IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Environmental Protection, Petitioner	:	
v.	:	
Pine Creek Valley Watershed Association, Inc., Respondent	:	No. 12 C.D. 2009 No. 13 C.D. 2009 Argued: September 14, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY[1] FILED: March 25, 2010

The Department of Environmental Protection (DEP) appeals from the Orders of the Environmental Hearing Board (Board) that awarded counsel fees and costs to Pine Creek Valley Watershed Association (Watershed Association)[2].

DEP's Approval of the Sewage Modules

On November 29, 2006, a sewage planning specialist for the DEP approved two sewage planning modules which proposed on-lot septic systems for

[1] This case was reassigned to the majority writer on January 12, 2010.

[2] The Watershed Association is a non profit group formed to support the special protection watersheds in its area.

two residential developments in Berks County.[3] The proposed development in the matter docketed at 12 C.D. 2009 was the Mulberry II development and, in 13 C.D. 2009, the proposed development was Fredericksville Farms.

The proposed on-lot septic systems were designed to discharge effluent to absorption areas in the ground and allow the effluent to percolate through the soil and into the groundwater. The proposed developments were located within the Pine Creek watershed. Pine Creek and its tributaries were designated by the DEP as being "exceptional value waters[4]" of the Commonwealth.

The DEP's approval of the sewage modules was issued pursuant to Section 10(2) of the Sewage Act, 35 P.S. §750.10(2), which authorizes the DEP "to approve or disapprove official plans."

Watershed Association's Appeal

On January 5, 2007, the Watershed Association appealed the DEP's approval of the sewage planning modules. Among other objections relating to the Sewage Act, the Watershed Association contended that "approval of the modules as submitted violate[ed] the antidegradation requirements of the Clean Streams Law as set forth in 25 Pa. Code [Chapter 93]." Pine Creek Valley Watershed Association Notice of Appeal, ¶13, at 4. Specifically, the appeal alleged that the modules possessed "inadequate information with respect to the quality of

[3] The submission of a sewage planning module is required by Section 5(a.1) of Pennsylvania's Sewage Facility Act (Sewage Act), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5(a.1).

[4] Exceptional value waters are "[s]urface waters of high quality which satisfy [25 Pa Code] §93.4b(b) (relating to antidegradation)." 25 Pa Code §93.1.

groundwater" and did not include "an evaluation of the impacts the proposed on-lot disposal systems will have on local groundwater." Pine Creek Valley Watershed Association Notice of Appeal, ¶10, at 3.

The regulations at 25 Pa. Code Chapter 93, entitled "Water Quality Standards" were promulgated pursuant to Sections 5(b)(1) and 402 of the Clean Streams Law, 35 P.S. §§691.5(b)(1) and 691.402.[5]

The Clean Streams Law was enacted to preserve and improve the purity of the waters of the Commonwealth. The regulations promulgated under the Clean Streams Law defined the goals and set forth the criteria to restore, protect and maintain the integrity of our waters. Antidegradation requirements in Chapter 93 apply to Pennsylvania's surface waters and ensure that existing uses be maintained and protected. 25 Pa. Code §§92.1, 93.1, 93.4a(b). The antidegradation regulations addressed the extent or allowance of a new or increased discharge to surface waters or exceptional value waters. The antidegradation program established specific requirements to make certain no new or increased discharge results in any lowering of existing water quality. 25 Pa. Code §93.4c.

DEP's Rescission of the Approvals

After a hearing was conducted on the merits of the Mulberry II case, and after the Watershed Association filed and served its post hearing brief to the Board, the DEP rescinded the contested approval so that it could evaluate the impact of the sewage disposal on the Exceptional Value Waters. Eventually the

Board dismissed the appeal. Shortly thereafter, the DEP rescinded its approval of the sewage module in the Fredericksville Farms case for the same reason. Both parties agree, for purposes of this appeal, that the Watershed Association raised numerous objections that were clearly not under the Clean Streams Law, and ultimately prevailed on the antedegradation claim.

Watershed Association's Application for Attorney Fees and Costs

The Watershed Association subsequently filed an application for fees and costs based on Section 307(b) of the Clean Streams Law which provided, in part, that "[t]he Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been *reasonably incurred by such party in proceedings pursuant to this act*." 35 P.S. § 691.307(b) (emphasis added).

However, the DEP argued that the proceeding was brought under the Sewage Act, which contains no provision for the recovery of counsel fees.

