



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

**PROTECT PT**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and OLYMPUS ENERGY,  
LLC, Permittee**

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**EHB Docket No. 2023-025-W**

**Issued: May 15, 2024**

**OPINION AND ORDER ON PERMITTEE’S MOTION TO STRIKE  
EXPERT REPORTS AND PRECLUDE EXPERT TESTIMONY**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Permittee’s motion to strike the Appellant’s expert reports and preclude expert testimony is denied. The challenges relate more to the weight to be given the expert testimony than to its admissibility.

**OPINION**

**Background**

Protect PT filed this appeal on March 10, 2023, challenging the issuance of permits by the Department of Environmental Protection (Department) for the drilling and operation of two unconventional gas wells, the Metis 2M and 4M. The permits were issued to Olympus Energy, LLC (Olympus) in connection with the Metis Well Site in Penn Township, Westmoreland County. In its appeal, Protect PT asserts that the Department’s issuance of the permits allows the introduction of PFAS, PFOA and other chemicals into the environment through hydraulic

fracturing without properly regulating or limiting their use and fails to require full disclosure of those chemicals.<sup>1</sup>

The matter now before the Board is Olympus' motion to strike the expert reports and testimony of Protect PT's experts, Dusty Horwitt, J.D. and Dr. Carla Ng, PhD. Olympus states that it has filed the motion in an effort to streamline this matter and to remove uncertainty over the extent to which Olympus and the Department must prepare to cross-examine Protect PT's experts and present reports of their own. Protect PT opposes the motion and asks the Board to allow the reports and testimony of Mr. Horwitt and Dr. Ng.

### **Standard**

A motion to strike an expert report or expert testimony is generally treated as a motion in limine. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161; *Pine Creek Valley Watershed Association v. DEP* ("*Pine Creek I*"), 2011 EHB 90, 92; *Township of Paradise v. DEP*, 2002 EHB 68. As we said in *Delaware Riverkeeper*:

A party may obtain a ruling on evidentiary issues by filing a motion in limine pursuant to 25 Pa. Code § 1021.121. A motion in limine is the proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Kiskadden v. DEP*, 2014 EHB 634, 635 (citations omitted). In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. Whether to accept expert testimony is within the discretion of the Board, and the Board's decision will not be disturbed on appeal unless it is clearly erroneous. *Rhodes v. DEP*, 2009 EHB 237, 238 (citing *Grady v. Frito-Lay*, 839 A.2d 1038, 1046 (Pa. 2003)).

2016 EHB at 161.

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<sup>1</sup> The notice of appeal also challenged Olympus' compliance history, but on May 6, 2024 the parties filed a Stipulation stating that Protect PT had withdrawn its objections relating to compliance history and this appeal solely involves the "PFAS related objections." (Stipulation, para. 1-3.)

## Discussion

Dusty Horwitt holds a J.D. and is a consultant with Physicians for Social Responsibility. His report discusses the use of PFAS in oil and gas operations and Pennsylvania’s regulatory framework regarding the disclosure of hydraulic fracturing chemicals. (Exhibit A to Olympus Motion.) Carla Ng, Ph.D. is an Associate Professor in the University of Pittsburgh’s Department of Civil and Environmental Engineering with secondary appointments in the Department of Chemical and Biological Engineering and Department of Environmental and Occupational Health. Her report discusses PFAS, including exposure, toxicology and potential linkage to the oil and gas industry. (Exhibit B to Olympus Motion.) Olympus has moved to strike both reports on the grounds they are 1) mere summations of research by other parties, 2) not based on generally accepted scientific methodology, 3) speculative and 4) not relevant to the gas wells that are the subject of this appeal.

### Generally Accepted Scientific Methodology – *Frye* Challenge

We first address Olympus’ argument that Dr. Ng’s and Mr. Horwitt’s reports and proffered testimony are not based on generally accepted scientific methodology. When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania courts have adopted the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-44 (Pa. 2003); *Kiskadden v. DEP*, 2014 EHB 618, 619; *Pine Creek Valley Watershed Association v. DEP* (“*Pine Creek II*”), 2011 EHB 761, 777; *Pine Creek I*, 2011 EHB at 92. Under *Frye*, “novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community.” *Grady*, 839 A.2d at 1043-44 (citing *Commonwealth v. Blasioli*, 713 A.2d 1117, 1119 (Pa. 1998); *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 68, 69. “The requirement of general acceptance

in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice.” *Kiskadden*, 2014 EHB at 619-20 (citing *Commonwealth v. Topa*, 369 A.2d 1277, 1282 (Pa. 1977) (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)); *Range*, 2022 EHB at 70.

