COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2023-025-W**
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: January 10, 2024**

OPINION AND ORDER ON
MOTION TO DISMISS APPEAL AS MOOT

By MaryAnne Wesdock, Judge

Synopsis

The Board denies a motion to dismiss for mootness where the action that is the subject of the appeal is capable of repetition yet evading review.

O P I N I O N

Background

This matter involves an appeal filed by Protect PT challenging two unconventional gas well permits issued to Olympus Energy, LLC (Olympus) in connection with the development of the Metis Well Site in Penn Township, Westmoreland County. The Department of Environmental Protection (Department) issued the permits for the Metis 2M Well and the Metis 4M Well (the Metis Wells) on February 9, 2023. Protect PT filed its appeal on March 10, 2023, asserting that the Department's issuance of the permits violates Article I, Section 27 of the Pennsylvania Constitution because it fails to take into account Olympus' compliance history; allows the introduction of PFAS, PFOA and other chemicals into the environment without properly regulating or limiting their use; and fails to require full disclosure of those chemicals. In its appeal, Protect

PT asks the Board to vacate the permits or, in the alternative, to substitute its discretion for that of the Department and impose additional terms and conditions in the permits.

According to the parties' filings, from August 22, 2023 to September 5, 2023, Olympus drilled and hydraulically fractured the Metis Wells. On September 15, 2023, flowback commenced for the Metis 2M Well, and on September 19, 2023, flowback commenced for the Metis 4M Well. On or about October 11, 2023, Olympus provided the Department with Completion Reports for the Metis Wells. As of October 13, 2023, all drilling and completion activities had been completed for the Metis Wells.

On October 20, 2023, Olympus filed a Motion to Dismiss Appeal as Moot (motion), asserting that because Olympus has completed all drilling, hydraulic fracturing and completion activities in connection with the Metis Wells, the Board is unable to grant any meaningful relief. On November 2, 2023, the Department filed a memorandum of law supporting the motion. On November 20, 2023, Protect PT filed a response in opposition to the motion, to which Olympus and the Department replied on December 5, 2023.

Standard of Review

"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.

Mootness

Olympus seeks to dismiss this appeal on the basis of mootness, arguing that because the Metis 2M and 4M Wells have already been drilled and hydraulically fractured there is no meaningful relief that the Board can provide with regard to the claims set forth in the appeal. The Department supports dismissal of the appeal on the basis of mootness and points out that Protect PT's objections are limited to well development, which has already occurred, and do not involve other aspects of the wells such as plugging or well site restoration. Both Olympus and the Department cite the Board's decision in *Alice Water Protection v. DEP*, 1997 EHB 447, in support of their position that this matter is moot. In *Alice Water,* the appellant contested the Department's issuance of a surface mining permit. During the course of the appeal, the mine operator completed the mining of coal and was in the process of reclaiming the site. The Board dismissed the appeal as moot, finding:

> Even if we were to find that the Department abused its discretion in issuing the mining permit, [the Permittee] Amerikohl has already gained the benefit of the permit. Its obligation would be the same as it is now--to reclaim the site.

Id. at 448.

Similarly, in *Brumage v. DEP*, 2002 EHB 496, the owners of a natural gas well appealed from the Department's issuance of a permit that authorized a mine operator to remove coal from

the vicinity of the well. While the appeal was pending, the mine operator completed the mining around the well in accordance with the permit. Based on this factor, the mine operator moved for the Board to dismiss the appeal as moot. The Board granted the motion, and in doing so, explained that it could not provide effective relief to the well owners because the authorized mining activity had already occurred, observing as follows:

> At this stage of the proceeding, the only relief the Board could grant would be to opine whether the Department made a mistake in granting the pillar permit. As stated in *Kilmer v. DEP*, 1999 EHB 846, 849, that is the essence of the mootness doctrine.

2002 EHB at 498.

A matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 762; *Klesic v. DEP*, 2016 EHB 142, 144; *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Consol*, 2015 EHB at 55 (citing *Horsehead Resource Development Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001)); *Solebury Township v. DEP*, 2004 EHB 23, 28-29. There are exceptions to mootness, including the following: (1) where the action complained of is capable of repetition but likely to evade review, (2) where issues of great public importance are involved, or (3) where a party will suffer a detriment without a decision by the Board. *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd,* 731 A.2d 133 (Pa. 1999); *Center for Coalfield Justice v. DEP*, 2017 EHB 713, 718; *Klesic*, 2016 EHB at 144; *Solebury Township*, 2004 EHB at 29. Any one of those circumstances may justify retaining jurisdiction. *Sludge Free*, 2015 EHB at 891 (citing *Ehmann*, 2008 EHB 386, 390). It is important to note that "[m]ootness does not deprive this Board of jurisdiction; rather, where an appeal is moot the Board has the

authority based upon its own measure of prudence to proceed." *Id.* (citing *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900 (quoting *Ehmann*, 2008 EHB at 388)).

