



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
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	:	
v.	:	EHB Docket No. 2020-082-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK’S POULTRY RANCH, INC., Permittee	:	Issued: July 3, 2024

**OPINION AND ORDER ON
MOTION IN LIMINE**

By Bernard A. Labuskes, Jr., Board Member and Judge

Synopsis

The Board grants a motion in limine precluding the testimony of an expert witness for the appellant where the expert will not offer testimony relevant to the Department’s narrow factual determination under appeal.

OPINION

Montgomery Township Friends of Family Farms (“Montgomery Friends”) has appealed an August 14, 2020 memorandum written by the Department of Environmental Protection (the “Department”) that memorializes an evaluation of information provided by Herbruck’s Poultry Ranch, Inc. (“Herbruck’s”) assessing air emissions for an egg laying and processing farm in Montgomery Township, Franklin County that is now in operation. The memorandum says the Department agrees with Herbruck’s conclusion that Herbruck’s operation qualifies as the “production of agricultural commodities” as defined under Section 4.1(b), 35 P.S. § 4004.1(b), of the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, that the estimated emissions do not trigger the major source requirements of the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q, and that,

therefore, Herbruck's is eligible for the exemption set forth in Section 4.1(a) of the Air Pollution Control Act, 35 P.S. § 4004.1(a).¹

The exemption in Section 4.1(a) provides that the Air Pollution Control Act does not apply to the "production of agricultural commodities":

Except as may be required by the Clean Air Act or the regulations promulgated under the Clean Air Act, this act shall not apply to the production of agricultural commodities and the Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities.

35 P.S. § 4004.1(a).² The effect of qualifying for the exemption is that Herbruck's does not need to apply for a plan approval or a permit for the air emissions generated by its facility under the Air Pollution Control Act. However, according to the parties, if the Herbruck's facility exceeds major source thresholds of air emissions, a permit for those emissions would still be required under the Clean Air Act, irrespective of the exemption set forth in Pennsylvania's Air Pollution Control Act. One of the allegations made by Montgomery Farms in its appeal is that Herbruck's air emissions actually do exceed major source thresholds, if those emissions are properly calculated, and Herbruck's is thus not eligible for the exemption.

¹ Whether or not the Department's memorandum would ordinarily be appealable, we previously denied a motion to dismiss filed by Herbruck's because in an earlier appeal the same parties entered into a stipulation of settlement, approved by this Board, that required Herbruck's to submit certain information to the Department pertaining to the Section 4.1 exemption and then required the Department to render a determination on that information one way or the other. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L (Opinion and Order issued Mar. 8, 2024). We found that, under these unique and unusual circumstances, the memorandum was an appealable action. We reasoned there was not any real difference between the Department being required to make a determination pursuant to a stipulation of settlement and the Department being required to make a determination pursuant to statute or regulation, which we have held to be appealable on a number of other occasions. *See id.*, slip op. at 7-8 (discussing *Winner v. DEP*, 2014 EHB 135; *Kiskadden v. DEP*, 2012 EHB 171; *Love v. DEP*, 2010 EHB 523; *Stern v. DEP*, 2001 EHB 628).

² Section 4.1(b) goes on to extensively define the "production of agricultural commodities." There does not appear to be any dispute in this appeal that Herbruck's egg laying farm falls within that definition.

The hearing on the merits in this matter is scheduled to begin on July 22, 2024. The parties have filed their prehearing memoranda. Herbruck's has now filed a motion in limine seeking to preclude the testimony of one of the experts Montgomery Friends has identified in its prehearing memorandum, Abel Russ. Herbruck's asserts that Abel Russ's expert report is focused on the possible effect of the facility's ammonia and particulate matter emissions on public health and the environment. Herbruck's argues that Russ will not offer any testimony that is relevant to the narrow issue of Herbruck's qualifying for the permitting exemption. Montgomery Friends argues in opposition that Russ's testimony is relevant because it relates to issues raised by Montgomery Friends in its notice of appeal, including issues addressing the facility's alleged impact on public health and the environment, and issues pertaining to Article I, Section 27 of the Pennsylvania Constitution.³ The Department has filed a response in support of the motion, agreeing with Herbruck's that Russ will not offer any testimony relevant to the narrow scope of this appeal.⁴

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93 (citing *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635). See also 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine.").

³ Article I, Section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

⁴ The Department adds in its response, perhaps as a failsafe, that, to the extent the Department's constitutional obligations are implicated by the motion, the Department has complied with Article I, Section 27.

The Board generally only accepts expert testimony if the testimony will assist us in understanding the evidence or determining a fact in issue. Pa.R.E. 702. “[T]he first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert’s specialized knowledge will aid us in understanding the evidence or determining a fact in issue.” *Rhodes v. DEP*, 2009 EHB 237, 239. A threshold determination for whether expert testimony will be an aid to us is whether the testimony will be relevant. The scope of our review in any given appeal, and therefore what is generally relevant, is circumscribed by the action under appeal. *See Winegardner v. DEP*, 2002 EHB 790, 793. “Only issues relevant to the particular action being appealed are relevant.” *PA Waste, LLC v. DEP*, 2010 EHB 98, 100 (citing *Winegardner*, 2002 EHB at 793). Although relevance can sometimes be quite broad in an appeal, *Bucks County Water & Sewer Authority v. DEP*, 2014 EHB 143, 152, the Board still generally follows the rules of evidence and will only consider evidence that is relevant to the issues before us, *Groce v. DEP*, 2006 EHB 335, 338. *See also* 25 Pa. Code § 1021.123(a) (Board generally applies the rules of evidence; relevant and material evidence of reasonable probative value is admissible). Accordingly, only relevant evidence is admissible and irrelevant evidence must be excluded. Pa.R.E. 402; *Kiskadden*, 2014 EHB at 635. If an expert witness will not offer relevant testimony, the testimony is not admissible.

