



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	EHB Docket No. 2023-074-W
	:	(Consolidated with 2022-072-W)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: February 7, 2024
PROTECTION and APEX ENERGY (PA),	:	
LLC, Permittee	:	

**OPINION AND ORDER ON
PERMITTEE’S MOTION FOR PARTIAL DISMISSAL**

By MaryAnne Wesdock, Judge

Synopsis

A permittee’s motion for partial dismissal is granted in part. An appellant may not use an appeal of the renewal of two unconventional gas well permits to challenge the issuance of the permits. The question presented in an appeal of a permit renewal is not whether the permit was appropriate in the first place, but whether it should continue in place. Where the wells have not been drilled and the renewal simply extended the date of the permits, the scope of the appeal is limited. However, where the record before us contains factual disputes and it is unclear what information was considered by the Department in renewing the permits, the motion must be denied in part.

OPINION

Background

This matter is a consolidated appeal brought by Protect PT challenging two unconventional gas well permits issued to Apex Energy (PA), LLC (Apex) by the Department of Environmental Protection (Department) for the Drakulic well site in Penn Township, Westmoreland County.

Protect PT is a grassroots nonprofit organization “formed in December of 2014 to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development.” (Notice of Appeal, Docket No. 2022-072-W, para. 7.) Protect PT appealed the issuance of the permits in 2022 and the renewal of the permits one year later in 2023. The appeals have been consolidated.

The matter pending before the Board is a Motion for Partial Dismissal (motion) filed by Apex, seeking to dismiss several of the objections raised in the appeal of the permit renewal. The Department filed a memorandum of law in support of the motion, and Protect PT filed a response in opposition. Both the Department and Apex have filed replies, and the motion is ripe for review. Based on the parties’ filings, a more detailed history of this matter is set forth below.

On August 17, 2022, the Department issued permits to Apex for the Drakulic 1H and 7H wells. On September 19, 2022, Protect PT appealed the issuance of the permits, and the appeal was docketed at Docket No. 2022-072-B. In its motion Apex states that it elected not to drill the Drakulic wells while the appeal was pending, and instead sought a two-year renewal of the permits, which was granted on August 15, 2023.¹ In the interim, Protect PT filed a substitution of counsel. On September 14, 2023, Protect PT appealed the renewal of the permits, and the appeal was docketed at 2023-074-B. On September 19, 2023, both appeals were consolidated at the latter docket number. On December 28, 2023, the consolidated appeal was reassigned and docketed at Docket No. 2023-074-W.

Standard of Review

¹ A well permit expires one year after issuance if drilling has not commenced. 58 Pa. C.S. § 3211(i); 25 Pa. Code 78a.17(a). An operator may request a two-year renewal accompanied by a fee, a surcharge and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b).

"A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern." *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015). The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Latkanich v. DEP*, EHB Docket No. 2023-043-B, *slip op.* at 4-5 (Opinion and Order on Partial Motion to Dismiss issued October 6, 2023); *Ongaco v. DEP*, EHB Docket No. 2023-022-CS, *slip op.* at 3 (Opinion and Order on Motion to Dismiss issued July 25, 2023); *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op.* at 2-3 (Opinion and Order on Motion to Dismiss issued May 15, 2023); *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol*, 2015 EHB at 54; *Winner v. DEP*, 2014 EHB 135, 136-37. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570. The standard for motions to dismiss also applies to motions for partial dismissal. *Borough of Jessup v. DEP*, EHB Docket No. 2023-068-L, *slip op.* at 3 (Opinion and Order on Motion to Dismiss in Part issued January 25, 2024); *Latkanich*, *slip op.* at 5; *Popovich v. DEP*, EHB Docket No. 2021-082-B (Opinion and Order on Motion to Dismiss Certain of Appellants' Objections issued March 22, 2023).

Discussion

This matter involves a consolidation of two appeals from the following actions: the issuance of the well permits for the Drakulic 1H and 7H wells (the Initial Appeal) and the renewal

of those permits (the Renewal Appeal). Apex seeks to dismiss a number of objections raised in the Renewal Appeal as being beyond the scope of the appeal.

We turn first to an analysis of the Board’s case law on this subject.

