

**LOWER SALFORD TOWNSHIP AUTHORITY:  
AND UPPER GWYNEDD-TOWAMENCIN  
MUNICIPAL AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION**

**EHB Docket No. 2005-100-K**

**Issued:** December 15, 2009

**OPINION AND ORDER ON  
APPLICATIONS FOR ATTORNEYS' FEES**

**By Michael L. Krancer, Judge**

**Synopsis:**

The Board denies the applications for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. The applications fail to meet the criteria for an award of fees and costs.

**FACTUAL BACKGROUND**

This case is the Clean Streams Law Section 307 petition of Lower Salford Township Authority (LSTA) and Upper Gwynedd-Towamencin Municipal Authority (UGTMA) for attorneys fees and costs which has emanated from the now settled and dismissed substantive litigation which was filed by LSTA and UGTMA challenging the nutrient portion of the Skippack Creek Watershed Total Maximum Daily Load (TMDL). LSTA and UGTMA filed their original appeal of the Skippack TMDL on May 16, 2005. The underlying litigation was the subject of several prior Board opinions and a Commonwealth Court disposition. *Lower*

*Salford v. DEP*, 2005 EHB 854 (denying DEP’s motion to dismiss); *Lower Salford v. DEP*, 2005 EHB 893 (denying petition for reconsideration and to amend order to allow interlocutory appeal); *DEP v. Lower Salford*, 2477 CD 2005 (Pa. Cmwlt. 2006) (denying DEP’s petition for review); *Lower Salford v. DEP*, 2006 EHB 657 (denying DEP’s motion for summary judgment). The factual, legal and procedural background of the Skippack TMDL and the litigation against it by LSTA and UGTMA is described in the earlier Board opinions and we will not repeat it here.

The Appellants, of course, challenged the technical merits of the TMDL in their appeal to the Board. They argued, among other things, “that the Skippack TMDL was (1) premised upon an indefensible scientific position which is fundamentally flawed and technically insufficient; (2) based on flawed modeling; (3) not substantiated by fact or law; and (4) contrary to law.” LSTA Application ¶ 37, LSTA Notice of Appeal ¶¶ 44-67. However, the threshold issue in the motion practice before the Board was the jurisdictional question, *i.e.*, whether the TMDL was issued by the Commonwealth or by the federal EPA. If the TMDL were the Commonwealth’s, *i.e.*, an action of the DEP, then the Board had jurisdiction. If the TMDL was an action of the federal EPA then we would not have had jurisdiction since, of course, we have jurisdiction only over actions of the state DEP, not the federal EPA. 35 P.S. § 7514(a) (the Board has the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses or decisions *of the department*) (emphasis added); 35 P.S. § 7514(c) (“no action *of the department* adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board . . .”) (emphasis added).

That threshold jurisdictional issue was never resolved as a final matter of law or fact in that the Board decisions merely denied DEP’s motion to dismiss on October 25, 2005 and DEP’s motion for summary judgment on September 19, 2006. On September 26, 2007, however, as

the parties' Stipulation of Settlement of the underlying litigation states, "EPA issued a document entitled *Decision Rationale For the Withdrawal of the Nutrient TMDLs for the Skippack Creek Watershed, Montgomery County, Pennsylvania*, which states that "EPA is now withdrawing the nutrient TMDLs, and preparing to propose replacement nutrient TMDLs." Stipulation of Settlement, ¶ E.

Notwithstanding this federal withdrawal of the nutrient TMDLs, the litigation continued. In a nutshell, LSMA and UGTMA say that they were unable to abandon the litigation for fear that they would suffer from the adverse collateral damage of administrative finality as the legal questions of the appropriate timing and forum for challenging a TMDL is not settled. So the Board scheduled a trial for December 2008 limited to the issue of whether the Board had jurisdiction over the Skippack TMDL. Stipulation of Settlement, ¶ F. The Department's contention for trial was that the Skippack TMDL was established by the EPA and, as such, is not an action of the Department subject to the jurisdiction of the Board. Stipulation of Settlement, ¶ G.1. The Appellants' contention for trial was that the Skippack TMDL was established by the Department, and as such, is an action of the Department subject to the jurisdiction of the Board. Stipulation of Settlement, ¶ G.2.