This is a very narrow appeal. It is an appeal of a factual determination that the Department has made in a memorandum that the Herbruck’s facility produces agricultural commodities within the meaning of the Air Pollution Control Act, and that the air emissions from that facility do not exceed major source thresholds under the Clean Air Act. As confirmed by Montgomery Friends’ response, instead of addressing the exemption determination, Abel Russ’s expert report “concentrates on the public health and environmental impacts of particulate matter and ammonia

emissions.” (Resp. Memo at 2-3.) Indeed, the Russ report begins by saying that it “summarize[s] the health and environmental threats posed by particulate matter (PM) and ammonia from poultry confinements, including my own research into the role that poultry-related ammonia emissions play in the ongoing water quality impairments in the Chesapeake Bay and its tributaries.” (Russ Report at 1.) The report spends a great deal of time discussing the hazards posed by emissions from concentrated animal feeding operations (CAFOs). The report discusses the public health impacts from particulate matter emissions and argues that any additional source of emissions, regardless of amount, will increase the mortality rate in Franklin County. It asserts that the ammonia produced from the facility will deposit onto the Chesapeake Bay and increase the nitrogen load in the Bay. It says that, even if the Herbruck’s facility emits less than the major source thresholds for a pollutant, this will still increase the risk to human health and the environment.

We struggle to see how any of the issues addressed in Abel Russ’s expert report are relevant to this limited appeal of whether or not, as a factual matter, Herbruck’s qualifies for the statutory exemption. The Russ report, and therefore his purported testimony, is instead entirely focused on things the Department *did not* act upon or decide in the memorandum under appeal. The Department has not made a determination on the effect of the emissions from the facility on the environment or public health. The Department has not made an assessment of any impact of the facility’s emissions on the facility’s immediate vicinity or on any areas downwind of the facility like the Chesapeake Bay. The Department has not made a determination on the risk associated with the emissions from the facility. The Department has not made a determination on any emission reduction controls that should be or are being used at the facility. All that the Department has done in the memorandum under appeal is made a factual determination that, based on the

information provided by Herbruck's, the facility meets the requirements of the exemption in Section 4.1 by producing agricultural commodities and falling under federal major source thresholds. We do not see how the proffered testimony of Abel Russ could help us determine any fact in issue regarding Herbruck's qualification for the exemption.

None of the arguments in Montgomery Friends' response make a convincing case for the relevance of the report. Montgomery Friends says that the expert report relates to issues raised in the notice of appeal regarding the health effects of poultry farms and the Department's responsibilities under Article I, Section 27, but that does not automatically convert otherwise irrelevant expert testimony into something that is relevant to the subject of this appeal. Montgomery Friends says that the Department failed to consider the public health and environmental impacts of Herbruck's admitted amounts of potential emissions of ammonia and particulate matter, but Montgomery Friends never explains how that should have entered into the decision of whether Herbruck's qualifies for the Section 4.1 exemption. For instance, Montgomery Friends never explains how, even if the Department did consider the public health effects of the emissions, that would have or could have changed the conclusion that Herbruck's emissions do not meet major source thresholds. Absent from Montgomery Friends is any explanation of how public health assessments enter into the factual determination the Department made in the memorandum.

The response also puts forth some unremarkable propositions that the Board can determine whether a Department action violates Article I, Section 27, but Montgomery Friends does not explain how Article I, Section 27 is implicated in the Department's decision here. Montgomery Friends cites other cases where the Board has considered the Department's action in terms of Article I, Section 27, but those cases involved the exercise of the Department's discretion in, e.g.,

renewing a solid waste management permit for an operating landfill, *Friends of Lackawanna v. DEP*, 2016 EHB 641, or in issuing a plan approval for a natural gas compressor station, *Snyder v. DEP*, 2015 EHB 857. In both of those cases, the Department evaluated a permit or plan approval application, decided how to act on that application, and decided what permit conditions and, in *Snyder*, pollution control technologies, that the operation would be subject to. That sort of discretion is just not present here in the factual determination made by the Department.

Montgomery Friends adds that the Department can consider public health effects under the Air Pollution Control Act, citing the Act's declaration of policy, 35 P.S. § 4002(a), but again, there is no explanation how that comes into play in the very defined, narrow decision under appeal. The exemption explicitly says that the Air Pollution Control Act does not apply to the production of agricultural commodities. Even if the Department did believe that there was a risk from the below-major-source emissions from the Herbruck's facility, Montgomery Friends does not explain how the Department somehow could have nevertheless required Herbruck's to apply for an air quality plan approval or permit, or otherwise regulate the emissions from the facility.

This appeal will turn whether or not Herbruck's has satisfied the elements of the exemption in Section 4.1 of the Air Pollution Control Act, not the merits of CAFOs or poultry farms writ large or the potential impacts from those facilities generally, or the potential public health or environmental impacts from Herbruck's facility in particular; those issues simply do not relate to the exemption determination. Montgomery Friends tells us that it has other experts to opine on the issue of whether Herbruck's emissions exceed major source thresholds. We expect those experts to offer testimony more relevant to this appeal and more helpful to our review of the Department's determination.

Accordingly, we issue the Order that follows.



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COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and HERBRUCK’S :
POULTRY RANCH, INC., Permittee :

ORDER

AND NOW, this 3rd day of July, 2024, it is hereby ordered that Herbruck’s Poultry Ranch, Inc’s motion in limine is **granted**. Abel Russ is precluded from testifying at the upcoming hearing on the merits in this matter.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Board Member and Judge

DATED: July 3, 2024

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