

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COGAN HOUSE TOWNSHIP,	:	No. 14-02035
Counterclaim Defendant	:	
	:	CIVIL ACTION – LAW
vs.	:	
	:	
DAVID and DIANNE LENHART (h/w),	:	
Counterclaim Plaintiffs	:	

**OPINION AND VERDICT**

AND NOW, this 10th day of May, following a twelve-day non-jury trial in this matter, the Court issues the following Opinion and Verdict.

***BACKGROUND***

The lengthy procedural history of this case is detailed extensively in numerous prior Orders of Court as well as the Commonwealth Court’s November 15, 2018 Opinion. This section will summarize those portions of that history relevant to this Opinion and Verdict.<sup>1</sup>

**A. Pleadings**

On August 7, 2014, CHT commenced this action by filing a Complaint. CHT alleged that David and Dianne Lenhart (the “Lenharts”), owners of property along Post Road in Cogan House Township, had interfered with “a series of drains, ditches and swales” that CHT had “cut, opened and maintained... to carry water

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<sup>1</sup> This section incorporates analysis previously discussed in this Court’s June 14, 2022 Opinion and Order.

away from Post Road.” CHT asserted that the Lenharts had placed “aggregate material” into the swales, diverting the path of water, and refused to remove that material despite CHT’s request that they do so. CHT’s Complaint contained one count to compel the Lenharts to remove the material and enjoin them from future interference with the drainage system, and one count seeking to recover “the cost of restoring the aforesaid” drainage system.

On August 18, 2014 the Lenharts filed an Answer, New Matter, and Counterclaim. In essence, the Answer acknowledged that the Lenharts had placed some materials in the area of the drainage system, but had only done so “to manage the increased flow of water runoff” that had entered their property as a result of CHT’s recent work on the Post Road drainage system. The Lenharts’ New Matter described the damage to their property caused by the increased runoff and explained that they had placed sediment to filter pollutants, which had begun to enter their property and caused environmental damage. The Lenharts’ Counterclaim asserted five counts: three describing specific manners of damage the Lenharts attributed to the Post Road work, one asserting trespass, and one asserting nuisance.

After substantial litigation, including multiple rounds of preliminary objections, the Lenharts filed their Fourth Amended Counterclaim (“FACC”) on July 27, 2016, which is the operative pleading in this case. The FACC contains six counts: Count I – Willful Misconduct or Gross Negligence; Count II – Negligence; Count III –

Negligence Per Se; Count IV – Nuisance; Count V – Trespass; and Count VI – Equitable Relief. The essence of the Lenharts' claim is that CHT performed the Post Road Modifications without proper preparation or care, causing damage to their property. The Lenharts seek money damages as well as injunctive relief requiring CHT to take affirmative steps to mitigate and remediate the damage.

**B. First Trial**

Per the agreement of the parties, the Court bifurcated the issues of liability and damages. The Honorable Dudley N. Anderson held a trial on liability on September 6, 7, and 8, 2017 (the "Previous Trial"). CHT chose not to prosecute the claims in its Complaint, and therefore the only issues before the Court in the Previous Trial were the claims the Lenharts raised in the FACC.

On October 12, 2017, Judge Anderson issued the Court's Opinion and Verdict, ultimately ruling against the Lenharts on each of their claims. Specifically, Judge Anderson made the following four conclusions of law:

"1. [CHT] did not violate [32 P.S. § 680.13].<sup>2</sup>

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<sup>2</sup> 32 P.S. § 680.13 is the provision of Pennsylvania's Storm Water Management Act [the "SWMA"] that defines the "[d]uty of persons engaged in the development of land," and states:

"Any... person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures... as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include... assur[ing] that the maximum rate of storm water runoff is no greater after development than prior to development activities; or... manag[ing] the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health

2. [CHT] did not violate 25 Pa. Code Chapter 102.<sup>3</sup>

3. [CHT] did violate 25 Pa. Code Chapter 105<sup>4</sup> 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. [CHT] did not violate their Stormwater Management Ordinance.<sup>5</sup>

The primary holding underlying the verdict was the Court's conclusion that the Post Road Modifications "do not constitute 'alteration or development of land,'" and thus were not subject to many of the duties and responsibilities forming the basis of the Lenharts' claims.

On October 23, 2017, the Lenharts filed post-trial motions, which the Court denied on December 1, 2017. The Lenharts filed a Notice of Appeal to the

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and property from possible injury."

<sup>3</sup> Title 25, Chapter 102 of the Pennsylvania Code ("Chapter 102") was enacted pursuant to the Clean Streams Law to implement "best management practices" to reduce erosion and sedimentation, manage stormwater, and maintain water quality during construction consisting of, *inter alia*, "earth disturbance activities" and "road maintenance activities." In broad terms, Chapter 102 requires the landowner performing construction to create and implement plans to reduce erosion and sedimentation, and to obtain certain permits from the Department of Environmental Protection (the "DEP").

<sup>4</sup> Title 25, Chapter 105, Subchapter C of the Pennsylvania Code ("Chapter 105") implements permitting requirements for construction done on bridges and culverts. The Post Road Modifications included the placement of a culvert, and thus fell under the scope of Chapter 105.

<sup>5</sup> CHT's Stormwater Management Ordinance "requires preparation and implementation of an approved Storm Water Management Site Plan for all 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.'" *October 12, 2017 Opinion and Verdict*.

Commonwealth Court on December 22, 2017, ultimately raising eight allegations of error.