That trial never took place as the parties entered into their Stipulation of Settlement in December and January 2008-2009 and the Stipulation was filed with the Board on January 23, 2009. The Board entered an Order that day dismissing the underlying litigation.

The attorneys' fees and costs applications were filed in February 2009 and briefing was completed on June 30, 2009. In short, the applicants argue they are entitled to fees and costs because they were "prevailing parties" in the sense of "[having] achieved some degree of success on the merits" and that their suit made a "substantial contribution" to the withdrawal of the

TMDL. They say that the expert reports in their case filed on November 14, 2006 disclosed problems with the two mathematical regressions which had been foundational in the establishment of the 2005 Skippack nutrient TMDL, to wit, the Dodds Regression and the Cattaneo Regression. They say that the TMDL was, thus, voluntarily withdrawn “because of [the appeal].” Sure enough, the EPA does confirm in a lengthy discussion in its September 26, 2007 *Decision Rationale For the Withdrawal of the Nutrient TMDLs for the Skippack Creek Watershed, Montgomery County, Pennsylvania*, that the two regressions were flawed for their use in the Skippack TMDL. Department’s Responses to Appellants’ Respective Applications For Recovery of Attorneys’ Fees and Costs, Affidavit of Martha E. Blasberg, Exhibit J.

DEP notes that the TMDL was withdrawn by the EPA, not DEP. LSTA’s Application admits that the TMDL was officially withdrawn “by EPA.” LSTA Application, ¶ 72 (emphasis added). LSTA, however, adds as a footnote to this admission that, “[d]espite the fact that the Skippack TMDL was withdrawn by EPA, the Appellants maintain and the record of this appeal demonstrates that the Skippack TMDL was established by the Department.” *Id.* at ¶ 72 n. 11. Also, DEP says that, in any event, the EPA became aware of the deficiencies in the two regressions a few weeks earlier, in a different case, from an independent source who was not even a party in the Skippack TMDL litigation. DEP says that EPA was made aware of the problems with the regressions through public comments filed with DEP on October 25, 2006 by the Pennsylvania Periphyton Coalition with respect to the Neshaminy TMDL which comments were copied to EPA.<sup>1</sup> Thus, says DEP, the EPA’s withdrawal of the Skippack TMDL could not have been brought about in any way, shape or form by the Appellants’ litigation. In addition, DEP makes the interesting point that the EPA withdrew the Skippack TMDL because it was not

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<sup>1</sup> The Neshaminy TMDL matter is the subject of another attorneys fees petition which is pending before the Board. *Crum Creek Neighbors*, EHB Docket No. 2007-287-L (petition filed on November 19, 2009), In that case, unlike this one, all parties agree that the Neshaminy TMDL is the Pennsylvania DEP’s promulgated TMDL.

strict enough. The *Decision Rationale* document says that “EPA is withdrawing the existing nutrient TMDLs that were established for the Skippack Creek watershed based on our determination that the 2005 nutrient TMDLs were not sufficient to attain and maintain existing water quality standards and water uses” and “EPA will re-establish the nutrient TMDLs for the Skippack Creek watershed by June 30, 2008.” *Decision Rationale*, p. 1. So, says DEP, this can hardly be a victory in any sense of the word for Appellants who were complaining that the TMDL of 2005 was too strict.

### ANALYSIS

Section 307(b) of the Clean Streams Law provides as follows:

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). The Supreme Court in *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007), and our opinions following remand from the Supreme Court, *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718, provide the guide for interpreting this provision. As we explained in our *Solebury* decision on remand, we do not view what the Supreme Court did in *Solebury* as so dramatic a shift in Pennsylvania law on fee-shifting as some have thought it to be. In our view, the Supreme Court’s *Solebury* decision allows us to continue to take a *Kwalwasser* approach so long as we do not do so too narrowly. *Solebury*, 928 A.2d at 1004-05.

