

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M&M STONE CO.,)	
)	Civil Action
Plaintiff)	No. 07-CV-04784
)	
vs.)	
)	
COMMONWEALTH OF PENNSYLVANIA,)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION;)	
ROGER J. HORNBERGER,)	
Individually and in His)	
Official Capacity;)	
J. SCOTT ROBERTS,)	
Individually and in His)	
Official Capacity;)	
MICHAEL D. HILL,)	
Individually and in His)	
Official Capacity;)	
KEITH A. LASLOW,)	
Individually and in His)	
Official Capacity;)	
MARTIN SOKOLOW,)	
Individually and in His)	
Official Capacity;)	
TELFORD BOROUGH AUTHORITY;)	
MARK D. FOURNIER,)	
Individually and in His)	
Official Capacity;)	
SPOTTS STEVENS & McCOY, INC.;)	
RICHARD M. SCHLOESSER;)	
DELAWARE RIVER BASIN)	
COMMISSION; and)	
WILLIAM J. MUSZYNSKI,)	
Individually and in His)	
Official Capacity;)	
)	
Defendants)	

O R D E R

NOW, this 29th day of September, 2008, upon
consideration of the following documents:

- (1) DEP and DEP Defendants' Motion to Dismiss the Complaint, which motion was filed January 4, 2008 on behalf of defendants Commonwealth of

Pennsylvania, Department of Environmental Protection, Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow; together with:

Plaintiff's Response to the Motion to Dismiss of Defendants Pennsylvania Department of Environmental Protection, Roger Hornberger, J. Scott Roberts, Michael Hill, Keith Laslow and Martin Sokolow, Esq., which response was filed February 2, 2008;

- (2) Motion of Spotts Stevens & McCoy, Inc. and Richard Schloesser to Dismiss Plaintiff's Complaint, which motion was filed January 4, 2008; together with:

Plaintiff's Response to the Motion to Dismiss of Defendants Spotts Steven & McCoy and Richard Schloesser, which response was filed February 8, 2008;

- (3) Defendant Telford Borough Authority and Defendant Mark Fournier's Motion to Dismiss and Strike Plaintiff's Complaint and Motion for a More Definite Statement, which motion was filed January 7, 2008; together with:

Plaintiff's Response to Defendants Telford Borough Authority's and Mark D. Fournier's Motion to Dismiss, which response was filed February 8, 2008;

- (4) Defendants Delaware River Basin Commission and William J. Muszynski's Motion to Dismiss Plaintiff's Complaint or for a Stay, which motion was filed January 7, 2008; together with:

Plaintiff's Response to the Motion to Dismiss of Defendants Delaware River Basin Commission and William J. Muszynski, which response was filed February 8, 2008; and

- (5) Motion of Defendants for Leave to File a Supplemental Motion and Brief, as Well as for Leave to Exceed Page Limitations, in Further Support of Their Motions to Dismiss the Complaint, which motion was filed April 4, 2008 by all defendants and includes a proposed brief titled

Defendants' Joint Supplemental Motion to Dismiss
Plaintiff's Complaint; together with:

Plaintiff's Response to Defendants' Motion
for Leave to File a Supplemental Motion and
Brief, as Well as for Leave to Exceed Page
Limitation, in Further Support of Their
Motions to Dismiss, which response was filed
April 25, 2008;

and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that the Motion of Defendants for Leave
to File a Supplemental Motion and Brief, as Well as for Leave to
Exceed Page Limitations, in Further Support of Their Motions to
Dismiss the Complaint is denied¹ without prejudice for defendants
to re-assert the arguments advanced in their joint proposed brief
titled Defendants' Joint Supplemental Motion to Dismiss
Plaintiff's Complaint by appropriate subsequent motion in this
action.

¹ Rule 7.1(C) of the Rules of Civil Procedure of the United States
District Court for the Eastern District of Pennsylvania provide that "[t]he
court may require or permit further briefs if appropriate" in a civil action.
Thus, the decision to grant or deny supplemental briefs is reserved to the
sound discretion of the trial court. See McNiff v. Asset Management
Specialists, 337 F.Supp 685, 687 n.1 (E.D.Pa. 2004)(Gardner, J.).

Defendants submitted four briefs in support of their original
motions to dismiss, which collectively include approximately 115 pages of
argument. These motions were filed before the Commonwealth of Pennsylvania
Environmental Hearing Board issued its Adjudication of plaintiff's claims on
January 31, 2008. However, defendants had ample opportunity to raise
arguments in their briefs concerning the anticipated effect of the Board's
Adjudication, or alternatively, to request a brief extension until after the
Board's Adjudication to file their original motions to dismiss.

Accordingly, I decline to exercise my discretion and will not
consider defendants' supplemental bases for dismissal of the within action.
However, defendants will be provided an opportunity to raise any of the
arguments advanced in their proposed joint supplemental motion to dismiss by
subsequent motion practice in this case.

IT IS FURTHER ORDERED that defendants' motions to dismiss are granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's claim for commercial disparagement against all defendants is dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that all claims against defendant Commonwealth of Pennsylvania, Department of Environmental Protection are dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that all claims against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow in their official capacities are dismissed from plaintiff's complaint to the extent that they do not seek prospective injunctive relief.

IT IS FURTHER ORDERED that plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow, Martin Sokolow, Mark D. Fournier and William J. Muszynski² in their individual capacities are dismissed from plaintiff's complaint without prejudice for plaintiff to re-assert these federal claims in a more specific amended complaint.

IT IS FURTHER ORDERED that plaintiff's substantive due process, equal protection and procedural due process claims

² Plaintiff has not asserted a First Amendment retaliation claim against defendant Muszynski.

against defendants Spotts Stevens & McCoy, Inc. and Richard M. Schloesser are dismissed from plaintiff's complaint without prejudice for plaintiff to re-assert these claims in a more specific amended complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's substantive due process claim against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow in their official capacities, as well as defendants' motions to dismiss this claim against defendants Telford Borough Authority and Delaware River Basin Commission, are each denied.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's claims for equal protection, procedural due process and First Amendment retaliation against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow in their official capacities, as well as defendants' motions to dismiss these claims against defendants Telford Borough Authority and Delaware River Basin Commission, are each granted, and these claims are dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's negligence claim against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow, Martin Sokolow, Mark D. Fournier and William J. Muszynski

in their individual capacities, as well as defendants' motions to dismiss this claim against defendants Telford Borough Authority and Delaware River Basin Commission, are each denied subject to the subsequent determination of immunity under state law after plaintiff re-pleads its claims against defendants asserting state immunity with more specificity in an amended complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's negligence claim against defendants Spotts Stevens & McCoy, Inc. and Richard M. Schloesser are denied.

IT IS FURTHER ORDERED that plaintiff's claims for interference with contractual relations and civil conspiracy against all defendants are dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's claim for punitive damages with respect to plaintiff's substantive due process claim against all defendants are granted.

IT IS FURTHER ORDERED that plaintiff's claim for punitive damages with respect to plaintiff's substantive due process claim against defendants Telford Borough Authority and Delaware River Basin Commission, as well as defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow in their official capacities, is dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that plaintiff's claim for punitive damages with respect to plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against defendants Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow, Martin Sokolow, Mark D. Fournier and William J. Muszynski in their individual capacities, and against defendants Spotts Stevens & McCoy, Inc. and Richard M. Schloesser, are each dismissed from plaintiff's complaint without prejudice for plaintiff to re-assert claims for punitive damages with respect to these federal claims in a more specific amended complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's claim for punitive damages with respect to plaintiff's negligence claim under Pennsylvania law are granted.

IT IS FURTHER ORDERED that plaintiff's claim for punitive damages with respect to plaintiff's negligence claim under Pennsylvania law against all defendants is dismissed from plaintiff's complaint.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's claim for attorney's fees with respect to plaintiff's claims under Pennsylvania law are granted.

IT IS FURTHER ORDERED that plaintiff's direct claim for attorney's fees against all defendants is dismissed from

plaintiff's complaint insofar as such fees are incurred in connection with plaintiff's claims under Pennsylvania law.³

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's complaint are denied with respect to their request for federal abstention.

IT IS FURTHER ORDERED that plaintiff shall have until October 20, 2008 to file an amended complaint more specifically re-asserting the claims against defendants which have been dismissed without prejudice in this Order consistent with the accompanying Opinion.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 12(e), plaintiff shall include in its amended complaint a more definite statement of its claims against all defendants asserting an immunity defense under Pennsylvania law.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

³ Nothing contained herein shall preclude plaintiff from recovering attorney's fees for its state law claims under the applicable federal fee-shifting statute.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M&M STONE CO.,)	
)	Civil Action
Plaintiff)	No. 07-CV-04784
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vs.)	
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DEPARTMENT OF ENVIRONMENTAL)	
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)	
Defendants)	

* * *

APPEARANCES:

BRIAN RICHARD ELIAS, ESQUIRE and
TIMOTHY T. MYERS, ESQUIRE
On behalf of plaintiff

BARRY N. KRAMER, ESQUIRE and
MARTIN SOKOLOW, ESQUIRE
On behalf of defendants Commonwealth of
Pennsylvania, Department of Environmental
Protection, Roger J. Hornberger, J. Scott Roberts,
Michael D. Hill, Keith A. Laslow and Martin
Sokolow

ANDREW J. BELLWOAR, ESQUIRE and
MICHAEL G. CROTTY, ESQUIRE
On behalf of defendants Telford Borough Authority
and Mark D. Fournier

GEORGE T. BELL, ESQUIRE and
STACEY A. SCRIVANI, ESQUIRE
On behalf of defendants Spotts Stevens & McCoy,
Inc. and Richard M. Schloesser

KENNETH J. WARREN, ESQUIRE and
KELLY A. GABLE, ESQUIRE
On behalf of defendants Delaware River Basin
Commission and William J. Muszynski

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on four motions of
defendants, including motions to dismiss the complaint, strike

the complaint, for a more definite statement, and for a stay.⁴ For the reasons which follow, defendants' motions to dismiss the complaint are granted in part and denied in part. Defendants Telford Borough Authority and Mark Fournier's motion to strike the complaint is denied. Defendants Authority and Fournier's motion for a more definite statement is granted.

In addition, each defendants' motion for a stay is denied. Moreover, plaintiff is provided the opportunity to file

⁴ The four motions are:

- (1) DEP and DEP Defendants' Motion to Dismiss the Complaint, which motion was filed January 4, 2008 on behalf of defendants Commonwealth of Pennsylvania, Department of Environmental Protection; Roger J. Hornberger; J. Scott Roberts; Michael D. Hill; Keith A. Laslow; and Martin Sokolow;

(Footnote 1 continued):

(Continuation of footnote 1):

- (2) Motion of Spotts Stevens & McCoy, Inc. and Richard Schloesser to Dismiss Plaintiff's Complaint, which motion was filed January 4, 2008;
- (3) Defendant Telford Borough Authority and Defendant Mark Fournier's Motion to Dismiss and Strike Plaintiff's Complaint and Motion for a More Definite Statement, which motion was filed January 7, 2008; and
- (4) Defendants Delaware River Basin Commission and William J. Muszynski's Motion to Dismiss Plaintiff's Complaint or for a Stay, which motion was filed January 7, 2008.

All defendants filed a fifth motion on April 4, 2008 styled Motion of Defendants for Leave to File a Supplemental Motion and Brief, as Well as for Leave to Exceed Page Limitations, in Further Support of Their Motions to Dismiss the Complaint. For the reasons expressed in footnote 1 to the Order accompanying this Opinion, I denied the motion without prejudice for defendants to re-assert the arguments advanced in their joint proposed brief titled Defendants' Joint Supplemental Motion to Dismiss Plaintiff's Complaint by appropriate subsequent motion in this action.

an amended complaint re-asserting those claims which were dismissed without prejudice and is directed to include in its amended complaint a more definite statement of its claims against defendants asserting state immunities.

SUMMARY OF DECISION

Specifically, plaintiff's claim for commercial disparagement against all defendants is dismissed because the applicable one-year statute of limitations has lapsed. All claims against Defendant Commonwealth of Pennsylvania, Department of Environmental Protection are dismissed because the department has sovereign immunity. Plaintiff's claims against Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow in their official capacities are dismissed to the extent that they do not seek prospective injunctive relief. Plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against defendants Hornberger, Roberts, Hill, Laslow, Sokolow, Mark D. Fournier and William J. Muszynski⁵ in their individual capacities are dismissed without prejudice to re-assert these federal claims in a more specific amended complaint. In addition, plaintiff's substantive due process, equal protection and procedural due process claims against defendants Spotts Stevens & McCoy, Inc. and Richard M. Schloesser are also

⁵ Plaintiff has not asserted a First Amendment retaliation claim against defendant Muszynski.

dismissed without prejudice to re-assert these constitutional claims in a more specific amended complaint.

