

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COGAN HOUSE TOWNSHIP,	: NO. 14 – 02,035
Plaintiff	:
	: CIVIL ACTION - LAW
vs.	:
	:
	:
DAVID LENHART and DIANNE LENHART,	:
Defendants	: Non-jury Trial

**OPINION AND VERDICT**

Before the Court is Defendants’ counter-claim<sup>1</sup> for damages and injunctive relief based on allegations that certain road construction activities approved by Plaintiff (“the Township”) for the road adjacent to Defendants’ property caused harm to their property. The parties requested that the court bifurcate the issue of liability from that of damages, and a trial on liability only was held on September, 6, 7, 8 and 29, 2017. The matter is now ripe for decision and the Court enters the following:

**FINDINGS OF FACT**

1. Cogan House Township is a rural municipality in Lycoming County.
2. Defendants own property in Cogan House Township, on both sides of a road named Post Road. The driveway to their residence is connected to Post Road.
3. In 2011, with the Township’s approval, two gas companies (Anadarko and Range Resources) together employed an engineering firm, Pennoni Engineering,

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<sup>1</sup> Plaintiff did not pursue its original claim and such is being dismissed in response to Defendants’ motion to that effect by separate order issued this date.

to design and oversee improvements to Post Road in anticipation of gas drilling activities to be conducted in the area.

4. Those improvements were completed by HRI in 2011 according to the Pennoni plan.

5. Before renovations, Post Road was gravel-covered for the most part, with occasional places which had been tarred-and-chipped, and the road surface was from twelve to sixteen feet wide. There were two-foot stone shoulders on both sides of the road surface.

6. The renovations on Post Road comprised an area of just shy of one mile in length along the north-south stretch of the road.<sup>2</sup> This length was subject to a full-depth reclamation sixteen feet across (which was established as the cart-way), which involved grinding the roadway surface to a depth of one foot, mixing powdered cement and water with the ground material, laying that mixture on the cart-way and topping that with three inches of blacktop. Four-foot stone shoulders were established on both sides of the cart-way.

7. In addition to the work on the roadway itself, prior to the reclamation work the pipes under the road were replaced with similar-sized pipes, including two pipes which carried streams under the road. The “new pipe” alleged to have been added at the Kyle driveway was not an additional pipe; it replaced a six-inch diameter pipe which was completely clogged and buried, with a 24” pipe.

8. In 2014, because the roadway began to crack and it was determined that underground seepage was causing soft spots, additional work was done by HRI to repair the soft spots, again according to a plan by Pennoni.

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<sup>2</sup> Post Road runs north-south for a certain length and then takes a sharp right turn to the east. The section running east-west was not involved in the 2011 or 2014 construction activities.

9. In 2014, an under-drain was installed in the ditch to the east side of the road for approximately 1000 feet, to carry underground water from the points of seepage to the end of the drain, which empties into a culvert which runs from the east side of the road to the west side.
10. At the time of the installation of the under-drain, the cracks in the road were also repaired, the entire road was overlaid with additional blacktop and a 1000-foot section of berm (adjoining the ditch which contained the under-drain) was paved on the east side.
11. Pennoni did utilize Stormwater Best Management Practices in both projects.
12. Pennoni did prepare a stormwater management analysis prior to beginning construction in 2011, and concluded that it met the stormwater management requirements by simply utilizing Stormwater Best Management Practices because it was matching existing drainage conditions, replacing pipes in their prior locations and directing flow through natural drainage areas.
13. Pennoni did not submit an erosion and sediment control plan as part of a permit application for either project, based on its assessment that the projects were “roadway maintenance projects” involving less than 25 acres.
14. The construction activities in both projects all occurred within the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features; i.e., within the existing road cross-section.<sup>3</sup> The affected area was between one and five acres.

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<sup>3</sup> The “existing road cross-section” is defined in Section 102.1 of Chapter 25 of the Pennsylvania Code.

15. A permit was obtained for the replacement of the pipe which carried Bear Run under Post Road. An erosion and sediment control plan was submitted in connection with that permit application.

16. A permit was not obtained for the replacement of the pipe which carried the tributary of Bear Run under Post Road.

### **DISCUSSION**

Defendants seek to impose liability on the Township and to require that the Township undertake “corrective” action, based on their assertion that the 2011 and 2014 modifications to Post Road were performed in violation of the requirements of 32 Pa.C.S. Section 680.13, 25 Pa. Code Chapter 102, 25 Pa. Code Chapter 105, and the Stormwater Management Ordinance of Cogan House Township.<sup>4</sup> Each of these will be addressed seriatim.

