IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 309 CD 2019 *consolidated with* No. 313 CD 2019

CLEAN AIR COUNCIL*, et al*.,

Designated Petitioners,

v.

SUNOCO PIPELINE L.P.,

Respondent.

BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

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The Pennsylvania Chamber of Business and Industry ("Chamber") submits this brief as *amicus curiae* pursuant to Pa.R.A.P. 531(b)(1)(i). This appeal presents the issue of whether Section 307(b) of the Pennsylvania Clean Streams Law, 35 P.S. § 691.307(b), authorizes the Environmental Hearing Board ("Board") to order permittees to pay attorney's fees to third parties challenging permitting decisions of the Pennsylvania Department of Environmental Protection ("Department").

The Court should conclude that permittees intervening in such proceedings to defend their permits and constitutionally-protected private property rights are never subject to fee awards under that section. At a minimum, the Court should conclude that permittees in this situation are subject to the same "bad faith" standards the Board applies to impose fees on unsuccessful third-party appellants challenging permitting decisions (such as individuals and environmental groups).

I. STATEMENT OF *AMICUS CURIAE'S* INTERESTS

The Chamber is the largest, broad-based business association in Pennsylvania. It has thousands of members throughout Pennsylvania, who employ more than 50 percent of the Commonwealth's private workforce. The Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members while, at the same time, ensuring that the natural environment is protected.

Members of the Chamber regularly apply for and obtain permits from the Department. In this case, the Board concluded that permittees, in the context of a third-party appeal from the Department's issuance of a permit, can be liable for attorney's fees and costs under Section 307(b) of the Clean Streams Law if it is shown that a permittee engaged in dilatory, obdurate, vexatious, or bad faith conduct in the course of prosecuting or defending the appeal. This is the same bad faith standard that the Board applies for awarding fees against a third-party appellant.

On appeal, the third-party appellants before the Board, Clean Air Council, *et al.* ("Clean Air Council"), and the Department, contend, *inter alia*, that the Board abused its discretion in ruling that attorney's fee awards against permittees in third-party permit appeals under Section 307(b) of the Clean Streams Law may only be granted when the permittee has engaged in dilatory, obdurate, vexatious, or bad faith conduct in the course of prosecuting or defending the appeal. They contend that the same standards applied against the Department should not be equally applied when considering a fee request against a losing permittee in a third-party permit appeal.

Attorney's fee awards are designed at least in part to deter undesirable behavior. Successfully applying for a permit to exercise one's own property rights, and then defending the Department's decision in a third-party appeal, are not acts the Commonwealth should deter or punish, especially in the absence of bad faith. Because Board precedent suggests that Section 307(b) of Clean Streams Law

reaches many permits issued by the Department,[1] the Court's decision on the issues in this appeal will materially affect the legal landscape and business climate for members of the Chamber, along with numerous other businesses that are required to obtain permits from the Department. Most particularly, the decision will impact the Chamber's members and the decisions they make regarding capital investment in this Commonwealth, and for that reason, it is of paramount concern to them.

II. SUMMARY OF ARGUMENT

The Board lacks authority to order that permittees pay attorney's fees in third-party appeals. On its face, Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), contains no standards to channel the Board's "discretion" to award fees. Beyond that threshold constitutional defect, the Board erred in concluding that permittees, in the context of third-party appeals from the Department's issuance of permits, can ever be liable for attorney's fees and costs under Section 307(b) of the Clean Streams Law. General principles of administrative law, the statutes prescribing the Board's authority, and basic statutory construction principles compel a contrary conclusion. Interpreting Section 307(b), moreover, to allow fee awards

[1] There was no dispute before the Board that this appeal is a proceeding pursuant to the Clean Streams Law and, as such, the current precedent regarding the purported reach of Section 307(b) is not before the Court.

against permittees would render the provision unconstitutional as applied to permittees who participate in third-party appeals to protect their property rights.