### **C. Commonwealth Court Opinion**

On November 15, 2018, the Commonwealth Court reversed the trial verdict and remanded for further proceedings.<sup>6</sup> The Commonwealth Court perceived the Lenharts' eight alleged errors as essentially raising three distinct issues on appeal:

"(1) whether the trial court erred in ruling that [CHT] did not engage in alteration or development of land for purposes of the [Storm Water Management Act] and [CHT's Stormwater Management] Ordinance; (2) whether the trial court erred in determining that [CHT's] activities constituted road maintenance and not road construction or reconstruction for purposes of DEP's regulations; and (3) whether the trial court erred in failing to address [the Lenharts'] common law claims and request for equitable relief."<sup>7</sup>

The Commonwealth Court addressed each of these issues separately, and found error with respect to all three.

#### **1. Alteration or Development of Land and Storm Water Runoff**

The first issue the Commonwealth Court addressed was whether the Post Road Modifications constituted "alteration or development of land" sufficient to trigger various permitting requirements and other responsibilities under Pennsylvania law and CHT's ordinance.<sup>8</sup> The Commonwealth Court first noted that the Storm Water Management Act ("SWMA") does not define the phrase "alteration

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<sup>6</sup> At the time of remand, the Honorable Dudley N. Anderson had retired from the bench, and the undersigned assumed responsibility for the matter.

<sup>7</sup> *Cogan House Township v. Lenhart*, 197 A.3d 1264, 1267 (Pa. Cmwlth. 2018).

<sup>8</sup> *Id.* at 1267-71.

or development of land,” and explained that the common usage of the phrase “alteration or development” in this context covers any “substantial change of land that may affect drainage runoff characteristics....”<sup>9</sup> With this definition in mind, the Court addressed the trial court’s conclusion “that the work completed did not constitute alteration or development of land... [because] ‘[t]he original location of the road and accompanying ditches was maintained and existing pipes were replaced in their original locations.’”<sup>10</sup>

The Commonwealth Court first found that “no competent evidence [in the record] support[ed] the determination that the work performed was limited to the original location and graded area of the road, and some evidence [existed] to the contrary.”<sup>11</sup> Thus, the Court concluded, the trial court’s factual finding in this regard was erroneous.<sup>12</sup> Furthermore, the Court highlighted “the trial court’s own findings regarding the undisputedly invasive nature of the activities undertaken....”<sup>13</sup>

Emphasizing that SWMA liability does not depend on “whether, in hindsight, runoff was in fact affected, but whether the statutory duties were triggered by the potential of such effects,” the Court ultimately held that as a matter of law, the Post Road Modifications “constituted alteration or development of land that affected storm

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<sup>9</sup> *Id.* at 1268.

<sup>10</sup> *Id.* at 1269.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1270.

<sup>13</sup> *Id.*

water runoff characteristics.”<sup>14</sup> The Commonwealth Court “remand[ed] for further evidence as to the amount of damages, if any, which resulted from the Township’s failure to comply with the aforementioned law and ordinance provisions.”<sup>15</sup>

## **2. DEP’s Regulations**

Next, the Court addressed the trial court’s holdings that Chapter 102 did not apply to the Post Road Modification and that CHT’s violation of Chapter 105 was irrelevant to the Lenharts’ damages.

The Court first held that the Post Road Modifications were not “road maintenance,” as the trial court found, but “road construction or reconstruction,” which falls under the scope of Chapter 102.<sup>16</sup> Thus, CHT was required to obtain a National Pollutant Discharge Elimination System permit, pursuant to 25 Pa. Code § 102.5.<sup>17</sup> Additionally, CHT failed to submit a written erosion and sedimentation plan as required by 25 Pa. Code § 102.4(b)(2).<sup>18</sup> With regard to Chapter 102, the Court “remand[ed] for further evidence as to the amount of damages, if any, which resulted from [CHT’s] failure to comply with Chapter 102....”<sup>19</sup>

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<sup>14</sup> *Id.* at 1269, 71. The Court further explained: “In other words, the duty to follow the dictates of the statutory provision is neither negated nor cured by whether or not runoff, ultimately, was altered. Of course, the amount of such an effect may be relevant to the issue of damages, but this case has not reached that stage of the proceedings.”

<sup>15</sup> *Id.* at 1271.

<sup>16</sup> *Id.* at 1272.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1273-74.

<sup>19</sup> *Id.* at 1274.



Next, the Court considered the trial court's determination that "there was insufficient evidence to support a finding of damage" for CHT's failure to comply with Chapter 105, and thus "there could be no liability for failure to procure a permit."<sup>20</sup> Finding this conclusion erroneous, the Court noted that the trial court "failed to acknowledge the existence of... evidence of harm," and that "the trial was bifurcated as to damages so there was no reason [the Lenharts] should have submitted all of the relevant evidence of harm."<sup>21</sup> With regard to Chapter 105, the Court "(1) reverse[d] the trial court's determination that [CHT's] failure to comply with Chapter 105... was irrelevant because that violation did not cause any damage to [the Lenharts'] property; and (2) remand[ed] for additional evidence, where necessary, and pertinent findings of fact and conclusions of law as to any damages that [the Lenharts] may have sustained."<sup>22</sup>

### **3. Common Law Claims and Request for Equitable Relief**

The Commonwealth Court held that the trial court erred in not addressing the Lenharts' common law and equitable claims, explaining that "common law provides that an owner of land who constructs a drain depositing increased water flow onto a neighbor's land can be held liable for damage to the land that results therefrom."<sup>23</sup> The Commonwealth Court "remand[ed] for the trial court's consideration of [the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1274-75.

<sup>22</sup> *Id.* at 1275.

<sup>23</sup> *Id.* (citing *Glencannon Homes Ass'n, Inc. v. N. Strabane Twp.*, 116 A.3d 706, 720 (Pa. Cmwlth. 2015)).



