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CONSIDERING ENVIRONMENTAL IMPACT UNDER
UNCOMMON PERSONAL CIRCUMSTANCES: *CAREY*
V. *COMMONWEALTH* AND THE
STORAGE TANK ACT

I. INTRODUCTION

In *Carey v. Commonwealth of Pennsylvania, Department of Environmental Protection*,¹ the Pennsylvania Environmental Hearing Board (the Board) considered whether Pennsylvania citizen John Floyd Carey, Sr., who owned five inactive underground storage tanks, should be provided more time to comply with the Storage Tank and Spill Prevention Act (the Act), and whether he should have to pay his outstanding Underground Storage Tank Indemnification Fund (USTIF) and registration fees.² The Act regulates both aboveground and underground storage tanks to protect all inhabitants from potential leakage and other environmental harms.³ There are a variety of fees and responsibilities commonly associated with the Act, including registration fees, USTIF fees, leak prevention duties, upholding warranties, and keeping out-of-service storage tanks pumped within one inch of petroleum product.⁴ The Pennsylvania Department of Environmental Protection (the Department) makes these determinations regarding fees and responsibilities under the Act, and the Board reviews them when disputed.⁵

The Board contemplated several factors to determine whether Carey should have received more time to comply with the Act and whether he was required to pay his USTIF fees.⁶ Some of these factors include: the Act's text, the environmental impact of both

1. No. 2015-036-R, 2019 WL 6998826, at *1 (Pa. Env'tl. Hearing Bd. Dec. 2, 2019) (providing subject case of this Note).

2. *See generally id.* (outlining purpose of Environmental Hearing Board decision).

3. *Welcome to Division of Storage Tanks*, DEP'T OF ENVTL. PROT., <https://www.dep.pa.gov/Business/Land/Tanks/Pages/default.aspx> (last visited Dec. 21, 2020) (providing purpose of Storage Tank Act).

4. *Id.* (highlighting Storage Tank Act purpose). *See also Carey*, 2019 WL 6998826, at *1-2 (listing Storage Tank Act responsibilities).

5. *History of the Environmental Hearing Board*, PA. ENVTL. HEARING BD., https://ehb.courtapps.com/content/ehb_history.php#:~:text=the%20legislative%20arm%2C%20the%20Environmental,decide%20appeals%20from%20Department%20actions (last visited Dec. 21, 2020) (mentioning Board's involvement with Department).

6. *Carey*, 2019 WL 6998826, at *8 (listing some factors Board considered). Carey was only required to pay \$250 of the \$3,250 he owed in registration fees. *Id.* (concluding Carey will pay less of owed registration fees).

providing additional time and not requiring payment of fees, Carey's personal circumstances, and the Department's inaction.⁷ The Board ultimately determined that Carey should be given another year to comply with the Act, and that he must pay both the outstanding USTIF fees in full and a portion of the outstanding registration fees.⁸

The Board's decisions to grant Carey more time to comply with the Act and require him to pay both USTIF and registration fees were squarely within its discretion.⁹ Without binding precedent to follow, the Board's decisions in *Carey* suggest a prioritization of environmental protection, with relative lenience regarding outstanding fee balances where the Department has not properly completed its related duties.¹⁰ This decision shows little concern for Carey's personal circumstances, but provides guidance for similarly situated parties in the future.¹¹ Although the Board was generally sympathetic to Carey's financial situation and acknowledged the Department's lack of communication for extensive periods of time, the Board ultimately took a firm stance on the prioritization of environmental protection and the fees collected to support it.¹²

This Note considers the environmental impact of underground storage tanks that are not properly maintained, as well as the justification for collecting USTIF fees from storage tank owners as it relates to environmental protection.¹³ Section II discusses the facts of *Carey*, considering each complaint brought separately.¹⁴ Section III outlines the sections of the Act that govern underground storage tank closure, USTIF fees, and registration fees.¹⁵ The Board's analysis of the complaints made reference to the Act's

7. *Id.* (providing Board's ultimate conclusion).

8. *Id.* at *8 (providing Board's ultimate conclusion). Carey was required to pay \$250 of the \$3,250 in registration fees he owed, and all of the \$3,372.16 in USTIF fees he owed. *Id.* at *9. Registration fees are for owning a storage tank, and USTIF fees are for "an industry-wide insurance fund for underground storage tanks administered by the Pennsylvania Department of Insurance." *Id.* at *6-8 (explaining fees ultimately owed).

9. *Id.* at *6 (describing Board's level of power).

10. *Id.* (explaining impact of lack of binding precedent). The Board has the authority to hear appeals and modify orders of the Department. *History of the Environmental Hearing Board*, *supra* note 5 (reminding purpose of Board).

11. *See Carey*, 2019 WL 69998826, at *7 (inferring Board's intent).

12. *Id.* (evidencing Board's purpose behind decision).

13. For a discussion of the potential impact of this decision, see *infra* notes 182-196 and accompanying text.

14. For a discussion of the facts surrounding *Carey*, see *infra* notes 19-45 and accompanying text.

15. For a discussion of the regulations created by the Storage Tank Act, see *infra* notes 46-66 and accompanying text.

framework, with special attention given to factors the Board considered and found influential.¹⁶ Section IV then considers the necessity of enforcing USTIF fee payments in situations where storage tank owners cannot afford to pay due to extenuating circumstances, but have otherwise followed the Act's empty tank requirement.¹⁷ Finally, Section V examines the potential impact and weight of the Board's decision on storage tank owners in similar predicaments.¹⁸

II. FACTS

Carey was the permittee of a property in Cameron County, Pennsylvania that contained an underground storage tank system.¹⁹ He purchased a store — no longer in existence — on the property in 1995, at which time he installed new tanks backed by a thirty-year warranty and featuring a new monitor system.²⁰ On July 18, 2001, Carey received a notice of violation from the Department.²¹ On November 9, 2001, Carey filed a registration form informing the Department that his storage tank system was “temporarily out of service” following a fire on the property the previous month.²²

By November 17 or 18, 2002, all five of the regulated tanks on Carey's property contained one inch of petroleum product or less.²³ In a letter dated April 11, 2003, the Department informed Carey that his previously documented violations were now in compliance.²⁴

16. For a discussion of the Board's analysis of Carey's administrative order challenge, see *infra* notes 67-140 and accompanying text.