Plaintiff's claim for substantive due process is adequately pled. Defendants' motion to dismiss this claim is denied. This claim may proceed against defendants Hornberger, Roberts, Hill, Laslow and Sokolow in their official capacities, and against defendants Telford Borough Authority and Delaware River Basin Commission. However, plaintiff's claims for equal protection, procedural due process and First Amendment retaliation against these defendants are dismissed.

Pursuant to Federal Rule of Civil Procedure 12(e), plaintiff shall include in its amended complaint a more definite statement of its claims against all defendants asserting an immunity defense under Pennsylvania law.⁶ Subject to the subsequent determination of immunity under state law, plaintiff's negligence claim may proceed against defendants Hornberger, Roberts, Hill, Laslow, Sokolow, Fournier and Muszynski in their individual capacities, and defendants Telford Borough Authority and Delaware River Basin Commission.

⁶ Federal Rule of Civil Procedure 12(e) provides:

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Plaintiff's claim for negligence under Pennsylvania law is not barred by the economic loss doctrine. Therefore, plaintiff's negligence claim may proceed against defendants Spotts Stevens & McCoy, Inc. and Schloesser. However, plaintiff's claims for interference with contractual relations and civil conspiracy are dismissed against all defendants.

Plaintiff's claim for punitive damages with respect to its substantive due process claim against all defendants is dismissed from plaintiff's complaint. However, plaintiff's claim for punitive damages with respect to plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against defendants Hornberger, Roberts, Hill, Laslow, Sokolow, Fournier and Muszynski in their individual capacities, and against defendant Spotts Stevens & McCoy, Inc. and defendant Schloesser are dismissed from plaintiff's complaint without prejudice for plaintiff to re-assert claims for punitive damages with respect to these federal claims in a more specific amended complaint. Additionally, plaintiff's claim for punitive damages is dismissed with respect to plaintiff's negligence claim against all defendants under Pennsylvania law.

Plaintiff's direct claim for attorney's fees against all defendants is dismissed insofar as such fees are incurred in connection with plaintiff's claims under Pennsylvania law.

However, this decision does not affect plaintiff's right to recover attorney's fees for its state law claims under the

applicable federal fee-shifting statute.

Each defendants' motion for a stay of this litigation⁷ pending the outcome of parallel Pennsylvania state court litigation is treated as a duplicative request for abstention, and, for the following reasons, are denied.

There is no basis for this court to abstain from proceeding with this action. Although there is a pending state proceeding in the Commonwealth Court of Pennsylvania, this federal action seeks to protect the federal constitutional rights of plaintiff, which rights cannot be enforced in the parallel state proceeding. Moreover, this federal action does not implicate difficult questions of state law, nor will it interfere with state efforts to establish a coherent policy of mining and water usage rights.

JURISDICTION

Jurisdiction in this case is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court

⁷ In footnote 1, above, I enumerated the five motions filed by defendants which were considered and decided by me in the within Opinion and accompanying Order. Each of the 12 defendants are seeking a stay of the within federal litigation. In motion (1) defendants Pennsylvania Department of Environmental Protection, Hornberger, Roberts, Hill, Laslow and Sokolow (collectively "DEP defendants") moved, in the alternative, for a stay. In motion (3) defendants Telford Borough Authority and Mark D. Fournier (collectively "Authority defendants") moved for a stay. In motion (4) defendants Delaware River Basin Commission and William J. Muszynski (collectively "Commission defendants") moved, in the alternative, for a stay. In motion (2) defendants Spotts Stevens & McCoy, Inc. and Richard M. Schloesser (collectively "Spotts Stevens defendants") joined in and incorporated each of the motions filed by defendants Pennsylvania Department of Environmental Protection, Telford Borough Authority and Delaware River Basin Commission.

has supplemental jurisdiction over plaintiff's pendent state law claims. 28 U.S.C. § 1367(a).

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because the events giving rise to plaintiff's claims allegedly occurred in West Rockhill Township, Bucks County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

Plaintiff M&M Stone Co. commenced this action on November 14, 2007 by filing a Civil Action Complaint. The complaint seeks damages and injunctive relief against the Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP"), an agency of Pennsylvania; Telford Borough Authority ("Authority"), a Pennsylvania municipality; Spotts Stevens & McCoy, Inc. ("Spotts Stevens"), a private entity; Delaware River Basin Commission ("Commission"), a federal-interstate compact agency; and various individuals associated, respectively, with these public and private defendant entities.

Defendants in this action are grouped as follows: DEP, Roger J. Hornberger, J. Scott Roberts, Michael D. Hill, Keith A. Laslow and Martin Sokolow (collectively "DEP defendants"); the Authority and Mark D. Fournier (collectively "Authority defendants"); Spotts Stevens and Richard M. Schloesser

(collectively "Spotts Stevens defendants"); and the Commission and William J. Muszynski (collectively "Commission defendants").

Plaintiff's eight-count complaint alleges that defendants have deprived plaintiff of rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States as well as rights conferred by the law of Pennsylvania.

Plaintiff asserts eight individual claims.

The federal claims are for violations of substantive due process, equal protection, procedural due process and First Amendment retaliation. Plaintiff's pendent state claims are for negligence, intentional interference with contractual relations, commercial disparagement and civil conspiracy.

Each claim is asserted against all defendants with the exception of plaintiff's claim for First Amendment retaliation. That claim is not asserted against the Spotts Stevens defendants or the Commission defendants.

FACTS⁸

The complaint alleges that the Authority defendants conspired with DEP, Spotts Stevens and the Commission defendants to have plaintiff pay for damages caused by the Authority defendants to local water supplies, and to extort private funding from plaintiff for public projects, including a new arsenic-free water supply. Moreover, the complaint avers that defendants'

⁸ The facts presented here are based upon plaintiff's Civil Action Complaint filed November 14, 2007 and the docket entries in this case. As indicated in the Standard of Review section, below, for the purposes of a motion to dismiss, the court must accept as true all well-pled factual allegations in the complaint and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Accordingly, these facts are deemed true for the purpose of the within motions to dismiss only and do not constitute affirmative findings of fact by the court.

conspiracy included a scheme to blame plaintiff for local consumer well dewaterings which were in fact caused by the Authority defendants. The complaint alleges that defendants' scheme resulted in the retaliatory closure of plaintiff's Telford Quarry on November 15, 2005 after plaintiff refused to pay for a new public water well for defendant Authority.

Background

Plaintiff M&M Stone Co. owns and previously operated a quarry located in West Rockhill Township, Pennsylvania. This mining site was generally referred to as the Telford Quarry and operated for the production of construction and architectural stone.

Defendant Commission regulates groundwater withdrawals in the Delaware River's watershed or basin. Plaintiff's Telford Quarry and multiple quarry operations run by defendant Authority are located within the Delaware River's watershed. Defendant DEP regulates quarry operations and water quality in Pennsylvania. Defendant Authority supplies drinking water to Telford Borough residences and business and to various neighboring communities.

Well Dewaterings

Defendant Authority owns and operates two public wells, known as Telford Borough Authority Well No. 4 and Telford Borough Authority Well No. 5, within the vicinity of the Telford Quarry. After defendant Authority put Well No. 5 into service, each time the Authority would lower a pump into Well No. 4, neighboring private wells and water supplies would be immediately adversely affected.

Defendant Commission concluded that defendant Authority's wells adversely affected nearby domestic water supplies. Specifically, defendant Commission found that defendant Authority was responsible for certain adverse effects caused by the Authority's Well No. 4 and Well No. 5, and required defendant Authority to repair the damage caused. In addition, defendant Commission required the Authority to settle claims with private well owners who suffered damage caused by the Authority's operation of its wells.

Standards for Arsenic Levels

On June 22, 2000, the United States Environmental Protection Agency (EPA) proposed new arsenic level standards for water supplies. The EPA subsequently adopted new arsenic level standards on January 22, 2001, to become enforceable on January 22, 2006.

The Authority defendants became aware of the EPA's new proposed federal arsenic standards in June 2000. Thereafter, the authority defendants were aware that their public water supply exceeded the proposed standards for arsenic levels and that they would therefore have to obtain a new water supply source or build an arsenic treatment facility by January 2006.⁹ The anticipated costs for either of these projects would be millions of dollars.

By June 2002, all defendants knew that the arsenic levels in Well No. 4 exceeded the new EPA standards. Thus, all defendants were aware that defendant Authority would be required to cease its operations at Well No. 4 unless it built an arsenic treatment facility or drilled a new well at a separate location (for a new supply of water). Nevertheless, defendant DEP did not prevent defendant Authority from pumping water for public consumption until July 2006.

Defendant Telford Borough Authority's Scheme

In October 1999, plaintiff applied to deepen the Telford Quarry by 50 feet. Thereafter, beginning in 2002, the Authority defendants secretly schemed to extort private funding from plaintiff for their own public projects. The Authority defendants retained and conspired with the Spotts Stevens defendants to further their scheme by obstructing pumping tests and interfering with the rehabilitation of Well No. 4. The scheme between the Authority defendants and the Spotts Stevens

⁹ Plaintiff avers that it did not cause the presence of arsenic in Telford Borough Authority Well No. 4. Moreover, no defendant has ever alleged that plaintiff was the cause of the arsenic in the well.

defendants sought to have plaintiff provide the Authority with a new public water source as a condition for plaintiff's October 1999 application to lower its well by 50 feet.

As part of this scheme, defendant Authority became a major commentator upon plaintiff's October 1999 well-deepening application. Specifically, during defendant DEP's review of plaintiff's application, defendant Authority sought to obtain from DEP a requirement for plaintiff to replace Well No. 4 by either installing a new well (at plaintiff's expense) or by paying for defendant Authority's purchase of water from some other public water purveyor. Defendant Authority was ultimately unsuccessful in obtaining a new well paid for by plaintiff.

Plaintiff's 2002 Permit

The complaint avers that defendant DEP imposed onerous conditions in its February 22, 2002 permit issued to plaintiff to operate the Telford Quarry. These conditions required plaintiff to install, at its sole expense, a modern interconnection between defendant Authority's water supply system and a neighboring public water authority. Defendant DEP precluded plaintiff from appealing this permit, offering plaintiff the option of either closing its quarry or accepting the conditions imposed by DEP.

Pennsylvania Department of Environmental
Protection 2004 Investigation

In 2004, defendant Commonwealth of Pennsylvania, Department of Environmental Protection investigated the Telford Borough Authority defendants' allegations regarding impaired production at the Authority's Well No. 4 and concluded that plaintiff's Telford Quarry was having an impact upon local water supplies. Defendant DEP determined that plaintiff's quarry was causing neighboring private wells to lose water and was causing the Authority's Well No. 4 to lose productive capacity.

However, defendant DEP did not take any steps to ascertain the impact of defendant Authority's wells upon its neighbors or upon its own water supply. Moreover, the DEP defendants, including defendant Hornberger, knew that plaintiff's Telford Quarry was too remote from the affected area to cause the alleged water losses at private wells and the alleged production deficiencies in Well No. 4. Nevertheless, defendant DEP's investigation focused exclusively on plaintiff's activities at the Telford Quarry and ignored the effect of the Authority's Well No. 4 and Well No. 5.

Defendant DEP's 2004 investigation of plaintiff's Telford Quarry contained a number of irregularities. During the investigation, two employees of defendant DEP responsible for the investigation, defendants Hornberger and Laslow, began seeking

future employment with a competitor of plaintiff after they reached their respective retirements in 2006 and 2007.

Additionally, defendant Hornberger assigned the statistical review of the monitoring well data to a geologist, defendant Hill, who had virtually no training or competency to conduct such a review. Moreover, defendant Hill's work was reviewed by defendant Laslow, an individual who also lacked the relevant supervisory competencies and was selected by defendant Hornberger. Defendant DEP also failed to report their investigation to defendant Delaware River Basin Commission.

Plaintiff's Requests for Investigation

In October 2004, plaintiff requested the Delaware River Basin Commission defendants to investigate defendant Telford Borough Authority. However, despite their knowledge that the Authority's Well No. 4 and Well No. 5 had been and were adversely affecting private wells, the Commission defendants refused to review the conduct of defendant Authority, which was the Commission's permittee. The Commission defendants had no technical basis to reject plaintiff's request.

On July 26, 2005, the Authority defendants lowered the pump in Well No. 4 by an additional 46 feet. Two days later, the neighboring private wells ran dry. However, defendant DEP blamed plaintiff's Telford Quarry for all private well dewaterings and

blamed plaintiff's quarry for an impaired water supply in Well No. 4.

Plaintiff avers that the true cause of the impairment to the Authority's Well No. 4 was the internal decline of defendant Authority's well caused by elevated hard mineral levels and other conditions which contributed to high arsenic levels. Plaintiff also maintains that the high presence of minerals in the Authority's Well No. 4 was, and is also, a contributing cause to the fouling of the pump in Well No. 4 and the fouling of the well itself.