Lenharts'] common law claims and request for equitable relief, which may include additional evidence and must include pertinent findings of fact and conclusions of law."<sup>24</sup>

#### **4. Summary of Issues Remanded**

To summarize the issues remaining on remand, the Commonwealth Court has directed this Court to:

1. Take further evidence as to the amount of damages, if any, arising from CHT's violation of the SWMA and CHT's stormwater ordinance;
2. Take further evidence as to the amount of damages, if any, arising from CHT's violation of Chapter 102;
3. Take further evidence if necessary and make findings of fact and conclusions of law as to any damages the Lenharts have sustained from CHT's violation of Chapter 105; and
4. Take further evidence if necessary and make findings of fact and conclusions of law regarding the Lenharts' common law claims and request for equitable relief.

#### **D. Pretrial Proceedings**

Following remand, the parties engaged in substantial motions practice, seeking on multiple occasions to extend motions deadlines to complete discovery on the remaining issues. Both parties' attorneys from the Previous Trial withdrew from representation, and new counsel entered their appearance for each party.<sup>25</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> The Lenharts experienced another change of lead trial counsel during the middle of the protracted second trial in this matter.

Between October 6, 2021 and December 10, 2021, the parties collectively filed nine motions, which the Court addressed in a 95-page Opinion and Order issued June 14, 2022.

On May 24, 2022, the Court issued a pretrial order scheduling trial and detailing Lycoming County nonjury trial procedure. Due to the parties' scheduling conflicts and the Court's schedule, the Court was forced to schedule the first five days of trial on non-consecutive dates between August 1, 2022 and September 12, 2022.

### ***NONJURY TRIAL***

Despite the parties' and Court's initial belief that trial could be completed within five full business days, matters proceeded slowly, and ultimately stretched across twelve full or nearly-full days of trial.<sup>26</sup> The record in this case is voluminous. In the remainder of this section, the Court will first summarize the issues before the Court as they stand on remand. The Court will next enumerate its findings of fact. The Court will then discuss relevant principles of law, before enumerating its conclusions of law.

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<sup>26</sup> The Court held trial on August 1, 2022; August 23, 2022; September 6, 2022; September 8, 2022; December 12, 2022; December 13, 2022; December 14, 2022; March 6, 2023; March 7, 2023; March 8, 2023; March 22, 2023; and March 23, 2023.

**A. Issues Before the Court**

**1. Common Law and Equitable Claims**

The Lenharts raise four common law claims against CHT. Count I of the FACC alleges willful misconduct or gross negligence, asserting that CHT's work on Post Road constituted willful misconduct, or at the very least reckless indifference to the Lenharts' rights. Count II, pled in the alternative to Count I, asserts that CHT was negligent in the performance of its work on Post Road, breaching a duty of care to the Lenharts and causing them significant damage by directing stormwater onto their property. Count IV asserts a claim of nuisance, contending that CHT's work on Post Road caused both a public and private nuisance on the Lenharts' property. Count V alleges that CHT's diversion of stormwater onto the Lenharts' property constitutes a common law trespass. Each of these common law claims contains a plea for monetary relief, attorney's fees, and costs.

Additionally, Count VI of the FACC sought equitable relief in the form of a permanent injunction "directing [CHT] to perform such remedial measure[s] as may be reasonably required to fully or partially remediate the damages to Defendants' real property," and any other relief the Court deems just.

On remand, the Commonwealth Court directed this Court to take additional evidence on these claims as needed, and to issue pertinent findings of fact and conclusions of law.

## **2. Negligence Per Se**

Count III of the Lenharts' Complaint alleged negligence per se attributable to the following statutory violations:

- Failure to comply with the Commonwealth of Pennsylvania's manual of Stormwater Best Management Practices, document number 363-0300-002.
- Failure to comply with Title 25, Chapters 92, 93, 102, 105 and 111 of the Pennsylvania Code.<sup>27</sup>
- Failure to comply with the Pennsylvania Clean Streams Law, the Pennsylvania Stormwater Act, and the Federal Clean Water Act.
- Failure to comply with the Cogan House Township Stormwater Management Ordinance.

The Commonwealth Court reached conclusions concerning several of these matters.

Regarding the Pennsylvania Stormwater Management Act ("SWMA"), the Commonwealth Court reversed this Court's determination "that [CHT's] activities did not constitute 'the alteration or development of land which may affect storm water runoff characteristics.'" The Commonwealth Court held that the work CHT performed on Post Road satisfied the definition of "alteration or development of land which may affect storm water runoff characteristics" as a matter of law, and remanded "for further evidence as to the amount of damages, if any, which resulted

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<sup>27</sup> In the remainder of this Opinion, the Court will refer to Title 25, Chapters 102 and 105 of the Pennsylvania Code as "Chapter 102" and "Chapter 105".

from [CHT's] failure to comply with the aforementioned law and ordinance provisions."

Concerning Chapter 102, implementing the Clean Streams Law, the Commonwealth Court reversed this Court's conclusion that CHT's work on Post Road constituted "road maintenance," holding instead as a matter of law that it constituted "road construction or reconstruction" as defined in Chapter 102. This triggered two separate obligations under Chapter 102, with which CHT failed to comply:

- Because the work on Post Road constituted road construction or reconstruction, it was thus an "earth disturbance activity" of sufficient size and therefore CHT was required to obtain an NPDES<sup>28</sup> permit prior to the commencement of work.
- For the same reason, CHT was required to implement and maintain "E&S BMPs,"<sup>29</sup> including developing a written E&S Plan.

Because CHT did not obtain an NPDES permit or file a written E&S Plan prior to the commencement of work, the Commonwealth Court remanded "for further evidence as to the amount of damages, if any, which resulted from [CHT's] failure to comply with Chapter 102 of DEP's Regulations."

