



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and OLYMPUS ENERGY
LLC, Permittee**

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EHB Docket No. 2023-077-W

Issued: July 29, 2024

**OPINION AND ORDER ON
OBJECTIONS TO PROPOSED SUBPOENA**

By MaryAnne Wesdock, Judge

Synopsis

The permittee’s objections to a subpoena for the production of records directed to an out-of-state non-party are overruled. The appellant has demonstrated that its requests are reasonably calculated to lead to the discovery of admissible evidence. Further, the Board finds that it has the authority to issue the subpoena.

OPINION

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 Metis Well Site in Penn Township, Westmoreland County. The Department of Environmental Protection (Department) issued the permits for the Metis 1U Well and the Metis 3U Well on or about August 17, 2023. Protect PT avers that the permit 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.¹

On June 12, 2024, Protect PT provided notice of its intent to serve a subpoena on Fluid Energy Industrial LLC for the production of documents pursuant to Pa. R.C.P. 4009.21(a), which states:

A party seeking production from a person not a party to the action shall give written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service. A copy of the subpoena proposed to be served shall be attached to the notice.

Olympus filed objections to the subpoena pursuant to Pa. R.C.P. 4009.21(c). Protect PT filed a response to Olympus' objections, and this matter is ripe for disposition.²

Olympus previously filed objections to a subpoena directed to a separate entity, Fluid Energy Group Ltd, in a related appeal at Docket No. 2023-025-W. Those objections were substantively similar to the objections raised here. The Board overruled the objections by order dated April 25, 2024. However, Olympus states that it is raising similar objections to the subpoena that is currently pending in this matter because it continues to believe they are meritorious and in order to preserve the issue for appeal. Additionally, in this filing Olympus has addressed arguments made by Protect PT in its response to Olympus' prior objections.

Olympus' first objection relates to Protect PT's request for safety data sheets or similar documents for "chemicals, fluids, mixtures and/or products" sold to Olympus and two other companies or agents for use in hydraulically fracturing gas wells in Pennsylvania since 2020. Olympus objects on grounds of relevance. It points out the subject of this appeal very specifically

¹ By Stipulation filed with the Board on July 29, 2024, Protect PT withdrew any objections related to the introduction of radiation into the environment. (EHB Docket 2023-077-W, Entry No. 21.)

² Olympus also filed objections in a related appeal at Docket No. 2023-025-W, and a separate Opinion has been issued in that matter.

concerns gas well permits for the Metis 1U and 3U gas wells in Penn Township, Westmoreland County, and it argues that Protect PT's request is not reasonably calculated to lead to the discovery of evidence that is admissible in this appeal.

In response, Protect PT asserts that in other cases Olympus and other gas drillers have responded that they do not know what chemicals they will be using for a particular well until that well is being drilled; in some cases their agents make those decisions. Protect PT states that it anticipates a similar response here. Given that anticipated response, Protect PT argues that finding out the chemicals that have been used to hydraulically fracture other Olympus wells throughout Pennsylvania is relevant to the chemicals that are likely to be used in this case. In reply, Olympus argues that Protect PT's response proves its point, i.e., that the information requested by the subpoena may not be relevant to the action on appeal since there is no guarantee that the chemicals that have been used in the past to hydraulically fracture other wells will be used to hydraulically fracture the Metis 1U and 3U wells.

Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1. Because it may be difficult to tell early on in a case whether a matter is relevant, we interpret the relevancy requirement broadly and generally allow discovery into an area so long as there is a reasonable potential that it will lead to relevant information. *Cabot Oil and Gas Corp. v. DEP*, 2016 EHB 20, 24 (citing *Parks v. DEP*, 2007 EHB 57.)

To the extent that Olympus can provide specific information regarding the chemicals and other materials that will be used in hydraulically fracturing the Metis 1U and 3U wells, it is possible that the subpoena request can be more narrowly focused. However, if, as Protect PT predicts, that

information is currently unknown or not available, then Protect PT makes a persuasive argument that the list of chemicals or other materials that have been used by Olympus and its related companies or agents in hydraulically fracturing other wells in Pennsylvania is a reasonable indicator of what may be used in the future. Protect PT makes a valid argument that this information is reasonably calculated to lead to the discovery of evidence that is admissible in this appeal. Pa. R.C.P. 4003.1. Therefore, this objection is overruled.

Olympus' second objection also relates to relevancy. Olympus challenges Protect PT's request for "[c]opies of any documentation submitted to the U.S. Customs and Border Protection, Pennsylvania Department of Transportation...the U.S. Department of Transportation, the U.S. Environmental Protection Agency, Pennsylvania Department of Environmental Protection for the creation, use, storage, or transport of the Products; any lists of the ingredients/content/makeup/composition of the Products."³ (Ex. A to Motion.) Olympus argues that because the request focuses on the "creation, use, storage, or transportation" of chemicals and other materials, rather than focusing simply on the identity of the chemicals that will be used in hydraulically fracturing the Metis 1U and 3U wells, it is seeking information that is not relevant.