Should the Court conclude that Section 307(b) is constitutional and, further, that permittees can be liable for attorney's fees and costs under Section 307(b) in the context of third-party appeals from the Department's issuance of permits, then the Board did not abuse its discretion in requiring symmetry in the standard applied to third-party appellants and permittees seeking fees. The potential chilling of constitutional rights is equally, if not more, applicable to a permittee in the context of a third-party appeal. The Board, thus, did not err when it concluded that applying differing standards here – one applicable to third-party appellants seeking fees and a second, more burdensome, one applicable to permittees seeking fees – would deprive permittees of equal protection and due process of law.

III. ARGUMENT

As described below, permittees should not be subject to fee awards under Section 307(b) under any circumstances. However, if the Court disagrees, then the Chamber submits that the standard for imposing fees against permittees must be the same as it is for third-party appellants (the "bad faith" test).

A. Permittees Are Not Subject To Fee Awards Under Section 307(b).

The Court should reject the notion that Section 307(b) authorizes the Board to order that an intervenor-permittee in a third-party appeal pay attorney's fees to the

appellant for three reasons. First, the statute violates basic delegation-of-powers principles. Second, neither the Environmental Hearing Board Act nor Section 307(b) of the Clean Streams Law authorizes the Board to order a permittee to pay fees to a third-party appellant based on general administrative law principles and statutory construction rules. Third, any other conclusion renders Section 307(b) unconstitutional as applied to a permittee involved in a third-party appeal to defend its private property rights.

1. The fee-shifting provision of Section 307(b) violates Article II, § 1 of the Pennsylvania Constitution.

As a threshold matter, this dispute reflects a fundamental problem with Section 307(b) of the Clean Streams Law. The Board and the parties disagree over a proper standard that the Board should apply when awarding fees under Section 307(b) *precisely because* that section fails to contain adequate standards to guide or constrain the Board's "discretion" when awarding fees and costs. As a result, the provision is an unconstitutional delegation of authority.

Article II, § 1 of the Pennsylvania Constitution provides that the legislative power of the Commonwealth is vested in a General Assembly. Although this article prohibits delegation of the legislative function, the General Assembly may confer authority and discretion upon another body in connection with the execution of a law but that "legislation must contain adequate standards which will guide and restrain

the exercise of the delegated administrative functions." *Eagle Environmental. II, L.P. v. Commonwealth*, 884 A.2d 867, 880 (Pa. 2005).

Further, although the General Assembly may delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend, it cannot empower an administrative agency to create the conditions which constitute the fact. *See In Re Marshall*, 69 A.2d 619, 626 (Pa. 1949); *Reeves v. Pa. Game Comm'n*, 584 A.2d 1062, 1068 n.14 (Pa. Cmwlth. 1990). Basic policy choices must be made by the General Assembly. *See Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 637 (Pa. 1989).

In *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 877 A.2d 383 (Pa. 2005) ("*PAGE*"), our Supreme Court upheld a constitutional challenge under Article II, § 1 to 4 Pa. C.S. § 1506. At the time *PAGE* was decided, Section 1506 provided that the siting of a gaming facility:

> shall not be prohibited or otherwise regulated by any ordinance, home rule charter provision, resolution, rule or regulation of any political subdivision or any local or State instrumentality or authority that relates to zoning or land use to the extent that the licensed facility has been approved by the board.

The Gaming Board stated that the policies and objectives listed by the General Assembly in 4 Pa. C.S. § 1102 to the text of the note as well as standards provided in other sections in the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§ 1101-1904, were sufficient standards for the Board to exercise its

discretion with regard to zoning. Our Supreme Court rejected the Board's argument while acknowledging that, although "eligibility requirements and additional criteria guide the Board's discretion in determining whether to approve a licensee, we find that they do not provide adequate standards upon which the Board may rely in considering the local zoning and land use provisions for the site of the facility itself." *PAGE*, 877 A.2d at 419. It then declared 4 Pa. C.S. § 1506 to be unconstitutional and severed it from the Gaming Act.

In pertinent part, Section 307(b) provides: "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). That is even more open-ended than the statute in *PAGE*, as it overtly leaves the matter to the Board's "discretion" with no standards to guide and constrain that "discretion." Moreover, it does not provide how the Board is to evaluate or determine whether fees and costs have been reasonably incurred by the petitioning party.

