2010

**PDG Land Development, Inc. v. Commonwealth of Pennsylvania Department of Environmental Protection: Pennsylvania's Environmental Hearing Board Declares All Streams are Created Equal**

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2010]

PDG LAND DEVELOPMENT, INC. V. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION: PENNSYLVANIA'S ENVIRONMENTAL HEARING BOARD DECLARES ALL STREAMS ARE CREATED EQUAL

I. Introduction

The network of trails that runs through Hays Woods provides hikers, bikers and even casual walkers with commanding views of the Monongahela River and downtown Pittsburgh. Local residents seeking respite from the city can visit Hays Woods and enjoy the wildlife. Several plant and bird species call Hays Woods home, and there have even been sightings of an albino red-tailed hawk nesting in the area. Located within three miles of the hub of downtown Pittsburgh, Hays Woods is an oasis of green in the otherwise developed landscape of Pittsburgh. This urban oasis, however, is threatened by future development. The controversy regarding development of Hays Woods boils down to one crucial issue: enforcement of Pennsylvania's stream buffer zone rule.

In 1980, Pennsylvania adopted Title 25, Section 86.102 of the Pennsylvania Administrative Code. Section 86.102(12), the stream buffer zone rule prohibits surface mining in certain circumstances,

8. 25 PA. CODE § 86.102 (2009).
including within one hundred feet of any stream. 9 This clause also establishes the necessary procedure to overcome the surface mining prohibition. 10 An individual or company wishing to overcome this prohibition may apply to Pennsylvania’s Department of Environmental Protection (DEP) for a variance, which the DEP will grant if the applicant “demonstrates beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the variance.” 11

A corporation unhappy with the DEP’s denial of a variance application may appeal to Pennsylvania’s Environmental Hearing Board (EHB). 12 Although not a part of the judiciary, the EHB functions like a court, with litigants “fil[ing] pleadings, motions and petitions, engag[ing] in discovery, tak[ing] part in hearings and submit[ting] briefs.” 13 The EHB reviews the DEP’s decisions de novo, and if dissatisfied with the DEP’s decision, may either substitute its own decision, or remand the case back to the DEP for correction. 14 A still dissatisfied applicant may appeal to the

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9. § 86.102(12) (describing prohibitions of stream buffer zone rule).
10. Id. (discussing exemptions to prohibited mining operations).
11. Id. Section 86.102(12) states,
[S]urface mining operations . . . are not permitted: Within 100 feet (30.48 meters) measured horizontally of the bank of a perennial or intermittent stream. The Department may grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the variance. The variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent adverse impacts. Prior to granting a variance, the operator is required to give public notice of application thereof in two newspapers of general circulation in the area once a week for 2 successive weeks. If a person files an exception to the proposed variance within 20 days of the last publication thereof, the Department will conduct a public hearing with respect thereto. The Department will also consider information or comments submitted by the Fish and Boat Commission prior to taking action on a variance request.
13. See id. (detailing how EHB functions and reviews DEP actions); see also Benjamin A. Ried, Note, UMCO Energy, Inc. v. Department of Environmental Protection: The Importance of Statutory Cross-Reference in a Broad Legislative and Regulatory Environmental Regime, 18 Widener L.J. 657, 663 (2009) (explaining EHB’s role).
Commonwealth Court, and ultimately to the Supreme Court of Pennsylvania.\textsuperscript{15}

Recently, the EHB had the opportunity to review the DEP’s denial of a variance application to allow surface mining for the tract of land in Pittsburgh known as Hays Woods.\textsuperscript{16} In \textit{PDG Land Development, Inc. v. Commonwealth of Pennsylvania Department of Environmental Protection (PDG Land Development)}, PDG Land Development (PDG) appealed the DEP’s denial of its surface mining permit application.\textsuperscript{18} PDG’s permit application set forth a development plan whereby PDG would fill in four stream valleys with overburden removed during surface mining operations and grading.\textsuperscript{19} The DEP, as well as Intervenor, Citizens for Pennsylvania’s Future (PennFuture), filed motions for summary judgment.\textsuperscript{20} The EHB granted the motions for summary judgment, and upheld the DEP’s denial of the application by reasoning that PDG’s plan to fill the stream valleys with overburden necessarily violated the stream buffer zone rule.\textsuperscript{21}

This Note analyzes the EHB’s decision in \textit{PDG Land Development}. Part II of this Note discusses the conflict between PDG, the DEP and PennFuture.\textsuperscript{22} Part III examines the different laws, both

\begin{itemize}
  \item \textsuperscript{15} See Ried, \textit{supra} note 13, at 661 (noting that applicants dissatisfied with EHB ruling may appeal to Commonwealth Court and eventually to Pennsylvania Supreme Court).
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} See \textit{id.} at *2 (noting that PDG appealed DEP’s denial of its permit application).
  \item \textsuperscript{19} See \textit{id.} at *3 (detailing PDG’s development plans). “Overburden is defined . . . as ‘the strata or material overlying a noncoal deposit or in between noncoal deposits in its natural state and material before or after its removal by surface mining.’” \textit{Eureka Stone Quarry, Inc. v. Dep’t of Envtl. Prot.}, 957 A.2d 337, 348 n.8 (Pa. Commw. Ct. 2008) (quoting 25 Pa. Code § 77.1 (2008)).
  \item \textsuperscript{21} \textit{PDG Land Dev.}, 2009 Pa. Envrn. LEXIS 21, at *6-7 (explaining that PDG’s development plan violated stream buffer zone rule).
  \item \textsuperscript{22} For a further discussion of the facts of \textit{PDG Land Development}, see infra notes 28-54 and accompanying text.
\end{itemize}
federal and state, behind the stream buffer zone rule. Part III also explores how the EHB dealt with the conditions of various environmental regulations in the recent past. Part IV considers the EHB’s decision in PDG Land Development and analyzes the rationale behind its determination. Part V provides a critical analysis of the EHB’s holding in PDG Land Development compared to previous EHB decisions. Finally, Part VI of this Note discusses the impact the PDG Land Development decision will have on future DEP decisions, the coal mining industry, and commercial development in Pennsylvania.

