COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | **Issued: October 29, 2024** |

**OPINION AND ORDER ON**
**DEPARTMENT'S AND PERMITTEE'S**
**MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

**By MaryAnne Wesdock, Judge**

**Synopsis**

Motions for Partial Summary Judgment filed by the Department and Permittee are 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. Objections that go beyond the limited scope of the renewal appeal are dismissed. Additionally, where the evidence in the record does not indicate that PFAS will be used at the well site in question, summary judgment on this issue is granted to the Department and Permittee pursuant to Pa. R.C.P. 1035.2(2).

**O P I N I O N**

**Background**

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) for the drilling of the Drakulic 1H and 7H wells (the permits) in Penn Township, Westmoreland County. The permits were appealed by Protect PT, a grassroots nonprofit organization formed "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.) That appeal is docketed at EHB Docket No. 2022-072-W (the Initial Appeal). Apex elected not to drill the Drakulic wells while the appeal was pending, and instead sought a two-year renewal of the permits,[1] which was granted on August 15, 2023.[2] On September 14, 2023, Protect PT appealed the renewal of the permits. That appeal is docketed at EHB Docket No. 2023-074-W (the Renewal Appeal). On September 19, 2023, the Initial Appeal and the Renewal Appeal were consolidated.

Pending before the Board are Motions for Partial Summary Judgment filed by the Department and Apex and a Motion for Summary Judgment filed by Protect PT. This Opinion addresses the Motions for Partial Summary Judgment filed by Apex and the Department.

**Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 351–52. Summary judgment may also be available:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

*Pileggi v. DEP,* 2023 EHB 288, 290 (citing Pa. R.C.P. No. 1035.2(2)).

[1] Apex Statement of Undisputed Material Facts, para. 5.

[2] 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).

In other words, the party bearing the burden of proof must make out a prima facie case. *Dengel v. DEP*, EHB Docket No. 2022-092-B, *slip op*. at 4 (Opinion and Order on Motion for Summary Judgment issued Aug. 29, 2024). In third-party appeals of the Department's issuance of a permit, the party protesting the issuance of the permit bears the burden of proof to show that the Department erred in issuing the permit. *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 224 (citing 25 Pa. Code § 1021.122(2)).

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, EHB Docket No. 2022-075-W, *slip op*. at 2 (Opinion and Order on Motions for Summary Judgment issued April 29, 2024). In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Id.* at 99 (citing *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587).

**Discussion**

Apex and the Department have moved for partial summary judgment on the grounds that 1) certain objections raised in the Renewal Appeal are beyond the scope of that appeal and 2) there is no evidence in the record to support Protect PT's claims that per- and polyfluoroalkyl substances and related chemicals (referred to collectively as PFAS) will be used and released at the Drakulic site.[3] We examine each of these arguments below:

**Objections Beyond the Scope of the Renewal Appeal**

[3] Additionally, Apex sought summary judgment on Protect PT's claims alleging that Apex's PPC plan and emergency response plans violate 25 Pa. Code § 78a.55. In its response to Apex's motion, Protect PT acknowledged that those claims were barred by the doctrines of *res judicata* and collateral estoppel and it has withdrawn its objections brought under Section 78a.55. (Protect PT Brief in Opposition to Apex Motion, p. 6.)

Before turning to Apex's and the Department's motions for partial summary judgment, it is helpful to review the Board's earlier opinion in this matter. In October 2023, Apex filed a Motion for Partial Dismissal, seeking to dismiss several objections that it asserted were beyond the scope of the Renewal Appeal. In considering Apex's motion, the Board discussed the scope of the Renewal Appeal and explained that although the Initial Appeal and Renewal Appeal were consolidated for the sake of judicial economy and the convenience of the parties "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 . . . whether they relate to the *renewal* of the permits." *Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W (Consolidated with 2022-072-W), *slip op.* at 12 (Opinion and Order on Motion for Partial Dismissal issued February 7, 2024) (hereinafter February 7, 2024 Opinion) (emphasis added). The Board explained:

> 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 [v. DEP]*, 2004 EHB [131] 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. . . 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.*

*Id.* at 4–5 (emphasis added). In short, "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." *Id*. at 8 (emphasis added). As the Board explained in *Tinicum Township v. DEP*, 2002 EHB 822, 835: "An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place." Rather, it "require[s] the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information." *Id.* (emphasis in original).

The Board granted Apex's Motion for Partial Dismissal in part and dismissed objections in the Renewal Appeal that were clearly an attack on the initial issuance of the permits.[4] With regard to the remaining objections, the Board concluded that it did not have sufficient information to make a determination on whether those objections were outside the scope of the renewal appeal. The Board stated:

> The record of decision [regarding the applications to renew the permits] 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.

[4] The Board dismissed the following Objections in the Renewal Appeal: Paragraphs 27, 29, 32, 36, 37, 38, 70, 71, 74, 81, 86, 103 and portions of paragraphs 52, 67 and 96.

*Protect PT, slip op.* at 13. Thus, the Board left open the possibility that additional objections in the Renewal Appeal could be evaluated in the context of a motion for summary judgment where further information was provided.

Apex and the Department now seek, through summary judgment, to dismiss those remaining objections that the Board declined to dismiss in its February 7, 2024 Opinion. Apex and the Department assert that the record demonstrates that the Department's review of Apex's application to renew its permits was very limited and that many of the objections raised by Protect PT in the Renewal Appeal go well beyond the scope of that review.

We begin our analysis by reviewing what the Department considered when it made the decision to renew the Drakulic 1H and 7H well permits. *Protect PT, slip op*. at 12 (citing *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 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.")

Section 78a.17(b) of the regulations sets forth the application requirements for the renewal of an unconventional gas well permit. It states as follows:

> (b) An operator may request a single 2-year renewal of an unexpired well permit. The request shall be accompanied by a permit fee, the surcharge required under section 3271 of the act (relating to well plugging funds) and an affidavit affirming that the information on the original application is still accurate and complete, that the well location restrictions are still met and that the entities required to be notified under section 3211(b)(2) of the act (relating to well permits) have been notified of this request for renewal. If new water wells or buildings are constructed that are not indicated on the plat as originally submitted, the attestation shall be updated as part of the renewal request.