The Board issued an Opinion and Order on May 20, 2008. Relying on our Supreme Court's decision in Solebury Township v. Department of Environmental Protection, 593 Pa. 146, 928 A.2d 990 (2007), the Board held that the Watershed Association's appeal before the Board was a proceeding pursuant to the Clean Streams Law and, thus, invoked the fee-shifting provision of Section 307(b). The Board noted that the Watershed Association achieved success because the DEP withdrew its approval of the sewage module. Therefore, the Watershed

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[5] Act of June 22, 1937, P.L. 1987, as amended.

Association achieved a final resolution of the appeal in the Watershed Association's favor. As such, the Board applied the public policy and liberally construed the fee-shifting provisions so as to justly compensate the party that challenged an unjust or unlawful agency action. The Board rejected the DEP's argument that the Watershed Association's appeal was only under the Sewage Act. The Board noted that the Watershed Association's notice of appeal alleged that the DEP failed to consider the potential impacts of its approval of the sewage module on Exceptional Value Watersheds as required by the DEP's antidegradation regulations as set forth in 25 Pa. Code §§ 93.4, 93.4b, and 93.4c, which were promulgated under the Clean Steams Law. The Board concluded that the appeal was a proceeding under the Clean Streams Law on this basis. As such, the Board determined that it had the discretion to award counsel fees to the Watershed Association and that it would hold a hearing to determine the appropriate amount of fees.

The Watershed Association and the DEP agreed initially to eliminate certain fees that were unrelated to the issue of antidegradation. On December 8, 2008, the Board issued a separate order and opinion for each of the two cases. The Board, again, ruled that the Watershed Association was entitled to fees and costs under the Clean Streams Law and cited to its May 20, 2008, decision. The remainder of the opinions detailed how the fees and costs should be awarded, recognizing that some fees and costs had been eliminated prior to submission to the Board.

On appeal[6], the DEP argues that the Board erred when it determined that the Watershed Association's appeal of the DEP's module approvals was a proceeding under the Clean Streams Law and, therefore, subject to the fee-shifting provision of Section 307(b) of the Clean Streams Law. The DEP also argues that even if the Watershed Association is permitted to recover costs and fees pursuant to Section 307(b) of the Clean Streams Law, the Board erred in calculating the awards.

Whether the Watershed Association's Appeal was a Proceeding Under the Clean Streams Law

First, the Watershed Association contends, and this Court wholly agrees, that the present matter clearly falls within the ambit of the attorney fees provision of Section 307 of the Clean Streams Law, 35 P.S. §691.307(b).

Our Supreme Court held in Solebury that the fee-shifting provision of Section 307 of the Clean Streams Law, 35 P.S. §691.307(b), may be implicated "in a situation where the underlying litigation concerns water quality certification and associated appeals, at least in circumstances "**where such proceedings arise out of the provisions of the Clean Streams Law or accompanying regulations**." Solebury, 593 Pa. at 160, 928 A.2d at 998. (Emphasis added). The Supreme Court

[6] When reviewing a decision of the Board, this Court's standard of review "is whether findings of fact were supported by substantial evidence and whether constitutional violations or errors of law were committed." UMCO Energy, Inc. v. Department of Environmental Protection, 938 A.2d 530, 534 n.9 (Pa. Cmwlth. 2007). Further, "[i]n considering the propriety of an award of counsel fees . . . appellate review is limited to determining whether the award constituted an abuse of discretion." Solebury Township, 593 Pa. at 157 n.8, 928 A.2d at 997 n. 8.

expressly held the phrase "proceedings under this act" was "broadly phrased and plainly encompasses **litigation arising under the Clean Streams Law**." Id.

Here, the DEP approved two sewage planning modules which proposed two on-lot septic systems. Although the approvals were originally issued under the Sewage Act, which authorizes DEP "to approve or disapprove official plans," 35 P.S. §750.10(2), the Association appealed to the Board because the DEP failed to comply with the antidegradation regulations that were undisputedly promulgated pursuant to the Clean Streams Law. 25 Pa.Code §93.4(b) and (c).

The provenance of these antidegradation requirements as a Clean Streams Law matter is beyond question. The antidegradation regulations at 25 Pa.Code §93.4(b) and (c), required the DEP to consider and analyze the impact of sewage discharge on the quality of Exceptional Value Waters. The regulations at 25 Pa. Code §93.4(a) establish a very specific and particular process and procedure which must be followed by an applicant proposing a new, additional or increased discharge to High Quality or Exceptional Value Water. Certain affirmative demonstrations must be made to the DEP as a prerequisite for the DEP's granting of a permit for such a new, additional or increased discharge.

