



**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
Rachel Carson State Office Building - Second Floor
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457**

**BIG SEWICKLEY CREEK
WATERSHED ASSOCIATION**

**1675 Route 228, No. 1077
Cranberry Township, Pennsylvania 16066
Telephone: (412) 445 - 0424**

Appellant;

v.

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

Appellee;

PENNENERGY RESOURCES LLC,

Permittee.

EHB Docket No. _____

NOTICE OF APPEAL

In accordance with Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514, and Rule 51 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.51, the Big Sewickley Creek Watershed Association (the Association) appeals two January 29, 2024 actions of the Commonwealth of Pennsylvania Department of Environmental Protection (the Department).

1. The name, address, and telephone number of the Appellant are:

Big Sewickley Creek Watershed Association
1675 Route 228, No. 1077
Cranberry Township, Pennsylvania 16066
Telephone: (412) 445 - 0424

2. This appeal involves several actions substantially connected or otherwise related to Well Pad Permit No. ESX17-007-0014, held by PennEnergy Resources LLC.

(a) The specific Departmental actions for which review is sought are:

- i. January 29, 2024 approval of amendment to Water Management Plan (WMP) No. WMP-294943-5; and
- ii. January 29, 2024 issuance of State Water Obstruction and Encroachment Permit No. E0407222-001.

In accordance with 25 Pa. Code § 1021.51(d), those actions are attached as Exhibits A and B to this Notice, respectively.

(b) The actions described above were taken by Brian K. Bailey, P.E., Program Manager, District Oil & Gas Operations.

(c) The operation or activity that is the subject of the Department's actions will be located within and around Big Sewickley Creek, Cooney Hollow, and the floodway of Unnamed Tributary No. 2 to Cooney Hollow in Economy Borough, Beaver County.

(d) The Association received notice of the actions described above on February 4, 2024, when Association members Rosemary Reilly and Julie DiCenzo discovered the Department's January 29, 2024 letters approving the WMP and Encroachment Permits referenced above on a community information page maintained by the Southwest Regional Office at <https://www.dep.pa.gov/About/Regional/SouthwestRegion/CommunityInformation/Pages/PennEnergy-Water-Management-Plan.aspx>. The next day, on February 5, 2024, Ms. DiCenzo sent an

e-mail message to other Association members, notifying them of the Department's actions. A copy of Ms. DiCenzo's February 5, 2024 e-mail message is attached as Exhibit C to this Notice.

3. The Association is not aware of any related appeals currently pending before the Board.
4. The Association's specific objections to the actions described above are presented in separate numbered paragraphs in the attached Appendix, together with a statement of the relief that the Association requests.

Dated: March 5, 2024

Respectfully submitted,



Evan Dimond Johns

(Pennsylvania ID No. 334608)

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Creek Watershed Association*



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**APPENDIX:
OBJECTIONS TO ACTIONS OF THE COMMONWEALTH OF
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In accordance with Rule 1021.51(e) of the Board’s Rules of Practice and Procedure, 25 Pa. Code. § 1021.51(e), Appellant Big Sewickley Creek Watershed Association sets forth in separate numbered paragraphs its specific objections to the January 29, 2024 actions of the Commonwealth of Pennsylvania Department of Environmental Protection (the Department), approving an amendment to Water Management Plan No. WMP-294943-5 and issuing State Water Obstruction and Encroachment Permit No. E0407222-001 to PennEnergy Resources LLC (PennEnergy).

I. Objections to Approval of Amendment to Water Management Plan No. WMP-294943-5

1. The Department’s approval of an amendment to Water Management Plan No. WMP-294943-5 was unreasonable, arbitrary, and contrary to law in failing to adequately protect in-stream flow of Big Sewickley Creek, prevent adverse effects on quantity and quality of water, and protect and maintain designated and existing uses (including the “maintenance and propagation of fish species” like the southern redbelly dace)¹ under 25 Pa. Code § 78a.69(b)(1), (2), and (3), respectively, and under Section 3211(m)(2) of the Oil and Gas Act, 58 P. S. § 3211(m)—including by:

- (a) accepting PennEnergy’s reliance on outdated flow data to determine the frequency of direct stream flow measurements necessary to maintain adequate pass-by flows for Big Sewickley Creek;
- (b) determining required pass-by flow rates according to the Tennant Method rather than a method designed to protect instream conditions during all seasons;
- (c) permitting intake structures in pools of insufficient depth to ensure protection of the threatened southern redbelly dace and other aquatic life;
- (d) unreasonably relying on the recommendations of the Commission as sufficient to avoid adverse impacts to the southern redbelly dace, given the quality of the data on which the Commission relied and its contradictory conclusions throughout the consultation process, *see Hanson Aggregates PMA v. Department of Environmental Protection*, 2007 EHB 519, 523–28 (September 17, 2007) (citing *Eagle Environmental v. Department of Environmental Protection*, 1997 EHB 733, 741–42 (August 20, 1997));

1 See 25 Pa. Code § 93.3.

- (e) unreasonably relying on a receipt from the Pennsylvania Natural Diversity Inventory (PNDI) that registered “[n]o known impacts” to legally protected species and advised that “[n]o further review [was] required,” when the Department had actual knowledge that at least one Pennsylvania Threatened species, the southern redbelly dace, is present and will be affected—a fact that should have registered on a proper PNDI inquiry and suggests that the PNDI inquiry may have omitted other relevant species of concern, including those specifically identified in public comments;² and
- (f) disregarding adverse impacts from authorized activities based on the presumed “temporary nature” of those impacts on Big Sewickley Creek.

2. The Department’s approval of the amendment to Water Management Plan No. WMP-294943-5 was unreasonable, arbitrary, and contrary to law in failing to adequately protect groundwater resources under 25 Pa. Code § 78a.69(b)(6), given the Department’s refusal to require a groundwater study sufficient to meaningfully characterize the effect of water withdrawals from Big Sewickley Creek on groundwater resources.
3. The Department’s approval of the amendment to Water Management Plan No. WMP-294943-5 was inconsistent with the Department’s duties as a trustee of the Big Sewickley Creek, the southern redbelly dace, and other “natural, scenic, historic and esthetic values of the environment” under Article 1, Section 27 of the Pennsylvania Constitution.

2 Other potentially affected species and resources include the Indiana bat, northern long-eared bat, tricolored bat, little brown bat, ten migratory and resident bird species of conservation concern, bald eagle, great blue heron, harvester, feature plant, trillium erectum x flexipes, harbinger-of-spring, rich hemlock mesic hardwoods forest, Virginia pine mixed hardwood shale woodland, and red mulberry.

4. In accordance with *Snyder v. Department of Environmental Protection*, 2015 EHB 857, 885 (December 21, 2015), the Association reserves its right to amend its objections upon the discovery of new information related to the Department’s January 29, 2024 approval of an amendment to Water Management Plan No. WMP-294943-5.

II. Objections to Water Obstruction and Encroachment Permit No. E0407222-001

5. The Department’s issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 violates 25 Pa. Code § 105.16(c)(3) in light of, among other things:
 - (a) the Department’s own acknowledgement of adverse impacts to “an area which serves as a habitat . . . for a species which has been designated as a threatened or endangered species,” notwithstanding the purported “temporary nature” of those impacts;
 - (b) the Department’s unreasonable reliance on the recommendations of the Pennsylvania Fish and Boat Commission given the quality of the data on which the Commission relied and the Commission’s contradictory conclusions throughout the consultation process, *see Hanson Aggregates*, 2007 EHB at 523–28 (citing *Eagle Environmental*, 1997 EHB at 741–42); and
 - (c) the Department’s unreasonable reliance on a receipt from the PNDI registering “[n]o known impacts” to legally protected species and advising that “[n]o further review [was] required,” despite the Department’s actual knowledge that at least one Pennsylvania Threatened species, the southern redbelly dace, could be affected and therefore should have registered on a valid PNDI receipt, as described above in paragraph 1(e).

6. The Department’s issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 was unreasonable, arbitrary, and contrary to law in light of PennEnergy’s failure to demonstrate the water dependency of the proposed activities under 25 Pa. Code § 105.14(b)(7) “based on the demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the . . . water obstruction . . . upon the environment and protect the public natural resources of the Commonwealth.” Non-water-dependent or otherwise less-damaging alternatives not adequately considered by the Department and PennEnergy include:

- (a) delivery of water to PennEnergy’s well pad by truck;
- (b) reliance on PennEnergy’s existing withdrawal from the Ohio River; and
- (c) application for a second withdrawal location from the Ohio River.

