



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
v. : EHB Docket No. 2022-038-CP-B
RANDY J. SPENCER :
 : Issued: August 13, 2024
 :

ADJUDICATION

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board assesses a civil penalty of \$65,766.68 against Randy J. Spencer for failing to comply with an Administrative Order that arose out of violations of the Dam Safety and Encroachments Act.

Background

The present matter before the Environmental Hearing Board (“Board”) is a Complaint filed by the Department of Environmental Protection (“the Department”) requesting the Board to assess a civil penalty of \$123,459.80 against the Defendant, Randy J. Spencer (“Mr. Spencer”). The Complaint follows our earlier resolution of Mr. Spencer’s appeal of the Department’s Administrative Order issued on September 30, 2019 (“September 2019 Order”). Mr. Spencer filed his notice of appeal of the September 2019 Order on October 31, 2019 and the appeal was docketed at EHB No. 2019-121-B (“2019 Appeal”). The Department’s September 2019 Order alleged violations of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27 (“Act”) and required Mr. Spencer to, among other things, cease placement of campers and vehicles in the floodway on two parcels he owns on Lower Twomile Run in Cranberry Township, Venango

County and, within 30 days, to remove all items, campers and vehicles within the floodway located on his property. The Board granted the Department’s motion for summary judgment in the 2019 Appeal when Mr. Spencer failed to file a response to the motion and, in addition, found that there was no genuine dispute of material facts. *Spencer v. DEP*, 2020 EHB 416, 420. Mr. Spencer did not appeal the Board’s ruling in the 2019 Appeal to the Commonwealth Court.

On June 7, 2022, the Department filed a Complaint for Civil Penalties (“Complaint”) pursuant to Section 605 of the Clean Streams Law 35 P.S. § 691.605, 25 Pa Code § 1021.71 and Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21. The Complaint requested a civil penalty in the amount of \$123,459.80. The Board received Mr. Spencer’s Answer to the Complaint (“Answer”) on July 12, 2022 and issued Prehearing Order No. 2, setting deadlines for discovery and dispositive motions. Discovery proceeded with minimal cooperation from Mr. Spencer which eventually resulted in the Department filing a Motion for Sanctions on October 13, 2023. In its Motion, the Department requested the Board to enter default judgment against Mr. Spencer as to liability and to assess the full amount of the requested civil penalty. After Mr. Spencer failed to respond to the Motion, the Board issued an Opinion and Order dated December 4, 2023 (“December 2023 Opinion”) granting a default judgment as to Mr. Spencer’s liability but denied the Department’s request for a default judgment as to the amount of the civil penalty. Under the language of 25 Pa. Code § 1021.76a, the Board determined that it was appropriate to hold an evidentiary hearing to determine the amount of the civil penalty.

On January 11, 2024, the Board issued an order setting a hearing date for April 4, 2024 and scheduling deadlines for the filing of pre-hearing memorandum by the Department and Mr. Spencer. The Department timely filed its pre-hearing memorandum, but Mr. Spencer failed to file a pre-hearing memorandum as ordered by the Board. As a result of this failure, the Department

filed another motion for sanctions seeking to preclude Mr. Spencer from presenting his case-in-chief at the hearing. After receiving no response to this motion from Mr. Spencer, we granted the Department's second motion for sanctions, precluding Mr. Spencer from presenting a case-in-chief at the hearing. The evidentiary hearing proceeded on April 4, 2024, however, Mr. Spencer was neither present at the hearing nor did he participate in any manner. After receipt of the hearing transcript, we issued a schedule for the filing of post-hearing briefs. The Department filed its post-hearing brief ("DEP Brief") on May 15, 2024. Mr. Spencer did not file a post-hearing brief in response to the DEP Brief and the Department elected not to file a reply brief. With the deadlines for post-hearing filings now past, the matter is ripe for decision.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 and the rules and regulations promulgated thereunder. (Complaint at ¶ 1; Defendant's Answer at ¶ 1).

2. Mr. Spencer is an adult individual with a mailing address of 166 Garden Lane, Franklin, PA 16323. (Complaint at ¶ 2; Defendant's Answer at ¶ 2).

3. Mr. Spencer owns two parcels of real property located in Cranberry Township, Venango County bearing Tax Map Parcel Numbers 08-01-66 and 08-01-67 ("Property"). (Complaint at ¶ 4; Defendant's Answer at ¶ 4).