In addition, the DEP regulations that implemented the Sewage Act specifically required that official plans and alternatives be consistent with the antidegradation regulations, which were promulgated under the Clean Streams Law. 25 Pa. Code §71.21(a)(5)(i)(E). Here, the DEP's approval of the sewage modules was inconsistent with the antidegradation regulations promulgated under

the Clean Streams Law. The Watershed Association's notice of appeal specifically charged that the DEP failed to consider the potential impacts to Exceptional Value Watersheds and that the module submitted violated the antidegradation requirements of the Clean Streams Law as set forth in 25 Pa.Code §§93.4, 93.4(b) and 93.4(c). The Watershed Association incurred expenses related to its appeal before the DEP eventually acknowledged its failure to comply with its own antidegradation regulations and filed a Motion to Dismiss whereby it rescinded its approval. Clearly, the matter appealed was under the Clean Streams Law and was the subject of the appeal and the proceedings, i.e., litigation, before the Board.

This controversy falls squarely within the standard espoused in Solebury. Contrary to the DEP's argument, Solebury does not stand for the proposition that the fee shifting provision only applies when the original approval or permit is granted pursuant to the Clean Streams Law.[7] To the contrary, the fact

[7] Under the Dissent's interpretation of Solebury in order to invoke the fee shifting provision the DEP's **authority** to issue the approvals at issue must arise out of the Clean Streams Law. Again, that is not the test. Rather, the focus of the Solebury decision was on the purpose of or reason for the underlying litigation. Here the "underlying litigation" was the Association's appeal of the DEP's approval of the sewage modules as being contrary to the Clean Streams Law regulations. Because the Association ultimately prevailed, it was entitled to recover those legal fees expended to demonstrate the DEP's violation of the Clean Streams Law regulations. Whether the **source** of the DEP's authority to approve the modules as part of its statutory duties arose out of the Sewage Act as opposed to the Clean Streams Law is neither here nor there. Solebury does not remotely suggest that should be the determinative factor. Nor should it be because clearly the DEP must consider and comply with the Clean Streams Law and its regulations before it issues an approval of a sewage module in furtherance of its duties under the Sewage Act. Attorney fees were properly awarded because the Association was forced to spend its time and money to correct or undo something that was done **contrary to the Clean Streams Law or its regulations**. The Association's appeal and the litigation, hearings, briefs, depositions, were all necessary to demonstrate that the DEP did not comply with the Clean Streams Law regulations – not the Sewage Act.

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that the initial approval of the sewage module was granted pursuant to the Sewage Act is not determinative. The test is, rather, whether the litigation (in this case, the appeal before the Board) arises under the Clean Streams Law.

On appeal the Watershed Association challenged the DEP's approval of the sewage modules because the DEP failed to perform the critical antidegradation analysis clearly implicated the provisions of the Clean Streams Law. In light of the DEP's rescission of its approval, the Board's award of attorney fees under Section 307 of the Clean Streams Law, 35 P.S. §691.307(b) was not error.

Whether the Board Erred in Calculating the Amount of Attorney Fees and Costs

In the Mulberry II matter, the Watershed Association was awarded $67,864.55, which represented an award of counsel fees of $56,094.00 and $11,770.55 in necessary costs. In the Fredericksville Farms matter, the Watershed Association was awarded $34,833.89, which represented an award of counsel fees of $22,530.00 and $12,303.89 in necessary costs.

The DEP argues that the Watershed Association did not sufficiently identify which matters were related to antidegradation and which were not. It claims that the Board erred when it calculated the attorney fees and costs because

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the Watershed Association's documentation lacked sufficient detail to establish that those costs and fees were solely related to the single claim upon which the Watershed Association prevailed. It claims that the Watershed Authority did not make a "reasonable effort" to distinguish attorney fees between its successful and unsuccessful claims.