7. The Department’s issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 was unreasonable, arbitrary, capricious, and contrary to law in light of the Department’s failure to analyze and minimize reasonably foreseeable, secondary, and cumulative effects under 25 Pa. Code § 105.14(b)(8), (12), and (14), respectively—including:

- (a) forest fragmentation;
- (b) introduction or proliferation of invasive species; and
- (c) the cumulative and secondary effects on Big Sewickley Creek, the larger watershed, and other natural resources of the construction and/or operation of all projects related to PennEnergy’s B50 Well Pad—including the B15 Well Connect, the B50 Aboveground Waterline, the B50 Truck Terminal and Temporary Waterline, and the

PER B50 Well Pad itself, as well as the effects of clearing, grading, and construction of water lines, roads, and staging areas associated with those facilities.

8. The Department’s issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 and its authorization to proceed under Pennsylvania State Programmatic General Permit No. 6 was unreasonable, arbitrary, and contrary to the express requirement of the Programmatic General Permit that “[a]uthorized activities must be in compliance with all . . . terms and conditions specific to each listed category” of “Non-Reporting and Reporting Activities” listed therein. *See* Pennsylvania State Programmatic General Permit No. 6, at 6 (June 11, 2021), available at <https://tinyurl.com/wf52tcxh>. As relevant here, that includes the requirement that all intake and outtake structures must be eligible for and consistent with the Department’s General Permit No. 4, *id.* at 10, which does not apply to “[s]tocked trout streams from March 1 through June 15,” Bureau of Waterways, Engineering & Wetlands General Permit No. 4, at 2–3 (June 2013), available at <https://tinyurl.com/5n8eswy4>; *cf.* Exhibit B at 4 (allowing work in the stream channel as early as June 1 without Commission approval).
9. The Department’s issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 was inconsistent with the Department’s duties as a trustee of the Big Sewickley Creek, the southern redbelly dace, and other “natural, scenic, historic and esthetic values of the environment” under Article 1, Section 27 of the Pennsylvania Constitution.
10. In accordance with *Snyder v. Department of Environmental Protection*, 2015 EHB 857, 885 (December 21, 2015), the Association reserves its right to amend its objections upon the

discovery of new information related to State Water Obstruction and Encroachment Permit No. E0407222-001.

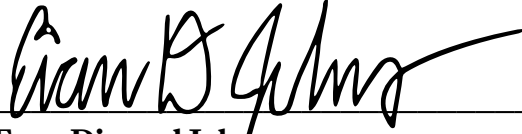
III. Relief Requested

11. Accordingly, the Association respectfully requests that the Board:

- (a) convene a hearing on the issues set forth in this Notice of Appeal;
- (b) declare the Department's issuance of State Water Obstruction and Encroachment Permit No. E0407222-001 and its approval of an amendment to Water Management Plan No. WMP-294943-5 unlawful;
- (c) revoke and remand State Water Obstruction and Encroachment Permit No. E0407222-001 and the January 29, 2024 approval of an amendment to Water Management Plan No. WMP-294943-5, with instructions to remedy the issues identified in this Notice of Appeal;
- (d) in the alternative to remand, modify State Water Obstruction and Encroachment Permit No. E0407222-001 and the January 29, 2024 amendment to Water Management Plan No. WMP-294943-5 as necessary to comply with applicable statutory and regulatory authority; and
- (e) provide any further relief to which the Association is entitled.

Dated: March 5, 2024

Respectfully submitted,



Evan Dimond Johns

(Pennsylvania ID No. 334608)

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NOTICE OF APPEAL FORM
SIGNATURE PAGE – Page 4

By filing this Notice of Appeal with the Environmental Hearing Board, I hereby certify that the information submitted is true and correct to the best of my information and belief. Additionally, I certify that a copy of this Notice of Appeal was served upon each of the individuals indicated on Page 3 of this form on the following date: March 5, 2024.



Signature of Appellant or Appellant's Counsel

Date: March 5, 2024

If you have authorized counsel to represent you, please supply the following information (*Corporations must be represented by counsel*):

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