Subsequently, plaintiff requested to engage in discussions concerning the water losses sustained in the vicinity of the Telford Quarry with the DEP defendants, defendant Commission and other independent geologic investigators. Plaintiff also sought senior level review and peer review of defendant DEP's technical analysis. All of plaintiff's requests were declined.

In addition, plaintiff attempted to demonstrate to defendant DEP that it was not responsible for the impairments to Well No. 4 and neighboring wells by offering to undertake a chemical and physical cleaning of the Authority's Well No. 4 at plaintiff's own expense. However, this request was rejected by defendant DEP because it would have purportedly established that defendant Authority was the true source of the dewaterings.

On November 2, 2005, defendant DEP, acting through defendant Roberts, stated to plaintiff that "If your dispute, as

I believe it is, is over interpretation of the data then I urge you to replace the wells in question (your liability policy should cover the replacement)." During this same conversation defendant Roberts admitted that it was his custom, policy and practice and the custom, policy and practice of defendant DEP to "err on the side of the [public] supply owner."

Defendant Roberts further admitted that the DEP defendants would not reconsider or further evaluate any investigation if they were to deem that "the public is being disadvantaged by any delay this causes." Thus, defendant DEP refused to reconsider the merits of its investigation and directed plaintiff to submit its matter over to its insurance company to privately fund the installation of a new water source for defendant Authority and its neighbors. Plaintiff has refused to comply with DEP defendants' demand.

License Suspension

After plaintiff refused to pay for a new public water supply for defendant Authority, on November 15, 2005, the DEP defendants suspended plaintiff's mining license and ordered plaintiff to cease operations at the Telford Quarry. However, defendant DEP had no reasonable scientific basis to hold

plaintiff responsible for diminishing pumping capacity in Well No. 4.

Between November 15, 2005 and March 9, 2006, defendant DEP issued three administrative orders related to the closure of the Telford Quarry.¹⁰ Subsequently, on March 21, 2006, defendant DEP stated to plaintiff that plaintiff was required to install new wells and accommodate defendant Authority as a "cost of doing business" like the "rest of the mining companies."¹¹

State Court Proceedings

On December 13, 2005, after plaintiff's Telford Quarry operating license was suspended, plaintiff appealed the first administrative order issued November 15, 2005 by defendant DEP to the Commonwealth of Pennsylvania Environmental Hearing Board. Defendant DEP's March 9, 2006 orders were subsequently incorporated into this appeal. The Environmental Hearing Board issued its Adjudication of plaintiff's appeal on January 31, 2008. Plaintiff has appealed the Environmental Hearing Board's adjudication to the Commonwealth Court of Pennsylvania.

¹⁰ The Pennsylvania Department of Environmental Protection allegedly shut down the Telford Quarry in retaliation for plaintiff's refusal to be a continuing source of private funding for the Authority defendants' public projects, responsibilities and liabilities.

¹¹ The complaint alleges, upon information and belief, that prior to November 2, 2005, the DEP defendants extorted private funding from certain other quarry operations, mining operations and other businesses similar to plaintiff to pay for public projects as a cost of doing business.

Plaintiff's Harm

Plaintiff alleges that the foregoing conduct of all defendants has deprived plaintiff of its property, business and right to mine by: (1) causing the closure of the Telford Quarry without any rational basis; (2) causing the rejection of plaintiff's deepening permit, and impairing prior, existing and future mining permits and applications without a rational basis; and (3) obstructing plaintiff's ability to conduct testing or rehabilitation of the Authority's Well No. 4 which would have restored Well No. 4's productive capacity and both satisfied the order issued to plaintiff and established that plaintiff was not the cause of the impaired production in Well No. 4.

STANDARD OF REVIEW¹²

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Ordinarily, a court's review of a motion to dismiss is limited to the contents of the complaint, including any attached

¹² The majority of defendants' arguments seek dismissal of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). However, defendants have also moved to dismiss certain named defendants pursuant to Rule 12(b)(1) and certain claims pursuant to Rule 12(f). Where a standard of review is applicable to the argument being considered in the discussion below, the applicable alternative standard of review is noted and explained.

exhibits. See Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1380 n.1 and n.2 (3d Cir. 1995).

Except as provided in Federal Rule of Civil Procedure 9, a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Twombly, ___ U.S. at ___, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions" when deciding a motion to dismiss. In re Burlington Coat Factory

Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the district court and the court of appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 945 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984)(emphasis in original); Maspel v. State Farm Mutual Auto Insurance Company, 2007 WL 2030272, at *1 (3d Cir. July 16, 2007).

DISCUSSION

In its eight-count complaint, plaintiff alleges that defendants have deprived it of rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States as well as rights conferred under the law of Pennsylvania. Plaintiff's constitutional claims, actionable through 42 U.S.C. § 1983, include substantive due process, equal protection, procedural due process and First Amendment retaliation. Plaintiff's complaint also asserts violations of state law, including negligence, intentional interference with contractual relations, commercial disparagement and civil conspiracy.

Each group of defendants in this action has incorporated the arguments of its co-defendants in its motion to

dismiss. Thus, unless otherwise specified, the positions and arguments discussed below are on behalf of all defendants.

Statute of Limitations

The United States Court of Appeals for the Third Circuit permits a defendant to assert a statute of limitations defense in a Rule 12(b)(6) motion if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations. Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002). All defendants have asserted that plaintiff's claims are barred by the applicable statutes of limitations. Thus, I consider the statute of limitations defense with respect to each of plaintiff's claims below.

Section 1983 does not include a relevant statute of limitations. 42 U.S.C. § 1983. To ascertain the applicable statute of limitations for section 1983 claims, courts rely on 42 U.S.C. § 1988, which requires the court to apply the statute of limitations for the state where it sits unless applying the state's statute of limitations would conflict with the United States Constitution or with federal law. See 42 U.S.C. § 1988; see also Lake v. Arnold, 232 F.3d 360, 368 (3d Cir. 2000).

For a civil rights action under § 1983, the United States Supreme Court has stated that courts should apply the state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 276-279, 105 S.Ct. 1938,

1947-1949, 85 L.Ed.2d 254, 267-269 (1985). Pennsylvania's statute of limitations period for personal injury actions is two years. 42 Pa.C.S.A. § 5524(7). Therefore, a two-year statute of limitations is applicable to plaintiff's constitutional claims for substantive due process, equal protection, procedural due process and First Amendment retaliation.

Plaintiff's state-law claims for negligence, intentional interference with contractual relations and civil conspiracy are governed by a two-year statute of limitations. 42 Pa.C.S.A. § 5524. However, plaintiff's state-law claim for commercial disparagement is governed by a one-year statute of limitations. Pro Golf Manufacturing, Inc. v. Tribune Newspaper Company, 570 Pa. 242, 246, 809 A.2d 243, 246 (2002).

Under federal law, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury. Gibson v. Superintendent of New Jersey Department of Law and Public Safety, 411 F.3d 427, 435 (3d Cir. 2005); see also Oshiver, 38 F.3d at 1386. Similarly, under Pennsylvania law, plaintiff's claims accrue "as soon as the right to institute and maintain suits arises...." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). In Moyer v. United Dominion Industries, Inc., 547 F.3d 532, 547 (3d Cir. 2007), the United States Court of Appeals for the Third Circuit stated that "[g]enerally, the statute of limitations for

a tort action under Pennsylvania law begins to accrue when the injury is sustained."¹³

Construing the allegations of the complaint in the light most favorable to plaintiff and drawing all reasonable inferences therefrom, as I am required to do, I conclude that plaintiff's claims were timely filed, with the exception of plaintiff's claim under Pennsylvania law for commercial disparagement. Plaintiff has alleged a broad conspiracy between state officials and private actors which existed for the purpose of extorting money from plaintiff to pay for public works projects for the benefit of defendant Telford Borough Authority. This conspiracy did not cause the main injury which is the subject of this action until November 15, 2005.

The impetus for defendants' conspiracy began as early as 1999. However, plaintiff has alleged that the specific harm caused to plaintiff by the conspiracy occurred on November 15, 2005 when plaintiff's mining license was suspended. It was only after the suspension that plaintiff became aware, or should have become aware, of defendants' alleged conspiracy. The suspension was also clearly the injury which triggered plaintiff's right to

¹³ The applicable statute of limitations may be extended by the discovery rule. See Oshiver, 38 F.3d at 1386-1388. The discovery rule postpones the beginning of the statute of limitations period from the date when the alleged unlawful act occurred to the date when the plaintiff actually discovered his injury. Id. at 1386; see also Lopez v. Brady, 2008 WL 2310943, at *4 (M.D.Pa. June 3, 2008) (McClure, J.). As a general matter, Pennsylvania applies the "discovery rule" and tolls the statute of limitations only where "the injury or its cause was neither known nor reasonably knowable." Fine v. Checchio, 582 Pa. 253, 266, 870 A.2d 850, 858 (2005).

bring and maintain the within action.

Plaintiff has alleged that conditions imposed in previous permits issued by defendant DEP violated plaintiff's federal and state rights. However, to the extent that defendants' prior conduct would be independently actionable, the relevant statutes of limitations for each of the claims has lapsed because the alleged offending conduct occurred more than two years before the filing of this action.¹⁴ Thus, plaintiff cannot maintain an independent claim based on defendants' conduct occurring on or before November 14, 2005 which does not relate to the suspension of plaintiff's mine operation license.¹⁵

¹⁴ Any challenges to the February 22, 2002 permit issued by defendant DEP pursuant to the claims asserted in this action are barred by the applicable statutes of limitations. Therefore, the doctrine of administrative finality, preventing collateral attacks of administrative decisions, need not be addressed. For a description of administrative finality, see Commonwealth Department of Environmental Protection v. Peters Township Sanitary Authority, 767 A.2d 601, 603 (Pa.Comm. 2001).

¹⁵ Defendants seek to have plaintiff's references to prior conduct stricken from the complaint pursuant to Federal Rule of Civil 12(f). Although such prior conduct is not independently actionable at this juncture, it is relevant for the purpose of describing the nature and history of the conspiracy between defendants in this action. Therefore, plaintiff's references to prior conduct of defendants, including the allegedly improper imposition of conditions in the February 22, 2002 permit, will not be stricken.

Plaintiff's averments are not "immaterial, impertinent, or scandalous matter" within the meaning of Rule 12(f). In Wright v. Philadelphia Gas Works, 2001 WL 1169108, at *2 (E.D.Pa. Sept. 28, 2001) (Giles, C.J.), the district court stated that "[m]otions to strike matters from pleadings...are disfavored by the courts and should not be

(Footnote 12 continued):

(Continuation of footnote 12):

granted, even in cases where averments complained of are literally within provisions of federal rule providing for striking of redundant, immaterial,

Moreover, plaintiff has not alleged that any of the individuals named in this action participated in the alleged conspiracy at any point within the applicable two-year limitations period. However, for the purpose of determining the running of the statute of limitations, a reasonable inference may be drawn from plaintiff's complaint that all of the named individuals had ongoing involvement with the conspiracy. Therefore, notwithstanding the paucity of individualized conduct by the individual defendants named in plaintiff's complaint, the claims against the individual defendants are timely.¹⁶

With regard to plaintiff's claim for commercial disparagement, plaintiff has not identified the specific disparaging statements which form the basis of its claim. In addition to its failure to specify the statement or statements at issue, plaintiff has not identified the party or parties who made the allegedly defamatory statements and the party to whom they were communicated. The only facts alleged in the complaint which support a disparaging communication either occurred prior to 2006 (for example, the investigations and reports of defendant DEP and allegedly defamatory statements made by the Authority defendants)

impertinent or scandalous matter, in absence of demonstration that [the] allegations attacked have no possible relation to [the] controversy and may prejudice [the] other party."

¹⁶ As discussed below, I grant plaintiff leave to re-plead the claims against the individual defendants in this action, which were dismissed without prejudice to assert these claims in a more specific amended complaint.

or were contained in the administrative orders issued by defendant DEP on November 15, 2005 and March 9, 2006.

Plaintiff filed its commercial disparagement claim on November 14, 2007. Therefore, in order to be actionable, any disparaging statements had to be made by defendants on or after November 14, 2006. 42 Pa.C.S.A. § 5523. Construing the complaint in plaintiff's favor, the latest date upon which any disparaging communication occurred was on March 9, 2006. Accordingly, plaintiff's claim for commercial disparagement was filed after the applicable one-year statute of limitations had expired and is dismissed against all defendants.

Sovereign Immunity

Standard of Review

A motion to dismiss pursuant to Eleventh Amendment sovereign immunity is properly brought pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Blanciak v. Allegheny Ludlum Corporation, 77 F.3d 690, 693 n.2 (3d Cir. 1996). As a general matter, once challenged, plaintiff has the burden of establishing this court's subject matter jurisdiction over his claims. Carpet Group International v. Oriental Rug Importers Association, 227 F.3d 62, 69 (3d Cir. 2000).