17. For a discussion of the Board's decision and a critical analysis of the same, see *infra* notes 141-182 and accompanying text.

18. For a discussion of the potential impact of the Board's decision, see *infra* notes 183-197 and accompanying text.

19. Carey v. Commw. of Pa., Dep't of Env'tl. Prot., No. 2015-036-R, 2019 WL 6998826, at *6 (Pa. Env'tl. Hearing Bd. Dec. 2, 2019) (describing Carey's land). Carey submitted a registration form, as necessary, to let the Department know the tanks were out-of-service as a result of the fire. *Id.* (explaining why Carey submitted registration form).

20. *Id.* at *1 (outlining Carey's past dealings on land).

21. *Id.* at *2 (noting Department contacted Carey via letter on April 11, 2003 regarding July 18, 2001 Notice of Violation).

22. *Id.* (pointing out Carey's action to inform Department). “In order for a tank to be considered ‘temporarily out of service,’ it must contain an inch or less of [petroleum] product.” See *id.* (providing specific regulatory requirements regarding petroleum levels).

23. *Id.* (describing Carey's actions regarding his storage pumps).

24. See Carey, 2019 WL 6998826, at *2 (mentioning letter Carey received from Department indicating compliance with regulations).

On August 4, 2014, Carey received a letter informing him that a Department inspection confirmed his tanks were empty.²⁵ In the letter, the Department informed Carey that “storage tanks may be in [temporary out of service] status for a period of three (3) years, after which they must be permanently closed or put back into service.”²⁶ Despite the letter indicating an inspection had confirmed the tank levels, the Department had not actually inspected Carey’s tanks, nor tested for possible corrosion, since July 2001.²⁷ The August 2014 letter further notified Carey that he owed “\$3,250 in storage tank registration fees and \$3,372.16 in Underground Storage Tank Indemnification Fund (USTIF) fees.”²⁸ Carey had not paid his USTIF fees since November 2001 and had not paid his tank registration fees since 2002.²⁹ Consequently, the Department issued an administrative order for Carey to close his storage tanks permanently by June 30, 2015, and to pay his delinquent USTIF and registration fees.³⁰

Subsequently, a Department employee, Doug Overdorff, measured the liquid in Carey’s storage tanks on April 18, 2019.³¹ During two previous inspections of Carey’s tanks between 2016 and 2019, Mr. Overdorff determined that the tank levels were compliant with Pennsylvania law.³² During these inspections, Mr. Overdorff used a “water-finding paste” to determine how much of the tanks’ contents were petroleum product, as regulations only allow one inch of petroleum product regardless of how much water is present.³³ Mr. Overdorff’s tests, in conjunction with his own readings of the tank levels, found the amount of liquid in the tanks to be in compliance, with no material difference between results from the three separate testing dates.³⁴ The Board noted that volume inspections are the only way to detect leaking storage tanks, but also reasoned that outside influences other than leakage may affect the

25. *Id.* (providing contents of letter received).

26. *Id.* (warning Carey of abandoned storage tank regulation).

27. *Id.* (explaining Department’s lack of inspection and testing).

28. *Id.* (describing what Carey owed). USTIF fees are to cover potential liabilities and loans through USTIF, an insurance fund for the industry. *See id.* at *7 (outlining necessity of USTIF fees).

29. *Carey*, 2019 WL 6998826, at *2 (recalling Carey’s past actions).

30. *Id.* at *3 (outlining Department’s issuance of Administrative Order).

31. *Id.* (mentioning role of Douglass Overdorff).

32. *Id.* (noting discrepancy between Carey’s letter and previous inspection results dating to 2016).

33. *Id.* (describing process of checking liquid).

34. *Carey*, 2019 WL 6998826, at *3 (explaining method to check liquid).

amount of product left in a storage tank.³⁵ In Carey's case, the Department did not find any evidence of leakage.³⁶

Due to a separate controversy, Carey "served [fourteen] years in federal prison and was released on March 26, 2019," approximately five weeks before his hearing for the present matter.³⁷ It was also established that Carey only had twenty-five dollars in his bank account at this time, which his daughter provided so he could open the account to receive Social Security payments.³⁸ After his release from prison, Carey informed the Board that he planned "to take care of the tanks but needed approximately one more year to do so" effectively.³⁹

As noted, the Department's administrative order required Carey to close his tanks permanently by June 30, 2015.⁴⁰ Carey challenged the Department's order in light of his personal circumstances, and the Board reviewed the matter *de novo*.⁴¹ The Board determined that Carey's request for additional time was acceptable considering the tanks were empty and showed no evidence of leakage.⁴² The Board, however, ordered full payment of the outstanding USTIF fees, emphasizing the financial commitment of storage tank owners and USTIF's important purpose.⁴³ Finally, the Board decided to decrease Carey's delinquent registration fees from \$3,250 to \$250.⁴⁴ The Board reached this conclusion because it determined that Carey was not put on notice about these fees until 2014.⁴⁵

35. *Id.* (providing alternate explanation for volume changes like seasonal changes and water evaporation).

36. *Id.* at *4 (noting lack of leakage in Mr. Carey's case).

