



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

**OPINION AND ORDER ON
APPELLANT’S MOTION FOR SUMMARY JUDGMENT**

By MaryAnne Wesdock, Judge

Synopsis

Summary judgment may be granted only when there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. Here, there are a number of facts in dispute. Additionally, where complex questions of law and fact are raised, they are generally not appropriate for disposition by summary judgment.

OPINION

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 Protect PT's motion.

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)).

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

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).

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

Protect PT asserts that the issuance and renewal of the permits was unlawful because 1) they violated 25 Pa. Code §78a.55; 2) will cause serious detrimental health effects; 3) will allow degradation to Turtle Creek and other waters of the Commonwealth; 4) were issued without the Department identifying the impact on public resources; 5) they failed to take into account Apex’s compliance history; 6) they permit a public nuisance; 7) they fail to require proper disclosure of chemicals; and 8) they violate Pennsylvania’s Climate Change Plan. Protect PT also asserts that it is entitled to summary judgment because the Department failed to perform its duties under the Environmental Rights Amendment, Article I, Section of the Pennsylvania Constitution. We examine these issues below:

Issues regarding 25 Pa. Code § 78.55 and Climate Change

In response to the Department’s and Apex’s Motions for Partial Summary Judgment, Protect PT acknowledged that its claims brought pursuant to 25 Pa. Code § 78a.55 were barred by

the doctrines of *res judicata* and collateral estoppel. Therefore, it has withdrawn its objections brought under Section 78a.55. (Protect PT Brief in Opposition to Apex Motion, p. 6.)

Additionally, Protect PT's claims regarding climate change have been dismissed as being outside the scope of the appeal. *See Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W, *slip op.* at 10–12 (Opinion and Order on Department's and Permittee's Motions for Partial Summary Judgment issued October 29, 2024). As such, Appellant's Motion for Summary Judgment on these claims is denied.

Health Effects

Protect PT alleges that the permits will cause serious detrimental health effects to residents in the area of the operation. It cites health studies performed by the University of Pittsburgh and Pennsylvania Department of Health with regard to fracking operations in southwestern Pennsylvania. Protect PT asserts that the Department should have implemented recommendations included in a Grand Jury Report that were designed to be protective of human health in relation to oil and gas operations. The Department and Apex dispute the evidence cited by Protect PT, assert it is hearsay and argue that Protect PT has failed to show causation between the alleged facts and the likelihood of harm to human health. Apex asserts that proving these claims will require expert testimony at a hearing.

We agree that this matter is not easily addressed through a motion for summary judgment. As we have noted, summary judgment may be granted only in the clearest of cases, where there are no material facts in dispute and the right to summary judgment is clear and free from doubt. *Scott, supra*. Claims involving complex questions of fact and law are often best addressed through the development of a record at hearing. *Clean Air Council v. DEP*, 2013 EHB 346, 360.

Degradation to Waters of the Commonwealth

Protect PT also asserts that the Department's permitting actions were unlawful because it allowed impacts and degradation to Turtle Creek which it states is designated as a navigable waterway, trout stream and warm water fishery. Specifically, Protect PT argues that the Department did not have the authority to issue the permits without providing for the public trust of Turtle Creek as a navigable waterway, and that the Department was required to coordinate with the Department of Conservation and Natural Resources (DCNR) in reviewing the application materials. Protect PT also discusses the TMDL in place for Turtle Creek under the Clean Water Act. The Department responds that its review of the permits included a subsurface hydrogeologic review, and it disputes that there will be degradation to Turtle Creek. Apex disputes that it will negatively impact any water of the Commonwealth and asserts that the argument that the Department was required to consult with DCNR lacks support in existing law. Apex also argues that this is the first time Protect PT has raised any claims with regard to Turtle Creek and, therefore, it cannot win summary judgment on claims it has waived.

The creation of impacts to or degradation of Turtle Creek is a material fact in dispute. Protect PT states it has established that Apex will bore under Turtle Creek as part of its operations at the site and alleges that simply by virtue of operating the well in close proximity, Turtle Creek will be impacted and degraded. Apex denies the assertion that any of its operations will negatively impact any water resource. Given the material facts in dispute regarding the degradation of Turtle Creek, summary judgment is not appropriate.

Similar to the argument regarding Turtle Creek, Protect PT argues that the permits will cause impacts to and degrade the surrounding waters of the Commonwealth. Protect PT states that the surrounding waters of the site are already impaired and that the environmental changes that the

operations under the permits will cause will be incremental and thus will compound and last for generations to come. The Department disputes that there will be harms, what those harms are, or how the permits would compound with any other existing impairments. Apex likewise disputes that it will negatively impact any water of the Commonwealth.

While Protect PT alleges that the surrounding waters of the site will be degraded, it provides little detail on how this will occur. Its brief merely states that because Apex is authorized to drill under a navigable waterway, the surrounding waters could be impacted. Considering that further information is needed, we do not feel that the standard for summary judgment has been met here.

Public Resources

Protect PT next alleges that the Department's issuance and renewal of the permits violated the Environmental Rights Amendment because the Department did not consider the potential impacts on public resources. The Department counters this argument and states that it considered a variety of public resources in its consideration of the permits, including publicly owned parks, game lands and wildlife areas, National or State scenic rivers, and habitats of rare and endangered flora and fauna and other critical communities. Apex denies that its operations will unreasonably degrade the environment or that the Department failed to appropriately consider the impacts of its operations.