A challenge to subject matter jurisdiction may be either facial or factual. Gould Electronics Inc. v. United

States, 220 F.3d 169, 176 (3d Cir. 2000). A "facial" challenge to subject matter jurisdiction attacks the sufficiency of the complaint on its face in alleging subject matter jurisdiction. In a facial challenge, the court must accept all allegations contained in the complaint as true. Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d Cir. 1977).

In contrast, a "factual" challenge to subject matter jurisdiction attacks the underlying factual basis for subject matter jurisdiction such that no presumption of truthfulness attaches to the allegations in the complaint. Id. Under a factual challenge, the court may evaluate the merits of jurisdictional claims by considering evidence beyond the pleadings and the court may weigh any such evidence. Carpet Group International, 227 F.3d at 69.

The assertion of Eleventh Amendment sovereign immunity as a defense is properly treated as a facial challenge.

Urella v. Pennsylvania State Troopers Association, 2008 WL 1944069, at *3 (E.D.Pa. May 2, 2008)(DuBois, J.).

Therefore, for the purpose of resolving defendants' four motions to dismiss, the allegations of plaintiff's complaint are accepted as true. Gould Electronics, 220 F.3d at 176. However, where jurisdiction is challenged on the basis of sovereign immunity, the party asserting immunity bears the burden of production and persuasion. Febres v. Camden Board of Education, 445 F.3d 227,

Eleventh Amendment Immunity

The United States Supreme Court has held that, subject to narrow exceptions, the Eleventh Amendment bars suits in federal court against states and state agencies.¹⁷ See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). The Eleventh Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States...." Eleventh Amendment sovereign immunity applies regardless of the relief sought by plaintiff. Cory v. White, 457 U.S. 85, 90-91, 102 S.Ct. 2325, 2328-2329, 72 L.Ed.2d 694, 699-700 (1982).

Sovereign immunity extends to state agencies which are considered "arms of the state". Bowers v. National Collegiate Athletic Association, 475 F.3d 524, 545-546 (3d Cir. 2007). A state entity is properly characterized as an arm of the state when a judgment against it would have essentially the same practical consequences as a judgment against the state itself. Fitchik v. New Jersey Transit Rail Operations, Inc.,

¹⁷ The immunity is also extended to state officials sued in their official capacities because such suits are just another way of pleading a claim against the state itself. See Hanani v. State of New Jersey Department of Environmental Protection, 205 Fed.Appx. 71, 79 (3d Cir. 2006); see also Callahan v. City of Philadelphia, 207 F.3d 668 (3d Cir. 2000).

873 F.2d 655, 659 (3d Cir. 1989)(internal citation omitted).

The United States Court of Appeals for the Third Circuit applies a three-part test to determine whether an entity is an arm of the state for Eleventh Amendment purposes. That test examines the following three elements: (1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has. Bowers, 475 F.3d at 546 (internal citations omitted).

There are two recognized exceptions to Eleventh Amendment immunity. First, Congress may abrogate Eleventh Amendment immunity by expressing its "unequivocal" intent to abrogate pursuant to a "valid exercise of power". Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55, 114 S.Ct. 1114, 1123, 134 L.Ed.2d 252, 266 (1996)(internal citation omitted).

Second, states may waive their sovereign immunity and consent to be sued. Alden v. Maine, 527 U.S. 706, 755, 119 S.Ct. 2240, 2267, 144 L.Ed.2d 636, 679 (1999). However, a state's waiver must "be unequivocally expressed". Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67, 77 (1984). Significantly,

Pennsylvania has expressly indicated that it has not waived its sovereign immunity. 42 Pa.C.S.A. § 8521(b); 1 Pa.C.S.A. § 2310.

There is also an additional exception to Eleventh Amendment sovereign immunity for state officers. Beginning with Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the United States Supreme Court recognized that the Eleventh Amendment does not preclude suits against individual state officers for declaratory and prospective injunctive relief to remedy ongoing violations of federal law.

However, Ex parte Young and its progeny do not apply where the defendant asserting immunity is not a state officer, but the state itself. Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161, 178 (3d Cir. 2002). Moreover, the Ex parte Young line of cases does not extend to actions against state officials on the basis of state law. Smolow v. Hafer, 353 F.Supp.2d 561, 569 (E.D.Pa. 2005)(DuBois, J.); Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 325 (3d Cir. 2002).

The DEP defendants and the Commission defendants each claim that they are entitled to sovereign immunity under the Eleventh Amendment and that plaintiff's complaint should be dismissed against them. The immunity of these two groups of defendants significantly differs, so each is considered in turn.

Plaintiff has not challenged the status of defendant DEP as an agency of the Commonwealth of Pennsylvania. In fact, the caption of this action as set forth in plaintiff's complaint specifically identifies defendant DEP as subdivision of the Commonwealth of Pennsylvania. As a matter of Pennsylvania law, defendant DEP is an agency of the Commonwealth. See Act of April 9, 1929, P.L. 177, art. II, § 201, as amended, 71 P.S. § 61; see also Paupack Township, Wayne County, Pennsylvania ex rel. Board of Supervisors v. Lake Moc-A-Tek, Inc., 863 A.2d 615, 617 (Pa.Comm. 2004). Moreover, defendant DEP has been specifically recognized as an agency of the Commonwealth of Pennsylvania in other actions in this district. See, e.g., Oley Township v. Delaware River Basin Commission, 906 F.Supp. 284, 286 (E.D.Pa. 1995)(VanAntwerpen, J.).

Because defendant DEP is a state agency and is an arm of the state, and because Pennsylvania has not waived its sovereign immunity, none of plaintiff's claims against defendant DEP can proceed in federal court. Accordingly, plaintiff's claims against defendant DEP must be dismissed.

This same sovereign immunity extends to all other DEP defendants in their official capacities with respect to plaintiff's claims for damages. However, to the extent that plaintiff seeks prospective injunctive relief, under Ex parte

Young, plaintiff's federal claims against defendant DEP state officials in their official capacities may proceed.¹⁸

Moreover, neither Eleventh Amendment sovereign immunity, nor Pennsylvania state sovereign immunity immunizes the individual state officials employed by defendant DEP in their individual capacities from plaintiff's claims for damages and injunctive relief. The Eleventh Amendment does not preclude a suit against a state official acting in his or her individual or personal capacity. Koslow, 302 F.3d at 168. Furthermore, there are sufficient allegations within the complaint to establish that the individual DEP defendants may have been acting outside the scope of their employment. See 1 Pa.C.S.A. § 2310.

With regard to the Commission defendants, the question of immunity is considerably more complex. Defendant Commission is a creation of the government of the United States of America (that is, the federal government), Delaware, New Jersey, New York and Pennsylvania. The Commission's charter document, the Delaware Basin River Compact ("Compact"), has been adopted as part of federal law and the state laws of its constituent members, including Pennsylvania. See Act of July 7, 1961, P.L. 513, as amended, 32 P.S. § 815.101.

Although the Compact states that defendant Commission is "an agency and instrumentality of the governments of the

¹⁸ The exception to sovereign immunity is inapplicable to plaintiff's claims under Pennsylvania law.

respective signatory parties", its provisions do not specify whether defendant Commission has sovereign immunity under the Eleventh Amendment akin to that of its constituent states.

Compact § 2.1.

In determining whether multi-state agencies may assert sovereign immunity, the United States Supreme Court has established a presumption that such agencies entities are not entitled to sovereign immunity "unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose."

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 43-44, 115 S.Ct. 394, 402, 130 L.Ed.2d 245, 258 (1994)(internal citation and quotation omitted).

In Hess, the United States Supreme Court applied a multi-factor analysis to determine whether a bi-state agency ratified by Congress could assert sovereign immunity. After weighing factors in favor of and against finding the agency's entitlement to assert sovereign immunity, the Supreme Court held that the guiding factor in Eleventh Amendment determinations is the prevention of federal court judgments which must be satisfied out of state treasuries. 513 U.S. at 47-49, 115 S.Ct. at 404-405, 130 L.Ed.2d at 260-261.

Defendant Commission has not asserted that an adverse judgment against it will have to be paid out of either federal or state coffers. To the contrary, a review of the Compact indicates that defendant Delaware River Basin Commission is an independent financial entity which receives its funding from a variety of sources, including the issuance of bonds. Compact § 12.

The Compact limits the obligation of the bonds to defendant Commission, not to the states, and specifically provides that "[t]he bonds and other obligations of the commission, except as may be otherwise provided in the indenture under which they were issued, shall be the direct and general obligations of the [Commission]". Compact § 12.1.

In addition, Defendant Commission may not pledge the credit of its constituent members or their counties or municipalities. Compact § 12.3. Although the capital financing provisions of the Compact indicate that the Commission may receive funding in the form of loans or appropriations from its constituent states, the Compact appears to contemplate a financially independent Commission. Compact §§ 12.20 and 13.3.

The Compact also contains jurisdictional provisions which support the conclusion that defendant Commission is subject to suit in federal court. Oley Township, 906 F.Supp. at 287. Section 3.8 of the Compact provides that "any determination of

the [Commission] shall be subject to judicial review in any court of competent jurisdiction." Similarly, the Compact states that defendant Commission may "sue and be sued in all courts of competent jurisdiction". Compact § 14.1(a)(1). In addition, the Compact provides that "the United States district court shall have original jurisdiction of all cases or controversies arising under the Compact...." Compact § 15.1.

Reviewing the relevant provisions of the Compact, there is no reason to believe that the constituent states intended to extend their Eleventh Amendment immunity to defendant Delaware River Basin Commission in enacting the Compact. Therefore, neither defendant Commission nor defendant Muszynski (defendant Commission's employee sued in his official and individual capacity) may assert the defense of sovereign immunity.¹⁹

¹⁹ The Commission defendants assert that they are immune from suit as an arm of the federal sovereign and because plaintiff did not file its action pursuant to the limited waiver of immunity codified in the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. However, this argument is without merit for the same reasons defendant Commission cannot assert sovereign immunity under the Eleventh Amendment. Defendant Commission is not an arm of the federal government and therefore cannot assert federal tort immunity.

In addition, any failure to adhere to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, does not bar plaintiff's claims against the Commission defendants. Although recognized under federal law, the Compact is clear that defendant Commission is not an agency of the federal government. Compact § 15.1(m). Because defendant Commission is not recognized as a federal agency, its decisions are not subject to APA review. Delaware Water Emergency Group v. Hansler, 536 F.Supp. 26, 36-37 (E.D.Pa. 1981) (VanArtsdalen, J.)(citing Dublin Water Company v. Delaware River Basin Commission, Civ.A.No. 78-3665 (E.D.Pa. Mar. 5, 1980)(Fullam, J.)(unreported), aff'd, 649 F.2d 858 (3d Cir. 1981)). Therefore, the APA does not provide a basis for the Commission defendants to block plaintiff's claims.

Moreover, plaintiff's failure to file an administrative appeal through defendant Commission's appellate procedures does not preclude

(Footnote 16 continued):

Accordingly, plaintiff's claims may proceed against the Commission defendants subject to the substantive challenges discussed below.

Constitutional Claims

42 U.S.C. § 1983

Plaintiff's complaint asserts four constitutional claims against defendants for violations of substantive due process, equal protection, procedural due process and First Amendment retaliation. These constitutional claims are actionable against defendants through 42 U.S.C. § 1983. However, defendants have challenged each of plaintiff's constitutional claims as deficiently pled under Federal Rule of Civil Procedure 12(b)(6).

(Continuation of footnote 16):

plaintiff from proceeding against the Commission defendants. Although a party must generally appeal a decision of defendant Commission within 45 days of the final action, the plain text of the provision applies only to a party which has participated in a "hearing" before defendant Commission. 18 C.F.R. § 401.90. As alleged in plaintiff's complaint, defendant Commission never held any hearing in this matter and never issued any decision. The Commission defendants have not demonstrated any explicit provision requiring administrative exhaustion for failures to act by defendant Commission.

Moreover, plaintiff is not challenging administrative actions by the Commission defendants. Instead, plaintiff has alleged that the Commission defendants participated in an extortion scheme and, as part of that scheme, refused to exercise their statutory authority. Accepting plaintiff's allegations as true, such conduct would make resort to defendant Commission's administrative procedures futile. Requiring plaintiff to exhaust administrative remedies in this context could effectively preclude meaningful appellate review of defendant Commission's actions. Thus, plaintiff's failure to exhaust administrative remedies does not preclude this action from proceeding.