II. FACTS

PDG owns the 635 acre site in Pittsburgh, now commonly referred to as Hays Woods. Hays Woods is one of the few green spaces remaining in the bustling, densely populated Pittsburgh area. The site is comprised of land originally farmed by James Harden Hays, and later by his son-in-law, Joseph Glass. Prior to 1930, the Hays’ mining company did extensive underground mining on the site, using drift, as well as room and pillar methods. As

23. For a further discussion of the stream buffer zone rule and its authority, see infra notes 55-70 and accompanying text.
24. For a further discussion of how the EHB has dealt with conditions in environmental regulations when granting permits, see infra notes 71-98 and accompanying text.
25. For a narrative analysis of the EHB’s rationale in PDG Land Development, see infra notes 99-110 and accompanying text.
26. For a critical analysis of the EHB’s reasoning in PDG Land Development, see infra notes 111-29 and accompanying text.
27. For a discussion of the impact of PDG Land Development on future DEP decisions and the coal mining industry in Pennsylvania, see infra notes 130-72 and accompanying text.
a result, there is evidence of mine subsidence and acid mine drainage in some areas of the site. Mine subsidence occurs when the earth, including the surface, above a coal mine is lowered or "sinks," due to the extraction of coal. Whereas mine subsidence affects the surface of the land, acid mine drainage affects water, polluting it as a result of the mining activity. The polluted water is then referred to as acid mine drainage and is characterized by "low pH, high acidity and low alkalinity, and high concentrations of metals, such as aluminum and manganese." After the Hays mined the land, it passed through several hands, including those of the U.S. Steel Corporation and LTV Steel; ultimately a New York developer, DGD, purchased the land in 1989 in partnership with PDG.

PDG filed a permit application with the DEP in 2003, seeking permission to surface mine portions of the site. In December 2006, the DEP "denied the permit on the grounds that PDG's actions would destroy more than 1.5 miles of perennial and intermittent streams." While the case was pending on appeal to the EHB, PennFuture filed a petition to intervene. PennFuture is a non-profit corporation "dedicated to the protection and enhancement of Pennsylvania's environment, including protection of surface wa-

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32. See History of Hays Woods, supra note 28 (describing effects of previous mining on site).
33. See People United to Save Homes, 789 A.2d at 323 (defining mine subsidence).
35. See id. (listing characteristics of acid mine drainage).
37. Application For Bituminous Surface Mining Permit, supra note 6 (stating PDG's plans for surface mining).

The EHB permitted PennFuture to intervene because individual members of PennFuture resided near, or would be impacted by, the proposed surface mining activities, making PennFuture an interested party. On May 21, 2009, the EHB upheld the DEP’s denial of the application, granting the DEP and PennFuture’s motions for summary judgment, noting “it is clear[ ] that the destruction of 1.5 miles of streams entitles the [DEP] to summary judgment as a matter of law.”

Controversy abounds regarding the condition of the streams in Hays Woods. According to PDG, the streams located in Hays Woods are of such poor quality that “the net environmental impacts of its project are positive.” Groups opposed to development, however, claim that the streams in Hays Woods provide a necessary haven to support wildlife. As one source noted:

When plans for the project were introduced, the site was characterized by the developer as an ecological disaster, and touted as everything from brownfield redevelopment to classic fill-in development. Scrutiny has revealed that while previous mining activities had resulted in some ecological impacts (such as acid mine pollution in the streams), the property is really a haven for wildlife.

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41. *See id.* at 3 (describing why PennFuture should be permitted to intervene).
43. For a discussion of the controversy surrounding the development of Hays Woods, see *infra* notes 44-55 and accompanying text.
44. Pa. board throws out PDG mine permit appeal, *supra* note 38; *see also* PDG Land Dev., 2009 Pa. Envrn. LEXIS 21, at *7* (justifying request for mining permit).
45. *See DEP, PennFuture Score Major Victory in Saving One of Pittsburgh’s Largest and Best Intact Green Spaces, supra* note 29 (describing Hays Woods as “a haven for wildlife”).
46. DEP, *PennFuture Score Major Victory in Saving One of Pittsburgh’s Largest and Best Intact Green Spaces, supra* note 29; *see also* Press Release, Citizens for Pa.’s Future, DEP, PennFuture score major victory in saving one of Pittsburgh’s largest and best intact green spaces (May 21, 2009), [available at](http://www.pennfuture.org/UserFiles/PDFs/HaysWoodsReleaseonletterhead52109final.pdf); *see also* Brief in Opposition to PennFuture’s Motion for Summary Judgment of Appellant at 1, PDG Land Dev., Inc., *v.* Commw. of Pa. Dep’t of Envtl. Prot., No. 2007-041-R (Pa.Envtl.Hr’g Bd. Oct. 6, 2008), [available at](http://ehb.courtapps.com/democorpus/converted/50251012007041.pdf) [hereinafter Brief for Appellant] (referring to planned development area as “an undeveloped, undermined, unstable, and environmentally contaminated site”).

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Beyond just protecting the streams, many individuals and groups, including PennFuture, support denial of PDG’s permit application to preserve Hays Woods as one of the few remaining green spaces in the city of Pittsburgh.\(^47\) Although specific development plans remain uncertain after the DEP’s denial of the permit application, PDG originally planned to redevelop the area “Palisades Park” and to construct a racetrack, hotel, entertainment complex and residential homes.\(^48\) The proposed development of Hays Woods has “sparked widespread opposition by environmentalists and [residents of] the Hays neighborhood, where more than 500 people turned out at a public hearing on the proposal.”\(^49\)

Though it was deep mined in the late nineteenth and early twentieth centuries, Hays Woods has since remained largely untouched.\(^50\) It is, in fact, the largest undeveloped tract of land in the city of Pittsburgh and is larger than either of the city’s two major parks.\(^51\) Residents of surrounding communities have used the site as a “de facto recreational green space” for the past forty years.\(^52\)