25 Pa. Code § 78a.17(b).

According to the Department's record of decision and the deposition testimony of the permit reviewer, Andrea Mullen, the Department considered the following in its review of Apex's renewal request:

- Confirmation that there was no change in the location, construction and coal/noncoal status of the proposed wells.
- Review of a Pennsylvania Natural Diversity Inventory (PNDI) search submitted by Apex identifying no endangered or threatened species.
- A review of Apex's compliance history showing no violations at the proposed site at the time of the review.
- Review of the site location with regard to schools and playgrounds.
- Examination of the list of interested parties and water supplies.

(DEP Motion, Exhibit B; Apex Motion, Exhibit B, p. 10-11; Apex Motion, Exhibit A, p. 12–15.) Based on its review, the Department concluded, "the requirements for renewal set forth in 25 Pa. Code § 78a.17 are met, including consistency with the prior permit . . . ."[5] (DEP Motion, Exhibit B, p. 4.)

The Board has recognized that the renewal of a permit is an opportunity to assess whether the permit should remain in place based on up-to-date information. *PQ Corporation v. DEP*, 2017 EHB 870, 874. Thus, we take into consideration any updated information or changes that have occurred between the time of the permit issuance and the time of the permit renewal in determining whether the activity covered by the permit should be allowed to continue. As we pointed out in our February 7, 2024 Opinion, this is particularly important when the permit has been in place for

[5] The Department's record of decision goes on to state that Apex's submissions had identified a new water supply; this was later determined to be an existing water supply whose location had been misidentified. (Apex Motion, Exhibit B, p. 10–11.)

several years or even decades. *See, e.g., Friends of Lackawanna*, 2017 EHB at 1128 (at the time of the permit renewal the landfill had been in operation for more than 30 years); *Sierra Club v. DEP*, 2017 EHB 685 (landfill had been in operation for decades at the time of its permit renewal). Here, however, the renewal of the permits occurred only *one year* after the issuance of the initial permits. Little changed during that one-year period, as reflected in the Department's record of decision. Indeed, Protect PT acknowledges that the renewal applications contained no substantive changes from the initial applications for the well permits.[6] The only changes that occurred were an update to Apex's compliance history and the correction of a location of a water well[7] which was not challenged by Protect PT. Moreover, there is no ongoing operation to assess for the purpose of determining whether it should be permitted to continue: At the time of the permit renewals and as recently as the filing of the summary judgment motions in August 2024, the wells had not been drilled and no operations were ongoing.[8]

As we stated in our February 7, 2024 Opinion, the scope of the Renewal Appeal is narrow. *Protect PT*, *slip op*. at 12. It is limited to the requirements of 25 Pa. Code § 78a.17(b) and the Department's review pursuant to that section, as well as any updated information. As we have stated, the only update pertains to Apex's compliance history. We now turn to the specific objections of the Renewal Appeal on which Apex and the Department seek summary judgment:[9]

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[6] DEP Statement of Undisputed Material Facts, para. 5, and Protect PT's response thereto.

[7] According to the Department's Andrea Mullen, Professional Geologist Manager, who reviewed both the initial permit applications and the renewal applications, the Department's record of decision on the renewal applications indicated the discovery of a new water supply identified in the renewal applications. However, upon further review, it was discovered that the longitude coordinate for the well had been misidentified in the initial permit application. This matter has not been challenged by Protect PT.

[8] DEP Statement of Undisputed Material Facts, para. 7, and Protect PT's response thereto.

[9] It should be noted that this section of Apex's and the Department's motions focuses solely on objections raised in the Renewal Appeal which they contend go beyond the scope of that appeal. A few of those objections were also raised in the Initial Appeal, and they are not dismissed by this Opinion unless so stated.

Objections that challenge the initial issuance of the permit

A number of objections in the Renewal Appeal either explicitly or implicitly challenge whether the permits should have been issued in the first place. Those objections may be summarized as follows:

> Objections 25, 26, 28 — the permits[10] allow the use, generation, discharge and emission of hazardous chemicals, including PFAS, into the air, water or soil in violation of the Environmental Rights Amendment, Art. I, § 27 of the Pennsylvania Constitution.[11]
>
> Objections 30–31, 33–35, 39–41 — the permits allow the generation, storage, transportation and disposal of radioactive waste (TENORM) and do not provide for proper management of such waste in violation of the Environmental Rights Amendment, Art. I, 27 of the Pennsylvania Constitution.
>
> Objection 42 — the Department violated the Environmental Rights Amendment by not requiring Apex to test its "fresh water" for hazardous chemicals, including PFAS, before being used in its operations.[12]
>
> Objection 64 — the Department violated the Environmental Rights Amendment because it did not determine the cumulative impact of the activities authorized under the permits.
>
> Objection 65 — Pennsylvania's oil and gas permitting scheme discriminates against people with disabilities.
>
> Objection 75 — the permits do not place limits on or require a permit for air emissions of hazardous chemicals or TENORM in violation of the Environmental Rights Amendment.

[10] These objections raise challenges to "the permits" which the Renewal Appeal identifies as the initial permits for the 1H and 7H wells. (Renewal Appeal, para. 8.)

[11] This claim is also made in Objection 67 of the Initial Appeal with regard to PFAS. The PFAS claims of the Initial Appeal are addressed later in this Opinion.

[12] This objection is also challenged by Apex and the Department on the grounds that Protect PT has failed to support its PFAS claims in the record. Additionally, both Apex and the Department provided evidence in the record that the fresh water that Apex uses in its hydraulic fracturing operations is tested and the sampling results are non-detect for PFAS. (Apex Motion, Exhibits F and G; DEP Motion, Exhibits D and O.)