Protect PT concedes that the Metis 2M and 4M Wells have been drilled and hydraulically fractured, "effectively rendering the case moot." (Protect PT Response, p. 1.) However, Protect PT argues that this case should be allowed to proceed under exceptions to the mootness doctrine, namely, that the action involved in this appeal is capable of repetition but likely to evade review and, second, that the issues involve matters of public importance. As to the first exception, Protect PT asserts that the issues involved in this appeal have been raised previously but continue to evade review "in a time period that is effectively too short to appeal the issue." (*Id*.) As to the second exception, Protect PT asserts that the issues are important to the public interest and should be decided on the merits because they apply not just to the wells at issue in this appeal but to the manner in which the Department approves all such wells across the Commonwealth.

Based upon a review of the parties' filings, we believe this case falls within the first exception to the mootness doctrine, i.e., conduct that is capable of repetition yet likely to evade review. In reaching this conclusion, we apply the guidelines set forth by the Commonwealth Court in *Consol Pennsylvania Coal Co. v. Department of Environmental Protection*, 129 A.3d 28 (Pa. Cmwlth. 2015): In order for this mootness exception to apply, "(1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be a reasonable expectation that the complaining party will be subjected to the same action again." *Id.* at 42 (quoting *Philadelphia Public School Notebook v. School District of Philadelphia*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012)); *Driscoll v. Zoning Board of Adjustment,* 201 A.3d 265, 269 (Pa. Cmwlth. 2018); *Sludge Free*, 2015 EHB at 891-92.

We believe this test has been met. As to the first prong, based on the timeline provided by Olympus it is apparent that the wells are capable of being drilled within a short period of time, prior to the completion of discovery and/or the scheduling of a hearing on the merits.[1] As to the second prong, we need not determine whether there is a "reasonable expectation" of repetition; we need only look at the very history of this case. In June 2022, Protect PT appealed the Department's issuance of permits for the 3M, 5M and 7M well pads at the Metis Well Site.[2] Protect PT states that in January 2023 it was alerted by Olympus that the wells at issue had been drilled and hydraulically fractured in September and October of 2022.[3] (Protect PT's Response, p. 3.) According to Protect PT, based on the fact that the 3M, 5M and 7M wells had been drilled, it made the decision to withdraw its appeal. (*Id.*) Protect PT subsequently appealed the permits issued for the 2M and 4M wells, which is the appeal now subject to the Motion to Dismiss. There is nothing in any of the parties' filings to suggest that future wells will not continue to be drilled. With the matter now having occurred twice without reaching the merits of the case, Protect PT urges the Board to allow this case to proceed.

Olympus and the Department contend that Protect PT could have sought a supersedeas to prevent the drilling and completion of the wells until such time as its request for relief could be addressed. Protect PT strongly opposes this suggestion, asserting as follows:

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[1] In its reply, Olympus counters, "The amount of time that elapses between issuance of a permit for a gas well and when the well is drilled varies widely by gas well, and is dependent on a variety of factors, including geologic and economic factors and the permittee's overall plan for developing its gas interests. In fact, under the Oil and Gas Act, the permittee can wait up to one year after the permit is issued to begin drilling the well, without the permit expiring. 58 Pa.C.S. § 3211(i)." (Olympus Reply, p. 3-4.) While we have no doubt that the timeframe for drilling wells can vary, as explained by Olympus, the wells at issue in this matter were drilled within a relatively short timeframe.

[2] That appeal was docketed at EHB Docket No. 2022-037-B.

[3] According to the reply filed by the Department, the wells were drilled and hydraulically fractured from May 26, 2022 to October 31, 2022. (Department's Reply, p. 5) (citing Olympus' Motion to Dismiss filed at EHB Docket No. 2022-037-B, para. 5).

> Given the facts and circumstances of this case, it would be exceedingly difficult, if not impossible, to make a non-speculative determination on the chance of success on the merits. Appellant *needs* to have access to discovery to gain knowledge of the chemicals that are being deemed "proprietary" in order for their assertions to be validly assessed. Without knowledge of the types of proprietary chemicals used, it is impossible for Appellant to provide anything but speculation as to 1) the types of chemicals being used, 2) the dangers of those chemicals to health and the environment, and 3) the likelihood that they might be released into the environment. Given those constraints, a petition for supersedeas is almost certainly doomed to fail.

(Protect PT's Response, p. 6) (emphasis in original).