37. *Id.* (recalling Carey's previous whereabouts).

38. *Id.* (explaining funds in Carey's bank account). Carey became eligible to collect Social Security benefits on May 22, 2019, but he did not receive them while incarcerated. *Id.* (detailing Carey's personal situation).

39. *Carey*, 2019 WL 6998826, at *4 (describing Carey's request of Board).

40. *Id.* at *1 (introducing Board's original order).

41. *Id.* at *3 (outlining process behind challenge).

42. *Id.* at *6-7 (explaining why Carey's request for additional time was acceptable).

43. *Id.* at *7 (outlining why USTIF fee was owed in full despite Carey's unstable financial condition).

44. *Carey*, 2019 WL 6998826, at *8 (noting Board's decision to lower owed registration fee). The Board determined that "the Department's decision to pursue collection of the entire amount of the [delinquent] fees at this time was not a reasonable exercise of its discretion." *Id.*

45. *Id.* (explaining how lower registration fee was determined). Payment of the \$250 was due annually for years 2014-2019. *Id.* (detailing Carey's required payment amount).

III. BACKGROUND

The Pennsylvania legislature introduced the Act on July 6, 1989.⁴⁶ The legislature created the Act to protect land and water resources in Pennsylvania from contaminants, specifically those from storage tanks.⁴⁷ The Act created regulations regarding operations, cleanup, and shutdown of storage tanks to thwart the threat of contaminants to public health.⁴⁸ The Pennsylvania legislature also gave the Department the power to enforce the Act.⁴⁹ The Department may promulgate regulations regarding both the maintenance of storage tanks and related fees, too.⁵⁰

Per regulations, storage tanks that are out of service for more than three years “must be permanently closed or put back into service.”⁵¹ The Department, however, can exercise discretion not to take action regarding this regulation.⁵² The Board may also consider additional factors when deciding whether to enforce its regulatory authority under the Act, including any extenuating circumstances and the environmental impact of the tanks in their current state.⁵³

The Act created the USTIF as a fund for underground storage tanks.⁵⁴ The Board may regulate the USTIF and require fees “as appropriate,” allowing broad discretion for the imposition of fees.⁵⁵ The Department considers these payments mandatory unless the Environmental Quality Board decides that the underground storage tank is exempt.⁵⁶ According to the Act, the fund money is meant to account for liabilities that “owners, operators, and certified tank installers of underground storage tanks” may incur, such

46. *See generally* 35 P.S. § 6021.101 *et seq.* (1989) (noting start of Act).

47. *Id.* §§ 6021.102(a)-(b) (mentioning purpose of Act).

48. *Id.* (highlighting regulatory scheme created under Act).

49. *See generally id.* § 6021.501 (outlining power of Department).

50. *Id.* § 6021.1309 (explaining Department’s abilities).

51. *Carey v. Commw. of Pa., Dep’t of Env’tl. Prot.*, No. 2015-036-R, 2019 WL 6998826, at *2 (Pa. Env’tl. Hearing Bd. Dec. 2, 2019) (noting regulation regarding abandoned storage tanks).

52. *See id.* at *6 (mentioning power of Department’s discretion).

53. *Id.* (providing other factors that may be considered).

54. 35 P.S. § 6021.704(a) (citing purpose of USTIF).

55. *Id.* at § 6021.705(d)(1) (highlighting Board’s ability to impose fees). Fees are paid by “owner[s], operator[s] or certified tank installers, as appropriate.” *Id.* (identifying who is responsible for fee payments).

56. 25 PA. CODE § 245.704(a) (2018) (showing exemption power of Department regarding USTIF fees).

as personal injury or damage to property.⁵⁷ The USTIF also provides funding for loans to storage tank owners.⁵⁸

Finally, the Act instituted an annual fee of fifty dollars per underground storage tank.⁵⁹ Case law, however, has established that the Board can exercise discretion regarding the collection and enforcement of fees “when it finds that the Department’s action is unreasonable.”⁶⁰

In *Carey*, the Board exemplified its broad discretion under the Act by making three determinations that affected the outcome of Carey’s challenge.⁶¹ The Board first granted Carey an extension to shut down his storage tanks permanently or otherwise address them in a satisfactory manner.⁶² Second, the Board decided payment of USTIF fees was necessary, reasoning that storage tank owners knowingly undertake the responsibility to pay USTIF fees.⁶³ Third, the Board reduced the amount of the registration fees that Carey owed.⁶⁴ The Board found the reduction was appropriate because Carey was not put on notice of his overdue registration fees until 2014, and only required him to pay those fees due between 2014 and the time of the hearing in 2019.⁶⁵ Ultimately, the Board’s decision only sustained the USTIF fee payment order.⁶⁶

IV. NARRATIVE ANALYSIS

In *Carey*, the Board considered three main issues in making its decision: (1) allowing additional time for an individual to close permanently or otherwise address out-of-service underground storage tanks; (2) requiring full payment of missed USTIF fees; and (3) requiring full payment of missed registration fees.⁶⁷ The Board granted Carey an additional year to get his storage tanks in order, required full payment of his missed USTIF fees, and only required payment of the delinquent registration fees for which Carey was on

57. 35 P.S. § 6021.704(a)(1) (explaining purpose of USTIF fund).

58. *Id.* (providing additional purpose of fund).

59. *Id.* § 6021.502(a) (mentioning annual registration fee cost).

60. *Diehl v. Commw. of Pa.*, No. 2016-099-M, 2018 WL 457286, at *18, *27 (Pa. Env’tl. Hearing Bd. Jan. 3, 2018) (citing case law granting discretion).

61. *See Carey v. Commonw. Of Pa.*, No. 2015-036-R, 2019 WL 6998826, at *1-9 (Pa. Env’tl. Hearing Bd. Dec. 2, 2019) (noting Board’s determinations).

