COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



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| **FRIENDS OF HIGH POINT LAKE** | : | |
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| **v.** | : | **EHB Docket No. 2025-102-W** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee** | : | **Issued: October 30, 2025** |

**OPINION SUPPORTING ORDER**
**DENYING PETITION FOR SUPERSEDEAS**

**By MaryAnne Wesdock, Judge**

**Synopsis**

Although the Appellant has made a reasonable showing of irreparable harm, its Petition for Supersedeas must be denied where there is a credible risk of injury to the public if the supersedeas is granted.

**O P I N I O N**

**Introduction**

This matter involves a notice of appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Friends of High Point Lake (the Appellant) challenging an authorization to drain High Point Lake in Somerset County. The Appellant filed a Petition for Supersedeas and an Application for Temporary Supersedeas in connection with its appeal. By Order dated September 30, 2025, the Board granted the Application for Temporary Supersedeas until a hearing on the Petition for Supersedeas could be held. A hearing on the Petition for Supersedeas was held on October 8 and 9, 2025. Following the hearing, on October 10, 2025, the Board issued an Order

denying the Petition for Supersedeas and lifting the temporary supersedeas. This Opinion is issued in support of that Order.

**Background**

The Pennsylvania Fish and Boat Commission (the Commission) owns and operates High Point Lake Dam (the dam) in Somerset County pursuant to a permit issued in March 1963 by the Water and Power Resources Board, a predecessor of the Department of Environmental Protection (Department). (Appellant Ex. 3, p. 1-3.) The reservoir associated with the dam is known as High Point Lake. The Appellant is an association consisting of over 170 individuals who enjoy recreational activities and the scenic environment of High Point Lake, including boating, fishing, bird watching and wildlife appreciation. (Appellant's Statement of Facts in Support of Petition for Supersedeas, para. 1.) According to the notice of appeal, the Appellant was formed after members learned of the Commission's plans to drain High Point Lake in connection with a rehabilitation project proposed for the dam.

High Point Lake Dam is categorized as a high hazard dam. This means that due to its location and size, if there were a failure of the dam, it presents the highest risk for loss of human life and property. High Point Lake Dam was constructed in 1965. Dams are generally constructed with a service life of 50-100 years, with many dams in Pennsylvania exceeding 100 years. (Tr. 369, 645.)[1] However, as is the case with many dams over a certain age, High Point Lake Dam was constructed with materials or features that are no longer deemed acceptable for use in high hazard dams, such as corrugated metal pipes in the spillway and drainage system, and seepage collars within the principal spillway outlet. (Tr. 369.) Additionally, High Point Lake Dam is not in

[1] "Tr. __" refers to a page in the transcript of the supersedeas hearing.

compliance with current Dam Safety regulations because it does not have a device that allows for a two-foot drawdown of the reservoir within 24 hours. (Tr. 488.)

Due to these issues, the Commission has targeted High Point Lake Dam and a number of other Commission-owned dams in Pennsylvania for dam rehabilitation projects. The proposed rehabilitation of High Point Lake Dam includes the reconstruction of the auxiliary spillway, installation of a new drainage filter system and improvements to the principal spillway. (Tr. 488-89.) The Commission submitted an application to the Department for the dam rehabilitation project in February 2023. The Department has conducted a technical review and provided comments to the Commission but no permit has been issued. In order to prepare for the anticipated rehabilitation work, the Commission planned a complete drawdown of the reservoir, which was expected to begin Spring 2026. (Tr. 257.) In anticipation of the project, the Commission temporarily lifted fishing regulations in order to reduce the number of fish in the lake.

However, in August 2025, the Commission determined that a full drawdown of the lake should happen sooner than the targeted Spring 2026 date. The High Point Lake Dam is inspected by Commission personnel every three months. During a routine inspection in 2024, Commission engineers evaluated a known wet area in the grass to the right of the auxiliary spillway. According to the Commission, between the months of September 2024 and July 2025, the wet area increased in size by approximately 10 times. (Tr. 460.) Additionally, in July 2025, a deposit of aggregate, sand and fine material was observed below the auxiliary spillway drain. Due to these observations, the Commission initiated a one-foot drawdown of the reservoir on July 7, 2025 for evaluation of the spillway. A five-foot drawdown of the reservoir was initiated on July 16, 2025 for further evaluation.

After consultation with its professional dam design engineering consultant, Michael Baker International, who performed testing and calculations, the Commission made the decision to fully drain the lake. On August 11, 2025, Ruth Hocker, Senior Civil Engineer - Hydraulic with the Commission, submitted to the Commission an "Application to Draw Off Water from Impoundments" (drawdown application) requesting a full dewatering of High Point Lake.[2] Data from the drawdown application was transmitted to the Department's Division of Dam Safety for review. Two days later, on August 13, 2025, a Permit to Draw Off Water from Impoundments (the permit) was signed by Kirk Kreider, Chief of the Department's Division of Dam Safety. (Commission Ex. 9.) On August 19, 2025, the permit was signed by Commission Fisheries Biologist 3 Benjamin D. Lorson. (*Id*.)

The Appellant filed a notice of appeal with the Board on September 19, 2025, challenging the issuance of the permit, and on September 22, 2025, the Appellant filed a Petition for Supersedeas. A conference call was held on September 24, 2025 to discuss the scheduling of a supersedeas hearing and later that day, the Appellant filed an Application for Temporary Supersedeas. After receiving responses in opposition to the Application for Temporary Supersedeas from the Department and Commission on September 29, 2025, the Board granted the Application for Temporary Supersedeas on September 30, 2025, which was to remain in effect until October 10, 2025. The Department filed a Motion to Dismiss on September 25, 2025 and the Appellant filed a response in opposition on September 26, 2025. The Commission filed a concurrence to the Department's motion on September 29, 2025, and on October 6, 2025, the Board issued an Opinion denying the Motion to Dismiss. The hearing on the Petition for

[2] During a conference call held with the Board on September 24, 2025, counsel for the Commission explained that it is standard practice for an application for a permit such as the one at issue here to be submitted to the Commission by an employee of the Commission.

