



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEECH MOUNTAIN LAKES ASSOCIATION, INC.	:	
	:	
v.	:	EHB Docket No. 2022-053-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH MAURER, Permittee	:	Issued: January 18, 2024
	:	

OPINION AND ORDER ON APPLICATION FOR FEES AND COSTS

By Bernard A. Labuskes, Jr., Board Member and Judge

Synopsis

The Board denies a permittee’s application to recover attorney’s fees and costs from an appellant under Section 307(b) of the Clean Streams Law because the appellant’s appeal of the Department’s approval of coverage under a general permit for a small floating dock does not qualify as a proceeding pursuant to the Clean Streams Law.

OPINION

Beech Mountain Lakes Association, Inc. (“BMLA”) appealed the Department of Environmental Protection’s (the “Department’s”) approval of Permittee Seth Maurer’s registration of a small floating dock under General Permit BWEW-GP-2, Small Docks and Boat Launching Ramps, for the construction of a 15-foot by 15-foot floating dock on the Lake of the Four Seasons in Butler Township, Luzerne County. On July 18, 2023, we issued an Opinion and Order denying a motion for summary judgment filed by BMLA and granting a motion for summary judgment filed by the Department and Maurer and dismissing this appeal. We found in our Opinion and Order that BMLA’s overall appeal was concerned with whether or not the Maurers were allowed to use the lake into which their dock would extend and other attendant property issues, and whether

Maurer provided the Department with enough information concerning property rights when the Department approved coverage under the general permit. We determined that the general permit did not grant or convey any property rights and that BMLA did not produce any facts sufficient to establish its cause of action in response to the joint motion for summary judgment filed by the Department and Maurer.

On August 17, 2023, Seth Maurer, the permittee, filed an application for fees and costs pursuant to the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, seeking to recover \$4,418.00 from BMLA, the appellant, for 16.5 hours of work by counsel.¹ Maurer argues that BMLA’s appeal was meritless, unsupported by evidence, and filed in bad faith. BMLA filed a response to the application arguing that its appeal was not filed pursuant to the Clean Streams Law, but rather the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, which does not contain a provision for fee recovery, and therefore, the application should be denied. We held a conference call with the parties on September 26, 2023. During the call, the Department expressed its position that it was not taking an active role in the fees proceedings. Maurer and BMLA agreed that neither a hearing nor discovery was needed to resolve the application. Maurer and BMLA expressed a desire to file briefs on the application. We issued an Order accordingly. Maurer filed a brief in support of the application on October 26, 2023. BMLA filed a brief in opposition to the application on November 27, 2023. Maurer was permitted but chose not to file a reply brief. The Department did not participate in the briefing.

¹ In a footnote at the end of his brief in support of the application for fees and costs, counsel for Maurer says Maurer has now been billed \$5,900.00, which includes the fees generated in conjunction with work done on the fee application. The brief does not attach any updated billing records for this work.

The Clean Streams Law allows any party to recover costs and attorney's fees that have been reasonably incurred in **proceedings pursuant to the Clean Streams Law**. Section 307(b) of the Clean Streams Law provides in relevant part:

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 threshold issue in Maurer's request for attorney's fees is whether this appeal of the Department's authorization of coverage under a general permit issued pursuant to the Dam Safety and Encroachments Act constitutes proceedings pursuant to the Clean Streams Law.

There are some appeals in which the Clean Streams Law issues are obvious on their face, but this is not one of them. However, even though the permit authorization granted by the Department for the construction of a small dock was issued under the Dam Safety and Encroachments Act and not the Clean Streams Law, this is not necessarily dispositive for our inquiry in determining whether a proceeding can be said to be pursuant to the Clean Streams Law under Section 307(b). Instead, we consider factors such as the reason the appeal was filed and the purpose of the litigation, whether the notice of appeal raised objections under the Clean Streams Law, whether the Clean Streams Law objections were pursued throughout the appeal, whether the regulations at the center of controversy were promulgated pursuant to the Clean Streams Law, and whether the case implicates the discharge of pollutants to the waters of the Commonwealth. *Gerhart v. DEP*, 2020 EHB 1, 6, *rev'd on other grounds*, *Clean Air Council v. Commonwealth*, 289 A.3d 928 (Pa. 2023); *Wilson v. DEP*, 2010 EHB 911, 914-15.

Overall, the important point is whether issues that can be fairly characterized as Clean Streams Law issues were involved in the appeal. Thus, we have previously found appeals of

actions that ostensibly arise out of other statutes can still be, at least in part, proceedings pursuant to the Clean Streams Law because of the issues that were litigated during the course of the appeal. *See, e.g., Friends of Lackawanna v. DEP*, 2018 EHB 401, 405-06 (finding that an appeal of a permit renewal for a landfill under the Solid Waste Management Act was still partially a proceeding pursuant to the Clean Streams Law because the appellant pursued issues of groundwater contamination throughout the appeal); *Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 237 (finding an appeal of a sewage facilities planning module issued under the Sewage Facilities Act was a Clean Streams Law proceeding where the appellant focused on the planning module's impact on Exceptional Value waters and the antidegradation requirements).