62. *Id.* at *5-6 (mentioning Board’s decision to give Carey more time).

63. *Id.* at *6-7 (concluding Board required USTIF fee payment).

64. *Id.* at *8 (noting Board reduced registration fee).

65. *Id.* (explaining reduced registration fees).

66. *Carey*, 2019 WL 6998826, at *7-8 (summarizing Board’s decisions after Carey’s challenge).

67. *See generally id.* at *5-8 (outlining issues Board considered).

notice.⁶⁸ In making these determinations, the Board took a fact-based approach, while simultaneously applying relevant provisions of the Act.⁶⁹ The Board also considered additional factors such as the potential environmental impact of each outcome, Carey's incarceration and financial status, and the Department's past actions and correspondence with Carey.⁷⁰

A. Storage Tanks

The Board upheld the Department's administrative decision ordering Carey to close his storage tanks permanently, finding the order was within the Department's authority.⁷¹ But, after considering Carey's request for additional time to comply with the order, the Board agreed it was reasonable to give Carey an additional year either to close permanently or improve the underground storage tanks.⁷²

1. *Legislative Intent*

The Board referred to Section 245.451 of the storage tank regulations, which allows underground storage tanks to be inactive for up to three years.⁷³ After three years, the underground storage tanks must either be brought back into active service or closed permanently.⁷⁴ Carey's underground storage tanks had been inactive since 2001, but the Department did not take action against him until 2015.⁷⁵ Despite the delay, the Board noted that the Department appropriately exercised its discretion not to act during this period of time.⁷⁶ The Board established further that the Department acted within its authority by ordering closure of Carey's tanks, since they had been inactive for well over the maximum duration permitted under the regulation.⁷⁷ Neither the Act nor the storage tank regulations speak on the issue of allowing additional time for compliance; rather, the decision is within the Board's discretion.⁷⁸

68. *Id.* at *9 (listing Board's conclusions).

69. *Id.* at *5-8 (providing approach Board applied to its decision).

70. *Id.* (stating specific factors Board considered).

71. *Carey*, 2019 WL 6998826, at *1 (upholding Department's tank closure).

72. *Id.* (allowing additional time).

73. *Id.* at *5 (citing 25 PA. CODE § 245.451 (2018)) (explaining § 245.451 of storage tank regulations).

74. *Id.* (specifying inactive tank time limit).

75. *Id.* (discussing Department's inaction).

76. *Carey*, 2019 WL 6998826, at *6 (upholding Department's inaction).

77. *Id.* (concluding Department acted accordingly).

78. *Id.* at *5-6 (acknowledging Board's discretionary power).

2. *Other Factors*

The Board's grant of additional time was largely due to other factors.⁷⁹ The Board's justification for granting Carey an extension to make his tanks compliant stemmed from the additional factors Carey argued and the Department's period of inaction.⁸⁰ Carey contended that he kept his tanks in satisfactory condition, under warranty, and without any signs of leakage or environmental harm.⁸¹ The Board's decision to allow Carey and the Department to decide what to do with the underground storage tanks was not prescribed by statute or regulation, but likely served as a compromise in light of Carey's good faith effort to comply with the storage tank regulations.⁸²

Additionally, the Board found the Department's fourteen-year hiatus from checking Carey's tanks relevant.⁸³ Overdorff, serving as a witness for the Department, could not articulate a good reason why the Department did not check Carey's tanks during this time.⁸⁴ The Board, however, recognized that decisions to inspect tanks and enforce closure are within the Department's discretion; thus, the Board did not base its decision solely on the fact that the Department did not check Carey's tank conditions from 2001 to 2015.⁸⁵

When the Department did inspect Carey's tanks, all five met the definition of "empty" per Department regulations.⁸⁶ The regulatory definition of "empty" requires tanks to be "pumped to within one inch of product."⁸⁷ Carey's tanks met this requirement, as documentation that suggested compliance for three separate years evinced.⁸⁸ Carey specifically pumped his tanks to be within one inch of product in 2002 before designating his tanks inactive.⁸⁹ Additionally, Mr. Overdorff testified that Carey's tanks satisfied regulatory requirements three times between 2016 and 2019, and the amount of product within each tank did not subsequently change.⁹⁰

79. *Id.* (noting Board considered additional factors).

80. *See id.* (reiterating additional factors).

81. *See Carey*, 2019 WL 69998826, at *4 (outlining Carey's storage tank argument).

82. *See id.* (implying weight of additional factors).

83. *See id.* (noting Board's findings on Department actions).

84. *See id.* (emphasizing Department testimony).

85. *Id.* (mentioning Department's inaction).

86. *See Carey*, 2019 WL 6998826, at *6 (supporting Carey's argument).

87. *Id.* at *5 (detailing definition of empty).

88. *See id.* at *6 (providing documentation of empty tanks).

89. *Id.* (reiterating Carey's compliance).

90. *Id.* (noting Overdorff's testimony of compliance).