Just as in *PAGE*, some general goals contained in other provisions of Section 307(b) (or elsewhere in the Clean Streams Law) are insufficient to give guidance to the Board in exercising its "discretion." Given the lack of guiding principles as to how the Board is to exercise its "discretion," Section 307 delegates the authority to the Board to award fees and costs without sufficient guidance. Because the General

Assembly gives no guidance, the fee-shifting provision of Section 307(b) is unconstitutional. It gives the Board, an administrative entity, the power to make legislative policy judgments otherwise reserved for the General Assembly.

Accordingly, because Section 307(b) provides insufficient guidance to the Board as to when to award fees and costs, Section 307(b) is unconstitutional under Article II, § 1.

2. The plain language of Section 307(b) of the Clean Streams Law does not authorize fee awards against permittees.

The Court's analysis may end here. Once the Court determines that a provision violates the Pennsylvania Constitution, the provision is unenforceable. If the Court looks beyond that threshold constitutional deficiency, Section 307(b) of the Clean Streams Law does not allow award of attorney's fees and costs against a permittee in a third-party appeal from the Department's issuance of a permit.

The Board is not a court. The Board is an administrative agency with limited powers.

The powers accorded to administrative agencies must be specifically granted by legislation either expressly or by necessary implication. *See Green v. Milk Control Comm'n*, 16 A.2d 9 (Pa. 1940). *See also Murphy v. Pa. Human Relations Comm'n*, 486 A.2d 388, 392 (Pa. 1985) ("[I]t is equally clear that the power of the [agency] results from the legislatures delegation of such power. As such the limits of that power must be strictly construed."); *Commonwealth, Dep't of Envtl. Res. v.*

Butler County Mushroom Farm, 454 A.2d 1, 5 (Pa. 1982) ("We begin with the well settled principle that the power and authority to be exercised by administrative agencies must be conferred by the legislature.").

When the courts evaluate the scope of an agency's authority, they look to the enabling statutes that the General Assembly has enacted through the lens of Pennsylvania's Statutory Construction Act, 1 Pa. C.S. §§ 1501 *et seq*. The Statutory Construction Act gives the courts clear guidelines:

- The object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa. C.S. §§ 1903(a), 1921(b).

- As a general rule, the best indication of legislative intent is the plain language of a statute. *See* 1 Pa. C.S. § 1921(b); *see also, e.g.*, *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 664 A.2d 84, 87 (Pa. 1995) ("Where the words of a statute are clear and free from ambiguity the legislative intent is to be gleaned from those very words.").

- Courts may resort to other considerations to divine legislative intent only when the words of the statute are not explicit. *See* 1 Pa. C.S. § 1921(b).

- When construing statutory language, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S. § 1903.

In this case, there are several statutory provisions demonstrating that the Board's authority to award fees under Section 307(b) is narrower than the Department and the Clean Air Council would have this Court believe. The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35

P.S. § 7514(c) ("EHB Act") provides that "[t]he board has the power and duty to hold hearings and issue adjudications under 2 Pa. C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department." Except for the subpoena power regarding the attendance of witnesses and production of documents during Board proceedings, the EHB Act does not authorize the Board to direct a party to take any action.

The General Assembly granted the Board limited authority under Article 3 of the Clean Streams Law to award fees in certain circumstances. That article of the statute deals with permit decisions of the Department. Section 307(b) provides, in pertinent part:

> 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***.

35 P.S. § 691.307(b) (emphasis added). Therefore, the statute is most logically read to authorize fee awards against the party whose action is challenged – the Department – not against permittees.