4. A portion of the Property is located to the east of Deep Hollow Road and is crossed by Lower Twomile Run, which empties into the Allegheny River approximately 0.17 mile

downstream of the Property (the “Site”). (Complaint at ¶ 5; Defendant’s Answer at ¶ 5; Exhibit A; Notes of Testimony Page No. (“T.”) 43, 46).

5. Five species of federal and/or state endangered species of mussels are known to inhabit the Allegheny River near the Site. (T. 14).

6. On April 30, 2015, the United States Fish and Wildlife Service designated a section of the Allegheny River, including the section near the confluence of Lower Twomile Run, as critical habitat for the rabbitsfoot mussel (*Quadrula cylindrical*). (T. 14).

7. On July 19-20, 2019, during an unprecedented rain event, campers, vehicles, and other objects (the “Debris”) that had been located on the Site in the floodway of Lower Twomile Run, were washed downstream, were deposited in, and caused silt and sediment to enter Lower Twomile Run and the Allegheny River. (T. 17-18).

8. Approximately a month after the July 2019 rain event, Joseph Brancato (“Mr. Brancato”), an Aquatic Biologist Supervisor at the Department, led a mussel survey right below the confluence of Lower Twomile Run and the Allegheny River near the Site. (T. 6, 18-19).

9. At the confluence, Mr. Brancato observed chassis of vehicles/RVs and parts of RVs such as carpeting, blankets, refrigerators, glass, tires, etc. (T. 19).

10. Jay Gerber (“Mr. Gerber”), another Department Aquatic Biologist, investigated the area on August 23, 2019 and documented his findings, which included photographs of his observations, in an inspection report. (T. 20-21; Exhibit D).

11. Mr. Brancato and Mr. Gerber observed several species of dead freshwater mussels including riffleshell and clubshell mussels, which are on the federal and state endangered species lists. (T. 21-23; Exhibit D).

12. Mr. Brancato described the crushed state of the fresh dead mussels he observed in the Allegheny River as being consistent with items rolling along the river bottom and smothering the stream bottom substrate. (T. 24).

13. The damage to Lower Twomile Run and the Allegheny River and the deaths of the endangered freshwater mussel species were consistent with the Debris observed in the Allegheny River that had come from the Site. (T. 25-26).

The Department's Administrative Order

14. On September 30, 2019, the Department issued the September 2019 Order to Mr. Spencer, pursuant to the Act, 32 P.S. §§ 693.1-693.27, and The Clean Streams Law, 35 P.S. §§ 691.1-691.1001, directing him to, among other things, cease placement of campers and vehicles in the floodway at the Site; not place any material substance or object in the floodway that would diminish the course, cross-section, or current of the floodway without first obtaining the written approval of the Department; and within 30 days, remove from the floodway all of the Items, campers, and vehicles located at the Site. (T. 47-49; Exhibit F).

15. Mr. Spencer did not remove the Items, campers, and vehicles from the floodway within 30 days after the date of the September 2019 Order. (T. 49).

EHB Appeal

16. On October 31, 2019, Mr. Spencer filed a Notice of Appeal of the Department's 2019 Order with the Board and the appeal was docketed at number 2019-121. (T. 59-60; Exhibit G).

17. On December 4, 2019, Mr. Spencer filed a Petition for Supersedeas in the 2019 Appeal that the Board ultimately denied without a hearing. (T. 62-63).

18. On November 16, 2020, the Board issued an Opinion and Order granting summary judgment in favor of the Department and terminating the 2019 Appeal (“Board’s Opinion and Order”). (T. 70; Exhibit U).

Commonwealth Court Enforcement

19. On November 20, 2019, the Department filed a Petition to Enforce the September 2019 Order against Mr. Spencer in the Commonwealth Court of Pennsylvania, which the Court granted on January 22, 2020, ordering Mr. Spencer to comply with the September 2019 Order by March 22, 2020. (T. 62, 64-65; Exhibits J and N).

20. After holding an evidentiary hearing, on February 9, 2021, the Commonwealth Court entered an order against Mr. Spencer, finding Mr. Spencer in contempt for his ongoing failure to remove the Items, campers, and vehicles from the floodway as required by the September 2019 Order and ordering him to attend a sentencing hearing on April 6, 2021. (Complaint at ¶¶ 36, 37; Defendant’s Answer at ¶¶ 36, 37).

21. Mr. Spencer removed the Items, campers, and vehicles from the floodway of Lower Twomile Run on approximately April 4, 2021, and, on April 5, 2021, he filed a notice with the Commonwealth Court stating that all Items had been removed. (T. 73-74, 76, 83, 101-102).