Supersedeas was held on October 8 and October 9, 2025. On October 10, 2025, the Board issued an Order denying the Petition for Supersedeas. This Opinion is issued in support of the Order denying the Petition for Supersedeas.

**Standard of Review**

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). A supersedeas, as defined by the Board's regulations, is a "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. The standard for obtaining a supersedeas is high. *Hopewell Township Board of Supervisors v. DEP*, 2011 EHB 732, 737. The petitioner bears the burden of demonstrating that a supersedeas should be granted. *Erie Coke Corp. v. DEP*, 2019 EHB 481, 484; *Center for Coalfield Justice v. DEP*, 2018 EHB 323, 327; *Tinicum Twp. v. DEP*, 2008 EHB 123, 126.

The grant or denial of a supersedeas is committed to the Board's discretion as guided by relevant judicial precedent and the Board's own precedent and the balancing of relevant criteria applied to the specific facts of the case. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a); *Lananger v. DEP*, EHB Docket No. 2024-016-B, slip op. at 4–5 (Opinion Supporting Order Denying Petition for Supersedeas issued Jan. 17, 2025) (citing *Erie Coke Corp.*, 2019 EHB at 484; *Center for Coalfield Justice v. DEP*, 2017 EHB 38, 43, *appeal dismissed*, 2017 Pa. Commw. Unpub. LEXIS 565, 174 A.3d 1204 (Pa. Cmwlth. Aug. 2, 2017)). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Delaware Riverkeeper Network v. DEP*, 2022 EHB 103, 110 (citing *Erie Coke Corp.*,

2019 EHB at 485); *Abercrombie v. DEP*, 2020 EHB 293, 295. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three factors and must be able to demonstrate that its chance of success on the merits is more than speculative. *Protect PT v. DEP*, 2024 EHB 154, 160 (citing *Teska v. DEP*, 2016 EHB 541, 544; *Global Eco-Logical Services., Inc. v. DEP*, 2000 EHB 829, 831).

Where a petitioner fails to satisfy any one of the supersedeas criteria, the Board is not obligated to consider the remaining criteria. *Liberty Township v. DEP*, 2023 EHB 170, 172; *Liberty Township v. DEP*, 2023 EHB 158, 160–62 (citing *Spencer v. DEP*, 2019 EHB 756, 760). In considering whether the criteria have been met we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals, Inc. v. DEP*, 2021 EHB 104, 106 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB, 41, 43). Importantly, "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2). *See also* 25 Pa. Code § 1021.63(b).

**Discussion**

In order for the Board to grant the Appellant's Petition for Supersedeas, the Appellant must make a credible showing that it will suffer irreparable harm if the supersedeas is not granted, that the Appellant is likely to win on the merits, and that there is no likelihood of harm to the public if the supersedeas is granted. *Lananger*, slip op. at 4 (citing *Delaware Riverkeeper Network*, 2022 EHB at 110; *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Association v. DEP*, 2011 EHB 689, 690-91). For the reasons set forth below, while we find that the Appellant has made a credible showing of irreparable harm if the supersedeas is not granted, it is outweighed by the potential risk to the public if the supersedeas is granted.

**Irreparable Harm – Loss of Aquatic Life and Wildlife**

"The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal." *Center for Coalfield Justice*, 2017 EHB at 55. For the reasons set forth below, we find that the Appellant has made a credible showing of irreparable harm with regard to the loss of aquatic life and wildlife.

The Appellant presented the testimony of Mr. Keith Hetrick, who lives approximately one-half mile from the south access to High Point Lake. He testified as a representative of Friends of High Point Lake and as a member of the community. At age 66, Mr. Hetrick has fished in the area of High Point Lake nearly his entire life, since he "was old enough to hold a pole." (Tr. 32.) He has held a Pennsylvania fishing license for over 50 years. High Point Lake is one of his two favorite spots to fish.

Mr. Hetrick discussed the impact that the full dewatering of High Point Lake will have on the members of the Friends of High Point Lake and those who live in the community surrounding the lake, as well as the impact that the current drawdown has already had. He described what the loss of the lake will mean to the community which has enjoyed its use for decades. In particular, Mr. Hetrick testified regarding the following concerns: loss of fish and mussels in the lake, loss of habitat for migratory birds, and the impact on fish in Glade Run.

While the Commission and the Department acknowledge a loss of aquatic life, wildlife and scenic resources, they argue that the harm is not irreparable because the fish, mussels, birds and use of the lake will return once the dam rehabilitation is completed and the lake is refilled. They also assert that active measures will be put into place to minimize siltation affecting downstream fish.

<u>Mussels</u>

Mr. Hetrick testified that paper pondshell mussels have been present in High Point Lake and Glade Run since the time when he fished those areas with his father as a child. He testified that they have become more abundant in the last few decades. Although the Commission has not done a survey to identify paper pondshell mussels in the lake, it does not dispute their presence. Mussels can serve to improve the water quality of the lake by removing algae, bacteria and sediment. According to exhibits provided by the Appellant and testimony by the Commission's Watershed Analysis Section Chief and Fisheries Biologist 3, Ben Lorson, paper pondshell mussels are not an endangered species but are considered to be imperiled in certain areas such as West Virginia.

It is the position of the Commission that, once the lake is restored following rehabilitation of the dam, the mussels will return to High Point Lake, just as they managed to find their way there in the first place. The Commission has no plans to restock the lake with mussels but asserts that the mussel community will easily re-propagate due to their hermaphroditic nature. (Tr. 527-28.)