Finally, regarding Chapter 105, regulating waterway management, this Court found at the Previous Trial that CHT failed to comply with Chapter 105 by "not applying for a permit when replacing the thirty-three inch pipe for the tributary of

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<sup>28</sup> National Pollutant Discharge Elimination System.

<sup>29</sup> Erosion and Sedimentation Best Management Practices.

Bear Run near [the Lenharts'] driveway," but held that the Lenharts had not presented evidence of any damage attributable to this violation. The Commonwealth Court found, however, that this Court was should not have addressed the issue of damages, in light of the Court's bifurcation of trial resulting in the Previous Trial addressing liability only. The Commonwealth Court remanded "for additional evidence, where necessary, and pertinent findings of law as to any damages that [the Lenharts] may have sustained."

### **3. Issues Before the Court**

The Commonwealth Court's November 15, 2018 Opinion is binding upon this Court. Thus, the Court may not disturb the Commonwealth Court's conclusions that CHT's work on Post Road violated the SWMA, Chapter 102, and Chapter 105 in the manner described above. Similarly, the Court may not undermine any findings of fact or conclusions of law necessary to those conclusions.

All other issues are before the Court. Regarding the common law claims, the Court must resolve them in their entirety. Regarding the Lenharts' request for a permanent injunction, the Court must determine the equitable relief to which the Lenharts are entitled. Regarding the SWMA, Chapter 102, and Chapter 105, the Commonwealth Court determined that CHT violated these provisions, but has remanded to this Court to determine in the first instance whether these violations caused the Lenharts any damage and, if so, to what extent.



## **B. Findings of Fact**

### **Post Road and the Lenharts' Property**

1. CHT is a second class township in Lycoming County, Pennsylvania.
2. Post Road is a road located within and owned by CHT. Post road originates at Pennsylvania Route 184 and runs in a north/south direction for just over one mile before curving to the east and continuing to run in an east/west direction. The east/west portion of Post Road is the "Dog Leg."
3. A private logging road called Frenchman's Ridge Road originates at the point where Post Road curves east and becomes the Dog Leg. Frenchman's Ridge Road runs north from Post Road for a short distance before following a winding path extending west/northwest from Post Road.
4. The Lenharts first purchased property adjacent to Post Road in 1996, and now own a number of parcels alongside the north/south portion of Post Road. Much of this land consists of forests and meadows, though one parcel along the west side of Post Road contains the Lenharts' residence. The Lenharts' residence originally had a gravel driveway that met Post Road at station 37+75.<sup>30</sup> The natural character of the area was a substantial factor in the Lenharts' purchase of the property.
5. The Lenharts' property contains two waterways: Bear Run and an unnamed tributary to Bear Run (the "Bear Run Tributary"). Pennsylvania has classified Bear Run and the Bear Run Tributary as "Exceptional Value" waterways. Bear Run flows southwest through the Ryder Farm (located northeast of the Lenharts' property, on the east side of Post Road), briefly entering the Lenharts' property before

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<sup>30</sup> At various points, this Opinion and Verdict will refer to a location along Post Road as "station AB+XY," where AB and XY are each two-digit numbers. Post Road officially originates at the median of Route 184; this is designated as station 00+00. All other station numbers refer to the location on Post Road that is A,BXY feet from that origin. For example, if a person began at the origin of Post Road and walked 4,260 feet up Post Road, that person would be at "station 42+60." The point where Post Road becomes the dogleg, which is also where Frenchman's Ridge originates, is located at approximately station 54+00.

crossing under Post Road at station 34+80 and proceeding west through the Lenharts' property. The Bear Run Tributary flows from the north of the Lenharts' Property on the west side of Post Road, at the area where Frenchman's Ridge Road meets Post Road, south through the Lenharts' property, crossing under Post Road at approximately station 37+75 before flowing into Bear Run a short distance thereafter.

6. The area north of the Dog Leg contains two houses amid substantial woodland. South of the Dog Leg, to the east of the north/south portion of Post Road, is the Ryder Farm. The Lenharts own the other adjacent land in the relevant area.

#### **Post Road Prior to 2011**

7. Prior to 2011, the majority of Post Road from station 00+00 to station 32+00 was tarred and chipped. The remainder of Post Road was surfaced with gravel. Both of these surfaces are largely impervious to rainwater.
8. Post Road consisted of a "cartway" (the area on which cars travel) that was typically 12 or 13 feet wide, with 2-foot gravel shoulders on each side. The cartway plus the shoulders constitutes the "roadway."

#### **2011 Post Road Project**

9. In 2010, CHT began communicating with numerous other parties about performing work on Post Road in order to better facilitate access for Range Resources and Anadarko, private companies that intended to drill for natural gas in areas accessible by Frenchman's Ridge Road. Significant alterations to Post Road were necessary to allow these companies to transport machinery and large vehicles to Frenchman's Ridge.
10. Anadarko hired Pennoni Associates, an engineering firm, to design the plan for the 2011 Post Road Project. Engineer Daniel Miller worked on the project for Pennoni.
11. In late 2010 and early 2011, CHT's Supervisors communicated with numerous parties about the planned work, including representatives of the gas companies, Representatives of Pennoni (including Miller), and HRI, the contractor that the gas companies hired to perform the work.

12. Pennoni was the primary designer of the Post Road Project Plans, and Daniel Miller supervised this design. CHT generally approved of most of Pennoni's plans without revision, though it made occasional suggestions and requests which were often incorporated into the final design. On one occasion, CHT offered materials for use in the project. CHT could have vetoed portions of the plan but chose not to.
13. A primary goal of the 2011 Post Road Project was to resurface the road from its origin to Frenchman's Ridge Road, a span of approximately 5,400 feet. The north/south portion of Post Road was resurfaced with full depth reclamation ("FDR"), a process by which existing road surface is dug up, mixed with cement, and re-laid. FDR was chosen over other methods in part because CHT questioned whether the other methods would be sufficient to support the anticipated increase in truck traffic.
14. A number of other alterations were made to Post Road, such as widening or clearing certain areas of the cartway and shoulders and other minor improvements to the road surface.
15. Significant to this action, the 2011 Post Road Project involved the replacement – and in one case the brand new placement – of culverts to transport water underneath Post Road.