Protect PT makes a persuasive argument. The standard for obtaining a supersedeas is high. *Hopewell Township Board of Supervisors v. DEP*, 2011 EHB 732, 737. As the Board has stated, "A supersedeas is an *extraordinary remedy* that places a *heavy burden* on the petitioners to make a clear showing of need." *Liberty Township v. DEP*, EHB Docket No. 2023-036-L, *slip op*. at 9 (Opinion and Order on Petition for Supersedeas issued June 13, 2023) (emphasis added) (quoting *Center for Coalfield Justice v. DEP*, 2018 EHB at 764). Among the factors that must be demonstrated by the petitioner are the following: (1) irreparable harm to the petitioner in the absence of a supersedeas, (2) the likelihood of success on the merits, and (3) whether there will be injury to the public or other parties, such as the permittee in third party appeals. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). A petitioner generally must make a credible showing on each of these factors, with a strong showing of a likelihood of success on the merits, *Teska v. DEP*, 2016 EHB 541, 544, and must be able to demonstrate that its chance of success on the merits is more than speculative. *Global Eco-Logical Services., Inc. v. DEP*, 2000 EHB 829, 831. Protect PT states that it would be nearly impossible to meet this burden without the ability to go through the prehearing discovery phase of the appeal.

Although Olympus is correct that parties may engage in limited discovery prior to a supersedeas hearing, 25 Pa. Code § 1021.61(d), we do not believe that the ability to conduct limited discovery resolves the issue here.[4] The standard that must be met in order to obtain a supersedeas is higher than that for succeeding at a hearing on the merits. As such, a supersedeas hearing does not take the place of a merits hearing. As we explained in *Center for Coalfield Justice*:

> [A] supersedeas hearing, by its very nature, is truncated and conducted without the normal safeguards of a full hearing on the merits and, as such, it cannot take the place of a hearing on the merits. A supersedeas is an extraordinary remedy that places a heavy burden on the petitioners to make a clear showing of need. *Emerald Contura, LLC v. DEP*, 2017 EHB 670, 672-73. A hearing on a supersedeas petition is held expeditiously – where feasible, within two weeks of the filing of the petition. 25 Pa. Code § 1021.61(c). Supersedeas hearings are limited in time and format and the parties are generally required to proceed without the opportunity for discovery. *Id.* at § 1021.61(d). In order to obtain a supersedeas, a petitioner must show not only that he or she is likely to prevail on the merits (at a future hearing on the merits) but also that he or she will suffer irreparable harm if the supersedeas is not granted. *Id.* at § 1021.63(a). As we have held many times, "a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal." *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 41, 44 (citing *Weaver v. DEP*, 2013 EHB 486, 489; *Tinicum Township v. DEP*, 2008 EHB 123, 127). Given the higher burden that must be met, it is possible that a party may be unsuccessful in obtaining a supersedeas yet meet its burden at a hearing on the merits.

2018 EHB at 764-65.

Requiring Protect PT to obtain a supersedeas in order to reach the merits of its appeal seems to us an unfair and inappropriate burden under the facts of this case. As we recognized in *Center*

[4] Olympus and the Department also point out that Protect PT could have sought an expedited hearing on the merits. Our Rules of Practice and Procedure allow parties to request an expedited hearing pursuant to 25 Pa. Code § 1021.96a, and the Board encourages parties to take advantage of this rule under appropriate circumstances. In determining whether an expedited hearing is appropriate, the Board will consider the factors set forth in § 1021.96a(c). Based on the facts of this case and the issues in dispute, it is not clear whether an expedited merits hearing could have been held in the timeframe at issue here.

for Coalfield Justice, given the higher burden of a supersedeas hearing, it is possible that Protect PT could be unsuccessful in obtaining a supersedeas yet able to meet its burden at a hearing on the merits. For the reasons set forth herein, we find that Protect PT has demonstrated that this matter falls within "the capable of repetition, yet evading review" exception to the mootness doctrine and should not be dismissed.

We further find that the appeal raises questions of public importance that should be allowed to proceed to a hearing. As we have previously noted, "the issue of mootness is a prudential question for the Board, not one of jurisdiction. Therefore, we need to determine based on our own measure of prudence whether we should proceed with this case." *Center for Coalfield Justice*, 2017 EHB at 720. *See Lower Milford Township v. DEP*, 2006 EHB 387, 394 (Questions of important public interest should be preserved for review.) As the Board stated in *Sludge Free*:

> We should hesitate before depriving a party of its right to due process before the only forum that can provide an opportunity to be heard at what may be the only time that party will have that opportunity. Our case law advises that we should exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt, at least in the context of a motion to dismiss [citations omitted].

2015 EHB at 897.

For the reasons set forth herein, we do not believe that this matter should be dismissed on the basis of mootness. Accordingly, we enter the order that follows:

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O R D E R

AND NOW, this 10th day of January, 2024, it is hereby ordered that the Motion to Dismiss Appeal as Moot is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: January 10, 2024

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