22. The Commonwealth Court issued an Order on April 14, 2021 finding that Mr. Spencer had substantially complied with the September 2019 Order and held his sentencing on the contempt in abeyance. (T. 74; Exhibit Z).

23. In total, Mr. Spencer failed to comply with the Department’s Order for 521 days—beginning on October 31, 2019 and continuing until April 4, 2021. (T. 79-84).

Department’s Proposed Civil Penalty

24. Ron Lybrook, (“Mr. Lybrook”), an Environmental Program Manager for the Department’s Waterways and Wetlands Program, calculated the civil penalty sought in the Complaint against Mr. Spencer. (T. 31, 50; Exhibit BB).

25. Mr. Lybrook has worked in the Waterways and Wetlands Program since 2005 and has calculated over 150 civil penalties pursuant to either the Clean Streams Law or the Act during his tenure with the program. (T. 32-34).

26. The civil penalty calculation was calculated for Mr. Spencer’s violation of Section 20 of the Act for his unlawful conduct in failing to comply with the Department’s Order. (T. 51; Exhibit BB).

27. Mr. Lybrook calculated the civil penalty using a Department guidance document and the factors outlined in Section 21 of the Act, 32 P.S. § 693.21. (T. 35-42, 51; Exhibits BB and CC).

28. Given the known damage that was caused by the rain event in July 2019, Mr. Lybrook determined that there was an environmental threat to Lower Twomile Run, the Allegheny River, and endangered freshwater mussel populations for the duration of time that Mr. Spencer failed to comply with the September 2019 Order. (T. 104-105).

29. Accordingly, Mr. Lybrook categorized Mr. Spencer’s violation of Section 20 of the Act as a major violation and calculated a base penalty of \$5,000 for that violation. (T. 52-53).

30. The base penalty of \$5,000 is half of the maximum penalty of \$10,000 that may be assessed pursuant to the Act. (T. 55).

31. When calculating the penalty amount to seek in the Complaint, Mr. Lybrook also considered Mr. Spencer’s degree of cooperation. (T. 38-39, 42, 61, 76).

32. In addition to the base penalty of \$5,000, the Complaint also seeks daily penalties for each day that Mr. Spencer's violation continued, in accordance with Section 21(a) of the Act, 32 P.S. § 693.21(a). (Complaint at ¶¶ 60-62; T. 77-85).

33. In calculating these daily penalties, Mr. Lybrook considered the willfulness of Mr. Spencer's violation throughout the time period in which Mr. Spencer failed to comply with the September 2019 Order. (T. 74-75, 77).

34. Mr. Lybrook calculated a penalty of \$100 per day for the 46 days that he determined that Mr. Spencer negligently failed to comply with the September 2019 Order, for a total of \$4,600. (T. 80).

35. Mr. Lybrook calculated a daily penalty of \$200 per day for the 340 days that he determined that Mr. Spencer recklessly failed to comply with the September 2019 Order, for a total penalty of \$68,000. (T. 82).

36. Mr. Lybrook calculated a daily penalty of \$300 per day for the 135 days that he determined that Mr. Spencer intentionally failed to comply with the September 2019 Order, for a total penalty of \$40,500. (T. 84).

37. The Complaint seeks a base penalty of \$5,000 and daily penalties totaling \$113,100, for a sum of \$118,100 for Mr. Spencer's increasing degree of willfulness in failing to comply with the September 2019 Order. (T. 84-85).

38. The Complaint also seeks penalties for the Department costs totaling \$5,359.80 that resulted from the staff time to conduct inspections, staff time to prepare enforcement proceedings, and staff time and travel for Commonwealth Court appearances. (Complaint at ¶¶ 63 – 64; T. 85).

39. The Department conducted 11 inspections of the Site from August 14, 2019 through April 1, 2021. The inspections took approximately six hours for each inspection for a total of 66 hours of Department time. (T. 86; Exhibits C, H, I, M, O, Q, S, U, W, X, and Y).

40. Mr. Lybrook calculated the inspection-related costs by multiplying the hours either Crispin Moran (“Mr. Moran”), a Department staff member, or Mr. Lybrook spent on the inspections by their respective individual, hourly rates of \$32.05 for Mr. Moran and \$45.73 for Mr. Lybrook. In total, the amount incurred by the Department for the 11 inspections was \$2,195.05 for Mr. Lybrook’s time and \$576.90 for Mr. Moran’s time. (T. 86-87).

41. The Department spent 31.5 hours on enforcement of the Department’s Order, at an hourly rate of \$45.73, for a total of \$1,440.95. (T. 89).