Carey's inactive tanks remained in compliance with the Department's product-level regulations while he was incarcerated from 2005 to 2019.⁹¹ Due to his incarceration, the Board found that Carey had little physical or financial ability to close the tanks.⁹² The Department argued that allowing Carey more time to comply with the storage tank regulations "present[ed] a danger to public health, safety and welfare and a threat to the environment."⁹³ The Department, however, could not produce evidence that Carey's tanks posed any environmental threat.⁹⁴ With no signs of leakage or environmental harm, the Board rejected the Department's argument as meritless.⁹⁵

Ultimately, the Board agreed to give Carey an additional year, in which he could either close the tanks or return them to active status.⁹⁶ The Board based its decision on Carey's efforts to ensure compliance prior to his incarceration, the hardship of maintaining the tanks while incarcerated, and the fact that the tanks showed no immediate threat to the environment or public health.⁹⁷ Finally, the Board found persuasive that the Department knew the tanks had been out of commission since 2001 but took no action until 2015.⁹⁸

B. USTIF Fees

The Board upheld the Department's administrative order requiring Carey to pay \$3,372.16 in overdue USTIF fees.⁹⁹ Carey challenged the propriety of enforcing collection in his case for several reasons.¹⁰⁰ In reaching its decision, the Board emphasized the policy justifications underlying USTIF fees and deemed deference to the same was the most important factor at hand.¹⁰¹

91. *See Carey*, 2019 WL 6998826, at *6 (mentioning Carey's incarceration).

92. *See id.* (reiterating Carey's inability to comply).

93. *Id.* at *5 (quoting Department's argument).

94. *Id.* (highlighting lack of Department evidence).

95. *Id.* at *5-6 (emphasizing lack of leakage).

96. *Carey*, 2019 WL 6998826, at *7 (allowing additional time).

97. *See generally id.* (noting factors Board applied).

98. *Id.* at *5 (reminding of Department's inaction).

99. *Id.* at *7 (concluding USTIF fees are due).

100. *Id.* (rejecting contention that collection is only permissible if actual creditor — Pennsylvania Department of Insurance — is named party in action).

101. *See Carey*, 2019 WL 6998826, at *7 (emphasizing reason for Board decision).

1. *Legislative Intent*

The USTIF and its related provisions are primarily described in Sections 703, 704, and 705 of the Act.¹⁰² USTIF maintains a board that oversees the fund and determines the fees underground storage tank owners and operators must contribute.¹⁰³ Section 704 also provides that USTIF fees are mandatory unless the Environmental Quality Board decides a particular tank is exempt.¹⁰⁴

The Board stressed the importance of the USTIF as both the Commonwealth's "sole source of payments" under the Act and a means for tank operators to "demonstrate financial responsibility", as stated below:

Moneys in the fund are hereby appropriated to the [USTIF] board for the purpose of making payments to owners, operators and certified tank installers of underground storage tanks who incur liability for taking corrective action or for bodily injury or property damage caused by a sudden or nonsudden release from underground storage tanks and for making loans to owners as authorized by this [A]ct.¹⁰⁵

The Board designed the Act's language to hold underground storage tank owners responsible for potential harm.¹⁰⁶ The USTIF fees hold owners financially accountable and compensate anyone injured by an underground storage tank.¹⁰⁷ This injury could be bodily harm or property damage, which encompasses any sort of environmental harm.¹⁰⁸

Because the Board found the statutory language and its purpose especially compelling, it made its decision to require Carey to pay the full USTIF fees solely on these provisions.¹⁰⁹ Even though

102. *See* 35 P.S. § 6021.704(a) (2001) (establishing USTIF).

103. *Id.* §§ 6021.704(a), 6021.705(d)(1) (highlighting USTIF regulations). The Board consists of fourteen members, including six members with expertise in the management of underground storage tanks who are appointed by the Governor from a list of nominees provided by various trade groups. *Id.* § 6021.703(a) (outlining Board members).

104. *Carey*, 2019 WL 6998826, at *7 (*citing* 25 PA. CODE § 245.704(a) (2018)) (mentioning fee exception). The Pennsylvania Department of Insurance administers the fund. *Id.* at *2 (explaining fund procedure).

105. *Id.* at *7 (outlining purpose of USTIF fees). *See also* 35 P.S. § 6021.704(a)(1) (2001) (citing necessity of USTIF fees).

106. *Carey*, 2019 WL 6998826, at *7 (reminding of USTIF fee importance).

107. *Id.* (emphasizing USTIF fee importance).

108. *Id.* (detailing injuries compensated).

109. *See id.* (outlining reason for decision).

Section 704 allows exemption from fee payment if the Environment Quality Board determines it acceptable, the Board did not consider the exemption in this case.¹¹⁰ The Board acknowledged other factors, which are outlined below, but ultimately decided to enforce the Department's administrative order based on the statutory language and underlying intent alone.¹¹¹

2. *Other Factors*

When deciding to enforce Carey's payment of overdue USTIF fees, the Board considered three additional factors that Carey argued should weigh in his favor.¹¹² First, Carey argued the USTIF fees demanded were due to the Pennsylvania Department of Insurance, which was not a party to the action.¹¹³ The Board rejected this argument because it was the Department's responsibility to collect these fees, so it was irrelevant where the fees would eventually be distributed.¹¹⁴

Second, Carey stressed that the Department did not exercise its authority to pursue collection of USTIF fees from 2002 to 2013.¹¹⁵ The Board deemed the Department's inaction a determinative factor in the registration fee issue but inconsequential for the USTIF fee argument.¹¹⁶ In fact, the Board's only discussion about the Department's nonenforcement was as a parenthetical in its discussion of Carey's registration fee argument, further divorcing it from resolution of Carey's liability for overdue USTIF fees.¹¹⁷

Finally, the Board recognized that Carey was experiencing financial hardship, as he was recently released from prison and, therefore, had limited funds to pay the USTIF fees.¹¹⁸ The Board, however, was firm in holding Carey to his financial responsibility as an underground storage tank owner.¹¹⁹ The Board ultimately required that Carey pay the full \$3,372.16 in overdue USTIF fees.¹²⁰

110. *Id.* at *6-7 (mentioning requirement of fee).

111. *See Carey*, 2019 WL 6998826, at *7 (explaining factors Board considered).

112. *Id.* (concluding fees are due).

113. *Id.* at *6 (highlighting Carey's main argument).

114. *Id.* at *7 (detailing Board's disagreement).