> Objections 76–85, 125 — the PPC plans and emergency response plans submitted with the initial permit applications were insufficient.[13]
>
> Objection 119 — the Department violated the Environmental Rights Amendment by issuing and renewing permits that will harm Pennsylvania's climate and the public's right to clean air and water.[14]
>
> Objection 120 — the permits do not limit and allow the introduction of Hazardous Chemicals, including PFAS, PFOA, and related chemicals into the environment through hydraulic fracturing in violation of the Department's responsibilities under the Environmental Rights Amendment.[15]

With the exception of a portion of Objection 119, the aforesaid objections challenge the issuance of the permits in the first place and allege failures on the part of the Department in approving the permits. In its response to Apex's and the Department's motions, Protect PT does not assert that these objections fall within the narrow scope of the Renewal Appeal discussed above. Rather, it quotes from a portion of its brief in support of its Motion for Summary Judgment which discusses why it believes the Department erred in issuing the permits. The Board's case law is clear that an appellant may not use the occasion of a permit renewal to challenge whether the original permit should have been issued in the first place. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134. *See also*, *Friends of Lackawanna*, 2017 EHB at 1163–64; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 248, *aff'd,* 131 A.3d 578 (Pa. Cmwlth. 2016); *Love*

[13] Some of these claims may be encompassed within Objection 73 of the Initial Appeal which alleges that the emergency response plan is insufficient to ensure the protection of health and safety of residents within close proximity of the well site in the event of a well blowout or other emergency event. Apex and the Department have not moved for summary judgment on Objection 73 of the Initial Appeal.

[14] This claim is similar to Objection 6 of the Initial Appeal which states that "the Department violated . . . Article I, Section 27 of the Pennsylvania Constitution by granting permits that will harm the public's right to clean air and water." (Initial Appeal, para. 6.) Neither Apex nor the Department have moved for summary judgment on Objection 6 of the Initial Appeal.

[15] A similar claim is made in Objection 67 of the Initial Appeal. The PFAS claims made in the Initial Appeal are addressed later in this Opinion.

*v. DEP*, 2010 EHB 523, 525; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359. As we explained in our February 7, 2024 Opinion, 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. We are not saying that Protect PT could not have raised the aforesaid objections to the permits, only that they should have been made at the time the permits were issued, not at the time of their renewal. The Renewal Appeal may not be used as an occasion to challenge errors Protect PT believes the Department made in issuing the permits or to raise matters that it believes the Department should have considered before authorizing the permits in the first place.

To the extent that Objection 119 contends generally that the renewal of the permits violates the Environmental Rights Amendment and the public's right to clean air and water, that portion of Objection 119 is not dismissed. Because the remainder of the objections fall outside the very limited scope of the Renewal Appeal which we have outlined above, partial summary judgment is granted to the Department and Apex and those objections are dismissed from the Renewal Appeal.[16]

Additional Objections that go beyond the scope of the Renewal Appeal

Apex and the Department also challenge the following objections as going beyond the scope of the Renewal Appeal:

> Objections 43–52 — the Department's renewal of the permits contributes to climate destabilization in violation of the Environmental Rights Amendment.

[16] Objections 25, 26, 28, 30, 31, 33, 34, 35, 39–42, 64, 65, 75–85, 120, 125 and part of 119 are dismissed from the Renewal Appeal. However, as noted earlier, where similar or identical claims have been raised in the Initial Appeal, and not challenged in Apex and the Department's motions, they remain viable.

> Objections 67–68 — the Department violated the Environmental Rights Amendment and 25 Pa. Code § 78(g)[17] by not engaging in a harms/benefits analysis.
>
> Objection 72 — the Department violated the Environmental Rights Amendment because it did not consider public comments or perform a holistic review of the effects the renewals of the permits would have, nor take into account the cumulative effect of all the surrounding sources of pollution.

As we have explained, the scope of the Renewal Appeal in this instance is limited to the information required by 25 Pa. Code § 78a.17(b), the Department's review of the renewal applications, and any changes that occurred between the initial issuance of the permits and the applications for renewal, which, as we have explained, includes only Apex's updated compliance history. Claims regarding climate destabilization and the need for a harms/benefits analysis and a holistic review fall outside the very limited scope of the renewal. Protect PT's response does not explain how these particular objections fall within the scope of the Renewal Appeal that we have outlined above; rather, it argues that the scope of the Department's review when it renewed the permits should have been broader. It quotes from its brief in support of its Motion for Summary Judgment in which it asserts that the Department should have considered a variety of factors before issuing the permits.

As support for its assertion that the Department should have conducted a harms/benefits analysis, Protect PT relies on the Pennsylvania Supreme Court's Opinion in *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921 (Pa. 2023). Protect PT describes this decision as suggesting that the Department should perform a harms/benefits analysis

[17] Objection 67 states that the Department violated "25 Pa. Code § 78(g)." This section does not exist in the regulations. We believe Protect PT may have intended to cite to 25 Pa. Code § 78a.15(g). Section 78a.15 deals generally with applications for permits for unconventional oil and gas wells. Subsection (g) sets forth factors the Department must consider prior to conditioning a well permit based on impacts to public resources.

similar to the permitting process under the Solid Waste Management Act. (Protect PT Brief in Opposition to Apex, p. 6.) However, the Board is not persuaded that this is what the Opinion was in fact suggesting. In *Marcellus Shale*, the Court was presented with an issue concerning the authority of the Department and Environmental Quality Board to promulgate certain regulations under the Oil and Gas Act. Specifically, the Court assessed whether the agencies had the authority to consider various public resources in the review of applications for well permits. The Court did not state that a harms/benefits analysis should be conducted with respect to public resources; it simply compared the agency's authority to conduct a harms/benefits analysis with the agency's authority to consider public resources under the respective enabling statutes. Moreover, the Opinion does not address section 78a.17(b) which governs the renewal of permits and is the section under which the Department conducted its review of Apex's request to renew its permits. Finally, and significantly, *Marcellus Shale* is a plurality opinion and the section of the Opinion upon which Protect PT appears to rely, discussing the harms/benefits test, was not joined by a majority of the Justices. Accordingly, *Marcellus Shale* does not support the assertion that a harms/benefits analysis should have been conducted here.

In Objection 72, Protect PT argues that the Department should have conducted a "holistic review" and taken into account the cumulative effect of all surrounding sources of pollution. It does not explain what it means by "holistic review." We can only surmise that Protect PT believes that an overall assessment of the environmental impact of the permits should have been undertaken as part of the Department's review of the renewal applications. As we have stated, the scope of the Renewal Appeal is limited to those matters that are required to be reviewed as part of the renewal request. If we were being asked to consider the renewal of a permit that had been issued a number of years – or even decades – in the past, it might be appropriate to take a broader look at

the overall environmental impact of the renewal. But where the renewal occurred only one year after the Department's initial review and issuance of the permits, such a broad assessment is clearly outside the scope of the very limited action being reviewed.