42. This enforcement time includes the time the Department spent on the Notice of Violation, preparation of the Department’s Order, witness time and preparation for several Commonwealth Court proceedings, and the preparation of the Complaint. (T. 88-89).

43. The Department provided no documentation supporting the time spent or the hourly rates it claimed for staff time. (T. 95-96).

44. The Department claimed an additional \$1,696.12 in travel costs, including vehicle mileage, parking, meals, and lodging to attend enforcement hearings at the Commonwealth Court in Harrisburg. (T. 89-90).

45. The Department provided no documentation supporting its claim for travel costs. (T. 95).

46. In calculating the penalty amount to seek in the Complaint, Mr. Lybrook also considered Mr. Spencer’s compliance history and his continuing, demonstrated disregard for the requirements of the Act. (T. 74-75).

47. Mr. Lybrook personally inspected the Site seven times between May 4, 2020 and April 1, 2021. (T. 65-73, 75; Exhibits O, Q, S, U, W, X, and Y).

48. During those inspections, Mr. Lybrook observed that Mr. Spencer had moved additional items into the floodway in violation of the September 2019 Order. During that timeframe, Mr. Spencer had also purchased another lot that was in the floodway and had placed additional materials in that area. (T. 75-76).

49. On April 3, 2024, the day prior to the hearing on the Complaint, Mr. Lybrook examined the Site and found that Mr. Spencer has placed new items in the floodway. (T. 91- 92).

50. The total civil penalty requested by the Department in the Complaint is \$123,459.80. (T. 90; Exhibit BB).

DISCUSSION

Legal Standard

The Board's role in evaluating a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. *DEP v. Percora*, 2007 EHB 545. The Department has the burden of proof in a case where it files a complaint for civil penalty assessments. *DEP v. EQT Production Company*, 2017 EHB 435, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The Department must show by a preponderance of the evidence that Mr. Spencer violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *Id.*, (citing *DEP v. Seligman*, 2014 EHB 755, 763); *DEP v. Simmons*, 2010 EHB 262, 276. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Id.*, (citing *Seligman*, 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007)). The guidance the Department uses in determining a suggested civil penalty is not

binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company*, 2017 EHB 435, 480 (citing *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

The Act provides that the Board, in an action brought by the Department, may assess a civil penalty upon any person for a violation or unlawful conduct. 32 P.S. § 693.21(a)(3). The civil penalty shall not exceed \$10,000, plus \$500 for each day of continued violation. 32 P.S. § 693.21(a). The Act also outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the stream regime and downstream areas of the Commonwealth, the costs of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person and “other relevant factors.” *Id.*

Analysis

The Department’s Complaint sets forth one count against Mr. Spencer for unlawful conduct under Section 18 of the Act for his failure to comply with the Department’s September 2019 Order in a timely manner. The September 2019 Order required Mr. Spencer to cease placing campers, vehicles and other materials into the floodway of Lower Twomile Run and to remove all of the existing campers, vehicles and identified items from the floodway within thirty days of the date of issuance of the September 2019 Order. In our December 2023 Opinion, the Board granted the Department’s Motion for Sanctions and found Mr. Spencer liable for the violation set forth in Count One of the Department’s Complaint. Specifically, Mr. Spencer is liable for failing to comply with the September 2019 Order from October 31, 2019 to April 4, 2021, a total of 521 days. Given our ruling establishing Mr. Spencer’s liability, the only remaining issue for the Board is what, if any, civil penalty to assess for Mr. Spencer’s noncompliance.

In the Complaint and at the evidentiary hearing, the Department argued for a civil penalty in the amount of \$123,459.80. The requested amount is derived from three distinct categories: 1) a base penalty for the initial violation, 2) daily penalties based on Mr. Spencer's willfulness, and 3) the Department's costs. The Department first suggested a base amount of \$5,000 for Mr. Spencer's initial failure to comply with the requirement to remove items from the floodway of Lower Twomile Creek within thirty days of the September 2019 Order. The requested amount is half of the \$10,000 civil penalty amount permitted under the Act. The Act allows an additional civil penalty of up to \$500 a day for each day that the violation continues to take place. The Department addressed Mr. Spencer's ongoing daily violation of the September 2019 Order by seeking an initial daily penalty of \$100 a day and escalating the penalty to \$200 a day and eventually \$300 a day based on the Department's determination that the level of willfulness of the violation increased over time prior to Mr. Spencer's eventual compliance in April 2021.