#### **32 Pa.C.S. Section 680.13**

Section thirteen of the Stormwater Management Act provides as follows:

#### **§ 680.13. Duty of persons engaged in the development of land**

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:

(1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or

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<sup>4</sup> Defendants’ initial assertion, that the Township has a statutory duty to maintain the township roads, is not in dispute.

(2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

32 Pa.C.S. Section 680.13. This provision applies only where there has been an “alteration or development of land”. *See* Youst v. Pennsylvania Department of Transportation, 739 A.2d 625 (Pa. Commw. 1999)(Section 13 imposes duty to ensure that “development” does not increase the rate of storm water run-off or to manage the increased run-off in a manner that protects health and property.)

Here, the court finds that the construction activities undertaken in the 2011 and 2014 Post Road improvements do *not* constitute “alteration or development of land”. The original location of the road and accompanying ditches was maintained and existing pipes were replaced in their original locations. Therefore, Section 13 does not apply and the Township cannot be found liable for any alleged violation thereof.

#### 25 Pa. Code Chapter 102

Chapter 102 of Title 25 of the Pennsylvania Code was implemented under the Clean Streams Law and its provisions apply to those who engage in “earth disturbance activities”. 25 Pa. Code Section 102.2. “Earth disturbance activity” is defined as follows:

A construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

25 Pa. Code Section 102.1. Relevant here, “road maintenance activities” is defined as follows:

Road maintenance activities --

- (i) Earth disturbance activities within the existing road cross-section or railroad right-of-way including the following:
  - (A) Shaping or restabilizing unpaved roads.
  - (B) Shoulder grading.
  - (C) Slope stabilization.
  - (D) Cutting of existing cut slopes.
  - (E) Inlet and endwall cleaning.
  - (F) Reshaping and cleaning drainage ditches and swales.
  - (G) Pipe cleaning.
  - (H) Pipe replacement.
  - (I) Support activities incidental to resurfacing activities such as minor vertical adjustment to meet grade of resurfaced area.
  - (J) Ballast cleaning.
  - (K) Laying additional ballast.
  - (L) Replacing ballast, ties and rails.
  - (M) Other similar activities.
- (ii) The existing road cross-section consists of the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features.

Id.

In the instant case, the construction activities carried out by HRI to improve Post Road are clearly “road maintenance activities”. The full-depth reclamation may be characterized as “restabilizing unpaved roads” and the replacement of pipes and cleaning of drainage ditches is specifically mentioned. Defendants’ argument that the activities may not be characterized as “road maintenance activities” because “paving” was performed and “paving” is not

mentioned,<sup>5</sup> is without merit. The definition reads “earth disturbance activities ... including the following”, rather than “the following earth disturbance activities”, implying that the list is simply illustrative and not exclusive. Further, “paving” could involve merely overlaying additional blacktop (as was done in 2014) which does not “disturb the surface of the land”, and therefore not even be subject to Chapter 102 at all.

As “earth disturbance activities”, the Post Road improvements triggered the erosion and sediment control requirements of Section 102.4(b), which provides as follows:

(b) For earth disturbance activities other than agricultural plowing or tilling or animal heavy use areas, the following erosion and sediment control requirements apply:

(1) The implementation and maintenance of E&S BMPs are required to minimize the potential for accelerated erosion and sedimentation, including those activities which disturb less than 5,000 square feet (464.5 square meters).

(2) A person proposing earth disturbance activities shall develop and implement a written E&S Plan under this chapter if one or more of the following criteria apply:

(i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more.

(ii) The person proposing the earth disturbance activities is required to develop an E&S Plan under this chapter or under other Department regulations.

(iii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water under Chapter 93 (relating to water quality standards).

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<sup>5</sup> This argument is directed at the permit exemption for such activities, as explained *infra*.

25 Pa. Code Section 102.4. HRI did implement and maintain erosion and sediment control best management practices and therefore did comply with Sub-section 102.4(b)(1). They also (through Pennoni) performed a stormwater management analysis and, through utilization of Best Management Practices, implemented an erosion and sediment control plan, thus also complying with Sub-section 102.4(b)(2).

Defendants also contend that the projects required issuance of a National Pollutant Discharge Elimination System permit (which would have required submission of an erosion and sediment control plan) under Section 102.5, which provides in relevant part as follows:

**§ 102.5. Permit requirements**

(a) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity. In addition to other applicable requirements, persons required to obtain an Individual NPDES Permit for Stormwater Discharges Associated With Construction Activities for projects proposed in special protection watersheds shall evaluate and use BMPs in accordance with antidegradation requirements in §§ 102.4(b)(6) and 102.8(h) (relating to erosion and sediment control requirements; and PCSM requirements) regardless of whether the discharge is new, additional or increased.