Scope of Renewal Appeal

It is well-established that an appellant may not use an appeal of a permit renewal to challenge the issuance of the permit in the first place. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134 (“An appellant may not use the occasion of an action that takes the form of a change, renewal, or update to challenge whether the original permit should have been issued in the first place.”) *See also, Friends of Lackawanna*, 2017 EHB 1123, 1163-64; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 248, *aff’d*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Love v. DEP*, 2010 EHB 523, 525; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359. In an appeal of a permit renewal, “an appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed.” *Solebury Township v. DEP*, 2004 EHB 95, 112-13.

The question to be considered in an appeal of a permit renewal is whether it is appropriate for the permit to continue in place for the term of the permit renewal. *Wheatland Tube*, 2004 EHB at 135-36. The Board “review[s] the Department’s action based upon up-to-date information to decide whether it was lawful and reasonable.” *PQ Corporation v. DEP*, 2017 EHB 870, 874. In *Friends of Lackawanna*, the Board considered an appeal of a renewal of a landfill permit. Writing for the Board, Judge Labuskes explained the Board’s scope of review:

Defining the precise boundaries of what should be evaluated in a permit renewal can undoubtedly be challenging. Permit “renewals require something more than the mindless application of a rubber stamp but something less than a reexamination of the merits of any earlier permitting decisions regarding the landfill.” *Friends of Lackawanna [v. DEP]*, 2016 EHB 815, 819. Our review of a permit

renewal, of course, is not whether the landfill should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *See Sierra Club v. DEP*, [2017 EHB 685]. A party may not use an appeal from a later Department action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action. *Love v. DEP*, 2010 EHB 523, 525. However, we have repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so.

Friends of Lackawanna, 2017 EHB at 1163-64. Thus, the Board's scope of review in considering an appeal of a permit renewal is to ensure that the *continuation* of the permitted activity is appropriate.

Where a renewal makes no changes to the permit, but simply extends the term of the permit, that fact alone does not necessarily limit the scope of the renewal appeal. *PQ Corporation*, 2017 EHB at 875. *See also Friends of Lackawanna*, 2017 EHB at 1166 (“[W]hether or not permit conditions have changed is not the sole or even primary focus of our inquiry.”) However, it is a factor that may be considered, particularly where, as here, there has been no activity undertaken under the permits and the renewal occurred only one year after the issuance of the permits. Under those circumstances, what may be considered within the scope of the appeal of the permit renewal is commensurately limited.

Much of the Board's jurisprudence addressing the question of the appropriate scope of review in the appeal of a permit renewal has involved an appellant who has not appealed the original permit but has appealed a permit renewal or reissuance down the road, or where the Department is charged with periodic review of the permit. For example, in *Friends of Lackawanna*, at the time of the appeal of the permit renewal the landfill in question had been operating for more than 30 years and had gone through several other renewals and modifications. The Board took into consideration the fact that under the municipal waste regulations the

Department was periodically required to evaluate the landfill permit “to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices.” 2017 EHB at 1164 (quoting 25 Pa. Code § 271.211(d)). Similarly in *Sierra Club*, 2017 EHB 685, the appellant appealed a 2015 reissuance, renewal and modification of a landfill permit that had been issued decades earlier and was subject to a major modification in 2009. The Board noted that the renewal, reissuance and modification was an opportune time to ensure that the operation was being conducted in accordance with the law, especially since the modification allowed the disposal of waste from a new source. *Id.* at 690-91. Likewise, *PQ Corporation* involved a Title V permit that had been issued in 2000. The permit had been renewed once and amended three times before a subsequent renewal was appealed in 2016 by the holder of the permit who claimed that emissions data from the operation of the facility warranted a change in one of the permit’s limits. The Board rejected the Department’s argument that the permit limits could not be challenged because the permit was administratively final, stating, “[W]hether PQ should be permitted to continue to operate its furnace for another five years, and if so, pursuant to what terms and conditions, is a perfectly legitimate and appropriate inquiry for the Department to make and for us to review.” 2017 EHB at 875.

In those cases, the Board recognized that “Departmental permits...last a long time. They need to be reviewed and possibly updated or modified over time.” *Wheatland Tube*, 2004 EHB at 133-34. The occasion of a permit renewal provides just such an opportunity “to ensure that an operation is being run in accordance with the law.” *Sierra Club*, 2017 EHB at 690 (quoting *Rausch Creek*, 2011 EHB 708, 727).