The Department applied the \$100 a day penalty for the initial 41 days of noncompliance during which time Mr. Spencer had filed his 2019 Appeal and had a pending petition for supersedeas. The Board denied Mr. Spencer's supersedeas petition without a hearing on December 16, 2019 finding that he had not shown that he had a strong likelihood of success on the merits or that he would suffer irreparable harm as a result of the September 2019 Order. The Department concluded that Mr. Spencer's failure to comply while his supersedeas petition was pending was negligent, the second level of willfulness in the Department's penalty guidance. Once the Board denied the petition, the Department characterized Mr. Spencer's ongoing noncompliance as reckless and raised the daily penalty to \$200 a day. The Department viewed Mr. Spencer's continued noncompliance as reckless and assessed \$200 a day until November 16, 2020, when the Board dismissed his 2019 Appeal. From that date on, the Department treated Mr. Spencer's

noncompliance as intentional and increased the penalty to \$300 per day until April 4, 2021, when Mr. Spencer complied with the September 2019 Order. Overall, the Department's calculation for the daily portion of the requested civil penalty is as follows:

Negligent: 41 days x \$100 = \$4,100

Reckless: 340 days x \$200 = \$68,000

Intentional: 135 days x \$300 = \$40,500 Total: \$113,100

The final portion of the Department's suggested civil penalty is based on personnel and travel costs it incurred pursuing this matter. The Department seeks to recover a total of \$5,359.80 for costs associated with multiple inspections of the Property and for its efforts to enforce the September 2019 Order at the Commonwealth Court. The personnel costs include 18 hours of inspection related work carried out by Mr. Moran at a rate of \$32.05 per hour and 52 hours of work that Mr. Lybrook dedicated to inspections and enforcement actions at a rate of \$45.73 per hour. In addition to these personnel costs, the Department seeks \$1,696.12 in travel costs.

As noted, under our caselaw, the amount suggested by the Department, \$123,459.80, is purely advisory and the Board is responsible for conducting an independent determination of the appropriate amount for a civil penalty using the factors outlined in the Act. The factors listed in the Act are: 1) the willfulness of the violation, 2) the damage or injury to the stream regime and downstream areas of the Commonwealth, 3) the costs of restoration, 4) the cost to the Commonwealth of enforcing the provisions of the act against such person and 5) other relevant factors. We will address each of these factors.

Willfulness

The Department treated Mr. Spencer's willfulness regarding his noncompliance with the September 2019 Order as ranging from negligent to reckless to intentional based on the status of

its ongoing enforcement activities. We think that approach was generous on the part of the Department. The violation at issue in this case was Mr. Spencer's decision to ignore the Department's directive to cease placing new items, including campers and vehicles in the floodway and to remove the items, campers and vehicles that were already located in the floodway of Lower Twomile Run. This directive was in response to the impact from the flood event that took place in July 2019 that left debris strewn along Lower Twomile Run and the Allegheny River impacting important habitat for threatened and endangered mussels and clearly killing some number of the mussels. The need for the actions the Department requested was readily apparent and the evidence in this case makes it clear that Mr. Spencer was aware of the issue and simply decided not to address the problem. We understand the Department's desire to give him the benefit of the doubt and allow the legal process to play out, but we think his actions showed intentional disregard for his responsibilities and the need to act as directed by the Department.

The evidence also makes clear that the burden to comply that the September 2019 Order placed on Mr. Spencer was relatively minor. Mr. Lybrook testified that based on his personal observations at the Site, Mr. Spencer made no effort to comply and did not remove a single item during the 500 plus days that this matter worked its way through the legal system. Only when Mr. Spencer faced a contempt hearing in the Commonwealth Court did he remove the items and, moreover, he accomplished their removal in less than a week. Mr. Lybrook inspected the Site on April 1, 2021 and observed that the September 2019 Order had not been complied with and that motorhomes, campers, motor vehicles and other items were still located in the regulated floodway. (DEP Ex. Y). On April 5, 2021, Mr. Spencer filed a Notice of Compliance with the Commonwealth Court and, following a hearing on April 6, 2021, the Commonwealth Court held that Mr. Spencer had substantially complied by removing his items from the floodway. (DEP Ex.

Z). Mr. Spencer could have easily complied with the September 2019 Order and then, if he had prevailed in his legal challenge, he could have just as easily returned the items to the Site. Instead, he knowingly and intentionally chose noncompliance for an extended period of time and risked a repeat of the harm observed following the July 2019 flood event.