In the immediate wake of the EHB’s May 21, 2009 decision, Ken Komoroski, an attorney for PDG, “said he hadn’t seen the decision but would review it with his client and consider all options,

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\(^{47}\) See Who We Are, http://www.hayswoods.org/who/index.html (last visited Jan. 20, 2010) (advocating saving Hays Woods from development). The Hays Woods Project is in favor of preserving the green space and preventing development of Hays Woods; its “website is sponsored by a broad coalition of groups and individuals opposing the Pittsburgh Palisades development proposal.” \(\text{Id.; see also Cynthia Robinson, Paradigms on the Move: The Groundworks Monongahela Conference, Community Arts Network, Dec. 2005, www.communityarts.net/readingroom/archivefiles/2005/12/paradigms_on_th.php (explaining how grassroots initiative developed to preserve Hays Woods). In the face of development, local community members created a grassroots initiative called “Save Hays Woods.” Id. Part of the initiative was developing a name for the tract of land and spreading news of the planned development. Id. Prior to the EHB’s May 21, 2009 order and opinion, plans for a website entitled www.savehayswoods.com, were in the works. Id.}


\(^{50}\) Major Victory, \textit{supra} note 29 (recalling past and present state of Hays Woods).


\(^{52}\) See History of Hays Woods, \textit{supra} note 28 (describing local residents’ use of site).
including an appeal to the state Commonwealth Court.”53 On June 22, 2009, PDG appealed to the Commonwealth Court.54

III. BACKGROUND

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA).55 The SMCRA provides for cooperation between federal and state governments regarding the regulation of surface mining operations.56 The SMCRA works in conjunction with state governments to regulate and control the environmental impact of surface coal mining, in part by establishing permit requirements and procedures.57 In 1980, Pennsylvania amended Title 52 of the Pennsylvania statute, which governs mines and mining, to comport with the SMCRA.58 Title 52 is an exercise of the state’s police power, and exists to benefit the people of the Commonwealth by regulating coal mining and limiting its adverse environmental impact.59

53. See Hopey, supra note 49 (noting remarks of PDG’s attorney following decision).
54. See PDG Case Information, EHB Docket, supra note 39 (reflecting that on July 22, 2009, time-stamped copy of certified record was delivered to Commonwealth Court); see also Docket No. 1190 CD 2009, PDG Land Dev., Inc. v. Dep’t of Envl. Prot., Commonwealth Court of Pennsylvania Docket Sheet, available at http://ujsportal.pacourts.us/docketsheets/CommonwealthCourtReport.aspx?docketNumber=1190%20CD%202009 (noting that Petitioner’s brief and reproduced record shall be filed by 3/8/10 and Respondent’s and Intervenor’s shall be filed by 4/26/10).
57. See id. (noting procedures required by SMCRA).
59. See id. (explaining purpose of Act). The statute provides:
This act shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of the Commonwealth, by providing for the conservation and improvement of areas of land affected in the surface mining of bituminous and anthracite coal and metallic and nonmetallic minerals, to aid thereby in the protection of birds and wild life, to enhance the value of such land for taxation, to decrease soil erosion, to aid in the prevention of the pollution of rivers and streams, to protect and maintain water supply, to protect land and to enhance land use management and planning, to prevent and eliminate hazards to health and safety, to promote and provide incentives for the remining of previously affected areas, to allow for government-financed reclamation contracts authorizing incidental and necessary coal extraction, to authorize a remining and reclamation incentive program, to prevent combustion of unmined coal, and generally to improve the use and
A. Pennsylvania Mining Environmental Regulation under the Clean Streams Law and Stream Buffer Zone Rule

Much of Pennsylvania’s surface mining environmental law derives from the Commonwealth’s Clean Streams Law. The Clean Streams Law governs interference with Pennsylvania’s waters. The statute seeks to prevent pollution of Pennsylvania’s waterways and to restore polluted waterways to an unpolluted condition. “Under the Clean Streams Law, the [DEP] has legal authority to issue orders to prevent the pollution of waters of the Commonwealth, which are defined very broadly to include ‘any and all rivers, streams . . . or parts thereof.’” The Commonwealth has enacted numerous regulations to implement the Clean Streams Law, including regulations that specifically address mining activities and their impact on streams. One such regulation is the stream buffer zone rule.

In compliance with the SMCRA, Section 86.102 provides the general provisions for areas unsuitable for mining. Section 86.102(12), the stream buffer zone rule, comports with both the SMCRA and the Clean Streams Law. The stream buffer zone provision differs from the Clean Streams Law in that it allows the DEP to grant a variance if the applicant can meet certain criteria. Specifically, to obtain a variance, the stream buffer zone rule dictates that the applicant must demonstrate “beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the enjoyment of said lands, to designate lands unsuitable for mining and to maintain primary jurisdiction over surface coal mining in Pennsylvania.

Id.

60. See James M. McElfish, Jr., Law of Envtl. Prot., ENVTL. LAW INST., § 7:15 n.1 (2009) (noting that “in Pennsylvania, much surface mining and hazardous waste environmental law derives from its Clean Streams Law”); see also Ried, supra note 13, at 661 (explaining that Clean Streams Law is actually environmental pillar upon which court relied in UMCO decision).


62. See Ried, supra note 13, at 661 (outlining goals of Clean Streams Law).


64. See Ried, supra note 13, at 661 (noting UMCO decision is based on regulations promulgated to implement Clean Streams Law).


66. See id. (enumerating areas in which surface mining operations, except those which existed on August 3, 1977, are not permitted).