However, unlike the permits at issue in *Friends of Lackawanna*, *Sierra Club* and *PQ Corporation*, here there is no ongoing operation that may be reviewed to ensure that it “is being

run in accordance with the law.” Apex’s permit was issued in August 2022 and extended only one year later in August 2023. The wells have not been drilled during the pendency of this litigation. There is no “continued operation” to evaluate.

Protect PT acknowledges that the scope of an appeal of a permit renewal is more limited than an appeal of the original permit, but it asks us to take a more expansive view in this case. It directs our attention to *Brockway Borough Municipal Authority* as support for its position. In that case, like here, the appellant appealed both the issuance of an unconventional gas well permit and the permit renewal, and the cases were consolidated. The appeal of the renewal included a challenge brought under Article I, § 27 of the Pennsylvania Constitution that had not been raised in the appeal of the original permit. In its adjudication of the matter, the Board took into consideration the particular facts of the case – specifically, 1) the appellant had appealed both the permit and the renewal, 2) neither the original permit nor the renewal were final due to the appeals, 3) the appeals were consolidated, and 4) the permittee had not yet drilled the well – and determined, “Under these circumstances there is no occasion to apply some diminished version of the Article I, Section 27 analysis because a renewal is involved.” *Brockway Borough Municipal Authority*, 2015 EHB at 248.

Protect PT points out that the circumstances of this case are similar to what occurred in *Brockway* – i.e., Protect PT has appealed both the issuance of the permits and the renewals, the permits and renewals are not final, the appeals have been consolidated and Apex has not drilled the wells – and, therefore, argues the Board should not “apply some diminished version of an analysis. . .of Appellant’s objections because a renewal is involved.” (Notice of Appeal, Docket No. 2023-074-W, para. 12.)

However, while Protect PT is correct that many of the facts in *Brockway* parallel the facts of this case, there are some important differences. Notably, in *Brockway* there was no dispute among the parties over what issues were properly included in the appeal of the permit renewal. The parties agreed that the Article I, Section 27 challenge was part of the renewal appeal. The question facing the Board was not whether the Article I, Section 27 claim should be permitted within the scope of the renewal appeal, but whether the Board’s analysis under Article I, Section 27 was limited because a renewal was involved.² *Brockway* does not stand for the proposition that the scope of a permit renewal appeal is broadened when the initial permit is also appealed. The Board’s case law remains clear that the scope of review of an appeal of a permit renewal is limited to considering matters pertaining to the renewal; it may not be used as an attack on whether the permit should have been issued in the first place.

Apex’s Motion

We turn now to the specific objections in the Renewal Appeal that Apex asserts should be dismissed. They may be summarized as follows: 1) Paragraphs 25-29 – claims regarding the use, generation and discharge of hazardous chemicals; 2) Paragraphs 30-42 – claims regarding the failure to limit, disclose or properly manage TENORM;³ 3) Paragraphs 43-52 – claims regarding climate destabilization; 4) Paragraphs 53-69 – claims regarding endangerment and impact to human health and vulnerable populations and threats to ambient air quality, as well as claims that the Department failed to take into account cumulative impact or perform a harms/benefits analysis;

² We note that Protect PT has raised a number of Article I, Section 27 claims in both its Initial Appeal and its Renewal Appeal (paragraphs 19-24) which have not been challenged by Apex in its motion and which will be evaluated by the Board.

³ TENORM is “technically enhanced naturally occurring radioactive material.” *Liberty Township v. DEP*, EHB Docket No. 2021-007-L, *slip op* at Findings of Fact 186-188 (Adjudication issued January 8, 2024).

5) Paragraphs 70-73 – claims regarding the failure to consider public input, perform a holistic review, or take into account the cumulative effect of surrounding sources of pollution; 6) Paragraphs 74-75 – claims regarding 25 Pa. Code § 127.14(8)(38c) (which pertains to exemptions to plan approvals for sources of air emissions); 7) Paragraphs 76-86 – claims regarding deficiencies of the Preparedness, Prevention, and Contingency Plan (PPC plan); and 8) Paragraphs 96-106 – claims regarding the Section 503 permit block provision of the Clean Streams Law, 35 P.S. § 691.503.⁴

Some of the claims pertain to the issuance of the initial permits (Initial Permits) and alleged deficiencies in the applications for the Initial Permits. As we have stated, challenges to the Initial Permits are outside the scope of the Renewal Appeal. Accordingly, those objections pertaining to the Initial Permits are dismissed. We turn our attention to the remaining objections, which we shall refer to as the “Renewal Objections.”