Damage or Injury to the Stream Regime or Downstream

In evaluating this factor, it is important to remember that the violation in this case is for noncompliance with the September 2019 Order. The Complaint does not seek a penalty for the harm to Lower Twomile Run and the Allegheny River as a result of the July 2019 flood event. (T. 99-100). The requested penalty is based on the failure to remove items from the floodway that risked further pollution and violated the Act's prohibition on unpermitted encroachments in a floodway. However, the Department did not present any evidence that demonstrated that actual environmental damage or injury occurred to either Lower Twomile Run or the Allegheny River as a result of Mr. Spencer's failure to comply with the September 2019 Order and Mr. Lybrook acknowledged in his testimony that no damage occurred as a result of the noncompliance. (T. 104). The material remaining in the floodway may have altered the flow regime if water in Lower Twomile Run reached the floodway during the time prior to Mr. Spencer removing it, but again, we were presented no evidence addressing this issue. We recognize that the lack of any damage or impact to the stream regime or downstream may largely be attributable to the sheer luck of favorable weather and it is not our intent to excuse Mr. Spencer's actions merely because he was fortunate that no further harm apparently occurred because of his noncompliance. However, we were presented no evidence of damage or injury to the stream regime or downstream during the period of noncompliance and none apparently occurred. As a result, when we consider this factor

in determining a reasonable penalty, we find that it mitigates the amount that is appropriate in this case.

Costs of Restoration

The Department made no claim for restoration costs as part of its proposed civil penalty. Further, the Department presented no evidence that the Commonwealth incurred any costs for restoration of the environment as a result of Mr. Spencer's noncompliance with the September 2019 Order. Therefore, we will not include any restoration costs as part of our civil penalty determination.

Costs to the Commonwealth

The Department's Complaint requested \$5,359.80 in Commonwealth personnel and travel costs. The personnel costs include time to conduct inspections and complete inspection reports, as well as time spent on enforcement efforts. The personnel costs of the Department were based on 18 hours of inspection related work Mr. Moran conducted, at a rate of \$32.05 per hour and 67.5 hours¹ for inspection and enforcement time for Ron Lybrook at a rate of \$45.73 hours. Although we would prefer to see supporting documentation showing the hours spent and the hourly rates, we will award the Department's requested personnel costs of \$3,666.68 because it appears reasonable given the testimony about the Department's efforts in this case.

However, we decline to award the Department any of its requested travel costs of \$1,696.12. We have previously discussed with Department counsel who have appeared in front of the Board that for us to award travel costs, we would strongly prefer to see documentation

¹ Mr. Lybrook testified to a mistake in the calculations shown in the civil penalty worksheet found at DEP Ex. BB. He listed only 4 hours of his enforcement time when it should have listed 19.5 hours. The amount calculated and shown on the worksheet, \$891.74, in fact reflects the amount of time, 19.5 hours, that Mr. Lybrook testified he actually spent on enforcement.

supporting the requested costs. We have set forth our concerns about proper documentation for costs in several prior opinions and adjudications. See *Keck v. DEP*, 2019 EHB 322, 343-44; *Schlafke v. DEP*, 2019 EHB 1, 43; *Whiting v. DEP*, 2015 EHB 799, 813-814. As fellow state employees, Board staff, including the judges, are keenly aware of the type of documentation and receipts that state employees must provide in order to receive travel reimbursement. We questioned Mr. Lybrook about whether he had to file expense reports that included documentation for hotel costs, food costs etc. Mr. Lybrook confirmed he did file expense reports and it was from those reports that he obtained the travel cost figures the Department sought in this case. (T. 95). Despite that, plus the fact that Department counsel were on notice about the importance the Board places on supporting documentation when reviewing costs, we once again have been asked to award travel costs without documentation to support the claim. We will not do so in this case.

Other Relevant Factors

A relevant factor we generally consider in a civil penalty case is the role of a penalty in deterrence of future violations both by Mr. Spencer and others who may decide to follow his example. See *EQT Production Company*, 2017 EHB at 480. In this case, the risk posed by Mr. Spencer's storage of campers, vehicles and other items in the floodway of Lower Twomile Run may not have necessarily been apparent prior to the July 2019 flood event. Mr. Lybrook testified that he was not aware of any action taken by the Department against Mr. Spencer for the storage of items in the floodway prior to the July 2019 flood. (T. 99). However, after the flood, there should have been no question in Mr. Spencer's mind that the continued storage of these items in the floodway posed a risk that needed to be promptly addressed. Instead, Mr. Spencer resisted multiple efforts by the Department to bring him into compliance. We fully recognize that Mr. Spencer had a legal right to challenge the September 2019 Order but, as we have often stated, the