Section 1983 is an enabling statute that provides a remedy for the violation of constitutional or statutory rights. The statute itself does not create any substantive rights, but rather provides a mechanism for the enforcement of certain rights guaranteed by the United States Constitution. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Thus, to state a claim under § 1983, a plaintiff must demonstrate that the defendant, acting under color of state law, deprived plaintiff of a right secured by the Constitution or the laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420, 428 (1986); Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008)(quoting Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006)). Furthermore, to face liability under § 1983, a defendant must have "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Bonenberger v. Plymouth Township, 132 F.3d 20, 23 (3d Cir. 1997)(internal citations and quotations omitted).

In the context of a § 1983 conspiracy, a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right under color of law. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 700 (3d Cir. 1993), abrogated on other grounds, United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003). To make out this claim, a plaintiff must allege both a civil rights violation and a conspiracy involving state action. Quintal v. Volk, 2000 WL 1367948, at *2 (E.D.Pa. Sept. 21, 2000)(Joyner, J.).

There is no heightened pleading requirement for civil rights actions pursuant to § 1983. Thomas v. Independence Township, 463 F.3d 285, 295 (3d Cir. 2006). However, for the purpose of pleading a § 1983 conspiracy, a plaintiff must "make specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events." Quintal v. Volk, supra, at *2.

Municipality and Agency Liability

Municipalities and local government entities are considered "persons" under § 1983 and may be held liable for constitutional torts if two prerequisites are met: (1) the plaintiff's harm was caused by a constitutional deprivation; and (2) the entity is responsible for that violation. Collins v.

City of Harker Heights, 503 U.S. 115, 120, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261, 270 (1992).

A municipality or local government agency cannot be held vicariously liable for the constitutional violations of its agents under a theory of respondeat superior. Langford v. Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). Instead, such entities are only liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under § 1983." Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694, 98 S.Ct 2018, 2037-2038, 56 L.Ed.2d 611, 638 (1978).

In the within action, defendants Authority and Commission are each subject to liability pursuant to § 1983 because plaintiff alleges constitutional deprivations caused by those entities. See Collins, supra. Plaintiff's complaint sufficiently alleges that defendants Authority and Commission each participated in a conspiracy to deprive plaintiff of its civil rights. Moreover, as discussed above, both defendants Authority and Commission are government entities without either federal or Eleventh Amendment sovereign immunity.

Specifically, the allegations of the complaint, if believed, establish that defendants Authority and Commission each

adopted and participated in the creation of policies aimed at extorting private funding from plaintiff for the benefit of defendant Authority. See Monell, supra. In furtherance of this extortion scheme, when plaintiff failed to agree to finance defendant Authority's public projects, defendants took punitive actions against plaintiff and deprived it of its mine operation license in which it had a protected constitutional right.

Accordingly, plaintiff's complaint sufficiently pleads entity liability against both defendants Authority and Commission.

Official and Individual Capacities

The United States Supreme Court differentiates between claims against government employees acting in their individual and official capacities. Kentucky v. Graham, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114, 121-122 (1985). Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." Id. (quoting Monell, 436 U.S. at 690 n.55, 98 S.Ct at 2035 n.55, 56 L.Ed.2d at 635 n.55).

As a general matter, state officers acting in their official capacities are not liable under § 1983 because the officers assume the identity of the government that employs them. Hafer v. Melo, 502 U.S. 21, 27, 112 S.Ct. 358, 362-363, 116 L.Ed.2d 301, 310-311 (1991)(citing Will v. Michigan

Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989)).

In contrast, individual capacity suits attempt to impose liability on government officials for their actions under color of law. Kentucky v. Graham, 473 U.S. at 165-166, 105 S.Ct. at 3104-3105, 87 L.Ed.2d at 121-122 (1985). Government officials sued in their individual capacities are "persons" under § 1983 and may be held liable in their individual capacities when, with deliberate indifference to the consequences, they establish and maintain a policy, custom, or practice which directly causes a constitutional harm. A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572, 586 (3d Cir. 2004) (quoting Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir. 1989)).

In addition, a government official with supervisory responsibilities may also be held liable if the official participated in violating the plaintiff's rights, or directed others to violate them, or had knowledge of, and acquiesced in, his subordinates' violations. Baker v. Monroe Township, 50 F.3d 1186, 1190-1191 (3d Cir. 1995). However, there is no liability in individual capacity § 1983 actions based on a theory of respondeat superior. Monell, 436 U.S. at 693, 98 S.Ct. at 2037, 56 L.Ed.2d at 637.

In the within action, nearly all of the individual defendants are government officials named in both their official and individual capacities. However, there are significant variations in the duplication of the claims asserted against each group of government official defendants.

The individual Pennsylvania Department of Environmental Protection defendants, defendants Hornberger, Roberts, Hill, Laslow and Sokolow, are named in both their official and individual capacities. The claims against these defendants in their official capacities are duplicative of the claims against defendant DEP. However, because the Eleventh Amendment bars this court from proceeding with a suit against defendant DEP directly (and defendant DEP has been dismissed, as explained above), the official capacity suits are the only means by which plaintiff may maintain its claims against defendant DEP.²⁰ Accordingly, the claims against these individuals in their official capacities are not duplicative and may proceed to the extent they seek prospective injunctive relief. Pennsylvania Federation of Sportsmen's Clubs, 297 F.3d at 323.

The situation is not analogous for the other individual government defendants named in this action. The claims against defendant Fournier in his official capacity are duplicative of those asserted against defendant Telford Borough Authority. Both

²⁰ This is known as the "legal fiction" of Ex parte Young. Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161, 168 (3d Cir. 2002).

injunctive and monetary relief are available against each of these defendants because they do not have immunity.

Similarly, the claims against defendant Muszynski in his official capacity are duplicative of the claims against defendant Delaware River Basin Commission and both injunctive and monetary relief are available against each defendant.

Accordingly, all claims against defendants Fournier and Muszynski in their official capacities are dismissed as duplicative.

The § 1983 constitutional claims against the individual government defendants (i.e., all individual defendants except defendant Schloesser, an employee of defendant Spotts Stevens & McCoy, Inc.) in their individual capacities are next considered. Reviewing the allegations of plaintiff's complaint, I conclude that there are insufficient averments to give defendants notice of the grounds upon which these constitutional claims rest.

Plaintiff has not pled specific factual allegations demonstrating a combination, agreement, or understanding among or between any of the individual government defendants as required by Quintal v. Volk, supra, at *2. The complaint contains no specific averments showing a plot, plan, or conspiracy between or among the individual government defendants to carry out the alleged conspiracy to coerce plaintiff to finance public projects for defendant Authority and to suspend plaintiff's mine operation

license in the absence of plaintiff's agreement to provide such financing.

Plaintiff's complaint contains only a few perfunctory assertions regarding the conduct of the individual government defendants. These assertions demonstrate that these individual defendants participated in certain acts furthering the alleged agendas of their government entity employers. For example, plaintiff pleads that defendants Hornberger, Laslow and Hill did improperly carry out the 2004 investigation of the source of well dewaterings.

However, plaintiff has not pled facts from which it may be inferred that any of the individual government defendants reached an agreement, either tacit or explicit, to violate plaintiff's rights. There are no allegations indicating the times and places where an agreement was reached, the scope of the agreement, the agreement's duration or the identity of those individuals who participated in the formation of the agreement. See Quintal, supra, at *2.

Plaintiff has also not averred that any of the individual government defendants had policy-making authority. A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d at 586. Moreover, plaintiff has not alleged that any of the individual government defendants personally established or

maintained the policies of their respective employers which directly caused the suspension of plaintiff's mine operation license.

Although plaintiff has averred that certain individual government defendants, including defendants Hornberger and Laslow, had supervisory authority, plaintiff has not demonstrated that these defendants had any direct role in the actual process of suspending plaintiff's license. Nor has plaintiff asserted that these individuals passively acquiesced when they could have intervened to prevent the suspension of plaintiff's license within the scope of their authority.

Accordingly, plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against defendants Hornberger, Roberts, Hill, Laslow, Sokolow, Fournier and Muszynski²¹ in their individual capacities are dismissed without prejudice for plaintiff to re-assert these constitutional claims in a more specific amended complaint.

Private Actor Liability

"[A] private party who willfully participates in a joint conspiracy with state officials to deprive a person of constitutional rights acts under color of state law for purposes

²¹ As noted above, plaintiff has not asserted a First Amendment retaliation claim against defendant Muszynski.

of § 1983." Harvey v. Plains Township Police Department, 421 F.3d 185, 190 (3d Cir. 2005)(internal citations omitted). Thus, a private party defendant, whether an entity or individual, may be deemed to be a state actor for the purpose of § 1983 liability where the private party conspires with a government official. Groman v. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1998).

In order to sufficiently plead a § 1983 conspiracy against private actor defendants, a plaintiff:

must plead with particularity the "circumstances" of the alleged wrongdoing in order to place the defendants on notice of the precise misconduct with which they are charged. Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.... [A]n inference [of conspiracy]...from the Complaint... [is] no substitute for the requirement that the circumstances of the conspiracy be pleaded with specificity.

Loftus v. Southeastern Pennsylvania Transportation Authority, 843 F.Supp. 981, 986-987 (E.D.Pa. 1994)(Robreno, J.)(citing Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989)).

Plaintiff has pleaded the existence of a conspiracy in its complaint. However, plaintiff's allegations fall short of the pleading requirements for a § 1983 conspiracy as set forth in Loftus against the private-actor Spotts Stevens & McCoy, Inc. defendants with regard to plaintiff's constitutional claims.

Plaintiff does not allege any facts indicating the period of the Spotts Stevens defendants' involvement in the conspiracy or specific actions taken by the Spotts Stevens defendants to achieve the goal of the conspiracy.

Plaintiff's conclusory averment that defendants Spotts Stevens and Schloesser were retained by, and conspired with, defendant Authority to obstruct pumping tests and interfere with the rehabilitation of Telford Borough Authority Well No. 4 does not suffice to demonstrate the role and length of participation by the Spotts Stevens defendants in the conspiracy. Nor does plaintiff's averment establish that the Spotts Stevens defendants shared defendant Authority's objective of unlawfully obtaining financing from plaintiff for defendant Authority's public works projects.

Accordingly, plaintiff's substantive due process, equal protection and procedural due process claims against the Spotts Stevens defendants are dismissed without prejudice for plaintiff to re-assert these constitutional claims in a more specific amended complaint.

Substantive Due Process

The due process clause of the Fourteenth Amendment²² to the United States Constitution protects an individual against

²² All government defendants in this action are state-level or local government actors. Therefore, the due process clause of the Fifth Amendment to the United States Constitution is not implicated in this action.

arbitrary action of government. County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043, 1057 (1998)(internal citation omitted). Allegations that government power has been arbitrarily and oppressively exercised implicate the substantive aspects of the due process clause. Id. at 846, 118 S.Ct. at 1717, 140 L.Ed.2d at 1057.

In order to allege a violation of substantive due process, a plaintiff must aver that defendants' conduct deprived plaintiff of a protected interest involving an arbitrary abuse of official power which "shocks the conscience". United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 399 (3d Cir. 2003). Thus, to prevail on a substantive due process claim arising from a municipal land use decision, a plaintiff must establish that (1) it has a property interest protected by due process, and (2) the government's deprivation of that property shocks the conscience. Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648, 654 (D.N.J. 2006).

The United States Court of Appeals for the Third Circuit has recognized that ownership interests in property are interests protected by the substantive aspect of due process. Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165, 1180 n.12 (3d Cir. 1997). The Third Circuit has explicitly held that cases involving "zoning decisions, building permits, or other governmental permission

required for some intended use of land owned by the plaintiffs...implicat[e] the 'fundamental' property interest in the ownership of land." Id. at 1179 n.12.

If plaintiff successfully pleads the existence of an interest protected by the due process clause, the analysis then turns to whether the violation of the interest "shocks the conscience". The meaning of the shocks-the-conscience standard varies based upon the factual context of each case. United Artists, 316 F.3d at 399-400. However, the standard reaches only conduct at the edges of tort law's scheme of culpability. Lewis, 523 U.S. at 848-849, 118 S.Ct. at 1717-1718, 140 L.Ed.2d at 1059 (internal citation omitted). Allegations of mere negligence are insufficient to constitute a substantive due process violation. Id.

Moreover, as a general matter, "land-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." United Artists, 316 F.3d at 399-400. Only the most egregious conduct can be said to be arbitrary in the constitutional sense. Lewis, 523 U.S. at 846, 118 S.Ct. at 1716, 140 L.Ed.2d at 1057 (internal citation omitted). For the purpose of due process, government conduct is arbitrary and irrational where it is not rationally related to a legitimate

government purpose. Sameric Corporation of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 595 (3d Cir. 1995).