We see the gravamen of the *Solebury* decision as announcing two key principles. First,

the Court declined to accept for application to Section 307(b) the approach of the majority opinion of the United States Supreme Court in the seminal case of *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Services*, 532 U.S. 598 (2001). Second, and perhaps this is a corollary to the first point or an explication thereof, it eliminated the hard and fast requirement that the applicant for fees is required to have won a formal final judgment or consent decree in court. As Justice Saylor said, “we cannot interpret Section 307 to eliminate the availability of attorneys fees to parties that may have incurred legitimate expenses solely on the basis of a restrictive interpretation of a federal [mining] statute.” *Solebury*, 928 A.2d at 1004.

If we are excluded from the territory of the *Buckhannon* majority then where are we? We think we are left inside the territory of Justice Ginsberg’s dissent in *Buckhannon*. This could be called the “catalyst” approach. As set forth by Justice Ginsberg, three major criteria compose that approach: (1) the applicant has to show that the other party provided some of the benefit sought in the suit; (2) the applicant has to show that the suit stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and (3) the applicant has to show that its suit was a substantial or significant cause of the defendant's action providing relief. *Buckhannon, supra*, 532 U.S. 598, 626-30 (Ginsburg, J., dissenting).<sup>2</sup>

The Board has not taken the approach that we are at square one after *Solebury* and we have applied a catalyst approach which borrows heavily from Justice Ginsberg’s three criteria. Judge Labuskes noted in *Solebury* upon remand from the Supreme Court that the catalyst approach “appears to mirror quite closely the Pennsylvania Supreme Court’s vision . . . of how Section 307 should be applied.” *Solebury*, 2008 EHB at 671.

This approach, which is more liberal than the *Buckhannon* majority or the strict

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<sup>2</sup> We are not dealing here in this case with evaluating the amount of fees to be awarded because, as we demonstrate, the applicants here do not qualify for the award of fees at all.

application of the *Kwalwasser* mining statute criteria is consistent with Justice Saylor's injunction that our view of Section 307 take into account the public policy of Pennsylvania favoring a liberal construction of fee-shifting provisions. Moreover, this approach relies on identifiable criteria which have been and are being applied by other courts in other cases under other fee-shifting provisions of other statutes including the federal Clean Water Act. In this regard, we note that while rebuking the EHB for its over-reliance on federal mining fee-shifting provisions, Justice Saylor clearly signaled that it would be appropriate for us to turn to similar federal Clean Water Act statutes, namely 33 USC § 1365(d). *Solebury*, 928 A.2d at 1004. That statute, as Justice Saylor pointed out, allows fees to be awarded to both "prevailing parties or substantially prevailing parties".

While the petitioning party need not be a prevailing party in the technical "term of art" sense as discussed by the *Buckhannon* majority or by Justice Scalia in his concurrence, the petitioner must still be at least a substantially prevailing party in that the party must have attained some result from the other side which is positive from the party's point of view and the suit must have been a substantial or significant cause of the defendant's action providing relief. Justice Saylor in his *Solebury* opinion directs us to a source which provides support for this and also insight into what this means in practice. He refers to an article by Jason Klein in the *Hastings Journal of Environmental Law and Policy*. *Solebury*, 928 A.2d at 1004 n.11 citing Jason Klein, *Attorney's Fees and the Clean Water Act After Buckhannon*, 9 *Hastings W.-N.W.J.Env.L. & Pol'y* 109 (2003) (hereinafter "*Hastings*"). In that article Mr. Klein discusses the history behind the insertion of the term "substantially prevailing party" into the Clean Water Act. He explains that in earlier days both the federal Clean Water Act and the federal Clean Air Act contained fee-shifting provisions with no reference at all to prevailing party or substantially prevailing party.

Both statutes provided that a “court may award costs of litigation whenever it determines that such award is appropriate.” *Hastings* at 114. In 1983 the United States Supreme Court dealt with that version of the Clean Air Act fee-shifting provision and it rejected an argument that fees should be awardable even though the court had rejected all of petitioners’ claims, and rejected their relief, on the ground that the suit had nevertheless “contributed to the goals of the CAA.” The Court said, “some degree of success is required before it is ‘appropriate’ to award fees.” *Ruckleshaus v. Sierra Club*, 463 U.S. 680.