(b) A person proposing a timber harvesting or road maintenance activity involving 25 acres (10 hectares) or more of earth disturbance shall obtain an E&S Permit under this chapter prior to commencing the earth disturbance activity.



25 Pa. Code Section 102.5. As the earth disturbance activity here involved more than one acre, sub-section (a) could apply to require the NPDES permit, but since that sub-section excludes “road maintenance activities” and the court has already determined that the projects here are properly classified as such, sub-section (b) applies instead. Under that sub-section, no permit was required since the activity involved less than 25 acres.

The court finds no violations of 25 Pa. Code Chapter 102.

#### 25 Pa. Code Chapter 105

Defendants contend the Township failed to comply with 25 Pa. Code Chapter 105 because they did not apply for a permit when they replaced the 33” pipe for the tributary of Bear Run near their driveway. Subchapter C of that Chapter “governs the construction, alteration, enlargement, repair, maintenance and removal of a bridge or culvert located in, along or across, or projecting into the regulated waters of this Commonwealth”, 25 Pa. Code Section 105.141, and requires that “[a] person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department.” 25 Pa. Code Section 105.11(a).<sup>6</sup>

While it may very well be that a permit should have been obtained for this culvert replacement,<sup>7</sup> Defendants have not provided credible evidence that the failure to obtain a permit resulted in any damage to their property. Their expert witness opined that the culvert is under-sized because it drained 123 acres prior to

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<sup>6</sup> A water obstruction is defined to include a culvert, and a culvert is defined as a “structure with appurtenant works which carries a stream under or through an embankment or fill” such as the pipe at issue. 25 Pa. Code Section 105.1.

the Post Road improvements and 144 acres thereafter, but his addition of the 20 acres north of the east-west section of Post Road is not supported by the evidence. There is a ditch along the north side of that section of road which drained that 20 acres to the same place before and after the 2011 and 2014 improvements (which improvements in fact did not include this section of Post Road).<sup>8</sup> Thus, the actual comparison is 123 acres to 124 acres, an increase of less than one percent. As was pointed out by the Township's expert, the difference in the hydraulic capacity of the 30" pipe and the 33" pipe which it replaced was "minor"<sup>9</sup> and the new pipe met the 25-year-storm design standards for rural roadways.

Defendants argue nevertheless that if the Township would have filed an application with DEP for the replacement of the 33" pipe along with their application for a permit for the 46" pipe (which carries Bear Run under Post Road), "DEP would have fully understood the significant extent of the 2011 Construction Activities" and "it is highly likely that DEP would have required Supervisors to fully comply with applicable law regarding storm water management for those Activities."<sup>10</sup> This argument is speculative at best, and as there is no evidence that applicable law (other than this particular permit requirement) was not complied with, cannot support a finding of liability against the Township.

### Stormwater Management Ordinance of Cogan House Township

The Township's Stormwater Management Ordinance requires preparation and implementation of an approved Storm Water Management Site Plan for all

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<sup>7</sup> In fact, the Township's expert witness so opined in his testimony. N.T., September 15, 2017 at p. 7-8.

<sup>8</sup> This section of Post Road did have millings placed on it in 2012, but was otherwise unchanged.

<sup>9</sup> Id. at p. 60.

regulated activities, which are defined as “[a]ny earth disturbances or any activities that involve the alteration or development of land in a manner that may affect stormwater runoff”.<sup>11</sup> As the court found in considering Section thirteen of the Stormwater Management Act, the 2011 and 2014 Post Road improvements do not constitute the alteration or development of land. The Township’s Ordinance is thus inapplicable and liability cannot be based thereon.

Accordingly, the Court draws the following:

### **CONCLUSIONS OF LAW**

1. The Township did not violate 32 Pa.C.S. Section 680.13.
2. The Township did not violate 25 Pa. Code Chapter 102.
3. The Township did violate 25 Pa. Code Chapter 105 by not applying for a permit for the pipe replacement in the tributary of Bear Run, but that violation did not cause any damage to the Defendants’ property.
4. The Township did not violate their Stormwater Management Ordinance.

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<sup>10</sup> See Defendants’ Trial Brief at p. 14.

<sup>11</sup> Stormwater Management Ordinance of Cogan House Township, Sections 301 and Article II (definitions).

**VERDICT**

AND NOW, this 12<sup>th</sup> day of October 2017, for the foregoing reasons, the Court finds in favor of Plaintiff and against Defendants on Defendants' counter-claim.

BY THE COURT,

Dudley N. Anderson, Judge

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