Both Apex and the Department contend that the Renewal Objections are an attempt to expand the scope of the Initial Appeal.⁵ They point out that the Renewal Appeal raises a number

⁴ This paragraph provides a summary of the objections challenged by Apex. The actual objections that Apex seeks to dismiss are those set forth in paragraphs 25-86 and 96-106 of the Renewal Appeal. (Apex Motion, p. 5 and Proposed Order to Motion.)

⁵ The Initial Appeal set forth 10 objections that may be summarized as follows: 1) Paragraph 66 -The issuance of the well permits constitutes a public nuisance due to Apex’s compliance history and violates the Department’s obligations under 71 P.S. § 510-17 and Article I, Section 27 of the Pennsylvania Constitution (Article I, Section 27); 2) Paragraph 67 - The permits authorize the introduction of PFAS, PFOA and other related chemicals into the environment through hydraulic fracturing in violation of the Department’s duty under Article I, Section 27; 3) Paragraph 68 - The permits allow hydraulic fracturing, well drilling, and natural gas production in close proximity to sensitive receptors and populations such as residential homes, a school, and species of special concern in violation of the Department’s duty under Article I, Section 27; and 4) Paragraphs 69-73 and 75 - Apex’s emergency response plan fails to comply with various subsections of 25 Pa. Code Chapter 78a.55 (dealing with emergency response for unconventional wells). (Notice of Appeal, para. 66-73, 75.) The Initial Appeal also alleged that the Department failed to adequately address impacts to threatened and endangered species habitat, but this objection was subsequently withdrawn. (Notice of Appeal, para. 74; Order issued by the Board on June

of new objections that were not raised in the Initial Appeal. In support of this contention, Apex provides a comparison between the Initial Appeal and the Renewal Appeal which it says demonstrates that the majority of the Renewal Appeal contains new material as compared to the Initial Appeal. (Exhibit F to Motion.) The Department argues that any attempt to raise issues that were not in the Initial Appeal must be done by means of a motion to amend the Initial Appeal, not by raising the issues as part of the Renewal Appeal.

However, in determining what is the proper scope of the Renewal Appeal, our inquiry is not whether the objections set forth in the Renewal Appeal correspond to or differ from objections set forth in the Initial Appeal. The Initial Appeal and the Renewal Appeal are two separate appeals of two separate actions, each with its own scope of review. As we noted earlier, the circumstances here differ from most of the Board’s previous cases addressing the appropriate scope of review of an appeal of a permit renewal. Those cases involved an appeal of a permit renewal where there had been no appeal of the issuance of the permit in the first place. Here, Protect PT has appealed both the issuance of the permits and the renewal of those permits, and the appeals have been consolidated at the joint request of the parties. However, the consolidation of the appeals does not change the standard for determining the proper scope of review.

Consolidation is governed by 25 Pa. Code § 1021.82(a), which provides: “The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such

15, 2023, striking paragraph 74 of the Notice of Appeal pursuant to the request of Protect PT, consented to by the Department and Apex.)

proceedings.” The typical consolidation involves multiple appeals from the same Department action. *Bucks County Water & Sewage Authority v. DEP*, 2013 EHB 203. Here, we have two separate, though related, actions by the Department that have been appealed by the same party, involving the same permits. We also have two different appeals, where certain issues raised in the Renewal Appeal were not raised in the Initial Appeal, and where certain issues raised in the Renewal Appeal were clearly raised in the Initial Appeal.

As the Board said in *Bucks County*, “[c]onsolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements.” 2013 EHB at 205 (citing *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23). The Board has broad discretion to manage its cases, specifically with regard to consolidation. *Borough of Danville v. DEP*, 2008 EHB at 378.