The Court may also evaluate provisions in which the General Assembly authorized attorney's fees in other contexts under the Clean Streams Law to determine the scope of the Board's authority under Section 307(b). To illustrate, whereas Section 307(b) deals with permit actions of the Department, Section 601 of the Clean Streams Law authorizes attorney's fees when citizens sue to abate nuisances under the Clean Streams Law after the Department has been notified and has taken no action:

> (c) Except as provided in subsection (e), any person having an interest which is or may be adversely affected ***may commence a civil action*** on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act which is not discretionary with the department or against any other person alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act. Any other provision of law to the contrary notwithstanding, ***the courts of common pleas shall have jurisdiction of such actions***, and venue in such actions shall be as set forth in the Rules of Civil Procedure concerning actions in assumpsit. (emphasis added).
>
> …
>
> (e) No action pursuant to this section may be commenced ***prior to sixty days after the plaintiff has given notice in writing of the violation to the department and to any alleged violator***, ***nor may such action be commenced if the department has commenced and is diligently prosecuting a civil action in a court of the United States or a state to require compliance with this act or any rule, regulation, order or permit issued pursuant to this act***, but in any such action in a court of the United States or of the Commonwealth any person may intervene as a matter of right.
>
> …

> (g) The court, in issuing any final order in any action brought pursuant to this section, ***may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.*** The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accord with the Rules of Civil Procedure.

35 P.S. § 691.601 (emphasis added).

When read in its proper context based on fundamental administrative law principles and within the confines of the EHB Act, the Clean Streams Law as a whole, and the Statutory Construction Act, Section 307(b) does not authorize the Board to award fees against a permittee in a third-party appeal challenging the Department's action.

Section 307(b) is limited to appeals from ***actions of the Department*** to the Board. That is, the only "proceedings pursuant to this act" that can be subject to the fee-shifting provision are appeals to the Board ***from final actions of the Department***.[2] That conclusion follows from the General Assembly's limited grant of jurisdiction to the Board. *See* 35 P.S. § 7514(a). Section 307(b) does not purport to expand the Board's limited jurisdiction.

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[2] The better interpretation of Section 307(b), when read in context, is that its application is limited solely to actions of the Department under Section 307 of the Clean Streams Law. The General Assembly's arguably incorrect use of "section" and "act" interchangeably in Section 307(b) has resulted in Section 307(b) being misinterpreted to apply well beyond its intended reach.

Section 307(b) provides that parties adversely affected by an action of the Department may request fees. There is a false presumption that Section 307(b) is designed solely to incentivize third parties to appeal decisions of the Department granting permit applications by giving them the opportunity to recover fees. Although Section 307(b) contemplates that others "adversely affected" by an action of the Department may appeal, Section 307(b) first and foremost provides a forum for permit applicants to challenge the Department's decision to deny their applications and gives permit applicants the opportunity to request fees when the Department errs in denying a permit application.

There is no question that the Board can order the Department to pay fees and costs to parties adversely affected by Department action. The Department is split into three "branches" in order to comply with state constitutional due process requirements. *See Lyness v. State Board of Medicine*, 605 A.2d 1204, 1207 (Pa. 1992). The Department carries out executive/prosecutorial functions; the Environmental Quality Board carries out the legislative/rulemaking functions; and the Board carries out adjudicatory functions limited to actions of the Department. Both the EHB Act and Section 307(b) authorize the Board to order its "co-equal branch" to take action, including under Section 307(b) to pay attorney's fees to parties adversely affected by the Department's actions.

Our Supreme Court also has interpreted Section 307(b) to give the Board authority to order third-party appellants to pay fees for initiating appeals in bad faith. *Lucchino v. Dep't of Envtl. Prot.*, 809 A.2d 264 (Pa. 2002). The ruling makes sense. If a third party has initiated litigation by appealing an action of the Department in bad faith, neither the Department nor any permittee intervening in the appeal should bear the costs of litigation.

But neither the EHB Act nor Section 307(b) authorize the Board to order to order permittees – whose actions are not challenged on appeal, and who did not initiate the appeal – to pay fees and costs for actions taken by the Department. This is so for several straightforward reasons.

First, it bears repeating that the issuance of a permit is an *action of the Department*. *See* 25 Pa. Code § 1021.2 (defining "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification"). A third-party appeal from that permit to the Board is, therefore, an appeal of an action of the Department, *not* of the permittee. The appeal is from the Department's issuance of a permit, not the permittee's application for it.