Plaintiff in the within action has pled a sufficient property interest for due process purposes with regard to its interest in the Telford Quarry mining operating license.²³ Plaintiff's mining license implicates plaintiff's fundamental property interest in the use, control and enjoyment of its real property. Courts around the country have recognized that land use permits create interests in property protected by the due

²³ In addition to plaintiff's property interest in its license to operate the Telford Quarry, plaintiff contends that it has an interest protected by due process in its reputation, business and goodwill that has been damaged by defendants' suspension of plaintiff's operating license. The ability to pursue a calling or occupation is a protected liberty interest under the due process clause. See Thomas v. Independence Township, 463 F.3d 285, 297 (3d Cir. 2006). However, one does not have a protected liberty interest in carrying out a specific job. Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1261-1262 (3d Cir. 1994). Moreover, one "does not have a protected property interest in reputation alone" protected by due process. Thomas, 463 F.3d at 297.

Plaintiff's complaint does not sufficiently demonstrate constitutional injury to any of these protected interests. Plaintiff's inability to conduct mining operations at the Telford Quarry because its license has been suspended does not prevent it from carrying out mining operations at other locations. Plaintiff does not have a protected interest in its business reputation alone. Even if plaintiff's reputation were protected, plaintiff must allege more to show a constitutional injury than that it has lost unspecified business as a result of its license being suspended. Therefore, plaintiff's alleged injury to its reputation, business and goodwill need not be considered further.

Plaintiff also claims that it has a liberty interest in its business reputation which has been violated by defamatory statements by defendants. The United States Supreme Court has recognized business reputation liberty interests in its precedents. See Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). However, plaintiff's complaint has not sufficiently alleged that any defamatory statements have been made by defendants and plaintiff has not pled any resulting damage or injury. Thus, there are simply insufficient allegations in the complaint to find any basis for so-called stigma-plus violations of liberty interests. See Alexander v. Hargrove, Civ.A.No. 93-5510, 1995 WL 144636, at *5 (E.D.Pa. Mar. 31, 1995)(Yohn, J.).

process clause. See, e.g., Continental Coal, Inc. v. Cunningham, 511 F.Supp.2d 1065, 1079 (D.Kan. 2007).

Because plaintiff has a protected interest, it must next be determined whether this interest has been violated under the shocks-the-conscience standard. I conclude that as alleged in plaintiff's complaint, the conduct of defendants in this action is sufficiently egregious so as to shock the conscience within the meaning of substantive due process clause. Plaintiff has averred the existence of a broad conspiracy between local, state and intra-state actors to extort money from plaintiff for the benefit of defendant Telford Borough Authority without any rational basis.

Accepting the allegations of the complaint as true, defendant Pennsylvania Department of Environmental Protection's suspension of plaintiff's mine operation license was wholly irrational and imposed as a punishment for plaintiff's failure to agree to provide multi-million dollar payments for the benefit of defendant Authority. As averred in the complaint, the license suspension was not based upon grounds related to the purpose for which the license was issued. Nor was the suspension based upon plaintiff's prior or future activities under the auspices of the license. Thus, the alleged conduct by defendants is more than mere bad faith.

Accordingly, plaintiff has adequately pled a violation of substantive due process, and defendants' motions to dismiss plaintiff's substantive due process claim are denied.

Equal Protection

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States provides that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV § 1. The clause prevents unlawful discrimination by state actors. See Kirby v. City of Philadelphia, 905 F.Supp. 222, 228 (E.D.Pa. 1995)(Brody, J.).

If a plaintiff alleges a violation of equal protection and is not a member of a recognized suspect class, such as race or gender, it may proceed pursuant to the "class of one" equal protection theory announced by the United States Supreme Court in Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)(per curiam). According to the "class of one" theory, a plaintiff states a claim for violation of the equal protection clause when it alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Id. at 564, 120 S.Ct. at 1074, 145 L.Ed.2d at 1063 (internal citations omitted). Thus, the alleged discrimination

must be wholly arbitrary and intentional. Glenn v. Barua, 252 Fed.Appx. 493, 500 (3d Cir. 2007).

The United States Court of Appeals for the Third Circuit has held that to state a claim under the "class of one" equal protection theory, a plaintiff must allege that (1) the defendant treated it differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment. Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006).

This irrational-and-wholly-arbitrary standard is especially difficult to satisfy in a land use dispute. See Eichenlaub v. Township of Indiana, 385 F.3d 274, 287 (3d Cir. 2004). Furthermore, "an equal protection claim" may not be used "as a device to dilute the stringent requirements needed to show a substantive due process violation". Id.²⁴

Plaintiff has pled that it has been intentionally, arbitrarily and irrationally singled out and discriminated against by defendants. Plaintiff alleges that defendants suspended plaintiff's mine operation license for the Telford Quarry because it is a private party with insurance that could be used to finance public works projects on behalf of defendant

²⁴ In Eichenlaub, the Third Circuit opined that it is "very unlikely that a claim that fails the substantive due process test will survive under an equal protection approach." 385 F.3d at 287.

Telford Borough Authority. Such allegations support a finding of arbitrary unconstitutional conduct.

However, plaintiff has failed to identify other similarly situated individuals who were treated differently than plaintiff (i.e., they did not face similar arbitrary and purposeful discrimination). Expressly to the contrary, plaintiff has indicated that defendant DEP has discriminated against other quarry operations, mining operations and businesses like plaintiff's in the past and has required private payments for public projects as a "cost of doing business" within defendant DEP's jurisdiction.

Plaintiff's own averments expressly bar it from proceeding on an equal protection theory in this case. Accordingly, plaintiff's equal protection claim against all defendants is dismissed.

Procedural Due Process

As stated above, the due process clause of the Fourteenth Amendment to the United States Constitution protects individuals against arbitrary government action. At the core of procedural due process jurisprudence is the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard. Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998)(internal citations omitted).

To state a claim pursuant to § 1983 for deprivation of procedural due process rights, plaintiff must allege that (1) it was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty or property, and (2) the procedures available to it did not provide due process of law. Maule v. Susquehanna Regional Police Commission, 2007 WL 2844587, at *6 (E.D.Pa. Sept. 27, 2007) (Gardner, J.)(citing Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000)).

Precisely the same interests considered in the discussion regarding substantive due process are implicated in this procedural due process analysis. Thus, plaintiff's allegations sufficiently establish that it has an interest in its mining operating license (governing the use of its real property) which is constitutionally protected through the procedural aspect of due process. Therefore, to determine whether a violation of procedural due process has been adequately pled, only the procedures available to defendant under Pennsylvania law must be considered.

Procedural due process is satisfied when a state affords a full judicial mechanism with which to challenge the administrative decision at issue. Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1998), abrogation on other grounds recognized, United Artists, 316 F.3d at 394. If adequate process

is provided by state procedures, procedural due process is satisfied whether or not the plaintiff avails itself of the provided appeal mechanism. DeBlasio v. Zoning Board of Adjustment for Township of West Amwell, 53 F.3d 592, 597 (3d Cir. 1995)(internal citations and quotations omitted).²⁵

"The availability of a full judicial mechanism to challenge the administrative decision to deny an application, even an application that was wrongly decided, preclude[s] a determination that the decision was made pursuant to a constitutionally defective procedure." Midnight Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 681 (3d Cir. 1991).

Moreover, the available state procedure need not provide all the relief available under a § 1983 cause of action in order for the available state procedure to be constitutionally adequate. Parratt v. Taylor, 451 U.S. 527, 543-544, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420, 434 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

The degree of process constitutionally required is measured by a balancing test, including whether a post-

²⁵ A court may take judicial notice of records outside the four corners of a complaint, including records of administrative and court proceedings. See Pension Benefit Guaranty Corporation . Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). Thus, I take judicial notice that plaintiff appealed the decision of defendant Pennsylvania Department of Environmental Protection to the Commonwealth of Pennsylvania Environmental Hearing Board. I also take judicial notice that plaintiff subsequently appealed the Board's Adjudication to the Commonwealth Court of Pennsylvania.

determination hearing is adequate. The United States Supreme Court has described the factors of the test as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

The controlling inquiry regarding whether a pre-deprivation hearing is required is "solely whether the state is in a position to provide for pre[-]deprivation process."

Hudson v. Palmer, 468 U.S. 517, 534, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393, 408 (1984).

Plaintiff's procedural due process challenge to defendant DEP's decision to suspend its license presents a structural challenge to the administrative scheme under which mining licenses are suspended. The challenge specifically attacks defendant DEP's failure to hold a pre-deprivation hearing before suspending plaintiff's license.²⁶

²⁶ Plaintiff also challenges to the way in which defendants administered the applicable regulatory scheme in plaintiff's case. This challenge attacks the basis of defendant DEP's decision, or lack thereof, including defendant Commission's failure to conduct a separate investigation and augment or supplant defendant DEP's findings. However, this challenge is a substantive due process argument and is not properly treated as asserting a violation of procedural due process.

Under Pennsylvania law, plaintiff has the right to challenge any adverse decision taken against its mine operation license by defendant DEP to the Commonwealth of Pennsylvania Environmental Hearing Board.²⁷ Furthermore, under 42 Pa.C.S.A. § 763, plaintiff has the right to appeal any adverse decision of the Environmental Hearing Board to the Commonwealth Court of Pennsylvania. Pennsylvania Coal Mining Association v. Watt, 562 F.Supp. 741, 744 (M.D.Pa. 1983).

Nevertheless, Pennsylvania statutory law does not provide plaintiff an opportunity for a pre-deprivation hearing before its operating license may be suspended or revoked. See 35 P.S. § 7514(c). However, the failure to hold a pre-deprivation hearing in the context of a land use decision does not deprive plaintiff of procedural due process.

The United States Court of the Appeals for the Third Circuit has held that procedural due process is satisfied by state administrative procedures concerning land use decisions which are reviewable only after the deprivation occurs. These decisions have specifically considered zoning variances and land usage permits. See, e.g., Rogin v. Bensalem Township, 616 F.2d 680, 694 (3d Cir. 1980); see also Bello v. Walker,

²⁷ See Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. §§ 3301-3326; Clean Streams Law, Act of June 22, 1937, P.L. 1987, art. I, § 7, as amended, 35 P.S. § 691.7; Act of July 13, 1988, P.L. 530, No. 94, § 4, 35 P.S. § 7514.

840 F.2d at 1128; Midnight Sessions, 945 F.2d at 682; DeBlasio, 53 F.3d at 598.

The procedural frameworks considered in the Third Circuit's land use decisions are analogous to the framework for challenging the administrative determinations of defendant DEP. Thus, the Supreme Court's multi-factor test need not be re-applied. However, I note that the allegations of plaintiff's complaint make clear that the administrative agencies involved in this case took actions to regulate local water supplies which had been become depleted or had become contaminated.

The regulation of such conditions would not require a pre-deprivation hearing as matter of procedural due process. See Hudson v. Palmer, 468 U.S. at 533, 104 S.Ct. at 3204, 82 L.Ed.2d at 407, where the United States Supreme Court stated that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available."

Plaintiff has not sufficiently alleged that its procedural due process rights were violated by defendants' failure to conduct a pre-deprivation hearing. Accordingly, plaintiff's procedural due process claim against all defendants is dismissed.

First Amendment Retaliation

To state a First Amendment retaliation claim, a plaintiff must allege two things: (1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action. Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006). The first factor is a legal question and the second factor is a factual question. Id. (citing Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004)).

This test has also been expressed by the United States Court of Appeals for the Third Circuit in a three-part formulation: Plaintiff must prove (1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation. Eichenlaub v. Township of Indiana, 385 F.3d 274, 282 (3d Cir. 2004).

However formulated, the threshold requirement of a First Amendment retaliation claim is that the plaintiff identify the protected activity that allegedly spurred the retaliation. Id. If plaintiff passes this first burden, the key question in determining whether a cognizable First Amendment claim has been stated is whether the alleged retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising his First

Amendment rights. Thomas v. Independence Township, 463 F.3d 285, 296 (3d Cir. 2006).

Plaintiff's complaint does not contain any specific allegations which support a conclusion that it has engaged in any protected First Amendment activities. Even assuming, arguendo, that plaintiff's vague averments regarding its efforts to have defendants perform additional independent testing of water supplies and reconsider their prior determinations could support such a finding, plaintiff did not allege a direct causal link between these efforts and the suspension of plaintiff's mine operation license.

The averments of plaintiff's complaint indicate a completely different motivation for defendants' conduct. The complaint asserts that plaintiff's license was suspended because it would not agree to finance public projects for the benefit of defendant Authority.

Thus, plaintiff has not alleged it engaged in protected First Amendment activities or faced retaliation as a result of its participation in such activities. Accordingly, plaintiff's First Amendment retaliation claim against all defendants is dismissed.

State Law Claims

Plaintiff's claim for substantive due process has survived scrutiny pursuant to Federal Rule of Civil Procedure

12(b)(6). Therefore, this court may exercise supplemental jurisdiction over plaintiff's claims founded upon Pennsylvania law. See 28 U.S.C. § 1367.