#### **Culverts Placed or Replaced in the 2011 Post Road Project**

16. The 2011 Post Road Project involved the placement or replacement of numerous culverts. The pre-existing culverts had been placed decades before, and were each clogged with rocks and sediment to varying degrees, diminishing or preventing the flow of water through them
17. Prior to the 2011 Post Road Project, culverts crossed under Post Road at roughly stations 52+75 and 48+50. Water entered both of these culverts on the east side of Post Road, flowed southwest beneath Post Road, and exited the culvert on the west side of Post Road, continuing toward the Lenharts' property. The parties disputed the characteristics of these culverts: CHT maintains that they were 15" culverts with smooth steel interiors, whereas the Lenharts maintain that they were

12" inch culverts with corrugated materials.<sup>31</sup> The parties agree that during the 2011 Post Road Project, both of these old culverts were replaced with new 15" culverts made of high-density polyethylene ("HDPE"). HDPE is roughly as smooth as steel, and smoother than a corrugated material. These culverts were oriented in the same direction as the culverts they replaced.

18. Prior to the 2011 Post Road Project, a 15" culvert with a corrugated interior crossed under Post Road at roughly station 40+50. Water entered the culvert on the west side of Post Road, flowed southeast beneath Post Road, and exited the culvert on the east side of Post Road, continuing toward Bear Run. During the 2011 Post Road Project, this culvert was replaced with a new 15" HDPE culvert oriented in the same direction as the culvert it replaced.
19. The Lenharts' original driveway approaches Post Road from the west, meeting Post Road at approximately station 37+75. Prior to the 2011 Post Road Project, a steel culvert crossed under Post Road at roughly station 37+75 (the "Driveway Culvert"). The Bear Run Tributary entered the culvert on the west side of Post Road just north of the intersection between the Lenharts' original driveway and Post Road, flowed southeast beneath Post Road, and exited the culvert on the east side of Post Road, flowing a short distance before emptying into Bear Run. The Lenharts maintain that this culvert was 33" in diameter based on their personal measurement as well as notations in Pennoni's plans. CHT maintains that the prior culvert was 30" in diameter,<sup>32</sup> and that the reference to a 33" diameter in Pennoni's plans was simply an error based on a prior incorrect survey. During the 2011 Post Road Project, this culvert was replaced with a new 30" HDPE culvert running in the same direction as the culvert it replaced.
20. Prior to the 2011 Post Road Project, a bolted steel<sup>33</sup> culvert crossed under Post Road at roughly station 34+80 (the "Bear Run Culvert"). Bear Run entered this culvert on the east side of Post Road, flowed west beneath Post Road, and exited the culvert on the west side of

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<sup>31</sup> Smooth surface permit faster passage of water than corrugated surfaces.

<sup>32</sup> Daniel Miller testified that he personally measured the culvert as 30" in diameter prior to its replacement.

<sup>33</sup> Bolted steel is less smooth than regular steel.

Post Road. The Lenharts maintain that this culvert was 48" in diameter, whereas CHT maintains this culvert was 46" in diameter.<sup>34</sup>

21. The original plans for the 2011 Post Road Project did not include the replacement of the Bear Run Culvert. When the gas companies determined it should be replaced, Pennoni sought and obtained an emergency permit from DEP on the condition that CHT and Pennoni submit a full permit within approximately three months. After Pennoni obtained the emergency permit, it replaced the Bear Run Culvert with a new 48" HDPE culvert running in the same direction as the culvert it replaced.
22. Prior to the 2011 Post Road Project, a 24" steel culvert crossed under Post Road at roughly station 29+00. Water entered this culvert on the east side of Post Road, flowed under Post Road, and discharged on the west side of Post Road. During the 2011 Post Road Project, this culvert was replaced with a new 24" HDPE culvert running in the same direction as the culvert it replaced.
23. Prior to the 2011 Post Road Project, there was a small drainage pipe where a driveway known as the Kile Driveway meets Post Road from the east. There was no culvert at this location. During the planning stage of the project, CHT requested that HRI place a 24" HDPE culvert at station 25+75 to convey water from the east of Post Road discharging on the west of Post Road. HRI placed this culvert in accordance with CHT's wishes.
24. Prior to the 2011 Post Road Project, each culvert was either partially or entirely blocked, and thus permitted no or reduced flow of water. Thus, a significant portion of stormwater runoff followed paths that did not flow through culverts. Each culvert placed during the 2011 Post Road Project was a new, unclogged culvert made out of smooth material, through which water could flow largely unobstructed. Thus, those culverts with outlets on the Lenharts' property necessarily deposited more stormwater runoff onto their property after the 2011 Post Road Project than before.

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<sup>34</sup> The testimony suggested that a culvert of this size could compress slightly over time into a near-circular oval, causing the diameter along one axis to slightly decrease and the diameter along the other axis to slightly increase.



### **The Dog Leg**

25. An obvious swale runs east to west along the north edge of the Dog Leg, conveying water in that direction towards the intersection of Frenchman's Ridge Road and Post Road. That water travels through a culvert passing under Frenchman's Ridge Road and into the Bear Run Tributary on the Lenharts' property.
26. In 2012, CHT placed millings on the Dog Leg in order to strengthen it for vehicular traffic. This work was performed solely by CHT and was not part of the 2011 Post Road Project. The placement of these millings raised the height of the Dog Leg by four to six inches.