The DEP relies on McDonald Land & Mining Co. v. Department of Environmental Resources, 664 A.2d 194 (Pa. Cmwlth. 1995). There, McDonald Mining Company had prevailed in a matter under the Surface Mining Conservation and Reclamation Act which authorized a prevailing party to recover fees and costs in proceedings related to mining permits and bond releases.[8] The DEP argued that McDonald was not entitled to fees and costs because it had failed to apportion its costs and fees related to legal work on a bond release denial, as opposed to legal work performed on McDonald's appeal from a compliance (enforcement) action. This Court, relying on federal case law, held that "whenever possible, the prevailing party is to make a reasonable effort to distinguish the fees from its successful and unsuccessful claims." McDonald, 664 A.2d at 198. Because McDonald failed to apportion, or even attempt to apportion, the costs which were attributable solely to its challenge to the compliance order, the Court affirmed the Board's denial of attorney fees and costs.

Unlike in McDonald, the record supports the Board's conclusion that the Watershed Association and its attorneys made a reasonable effort to apportion the fees and costs expended in pursuit of the appeal between the claims related to

[8] Act of May 31, 1945, P.L. 1198, 52 P.S. 1396.1-1396.19a., as amended.

the Clean Streams Law regulations from those which fell more clearly within the purview of the Sewage Act and its regulations.

The itemized bill of Eugene E. Dice, Esquire (Attorney Dice) was attached to the Watershed Association's Application for Fees and Costs as Exhibit 4. Attorney Dice commenced the appeal in September 2005 and pursued it to December 2006. He listed the hours he worked on the matter, broke down the hours by task, and subtracted the hours he worked on issues other than antidegradation. The Board found that Attorney Dice's narrative was clear as to which issues he worked on and that the Watershed Association properly reduced the amount of its fee application for Attorney Dice's time by eliminating hours spent on issues that were clearly unrelated to its claim under the Clean Streams Law.

Likewise, the itemized bill of John Wilmer, Jr., Esquire (Attorney Wilmer) was attached as Exhibit 7 to the petition. Attorney Wilmer's hours reflected that all of his work was spent on the antidegradation issue under the Clean Streams Law. Attorney Wilmer entered his appearance for the Watershed Association in April 2007. The Board concluded that Attorney Wilmer's participation in the appeal was fully concentrated on the DEP's failure to consider the DEP's antidegradation regulations and that this was the reason expressed by the DEP for withdrawing its approval of the module.

Clearly, the Watershed Association made a reasonable effort through the sworn affidavits to apportion the costs as required by McDonald. Accordingly, this Court concludes that the awards of the Board were appropriate and reasonable and did not constitute error or an abuse of discretion.

The orders of the Board are affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Environmental Protection, Petitioner	:	
v.	:	
Pine Creek Valley Watershed Association, Inc., Respondent	:	No. 12 C.D. 2009 No. 13 C.D. 2009

O R D E R

AND NOW, this 25th day of March, 2010, the orders of the Environmental Hearing Board in the above-captioned matter are hereby affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Environmental Protection, Petitioner	:	
v.	:	No. 12 C.D. 2009
Pine Creek Valley Watershed Association, Inc., Respondent	:	No. 13 C.D. 2009
	:	Argued: September 14, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION BY JUDGE COHN JUBELIRER **FILED: March 25, 2010**

I respectfully disagree that the Pine Creek Valley Watershed Association, Inc. (Association) is entitled to recover fees and costs from the Department of Environmental Protection (DEP) pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).[1] Because I believe that the proceedings before the Environmental Hearing Board (Board) in this case were brought pursuant to the Pennsylvania Sewage Facilities Act (Sewage Act),[2] which does not contain a fee-

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

[2] Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§ 750.1 – 750.20a.

shifting provision, and disagree with the majority's expansive interpretation of Solebury Township v. Department of Environmental Protection, 593 Pa. 146, 928 A.2d 990 (2007), I must respectfully dissent.

The Supreme Court, in Solebury, examined Section 307(b) of the Clean Streams Law and awarded attorney fees and costs pursuant to that section to the townships that challenged DEP actions. In that case, DEP issued to the Pennsylvania Department of Transportation (DOT) the federal water quality certification required by Section 401(a) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341(a) (Section 401 Certification) in connection with a bypass project. In order to receive the federal permits "to place dredge or fill material into navigable waters," DOT needed a Section 401 Certification from DEP indicating that the discharge would comply with the Clean Water Act and Pennsylvania clean water regulations. Solebury, 593 Pa. at 152, 928 A.2d at 993. The townships challenged the issuance of the Section 401 Certification as contravening DEP regulations. DEP ultimately rescinded the Section 401 Certification, and the townships sought to recover counsel fees and costs under Section 307(b) of the Clean Streams Law. The Board denied the award of fees and costs, this Court reversed, and the Supreme Court affirmed.