However, that portion of Objection 72 claiming that the Department failed to consider public comments in its review of the renewal applications may proceed since it is not clear from the record of decision whether public comments were received or considered by the Department. (DEP Motion, Exhibit B.)

For the aforesaid reasons, we find that Objections 43–52, 67–68 and that portion of Objection 72 stating that a holistic review was required go beyond the scope of the Renewal Appeal. Partial summary judgment is granted to the Department and Apex, and these objections are dismissed.

Compliance History

Apex seeks summary judgment on Objections 96–106 which may be summarized as follows:

> Objections 96–106 — Apex's compliance history required a denial of the permit renewals under the Environmental Rights Amendment and the permit block provision of the Clean Streams Law.[18]

Apex's updated compliance history was considered by the Department as part of its review of the permit renewal applications. The Department's record of decision indicates that Apex had no violations at the proposed site at the time of the review. However, Protect PT asserts that Apex accrued notices of violations from the time of the issuance of the permits until their renewal and following the renewal of the permits. One of Protect PT's arguments in this case is that Apex has

[18] The Department seeks summary judgment on Objection 126 which also relates to compliance history.

a "pattern of noncompliance" that "renders the Department's issuance and renewal of the Permits clearly erroneous . . . ." (Protect PT Brief in Opposition to Apex Motion, p. 5.)

Apex's compliance history was clearly part of the Department's review of the renewal applications. (DEP Motion, Exhibit B, p. 2.) Moreover, the parties do not dispute that the compliance history has changed since the initial issuance of the permits, although the parties differ in their description of the violations. Therefore, it is properly within the scope of the Renewal Appeal. Summary judgment is denied on these objections.

Public Resources

Both Apex and the Department seek summary judgment on Objection 66 which may be summarized as follows:

> Objection 66 — the Department violated the Environmental Rights Amendment and 25 Pa. Code § 78(g)[19] and abused its discretion by failing to consider the potential impacts on public resources, citing *Marcellus Shale Coalition, supra*.

The Oil and Gas Act defines "public resource" to mean a number of resources, including "habitats of rare and endangered flora and fauna." 58 Pa. C.S. § 3215(c)(4). As we noted earlier, one part of the Department's review of the renewal applications was the consideration of an updated PNDI search submitted by Apex. Because the PNDI search includes a review of threatened or endangered plants, we find that Objection 66 may be considered to fall within the scope of the Renewal Appeal.

However, we do find that portion of the Objection referencing "25 Pa. Code § 78(g)" to be beyond the scope of the appeal. As we explained in footnote 17, there is no section "78(g)" of the unconventional oil and gas regulations. We understand Protect PT to be referring to "25 Pa. Code

[19] *See supra* note 17.

§ 78a.15(g)." Section 78a.15 deals with applications for well permits, not renewals. As noted earlier, challenges to the initial issuance of the permits are outside the scope of the Renewal Appeal.

"Partiality to Permittee"

The Department seeks summary judgment on Objection 73, which states as follows:

> The Department violated the [Environmental Rights Amendment] by showing partiality to Permittee over the beneficiaries under the [Environmental Rights Amendment], including Appellant.

(Renewal Appeal, para. 73.)

It is unclear what Protect PT means by this assertion. To the extent Protect PT is asserting that the Department failed to conduct a harms/benefits analysis in its review of the renewal applications, we have already stated that is outside the scope of the Renewal Appeal. However, because it is not clear what Protect PT is objecting to, and because summary judgment may only be granted when the right to it is clear and free of doubt, we decline to grant summary judgment as to this objection. *Thomas*, 1998 EHB at 98.

Impact to Public Resources, Endangerment to Human Health, Risk to Certain Populations

Apex and the Department seek summary judgment on Objections 53–63 and 69 which may be summarized as follows:

> Objections 53–63 — the location and operations of the Drakulic well site in relation to water supplies, residential areas, a school and vulnerable populations will impact public resources and endanger human health and pose a risk to certain populations.
>
> Objection 69 — citation to health studies published by the Pennsylvania Department of Health and the University of Pittsburgh.

Objections 59, 60 and 62 of the Renewal Appeal deal with water supplies and a school within a certain proximity of the well site. Because the Department's review of the renewal

applications included a review of water supplies and location of schools, we find these objections to be within the scope of the Renewal Appeal.

The remaining objections allege risks associated with the site's proximity to a residential area and vulnerable populations. While arguably outside the scope of the Renewal Appeal, they appear to relate to Objection 3 of the Initial Appeal which states that the Department's issuance of the well permits, with knowledge that the well development would occur in close proximity to sensitive receptors, residential homes and a school, was a violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution. Rather than parse through what is covered under the Initial Appeal and what is covered under the Renewal Appeal, we decline to dismiss these objections. As we have stated, summary judgment may be granted only where the right to it is clear and free of doubt. *Thomas*, 1998 EHB at 98.

Summary

For the reasons set forth above, partial summary judgment is granted to Apex and the Department and the following objections are dismissed: Objections 25, 26, 28, 30, 31, 33–35, 39–42, 43–52, 64, 65, 67–68, 75–80, 82–85, 120, 125 and portions of Objections 66, 72 and 119 of the Renewal Appeal.