67. See id. (explaining that provisions of Section 86.102 were amended under SMCRA and Clean Streams Law).

68. See id. (describing procedure to overcome stream buffer zone rule).
B. Enforcement of Pennsylvania's Buffer Zone Provisions

Since 1998, the EHB has consistently held that regulatory conditions must be satisfied before the DEP may grant a mining permit. In Chestnut Ridge Conservatory v. DEP and Tasman Resources, Ltd. (Chestnut Ridge), the EHB sustained the appeal filed by Chestnut Ridge, challenging the DEP’s issuance of a noncoal surface mining permit to Tasman Resources (Tasman). The DEP approved Tasman’s permit mining application, even though part of Tasman’s mining plan remained unresolved. Specifically, the status of a proposed roadway, the only means of ingress and egress to the mining site, was still in dispute. The EHB noted that noncoal mining regulations require an applicant to submit detailed information pertaining to the applicant’s right to enter and mine within the permit area. Where, however, the ownership of that means of ingress and egress is in dispute, “it follows that the [DEP] must require the applicant to provide sufficient information demonstrating its right to enter and affect the property in question.” In determining that the permit conditions must be met before the DEP may grant the permit, the EHB borrowed the reasoning from an earlier opinion, noting that the “DEP has the power ‘to place conditions in

69. Id. (outlining criteria necessary to obtain variance).
71. See Chestnut Ridge Conservatory, 1998 Pa. Envrn. LEXIS 35, at *21 (holding that DEP may not grant permit until Noncoal Surface Mining and Reclamation Act requirements and regulations are satisfied).
72. Id. (affirming appeal).
73. See id. at *1 (describing EHB’s determination).
74. See id. at *5-6 (explaining that status of proposed roadway to access site was still in dispute).
75. Id. (explaining that Tasman had not resolved issue of access to site).
76. See Chestnut Ridge Conservatory, 1998 Pa. Envrn. LEXIS 35, at *18 (outlining that permits for coal mining must include plans for access to site).
77. Id. (outlining permit conditions regarding ingress and egress).
permits' and that such 'conditions in a permit are generally appropriate exercises of [the] DEP's discretion . . . .'"\(^{78}\)

Similarly, in 2000, the EHB held that, where the regulatory language of Section 86.37 of Title 25 dictated, a permit applicant must prove that mining activities could "feasibly be accomplished" in compliance with the regulation.\(^ {79}\) Thus, a lack of waivers for mining activity within 300 feet of dwellings constituted grounds for remanding the permit.\(^ {80}\) In *Blose v. DEP and Seven Sisters Mining Co. (Blose)*,\(^ {81}\) Mr. Blose, a nearby neighbor to the land at issue, appealed the DEP's issuance of a mining permit to Seven Sisters Mining.\(^ {82}\) Section 86.37(a)(5)(v) provides that mining is prohibited "[w]ithin 300 feet of any occupied dwelling . . . ," and Section 86.37(a)(2) states that a permit may only be granted if the applicant demonstrates that the coal mining activity can be "feasibly accomplished."\(^ {83}\) Mr. Blose argued, and the EHB agreed, that where the permit application showed future mining activities within 300 feet of dwellings, and no waivers had been obtained, mining operations could not be "feasibly accomplished."\(^ {84}\) Although the DEP and Seven Sisters argued that the mining company would eventually obtain waivers prior to mining, the EHB remanded the permit, citing noncompliance with the regulation because the proposed activities fell within 300 feet of several occupied dwellings.\(^ {85}\) In sum, the EHB held that mining feasibility, meaning all pertinent conditions of a regulation, must be satisfied prior to the permit issuance.\(^ {86}\)

Most recently, in 2004, the EHB held in *UMCO Energy, Inc. v. DEP and Citizens for Pennsylvania's Future (UMCO)*\(^ {87}\) that Section 89.141(b)(2) of Title 25 of the Pennsylvania Administrative Code, a


\(^{80}\) *See id.* (noting why EHB remanded case).

\(^{81}\) *Id.* (recounting facts of *Blose*).

\(^{82}\) *See id.* at *1* (describing why Mr. Blose appealed granting of Seven Sisters’ permit).

\(^{83}\) *Id.* at *15* (stating that feasibility is necessary before permit may be granted).

\(^{84}\) *Blose*, 2000 Pa. Envirn. LEXIS 17, at *15-16* (stating Mr. Blose’s argument).

\(^{85}\) *See id.* at *28* (remanding permit for noncompliance).

\(^{86}\) *See id.* at *40* (explaining that regulations in case at bar indicate that mining feasibility must be demonstrated before permit may be granted).

regulation governing the subsidence effects of mining, pertained to all streams, regardless of their size or condition.\textsuperscript{88} After issuing a coal mining permit to UMCO and after UMCO had mined a portion of its site, one of two streams, and every spring and seep related to it, went dry.\textsuperscript{89} To prevent the second stream from either losing flow or drying up completely, the DEP issued an order prohibiting UMCO from mining near that stream.\textsuperscript{90} That same day, UMCO filed an appeal and a petition for \textit{supersedeas}.\textsuperscript{91} One of the factors considered in a \textit{supersedeas} petition is the likelihood of the petitioner prevailing on the merits; the EHB, therefore, analyzed UMCO's legal arguments.\textsuperscript{92} All UMCO's arguments shared a common basis.\textsuperscript{93} Namely, each argument depended upon the premise that the DEP erred by treating the second stream as though it were perennial when it was actually intermittent.\textsuperscript{94} After a detailed survey of the stream, the EHB deduced, based on the DEP's plethora of evidence and UMCO's lack thereof, that the stream was perennial.\textsuperscript{95} The EHB flatly rejected UMCO's argument that the stream was little more than a ditch and thus unworthy of protection, noting that "[t]here is no \textit{de minimus} exception under the law for small perennial streams" and "no reduced standard of legal protection for first-order, or feeder, perennial streams."\textsuperscript{96} The Commonwealth Court subsequently affirmed the UMCO decision, noting that the Mine Subsidence Act cannot be read to supersede the Clean Streams Law.\textsuperscript{97} The Commonwealth Court even clarified the EHB's holding, stating, "The regulation does not distinguish

\textsuperscript{88} See id. at *10-12 (stating that size of stream does not matter).
\textsuperscript{89} See id. at *2-6 (describing condition of stream after UMCO began mining activities).
\textsuperscript{90} See id. at *7 (describing DEP's order preventing destruction of second stream).
\textsuperscript{91} See id. (noting UMCO's actions in response to DEP's action). Supersedeas is defined as "a writ or bond that suspends a judgment creditor's power to levy execution, usually pending appeal." \textit{BLACK'S LAW DICTIONARY} 691 (3d pocket ed. 2006). Further, a "supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need." \textit{UMCO Energy}, 2004 Pa. Envrn. LEXIS 57, at *8-9.
\textsuperscript{93} For a discussion of the common basis of all of UMCO's arguments, see \textit{infra} note 94 and accompanying text.
\textsuperscript{94} See \textit{UMCO Energy}, 2004 Pa. Envrn. LEXIS 57, at *9-10 (tracing UMCO's argument that stream was intermittent).
\textsuperscript{95} See id. (describing EHB's determination that stream was perennial).
\textsuperscript{96} Id. at *12 (rebuttering UMCO's argument).
between large and small perennial streams; it applies to all perennial streams regardless of size."