Birds

Mr. Hetrick testified as to birds in the area of the lake. He has seen herons which he said are commonplace at High Point Lake, as well as bald eagles which he has seen many times. The Commission and Department did not disagree with the Appellant's position that multiple species of birds are present at High Point Lake.

Mr. Hetrick raised a concern that migratory birds will leave the area once the lake is dewatered. According to the Commission's Mr. Lorson, migratory birds stop in an area to rest and forage before moving on. It is Mr. Lorson's position that the migratory birds will simply seek another water body that is close by. In this case, all parties agree that the nearest water body is the Deer Valley YMCA Lake, located approximately one-half mile away. However, Mr. Lorson

acknowledged that the YMCA Lake is only one-third the size of High Point Lake. Another suitable waterway, in Mr. Lorson's opinion, is Yough Lake, which is five to six miles from High Point Lake at its closest point.[3]

As with the mussels, the Commission asserts that the loss of birds at the lake is temporary; it contends that migratory birds will return to the lake once the dam repairs are completed and the lake is refilled, just as they came to the lake initially when it was first constructed.

Fish

Mr. Hetrick testified as to the loss of fish that will occur if the lake is fully drained. According to Mr. Hetrick, High Point Lake has a robust fish population and is "about as good a fishery [as] you could ask for." (Tr. 33-34.) As a fisherman, he is affected by the loss of the fishery at the lake. He also testified that the loss is deeply felt by the surrounding community. He provided a moving story of a young boy in the neighborhood trying to save the fish as the lake was being drawn down. The Commission's Director of the Bureau of Engineering, Paul Urbanik, acknowledged that the draining of a lake can be very upsetting to a community.

The Appellant also presented the testimony of Larry Mayton, who routinely fishes High Point Lake, including several summers of bass fishing tournaments. Mr. Mayton lives approximately 1 ½ hours from High Point Lake but enjoys fishing there and ranks High Point Lake as one of his favorite lakes to fish. Due to its vegetative growth, he described it as follows: "You really don't think you're on a reservoir or a dam. You're almost on…a natural type lake." (Tr. 134.) Mr. Mayton got involved when he heard that High Point Lake was going to be drained and would be out of operation for several years.

[3] We understand Mr. Lorson's estimation of 5-6 miles from High Point Lake to Yough Lake to be "as the crow flies," based on testimony by the Commission's David Nihart that the driving distance from High Point Lake to the "Youghiogheny reservoir," is 13-15 miles. (Tr. 550.)

In response, the Commission provided testimony as to the active role it will play in saving many of the fish that are present in High Point Lake. Once the lake is drawn down sufficiently, the Commission will conduct a fish salvage whereby it will attempt to rescue fish in High Point Lake and transport them to a nearby compatible body of water. The Commission's Chief of the Division of Fishery Management, David Nihart, was recognized as an expert in fisheries management, and he provided extensive testimony as to the details of the fish salvage operation. First the Commission locates a suitable water body to which to transport the fish. The ideal water body is in close proximity and is appropriate for the type of fish to be transferred there. In this case the Commission has selected the Youghiogheny reservoir[4] which is approximately 13-15 miles from High Point Lake. (Tr. 550.) When High Point Lake is sufficiently drawn down, Commission staff will use one of two methods – either seining or electrofishing – to catch the fish for transport. Seining involves the use of a large net to corral the fish. Electrofishing involves the use of electricity to temporarily stun the fish and allow capture. According to Mr. Nihart, the use of electrofishing does not hurt the fish and they quickly return to their active state once removed from the electricity source. The seining and electrofishing are performed both in the lake itself as well as in the settling basin at the bottom of the spillway. The captured fish will then be transported within "5 to 6 full size hatchery trucks" to the Youghiogheny reservoir. (Tr. 550.) Mr. Nihart testified that he has been involved in a handful of fish salvage operations and all have been successful.

Mr. Nihart conceded that not all fish in High Point Lake will be rescued or transferred to a new location. He stated that the Commission will use this opportunity to weed out species of fish

[4] We understand this to be same body of water as "Yough Lake" which was referenced in Mr. Lorson's testimony.

that are considered to be "undesirable." For example, in the case of High Point Lake, the Commission considers the chain pickerel that are present in High Point Lake to be an undesirable invasive species. They will not be transported to the receiving water body, but, rather, will be allowed to perish. Additionally, not all "desirable" fish will be rescued during the salvage operation but, when pressed on the point, Mr. Nihart felt that a large number would be rescued.

It is the contention of the Commission that any loss of fish is not irreparable since the Commission will simply restock the lake when the dam repairs are completed and the lake is refilled. Mr. Nihart anticipates that the drawdown and eventual refilling and restocking of the lake will have a beneficial effect, something he called "new lake effect," due to new vegetative growth, as well as the restocking of the lake with appropriate species of fish. (Tr. 560-63.)

Furthermore, the Commission is concerned that leaving the lake at its current level provides more risk of harm to the fish. Mr. Nihart explained that the salvage cannot take place until the lake is nearly drained. It is Mr. Nihart's opinion that if the fish are left in place at the current drawdown level there is a likelihood they will not survive a winter freeze. This was also conceded by the Appellant's Mr. Hetrick. The Appellant asserts that it is not asking for the lake to stay at the drawdown level that was in effect during the temporary supersedeas but, rather, for the lake to be refilled. However, given our findings regarding the safety of the dam, which will be discussed later in this opinion, the Board is not inclined to order a refilling of the lake.