It follows, therefore, that permittees, whose actions cannot be appealed to the Board, cannot be subjected to a fee award under Section 307(b). This is not shielding

a permittee from the permittee's own action because a third-party appeal from a permit is not a challenge to permittee action at all. If the Department does not believe a permittee's application for a permit meets the requirements of the applicable statutory and regulatory provisions, then it should deny the permit.

Second, a permittee stands in a position different from that of a third-party appellant initiating an appeal in bad faith. A permittee does not initiate any action challenging the Department's decision to issue a permit in a third-party appeal. The permittee merely applied for a permit to use its property subject to conditions imposed by statute and regulation. Even if the Department committed an error, that error belongs to the Department, not the permittee. Under those circumstances, a permittee cannot be forced to finance a third-party challenge to an action of the Department.

Along those lines, neither the EHB Act nor any of the substantive statutes administered by the Department automatically make permittees parties to third-party appeals from final actions of the Department. *See, e.g.*, 35 P.S. §§ 7511 *et seq*. By statute, a permittee never needs to participate in a third-party appeal (and therefore could not be subject to any fee award).

Although permittees are automatically made parties to third-party appeals by operation of ***a Board rule*** – 25 Pa. Code § 1021.51(i) – that rule is for the permittees' benefit to protect their due process rights, not to add another "pocket" from which

third-party appellants can draw to finance their litigation efforts. *See White Township v. DEP*, 2005 EHB 611, 614 ("The purpose underlying the Rule is to protect the due process rights of appellees when their permits are challenged. A system which allows third parties to attack permits without providing an opportunity for the Permittee to participate fully in the case would suffer serious constitutional problems," interpreting former 25 Pa. Code § 1021.51(g)).

If Section 307(b) is interpreted to allow fee awards against permittees, then permittees would have to decide, at the inception of any third-party appeal potentially involving a fee-shifting provision like Section 307(b), to affirmatively move the Board to surrender their automatic party status or be potentially subject to a fee award. The General Assembly could not have intended to create such a Hobson's choice when strangers to a project challenge the Department's decision to issue a permit to private parties obtaining permits to exercise their property rights. The appeal would proceed – and attorney's fees would be incurred – whether or not the permittee joined the Department's defense of the Department's decision.

Third, the Clean Streams Law's two fee-shifting provisions address two different scenarios – one authorizes fees against the Department and one authorizes fees against alleged violators of the statute. As explained above, Section 307(b) deals with the Department's actions on a permit, while Section 601 deals with *inactions* of the Department. *See* 35 P.S. § 691.601. In the latter situation, a citizen

may challenge defendants allegedly engaged in nuisance-creating behavior when the Department has failed to act on its own. In that circumstance, the courts may award fees against the alleged violator. The General Assembly envisioned fee awards against the Department under Section 307(b) for *its* unlawful behavior in the permit context and fee awards against persons or permittees for *their* unlawful behavior under Section 601 when the Department has failed to take action.

Fourth, it would be incongruous from a cost perspective to impose liability on permittees when third parties challenge the Department's decision to issue a permit. The General Assembly authorizes the Department to impose fees on permit applications for a variety of activities, and applicants have the obligation to pay those fees lest they be denied their application from the outset. Those fees are often set by regulation and must fairly reflect the costs of administering the regulatory program. *See, e.g.*, *Flynn v. Horst*, 51 A.2d 54, 60 (Pa. 1947) ("[n]o principle is more firmly established in the law of Pennsylvania than the principle that a revenue tax cannot be constitutionally imposed upon a business under the guise of police regulation, and if the amount of a 'license fee' is grossly disproportionate to the sum required to pay the cost of the due regulation of the business, the 'license fee' will be struck down.").

If the permittee is forced to incur *the Department's costs of defense* in a third-party appeal, then the permittee essentially ends up paying the Commonwealth an application fee for a permit that is grossly disproportionate to the cost of processing

the permit application. The permittee should not be forced to fund the Department's cost of defense.