filing of a notice of appeal with the Board does not pause a party's responsibility to comply with the Department's order unless the Board grants a supersedeas.² See, *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252-53. When Mr. Spencer sought a supersedeas from the Board, we denied it without a hearing because, in part, Mr. Spencer did not demonstrate that he was likely to prevail in his 2019 Appeal. At that point, even if he retained the belief that he would ultimately prevail, Mr. Spencer should have complied with the September 2019 Order. Instead, he continued to refuse to comply and the Department was forced to bring multiple enforcement efforts in Commonwealth Court. Mr. Spencer, finally, with just a few days of work on his part, removed the items from the floodway and came into compliance with the 2019 Order, but only under the threat of incarceration for contempt by the Commonwealth Court. Despite the long drawn out effort to bring Mr. Spencer into compliance, Mr. Lybrook testified that he drove by Mr. Spencer's property on the day before traveling to our hearing in this matter and observed a camper in the exact same spot in the floodway where the prior ones were previously located. (T. 92). In light of that testimony, we think that it is important that the civil penalty be sufficient to act as a deterrent to Mr. Spencer placing new items in the floodway of Lower Twomile Run and risking a repeat of the July 2019 flood event.

Another relevant factor we consider is whether there have been any costs savings to the violator. We have no evidence one way or another regarding any cost savings that Mr. Spencer may have had as a result of his noncompliance and none are readily apparent from the facts of the case. Therefore, we will not add any amount to the civil penalty for cost savings.

² Section 4(d)(1) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) provides, "No appeal shall act as an automatic supersedeas."

Civil Penalty

When we look at these factors, we conclude that the appropriate civil penalty in this case is \$65,766.68. We determined the amount by assessing the \$10,000 maximum penalty allowed under the Act plus a daily penalty as permitted under the Act of \$100 per day for each of the 521 days that Mr. Spencer failed to comply with the Department's September 2019 Order. The penalty amount also includes \$3,666.68 for the personnel costs the Department requested. Mr. Spencer's intentional failure to comply with the Department's September 2019 Order over an extended period of time warrants a significant penalty to act as a deterrent to himself and others who may choose to delay compliance and risk further harm to the environment. While our intent is in no way to condone Mr. Spencer's conduct by setting a lower penalty amount than that requested by the Department, the lesser amount reflects the fact that his noncompliance ultimately did not have a detrimental impact on the environment and that he eventually complied with the September 2019 Order to the Commonwealth Court's satisfaction.

In determining the penalty amount, we also reviewed other recent penalty cases before us to ensure that the amount was consistent with our prior rulings involving both the Act and other environmental laws.³ We reviewed three relatively recent cases involving civil penalties arising from long term noncompliance with Department orders. In each of the cases, the actual environmental harm was limited or difficult to determine but the potential for harm existed as a result of the ongoing noncompliance. In *DEP v Keck*, 2019 EHB 322, the Board assessed a \$5,000 penalty for the failure to comply with a Department order under the Clean Streams Law as part of an overall civil penalty of \$42,500. The Department requested \$34,500 for the counts involving

³ Pennsylvania's environmental laws generally have similar civil penalty provisions to the one found in the Act and relied on in this case. See Clean Streams Law, 35 P.S. § 691.605(a); Storage Tank Act, 35 P.S. § 6021.1307; Solid Waste Management Act, 35 P.S. § 6018.605.

noncompliance with the order. Mr. Keck was directed by the order to ensure that remaining soil contamination was properly addressed and any further impact to waters of the Commonwealth was prevented. *Id.* at 338. Mr. Keck never fully complied with provisions of the order in his case but the impact of that noncompliance to the environment was indeterminate based on the testimony presented at the penalty hearing.

In *Rozum v. DEP*, 2018 EHB 843, the Board upheld an \$18,000 civil penalty assessment by the Department. In the *Rozum* case, the Department issued an order under the Solid Waste Management Act to the Rozums in 2008 that required them to remove thousands of waste tires from their property. The Rozums contested the order in front of the Board and in the Venango County court system. Finally, four and a half years after the order and after the Rozums limited compliance with some of the requirements of the Department's order, the Department was required to hire a contractor to remove the tires. The Board found the Department's \$18,000 penalty assessment reasonable under these facts.