**PFAS-Related Claims**

In both the Initial Appeal and Renewal Appeal, Appellant raised claims regarding the use and release of PFAS, PFOA and related chemicals (herein collectively referred to as "PFAS") at the Drakulic site.[20] We have already determined that the objections raised in the Renewal Appeal

[20] PFAS are per- and polyfluoroalkyl substances. *PFAS Explained*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/pfas/pfas-explained (last updated Oct. 3, 2024). According to EPA, "PFAS are widely used, long lasting chemicals, components of which break down very slowly over time . . . There are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products." *Id.* PFOA is generally considered a subset of PFAS. *Fact Sheet: EPA's Proposal to*

related to PFAS are outside the scope of the Renewal appeal.[21] We turn to the following objections relating to PFAS raised in the Initial Appeal:

> - The Department is aware that hydraulic fracturing releases PFAS, PFOAS, and related chemicals into the environment and, therefore, the Department is permitting the release of PFAS, PFOAS, and related chemicals in issuing the Well Permits. (Initial Appeal, para. 27.)
>
> - Protect PT objects to the Department's approval of the Well Permits because the Well Permits allow the introduction of PFAS, PFOAS, and related chemicals into the environment through hydraulic fracturing, which do not break down and which are known to cause deleterious health effects, without properly limiting or regulating their use, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution. (Initial Appeal, para. 67.)

Apex had previously moved to dismiss these objections on a number of grounds including that the claims were speculative. Because discovery was still ongoing, the Board denied the motion. *Protect PT v. DEP*, 2023 EHB 191, 198. Now that discovery has been completed, both Apex and the Department seek summary judgment on Protect PT's PFAS objections pursuant to Pa. R.C.P. 1035.2(2) which provides:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

As the party bearing the burden of proof, Protect PT must come forward with sufficient evidence to make out a *prima facie* case with regard to its PFAS claims. *Dengel*, *slip op*. at 4. Apex and the Department assert that Protect PT has failed to do so.

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*Limit PFAS in Drinking Water,* U.S. ENVIRONMENTAL PROTECTION AGENCY (March 2023), https://www.epa.gov/system/files/documents/2023-04/Fact%20Sheet_PFAS_NPWDR_Final_4.4.23.pdf

[21] Specifically, Objections 25, 42 and 120 of the Renewal Appeal, related to PFAS, were determined to be outside the scope of the Renewal Appeal.

Protect PT's PFAS objections assert that 1) the permits allow the release of PFAS through hydraulic fracturing and 2) the Department violated its duty under the Environmental Rights Amendment of the Pennsylvania Constitution, Article I, Section 27, when it issued the permits. The Board has articulated its standard for assessing Article I, Section 27 challenges as follows:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

*Stocker v. DEP*, 2022 EHB 425, 445 (quoting *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493 (citing *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 858–59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB at 1163)). "The burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan v. DEP*, 2018 EHB 71, 115 (citing *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 250).

Thus, Protect PT's burden is to produce evidence of facts essential to proving that the Department did not consider the environmental effects of its permitting action and that the issuance of the permits is likely to cause unreasonable degradation or deterioration of the public natural resources of the Commonwealth through the introduction and release of PFAS through the hydraulic fracturing process. Then, the Board will assess whether the Department acted with prudence, impartiality, and loyalty in carrying out its permitting actions.

Apex and the Department argue that discovery is now closed and Protect PT has failed to produce or obtain any record evidence that PFAS will be used or released at the Drakulic well site or that the Department is aware of any such usage. Protect PT relies on the reports of three experts: Dr. Carla Ng, Mr. Dusty Horwitt and Mr. Marc Glass. Dr. Carla Ng is an Associate Professor with

the University of Pittsburgh's Department of Civil and Environmental Engineering. Her expert report details the general background and chemistry of PFAS, common uses of PFAS and ways in which people can be exposed, impacts of PFAS on the human body, and a short section on PFAS use generally in the oil and gas industry. (DEP Motion, Exhibit Q.) There is no specific mention of Apex's operations nor the well permits at issue in this appeal.

Mr. Dusty Horwitt is an attorney and a consultant with Physicians for Social Responsibility. According to his expert report, he has spent nearly 20 years researching the health and environmental impacts of oil and gas drilling and hydraulic fracturing, including the past two years studying the use of PFAS in oil and gas extraction. His report provides an extensive discussion about PFAS. He states that data shows that at least one type of PFAS was used in fracking operations at eight wells in Beaver, Lawrence and Washington Counties. He believes that PFAS use in the oil and gas industry in Pennsylvania is likely under-reported due to a lack of reporting and disclosure requirements under Pennsylvania law. (DEP Motion, Exhibit P.) Mr. Horwitt's report does not discuss Apex or any of its well sites or the permits at issue in this appeal.

In responding to Apex and the Department's motions, Protect PT relies primarily on the report of Marc Glass. Mr. Glass is a principal and senior scientist with the environmental consulting firm of Downstream Strategies. In his report, Mr. Glass states, in his professional opinion, contaminants generated by unconventional oil and gas wells, including PFAS, are insufficiently monitored. He recommends that the Board order the Department to amend the permits to require the applicant to prepare:

> a conceptual site model that considers the environmental fate and transport of contaminants including PFAS compounds, where applicable, all undisclosed contaminants concealed as "trade secrets," radon and its radioactive progeny, and potentially complete exposure pathways; necessary measurements or estimates of emissions from each of these contaminant sources; appropriate

> analysis by a qualified, independent third-party air modeler(s) with experience in modeling; and dose estimates to receptors for any complete or potentially complete exposure pathways.

(Protect PT Response to DEP Motion, Exhibit E, p. 1.)

Mr. Glass' report primarily focuses on the radiological components of oil and gas production. However, in one section of his report he does mention PFAS and the Drakulic well site, stating his opinion as follows: "Unmonitored air emissions from the Drakulic well pad, to a reasonable degree of scientific certainty, will include PFAS, undisclosed contaminants concealed as 'trade secrets,' and Radon and its progeny." (Protect PT Response to Apex Motion, Exhibit G, p. 5; Protect PT Response to DEP Motion, Exhibit E, p. 5.) The basis for his conclusion regarding PFAS emissions at the Drakulic site is that "Pennsylvania's system of ambient air quality monitoring stations does not monitor for Radon or its progeny, or Per- and polyfluorakyl substances (PFAS) know[n] to be used at *some* [unconventional oil and gas] well sites in Pennsylvania," citing a report coauthored by Mr. Horwitt. (*Id*. at p. 6) (emphasis added). As noted earlier, Mr. Horwitt found evidence of use of PFAS at some oil and gas operations in Pennsylvania but there is no indication that any of those sites were operated by Apex. There is also no evidence that Mr. Glass conducted his own independent evaluation of PFAS use by Apex.