Finally, any argument that Section 307(b) should be interpreted to include permittees within its reach because the Department and permittee often "share the role" in defending a permit is nonsense. The Department's governmental action is at issue in a third-party appeal, not the permittee's. The Court should not read Section 307(b) to mean that the permittee's price of admission in a third-party appeal to defend its permit is the cost of the third party's legal fees.

Accordingly, the Court should conclude that Section 307(b) does not authorize the Board to award fees and costs against a permittee in a third-party appeal.

3. Interpreting Section 307(b) to allow fee awards against permittees would render the provision unconstitutional.

If the Court concludes that Section 307(b) survives scrutiny under Article II, §1 of the Pennsylvania Constitution, then there is yet another reason why Section 307(b) does not authorize the Board to award fees and costs against a permittee in a third-party appeal: any other interpretation would render the provision unconstitutional and unfair as applied to permittees.

This Court has an obligation to interpret a statute in a manner that avoids a violation of a private party's constitutional rights. *See DePaul v. Commonwealth*, 969 A.2d 536, 537 n.5 (Pa. 2009) ("we are required, whenever possible, to construe

a statute in a manner that upholds its constitutionality"); *Commonwealth v. Pure Oil Co.*, 154 A. 307, 309 (Pa. 1931) (holding that a court must, if reasonably possible, construe a statute so as to find the statute constitutional). A conclusion that Section 307(b) allows fee awards against permittees would render the provision unconstitutional as applied.

Private property owners have an inherent, and constitutionally-protected, right to use their property for any lawful purpose. *See Driscoll v. Corbett*, 69 A.3d 197, 208-209 (Pa. 2013) ("The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty — an expression of his freedom — guaranteed as inviolate by every American Bill of Rights," quoting *Appeal of White*, 134 A. 409, 412 (Pa. 1926)); *Appeal of Lord*, 81 A.2d 533, 537 (Pa. 1951) (same).

The Commonwealth's environmental protection statutes, like the Clean Streams Law, are exercises of the police power that restrict inherent property rights that pre-date the constitution. A permit that the Department issues under those statutes simply restores to the permittee (with conditions) rights it otherwise had before the adoption of the statutes. The permit contracts, or relaxes, the exercise of the police power, allowing a landowner to exercise rights that he already possessed.

It follows that Section 307(b) of the Clean Streams Law cannot be interpreted to allow a fee award against a permittee who applied for and obtained a permit from the Department. To do so would *penalize* private property owners for exercising inherent, pre-constitutional property rights and petitioning the government for redress (in the form of a permit to relax the exercise of the police power). *See*, *e.g.*, Pa. Const. Art. I, § 26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."); *Fischer v. DPW*, 502 A.2d 114, 124 (Pa. 1985) (cannot be penalized for the exercise of a constitutional right). *See also Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977) (same); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (same).

Accordingly, the Court should conclude that Section 307(b) does not authorize the Board to order that a permittee pay attorney's fees to a third-party appellant, particularly when (as here) the Department and the third party settled their dispute and the permittee is merely defending its property rights. That would be both unconstitutional and unfair. There is simply nothing nefarious about participating in litigation to protect one's own property rights, especially when the Department has issued a permit.

B. If The Court Determines That Permittees Are Subject To Fee Awards Under Section 307(b), Then The Standard For Imposing Fee Awards Against A Permittee Must Be The Same As It Is For Third-Party Appellants.

Should this Court conclude that permittees are generally subject to fee awards under Section 307(b), then it should affirm the Board's decision to impose the same burden on parties seeking fees from permittees under Section 307(b) that is imposed on permittees seeking fees from third-party appellants under Section 307(b).

Section 307(b) does not establish a standard to be applied in determining whether and to whom to award fees. Thus, on the face of Section 307(b), the same standard should apply to both the permittee and the third-party appellant. There is no legal basis for construing the statute differently for one party versus another. For policy reasons, the Board and the courts have required that those seeking fees from a third-part appellant establish that the third-party's actions were somehow dilatory, obdurate, and vexatious or in bad faith in order to avoid an "undue chilling effect" on appellants. *See Lyons v. DEP*, 2011 EHB 447, 449. The potential chilling effect is equally, if not more, applicable to *a permittee* in the context of a third-party appeal.

