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Attorney Fees Awards Under the Clean Streams Law

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In February, the Pennsylvania Supreme Court decided that the Environmental Hearing Board could award attorneys' fees and litigation costs to a prevailing third-party appellant under the Clean Streams Law. *Clean Air Council v. Dept. of Envtl. Prot'n*, No. 73 MAP 2021 (Pa. Feb. 22, 2023). Importantly, the award in that case was *against* the private applicant whose permits the third-party had challenged, not against the Department of Environmental Protection alone. That result has possible implications for how one might prudently pursue approvals. It may turn out to chill important behavior.

The Clean Streams Law, 35 Pa. Stat. Ann. §§ 691.1 to .1001, is Pennsylvania's water pollution regulatory statute. It is not a "little" version of the federal Clean Water Act, but instead a state law dating back to 1937.

Article III of the Clean Streams Law governs discharges of "industrial waste." The statute defines "industrial waste" as essentially any material (even material not conventionally thought to be waste) resulting from any "manufacturing or industry" *or* from any "establishment." An "establishment" includes most facilities or vehicles other than a residence.

Section 301 prohibits any direct or indirect discharge of "industrial waste" to any surface water or groundwater. Section 307(a) allows that discharge subject to a permit or a regulation. Section 307(b) provides that the Department of Environmental Protection will provide public notice of any permit application.

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Section 307(b) further provides that "[a]ny 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 . . . ." That is, as is familiar, any permit or permit denial under the Clean Streams Law may be appealed by the applicant or an interested third person.

At the conclusion of that appeal, "[t]he 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 Pa. Stat. Ann. § 691.307(b). *Clean Air Council* addresses that award.

Clean Air Council involves two sets of appeals from permits issued to a private company to build a pipeline across Pennsylvania. In one case, public interest groups challenged twenty permits necessary for the whole pipeline. In the other, private landowners challenged two permits necessary for the pipeline to cross their property. In each case, these were not conventional wastewater discharge permits, but instead construction-related stormwater, wetlands, and stream encroachment permits.

When they partially prevailed, the appellants sought an award of attorneys' fees under section 307(b) from the pipeline developer. The EHB denied the application, finding that the permit applicant had not proceeded in bad faith.

The Supreme Court held that the EHB's application of what amounted to a *de facto* bad faith threshold for any attorneys' fees award against a private party violated the Clean Streams Law. The court agreed that some earlier rulings from the courts and the EHB seemed to call for a showing of bad faith in order to justify an award against a third-party appellant. But, reasoned the court, the same ought not to be true for awards against a successful permit applicant defending its permit in the EHB.

The court viewed third-party appellants and permit applicants as having different roles in the system set up by the Clean Streams Law. Ultimately, the Clean Streams Law is designed to effectuate compliance with the Environmental Rights Amendment, Pa. Const. art. I, § 27. Of course, neither the Environmental Hearing Board nor the Environmental Rights Amendment existed in 1937, but the current statute has been amended since.

Third-party appellants, according to the court, serve as a check on applicants and the Department, assuring that permits preserve pure water, the values of the environment, and the environmental trust resources. Applicants can submit inadequate, incomplete, misleading, or false information, even in good faith, and therefore, reasoned the court, applicants are among the parties to be checked by the process.

The Clean Streams Law does not restrict the discretion of the EHB in awarding fees. Accordingly, reasoned the court, the Board could not restrict its own discretion by applying a *per se* rule limiting private awards to situations where a permit applicant had proceeded in bad faith. If a third-party appellant caught and corrected an error, even a good-faith error, it should receive its fees, and the burden should not necessarily be placed on the DEP.

This reasoning is at odds with what many applicants may regard as their role. An applicant seeks a permit. Other than explicit requirements of a regulation or an applicant form, the applicant typically does not see itself has having any particular obligation to be forthcoming about facts. Most applicants would not offer additional information unless the DEP requested it.

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Moreover, on complicated or novel questions, applicants expect latitude to advocate for a favorable reading of the law. That advocacy is important to the development of regulatory programs. The draftsmen of statutes and regulations cannot anticipate every circumstance that may arise over time. One would not want permitting staff at the DEP to treat those rules so prescriptively that they cannot apply them adaptively in new situations. An applicant can propose a reading. DEP has the obligation to evaluate the applicant's proposed reading, and to act accordingly.

An award of fees *against* an applicant implicitly criticizes how the applicant pursued approvals. Even without a finding of bad faith, it impugns the reasonableness of the positions that the applicant took. Many applicants, like the pipeline company in *Clean Air Council*, regularly require permits from DEP. An EHB decision awarding fees to a third party will have a tendency to chill what may be quite useful creative advocacy. The applicant's advocacy had to have been somewhat reasonable because in any case where the EHB sustains a third-party appeal, the advocacy must have convinced DEP to grant the approval to the applicant in the first place. Do we want a rule that will chill the applicant's advocacy because it is sometimes overly successful?

Recall also that the Clean Streams Law does not only authorize conventional "water" permits. It is among the statutes that authorize the permitting rules for solid waste facilities, the cleanup standards under the Land Recycling Program, the permits for mines and oil and gas wells, and so forth. This ruling may have a broad reach.

And the broadest reach may be in the advocacy regarding the Environmental Rights Amendment itself. The ERA is in the early days of its reinterpretation following the Supreme Court's rulings in *Robinson Township* and *Pennsylvania Environmental Defense Foundation*. The ERA applies both to the grant of a permit and to its denial; either can have impacts on environmental quality or environmental trust assets. There is no structural reason given by the court why applicants and third-party appellants ought to be differently situated in order for that litigation to play out and the Amendment to be interpreted properly.

Maybe the American Rule ought not to be conventional in any EHB litigation. A right to recover fees from the Commonwealth when an appeal corrects the DEP's action may make sense. But exposing good faith private permit applicants to an award may be significant. Prudent practitioners must advise their clients that positions with which the EHB ultimately disagrees may expose their clients to an award of litigation expenses to another party and the implicit criticism that award entails.

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