Immunity of State and Local Government Defendants

The United States Court of Appeals for the Third Circuit has held that the determination of immunity should be made as early as possible in civil actions against government officials. Thomas v. Independence Township, 463 F.3d 285, 295 (3d Cir. 2006).²⁸ An essential attribute of immunity "is the entitlement not stand trial or face other burdens of litigation". Id.

Thus, under the inherent powers of the court, in order to facilitate the early resolution of an immunity defense, a plaintiff may be ordered to provide a more definitive statement of the factual basis of its claims pursuant to Federal Rule of Civil Procedure 12(e). Id. (citing Crawford-El v. Britton, 523 U.S. 574, 600-601, 118 S.Ct. 1584, 1598, 140 L.Ed.2d 759, 601 (1998), and Fed.R.Civ.P. 1).

As currently pled in plaintiff's complaint, there are insufficient averments to determine the issues of state sovereign

²⁸ Although the Third Circuit's decision in Thomas v. Independence Township was considering the application of federal qualified immunity, the reasoning of the decision is equally applicable to determinations of immunity conferred under state law.

immunity of the individual DEP defendants²⁹ under Pennsylvania law and the immunity of the Authority defendants and the Commission defendants under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §§ 8541-8542. Specifically, as currently pled, it cannot be determined whether the individual government defendants were acting within the scope of their employment when they participated in the alleged conspiracy.

In addition, it cannot be determined whether defendants Authority or Commission are local agencies entitled to immunity as set forth in 42 Pa.C.S.A. § 8545, or whether they would be subject to an exception to immunity pursuant to 42 Pa.C.S.A. § 8542(b).

Under these circumstances, the Third Circuit's mandate is clear. Plaintiff must provide a more definite statement of its claims for the purpose of resolving the immunity defenses asserted by defendants as early as possible in this action.

Accordingly, pursuant to Federal Rule of Civil Procedure 12(e), plaintiff shall provide a more definite statement of its claims against all defendants asserting an immunity defense under Pennsylvania law.

²⁹ As stated above, Eleventh Amendment sovereign immunity bars this court from entertaining any action directly against the Commonwealth of Pennsylvania, including actions against its agencies pursuant to state law.

Negligence

Defendants have challenged the sufficiency of plaintiff's claim for negligence under Pennsylvania law solely on the basis of the economic loss doctrine. However, as explained below, the doctrine does not bar plaintiff's negligence claim because plaintiff has alleged a sufficient injury to its real property.

Pennsylvania law has been applied to dismiss claims for negligence where the damages alleged are solely economic.

Rock v. Voshell, 397 F.Supp.2d 616, 627 (E.D.Pa. 2005)

(Baylson, J.). The economic loss doctrine provides that no cause of action can be maintained in tort for negligence or strict liability where the only injury is "economic loss"—that is, loss that is neither physical injury nor damage to tangible property.

2-J Corp. v. Tice, 126 F.3d 539, 541 (3d Cir. 1997)(citing

Aikens v. Baltimore & Ohio Railroad Company, 348 Pa.Super. 17, 21-22, 501 A.2d 277, 279 (1985)).

Pennsylvania state courts are generally hostile to torts alleging economic losses. See Public Service Enterprise Group v. Philadelphia Electric Company, 722 F.Supp. 184, 193 (D.N.J. 1989). Based in part upon this antagonism, the United States Court of Appeals for the Third Circuit has predicted that the Supreme Court of Pennsylvania would extend the economic loss doctrine beyond negligence and strict liability to include cases

of intentional fraud. Werwinski v. Ford Motor Company, 286 F.3d 661, 675 (3d Cir. 2002). However, applications of the economic loss doctrine have generally been limited to losses which flow from the termination of a contract. Constar, Inc. v. National Distribution Centers, Inc., 101 F.Supp.2d 319, 322 (E.D.Pa. 2000)(Kelly, Robert F., J.).

Whether plaintiff's negligence claim is barred by the economic loss doctrine turns on whether plaintiff has suffered damage to its real property. Plaintiff is not alleging that its real property, the Telford Quarry, has been physically damaged. Rather, plaintiff is asserting that the use of its property has been impaired as a result of the intentional acts of defendants in revoking its mine operation license. Thus, plaintiff's alleged injury to its real property is in the form of a usage restriction.

No party in this case has addressed whether an impairment in the use of one's property through the suspension of a license constitutes an injury to real property within the meaning of economic loss doctrine in Pennsylvania jurisprudence. Nevertheless, in the context of this action, I conclude that a land usage restriction resulting from the suspension of a quarry operating license is sufficient to constitute an injury to real property.

The loss of a mining or extraction operating license significantly lessens the value of the property to which the license applies. This resulting diminution in property value is entirely foreseeable by the negligent tortfeasors, as is the resulting economic harm to the site operator's business and financial interests.³⁰

Accordingly, defendants' motion to dismiss plaintiff's claim for negligence under Pennsylvania law is denied.

Intentional Interference With Contractual Relations

The tort of intentional interference with contractual relations has been adopted by the Supreme Court of Pennsylvania. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 431-432, 393 A.2d 1175, 1183 (1978). Under this tort, defendants may be held liable for "intentionally and improperly interfer[ing] with the performance of a contract...between another and a third person by inducing or otherwise causing the third person not to perform the contract". Id. at 431, 393 A.2d at 1183 (quoting Restatement (Second) of Torts § 766 (Tentative Draft No. 23, 1977)).³¹

³⁰ As recognized by the Superior Court of Pennsylvania, "[t]he reason a plaintiff cannot recover [pure economic losses] stems from the fact that the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harm to the plaintiff's interest." Aikens v. Baltimore & Ohio Railroad Company, 348 Pa.Super. at 21, 501 A.2d at 279.

³¹ As noted by the United States Court of Appeals for the Third Circuit, although the Supreme Court of Pennsylvania relied on a tentative

(Footnote 27 continued):

As recognized by the United States Court of Appeals for the Third Circuit, the elements of intentional interference with a contractual relation under Pennsylvania law, whether existing or prospective, are as follows:

- (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Crivelli v. General Motors Corporation, 215 F.3d 386, 394 (3d Cir. 2000)(citing Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa.Super. 1997)).

Plaintiff's complaint is deficient in nearly all respects concerning plaintiff's claim for tortious interference with contractual relations. The complaint contains no averments identifying either an existing contract or prospective contract with which a third-party has interfered. The complaint's allegations fail to identify the parties to the existing or prospective contract, nor do they identify the interfering party.

(Continuation of footnote 27):

draft of the Restatement (Second) of Torts § 766, the final version is the same in substance. See Windsor Securities, Inc. v. Hartford Life Insurance Company, 986 F.2d 655, 659 n.6 (3d Cir. 1993).

Moreover, the complaint does not state the amount of actual legal damage caused by the loss of the contract.

Accordingly, plaintiff's claim for tortious interference with contractual relations against all defendants is dismissed.

Civil Conspiracy³²

To state a claim for civil conspiracy under Pennsylvania law, a complaint must allege:

- (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose;
- (2) an overt act done in pursuance of the common purpose; and
- (3) actual legal damage.

McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa.Super. 2000).

The fact that two or more people are acting to do something at the same time is not by itself an actionable conspiracy. Thompson Coal Company v. Pike Coal Company, 488 Pa. 198, 211, 412 A.2d 466, 473 (1979)(internal citations omitted)). Additionally, proof of malicious intent is an

³² Although some defendants interpreted plaintiff's complaint to assert a federal conspiracy claim pursuant to 42 U.S.C. § 1985, plaintiff has treated its civil conspiracy claim as asserted solely under Pennsylvania law. Therefore, only the state claim for civil conspiracy is considered in this analysis.

essential element of a claim for conspiracy. Thompson Coal Company, 488 Pa. at 211, 412 A.2d at 473.

In Pennsylvania, absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy. Nicks v. Temple University, 408 Pa.Super. 369, 380 596 A.2d 1132, 1137 (1991)(internal citation omitted). Applying Pennsylvania law, the Third Circuit has held that this requirement necessarily means that a claim for civil conspiracy is not "independently actionable" and is instead a "means for establishing vicarious liability for the underlying tort." Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 405-407 (3d Cir. 2000)(internal citations omitted).

However, because conspiracy itself is an intentional tort, negligence cannot serve as the underlying tort upon which a conspiracy claim is based. DeBlasio v. Pignoli, 918 A.2d 822, 826 n.5 (Pa.Comm. 2007). Conduct which subjects one to liability for negligence and strict liability is insufficient to support a claim for civil conspiracy under Pennsylvania law. Stitt v. Philip Morris, Inc., 245 F.Supp.2d 686, 694 (W.D.Pa. 2002). See also Athanasiadis v. Bellman, 1991 WL 185244, at *3 (E.D.Pa. Sept. 16, 1991), where former Senior Judge Newcomer recognized that one cannot negligently conspire.

Thus, plaintiff may not proceed on its conspiracy theory of liability in this action. Plaintiff's claim for

negligence remains in this action. However, this is the sole tort claim under Pennsylvania law remaining in this action. For the above reasons, negligence cannot serve as the underlying tort supporting a civil conspiracy theory of liability.

Accordingly, plaintiff's claim for civil conspiracy against all defendants under state law is dismissed.

Causal Connection Between Defendants'
Misconduct and Plaintiff's Harm

The Delaware River Basin Commission defendants have challenged all claims in plaintiff's complaint with respect to the relationship between the actions of the Commission defendants and plaintiff's harm. Under both federal and Pennsylvania law, plaintiff must demonstrate a causal relationship between the alleged misconduct of defendants and the harm suffered by plaintiff.

Causation between government action and the alleged constitutional deprivation is required in § 1983 actions, Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996). Causation is required under Pennsylvania tort law as well. Wilder v. United States, 230 F.Supp.2d 648, 654 (E.D.Pa. 2002) (Joyner, J.). As explained below, plaintiff has satisfied its burden to show a causal connection between the Commission defendants' conduct and the suspension of its operating license (i.e., plaintiff's harm).

The Commission defendants assert that plaintiff has alleged that they caused harm to plaintiff only through their

failure to accede to plaintiff's requests for testing and investigation of defendant Telford Borough Authority's wells. The Commission defendants argue that because a Commission investigation could not have any legal effect on defendant DEP's licensing decision, no causal connection can be established between the suspension of plaintiff's license and the actions, or lack thereof, of the Commission defendants.

The Commission defendants assert that defendant Commission has delegated to defendant DEP its authority to evaluate mining projects. The Commission defendants aver that pursuant to this delegation, defendant Commission does not review the actions of defendant DEP related to mining projects. The Commission defendants also claim that defendant DEP could order the closure of plaintiff's Telford Quarry regardless of any Commission investigation. Therefore, the Commission defendants argue that there is no causal connection between defendant Commission's alleged failure to conduct an investigation and the closure of the Telford Quarry.

Plaintiff argues in opposition that the complaint sufficiently alleges that the Commission defendants participated in the conspiracy of the other defendants which resulted in the suspension of plaintiff's mine operation license. Thus, plaintiff asserts that there is a causal nexus between the conduct of the Commission defendants and plaintiff's harm.

The Commission defendants' argument is without merit. Plaintiff has alleged that the Commission defendants did not adhere to plaintiff's testing and investigation requests because it would have undermined defendant DEP's claim that plaintiff was causing damage to water supplies in the vicinity of Telford Borough Authority's Well No. 4 and Well No. 5.

Based on this averment and the averments regarding the conspiracy to extort funds from plaintiff for the benefit of defendant Authority, the reasonable inference may be drawn that defendant Commission joined with the other defendants in the conspiracy. There are multiple allegations in plaintiff's complaint indicating the close relationship between defendants Commission, DEP and Authority. With defendant Commission's participation in the overall scheme inferred, a causal connection between the conduct of defendant Commission, as a co-conspirator, is established by the tortious acts of the other co-conspirators. See Glass v. City of Philadelphia, 455 F.Supp.2d 302, 360 (E.D.Pa. 2006)(Robreno, J.).

Accordingly, plaintiff has alleged a sufficient causal nexus between the acts of the Commission defendants and the suspension of plaintiff's mine operation license.

Punitive Damages

Governmental entities, including municipalities, are immune from punitive damages in actions brought under § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S.Ct. 2748, 2761, 69 L.Ed.2d 616, 634 (1981). However, punitive damages may be recovered from individual government officials acting in their individual capacities if the officials' "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632, 651 (1983).

Under Pennsylvania law, punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others. Punitive damages must be based on conduct which is "malicious, wanton, reckless, willful, or oppressive". Feld v. Merriam, 506 Pa. 383, 396, 485 A.3d 742, 748 (1984)(internal citations and quotations omitted).

Punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment. Even gross negligence is not sufficient to justify an award of punitive damages. Hall v.

Jackson, 788 A.2d 390, 403 (Pa.Super. 2001) (internal citation and quotations omitted).

