P.S. Health and Safety (Refs & Annos)

Chapter 5. Water and Sewage (Refs & Annos) the Clean Streams Law (Refs & Annos)

Article III. Industrial Wastes

35 P.S. § 691.307

§ 691.307. Industrial waste discharges

Currentness

(a) No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. For the purposes of this section, a discharge of industrial wastes into the waters of the Commonwealth shall include a discharge of industrial wastes by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth.

(b) Public notice of every application for a permit or bond release under this section shall be given by notice published in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four weeks. The department shall prescribe such requirements regarding public notice and public hearings on permit applications and bond releases as it deems appropriate. For the purpose of these public hearings, the department shall have the authority and is hereby empowered to administer oaths, subpoena witnesses, or written or printed materials, compel the attendance of witnesses, or production of witnesses, or production of materials, and take evidence including but not limited to inspections of the area proposed to be affected and other operations carried on by the applicant in the general vicinity. Any person having an interest which is or

may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law, and from the adjudication of said board such person may further appeal as provided in Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act. In all cases involving surface coal mining as it is defined in section 3 of the act of May 31, 1945 (P.L. 1198, No. 418), known as the "Surface Mining Conservation and Reclamation Act," [1] any person having an interest which is or may be adversely affected shall have the right to file written objections to the proposed permit application or bond release within thirty days after the last publication of the above notice. Such objections shall immediately be transmitted to the applicant by the department. If written objections are filed and an informal conference requested, the department shall then hold an informal conference in the locality of the surface mining operation. If an informal conference has been held, the department shall issue and furnish the applicant for a permit or bond release and persons who are parties to the administrative proceedings with the written finding of the department granting or denying the permit or bond release in whole or in part and stating the reasons therefor, within sixty days of said hearings. If there has been no informal conference, the department shall notify the applicant for a permit or bond release of its decision within sixty days of the date of filing the application. The applicant, operator, or any person having an interest which is or may be adversely affected by an action of the department to grant or deny a permit or to release or deny release of a bond and who participated in the informal hearing held pursuant to this subsection or filed written objections, may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law and from the adjudication of said board such person may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes.

(c) A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance.

Credits

1937, June 22, P.L. 1987, art. III, § 307. Amended 1945, May 8, P.L. 435, § 4; 1970, July 31, P.L. 653, No. 222, § 9; 1980, Oct. 10, P.L. 894, No. 157, § 1, imd. effective.

Notes of Decisions (49)

Footnotes

1 52 P.S. § 1396.3.

35 P.S. § 691.307, PA ST 35 P.S. § 691.307
Current through 2021 Regular Session Act 4. Some statute sections may be more current, see credits for details.