The Supreme Court determined that the Clean Streams Law's fee recovery provision of Section 307(b) "may be implicated in a situation where the underlying litigation concerns water quality certification and associated appeals, at least in circumstances where such proceedings arise out of the provisions of the Clean Streams Law or accompanying regulations." Id. at 160, 928 A.2d at 998. The

Supreme Court agreed with the townships' position that the phrase in Section 307(b) that stated, "proceedings pursuant to this act," was "broadly phrased and plainly encompasse[d] litigation arising under the Clean Streams Law." Id. The Supreme Court found that a sufficient connection existed between the Clean Streams Law and the Clean Water Act's Section 401 Certification process to allow recovery under Section 307(b) of the Clean Streams Law because:

> the plain language of [DEP's] regulations indicates that DEP regards the Section 401 Certification process *as a subset* of its consideration of state law permit applications. See 25 Pa. Code § 105.15(b) (requiring any applicant seeking a water quality certification to submit an environmental assessment equivalent to that required for a state law permit).

Id. at 161, 928 A.2d at 999 (emphasis added). Further, the Supreme Court noted that: (1) Section 401 Certifications are granted pursuant to requirements of the federal Clean Water Act, which the Commonwealth adopted; (2) DEP grants Section 401 Certifications under authority vested in Chapter 105 of DEP's regulations;[3] (3) DEP has the authority to place limitations or conditions upon Section 401 Certifications pursuant to 33 U.S.C. § 1341(d); and (4) Section 401 Certifications are a part of the requirements for permitting under 25 Pa. Code § 105.15(b). Id. at 151-161, 928 A.2d at 993-999.

Unlike in Solebury, DEP's authority to issue approvals for sewage planning modules in this case arises out of the Sewage Act, not the Clean Streams Law.

[3] Chapter 105 was promulgated pursuant to both the Clean Streams Law and the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27 (which does not contain a fee-shifting provision).

Further, Solebury involved the permitting process for discharging *industrial* waste, whereas the focus in this case is only on *sewage*, which is explicitly excluded from the definition of "Industrial waste."[4] Moreover, the Supreme Court, in Solebury, was careful to limit its holding to that case's particular facts by concluding "that, at least *under the circumstances presented in this case*, challenges to the Clean Streams Law aspects of the issuance of Section 401 Certifications are 'proceedings pursuant to this act' for purposes of the fee-shifting provision of Section 307." Id. at 161, 928 A.2d at 999 (emphasis added).

Based on these reasons, I would not affirm the Board because I believe that the Board's decision is inconsistent with the Supreme Court's limited holding in Solebury and could improperly implicate Section 307(b)'s fee-shifting provision in almost every DEP approval of any development. Accordingly, I respectfully dissent from the majority opinion and would reverse the orders of the Board granting the Association fees and costs in the Mulberry II case docketed at 12 C.D. 2009, and in the Fredericksville Farms case docketed at 13 C.D. 2009.[5]

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[4] Section 307 of the Clean Streams Law describes the permitting process for discharge of "Industrial Waste," which is defined as any type of pollution or discharge *except* sewage. The Clean Streams Law defines "Industrial waste" as:

> "Industrial Waste" shall be construed to mean any liquid, gaseous, radioactive, solid or other substance, *not sewage*, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, refuse, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations. "Industrial waste" shall include all such substances whether or not generally characterized as waste.

35 P.S. § 691.1 (emphasis added).

[5] Because I would reverse the orders granting the Association fees and costs, I would not reach the Association's second issue of whether the Board properly apportioned the fees and

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RENÉE COHN JUBELIRER, Judge

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costs. However, were I to reach that issue, I would reverse the Board because the Association failed to apportion its costs and fees based *solely* on its prevailing issue regarding DEP's failure to consider the antidegradation regulations at 25 Pa. Code § 93.4c(b). The record exhibits to the Association's application for fees and costs in the Mulberry II case do not set forth which billable hours are attributable to the antidegradation claim. It is noteworthy that, in the Mulberry II case, the Association sought fees and costs from the time the notice of appeal was filed in 2005, which predated the elimination of 26 objections in September 2007. Similarly, in the Fredericksville Farms case, the Association does not clearly delineate which billable hours are attributable to the antidegradation claim.