It must be remembered, as explained above, that private property owners have an inherent, and constitutionally-protected, right to use their property for any lawful purpose. The permit that the Department issues simply restores to the permittee (with conditions) rights it otherwise had prior to the adoption of the statutes. The requirement to obtain a permit, as an exercise of the police power, may regulate but

cannot eliminate or unduly burden that constitutionally-protected right. *See Appeal of White*, 134 A. at 413; *Robinson Township v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) (laws are fundamentally limited by those rights and powers of the people in Article I).

Exposing a permit applicant to an award of fees under any standard other than the "bad faith" test unduly burdens its exercise of its right to use its property. The Department decides whether the permit should be issued and what conditions should be imposed. The applicant can only submit the information required by the Department, in accordance with the Department's regulations, policies and forms. If the Department does not request the necessary information or otherwise errs in issuing the permit, that is the Department's action, not the applicant's. Making the applicant responsible for possible errors by the Department, which controls the process, will "unduly chill" an applicant's right to use its property, subject to a reasonable exercise of the police power.

The desire to avoid "unduly chilling" an appellant's opportunity to challenge a permit was also motivated by the thought that an appellant, often in the past an individual or local citizens group, lacked the financial resources necessary to vigorously carry out the litigation. However, as this case illustrates, increasingly appellants are often well-funded advocacy groups supported by multi-billion-dollar foundations. When the permittee is a small family-owned business the economic

calculus favors the appellant. Erroneous assumptions regarding economic disparity should not form the basis for imposing a greater burden on permittees than on third-party appellants.

Imposing a heightened standard on a permittee seeking fees, but not on the third-party appellant or the Department, also chills the permittee's right to petition the government for redress of grievances under the First Amendment – *i.e.*, it chills the permittee's right to apply for a permit to exercise his property rights. *See, e.g.*, *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 863 (6th Cir. 2012) (finding that a zoning request, because it is akin to generally seeking redress from a government official, constitutes protected petitioning conduct).

The "bad faith" standard that the Board has imposed upon permittees, in the context of third-party appeals, was borrowed from federal case law imposing such requirements on prevailing defendants accused of, for example, violating the law or the plaintiff's civil rights. *See, e.g., Alice Water Protection Ass'n v. DEP*, 1997 EHB 840. In those circumstances, the courts have reasoned that plaintiffs must be protected from liability for exercising their right to petition the courts for the redress of grievances and, accordingly, imposed a bad faith standard on *prevailing defendants* seeking fees and costs. *Id*. As explained by the Board in *Alice Water*:

> The reasoning behind holding plaintiffs and defendants to a different standard for recovery of attorney's fees, even though the statute simply refers to "prevailing party," was explained by the U.S. Court of Appeals

> for the Seventh Circuit in *Unity Ventures v. County of Lake*, 894 F.2d 250 (7th Cir. 1990). The court stated as follows:
>
> Both prevailing plaintiffs and prevailing defendants may collect attorney's fees under section 1988; different standards -- reflecting different policy considerations -- apply, however, depending on whether the plaintiff or the defendant prevails. A plaintiff, for example, may be awarded attorney's fees as a prevailing party if she succeeds on "any significant issue in the litigation which achieves some of the benefit [she] sought in bringing suit." [Citing *Hensley* and *Nadeau, supra*] A prevailing defendant, on the other hand, must demonstrate that the plaintiff brought her action in subjective bad faith, or that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" in order to collect attorney's fees. [Citing *Christianburg Garment Co., supra*,] 894 F.2d at 253.
>
> The different standard was further explained by the Supreme Court in *Christianburg Garment Co., supra*. Unlike a losing defendant, a losing plaintiff is not a violator of the law. 434 U.S. at 418.

Alice Water, 1997 EHB at 847-48.