115. *Id.* (noting Department's inaction).

116. *Carey*, 2019 WL 6998826, at *8 (mentioning weight of inaction).

117. *Id.* (emphasizing lack of importance in USTIF case).

118. *See id.* at *7 (acknowledging difficulty of Carey's financial situation due to period of incarceration).

119. *Id.* (enforcing fee because "an owner may not shirk his responsibility for payment into the USTIF fund").

120. *Id.* (enforcing USTIF fees).

C. Registration Fees

Although the Board upheld the Department's administrative order requiring Carey to pay overdue registration fees, it reduced the amount from \$3,250 to \$250.¹²¹ This decision was influenced heavily by the Department's inaction in pursuing collection, which did not put Carey on notice that the fees were due.¹²²

1. Legislative Intent

The Act's language pertaining to registration fees is contained in Section 502(a).¹²³ This section establishes an annual registration fee of fifty dollars per underground storage tank.¹²⁴ Carey's five underground storage tanks, therefore, amounted to an annual fee total of \$250.¹²⁵ The Department requested that Carey pay \$3,250 for approximately seventeen missed years, beginning the year after he put the tanks into out-of-service status.¹²⁶ The Board considered the statutory language and remarked that it could require Carey to pay back all delinquent fees without issue.¹²⁷ The Board, however, awarded greater weight to other relevant factors and determined Carey should only be required to pay one year of registration fees.¹²⁸

2. Other Factors

The Board principally considered the Department's action to collect the owed registration fees.¹²⁹ Although the Department was entitled to collection of Carey's registration fees under the Act, it did not exercise its authority to pursue collection of the fees from 2002 to 2013.¹³⁰ The Department also provided no clear reason why it suddenly pursued collection of all missed fees in 2014.¹³¹

121. See *Carey*, 2019 WL 6998826, at *8 (providing rationale for reduced registration fees).

122. See *id.* (noting Department's lack of notice warrants reduced registration fees).

123. 35 P.S. § 6021.502(a) (2005) (providing relevant statute).

124. *Id.* (detailing statutory provision).

125. See *Carey*, 2019 WL 6998826, at *1 (Pa. Envtl. Hearing Bd. Dec. 2, 2019) (specifying number of storage tanks).

126. *Id.* at *8 (reminding of fee overdue).

127. *Id.* (highlighting application of statute).

128. See *id.* (concluding fee reduction).

129. *Id.* (outlining Department's inaction).

130. See *Carey*, 2019 WL 6998826, at *8 (describing extent of inaction).

131. *Id.* (stating Department failed to provide explanation for inaction).

There was further confusion over whether the Department attempted to write off Carey's delinquent fees.¹³² Carey argued that the Department wrote off his fees, as evidenced by "a printout from the Department's computer data system."¹³³ This document was the only evidence the Department could produce that mentioned missed fees.¹³⁴ Additionally, the Department's sole witness did not understand the printout but admitted it could imply that Carey's fees had been written off.¹³⁵ Although this document did not prove the fees were written off, the Board concluded that the Department had at least considered doing so.¹³⁶

Although the question of whether the Department attempted to write off Carey's missed payments was inconclusive, the Board found it unreasonable that the Department suddenly required full back payment after not pursuing collection for almost thirteen years.¹³⁷ The Board ultimately decided on a compromise, only requiring that Carey pay registration fees for the years in which he had correspondence from the Department and, therefore, was on notice.¹³⁸ The Department's letter to Carey on August 4, 2014 put him on notice from that date until the Department's order on March 2, 2015.¹³⁹ Accordingly, the Board waived Carey's registration fees from 2002 to 2013, only requiring him to pay \$250 — one year of fees — of the original \$3,250 owed.¹⁴⁰

V. CRITICAL ANALYSIS

By holding that Carey should pay back his delinquent USTIF fees irrespective of his financial situation, the Board displayed a firm stance on matters that could potentially affect the environment.¹⁴¹ The Board had full discretion to render its decision due to the lack of binding precedent coupled with the fact that most relevant statutes permit decisions to be made on a case-by-case basis.¹⁴² Given that the Board is not forced to adhere to precedent, its

132. *See generally id.* (noting lack of conclusive evidence).

133. *Id.* at *7 (mentioning potential write off).

134. *Id.* (describing print out document).

135. *Carey*, 2019 WL 6998826, at *7 (acknowledging witness testimony regarding possibility of write off).

136. *Id.* (resolving confusion concerning write off of fees).

137. *Id.* at *8 (deciding to reduce fees).

138. *Id.* (noting Board's consideration regarding notice of fee payment).

139. *Id.* (concluding Department's letter put Carey on notice).

140. *See generally Carey*, 2019 WL 6998826, at *8 (waiving majority of fees).

141. *See generally id.* (mentioning weight of Board's conclusion on environment).

142. *See generally id.* (allowing Board more power).

decisions reveal the Board's current priorities.¹⁴³ In reaching its decision, the Board showed deference to the Act's strict language, underlying intent, and showcased its commitment to environmental protection even in spite of difficult personal circumstances.¹⁴⁴

When considering the closure of Carey's underground storage tanks, the Board appropriately turned to the language of the statute to decide whether the Department had acted within its powers.¹⁴⁵ In contemplating whether Carey should pay back the USTIF fees he owed, the Board emphasized the environmental necessity of these fees, which is the reason they even exist.¹⁴⁶ When deliberating whether Carey should pay back the registration fees he owed, the Board fairly considered the Department's failure to put Carey on notice of his delinquency, and the fact that Carey was not put on notice while incarcerated.¹⁴⁷ Finally, the Board weighed confusion over whether the Department intended to write off the amount Carey owed in registration fees.¹⁴⁸

The Act's language permitting the Board to make decisions on a case-by-case basis enhances the risk that personal biases may impact the Board's decisions.¹⁴⁹ Consistent mention of the Department's shortcomings indicated the Board was sympathetic to the fact that the Department did not put Carey on notice of his delinquency when he was incarcerated.¹⁵⁰ The Board emphasized further that the Department had the ability to act within its discretion when choosing to enforce fee repayment but still did not act reasonably.¹⁵¹ The Board, however, acted impartially in allowing Carey an additional year to get his underground storage tanks in order.¹⁵² Per the language of the Act, Carey should have had to close his tanks immediately, but the Board did not enforce an immediate closing.¹⁵³ The Board recognized its authority under the Act to enforce an order for immediate closure of Carey's under-

143. *See generally id.* (assuming Board priorities).