In *Barshinger v. DEP*, 1996 EHB 1021, the Board declined to consolidate where it found that there were not sufficient common issues of law and fact. That case, as here, involved two appeals filed by the same appellants, of two separate Department actions, both relating to the same project. The Board found that certain issues raised in one appeal were not part of the other appeal. In cases where issues are drastically different, proceeding with separate appeals may make sense. For example, where the Department has undertaken a very different analysis in deciding to renew a permit than it did in issuing the permit in the first instance, it may be more appropriate to pursue the renewal appeal as a separate matter.

In this case, we have determined that consolidation of the two appeals is appropriate for the sake of judicial economy and the convenience of the parties. However, it is important to keep

in mind that, although this is one “case” for purposes of managing the docket, conducting discovery and engaging in other prehearing matters, when determining the proper scope of review, we view each appeal separately. Therefore, in determining what objections are properly part of the Renewal Appeal, the question is not whether they are related to objections raised in the Initial Appeal but whether they relate to the renewal of the permits.

We begin our analysis by reviewing what the Department considered when it made the decision to renew the Drakulic 1H and 7H well permits. *Friends of Lackawanna*, 2017 EHB at 1165 (“Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.”) Here, both Apex and the Department assert that the renewal of the permits was in essence a ministerial action. They point to Section 78a.17(b) of the regulations which sets forth the application requirements for the renewal of an unconventional gas well permit. The process simply requires the payment of a fee and surcharge and an affidavit stating that the original application remains accurate and complete. 25 Pa. Code § 78a.17(b). The record demonstrates that Apex submitted to the Department the necessary affidavits attesting to the fact that the information in the applications for the Initial Permits was still accurate and complete. (Exhibit A to Department’s Memorandum). According to the Department, “[t]his limited submission and review process results in a very narrow Department action, which only turns upon whether the original application is still accurate and complete.” (Department Memorandum in Support of Partial Motion, p. 5.)

However, according to the Department’s record of decision, provided as a link in Apex’s Memorandum of Law in Support of its Motion, the Department conducted not only a completeness

review but also a technical review.⁶ The technical review indicates that water supply information was updated and that certain other information was considered.⁷ The decision record states, “DEP concludes based on its review that public natural resources will be protected, conserved, and maintained, while allowing for the development of natural gas on the Drakulic well site.”⁸

The record of decision indicates that the Department required more than simply the submission of affidavits and that additional information was considered as part of its decision-making process. While the scope of the renewal application appears to have been limited, it clearly involved more than simply checking a box stating that the original applications remained accurate and complete. The Board is reluctant to grant a motion for partial dismissal where there are facts in dispute. Without documentation in the record attesting to what the Department considered in its review of the renewal applications, we can only surmise which, if any, of the Renewal Objections should be dismissed. As we have stated, the Board will only grant a motion to dismiss objections when a matter is free of doubt. *Bartholomew*, 2019 EHB at 517. Where the matter is not clear, the motion must be denied. *Thomas v. DEP*, 1998 EHB 93, 98. We believe it would be more prudent for these questions to be considered in the context of a motion for summary judgment.

Accordingly, we enter the following order:

⁶ [eFACTS on the Web \(pa.gov\)](#)

⁷ August 7, 2023 Memo from Andrea Mullin, Licensed Professional Geologist, DEP Office of Oil and Gas Management, to Thomas E. Donahue, P.G., Environmental Program Manager, DEP Office of Oil and Gas Management, through Heather Campbell, Professional Geologist Manager, DEP Office of Oil and Gas Management [Microsoft Word - Renewal ROD Drakulic FINAL \(pa.gov\)](#)

⁸ *Id.* at p. 5.



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PROTECT PT

v.

COMMONWEALTH OF PENNSYLVANIA,
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PROTECTION and APEX ENERGY (PA),
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EHB Docket No. 2023-074-W
(Consolidated with 2022-072-W)

ORDER

AND NOW, this 7th day of February, 2024, it is hereby ordered as follows:

- 1) Apex’s Motion for Partial Dismissal is *granted in part*.
- 2) Paragraphs 27, 29, 32, 36, 37, 38, 70, 71, 74, 81, 86 and 103 and portions of Paragraphs 52, 67 and 96 of the Renewal Appeal constitute challenges to the Initial Permits and therefore they are **dismissed** for the reasons set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN

Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.

Judge

s/ Sarah L. Clark

SARAH L. CLARK

Judge



s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Judge

DATED: February 7, 2024

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