IV. NARRATIVE ANALYSIS

The EHB’s dismissal of PDG’s appeal on summary judgment grounds was short and simple. PDG’s surface mining permit application proposed to fill five streambeds with overburden from surface mining operations. The EHB rationalized that such operations necessarily interfered with the streams, and that PDG could not possibly meet the requisite grounds for a variance. The EHB noted that “[t]he dumping of rock and other overburden so as to bury these streams clearly prevent[s] PDG from demonstrating ‘beyond a reasonable doubt’ that there will be no ‘adverse hydrological impacts, water quality impacts or other environmental resources impacts . . . .’”

PDG argued that the streams it planned to fill with overburden were of a poor quality, and that the overall environmental impacts of its project would be positive. The EHB rejected this line of reasoning, stating that such arguments should be made to the General Assembly. It also relied on its earlier decision in UMCO. The EHB analogized PDG’s claim that the streams PDG wished to fill with overburden were of poor quality with UMCO’s argument that the stream adversely affected by UMCO’s mining operations was insignificant and unworthy of protection. The EHB pointed to the UMCO decision as standing for the proposition that a water-

98. Id. at 538 (reaffirming EHB decision that regulation does not distinguish between large and small perennial streams).


100. See id. at *7 (describing PDG’s proposed mining operations).

101. See id. (describing why PDG’s permit application necessarily failed to meet requisite requirements for variance).

102. Id. at *6-7 (explaining that PDG was unable to meet necessary burden of proof).

103. See id. at *7 (outlining PDG’s arguments in support of DEP granting permit application).

104. See PDG Land Dev., 2009 Pa. Envrn. LEXIS 21, at *7-8 (explaining that such arguments should be made to General Assembly).

105. See id. (explaining that similar arguments were rejected in UMCO).

106. See id. at *7 (comparing arguments of PDG and UMCO regarding stream quality).
shed cannot be segmented into components, but must be viewed in conjunction with its entire hydrologic system.\textsuperscript{107}

The EHB also pointed to the \textit{Blose} and \textit{Chestnut Ridge} decisions in support of its assertion that the EHB has strictly upheld buffer zone provisions of surface mining regulations.\textsuperscript{108} In these prior decisions, the EHB ruled that the DEP had improperly issued a mining permit, and revoked a mining permit for failure to comply with a regulation, respectively.\textsuperscript{109} Based on the aforementioned reasoning, the EHB dismissed PDG's appeal on summary judgment motions and upheld the DEP's denial of its surface mining permit application.\textsuperscript{110}

\section*{V. Critical Analysis}

The EHB correctly determined that the stream buffer zone rule, like other surface mining buffer zone provisions, should be strictly upheld.\textsuperscript{111} The EHB, however, undermined the DEP's broader goal of promoting measurable environmental improvement by failing to assess the condition of the streams that PDG proposed to fill with overburden.\textsuperscript{112} Thus, the EHB's holding in \textit{PDG Land Development} predominately focuses on the technical letter of the law and not necessarily on the greater environmental impact.\textsuperscript{113} Acknowledging that its role is to interpret rather than construct statutes, the EHB directed PDG to take its complaint, that the overall environmental impact of its project would be positive, to the leg-

\textsuperscript{107} See id. (noting that streams must be viewed in conjunction with the entire hydrologic system). \textit{PDG Land Development} specifically notes that "it is inappropriate to segment watersheds down to components that may appear inconsequential when viewed in isolation." \textit{Id.}

\textsuperscript{108} See id. at *8 (outlining holdings in \textit{Blose} and \textit{Chestnut Hill} in support of proposition that buffer zone provisions of surface mining regulations are to be strictly upheld).

\textsuperscript{109} See \textit{PDG Land Dev.}, 2009 Pa. Envirn. LEXIS 21, at *8 (tracing EHB's reliance on prior decisions to determine when permits are properly denied).

\textsuperscript{110} See id. at *8-9 (discussing rationale behind EHB's dismissal of PDG's appeal on summary judgment motions).

\textsuperscript{111} For a further discussion of why the EHB's determination was correct, see \textit{infra} notes 115-22 and accompanying text.

\textsuperscript{112} See \textit{PDG Land Dev.}, 2009 Pa. Envirn. LEXIS 21, at *5-10 (dismissing PDG's appeal without discussing streams' condition); see also Pa. DEP, Mission Statement, http://www.depweb.state.pa.us/portal/server.pt/community/about_developments/13464 (last visited Jan. 20, 2010) [hereinafter Mission Statement] (stating that DEP's mission is to protect Pennsylvania's air, land and water from pollution, and provide for health and safety of citizens through cleaner environment).

\textsuperscript{113} See \textit{PDG Land Dev.}, 2009 Pa. Envirn. LEXIS 21, at *7-8 (dismissing PDG's appeal without thoroughly analyzing quality of streams in question).
A. Enforcement of the Stream Buffer Zone Rule

The EHB correctly upheld strict enforcement of the stream buffer zone rule. Prior EHB decisions make plain that all conditions of a regulation must be met before the DEP may grant a surface mining permit. In *PDG Land Development*, the regulation at issue, Section 86.102(12), prohibited surface mining "[w]ithin 100 feet . . . measured horizontally of the bank of a perennial or intermittent stream." PDG could overcome this prohibition via the granting of a variance only if PDG proved in its surface mining permit application that no "adverse hydrologic impacts, water quality impacts or other environmental resources impacts" would result from the granting of the variance.