144. *See generally id.* (detailing Board priorities).

145. *See generally Carey*, 2019 WL 6998826, at *5-6 (considering priorities of closing tanks).

146. *See generally id.* at *6-7 (analyzing environmental necessity for USTIF fees).

147. *See generally id.* at *7-8 (rationalizing Board's decision regarding registration fees).

148. *See generally id.* at *7 (uncovering Department's potential write off).

149. *See generally id.* at *8 (noting purpose of statutory language).

150. *See generally Carey*, 2019 WL 6998826, at *6-7 (exemplifying Board's sympathy toward Carey).

151. *See id.* at *7 (recognizing Department's reasoning).

152. *See id.* at *6-7 (providing Board's closure decision).

153. *Id.* at *6 n.6 (explaining plan for storage tanks).

ground storage tanks, and that doing so would mitigate the risk of undermining the Act.¹⁵⁴ But the Board was sympathetic to Carey's personal situation and permitted him an additional year to take care of his storage tanks.¹⁵⁵

In a somewhat vague and ambiguous move, the Board did not decide whether Carey had to permanently close the tanks at the end of the additional year; the Board left the subsequent decision of how to handle the tanks up to the Department and Carey's discretion.¹⁵⁶ Although this decision was intended to benefit Carey and the Department, it is possible that the parties will struggle to reach mutually satisfactory terms, which would draw out the process of reaching a final decision regarding closure of the tanks.¹⁵⁷ The Board's decision also fails to consider the possibility that Carey will sell his land — and the underground storage tanks — in the next year rather than permanently close the tanks himself.¹⁵⁸

This possibility shows the Board is adamant about following statutory language yet open to more owner-friendly outcomes provided environmental harm does not result.¹⁵⁹ Ordering immediate closure of the tanks would only bring harm to Carey without benefiting another party.¹⁶⁰ Under Carey's control, the tanks are under warranty, show no signs of leakage or environmental harm, and are pumped within regulation requirements.¹⁶¹ Immediate closure, however, may result in careless closing procedures, creating new environmental harms.¹⁶² Rather, Carey's potential sale of the land would benefit him personally, as well as the Department because a new buyer would likely pay the fees in a more timely manner.¹⁶³

The Department strictly followed the statutory text regarding the payment of USTIF fees.¹⁶⁴ By concluding Carey must pay back all of the missed USTIF fees, the Board prioritized the community.¹⁶⁵ While the Board understood Carey's inability to afford this

154. *Id.* at *6 (mentioning section's applicability).

155. *See Carey*, 2019 WL 6998826, at *5-6 (allowing Carey additional time).

156. *See id.* at *6 n.6 (briefing discretionary future decision).

157. *Id.* at *6 (emphasizing future discretionary decision).

158. *Id.* (providing Carey's alternate plan).

159. *See generally id.* at *5-6 (outlining Board's environmental considerations).

160. *See generally Carey*, 2019 WL 6998826, at *6 (warning of effect of immediate closure order).

161. *See generally id.* at *5 (informing of Carey's proper upkeep of tanks).

162. *See generally id.* at *6 (mentioning possible outcome of immediate tank closure).

163. *See generally id.* at *6, n.6 (explaining impact of Carey selling land).

164. *See id.* at *7 (describing Board decision).

165. *See Carey*, 2019 WL 6998826 at *7 (analyzing reason for Board decision).

fee, it likely ordered full payment because this fee affects parties outside of Carey and the Department.¹⁶⁶ The USTIF fee is meant to support tank owners in the industry as well as the community at-large in the event of environmental damage.¹⁶⁷ If the Department allowed Carey to avoid his full USTIF fee, residents in the area could have gone uncompensated for physical or property damage caused by storage tank-related environmental harm.¹⁶⁸ By ordering this payment, the Board committed to both the statutory language and the entire community's wellbeing.¹⁶⁹ The Board confusingly did not explore implementation of an alternative repayment plan that would have both allowed the Board to collect the owed fees and allow Mr. Carey additional time to get the payment in order.¹⁷⁰

The Board's registration fee decision is a creative departure from its strict interpretation of the Act because it considered the Department's confusing and limited enforcement actions for Carey's registration fees.¹⁷¹ The Board thoughtfully gave more weight to the Department's inaction and the confusion surrounding the write off attempt.¹⁷²

The Board emphasized the Department's lack of effort to collect Carey's payments since 2002 — evidence that the Department may have written them off — and inconclusive testimony from the Department's sole witness.¹⁷³ The Department's witness specifically could not confirm or deny the alleged write off of Carey's payments.¹⁷⁴ The Board determined the Department failed to exercise reasonable discretion in this situation and instead sympathized with Carey.¹⁷⁵ The Board understood Carey's inability to afford the full fee and did not find the full fee necessary.¹⁷⁶ By requiring Carey to pay fees for only the years the Department put him on written notice, the Board respected the Act while also acknowledging a community member's special circumstances.¹⁷⁷ While the registration

166. *Id.* (describing Board's thought process).