### **2014 Improvements to Post Road**

27. In 2014, Anadarko again hired Pennoni to design improvements to Post Road to address deterioration caused by truck traffic.
28. CHT again agreed to allow this work, which consisted of paving over gravel shoulders, increasing the width of the roadway. Following this work, the Cartway was 16 feet in width, with a four-foot paved shoulder on each side.<sup>35</sup>
29. The 2014 Improvements also placed a 1,000-foot-long "U-drain" in what was previously a rock-lined ditch, running along the eastern edge of Post Road between stations 54+00 and 44+00. Water flows from north to south in this U-drain, capturing water from the Ryder Field and terminating in the Lenharts' property.

### **Frenchman's Ridge Road**

30. In the years after the completion of the 2011 Post Road Project, private parties substantially widened Frenchman's Ridge Road and placed culverts beneath it. The Lenharts acknowledged that some stormwater runoff that reached their property originated in the area of Frenchman's Ridge Road and was thus not attributable to the work on Post Road.

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<sup>35</sup> This finding of fact underlies conclusions reached by the Commonwealth Court in its November 15, 2018 Opinion.



### **Changes to Lenharts' Property After 2011 Post Road Work and 2014 Improvements**

31. Following the commencement of work on the 2011 Post Road Project, the amount of stormwater runoff reaching certain areas of the Lenharts' property has increased. This has resulted in some pre-existing routes of stormwater runoff to change their paths, eroding sediment from the ground. Some of this sediment inevitably reaches the Bear Run Tributary and Bear Run. Additionally, certain areas of the Lenharts' property have become perpetually wet.
32. Prior to the 2011 Post Road Work, the volume of flowing water reaching the Driveway Culvert had never been so great as to flow over the surface of the Lenharts' original driveway (which is many feet higher than the channel leading to the Driveway Culvert). Since that time, the Lenharts' original driveway has experienced three "overtoppings" significant enough to prevent access by vehicle during storm events, as well as eight less significant overtoppings that did not prevent access by vehicle. The significant overtoppings eroded the Lenharts' original driveway, requiring substantial effort to make it traversable again.
33. The Lenharts constructed a new driveway in 2020. The Lenharts constructed this new driveway for multiple reasons, only one of which was to ameliorate the harm caused by the overtopping of their original driveway. The testimony of Lake Randall, the Lenharts' expert witness, established that the Lenharts could have resolved the erosion of their driveway from overtopping by paving or otherwise altering a portion of their original driveway for a substantially lower cost than the installation of their new driveway.

### **Increase in Stormwater Runoff to Lenharts' Property**

34. Miller testified credibly, explaining the nature of each culvert placed during the 2011 work and highlighting the ways in which the new culvert differed from the old one.
35. CHT's replacement of the culverts was essentially in-kind. The testimony established that the older culverts were placed at different times over a span of decades, sometimes using whatever material was at hand. The fact that the new culverts were constructed of new

material is insufficient to render them not in-kind, as it would be absurd to require a township to replace old culverts with culverts constructed with similarly old materials.

36. To the extent that there were any differences between the old culvert and the new culvert replacing it, such as in diameter and orientation, those differences were minor. Any substantial change in the flow of stormwater attributable to the 2011 Post Road Project was primarily caused by the fact that the culverts were no longer fully or partially clogged with sediment and debris after their replacement.
37. The replacement of the culverts essentially rehabilitated them from non-functional to their originally-intended state of functionality.
38. A significant amount of stormwater runoff reached the Lenharts' Property from:
  - a. Frenchman's Ridge Road and the surrounding area, which is not in CHT's control;
  - b. The Ryder Farm; and
  - c. The area above the Dog Leg.
39. The Lenharts contend that at some point in the past, stormwater originating north of the Dog Leg flowed over top of the Dog Leg and onto the Ryder Farm. The Lenharts point to certain features on historical aerial maps that they and their expert, Lake Randall, P.E., contend demonstrate such flow in the past. When the placement of the 2012 millings raised the height of the Dog Leg by four to six inches, the Lenharts contend, stormwater runoff could no longer flow over top of the Dog Leg and instead flowed west through the swale, under Frenchman's Ridge Road and into the Bear Run Tributary on the Lenharts' property. Additionally, the Lenharts contend that the maps show that a culvert used to direct water underneath the Dog Leg onto the Ryder Farm.
40. CHT contends that water has never flowed over the Dog Leg and onto the Ryder Farm. CHT's expert, Jerry Snyder, P.E., asserts that the aerial maps do not demonstrate the flow of water at any time in the past either over or under the Dog Leg. CHT presented lay witnesses

who provided their historical observations of the area surrounding the Dog Leg, as well as alternate explanations for certain features on the maps.

41. The evidence shows that water has never flowed over or under the Dog Leg, and has always traveled west along the swale to the point where Post Road curves and becomes the Dog Leg.
42. Randall's conclusion that CHT's 2012 work on the Dog Leg substantially increased the amount of water flowing onto the Lenharts' property via the Bear Run Tributary is not supported by the evidence.
43. The evidence is sufficient to establish that the 2011 Post Road Project and the 2014 Improvements increased the amount and rate of stormwater runoff reaching the Lenharts' property to some extent. The evidence does not establish with any specificity, or even with any useful degree of generality, what proportion of the increase in stormwater runoff flowing onto the Lenharts' property is attributable to the work on Post Road, and what proportion of it is attributable to the actions of private companies working on Frenchman's Ridge, the owners of the Ryder Farm, or natural conditions.
44. Two of the three storm events resulting in significant overtoppings of the Lenharts' driveway – Hurricane Lee on September 8, 2011 and the storm of late February 2016 – featured extreme amounts of precipitation that would have resulted in overtopping even if the Driveway Culvert had been much larger.
45. A significant amount of stormwater runoff reaching the Lenharts' property originates on the Ryder Farm. The Lenharts agreed that the owner of the Ryder Farm took actions in the 2010s to divert runoff from the farm onto the Lenharts' property.
46. The work on Post Road increased the impervious area of Post Road to the extent that it expanded Post Road's shoulders past their previous widths. The majority of the work performed within the roadway, however, was conducted on surfaces that were already impervious.