Four years later Congress drove home the point made by the Court in the *Ruckleshaus* decision by amending both the Clean Air Act and the Clean Water Act to include the phrase “prevailing or substantially prevailing party.” The Senate Report says:

the purpose of . . . the amendment [ ] is to clarify the circumstances under which costs of litigation may be awarded. In *Ruckleshaus* the lower court had said it was appropriate to award fees to a party even though the government prevailed on all issues. The Committee does not believe that it is reasonable or appropriate . . . for a party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on the issues. Accordingly, these amendments would limit awarding of costs under the CWA to prevailing or substantially prevailing parties.

*Hastings* at 115 citing S. Rep. No. 50, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 33 (1985).

Mr. Klein also notes that Black’s Law Dictionary does not define “substantially prevailing party” but it does define “substantially” as “essentially, without material qualification, in the main, in a substantial manner.” There are no modifiers like “nearly,” “almost,” or “approximately” so, as he says, the definition is limited to substantive success. *Hastings* at 113.

Judge Labuskes in the *Solebury* remand echoes these principles. He emphasized that the applicant for fees should show that “the lawsuit brings about a voluntary change in the defendant’s conduct consistent with the relief sought by the fee applicant in the litigation”. Further, he notes that we look to see whether “the proceedings caused the Department to alter its

behavior, even in the absence of a Board order on the merits or a Board approved settlement;” and “what the party accomplished, the extent to which the litigation brought about the accomplishment, the particular party’s role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant;” and, “the important point is that the agency changed its conduct at least in part as a result of the appeal.” 2008 EHB at 671, 672, 673, 675-76. Also, as we said in our *Solebury* opinion on reconsideration, “[f]inally, let us take this opportunity to be clear: fee awards are not available in frivolous, groundless or nuisance appeals.” *Solebury*, 2008 EHB at 722.

It is noteworthy that even the applicants in this Section 307(b) case see that the catalyst criteria in basically the form set forth by Justice Ginsberg in her dissent in *Buckhannon* are the key and they do argue that they were a “prevailing party” in the sense of “[having] achieved some degree of success on the merits” and that their suit made a “substantial contribution” to the withdrawal of the TMDL. They say the withdrawal was “because of UGTMA’s Appeal.” Memorandum of Law, §§ 2, 3 (the pages are not numbered). UGTMA calls this the “modified *Kwalwasser* Criteria” which are resultant from the Supreme Court’s *Solebury* case.

### **Application of the Criteria to This Case**

We think there is quite an adequate record to determine these applications without further litigation. The parties’ pleadings and the Stipulation of Settlement provide an adequate basis upon which to decide this particular case. At the end of the day, applying the criteria discussed above we do not believe that Section 307 of the state Clean Streams Law can or should be a vehicle for recovery of fees and costs where it was not DEP who took the action being claimed as being the victory or the substantial victory. Here it was not DEP that did anything or took any action or changed any behavior which supplied what the applicants point to as their good result.

It was, instead, the federal EPA that withdrew the Skippack TMDL as even the applicants admit.

In this case the applicants obviously cannot show that “the other party” to the litigation provided some of the benefit sought in the suit. Even if the EPA’s withdrawal of the Skippack TMDL can be considered a benefit to the applicants, it was EPA, a federal sovereign and a non-party to the EHB suit, which provided that benefit. As Judge Labuskes points out numerous times in the *Solebury* decision, we need to look at whether the “the lawsuit [brought] about a voluntary change in the *defendant’s conduct*” and “if the proceedings caused *the Department* to alter its behavior.” *Solebury*, 2008 EHB at 671, 672.