167. *Id.* (providing purpose of USTIF fees).

168. *See generally id.* (warning effects of lack of payment effects).

169. *See id.* (explaining Board's reasoning).

170. *See generally Carey*, 2019 WL 6998826, at *7-8 (analyzing Board's decision-making process).

171. *See generally id.* (emphasizing Board's creativity in decision).

172. *See id.* at *8 (reiterating Board's thought process).

173. *Id.* at *7-8 (mentioning inconclusive write off argument).

174. *Id.* at *7 (stating inconclusive witness testimony).

175. *Carey*, 2019 WL 6998826, at *8 (underscoring Board's discretionary authority).

176. *See id.* (summarizing Board's reasoning).

177. *See generally id.* (considering weighted factors).

fees are relatively arbitrary, their flexibility allowed leniency for Carey's inability to pay and lack of notice while incarcerated.¹⁷⁸

The Board's actions demonstrated its commitment to the Act and its statutory language, but also acknowledged how the Board's actions may affect the community.¹⁷⁹ The Board also showed an aspiration for fairness by scrutinizing the Department's actions when taking into account each situation's facts.¹⁸⁰ Although the Board could have required Carey to pay all his missed fees and shut down his underground storage tanks immediately, it recognized his compliance with the out-of-service rules and the fact that he was not harming the environment in any way.¹⁸¹ Putting environmental harm, and its financial repercussions, at the forefront of its decisions showed the Board's high level of commitment to protecting the environment and local community.¹⁸²

VI. IMPACT

The Board's decision in *Carey* is unsurprising because the Act's broad language leaves much discretion to the Board to make decisions under unique circumstances.¹⁸³ Without binding precedent, and given the Department's grant of discretion, the Board will continue to determine situations similar to Carey's on a case-by-case basis.¹⁸⁴ The Board's discretion may result in inconsistent decisions regarding Act violations.¹⁸⁵ Additionally, the Board's decisions may vary as the Board's composition changes, considering the different priorities of individual board members.¹⁸⁶

Although a lack of binding precedent can benefit storage tank owners like Carey, who need additional time to comply with the Act and benefit from the Board's flexibility, lack of precedent can also be detrimental to citizens.¹⁸⁷ Without prior, consistent decisions to review, citizens may be less likely to appeal decisions that were

178. *See id.* at *7 (emphasizing Board's sympathy).

179. *See generally id.* (highlighting impact of Board decision).

180. *See Carey*, 2019 WL 6998826, at *8 (analyzing Department's inaction).

181. *See id.* at *6 (highlighting Carey's actions).

182. *See generally id.* (explaining Board's priorities).

183. For a discussion of the factors considered, see *supra* notes 67-140 and accompanying text.

184. *See generally Carey*, 2019 WL 6998826, at *8 (describing potential impact of background law).

185. *See generally id.* (warning of potential impact of decisions).

186. *History of the Environmental Hearing Board*, *supra* note 5 (noting changing composition of Board members).

187. *Id.* (describing ability of citizens to appeal Board decisions).

wrongly decided.¹⁸⁸ Inconsistent rulings give little guidance to future appellants, potentially limiting citizen access to the judicial system.¹⁸⁹

Carey reveals the value the Board places on the Department providing notice to storage tank owners.¹⁹⁰ In this case, Carey's lack of notice while incarcerated was an influential factor in the Board's decision to grant him extra time to solve his storage tank situation and to reduce the registration fees he owed.¹⁹¹ Carey's outcome will likely incentivize the Department to be more diligent in putting storage tank owners — and, specifically, incarcerated individuals — on notice of fees, which may limit the ability of future litigants to question both fees owed and Department decisions made.¹⁹²

Similarly, the Board's decisions in *Carey* demonstrate its ability and willingness to be creative.¹⁹³ Even without precedent, these decisions — based on Carey's compliance with regulations, the Department's lack of action, and Carey's unique circumstances — may give hope to future litigants who diligently follow Department regulations.¹⁹⁴ Storage tank owners who make a good faith effort to comply with the Act's requirements may fare well going forward because this decision shows the Board's understanding when underground storage tanks are kept empty, in compliance with the Act, and with no signs of environmental harm.¹⁹⁵

Although the law is unpredictable, storage tank owners may safely presume that the Board is understanding toward owners who make a good faith effort to comply with the Act, abide by the storage tank regulations, and keep the contents of their storage tanks from harming the environment.¹⁹⁶ Moving forward, the Board and Department should seek to establish binding precedent for future

188. *Id.* (describing ability of citizens to appeal Board decisions).

189. *Diehl v. Commw. of Pa.*, No. 2016-099-M, 2018 WL 457286, at *18, *27 (Pa. Env'tl. Hearing Bd. Jan. 2, 2018) (indicating leeway of Board to make decisions).

190. *Carey v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 2015-036-R, 2019 WL 6998826, at *8 (Pa. Env'tl. Hearing Bd. Dec. 2, 2019) (providing Board's emphasis of notice).

191. *See generally id.* (highlighting absence of notice as influential factor in Board's decision).

192. *See generally id.* (highlighting importance of notice on Board decisions).

193. *Id.* (noting Board considerations)

194. *See generally id.* at *2 (detailing Carey's efforts to comply with Act and related regulations).

195. *See Carey*, 2019 WL 6998826, at *1-9 (identifying operative facts from case).

196. *See generally id.* (noting compliance with Act and Board considerations).

cases; predictability in how the Board will handle situations will discourage storage tank owners from attempting to take advantage of leniency and keep environmental protection a priority.¹⁹⁷

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197. For a discussion of the factors that the Board considered in *Carey*, see *supra* notes 141-148 and accompanying text.

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