Where the action underlying an appeal is derivative of authority other than the Clean Streams Law, it is particularly important that a party seeking fees comes forward and explains what issues implicate the purposes and values of the Clean Streams Law. For instance, in the sewage planning context, a party seeking fees needs to explain how the appeal implicated Clean Streams Law issues instead of issues more appropriately characterized as issues under the Sewage Facilities Act, which, like the Dam Safety and Encroachments Act, has no fee recovery provision. *Compare Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 705 (awarding fees in planning module appeal for issues that focused on water quality), *with Longenecker v. DEP*, 2016 EHB 872 (denying fees because a few cursory references to the Clean Streams Law in a lengthy notice of appeal concerning an approval of a sewage facilities plan not sufficient to make appeal a Clean Streams Law proceeding), *and Borough of Kutztown v. DEP*, 2016 EHB 189 (denying fees in appeal of approval of exemption from requirement to revise sewage facilities plan focused on a certification of capacity under the sewage planning regulations, not anything about water quality).

Neither BMLA’s appeal nor Maurer’s defense of his permit involved issues that can fairly be characterized as Clean Streams Law issues. As previously mentioned, this appeal was all about whether Maurer had the necessary property rights to install the dock. There are no objections in the notice of appeal that can be said to raise concerns about the pollution of the lake. BMLA did not raise any such objections as the appeal proceeded, and the contest over summary judgment, like the appeal itself, centered on property rights. Maurer’s permit defense did nothing to advance the purposes and values of the Clean Streams Law. Our Opinion and Order granting summary judgment did not mention or raise any issues regarding the Clean Streams Law. Instead, our rationale for dismissing this case was that the Department has a limited role in assessing property rights in the context of a general permit authorization for a small dock. This case simply has none of the markers that render it a Clean Streams Law proceeding.

This appeal stands in contrast with *Lyons v. DEP*, 2011 EHB 447, where we dealt with a similar factual scenario involving the issuance of a permit for a small dock under the Dam Safety and Encroachments Act. In *Lyons*, although we ultimately denied the application for fees, we found that the appeal was a proceeding pursuant to the Clean Streams Law, at least in part. There, unlike here, the appellant throughout the case and at the merits hearing “presented argument and testimony that the project violated the Clean Streams Law and regulations promulgated thereunder because of the adverse effect the dock would allegedly have on the water quality of the lake and the creatures that live therein.” *Id.* at 448. We noted that the appellant sincerely wished to protect the lake and believed, albeit incorrectly, that the dock would have an adverse impact on the lake’s environment. *Id.* at 449-50. The appellant presented expert testimony that use of the dock could cause environmental harm because of the shallowness of the water around the dock. *Id.* at 450. To repeat, no such issues or concerns were raised or pursued in BMLA’s case.

Maurer argues that the Dam Safety and Encroachments Act authorizes the Environmental Quality Board (EQB) to promulgate regulations, 32 P.S. § 693.5, and when the EQB promulgated those regulations at Chapter 105 of Title 25 of the Pennsylvania Code, it listed the Clean Streams Law among the authority for developing those regulations, in addition to the Dam Safety and Encroachments Act (as well as the Administrative Code of 1929 and the Floodplain Management Act). However, we are fairly sure that every environmental regulation in Pennsylvania has been promulgated in part pursuant to the Clean Streams Law. “It is a long reach to say that an appeal is a proceeding pursuant to the Clean Streams Law simply because it cites a regulation which names the Clean Streams Law as one of a number of promulgating authorities.” *Angela Cres Trust v. DEP*, 2013 EHB 130, 139. *See also Borough of Kutztown v. DEP*, 2016 EHB 189, 194 (“While it is true that the Clean Streams Law is listed among the sources of authority for the regulation, the important point is that the regulation does not relate to water quality in any material way.”).

Citing the Pennsylvania Supreme Court’s recent Opinion in *Clean Air Council v. Commonwealth*, 289 A.3d 928 (Pa. 2023), Maurer says that the Board must liberally employ the fee shifting provision in the Clean Streams Law. *Id.* at 954. Although our Supreme Court has certainly provided us with the direction to construe fee applications broadly, it has also directed us to look to the reasons why the Clean Streams Law exists, finding that the “express legislative goal” of the Clean Streams Law “is clean water.” *Clean Air Council*, 289 A.3d at 954. The Court did not provide us with the latitude to allow parties to transmogrify appeals that had nothing to do with upholding the purposes and values espoused by the Clean Streams Law so that those parties can recover fees.



Because establishing that a proceeding is pursuant to the Clean Streams Law “is essentially akin to a jurisdictional requirement” for fee requests under Section 307(b), *Gerhart*, 2020 EHB at 6, we need not evaluate Maurer’s application any further.

Accordingly, we issue the Order that follows.



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ORDER

AND NOW, this 18th day of January, 2024, it is hereby ordered that the Permittee’s application for fees and costs is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Board Member and Judge



s/ Paul J. Bruder, Jr. _____
PAUL J. BRUDER, JR.
Board Member and Judge

DATED: January 18, 2024

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