Since the *Chestnut Ridge* decision in 1998, the EHB has consistently held that regulatory conditions must be satisfied before the DEP may grant a permit for mining. PDG’s surface mining permit application, however, did not include an explanation of how PDG planned to fill the streams with overburden without any adverse hydrologic, water quality, or other environmental resources.

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114. *See id.* at *7* (explaining that complaints about streams’ poor quality and project’s positive net environmental impacts should be made to General Assembly, not EHB).

115. For a discussion of why the EHB correctly upheld strict enforcement of the stream buffer zone rule based on prior case law, see *infra* notes 116-22 and accompanying text.


118. *See § 86.102(12) (outlining criteria necessary to overcome stream buffer zone rule).*

119. *See Chestnut Ridge Conservatory*, 1998 Pa. Envrn. LEXIS 35, at *21* (holding that DEP may not grant permit until Noncoal Surface Mining and Reclamation Act requirements and regulations are satisfied); *see also Blose*, 2000 Pa. Envrn. LEXIS 17, at *5* (enforcing buffer zone provision by remanding permit that did not meet conditions of regulation back to DEP).
impacts. Without this explanation, the requirements set forth in Section 86.102(12) could not be met. Because the DEP may not grant a permit unless all the regulatory conditions are satisfied, it acted correctly and uniformly in denying PDG's surface mining permit application.

B. Lack of a Holistic Approach

The EHB did not address the quality of the streams affected by PDG's proposed mining; instead it stressed that because PDG's operations would interfere with streams, the operations were contrary to law and therefore prohibited. In stark contrast to this approach, the EHB in UMCO spent three paragraphs spanning two pages analyzing the stream in question to support its assertion that size and quality of the stream affected by the mining does not matter. Although the DEP's denial of the EHB's permit application would likely still have been upheld had the EHB analyzed the streams in question, the EHB's lack of investigation into the streams' quality appears contrary to the DEP's overall goal of improving environmental conditions in Pennsylvania. PDG main-

120. See Application For Bituminous Surface Mining Permit, supra note 6 (lacking description of how PDG planned to comply with stream buffer zone rule).  
121. See § 86.102(12) (outlining requirements necessary to overcome stream buffer zone rule).  
122. See Chestnut Ridge Conservatory, 1998 Pa. Envrn. LEXIS 35, at *21 (holding that DEP may not grant permit until Noncoal Surface Mining and Reclamation Act requirements and regulations are satisfied); see also Blose, 2000 Pa. Envrn. LEXIS 17, at *5 (enforcing buffer zone provision by remanding a permit that did not meet conditions of regulation back to DEP).  
125. See Application For Bituminous Surface Mining Permit, supra note 6 (detailing streams on proposed mining site). PDG’s permit application would probably still have been denied even if the EHB had analyzed the streams because the permit application shows that the streams are designated as unnamed tributaries to Glass Run and Becks Run, both tributaries to the Monongahela River, which eventually feeds into the Ohio River. Id. Thus, like the stream in question in UMCO, the unnamed tributaries are part of a larger hydrologic system. See UMCO Energy, 938 A.2d at 556.  
126. See Mission Statement, supra note 112 (stating that DEP’s mission is to protect Pennsylvania’s air, land, and water from pollution, and provide for health and safety of citizens through cleaner environment); see also Brief for Appellant, supra note 46, at 32 (stating that environmental impacts of coal refuse disposal valley fills routinely approved by DEP are greater than alleged environmental impact resulting from PDG’s proposed valley fills).
tains that the site is an "undermined, unstable, and currently unusable tract of land."\(^{127}\)

Further, PDG argues that the development plan will actually have a positive effect on the environment, improving "the overall hydrologic and environmental quality of the [site], eliminating acid mine drainage, extinguishing an underground fire, and creating a sustainable community based on principles of New Urbanism that are entirely consistent with the [DEP's] and ... PennFuture's stated goals ..."\(^{128}\) The EHB has held that watersheds cannot be isolated and segmented into individual components, but must be viewed in conjunction with their entire hydrologic systems.\(^{129}\) Similarly, the impact of surface mining should not be judged by its effect on only one component of the environment, such as a stream, but must be determined by the project's overall effects on the entire tract of land.\(^{130}\)

VI. IMPACT

The EHB's decision in \textit{PDG Land Development} had an immediate impact because PennFuture and the media perceived the decision as preserving Hays Woods as a green space.\(^{131}\) The Commonwealth Court will likely affirm the EHB's decision,\(^{132}\) causing \textit{PDG Land Development} to have even more lasting repercussions.\(^{133}\) \textit{PDG Land Development} will affect the DEP's determinations to either deny or approve permit applications, making the DEP more prone to deny where applications are not in strict compliance

\(^{127}\) Brief for Appellant, \textit{supra} note 46, at 40 (arguing that land will be in better environmental shape after surface mining).

\(^{128}\) Brief for Appellant, \textit{supra} note 46, at 40 (explaining positive aspects of PDG's proposed surface mining project).

\(^{129}\) See \textit{UMCO Energy, Inc.}, 938 A.2d at 536 (refuting UMCO's argument that stream was intermittent by stating that streams many not be segmented into components).

\(^{130}\) For a discussion of the potential positive effects of PDG's mining operations and why the environmental impact of surface mining should be judged holistically, see \textit{supra} notes 127-28. For a discussion of PDG's potential recourse, see \textit{infra} notes 169-72 and accompanying text.

\(^{131}\) See Press Release, \textit{supra} note 46 (noting that, while \textit{PDG Land Development} decision stands for proposition that Pennsylvania will not tolerate harm to its streams, decision also preserves Hays Woods as green space); see also \textit{Green}, \textit{supra} note 38 (describing PennFuture's treatment of Hays Woods as park, and desire to incorporate Hays Woods into city's park system).

\(^{132}\) For a discussion of why the Commonwealth Court will likely affirm the EHB's decision in \textit{PDG Land Development}, see \textit{infra} notes 150-56 and accompanying text.

