

## What is the Risk of Personal Liability for Environmental Violations?

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A common assumption is that owning and operating a business or real estate through a limited liability company, or other corporate entity, affords significant liability protection for violation of environmental laws to individual corporate officials, including officers, managers and others with operational authority. However, recent holdings by the Commonwealth Court and the Pennsylvania Environmental Hearing Board (“EHB”), which hears appeals from final actions of the Department of Environmental Protection (“DEP”), are a reminder that these those individuals with operational authority can be held personally liable not only for affirmative unlawful acts, but also for a failure to act to address violations.

In *B&R Resources, LLC v. DEP*, 180 A.3d 812 (Pa. Commw. Ct. 2018), the Commonwealth Court held that individuals can be personally liable for a company’s inaction if:

1. they had the necessary authority and duty to address the violations;
2. they had knowledge of the violations;
3. they failed to take reasonable steps to address the violations; and
4. their conduct had a causal connection to the violations.

In *Schlafke v. DEP*, EHB Docket No. 2016-117-B (January 8, 2019), <http://ehb.courtapps.com/efile/documentViewer.php?documentID=44471&opinion=true>, Maria Schlafke, the managing member of a LLC, was assessed a civil penalty for multiple violations of Pennsylvania’s Safe Drinking Water Act (“SDWA”). The LLC owned a mobile home park and a public water supply that served its residents. The violations that were the basis for the civil penalty included numerous failures to conduct certain tests and report results to DEP and failure to retain a certified system operator.

The EHB found that Schlafke’s inaction met the criteria set forth in *B&R Resources* to establish her personal liability for the SDWA violations. Schlafke had an available affirmative defense that the LLC’s poor financial health prevented her from complying with the SDWA requirements. To successfully assert this affirmative defense, she had to demonstrate that:

1. the cost of compliance respecting each violation, and
2. the financial resources of the company available to address each violation. Actual insolvency of the company was not required.

The EHB rejected this defense, noting that the LLC’s compliance costs were only 10 percent of the amount the LLC received in rent and water service payments, and that the LLC’s other demonstrated costs did not account for the remaining 90 percent.

*B&R Resources* and *Schlafke* stand for the proposition that those with operational authority can be personally liable for their failure to correct violations they know, or should have known, about. The limited liability entity will not necessarily protect them from such liability.