Conclusion Regarding Irreparable Harm – Loss of Aquatic Life and Wildlife

The Commission and the Department acknowledge that there will be some harm to the Appellant during the time in which High Point Lake is drained. However, as stated above, they do not believe the harm is irreparable. It is their position that once the dam is rehabilitated and the lake refilled, wildlife will return to the area of the lake, either naturally, as in the case of the mussels

and birds, or with the assistance of the Commission, as in the case of the fish. Additionally, once the lake is reopened, boating and other recreational activities may resume. It is the position of the Appellant, however, that there is no guarantee that the wildlife and aquatic life will return to the lake at the level at which it now exists and that any such restoration of wildlife to the area will not happen quickly but will be a long-term process, likely taking years. The Appellant points out that there is not even a permit in place to begin the rehabilitation work to the dam, nor any indication as to when that will occur. Additionally, the Appellant referenced other dam rehabilitation projects that resulted in problems such as downstream sedimentation or other issues delaying a full restoration of activities at the lake.

In considering the question of irreparable harm, we find this matter to be similar to that of *Center for Coalfield Justice v. DEP*, 2017 EHB 38 (*CCJ*), *appeal dismissed*, 2017 Pa. Commw. Unpub. LEXIS 565, 174 A.3d 1204 (Pa. Cmwlth. Aug. 2, 2017), in which the appellant sought a supersedeas to prevent mining under a stream located within a state park. In *CCJ,* as in this case, the Department and permittee did not dispute that harm to the stream would occur. Rather, they argued that any negative impacts to the stream would be temporary and could be addressed by the mining company through mitigation. They argued, as the Department and Commission do here, that any harm that occurs can be repaired and, therefore, it is not irreparable. The Board was not persuaded by the argument put forth by the Department and the permittee in *CCJ* because there was no guarantee that the stream could be fully repaired, and any such repairs would alter the stream from its original state. Pertinent to the matter here, the Board recognized the value of the stream as a source of public recreation:

> There is no question that the public use of Kent Run will, at a minimum, be impacted during any repair work on Kent Run. Longer term, if the repairs are not successful, the public use of Kent Run, along with its environmental value, will be harmed. In the context

> of a petition for supersedeas, such as this, we think that there is a strong argument that Kent Run may suffer actual irreparable harm and that such harm would affect [the appellants], their members and the general public.

*Id.* at 57.

Here, no one disputes that there will be a long-term impact on aquatic life, wildlife and the enjoyment of the lake by Appellant's members and the surrounding community while High Point Lake is drained. While we agree with the Commission that wildlife is likely to return to the area and activities such as fishing and boating may resume once the lake is refilled and restocked, there, of course, is no guarantee as to what that will look like or how long it will take. Moreover, although Commission witnesses discussed the return of wildlife and the restocking of the lake with fish once the dam rehabilitation project is complete and the lake is refilled, it is important to point out that there is no permit authorizing the dam rehabilitation at High Point Lake at this time. A permit application was submitted by the Commission in February 2023 and remains pending.[5] Without a permit, the dam cannot be rehabilitated; without the dam rehabilitation, the lake cannot be refilled. Although witnesses for both the Commission and Department were confident that a permit will be issued for the dam rehabilitation project, there is no estimate as to when this is likely to occur. Moreover, even if the permit is obtained, the Commission explained that the actual work to be done to the dam must go through a bidding process with a separate state agency. Until there is an actual permit in place for the rehabilitation of High Point Lake Dam which will then eventually allow the restoration of High Point Lake, we cannot say that the harm to the Appellant is reparable.

[5] During a conference call with the Board held on October 17, 2025, the Department and Commission advised the Board that a technical review is ongoing and the Department has provided comments to the Commission. The Department is awaiting a response from the Commission's consultant, Michael Baker International.

As such, we find that the Appellant has made a credible showing of irreparable harm resulting from the full drainage of High Point Lake.[6]

**Irreparable Harm – Sedimentation and Glade Run**

The Appellant also raised a concern about the draining of the lake causing issues with the brook trout population in Glade Run, the downstream receiving water. Mr. Hetrick testified that he has caught native brook trout in Glade Run as recently as June of 2025. While fishing in Glade Run in June 2025, Mr. Hetrick noted the presence of stocked trout in addition to the native trout. Mr. Hetrick testified that he is concerned that if the water level were to get too low in Glade Run, due to the dewatering of High Point Lake, the trout could become "landlocked" and unable to travel to deeper pools if needed.

According to the Commission's Mr. Nihart, while Glade Run is a native, or wild, brook trout stream, it has a very low-density population of wild brook trout. (Tr. 554.) He noted that the Commission does stock Glade Run with non-native trout as well. In Mr. Nihart's opinion, the presence of High Point Lake on Glade Run has a negative impact on the stream's ability to support a higher density brook trout population. Brook trout are a thermally intolerant species and require cool waters to survive. (Tr. 555.) The water that comes out of the dam and enters Glade Run is generally coming from the top of the reservoir's water column, and that surface water is warmer in temperature from exposure to sunlight. (Tr. 555.) As such, in Mr. Nihart's opinion, the presence of the dam on Glade Run causes a negative thermal impact with respect to the brook trout.

With respect to Mr. Hetrick's concerns over reduced flow and the water level becoming too low in Glade Run, it was noted that pursuant to Department regulations, the Commission is

[6] However, based on our findings on the other two elements of a supersedeas – i.e., likelihood of success on the merits and risk of harm to the public, we find that the Appellant's showing of irreparable harm cannot warrant the issuance of a supersedeas.

required to maintain a flow through the dam for the purpose of feeding Glade Run. (Tr. 83.) Specifically, the Commission is required to maintain a base flow, or the flow necessary to maintain biological and ecological integrity, in Glade Run. (Tr. 362.)

With respect to sedimentation or siltation, in Mr. Nihart's opinion, any impacts from the lake drawdown on the brook trout in Glade Run will be minimal. Mr. Nihart provided the following explanation: Brook trout start the spawning process in mid-to-late September, continuing into early November. (Tr. 556, 571.) As part of the spawning process, brook trout pair up and create a redd where they will lay their eggs. (Tr. 556.) Brook trout generally lay their eggs at the bottom of a ripple or run, as they require flowing water, and do not typically create redds in areas where sediment is expected to load, such as in deeper pools of water. (Tr. 556.)