A *Frye* challenge goes to the expert’s *methodology*: It is the methodology that must be generally accepted in the field, not necessarily the expert’s conclusions. *Kiskadden*, 2014 EHB at 620. Here, Olympus does not take issue with any particular methodology employed by Dr. Ng and Mr. Horwitt; rather, its argument is that the reports do *not* contain a methodology and are simply a collection of data. It asserts that the “reports, in short, are devoid of any express or implied methodology for their opinions.” (Olympus Memorandum, p. 11.) Protect PT disagrees; it argues that Dr. Ng’s and Mr. Horwitt’s reports draw conclusions based on a litany of peer-reviewed work which is an acceptable methodology in their field. It asserts that the reports contain “citations to 190+ publications, including [Dr. Ng’s and Mr. Horwitt’s] own research, peer reviewed publications, publications authored by experts in their relevant fields, and studies with thoroughly explained methodology and robust data,” and, as such, “fall well within the type of scientific rigor envisioned by Pennsylvania when implementing the *Frye* standard.” (Protect PT Response, p. 8.)

The purpose of the *Frye* test is to prevent the trier of fact from having to hear opinions founded upon scientific theories that amount to “junk science.” *Range*, 2022 EHB at 71; *Kiskadden*, 2014 EHB at 623. Olympus has not demonstrated that is the case here. Moreover, the Board has recognized the limited application of the *Frye* test in Board proceedings. In *Kiskadden*, we held:

The *Frye* test is designed to ensure that opinions based upon unaccepted science are not presented to impressionable jurors. *Blum*

*v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314, 1317 (Pa.Super. 1997), *aff'd*, 764 A.2d 1 (Pa. 2000). However, the Board "operates in a nonjury setting. We deal with scientific theories every day." [*Pine Creek II*], 2011 EHB at 778-79. The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility should be given to expert testimony presented at trial.

2014 EHB at 623. Similarly, in *Pine Creek I*, we stated:

There is a fine line between methodology and conclusions. Indeed, the entire construct is somewhat artificial. The fundamental job of a court is to ensure that bogus opinions based upon junk science are not presented to what some people fear might be impressionable jurors. *Blum* [705 A.2d at 1317]. Although the Members of this Board are, perhaps, not quite as impressionable, bogus opinions obviously waste time and do not aid us in our search for the truth. *In a setting such as ours, questions regarding the methods used by an expert may go more to the weight of the opinions than their admissibility.* The weight to be given to an expert's opinion depends upon many factors and "as the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties." *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007) (*en banc*), citing *Bethayres [v. DER]*, 1990 EHB [570] at 580.

2011 EHB at 93-94 (emphasis added).

Thus, the *Frye* test plays a more important role where a jury is the factfinder; in that situation, the court must be proactive in ensuring that the jury is not swayed by improper expert testimony. In non-jury trials, this is less of a concern. This is especially so in matters before the Board, which is specialized and skilled in dealing with expert testimony. Moreover, unlike a jury, the Board issues a written adjudication following a hearing that explains the basis of its decision.

The Board has recognized that "[t]he *Frye* standard 'is an exclusionary rule of evidence. As such it must be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for truth.'" *Pine Creek I*, 2011 EHB at 94 (quoting *Trach v. Fellin*, 817 A.2d 1102, 1104 (Pa. Super. 2003)). In both *Pine Creek I* and *Kiskadden*, the Board declined to grant a *Frye* motion, finding that it was more prudent to address the questions raised by the

motion at a hearing. Here too we believe that Olympus' criticism is more appropriately addressed through cross-examination and not as a *Frye* challenge.