In the within action, punitive damages are not available with respect to plaintiff's substantive due process claim brought pursuant to § 1983 against defendants Authority or Commission. Under § 1983 jurisprudence, these defendants are protected against punitive damage awards because they are state government entities.

Similarly, with regard to remedies under federal law, only prospective injunctive relief may be obtained against defendants Hornberger, Roberts, Hill, Laslow and Sokolow in their official capacities. Therefore, plaintiff's claim for punitive damages with respect to plaintiff's substantive due process claim must be dismissed against these defendants in their official capacities.

Thus, with regard to plaintiff's sole remaining federal claim for substantive due process violations, plaintiff's claim for punitive damages against all defendants is dismissed. However, punitive damages may be available against defendants which have been dismissed from this action without prejudice after plaintiff files a more specific amended complaint.

Specifically, punitive damages may be available with respect to plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims

against the individual DEP³³, Authority³⁴, and Commission³⁵ defendants in their individual capacities. Additionally, punitive damages may also be available with respect to plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against the Spotts Stevens defendants.³⁶

As alleged in plaintiff's complaint, these defendants conspired to extort financing from plaintiff for public projects for the benefit of defendant Authority and to deprive plaintiff of its mine operation license. Such conduct may demonstrate defendants' evil intent and establish a callous disregard for plaintiff's federally protected right to use its real property.

However, plaintiff's claim for punitive damages with respect to its negligence claim under Pennsylvania law must be dismissed against all defendants in this action. As noted above, under Pennsylvania law, punitive damages are not available for claims based upon negligent conduct, even if the alleged conduct constitutes gross negligence.

³³ The individual DEP defendants are defendants Hornberger, Roberts, Hill, Laslow and Sokolow.

³⁴ The individual Authority defendant is defendant Fournier.

³⁵ The individual Commission defendant is defendant Muszynski.

³⁶ The Spotts Stevens defendants are Spotts Stevens & McCoy, Inc. and Richard M. Schloesser.

Accordingly, plaintiff's claim for punitive damages is dismissed with respect to plaintiff's substantive due process claim against all defendants. Plaintiff's claim for punitive damages with respect to plaintiff's substantive due process, equal protection, procedural due process and First Amendment retaliation claims against the individual DEP, Authority, and Commission defendants in their individual capacities, and the Spotts Stevens defendants may be re-asserted in a more specific amended complaint.

Finally, plaintiff's claim for punitive damages is dismissed with respect to its negligence claim under Pennsylvania law against all defendants.

Attorney's Fees

Under federal law, in its discretion, the court may award attorney's fees to a prevailing party in a civil rights action pursuant to 42 U.S.C. § 1983. See 42 U.S.C. § 1988. However, Pennsylvania law is clear that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of parties, or some other established exception. Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993).

Plaintiff's substantive due process claim is brought pursuant to 42 U.S.C. § 1983. Therefore, if plaintiff is ultimately the prevailing party on its substantive due process

claim, it may seek attorney's fees pursuant to 42 U.S.C. § 1988, the federal fee-shifting statute for civil rights actions.

However, plaintiff has not cited any statutory basis for the imposition of attorney's fees based upon Pennsylvania law in this action. Plaintiff has not averred the existence of any fee-shifting agreement, nor has plaintiff pointed to any established exception in Pennsylvania case law pursuant to which it may be entitled to attorney's fees. Absent a clear basis to impose attorney's fees under Pennsylvania law or a fee-shifting agreement, the "American Rule" will be followed, and each party will be responsible for its own attorney's fees for plaintiff's Pennsylvania law claims. Merlino v. Delaware County, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999).

Accordingly, plaintiff's direct claim for attorney's fees is dismissed insofar as they are incurred in connection with its claims under Pennsylvania law. However, this decision is independent of whether plaintiff may eventually recover its attorney's fees for its state law claims under the applicable federal fee-shifting statute.³⁷

³⁷ In Luria Brothers & Company, Inc. v. Allen, 672 F.2d 347, 357 (3d Cir. 1982), the Third Circuit applied the United States Supreme Court's "substantiality test" and recognized that attorney's fees may be awarded for non-fee claims arising out of a "common nucleus of operative fact".

Abstention

Stay Request

Where a party in federal court seeks a stay because of pending parallel litigation in state court, this court is obliged to consider such a request as a motion for abstention. Westport Insurance Corporation v. Law Offices of Marvin Lundy, 2004 WL 555415, at *5 (E.D.Pa. Mar. 19, 2004) (Baylson, J.). This policy is based upon the reality that if there is parallel state court litigation, a stay of the federal case may forever foreclose the federal courts as a forum in which plaintiff may seek relief. Spring City Corp. v. Contractors of America, Inc., 193 F.3d 165, 171 (3d Cir. 1999).

Thus, because of the close interrelationship between a motion for a stay based on parallel state proceedings and a motion for abstention based on parallel state proceedings, the motion for a stay pending the outcome of pending parallel state court litigation is properly treated as a motion for abstention. Accordingly, defendants' request for a stay of this litigation pending the outcome of parallel Pennsylvania state court litigation is treated as a duplicative request for abstention, and, for the following reasons, is denied.

Abstention Generally

The United States Court of Appeals for the Third Circuit has recently stated the following regarding the application of abstention:

Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or agency will have the opportunity to decide the matters at issue. The doctrine is rooted in concerns for the maintenance of the federal system and represents an extraordinary and narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 303 (3d Cir. 2004)(internal citations and quotations omitted).

Abstention should be rarely invoked and is appropriate only in the exceptional and limited circumstances. Addiction Specialists, Inc. v. The Township of Hampton, 411 F.3d 399, 408 (3d Cir. 2005). Furthermore, the Third Circuit has held that abstention is not implicated merely because local or municipal land use issues form part of the federal controversy. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746 (3d Cir. 1982); Gwynedd Properties, Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1999 (3d Cir. 1992).

Defendants seek to have this court abstain from this matter pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Burford v. Sun Oil

Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

The application of each of these abstention doctrines is considered below.

Younger Abstention

The abstention doctrine enunciated in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny is based upon principles of equity, comity and federalism. Younger abstention is a prudential limitation on a federal court's jurisdiction which applies when a party seeks to have a federal court interfere with ongoing state proceedings. Marran v. Marran, 376 F.3d 143, 154 (3d Cir. 2004). As formulated by the Third Circuit:

Abstention under *Younger* is appropriate only if (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims....

Even if the necessary three predicates exist, however, *Younger* abstention is not appropriate if the federal plaintiff can establish that (1) the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) some other extraordinary circumstances exist, such as proceedings pursuant to a flagrantly unconstitutional statute, such that deference to the state proceeding will present a significant and immediate potential for irreparable harm to the federal interests asserted....

Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989)(internal citations omitted).

Particularly apt to the within action is the Third Circuit's decision in Gwynedd Properties, Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1999 (3d Cir. 1992). In that action, a real estate developer claimed that its constitutional rights had been violated through the abusive denial of land use permits under local ordinances by a local municipality and its officials.

In reversing the district court's decision granting Younger abstention, the Third Circuit remarked: "Unlike state proceedings in which the legality of land use ordinances are at issue, here [plaintiff] alleges that the defendants have *applied* these ordinances maliciously in order to deprive [plaintiff] of its federal constitutional and statutory rights". Id. at 1202. After declining to find abstention appropriate, the Third Circuit held that federal jurisdiction was appropriately exercised. Id.

Thus, in Gwynedd Properties the Third Circuit held that Younger abstention is not implicated simple because land use issues may form part of the controversy between the parties and there are parallel state proceedings. Nevertheless, each of the Younger abstention factors is considered below.

There is no dispute in this action that there are ongoing state proceedings that are judicial in nature. Although these proceedings were ongoing before the Commonwealth of Pennsylvania Environmental Hearing Board at the time defendants filed their motions to dismiss, the Environmental Hearing Board

has issued its Adjudication. However, plaintiff has appealed the Board's Adjudication to the Commonwealth Court of Pennsylvania, and the appeal is currently pending. Thus, there are ongoing proceedings before the Commonwealth Court, and such proceedings are judicial in nature.

Turning to the state interests which are implicated in the state proceedings, the Third Circuit Court has held that "land use law is one of the bastions of local control, largely free of federal intervention." Congregation Kol Ami v. Abington Township, 309 F.3d 120, 135-136 (3d Cir. 2002). "Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3d Cir. 1988).

For this reason, federal courts are generally loathe to interfere with state land use regulatory schemes. Rucci v. Cranberry Township, Pennsylvania, 130 Fed.Appx. 572, 577 (3d Cir. 2005)(citing Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3d Cir. 1988)). Thus, the parallel state proceedings related to the within action implicate important state interests.

Notwithstanding satisfaction of the first two Younger abstention requirements, defendants have not demonstrated that the parallel state proceedings provide an adequate forum in which plaintiff's constitutional claims can be vindicated. Although

defendants aver that plaintiff has asserted constitutional claims in the parallel state proceedings, defendants have not demonstrated that either the Environmental Hearing Board or the Commonwealth Court (in reviewing the decision of the Board) considered, or will entertain, plaintiff's constitutional claim for substantive due process. Moreover, defendants have not demonstrated that the parallel proceedings could award damages against any of the defendants in the within action.

Plaintiff's inability to raise its constitutional claim in the state proceedings is borne out through review of the January 31, 2008 Adjudication rendered by the Environmental Hearing Board. The decision indicates that the only constitutional claim considered by the Board was a challenge to defendant Pennsylvania Department of Environmental Protection's three orders as an unconstitutional taking. Furthermore, as a matter of Pennsylvania law, the Board's actions will be reviewed under an arbitrary-and-capricious standard by the Commonwealth Court. UMCO Energy, Inc. v. Department of Environmental Protection, 938 A.2d 530, 531 (Pa. Commw. 2007).

Because plaintiff cannot adequately raise its constitutional claim in the parallel state proceeding, Younger abstention is not applicable. Accordingly, defendants' motions to dismiss on the basis of Younger abstention are denied.

Burford Abstention

In Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the United States Supreme Court held that federal courts should refrain from reviewing state issues involving a complex regulatory scheme and sensitive areas of state concern. Burford abstention provides that when state-court review is available, a federal court should decline to interfere with the state proceedings:

- (1) when there are difficult questions of state law bearing on policy problems of substantial public importance; or
- (2) where the exercise of federal review of the question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Fiege v. Sechrest, 90 F.3d 846, 847 (3d Cir. 1996)(internal citations and quotations omitted).

Burford abstention has generally been limited in its application to state regulatory matters such as establishing rates for natural gas or transportation. Commerce Commercial Leasing, LLC v. Broward Title Company, 2005 WL 1244919, at *1 (E.D.Pa. May 25, 2005)(Green, S.J.). Moreover, if the federal case involves claims for money damages as well as injunctive relief, the proper course under Burford abstention is to stay the federal case pending the outcome of the state court proceedings, not outright dismissal. Fiege v. Sechrest, 90 F.3d at 851.

However, Burford abstention does not apply to this action. Plaintiff is not attacking Pennsylvania's complex regulatory scheme governing mining licenses and water extraction. Instead, plaintiff is seeking redress for an elaborate conspiracy between state and local agencies, government officials and private actors which has resulted in the alleged deprivation of plaintiff's constitutional rights. Plaintiff's claim is based upon defendants' misuse of their authority, not the ability of the state to confer regulatory authority or enforce such authority.

Thus, the plaintiff's claim against defendants' official actions in this case involves constitutional questions based upon defendants' conspiracy and malicious misuse of power. Plaintiff's claim does not involve complex questions of state law bearing on policy problems of substantial public importance. Cf. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 748 (3d Cir. 1982).

Moreover, because plaintiff is not attacking Pennsylvania's regulatory scheme itself, there is little possibility that plaintiff will upset Pennsylvania's ability to set a coherent state policy concerning mining permits and water extraction rights. Defendants have not asserted that any relief granted in this action could upset the delicate balance achieved through state regulations allocating licensing authority.

Defendants have not averred that this federal action will interfere with any policymaking or regulatory function of Pennsylvania agencies.

Accordingly, defendants' motions to dismiss on the basis of Burford abstention are denied.

CONCLUSION

For the foregoing reasons, and consistent with the within Opinion, I grant in part and deny in part each of the following motions: (1) DEP and DEP Defendants' Motion to Dismiss the Complaint; (2) Motion of Spotts Stevens & McCoy, Inc. and Richard Schloesser to Dismiss Plaintiff's Complaint; (3) Defendant Telford Borough Authority and Defendant Mark Fournier's Motion to Dismiss and Strike Plaintiff's Complaint and Motion for a More Definite Statement; and (4) Defendants Delaware River Basin Commission and William J. Muszynski's Motion to Dismiss Plaintiff's Complaint or for a Stay.