\(^{133}\) For a discussion of the likely impacts of the \textit{PDG Land Development} decision on the DEP after it has been affirmed by the Commonwealth Court, see \textit{infra} notes 157-62 and accompanying text.
with regulatory conditions. This denial of applications, in turn, will impact the coal mining industry and general development in Pennsylvania.

PennFuture’s and the media’s responses to the *PDG Land Development* decision have confused the decision’s holding. In *PDG Land Development*, the EHB upheld strict enforcement of the stream buffer zone rule. Although a consequence of strictly upholding the stream buffer zone rule was to halt immediate development of Hays Woods, *PDG Land Development* does not baldly preserve Hays Woods as a green space.

Heather Sage, vice president of PennFuture, characterized the *PDG Land Development* decision as a “great victory, protecting a true oasis of green and home to abundant and healthy wildlife in the heart of the city.” In an article reporting on the *PDG Land Development* decision, Sage further commented, “That side of Pittsburgh doesn’t have the same park resources as some other neighborhoods.” She went on to note that Hays Woods is “a great asset in terms of wildlife preservation and recreational opportunities.”

Many local groups had united in opposition to PDG’s permit application, basing their opposition on preserving Hays Woods as green space and one of the few undeveloped areas in the City of Pittsburgh. After the EHB's decision, many still see *PDG Land Develop-

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135. For discussion of how strict enforcement of buffer zone provisions will impact the coal mining industry and development in Pennsylvania, see infra notes 163-68 and accompanying text.

136. For a discussion of how PennFuture’s and the media’s responses to the *PDG Land Development* decision have confused the case’s holding by emphasizing the preservation of Hays Woods as green space, see infra notes 137-149 and accompanying text.

137. See *PDG Land Dev.*, 2009 Pa. Envrn. LEXIS 21, at *6 (holding that DEP properly denied PDG’s permit application because PDG’s plan to fill streambeds with overburden necessarily violated stream buffer zone rule).

138. See id. at *5-9 (noting why DEP correctly denied PDG’s permit application and why case was thus properly dismissed on summary judgment motions, but failing to mention preservation of Hays Woods as green space as factor in consideration).

139. Press Release, supra note 46 (quoting PennFuture vice president’s reaction to *PDG Land Development* decision).

140. See *Green*, supra note 38 (quoting Sage).

141. See id. (noting Sage's reference to Hays Woods as recreational space).

operation’s primary impact as preserving Hays Woods, as opposed to strictly enforcing the stream buffer zone rule.\textsuperscript{143}

In reality, the \textit{PDG Land Development} decision does not protect the “oasis of green” that is Hays Woods, but rather protects the specific streams therein.\textsuperscript{144} Hays Woods remains privately owned.\textsuperscript{145} PDG owns the tract of land known as Hays Woods and still hopes and plans to develop the property.\textsuperscript{146} If the current development plan proves unsuccessful, PDG could still develop the property in a different way.\textsuperscript{147} While one effect of strictly enforcing the stream buffer zone rule may be to preserve green space, this is only an ancillary consequence of the EHB’s holding in \textit{PDG Land Development}.\textsuperscript{148} The \textit{PDG Land Development} holding pertains specifically and narrowly to enforcement of the stream buffer zone rule.\textsuperscript{149}

The Commonwealth Court will likely affirm the EHB’s decision in \textit{PDG Land Development}.\textsuperscript{150} The Commonwealth Court’s standard of review in evaluating the EHB’s dismissal of a case on summary judgment motions is difficult to overcome.\textsuperscript{151} When reviewing a

\begin{itemize}
    \item Smog and Pollution] joined with the Sierra Club, PennFuture, Clean Water Action, the Baldwin Citizens Alliance, CMU’s Studio for Creative Inquiry and local citizens to protect [Hays Woods]). GASP referred to the Hays Woods property as “woods hidden within a city.” \textit{Id.}
    \item For a discussion of how PennFuture’s and the media’s reporting has confused the actual primary impact of the \textit{PDG Land Development} decision, see \textit{supra} notes 136-42 and accompanying text.
    \item For a discussion of PDG’s ownership of Hays Woods, and how PDG came to own the property, see \textit{supra} notes 28-36 and accompanying text.
    \item For a discussion of PDG’s continued plans to develop Hays Woods and to appeal the EHB’s decision, see \textit{supra} notes 53-54 and accompanying text.
    \item \textit{See Craig Smith, Hays developer denied license for strip mine, PITTSBURGH TRIBUNE,} Dec. 22, 2006, \textit{available at} 2006 WLNR 22385333 (noting that although DEP had denied PDG’s permit application, PDG could still develop property “in a different manner”); \textit{but see Sierra Club Allegheny Group, Hays Woods Developer Denied Mining Permit,} (May 22, 2009), http://allegheny.org/1165 (last visited Jan. 20, 2010) (arguing that EHB’s dismissal of PDG’s appeal, coupled with condemnation of right-of-way carrying power lines to section of Hays Woods property leaves PDG with little further recourse for development).
    \item \textit{See PDG Land Dev.,} 2009 Pa. Envrn. LEXIS 21, at *6-8 (explaining that only issue at bar in PDG’s appeal was enforcement of stream buffer zone provision).
    \item \textit{See id.} (detailed requiring enforcement of stream buffer zone rule).
    \item For a discussion of why the Commonwealth Court will likely affirm the EHB’s decision in \textit{PDG Land Dev.}, see \textit{infra} notes 150-54 and accompanying text.
\end{itemize}
case on appeal from an entry of summary judgment, the Commonwealth Court may only reverse the EHB "where there has been an error of law or a clear or manifest abuse of discretion." Further, a majority of EHB cases on appeal to the Commonwealth Court are decided in conformity with the EHB decisions. Instantly, the EHB correctly judged that, based on the stream buffer zone rule, the DEP’s denial of PDG’s permit application was proper. Thus, the EHB dismissed PDG’s appeal on summary judgment motions. Because the EHB’s determination was proper, the EHB did not commit an error of law or abuse its discretion; accordingly, the Commonwealth Court will likely affirm the EHB’s PDG Land Development decision.