Additionally, as the lake is being drawn down, the Commission will be working to implement sediment and erosion control measures, such as seeding exposed soil, to help eliminate the threat of harmful sedimentation or erosion. (Tr. 552–53.) Finally, sedimentation concerns are also mitigated by the settling basin that intercepts sediment coming out of the dam prior to entering Glade Run. (Tr. 556.)

Moreover, according to Mr. Nihart, even if there were to be impacts, he does not believe that repopulation or reintroduction of brook trout into Glade Run would take a very long period of time. Because Glade Run is a tributary to McClintock Run, which has other wild brook trout tributaries and thus a brook trout population, the proximity would assist in repopulating Glade Run. (Tr. 557.) Mr. Nihart noted that brook trout often occur in small headwater streams prone to drought or flooding events and as such, are a very resilient fish species. (Tr. 557.) We find Mr. Nihart's testimony to be persuasive. Accordingly, we do not find that the Appellant met its burden

of showing that the lake drawdown will cause irreparable harm to Glade Run or its associated brook trout population.

**Likelihood of Success on the Merits**

While the petitioner bears the burden of proof in a supersedeas hearing and thus must demonstrate a likelihood of success on the merits, a discussion of the Commission's investigation and the Department's review leading up to the issuance of the permit provides helpful background:

Construction of the Dam

High Point Lake Dam is approximately 300 acres in size. At normal pool the lake holds approximately 2.1 billion gallons of water and the depth is 34 feet where it is closest to the dam. (Tr. 368.) One of the various components of a dam is an auxiliary spillway, the purpose of which is to convey water during large storms up to and including the probable maximum precipitation event. The spillway is comprised of eight-inch-thick concrete slabs placed on top of drainage. There is a stone subbase beneath the slabs. The auxiliary spillway contains a 12 inch-HDPE[7] plastic pipe that serves to drain water coming under the spillway. (Tr. 367.)

From the ogee weir at the top of the spillway to the spillway drain it is gently sloping. Then, the slope becomes steeper. At the bottom of the spillway is a stilling basin; as water exits the spillway, it is given a chance to still and lower the velocity before entering the outlet channel. The stilling basin protects the receiving stream — by minimizing the velocity of the water, it minimizes the potential for erosion and scouring. (Tr. 365.)

There are two potential modes of failure for an auxiliary spillway such as the one at High Point Lake Dam: One such situation is where water pressure below the spillway creates a force that could cause uplifting and overturning of the concrete slabs of the spillway. (Tr. 365-66.) A

[7] High density polyethylene.

second failure mode would be the collapse of the spillway due to internal erosion, i.e., water entering beneath the spillway slabs and moving material such as stone and compacted soil out from below the slabs. (Tr. 366.) If the auxiliary spillway fails, any water that is held within the reservoir will exit the reservoir at once. (Tr. 366-67.)

The Commission's Investigation

Ruth Hocker is a Senior Civil Engineer – Hydraulic. She acts as the Commission's Dam Safety Program Manager. In this position she is responsible for the inspection, oversight, maintenance, rehabilitation and construction of the Commission's 33 high hazard dams across the Commonwealth. She is also responsible for developing and enacting emergency action plans. Ms. Hocker was recognized by the Board as an expert in high hazard dams and hydraulic engineering. She estimates the life of High Point Lake Dam as being closer to 50 years, rather than 100, in part due to the materials used to construct the dam. Specifically, the dam contains corrugated metal pipe which Ms. Hocker estimates as having a service life between 25-50 years (Tr. 369.) Corrugated metal is not approved for use in construction of high hazard dams today. (Tr. 370.)

The decision to drawdown High Point Lake was based on the following areas of concern observed by Commission personnel: an area of ground saturation near the dam designated as the "wet area," areas of pressurized water coming through the spillway slab, the presence of aggregate and fine material in the stilling basin below the areas of pressurized water, and the presence of a small void in the area below the spillway.

*The Wet Area:*

An area of ground saturation identified during the hearing as "the wet area" or "wet spot" is located near the dam. The wet area is approximately 25 to 30 feet from the auxiliary spillway. (Commission Ex. 1 and 2; Tr. 377.) In elevation it is approximately 10 to 15 feet below the

drainpipe in the center of the spillway. (Tr. 377.) The wet area is located in an area that was constructed of compacted fill at the same time as the dam construction in 1965. (Tr. 377.) The Commission has known about this wet area since at least 2020 and began to document it in annual inspection reports at that time. (Tr. 375.)

During an inspection in September 2024, Ms. Hocker and other Commission personnel noted the wet area felt "like you were walking on a waterbed" which she described as being "different from prior inspections." (Tr. 378.) During the September 2024 inspection, Commission personnel inserted a probing rod into the ground in the wet area. Based on Ms. Hocker's notes taken at the time of the inspection, the wet area measured 30 feet by 15 feet in size and the probe was able to reach depths of five inches to 12 inches. (Commission Ex. 3.) Following the September 2024 inspection, Ms. Hocker and her team continued to monitor the area. They noted that the surface area of the wet area was expanding and the probe depths, where probing could occur without resistance, were increasing. (Tr. 381.)

During an inspection on April 9, 2025, the wet area was measured as being 66.5 feet by 36 feet with a probe depth of 12 to 19 inches. (Tr. 381; Commission Ex. 3.) Additionally at that time, a small amount of clear water was observed flowing from the area as well as a minor plume of cloudy water in one of the standing puddles. (Tr. 381.) During an inspection on May 19, 2025, the area measured slightly larger at 80 feet by 38 feet; probe depths remained at 12 to 19 inches, and holes left by the probe quickly refilled with cloudy water. (Tr. 382; Commission Ex. 3.)