In asserting that the Department failed to consider the environmental effects of its permitting action, Protect PT references 58 Pa. C.S. § 3215(c), which outlines a number of public resources that the Department is to consider in making a determination on a well permit. Protect PT does not indicate which public resources it believes the Department failed to account for. Rather, it generally states that the Department failed to consider the environmental effects of its

permitting action. Without specific claims or arguments as to how the Department failed to consider environmental effects on public resources, the Board is unable to grant summary judgment on this claim.

Compliance History

Protect PT asserts that the permitting action was unlawful because the Department failed to properly consider Apex's compliance history pursuant to the Clean Streams Law and its duties as a trustee under the Environmental Rights Amendment. The Department responds that it did consider Apex's compliance history in both its issuance and renewal of the permits. The Department further asserts that Protect PT simply disagrees with the Department's decision to issue and renew the permits after its consideration of the compliance history. Apex responds that the Department did consider its compliance history, that Protect PT has failed to prove a pattern of noncompliance, and that Protect PT failed to prove that the Department improperly applied its discretion.

Protect PT has established that Apex was subject to a number of notices of violation (NOVs) at the time of the permits' issuance and renewal. The Department asserts in response that Apex was not in continuing violation of any final action by the Department. The Department also states that the NOVs referenced by Appellant were not separate violations but were continuing violations where NOVs were issued on multiple occasions while corrective actions were being taken. Whether the NOVs were continuing violations and whether those violations justify denial of the permits involve disputed questions of material facts such that summary judgment is not appropriate on these issues.

Public Nuisance

Protect PT claims that the issuance and renewal of the permits was unlawful because they allow a public nuisance. The Department responds that because the well site has not been constructed, any harms that Protect PT identified as constituting a public nuisance are speculative. The Department also argues that Protect PT failed to show how the alleged harms will occur. It highlights a Consent Judgment applicable to the permits that includes mitigation measures for concerns such as noise and dust. Similar to the Department, the Permittee argues that the harms outlined by Protect PT are speculative and unsupported.

Protect PT alleges that noise, dust, truck traffic, and the volatilization and leaching of chemicals into storm and groundwater are all impacts that the Department knew or should have known would happen if it were to issue and renew the permits. Protect PT argues that these issues are “inevitable.” The Department and Apex, however, have provided evidence that specific mitigation measures are required to be in place regarding potential nuisance-inducing concerns such as noise and dust, per the Consent Judgment. Summary judgment should only be granted where a limited set of material facts are truly undisputed, and that is not the case here. Because the creation of a public nuisance is a material fact in dispute, summary judgment with respect to this claim is denied.

Chemical Disclosure

In support of its motion, Protect PT alleges that the Department’s permitting action was unlawful because it did not require Apex to fully disclose the chemicals to be used at the site. With respect to its claims made pursuant to 25 Pa. Code § 78a.55, as we have noted earlier, Protect PT has since withdrawn them. Protect PT does, however, maintain its claim that the Department’s alleged failure to require certain information, such as chemical disclosure, to be contained in Apex’s PPC Plan and emergency response plan as part of its permit application violates the

Environmental Rights Amendment. The Department disagrees with Protect PT's assessment and points out that Pennsylvania's oil and gas regulations contain specific requirements regarding site containment and emergency response, as well as requirements for management of products used on site.

There are questions of law and fact surrounding Protect PT's claim that the Environmental Rights Amendment obligates the Department to obtain a list of the chemicals that oil and gas operators use in their operations. These questions need to be more fully developed and are not appropriate for resolution in the context of the parties' summary judgment motions.

Article I, Section 27

Protect PT asserts generally that it is entitled to summary judgment because the Department violated the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution by failing to consider all environmental effects prior to issuing and renewing the permits and because there is no benefit to the beneficiaries under Article I, Section 27.

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 *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 858-59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 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).

This is a complex case with a multitude of issues and a voluminous summary judgment record. In cases involving complex issues of fact and law, as is the case here, the Board has found that summary judgment may be inappropriate and has held that such matters are often best decided on a fully developed record at a merits hearing. *Three Rivers Waterkeeper v. DEP*, 2020 EHB 87, 89; *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

We have reviewed the arguments set out by the parties in their briefs, as well as the voluminous facts and exhibits presented for our consideration. Viewing that information in the light most favorable to the Department and Apex, as the non-moving parties, and resolving all doubt as to the existence of a genuine issue of material fact against Protect PT, as the moving party, we find that Protect PT has not demonstrated that it is entitled to summary judgment in this matter because the right to summary judgment is not clear and free from doubt. The issues raised in Protect PT's motion involve mixed questions of fact and law that make a grant of summary judgment inappropriate. As the Board has held, "issues of this type are best decided following a full hearing that allows all sides in the case to present their evidence so that the law can be applied to a fully developed factual record." *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347 (citing *National Fuel Gas Midstream Corp. v. DEP*, 2014 EHB 914; *DEP v. Sunoco Logistics Partners L.P.*, 2014 EHB 791). *See also*, *Clean Air Council v. DEP*, 2013 EHB 346, 360 ("In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process.")

Accordingly, we enter the following order:



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**EHB Docket No. 2023-074-W
(Consolidated with 2022-072-W)**

ORDER

AND NOW, this 29th day of October, 2024, it is hereby ordered that Protect PT’s Motion for Summary Judgment is denied for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: October 29, 2024

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

For the Commonwealth of PA, DEP:
Forrest M. Smith, Esquire
Kathleen Anne Ryan, Esquire
(via *electronic filing system*)

For Appellant:

Lisa Johnson, Esquire
(via electronic filing system)

For Permittee:

Megan S. Haines, Esquire
Jeffrey Wilhelm, Esquire
Casey Snyder, Esquire
(via electronic filing system)