The public policy concerns underlying the differential treatment of prevailing plaintiffs and defendants in, for example, the antitrust, civil rights or citizen suit contexts, are absent in the context of a permit appeal. Quite unlike an antitrust, civil rights or citizen suit *defendant*, a permittee is not, in the context of the third-party permit appeal, an alleged violator of the law. The question is whether the Department erred. Thus the basis for applying a different standard to a *defendant* in a citizen suit is not applicable to a mere permit applicant.

In this context, a permittee lawfully obtains a permit from the Department, which is then challenged by a third-party. The permittee, by operation of Board rule,

may participate in the appeal. The permittee is not obligated to "roll over and play dead" with respect to the third-party appeal or in defending *its* legitimate and substantial private property rights and investment-based expectations in its permit. The permittee is left with the Hobson's choice of (a) defending the permit along with the prospect of paying fees and costs if the Department is ultimately found to have erred, or (b) "rolling over and playing dead" while the Department and strangers to the project decide the fate of the permittee's rights.

Treating permittees differently than third-party appellants engenders constitutional concerns. To illustrate, for example:

- Permittees electing to defend their permit cannot be subject to a different standard than third-parties merely because they are permittees – that type of viewpoint discrimination violates First Amendment principles of treating equally all those petitioning the government for redress of grievances regardless of what viewpoint they hold. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972); J. Nowak & R. Rotunda, Constitutional Law, §§ 2.12, 16.11 (6th ed. 2000).

- There would be an improper classification prohibited by Equal Protection principles by making it easier to obtain fees from a permittee (who took no action) and harder to obtain fees on a third party (who initiated the litigation) even though the permittee is exercising its rights for the proper purpose of defending its permit. *See* Pa. Const. Art. I, § 20; *see also James v. Southeastern Pennsylvania Transp. Auth.*, 477 A.2d 1302, 1306 (Pa. 1984).

- Finally, Due Process principles militate against the inherent bias and partiality created by a double standard that favors a third-party appellant initiating the administrative proceeding over an intervenor defending his or her permit. *See Dayoub v. State Dental Council and*

Examining Bd., 453 A.2d 751, 753 (Pa. Cmwlth. 1982) ("due process applies to administrative agencies as it does to courts").

Those concepts are inherent in decisions from this Court. In *Big B. Mining Co. v. Department of Environmental Resources*, this Court rejected – as contrary to Pennsylvania law – the application of differing standards for counsel fee awards under the SMCRA based upon a distinction between permittees and other parties. 624 A.2d 713, 715-16 (Pa. Cmwlth. 1993). While the Board has concluded that this Court in *Big B* "was not faced with the question of whether a permittee should be allowed to recover attorney's fees against a third-party appellant," *Alice Water* 1997 EHB at 844, this Court's decision made no such distinction. Instead, this Court held that, under the plain language of Section 4(b) of SMCRA, which is identical to Section 307(b), "no segregation of petitioner classes is permissible" and that the provision "must be applied equally to all those eligible for attorney's fees." *Big B*, 624 A.2d at 715.

Lastly, applying a different standard to permittees may actually be counter-productive. When faced with a third-party appeal, a permittee may be willing to make modifications to its permit or to its processes that are not required by law but which the appellant seeks, in order to expeditiously resolve the appeal and save litigation costs to all parties. A permittee will be less likely to agree to modifications if it will then be subject to a claim for fees based on the catalyst test the Department advocates. The lesser motivation to agree to implement "extras" means that

everyone, including the Department and the third-party appellant, will experience more fees and some additional environmental benefit may be forfeited.

III. CONCLUSION

Permittees cannot be liable for attorney's fees and costs under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). Should the Court conclude that permittees, in the context of a third-party appeal from the Department's issuance of a permit, can be liable for attorney's fees and costs under Section 307(b), then the Board did not abuse its discretion in requiring symmetry in the standard applied to third-party appellants and permittees seeking fees.

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 531, I hereby certify that this *amicus curiae* brief contains less than 7,000 words as calculated by the word count feature on the word processing program that was used to prepare it.

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CERTIFICATE OF COMPLIANCE

I hereby 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.

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