Ms. Hocker could not eliminate rainfall as impacting the wet area with 100% certainty and agreed it could be a limited factor. However, it is her opinion that the presence of the wet area, in conjunction with other factors discussed herein, is "indicative of a problem with the dam's normal operation." (Tr. 377.) Engineers with the Commission's consultant, Michael Baker International

(MBI), also determined the wet area to be an area of concern, but in an email dated August 4, 2025, admitted they did not know where the connection was between the lake and the wet area.

*Pressurized Water Exiting the Spillway & Presence of Aggregate Deposit in Stilling Basin:*

On July 3, 2025, Ms. Hocker and her team observed what appeared to be pressurized water exiting the steeper portion of the auxiliary spillway near the stilling basin. (Tr. 387-89; Commission Ex. 4 and 5.) The water appeared to be pumping out between two joints on the spillway. She felt that the spouting water was a concern because it might indicate that water was moving up through the concrete of the spillway from somewhere other than over the top, and spillways are designed to convey water over the top, not below them. (Tr. 388.) Also in July 2025, Ms. Hocker and her team observed what appeared to be a large aggregate deposit in the stilling basin below the auxiliary spillway. (Tr. 388.) The deposit consisted of a reddish colored stone that ranged in size from ¾ inch to two inches. (Tr. 397.) She stated that neither she nor her team had noticed a similar deposit on prior inspections. (Tr. 390, 397.) Its location led her to hypothesize that the stone came from beneath the upper spillway slabs through the spillway drain. (Tr. 397-98.)

Following these observations, Ms. Hocker requested a one foot-drawdown in order to allow an evaluation of the auxiliary spillway. Thereafter, in consultation with engineers from MBI, Ms. Hocker then requested a five foot-drawdown in order to assess conditions observed at and around the spillway. (Tr. 393–94.) After the five-foot drawdown, they observed no further expansion of the wet area and no further change in the depths of the probes. (Tr. 405.)

In July 2025, MBI performed a sounding technique on the spillway, which involved striking the concrete with a hammer and listening for differences in sound, to determine the

likelihood that voids were present. (Tr. 395–96.) According to Ms. Hocker, MBI's sounding technique indicated that voids were likely present. (Tr. 396.)

In early August, Ms. Hocker contacted MBI and asked that it perform hydraulic and hydrologic calculations to determine to what elevation the reservoir would need to be drawn down so as not to exceed the control elevation in the event of various large storm scenarios. (Tr. 400–01.) For three out of the six scenarios, the reservoir would exceed the control elevation and as such, MBI recommended that High Point Lake be drained to reduce the possibility of failure in either the embankment or the spillway. (Tr. 402–03; Commission Ex. 8.) Ms. Hocker testified that the full drawdown of the lake was requested due to what she believed to be the beginning of an active failure mode beneath the auxiliary spillway. (Tr. 405.) The Commission's Director of the Bureau of Engineering, Mr. Paul Urbanik, was kept apprised of Ms. Hocker's investigation and agreed with the decision to drawdown High Point Lake. The Department was also involved in the review of the Commission's findings and concurred with the drawdown of the lake.

Ms. Hocker acknowledged that, under normal circumstances, when the Commission is planning to do dam rehabilitation projects that require a full drawdown of a reservoir, the Commission does not request the drawdown until it has a Dam Safety permit from the Department in hand. Here, however, she believes the condition of the dam necessitated the drawdown at this time. (Tr. 407.) She submitted the application for the drawdown permit on August 11, 2025, and it was approved a few days later.

*The Void:*

Following the issuance of the permit, on August 21, 2025, a push camera was run into the drainpipe under the spillway. The video shows a deteriorated metal screen that had been affixed to the end of the pipe. The video also shows a void space under the spillway slab and drainpipe.

Although the void has not been measured, based on the video and photograph of it, Ms. Hocker estimates that it is approximately six inches in height and 12 inches in width. (Tr. 411; Commission Ex. 11.) From the video it is impossible to determine the depth. It is the position of the Commission that the void indicates an active failure of the auxiliary spillway and the potential for full failure of the dam. As noted above, sound testing performed by MBI indicates that other voids are likely present.

The Department's Review

The Department presented the testimony of Kirk Kreider, Chief of the Division of Dam Safety and senior civil engineer. He has held this position for 3 ½ years and has 25 years' experience working with dams. Mr. Kreider was recognized by the Board as an expert in the field of civil engineering, including the engineering aspects of dams and dam safety. Throughout his career he has been involved in the review of engineering plans for approximately 1,000 earthen dams and was the primary reviewer for approximately half of them.

The Department was involved in the review of the request to drawdown High Point Lake, and Mr. Kreider's signature, along with that of the Commission's Ben Lorson, appears on the drawdown permit. It is the opinion of Mr. Kreider that High Point Lake Dam is in an unsafe condition and the drawdown needs to continue.

Mr. Kreider provided a helpful description of the auxiliary spillway: The auxiliary spillway is built on an earthen foundation, i.e., dirt. There is a drain that runs under the spillway that is built of sand and stone aggregate. (Tr. 589.) Mr. Kreider described how the drain is critical to the function of the dam: He explained that earthen dams and earthen foundations seep. The point of the drain is to collect that seepage and have it safely collected in a controlled manner. (Tr. 593.)

He testified that the sand and the aggregate should remain in place for the proper and safe functioning of the dam.

It is Mr. Kreider's opinion that the pile of aggregate, sand and fine material observed in the stilling basin came from portions of the drain that are breaking away and loss of the spillway's foundation material. Based on Mr. Kreider's observation of the aggregate pile in the stilling basin, he estimates that the size of the void is at least the size of the aggregate pile or even larger since some of the finer material has likely washed downstream. It is also his opinion, based on his experience, that there are likely to be multiple voids in the spillway subsurface, not just the one observed with the camera. He testified that anytime aggregate material or fines are observed, that is "a very large red flag." (Tr. 598.) Mr. Kreider also provided testimony regarding the pressurized water seen shooting out of the spillway. He testified that it is caused by water building up in the area, likely due to portions of the drain breaking away.

