

PA Supreme Court Enhances Ability of Permit Challengers to Recover Attorney's Fees from Private Parties

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The Pennsylvania Supreme Court has made it easier for public interest groups and others challenging clean water permits issued by the Department of Environmental Protection ("DEP") to recover attorney's fees and costs from permit applicants. In a decision issued February 22, 2023, the Court struck down a rule imposed by the Environmental Hearing Board ("EHB") that limited the recovery of attorney fees and costs from private parties to those instances where the applicants acted in bad faith. The Court's ruling increases the potential that permit applicants must not only bear their own legal costs in defending a permit appeal but may also be required to reimburse parties that challenge clean water permits for their attorney's fees and costs.

Parties affected by DEP approval or disapproval of permit applications can appeal that action to the EHB. These parties include a permittee (in the case of a permit application disapproval) or parties impacted by a permit approval. The Pennsylvania Clean Streams law allows the EHB to order any party to the appeal to pay costs and attorney's fees that it determines to have been reasonably incurred by another party to the appeal. The Court's action reverses a standard established by the EHB that limited the recovery of attorney's fees and costs against private parties to an appeal to only instances where a private party acted in bad faith or for an improper purpose.

Despite striking down the EHB's previous standard for awarding fees under the Clean Streams Law, the Court left the EHB with broad discretion to decide when to award attorney's fees and costs, based upon the facts of individual appeals. That said, permit applicants now face an increased risk of footing the legal expenses of parties challenging their permits. These expenses can run in the hundreds of thousands of dollars. There are steps, however, that permit applicants can take to minimize this risk. The most important measure is for those seeking permits from DEP to submit high quality permit applications. This means working closely with environmental consultants, and environmental counsel when necessary, when preparing permit applications. This is particularly true for projects that may be controversial or subject to heightened public scrutiny. Failure to do so could lead not only to a denial of a permit application by DEP but payment of opposing parties' legal expenses. High quality permit applications not only increase the potential that DEP will take timely favorable actions, it also increases the odds that the approvals will withstand challenges.

The case is [Clean Air Council v. DEP](#).

If you have any questions pertaining to the latest court ruling or changes to permit applications, please contact [me](#) or anyone in the Barley Snyder [Environment & Energy Industry Group](#).

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