In *Paul Lynch Investments, Inc. v. DEP*, 2017 EHB 891, the Board upheld the Department's assessment of a \$4,500 penalty for failing to timely comply with a Department order as part of an overall \$9,000 civil penalty under the Storage Tank Act. The violation involved the failure to empty product from an underground storage tank as required. There was no evidence that the failure to remove the product caused any environmental harm. Lynch Investment's noncompliance was deliberate and continued for almost 11 months, but the Department decided to treat it as only a single day of noncompliance in its penalty assessment. During the period of noncompliance, the Department went to Lawrence County Court seeking to enforce its order. Under these facts, the Board upheld the Department's assessment of a \$4,500 penalty. See also *DEP v. Seligman*, 2014 EHB 755 (The Board rejected the Department's request for \$14,000 and assessed \$3,400 under

the Act and the Clean Streams Law against a defendant for conducting earth disturbance activities in a stream, within the floodways of streams and within a wetland without a permit.); *DEP v. Colombo d/b/a Glenburn Services*, 2013 EHB 635 (The Board rejected the Department’s request for at least \$19,560 and assessed \$9,500 under the Act and the Clean Streams Law for unpermitted dredge and fill activities that had a significant impact on a creek.); *DEP v. Simmons*, 2010 EHB 262 (The Board agreed with the Department’s requested amount and assessed \$21,000 under the Clean Streams Law for earth disturbance activities that continued for 167 days after the defendant was told to correct the violations.) and; *DEP v. Sabot*, 2009 EHB 38 (The Board rejected the Department’s request for \$45,318.28 and assessed a \$5,000 total penalty under the Act including \$2,500 for failure to comply with a Department order where the Board determined that the area of wetlands impacted was minimal and could be repaired.).

As should be evident from our review of these cases, while the civil penalty we assessed against Mr. Spencer is lower than the penalty requested by the Department, it remains a substantial penalty when considering other past penalty amounts assessed by both the Department and the Board. The facts of this case warrant a substantial penalty, but the penalty amount we assess is mitigated by a key factor we are required to consider under the Act, namely, the impact to the environment resulting from the violation. This case is about the potential for harm given the events of July 2019 and the proximity of the Site to the Allegheny River and the critical mussel habitat, but that threat needs to be balanced against the fact that no actual harm took place due to Mr. Spencer’s noncompliance. We also find that a substantial penalty is warranted because of the apparent need to deter Mr. Spencer from again placing items into the floodway of Lower Twomile Run. Despite the protracted legal proceedings that went against him at every turn, including the possibility that Mr. Spencer would be incarcerated by the Commonwealth Court for contempt, Mr.

Lybrook testified that Mr. Spencer has recently placed at least one item back into the floodway. (T.92). We conclude that a substantial civil penalty is required to convince Mr. Spencer that he should comply with the law. We believe that the amount we are assessing properly balances the issues in this case and is in line with our prior rulings.

CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 and the rules and regulations promulgated thereunder.

2. The Department must show by a preponderance of the evidence that Mr. Spencer violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *DEP v. EQT Production Company*, 2017 EHB 435 (citing *DEP v. Seligman*, 2014 EHB 755, 763); *DEP v. Simmons*, 2010 EHB 262, 276.

3. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Seligman*, 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

4. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company*, 2017 EHB 435, 480 (citing *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

5. The Act outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to stream regimen and

downstream areas of the Commonwealth, the costs of restoration, cost to the Commonwealth of enforcing the provisions of the Act, and other relevant factors. 32 P.S. § 693.21(a)(3).

6. Other relevant factors include the deterrent effect of the penalty. *EQT Production Company*, 2017 EHB at 480.

7. The filing of a notice of appeal with the Board does not pause a party's responsibility to comply with the Department's order unless the Board grants a supersedeas. See, *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252-53; 35 P.S. § 7514(d)(1).

8. Mr. Spencer's failure to respond to the Department's discovery requests, Board orders, and to the Department's Motion for Sanctions resulted in the entry of default judgment in favor of the Department with regards to Mr. Spencer's liability for the violations. 25 Pa. Code § 1021.161; 25 Pa. Code 1021.76a(d).

9. The Board assesses a civil penalty in the amount of \$65,766.68 against Mr. Spencer for his violation of the Act.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

v. :

RANDY J. SPENCER :

EHB Docket No. 2022-038-CP-B

ORDER

AND NOW, this 13th day of August, 2024, it is hereby ORDERED that Randy J. Spencer is assessed a civil penalty of \$65,766.68.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark

SARAH L. CLARK
Judge

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Judge

DATED: August 13, 2024

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



c: For the Commonwealth of PA, DEP:

Carl D. Ballard, Esquire
Kayla A. Despenes, Esquire
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