Mr. Kreider also provided an assessment of the wet area. In particular he disagreed with the Appellant's assertion that the wet area is not on the dam embankment. Because the wet area is not located on natural ground but on a constructed berm that acts as a buttress to the main dam embankment, he considers it to be on the dam embankment. (Tr. 603.) Based on the location of the wet area, it is Mr. Kreider's opinion that it would be highly unlikely for it not to be hydraulically connected to the dam. However, even if the wet area were not hydraulically connected, in his opinion the loss of foundation material and drain material from underneath the spillway is enough reason for draining the dam. With the continuation of that process, he believes erosion will continue to occur. If that occurs, he testified that the spillway slabs will no longer be supported by the foundation and the slabs will collapse and fall into the growing void, resulting in dam

failure. Based on this analysis, Mr. Kreider stated that if the Commission had not voluntarily undertaken steps to drain High Point Lake, the Department would have insisted upon it. (Tr. 625.)

The Appellant's Petition for Supersedeas

The Appellant does not dispute that repairs need to be made to the dam but argues that the repairs can be done much more modestly and do not require a full drawdown of the lake. The Appellant contends that the "areas of concern" relied upon by the Commission and Department, i.e., the wet area, the void and the presence of aggregate and fine material in the stilling basin,[8] are not connected to an active failure of the dam and, therefore, the decision to drawdown the lake was arbitrary and capricious.

*Appellant's Argument: The Wet Area*

The Appellant presented the testimony of Mr. Larry Mayton and Mr. Ronald Musser with regard to the area near the dam that has been designated as "the wet area." Mr. Larry Mayton is a retired mining engineer and a frequent fisherman at High Point Lake. He conducted a visual inspection of High Point Lake Dam in July 2024. It is his testimony that on the day of his inspection the dam was full.[9] If seepage is occurring, he believes it would be more likely to occur when the dam is full, yet he saw no evidence of any seeps from the dam embankment or downstream of the dam embankment. He also did not see evidence of the wet area as described by Commission personnel. Mr. Mayton took photographs of the dam on the day of his visit, and they

[8] The Appellant did not address the pressurized water shooting out of the spillway because, as the Board understands it, that was not provided by the Commission as a primary reason for the drawdown of the lake prior to the testimony at the supersedeas hearing. However, as outlined in the section addressing the Department's Review, the pressurized water was a factor considered by the Department in its assessment of the safety of the dam. Additionally, the Board may consider this information pursuant to its *de novo* review authority. *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

[9] Based on Ms. Hocker's review of photographs taken by Mr. Mayton on the day of his visit, it appears that the dam was somewhat less than full.

show that the area was mowed and there were no ruts which one might observe if the area were wet. Mr. Mayton visited the dam again in August 2025 as part of a site visit with Commission personnel and other officials. This was around the time when the Commission announced it would be implementing a full drawdown of the lake. Mr. Mayton observed no seeps at that time.

Mr. Ronald Musser is a senior geologist and Vice President of Musser Engineering. The bulk of his work is in the field of hydrogeology. Musser Engineering was retained by the Appellant to look into the proposed rehabilitation of High Point Lake Dam. Mr. Ronald Musser is the co-author of two reports, along with Mr. Randall Musser, providing an assessment of High Point Lake Dam. It is the opinion of Mr. Ronald Musser that the wet area is not the result of seepage from the dam embankment. Mr. Musser relied, in part, on Google Earth photographs dating back to 2005 showing, in his opinion, that the wet area has existed since at least that time and that the size of the area fluctuates. It is the professional opinion of Mr. Musser that the wet area is caused by seasonal precipitation and water movement in the vadose zone and is unconnected to the dam itself. (Tr. 122-24.) According to Mr. Musser, the wet area lies in a valley bounded by two steep mountains on either side. Water moves down the mountains as surface runoff toward the wet area, and, in his opinion, water movement in the vadose zone would follow topography. (Tr. 124.) His opinion was further supported by rain data for the spring of 2025, which included heavy rainfall amounts. (Tr. 118.)

Mr. Musser was the only geologist to testify with regard to the wet area and, therefore, we assign a high degree of weight to his testimony regarding whether there is a likely hydrogeological connection between the dam and the wet area. Additionally, the Commission's consultant, MBI, was unable to establish where a connection existed between the dam and the wet area. However, the observations of Commission engineer Ruth Hocker and the analysis of Department Dam Safety

Division Chief Kirk Kreider present a strong argument that a connection may exist. As Mr. Kreider testified, based on his 25 years of experience in the field of dam safety, "when you have in this case a 34 foot wall of water being impounded just a hundred feet or whatever that distance is upstream, and you have wet areas, it is highly unlikely there is not some sort of connection." (Tr. 603-04.) There appears to be no definitive answer, and even Ms. Hocker and Mr. Kreider acknowledge that if the wet area were the only area of concern, it would likely not provide a basis for draining the lake. However, when viewed in conjunction with the other areas of concern, we agree with the Commission and the Department that the presence of the wet area provides added support for the decision to drawdown the lake.

*Appellant's Argument: The Void and Presence of Aggregate/Fine Material in Stilling Basin*

The Appellant asserts that the presence of aggregate and fine material in the stilling basin does not support the decision to fully drain the lake. It further argues that the presence of the void behind the area of the drainpipe, while indicative of repairs needed for the dam, does not provide a basis for draining the entire lake. In support of its position the Appellant presented the testimony of engineers Larry Mayton and Randall Musser.