### **C. Conclusions of Law**

#### **Commonwealth Court Opinion – Law of the Case**

1. The 2011 Post Road Project and 2014 Improvements “constituted alteration or development of land that affected storm water runoff characteristics.” Thus, the SWMA required CHT to implement measures to “assure that the maximum rate of storm water runoff is no greater after development than prior to development activities” and “manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.”
2. The 2011 Post Road Project and 2014 Improvements constituted “earth disturbance activities” – specifically, “road maintenance activities” – and therefore was required under Chapter 102 to obtain an NPDES permit prior to commencing work on Post Road.
3. Similarly, CHT was required by Chapter 102 to submit a written E&S plan to the DEP.

#### **Counts I, II, and III: Willful Misconduct, Gross Negligence, Negligence, and Negligence Per Se**

In order to prove negligence, a plaintiff must demonstrate the following elements “(1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) a causal relationship between the breach and the resulting injury suffered by the plaintiff; and (4) actual loss suffered by the plaintiff.”<sup>36</sup> Gross negligence is behavior that goes beyond mere negligence in that it constitutes “an ‘extreme departure’ from the standard of care, beyond that required to establish ordinary negligence, and is the failure to

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<sup>36</sup> *Reeves v. Middletown Athletic Ass’n*, 866 A.2d 1115, 1126 (Pa. Super. 2004).

exercise even 'scant care.'"<sup>37</sup> Beyond gross negligence is willful misconduct, which requires a showing "that the actor was conscious of the risk of harm and... the risk was high either in degree or probability."<sup>38</sup>

Negligence per se is form of negligence consisting of "conduct, whether of an action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances."<sup>39</sup> A violation of a statute or ordinance may constitute such conduct, but only if the following elements are satisfied:

- "(1) The purpose of the statute [is], at least in part, to protect the interest of a group of individuals, as opposed to the public generally;
- (2) The statute or regulation must clearly apply to the conduct of the defendant;
- (3) The defendant must violate the statute or regulation; and
- (4) The violation of the statute or regulation must be the proximate cause of the plaintiff's injuries."

- 4. As found by the Commonwealth Court, CHT violated at least four applicable regulations:
  - a. It failed to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities, as required by the SWMA;
  - b. It failed to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise

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<sup>37</sup> *Feleccia v. Lackawanna College*, 215 A.3d 3, 20 (Pa. 2019).

<sup>38</sup> *Kuzel v. Krause*, 658 A.2d 859 n.6 (Pa. Cmwlth. 1995).

<sup>39</sup> *Schemberg v. Smicherko*, 85 A.3d 1071, 1074 (Pa. Super. 2014).

adequately protects health and property from possible injury, as required by the SWMA;

- c. It failed to obtain an NPDES permit prior to commencing work on Post Road, as required by Chapter 102; and
  - d. It failed to submit a written E&S plan to the DEP as required by Chapter 102.
- 5. These statutes are at least partially intended to protect a group of individuals smaller than the public at large, as they are each directed in some measure to the prevention of damage to real and personal property in the vicinity of engineering work. Furthermore, it is indisputable that CHT violated each of these regulations.
- 6. The Court concludes that prior to CHT's commencement of the 2011 Post Road Project and subsequent 2014 Improvements, it was not clear that these requirements applied to this work.
  - a. Daniel Miller testified credibly, and provided a detailed explanation of Pennoni's efforts to analyze and understand DEP regulations which led Pennoni to conclude that its work on Post Road did not implicate those regulations. These efforts included a review of the relevant regulations as well as communication with DEP and various other officials.
  - b. The Commonwealth Court concluded as a matter of law that CHT was in fact required to comply with these statutes, but this Court finds that their mistaken belief as to this requirement was reasonable.
- 7. Furthermore, the Lenharts have not established that the violation of these requirements was the proximate cause of their injuries.
  - a. Regarding the failure to obtain an NPDES permit and a failure to submit a written E&S plan, the evidence is insufficient to demonstrate that the work would not have been approved had CHT applied for the proper permits and submitted the required plan. The evidence presented is insufficient to remove that possibility from the merely speculative. To the contrary, substantial evidence at trial



suggested that the permit would have been granted and the work approved with no or little change.

b. Regarding the failure to address the maximum rate of stormwater and the quantity, velocity and direction of stormwater, the evidence established that the 2011 Post Road Project and 2014 Improvements caused an increase in the quantity and velocity of stormwater entering and traversing the Lenharts' property.

c. The evidence was insufficient to establish the extent to which any damage to the Lenharts' property was caused by stormwater attributable to the 2011 Post Road Project and 2014 Improvements, rather than improvements to Frenchman's Ridge, work performed on the Ryder Farm, or natural events.

d. The Lenharts failed to establish with specificity numerous claims of damages, as follows:

i. The Lenharts did not present sufficient evidence to establish the creation of wetlands on their property. The Court specifically found that the Lenharts' expert did not possess sufficient expertise to testify as to the creation or character of wetlands.

ii. Similarly, the Lenharts established that additional water was flowing through the Bear Run Tributary and Bear Run, bringing increased sediment into those waterways. The Lenharts have not established that this constituted a compensable harm to their property, such as by reducing the quality of these waterways.

e. The Lenharts established that prior to the 2011 Post Road Project their original driveway had not overtopped since it was constructed, but after 2011 it has overtopped 11 times. The testimony and evidence established, however, that at least some of the significant storms in that time frame would have deposited sufficient precipitation to cause overtoppings of the original driveway regardless of its specifications.

f. Furthermore, the Lenharts claim as damages the cost of constructing their new driveway. However, the Lenharts' own

testimony, as well as that of their expert, established that the Lenharts built their new driveway for multiple reasons, only one of which was to prevent overtopping. Additionally, the testimony and evidence clearly established that the Lenharts could have mitigated their damages by paving or otherwise altering a portion of their original driveway, ameliorating the harm caused by overtopping at a far lesser cost than the construction of their new driveway.