PDG Land Development provides clear guidance for the DEP regarding surface mining permit application approval and denial. As demonstrated in Blose, the EHB has the power to step in and correct the DEP where the EHB deems the DEP has erred. Thus, the DEP has little choice but to follow the guidelines set forth by the EHB or see its decisions overturned. In the wake of PDG Land Development, the DEP will likely deny most surface mining permit applications that propose interference with streams, as most interference can be construed as causing adverse hydrologic, water

153. See History of the EHB, supra note 12 (noting that out of 300 EHB cases appealed to Pennsylvania appellate courts, higher courts have agreed with EHB in more than eighty percent of cases).
154. For a discussion of why the EHB’s determination was proper, see supra notes 111-22 and accompanying text.
156. See Joseph J. Brunner, Inc., 869 A.2d at 1173 n.2 (explaining that Commonwealth Court may only reverse EHB where there is clear error of law or abuse of discretion).
157. See PDG Land Dev., 2009 Pa. Envrn. LEXIS 21, at *5-8 (emphasizing that all conditions of regulation must be met before permit may be granted and stressing importance of enforcing protection of all streams).
159. See id. (demonstrating that if EHB determines that DEP has granted permit application that does not comply with regulations, EHB can remand permit back to DEP, creating incentive for DEP to adhere to EHB’s guidelines so as to avoid permits being remanded).
quality, or environmental impacts. Additionally, the DEP will likely review all surface mining permit applications carefully for strict compliance with regulatory conditions prior to granting them. Applications that do not strictly conform to regulations will likely be denied.

The PDG Land Development decision, especially if the Commonwealth Court affirms it, will significantly impact the Pennsylvania coal mining industry, effectively preventing mining activity within one hundred feet of any stream. Further, the decision will also impact development in Pennsylvania, specifically of any previously mined areas near streams. For example, in PDG Land Development, PDG’s primary objective was not to mine the area known as Hays Woods, but to develop it. The surface mining permit application was simply a necessary step in preparing the previously mined land for future development. PDG Land Development presents a difficult hurdle for coal companies and developers seek-

160. For a discussion of why the DEP will likely deny surface mining applications that propose interference with streams, see supra notes 156-57 and accompanying text. See also PDG Land Dev., 2009 Pa. Envirn. LEXIS 21, at *6-7 (discussing why PDG’s proposed interference necessarily violated stream buffer zone provision).

161. See PDG Land Dev., 2009 Pa. Envirn. LEXIS 21, at *6-8 (stressing that permit applications must strictly comply with specific conditions of regulation).

162. See id. at *6-7 (holding that PDG’s permit application was properly denied because it did not comply with conditions for variance set forth in regulation).

163. See id. at *5-6 (noting that “mining regulations strictly prohibit surface mining activities, including placement of mine spoil, within 100 feet of a stream bank unless the operator obtains a variance”). PDG could not obtain a variance because its proposed mining activity did not meet the variance requirements, namely that its proposed mining activity have no adverse hydrological or environmental impacts. Id. at *6-7.

164. See Press Release, Citizens for Pa.’s Future, supra note 46 (noting that as result of strict application of stream buffer zone rule, Hays Woods was spared from development).

165. See Conte, supra note 48 (discussing development plans for Palisades Park, including construction of racetrack, entertainment center and homes); see also Palisades Project, supra note 48 (describing PDG’s development plan for Hays Woods, which includes developing site “into a horse racing track, commercial area and residential area with high-end homes and rentals”).

166. For a discussion of why PDG planned to surface mine the area known as Hays Woods, see supra note 128 and accompanying text.
ing surface mining permits to overcome,\textsuperscript{167} potentially impeding the coal mining industry and development in Pennsylvania.\textsuperscript{168}

As the EHB suggested in the \textit{PDG Land Development} decision, PDG could take its complaint regarding strict enforcement of the stream buffer zone provision to the legislature.\textsuperscript{169} PDG contends that, although its proposed development plan involves filling streambeds with overburden from surface mining operations, the net environmental impact of its project is positive.\textsuperscript{170} Thus, PDG could argue that strict enforcement of the stream buffer zone provision, as applied in \textit{PDG Land Development}, does not encourage environmentally sound development, but rather stifles it.\textsuperscript{171} PDG or other similarly situated groups could lobby the General Assembly to amend the stream buffer zone rule and other surface mining regulations to comport with a more holistic approach to environmentally sound development.\textsuperscript{172} Arguably, the stream buffer zone rule should be changed to reflect the most modern approach to environmentally sound development—development that is judged by its entire environmental impact, not by its impact on certain aspects of the environment, such as streams.\textsuperscript{173}

* Heather Garleb*

\textsuperscript{167} For a discussion of why the EHB’s decision in \textit{PDG Land Development} will make it more difficult for applications to obtain surface mining permits from the DEP, see \textit{supra} notes 161-64 and accompanying text.

\textsuperscript{168} Brief for Appellant, \textit{supra} note 46, at 14-15 (arguing that strict enforcement of stream buffer zone rule renders mineral rights worthless and would possibly effectuate regulatory takings).


\textsuperscript{170} \textit{See id.} (outlining PDG’s argument).

\textsuperscript{171} \textit{See id.} (discussing why strict application of stream buffer zone rule impedes PDG’s more holistic environmental aims); \textit{see also} Mission Statement, \textit{supra} note 112 (stating that DEP’s mission is to protect Pennsylvania’s air, land, and water from pollution, and provide for health and safety of citizens through cleaner environment).


\textsuperscript{173} \textit{See Brief for Appellant,} \textit{supra} note 46, at 1-2 (noting that PDG’s permit application should be approved because of environmental benefits that would derive from proposal). These benefits include “the reclamation of abandoned mine lands, the elimination of mine drainage impacts, the construction of an environmentally-sustainable sprawl-reducing New Urbanist community, and the preservation of 81 percent of the Project Site as parks and open space (including 265 acres of dedicated undisturbed perimeter park land).” \textit{Id.}

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