Mr. Mayton is a retired mining engineer. He served as a mine superintendent and subsequently as an engineer with the Mine Safety and Health Administration. Mr. Mayton was recognized by the Board as an expert on dam impoundments and dam facility inspections. Mr. Mayton conducted a visual inspection of High Point Lake Dam in July 2024. At that time, he stated he observed aggregate material in the stilling basin, but it was difficult to see due to the murkiness of the water. In other testimony, it was pointed out that the stilling basin had not been drained since 2018. (Tr. 468.) It is the position of the Appellant that the aggregate material observed by Commission personnel in July 2025, and relied upon as a reason for draining the lake,

had been there all along but was not visible due to the murkiness of the water and was not evidence of the dam beginning to fail. However, it is Ms. Hocker's opinion that the material shown in Mr. Mayton's photographs of the stilling basin on the day of his site visit in July 2024 was biological material, such as algae, and not the aggregate material that her team observed in July 2025. While it is unclear what material Mr. Mayton may have observed in the stilling basin in July 2024, there appears to be no question that aggregate, sand and fine material was observed by Commission personnel in July 2025, and that such material appeared below the areas of pressurized water. Moreover, even if the material observed by Mr. Mayton in July 2024 were aggregate material, we do not believe this disproves the position of the Commission and the Department that parts of the spillway may be breaking away — it is possible that aggregate material has been breaking away from the spillway since as early as July 2024.

In addition to Mr. Mayton's testimony, the Appellant relied heavily on the testimony of Mr. Randall Musser, a Licensed Professional Engineer and founder of Musser Engineering. Musser Engineering was retained by the Appellant in the spring of 2024 after Appellant learned of proposed plans by the Commission to conduct a large-scale rehabilitation of High Point Lake Dam which involved draining the lake. During his long career, Mr. Musser has carried out inspections of impoundments associated with coal mines as well as dams regulated by the Department. Mr. Randall Musser is co-author of two reports, along with Ronald Musser, which provide an assessment of High Point Lake Dam following the Mussers' visual inspection of the dam and surrounding area in June 2024.

In his testimony, Mr. Musser addressed the void space found under the spillway during the video inspection. While Mr. Musser agrees that prompt remedial action should be taken to address the void, he does not agree that the first course of action should be to drain the lake; rather, he

suggested using a concrete saw to cut a portion of the spillway slab, approximately three feet by three feet, in order to assess the void. He suggested that one method of repairing the void would be with grout. (Tr. 259.) The Commission's Ms. Hocker and the Department's Mr. Kreider acknowledged that grouting may be a viable option for filling a void. (Tr. 434, 642.) Mr. Musser also recommended replacing the rusted metal cap to the drainpipe with a screen in order to prevent aggregate and other materials from traveling through the pipe. (Tr. 243-44.) He felt that this type of repair would be far less costly than the dam rehabilitation that has been proposed for High Point Lake Dam. In Mr. Musser's opinion, the discovery of a modest sized void in the spillway subsurface and what he considers to be a modest amount of gravel in the stilling basin does not warrant the sudden and full drawdown of High Point Lake. At a minimum, Mr. Musser believes that further investigation should be done before taking the drastic step of draining the lake. Indeed, the Appellant points to other dam rehabilitations, including one that involved the reconstruction of a spillway, which did not require the full drainage of the reservoir associated with the dam.

While Mr. Musser presented viable options for providing repairs to the dam, we are not convinced that the dam would remain in a safe state if it were allowed to remain full while the assessment and repairs were being conducted. The Commission and Department presented credible testimony that the dam may very well be in an active state of failure. In particular, Mr. Kreider's testimony regarding the pressurized water shooting through the spillway, the presence of aggregate material in the stilling basin below the areas of pressurized water, and the likelihood that more voids exist under the spillway was persuasive that the dam may present a safety risk if allowed to remain full.

**Risk to Public Safety**

The Appellant argues that there cannot be a risk to public safety because, at the time of the issuance of the permit to drawdown the lake, the Commission was still allowing fishing, boating, kayaking and other activities to continue on the lake. Thus, argues the Appellant, there cannot be an imminent risk to public safety if activities on the lake are still permitted. In response, both the Commission and Department presented testimony that the risk is to downstream populations due to flooding in the case of a major storm event. In particular, the Department and Commission presented what they referred to as an inundation map showing the likely path of downstream flooding and the areas that would be affected in the event of a dam failure. The Commission and Department estimate that downstream flooding could impact approximately 1,500 people living downstream of the dam and another 700 who work in that area.

While the Commission acknowledges that the risk of a major storm event of the size that could cause the dam to fail is low, it is not zero. (Tr. 372-73.) Any risk to the public prevents us from granting a supersedeas. Moreover, we are persuaded by the testimony of Mr. Kreider that the dam will only continue to erode as time goes on, and under such circumstances the risk will continue to increase.

**Conclusion**

While the Appellant has made a credible showing of irreparable harm to its members and the community resulting from the decision to dewater High Point Lake, ultimately the Board cannot grant a supersedeas where there is a risk to public safety. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b) (where injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect, the Board may not grant a supersedeas.) Here, the Commission and the Department are responsible for the integrity of High Point Lake Dam and the safety of those living and working downstream of the dam. We find that they have presented

compelling evidence that the decision to drawdown High Point Lake was a reasonable use of their discretion in order to avoid the risk of a dam failure in the event of a major storm event. While there is no question that the loss of the lake will have a deep impact on the Friends of High Point Lake and the surrounding community, we ultimately must find in favor of public safety. Therefore, the Petition for Supersedeas must be denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



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| **FRIENDS OF HIGH POINT LAKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2025-102-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Permittee** | : | |

**O R D E R**

AND NOW, this 30th day of October, 2025, this Opinion is hereby issued in support of our Order of October 10, 2025 denying the Petition for Supersedeas.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: October 30, 2025**

**c:** **DEP, General Law Division:**
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