While the expert reports produced by Protect PT provide information regarding PFAS chemicals and their use in some oil and gas operations, none support its assertion that it has provided "expert opinion regarding Apex's other operations and the use of PFAS in hydraulic fracturing operations." (Protect PT Brief in Opposition to DEP Motion, p. 14; Protect PT Brief in Opposition to Apex Motion, p. 11.) The reports are fairly general to the oil and gas industry. While they indicate a possibility for PFAS to be used in oil and gas operations, none of the expert reports are specific to Apex nor do they provide any evidence that PFAS will be used at the

Drakulic site. None of the reports address Apex's past operations, its alleged use of PFAS chemicals or its plans for the Drakulic site.

The speculative nature of Protect PT's claims is further demonstrated by the deposition testimony of Protect PT's Executive Director, Gillian Graber. Ms. Graber could not identify any specific evidence that Apex would use or release PFAS at the Drakulic site. When asked in deposition, "what's Protect PT's basis that PFAS are going to be used at the Drakulic site?" Ms. Graber responded as follows:

> Well, we have no indication that it's not going to be used. We know that it is used in oil and gas operations broadly. We know that some of the chemicals are -- that are used are proprietary. And so that proprietary nature we have no way of knowing whether that's PFAS or not.

(Apex Motion, Exhibit I, p. 130.)

In contrast, Apex and the Department provided evidence that PFAS are *not* likely to be used by Apex at the Drakulic site. Safety data sheets produced by Apex from a recently constructed well site (the Graham site) identify no PFAS. (Apex Motion, Exhibit E; Apex Statement of Undisputed Material Facts, para. 13.) Likewise, water sampling results from the municipal water supply that Apex is required to use for the Drakulic site have not shown the presence of PFAS. (Apex Motion, Exhibits F and G.)

Protect PT, however, directs us to the deposition testimony of Apex's corporate designee, Christopher Hess, General Counsel and Executive Vice President. Counsel for Protect PT asked Mr. Hess about the company's use of PFAS or PFOA. Mr. Hess repeatedly responded that he did not think there was a "standard definition," that the term was "defined broadly by different groups," and that Apex could not guarantee the use or nonuse of PFAS without "an agreed upon clear definition of what a PFAS is." (Protect PT Response to Apex Motion, Exhibit C, p. 46, 95–

96.)[22] However, while acknowledging that the term PFAS was "poorly defined" or "defined broadly by different groups," he testified that, to his knowledge, Apex does not use PFAS or PFOA in its operation. (*Id.* at p. 46:13–21.) Taken as a whole, Mr. Hess's testimony does not support Protect PT's claim that PFAS will be used by Apex in its hydraulic fracturing of the wells at issue in this appeal. We read his testimony as saying that Apex does not intend to use PFAS at the Drakulic site, but because the definition of the term may vary, he could not guarantee it.

Protect PT also points to the testimony of the Department's corporate designee, Thomas Donahue, Environmental Program Manager in the Office of Oil and Gas Management, who testified that, when considering a well permit application, the Department does not review whether the applicant uses or has used PFAS in its operations; rather, that information is contained in the completion report which is prepared after the well is completed. (Protect PT Motion, Exhibit 15,

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[22] An excerpt of Mr. Hess's deposition testimony is as follows:

> Q: …Is it Apex's position without a comprehensive list of each PFAS compound, Apex is unable to confirm whether or not they have or they will be using PFAS?
>
> A: I think it's Apex's position that not with respect to each particular compound, but with respect to a -- an agreed upon clear definition of what a PFAS is. Without that, we can't make a guarantee one way or the other.
>
> *****
>
> Q: So based upon your reading of the definition of a PFAS from the Department or from the EPA, would Apex -- or have they used or will they will using PFAS based on the definitions of either DEP or EPA?
>
> A: I couldn't say one way or the other. I think it is -- to my knowledge, we are not planning on using any chemical compounds that would constitute a PFAS, but that answer is subject to, I think, a clear definition that we could hold against the chemical compounds and -- and -- you know, and make that representation.

(Protect PT Response to Apex Motion, Exhibit C, p. 95–96.)

p. 105) When asked whether the Department has discovered the use of PFAS in completion reports, Mr. Donahue responded that he did not know. (*Id.* at p. 106.)

At most, the evidence in the record indicates that PFAS may be used or released in some oil and gas operations, and while they could be used by Apex at the Drakulic site there is nothing in the record to suggest that they will be used; on the contrary, there is evidence to suggest they will not be used. On that basis, both the Department and Apex ask us to dismiss Protect PT's PFAS claims as speculative. *See, e.g., Stocker*, 2022 EHB at 444; *Liberty Township v. DEP*, 2022 EHB 398, 402; *Heasley v. DEP*, 1991 EHB 1758, 1761–62.

Protect PT argues that it is unable to provide more specific information for a variety of reasons. First, it reminds us that there are no ongoing operations at the Drakulic site from which to gather information since the wells have not been drilled. It argues that third-party appellants who are challenging development that has not yet occurred are adversely affected by the Board's standard that harm may not be speculative. Second, as set forth in the expert reports of Mr. Horwitt and Mr. Glass, Protect PT argues that PFAS use among the oil and gas industry is under-reported due to the lack of sufficient monitoring, measurement and documentation, and further due to certain constituents being classified as trade secrets. Finally, it argues that it was unable to obtain information regarding PFAS usage at the Drakulic site because Apex and the Department provided insufficient responses to its discovery requests related to PFAS.

Protect PT argues that the Board should reevaluate what constitutes "speculative evidence" and cites the Pennsylvania Supreme Court's opinion in *EQT Production Co. v. Borough of Jefferson Hills,* 208 A.3d 1010 (Pa. 2018) in support of this position. *Jefferson Hills* involved a zoning matter in which the issue presented was whether a municipality, in considering a natural gas company's conditional use application for the construction and operation of a well site, could

consider the testimony of residents of another municipality regarding impacts to their health, quality of life and property, which they attributed to a similar facility operated by the same company in their municipality. The trial court found the testimony to be speculative and the Commonwealth Court affirmed. On appeal, the Supreme Court reversed and held that testimonial evidence from the residents of the other municipality was properly admitted and received by the borough in considering the zoning application. Because the testimony of the residents established that the operation for which EQT was seeking approval was of a similar nature to the operation in their municipality, the Court found their testimony to the zoning hearing board to be relevant and probative.