**Pa. R.E. 703, Comment**

Similar to Olympus' *Frye* challenge is its assertion that the reports of Mr. Horwitt and Dr. Ng are simply "literature reviews" that recite what others have stated in their publications without exercising any expertise, experience or judgment to establish an independent opinion. Olympus contends that the reports of Mr. Horwitt and Dr. Ng fail to comply with the comment to Pennsylvania Rule of Evidence 703, which states, "An expert witness cannot be a mere conduit for the opinion of another. An expert witness may not relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it in forming the witness's own opinion." See *Commonwealth v. Towles*, 106 A.3d 591, 606 (Pa. 2014) (An expert may not act as a mere conduit of hearsay). Olympus directs our attention to various sections of the expert reports where it contends that Mr. Horwitt and Dr. Ng discuss a particular study or report but do not stake out any expert opinion of their own. Protect PT disagrees with Olympus' characterization and argues that the reports of Dr. Ng and Mr. Horwitt present a summation of existing science that includes the application of their specialized expertise.

The Board addressed this issue in *Pine Creek II*:

While an expert may rely on other experts in forming his own opinion, in the end it must be *his* opinion. *Allegheny Energy Supply Co. v. Greene County*, 788 A.2d 1085, 1096 (Pa. Cmwlth. 2001.) An expert may not simply regurgitate the opinion of another expert, particularly one who does not testify. *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa Super. 1992) (expert should not be permitted to simply repeat another's opinion or data without bringing to bear his own expertise or judgment).

2011 EHB at 784.

We do not believe that Dr. Ng’s and Mr. Horwitt’s expert reports conflict with the standard set forth in the comment to Pa. R.E. 703. While Dr. Ng’s and Mr. Horwitt’s reports cite a number of sources, they are not simply parroting others’ opinions. Rather, they rely on those sources in reaching their own conclusions. Pursuant to the comment to Pa. R.E. 703, an expert witness may relate the opinion of a non-testifying expert when the witness has reasonably relied upon it in forming the witness’s *own* opinion. We believe the expert reports of Dr. Ng and Mr. Horwitt meet this standard. Additionally, as with Olympus’ *Frye* challenge, we believe this is a matter more appropriately addressed through cross-examination at a hearing.

**Relevance and Specificity**

Finally, Olympus argues that the reports of Dr. Ng and Mr. Horwitt are speculative and fail to address matters specifically related to the particular well site in question in this appeal. Olympus points to the use of conjectural language in the expert reports. For example, at one point Mr. Horwitt states, “PFAS-tainted wastewater from oil and gas wells *could* be injected into underground disposal wells where it *could* flow to the surface and break out into groundwater through nearby abandoned oil and gas wells...” (Ex. A to Olympus Motion, p. 11.) Likewise, Dr. Ng states, “it is clear that a variety of PFAS *may have been* used historically and *may still be used* now in gas extraction.” (Exhibit B to Olympus Motion, p. 15.) Olympus argues:

Notably, neither expert has considered the question of whether the hydraulic fracturing activities that were conducted pursuant to the Well Permits at issue could have allowed the introduction of PFAS into the environment, never mind opined with reasonable certainty that the activities “did” or “would have” allowed it.

(Olympus Memorandum, p. 9.) It further argues:

Neither report contains a single fact, data point, or opinion specific to the Wells or anything else that is specific to this appeal, let alone any information regarding the Metis Well Site or even Olympus’s activities generally. Even though there are thousands of different

PFAS chemicals, Mr. Horwitt and Dr. Ng do not identify any particular PFAS chemical that Olympus has used or explain how or why, in relation to the Wells, a release of some quantity of that chemical has occurred, or will occur, leading to some particular type of harm. The reports, in fact, are devoid of any references to Olympus.

(Olympus Memorandum, p. 7.) Based on the above, Olympus argues that Dr. Ng's and Mr. Horwitt's testimony is irrelevant and inadmissible.

Protect PT counters that any lack of specificity in its reports is not reflective of a deficiency in the experts' analyses, but, rather, Olympus' inability or refusal to provide information that would allow Protect PT's experts to draw more case-specific conclusions. Protect PT asserts that it must work in terms of generalities due to trade secret laws and regulations that prevent the disclosure of many substances used in the hydraulic fracturing process, including operations at Olympus' site. Protect PT responds to Olympus' argument as follows:

[I]ndeed, the experts in question tend to reference PFAS and PFOAS impacts generally, rather than impacts of the specific wells at issue here, but there are deliberate reasons for this type of generality. As Dusty Horwitt's report demonstrates, trade secrets laws and regulations surrounding Material Safety Data Sheets prevent the disclosure of exact chemical identities of many substances used in fracking. Horwitt Report at p. 5. Since Olympus has not or cannot disclose the identity of the substances it has used in the fracking process, our experts cannot make any more specific statements about such wells, and instead have to speak about PFAS chemicals more broadly.