8. Regarding the Lenharts' negligence, gross negligence, and willful misconduct claims other than their negligence per se claims, the Court concludes that the Lenharts have failed:
  - a. To show that CHT owed them a duty beyond those statutory and regulatory duties already discussed;
  - b. To show the CHT committed an extreme departure from the standard of care or that CHT was conscious of the risk of substantial harm to the Lenharts yet proceeded; and
  - c. To establish the extent to which their injuries were attributable to CHT's work on Post Road as opposed to some other actor or cause.
9. Due to the Lenharts' failure to establish with any specificity the extent to which any harms they suffered were attributable to CHT, the Court cannot say that the work on Post Road is a proximate cause of any redressable harm.

#### **Counts IV and V: Nuisance and Trespass**

The Lenharts claim both a public and private nuisance. To establish a public nuisance, a plaintiff must demonstrate "an inconvenience or troublesome offense that annoys the whole community in general," affecting the "health, safety or morals"

of the community.<sup>40</sup> To establish a private nuisance, a plaintiff must show that the defendant's conduct:

"is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or  
(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."

A plaintiff may demonstrate a common law trespass by showing that the defendant "intentionally enter[ed] land in the possession of the [plaintiff], or cause[d] a thing or a third person to do so," without privilege to take such action.<sup>41</sup>

10. The work on Post Road did not cause harm or offend the entire community or public at large; therefore, the increased flow of water onto the Lenharts' property was not a public nuisance.
11. CHT's invasion of the Lenharts' property rights was intentional. CHT replaced old, blocked culverts with new, unobstructed culverts, positioning at least some of them so that water flowed from outside of the Lenharts' property, through the culvert, and onto the Lenharts' property. The positioning of the culverts and the obvious effect of their placement demonstrates an intent that they function accordingly.
12. CHT's depositing of water onto the Lenharts' land was not unreasonable. As discussed above, CHT reasonably, though mistakenly, believed that the work it was performing on Post Road did not fall under the ambit of the SWMA, Chapter 102, or Chapter 105. It was reasonable for CHT, observing that each of the culverts under a given township road were partially or completely blocked, to replace those culverts to restore them to their intended functionality.

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<sup>40</sup> *SPTR, Inc. v. City of Philadelphia*, 150 A.3d 160, 166-67 (Pa. Cmwlth. 2016).

<sup>41</sup> *Liberty Place Retail Associates, L.P. v. Israelite School of Universal Practical Knowledge*, 102 A.3d 501, 506 (Pa. Super. 2014).; *Kopka v. Bell Telephone Co. of Pa.*, 91 A.2d 232, 235 (Pa. 1952).

13. Therefore, the Lenharts have not demonstrated a private nuisance.
14. Regarding a claim of common law trespass, the Lenharts have shown that CHT caused water to enter their land, but have not demonstrated that CHT was without privilege to do so. Neither party has directly addressed whether the presence of blocked culverts at the time the Lenharts' purchased the various parcels comprising their property should have suggested to them that CHT may some day either remove or replace the culverts. As discussed above, the Court concludes that this was an eminently reasonable action for CHT to take in the course of maintaining its township roads.
15. Regardless of whether the Lenharts have satisfied the elements of common law nuisance or trespass claims, they have failed to establish the degree to which any nuisance or trespass *attributable to CHT* has caused them injury or damages with sufficient specificity to remove the matter from the realm of the purely speculative. The Lenharts have not satisfied their burden of providing the Court with a sufficient factual basis upon which to determine an appropriate award of damages, or whether CHT's actions are a proximate cause of those damages.

#### **Count VI: Permanent Injunction**

A party seeking the award of a permanent injunction “must establish [1] that his right to relief is clear, [2] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [3] that greater injury will result from refusing rather than granting the relief requested.”<sup>42</sup>

16. The Lenharts have not established that their right to relief is clear, as they have not established that CHT's actions are a proximate cause of their damages, or what those damages are with any certainty.
17. The Lenharts have failed to establish that CHT has caused them injury that cannot be compensated by damages.

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<sup>42</sup> *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560 (Pa. Cmwlth. 2022).

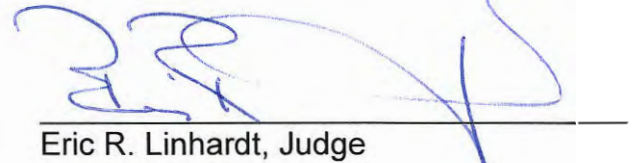
18. These conclusions are each independently sufficient to deny CHT's request for a permanent injunction.

### **CONCLUSION**

For the foregoing reasons, the Court finds in favor of Counterclaim Defendant Cogan House Township and against Counterclaim Plaintiffs David and Diane Lenhart on the matters tried before the Court. To the extent that CHT has failed to comply with the Commonwealth Court's requirement that they obtain an NPDES permit under Chapter 102, and submit a written E&S plan to DEP, they shall do so forthwith.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

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