In *Jefferson Hills*, firsthand accounts of similarly-affected residents were found to be relevant when considering a zoning application. Here, however, Protect PT has not produced any firsthand experiential evidence, such as the use of PFAS by Apex at its other drilling sites. While Mr. Horwitt's reports discusses the use of PFAS at other oil and gas sites in Pennsylvania, he mentions its use at only eight wells in Pennsylvania, none of which is identified as an Apex site. Protect PT has presented no evidence in the record indicating that PFAS chemicals will be used at the Drakulic site; it can only speculate as to their usage based on what it has found at a small number of other sites in Pennsylvania. We do not believe *Jefferson Hills* changes the standard for what constitutes "speculative evidence" before the Board. We agree with the position articulated by the Department in its reply to Protect PT:

> [T]he Pennsylvania Supreme Court did not allow for "speculative evidence" but simply disagreed with the Commonwealth Court regarding the probative value of the testimonial evidence, reasoning that it was not speculative, but probative in the specific context of the zoning board decision.

(DEP Reply, p. 9) (citing *Jefferson Hills*, 208 A.3d at 1028). Here, Protect PT has not come forward with relevant and probative evidence demonstrating the likelihood of PFAS use at the Drakulic site.

Protect PT contends that it attempted to obtain this information but did not receive sufficient answers to its requests for interrogatories served upon Apex and the Department. In particular, it directs us to the following responses provided by Apex and the Department's in response to interrogatories:

> INTERROGATORY 32 [directed to Apex]: Identify all PFAS identified in the 1,173 "hydraulic fracturing-related chemicals" identified by the Environmental Protection Agency and which specific PFAS chemical compounds will be used by Permittee at the Drakulic well site.
>
> ANSWER [by Apex]: In addition to the General Objections, Apex objects to this Interrogatory as vague and ambiguous. Apex also objects to this Interrogatory as seeking irrelevant information. Apex objects to this Interrogatory as seeking to impose discovery obligations which do not exist under applicable law. Apex objects to this Interrogatory to the extent it seeks expert opinions and conclusions. Subject to and without waiving the foregoing objections, this Interrogatory is not capable of a meaningful response. Apex does not know what is meant by the "1,173 'hydraulic fracturing-related chemicals' identified by the Environmental Protection Agency" and is unaware of any list formulated by [sic] purporting to be a list of chemicals used in hydraulic fracturing. By way of further response, Apex refers Appellant to EPA's website which indicates that a list of "Chemicals Identified in Hydraulic Fracturing Fluids and Wastewater" "contains tables of chemicals reported to be used… and detected…" (emphasis supplied). https://www.epa.gov/hfstudy/appendix-chemicals- 09/23/2024 - 13 - identified-hydraulic-fracturing-fluids-and-wastewater-excel-file. Additionally, as Apex has repeatedly advised Appellant, Apex has not yet selected vendors and, therefore, the products it may use at the Drakulic site have not been identified. However, Apex has also provided representative SDS for its drilling and completions operations. Based upon those SDS, Apex has no knowledge that its operations will utilize PFAS compounds.

(Protect PT Response to Apex Motion, Exhibit B, p. 12–13.)

> INTERROGATORY 34 [directed to the Department]: [Does] the Department have knowledge that the Permittee has used PFAS chemicals at any well sites in Pennsylvania.
>
> ANSWER [by the Department]: Because the interrogatory is not specific to the permit renewals at issue in this case, the Department objects to the interrogatory as overly burdensome. The Department objects to the extent this interrogatory requires expert analysis or discovery or seeks a legal conclusion to which no response is required. The Department further objects to the terms "used," "PFAS chemicals," and "any well sites in Pennsylvania" as vague, ambiguous, and overly broad. The Department objects to the extent this definition exceeds the requirements of the Pennsylvania Rules of Civil Procedure, and further objects to this definition as overbroad as it inquires into all well sites in Pennsylvania that Permittee operates. The Department objects to this interrogatory because it assumes PFAS use on an Apex well site. Furthermore, the Department objects as this question is improper in that it assumes a fact without any basis or foundation and does not necessitate a further response. Subject to the foregoing, based on its knowledge and understanding, the Department is not aware that Apex has utilized "PFAS chemicals" on its well sites.

(Protect PT Response to Apex Motion, Exhibit A, p. 27–28.)

However, Protect PT did not seek to address these alleged deficiencies by filing a motion to compel with the Board. The Board's role is to oversee the exchange of information through the process of discovery. Where a party requests information in discovery and believes that the responding party has failed to provide complete and sufficient answers, our rules allow for the requesting party to petition the Board to compel more complete answers. 25 Pa. Code § 1021.102(d). That was not done here, and, therefore, the Board did not have the opportunity to consider whether Apex and the Department needed to provide more complete answers and, if so, order them to comply.

Protect PT argues that it is reasonable to infer that Apex will use PFAS at the site at issue in this appeal. It relies on what it deems to be insufficient reporting requirements discussed in its

expert reports and the allegedly deficient responses to interrogatories discussed above. It also directs us to a violation issued by the Department to Apex for failure to report fracking chemicals for 37 wells in Westmoreland County over the course of six years as evidence of Apex withholding information. On September 9, 2024, the Department issued a Notice of Violation (NOV) to Apex for failure to comply with 25 Pa. Code § 87a.122(b)(6)(iv), which requires the company to provide a list of the chemicals it intentionally adds to its stimulation fluid. (Protect PT Response to Apex Motion, Exhibit F.) While Apex did submit the required completion reports for the wells at issue in the NOV letter, the company provided "Proprietary" or "Trade Secret," rather than actually including the chemical information.