(Protect PT Response, p. 9-10.)

Protect PT points out that it has served a subpoena on Olympus' chemical supplier to obtain the identities of the chemicals used in its hydraulic fracturing process. Olympus filed objections to the subpoena which were overruled on April 15, 2024. Protect PT asserts that, until it obtains this information, its experts have no choice but to speak generally. It adds that Olympus itself



could clear up any uncertainty by simply providing the specific identity of the chemicals used in its hydraulic fracturing process.

Olympus references Pennsylvania Rule of Evidence 403 which states that relevant evidence may be excluded if its probative value is outweighed by a danger of unfair prejudice. It contends that “the prejudicial effect of Mr. Horwitt’s and Dr. Ng’s proffered testimony that something ‘could’ or ‘might’ happen at an oil or gas well far outweighs whatever probative value their speculative, non-Olympus-specific testimony might carry.” (Olympus Memorandum, p. 10.)

Protect PT disputes that there is any prejudice to Olympus and makes the following argument:

[T]he words “could” or “might” should not be seen as weak conclusions, but rather, the measured responses of experts trying to be as accurate as possible while being denied essential facts to their analysis, such as the chemical identities of the substances used by Olympus in fracturing processes.

(Protect PT Response, p. 11.)

Protect PT relies on the Board’s decision in *Blythe Twp. v. DEP*, 2011 EHB 433, 436, which held that “[e]xpert opinion regarding increased risk and the likelihood of something occurring are routinely admitted, so long as the opinion does more than describe mere possibilities.” However, that is precisely Olympus’ point – that the reports of Dr. Ng and Mr. Horwitt describe “mere possibilities” by their use of terms such as “may” and “could.” Protect PT disagrees and makes the following argument:

Language like “could” and “might” is acceptable to describe likelihood and increased risk, and in the present case, is the most accurate way to describe elevated risks of using an entire class of chemicals, since the experts in question have been blocked from knowing identities of the chemicals in question within that class. Until Olympus claims that they do not use any dangerous chemicals in their fracking process, both [sic] Protect PT will be forced to use the allegedly “prejudicial” language of “could” and “might” in order to give the most honest reports.

Further, although Olympus claims that the expert reports offer only speculative conclusions that were “deduced by surmise” and unsupported by any confirming evidence, as discussed above, our expert’s analysis is cabined by Olympus’s failure to disclose the exact chemical identity of the substance(s) in question, so words like “probably” and “likely” are needed to accurately describe the effects of substances the exact nature of which remain unknown. However, the experts are able to draw strong conclusions supported by evidence in regard to the impacts of PFAS more generally.

(Protect PT Response, p. 11-12.)

Both Olympus and Protect PT make strong arguments in support of their respective positions. Olympus is correct that expert opinion must consist of more than mere guesswork in order to be helpful to the trier of fact. However, Protect PT has sufficiently explained why its experts cannot proceed with a higher level of certainty due to barriers that prevent the disclosure of much of the information it seeks. We note that discovery is still ongoing in this matter. While Olympus and the Department have had Protect PT’s expert reports since August 2023, they have not yet produced their own reports. Although Olympus filed this motion for the purpose of removing uncertainty, it is possible that the production of Olympus’ expert reports may clear up some of that very uncertainty. Additionally, as noted earlier, Protect PT has only recently had the opportunity to subpoena Olympus’ supplier for information related to the substances used by Olympus in the hydraulic fracturing process at the Metis site. Amid this backdrop, there is no basis for taking the drastic step of striking Protect PT’s expert reports and expert testimony. Additionally, to the extent that Olympus contends that Protect PT’s expert reports are not specific enough, this criticism goes to the weight and credibility to be afforded Protect PT’s experts, not the admissibility of their expert testimony. *Blythe Township*, 2011 EHB at 436.

Accordingly, we enter the order that follows:



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 PROTECTION and OLYMPUS ENERGY, :  
 LLC, Permittee :

**ORDER**

AND NOW, this 15<sup>th</sup> day of May, 2024, it is hereby ordered that Olympus’ Motion to Strike Expert Reports and Preclude Expert Testimony Based on the Reports is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 15, 2024**

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