As noted earlier, while the applicants admit, as they must, that EPA withdrew the Skippack TMDL they qualify that admission by saying, “Appellants maintain and the record of this appeal demonstrates that the Skippack TMDL was established by the Department.” LSTA Application, ¶ 72 n. 7. First, the record does not establish anything in this case other than DEP was not entitled to the granting of a motion to dismiss nor a motion for summary judgment. The underlying allegation of Appellants, that it was DEP that promulgated the TMDL as a matter of fact was, of course, never resolved. Indeed, the Board’s opinion denying summary judgment categorized the as of yet unresolved and not fully developed competing factual points on the radar screen for each party on that question. *Solebury*, 2006 EHB at 663.

We think it would be perverse and useless to now hold a mini-trial on the threshold jurisdictional issue of who promulgated the TMDL. Nobody contends that fee-shifting provisions, whether from the Clean Streams Law or anywhere else, necessitate trials on the matters settled in order to resolve the subsequent fee petition claims. The Supreme Court’s *Solebury* decision certainly does not point in that direction. Also, as Judge Labuskes said in *Solebury* on remand, “We are reluctant to hazard what would be little more than a guess in this

context, and fee applications should not turn into mini-trials on the merits.” *Solebury*, 2008 EHB at 675.

In addition, there would be no point to the exercise of conducting a mini-trial now of whose TMDL it was here. Regardless of who promulgated this TMDL in the first place in 2005, nobody here disputes that it was EPA that withdrew it on September 26, 2007. So the answer to the question is of no consequence in the context of a Section 307(b) fees application.

We do believe that the Appellants appeal in this case was colorable, and it was not frivolous, unreasonable or groundless. First, on the threshold jurisdictional question, that the Board rejected two DEP requests for summary relief and a motion for reconsideration shows that the claims were certainly credibly brought in our court in the first instance. As to the technical merits of the case, we have no reason to doubt that the technical points were colorable. After all, the EPA did withdraw the Skippack nutrient TMDL and it appears that this was done, at least in part, for some of the same reasons upon which Appellants grounded their challenge on the merits to the TMDL. However, as discussed at length above, the threshold jurisdictional question was never resolved so we have no way of knowing whether we ever would have had jurisdiction over the technical merits of the case. Moreover, we demur from holding two mini-trials, one over the jurisdiction question and if Appellants win the day on that mini-trial, another mini-trial on the technical merits of the case. Actually, to call either one of those a mini-trial would be a misnomer. Both would be “maxi”-trials in that they would be huge undertakings.

We need not conduct a detailed “post-game analysis” to determine what role, if any, the Appellants’ activities in the EHB litigation may have had on EPA’s decision to withdraw the Skippack TMDL because it was EPA, not DEP, which took that action. Thus, the resolution of the interesting question of what extent, if any, the Appellants’ expert reports versus the public

comments filed in the Neshaminy TMDL matter might have played in bringing about or causing *EPA's action* is not necessary. It was EPA's action, not DEP's.

Our last sentence provides a good segue into the third criteria. The action from which the applicants claim victory (or substantial victory) is an action of the federal EPA, not DEP. It really does not matter, then, whether the Appellants' actions in this suit had a substantial or significant causal connection in bringing about that result, even if that result were to be viewed as some of the benefit sought in the suit, for the simple reason, as discussed above, the defendants, *i.e.*, DEP, did not provide that relief.



**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD**

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AND UPPER GWYNEDD-TOWAMENCIN  
MUNICIPAL AUTHORITY**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
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**EHB Docket No. 2005-100-K**

**ORDER**

AND NOW, this 15<sup>th</sup> day of December, 2009, it is HEREBY ORDERED that the applications for fees and costs under Section 307(b) of the Clean Streams Law of LSTA and UGTMA are denied.

**ENVIRONMENTAL HEARING BOARD**

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**THOMAS W. RENWAND**  
Chairman and Chief Judge

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**MICHELLE A. COLEMAN**  
Judge

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**BERNARD A. LABUSKES, JR.**  
**Judge**

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**MICHAEL L. KRANCER**  
**Judge**

**Judge Richard P. Mather, Sr. is recused and did not participate in this decision.**

**DATED:** December 15, 2009

**c: DEP Bureau of Litigation:**  
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