On the basis of the NOV, the allegedly deficient discovery responses discussed above, and the alleged lack of adequate reporting, Protect PT states that it intends to move for an adverse inference against Apex and the Department with regard to the use of PFAS chemicals at the Drakulic site. The decision as to whether to grant a sanction such as an adverse inference is within the discretion of the trial court. *Kiskadden v. DEP*, 2014 EHB 380, 386 (citing *Magette v. Goodman*, 771 A.2d 775, 779 (Pa. Super. 2001)). The Board has the authority to impose sanctions, including those permitted under Pa. R.C.P. 4019, upon a party for failure to adhere to a Board order or Board rule of practice and procedure. 25 Pa. Code § 1021.161. "The general rule regarding adverse inferences is that where evidence that would properly be part of a case is within the control of the party in whose interest it would be to produce it, and the party fails to produce it without satisfactory explanation, an adverse inference may be drawn that the evidence would be unfavorable to him." *Kiskadden,* 2014 EHB at 386 (quoting *Magette*, 771 A.2d at 779).

Here, no motion for an adverse inference has been made, but even if it were, it is not clear that the requirements for an adverse inference have been met. There is no indication that either

the Department or Apex has failed to abide by a Board order or rule of practice and procedure. As we stated earlier, no motion to compel was filed against Apex or the Department; therefore, there is no Board order directing Apex or the Department to provide more complete answers in discovery. Moreover, there is no indication as to whether the information sought by Protect PT is within the control of the parties or a third-party such as a chemical manufacturer or vendor.

The Board addressed the use of adverse inference in *Kiskadden*. That case involved a landowner who claimed that gas operations had contaminated his water supply. In discovery, the landowner sought information regarding the chemicals used at the well site, and the permittee claimed that the information was either not available or it was proprietary. The landowner filed a motion to compel which the Board ultimately granted. After several unsuccessful attempts at obtaining the information, the landowner asked for an adverse inference that would have precluded both the permittee and the Department from arguing that products used at the well site did not contaminate the landowner's water supply and would have further declared the Department's finding of no impact to the landowner's water supply null and void.

The Board declined to grant the adverse inference requested by the landowner. However, it did grant the landowner a rebuttable presumption that contaminants found in his water supply may have been used at the permittee's site. Unlike the present case, in *Kiskadden* a motion to compel had been filed and a Board order granting the motion had been issued. Here, without a motion to compel having been filed, the Board had no opportunity to determine whether Apex and the Department's answers to interrogatories were deficient and no opportunity to order one or both of those parties to produce more complete information, if warranted.

Moreover, additional tools were available to Protect PT in discovery to attempt to obtain information regarding the identity of product constituents. Based on our review of the record, it

does not appear that Protect PT issued discovery requests seeking information on "proprietary" chemicals or copies of completion reports for Apex's other sites, did not serve a subpoena on any of Apex's chemical suppliers,[23] nor did it purport to offer a definition of PFAS to Apex's corporate designee when he indicated he needed one to answer the deposition questions fully. We understand that some of this information may not have been available through discovery,[24] and we are not so naïve as to believe that Protect PT would have been flooded with information had it asked for it. But, it was incumbent upon Protect PT to exhaust all other avenues before seeking further remedies.

Moreover, in this case, Apex has provided some information indicating that PFAS will not be used at the site. As noted earlier, it provided safety data sheets for products used at another site and those materials did not show PFAS as a constituent. Additionally, Apex and the Department provided sampling results for the public water supply that Apex is required to use at the Drakulic site and those results have not identified PFAS. Finally, Apex's corporate designee, Mr. Hess, stated that to his knowledge Apex did not use PFAS in its operations, albeit with some wrangling over the definition.

At this stage of the proceeding—where discovery has concluded and the case is proceeding to a hearing[25]—Protect PT does not have evidence to support its claims that PFAS will be used or released to the environment through the hydraulic fracturing process at the Drakulic well site.

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[23] We recognize that Apex's response to Protect PT Interrogatory no. 32 stated that it had not yet selected vendors for the Drakulic site. However, as we have stated, there was no motion filed to compel further information, and the record does not indicate that any further attempt was made to obtain this information.

[24] *See, e.g.,* 58 Pa. C.S. § 3222.1, which addresses hydraulic fracturing chemical disclosure requirements. *But see, Kiskadden*, 2014 EHB at 385 (holding that the operator "as the party that used the products in question, bears some responsibility for producing information regarding the chemical composition of the products.")

[25] A hearing in this matter has been scheduled to begin January 15, 2025.

While its experts have provided substantive reports on the risks associated with PFAS and the general use of PFAS chemicals in the oil and gas industry, there is nothing it can point to that shows that PFAS will be used at the Drakulic site. On the contrary, Apex and the Department have produced evidence that PFAS will not be used.

The question to be answered in determining whether summary judgment is warranted under 1035.2(2) is whether there is a genuine issue for trial. *Casey v. DEP*, 2014 EHB 439, 443 (citing *Kleinberg v. SEPTA*, 765 A.2d 405, 408 (Pa. Cmwlth. 2000) ("[W]here a motion for summary judgment has been made and properly supported, parties seeking to avoid imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.") In order to overcome a motion filed pursuant to Pa. R.C.P. 1035.2(2), the adverse party must be able to demonstrate evidence in the record establishing the facts essential to the cause of action. Pa. R.C.P. 1035.3. In other words, a party must identify evidence in the record which indicates that it can prove its claim. *Casey,* 2014 EHB at 444 (citing *Jackson v. DEP*, 2005 EHB 496, 498–99). We do not believe that Protect PT has pointed to sufficient evidence in the record indicating that it can prove its PFAS claims.

Therefore, summary judgment is granted to Apex and the Department on Objections 27 and 67 of the Initial Appeal.

Accordingly, we enter the following order:

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 PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 29th day of October, 2024, it is hereby ordered as follows:

1) Apex's and the Department's Motions for Partial Summary Judgment are granted in part.

2) Paragraphs 25, 26, 28, 30, 31, 33–35, 39–42, 43–52, 64, 65, 67–68, 75–80, 82–85, 120, 125 and portions of Objections 66, 72 and 119 of the Renewal Appeal are dismissed, as set forth herein.

3) Paragraphs 27 and 67 of the Initial Appeal are dismissed.

**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: October 29, 2024**

**c:** **DEP, General Law Division:**
Attention: Maria Tolentino
*(via electronic mail)*

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