In response, Protect PT explains that it is trying to obtain the names of chemicals used for hydraulic fracturing in Pennsylvania and for the wells at issue in this case,⁴ but explains that the subpoena was drafted in this manner so that it could obtain information in a way that would not be objected to on the grounds that it requires the creation of a document. For instance, it states that its request for "lists of the ingredients/content/makeup/composition of the Products" will be fruitless if Fluid Energy Industrial responds that no such list exists. In drafting the subpoena request

³ "Products" is defined in the subpoena as "chemicals, fluids, mixtures and/or products." (Ex. A to Motion.)

⁴ Protect PT states that it is agreeable to a confidentiality order if necessary.

in the manner it did, it contends that its goal was to obtain documentation containing the requested information should a “list” of such information not be available. Olympus argues that if Protect PT simply wants the “names” of chemicals its request goes far beyond that.

Relevance for discovery purposes is to be construed broadly. *Parks v. DEP*, 2007 EHB 57, 58. As the Board held in *Khodara v. DEP*, 2001 EHB 855, 857, “it is enough that the evidence sought *might be* relevant.” (Emphasis in original) (citing *City of Harrisburg v. DER*, 1992 EHB 170). The Board generally allows broad discovery. See *Solebury Township v. DEP*, 2007 EHB 325, 327) (“As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal”); *Sludge Free UMBT v. DEP*, 2014 EHB 933, 941 (“We allow broad discovery because one of the primary purposes of discovery is to avoid unfair surprise and trial by ambush”) (citing *Kiskadden v. DEP*, 2013 EHB 21, 26 n.1; *PA Waste, LLC v. DEP*, 2009 EHB 317, 318). Quite simply, information is relevant if it can lead to the discovery of admissible evidence.

We are not persuaded that Protect PT’s request is so broad as to go beyond the proper scope of discovery. The request, as drafted by Protect PT, appears to be a reasonable method of obtaining information that is relevant to this appeal, particularly if, as it claims, this information is absent in other formats. As we stated earlier, if Olympus is able to provide Protect PT with specific information regarding the hydraulic fracturing of the Metis 1U and 3U wells, it is possible that this subpoena request can be narrowed. In the absence of that information, Protect PT has sufficiently demonstrated that its subpoena request is drafted in such a manner as to reasonably lead to the discovery of admissible evidence, in compliance with Pa. R.C.P. 4003.1.

Olympus' final objection is that the Board does not have the authority to issue a subpoena that can be enforced across state lines. Here, the subpoena is directed to Fluid Energy Industrial LLC, which is located in the state of Delaware. The Delaware Uniform Interstate Depositions and Discovery Act (Delaware Interstate Discovery Act), 10 Del. Code § 4311, oversees the service of foreign subpoenas upon persons in the state of Delaware and provides as follows:

(c) *Issuance of a subpoena.*

(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to the prothonotary in the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this State.

(2) When a party submits a foreign subpoena to a prothonotary in this State, the prothonotary, in accordance with the court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

10 Del. Code § 4311(c)(1) and (2). Thus, in order for Protect PT to request the issuance of a subpoena in Delaware it must first submit a foreign subpoena obtained within the Commonwealth of Pennsylvania.

Olympus asserts that the Board does not have the authority to issue a "foreign subpoena" which is defined in the Delaware Interstate Discovery Act as "a subpoena issued under authority of a *court of record* of a foreign jurisdiction." *Id.* at § 4311(b)(2) (emphasis added). It is Olympus' position that the Environmental Hearing Board may not issue a subpoena for purposes of the Delaware Interstate Discovery Act because it is not a "court of record." In support of this assertion, Olympus cites *L.E.A.D. Group of Berks v. Exide Corp.*, 1999 U.S. Dist. LEXIS 2672, 1999 WL 124473 (E.D. Pa. February 19, 1999), which, in turn, relies on *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir. 1979). For the reasons that follow, we disagree with Olympus that

these decisions support its argument that the Board lacks the authority to issue a subpoena directed to Fluid Energy Industrial LLC.

In *Baughman* and *L.E.A.D.*, the Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania, respectively, addressed a very narrow question - whether the Environmental Hearing Board was “a court of...a State” for purposes of precluding a citizen suit under the Federal Clean Air Act at 42 U.S.C. § 7604(b)(1)(B).

Under the Clean Air Act, private citizens may bring an action in federal district court to enforce a State Implementation Plan against alleged violators. *Id.* at § 7604(a)(1). However, such an action is precluded “if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil action *in a court of* the United States or *a State* to require compliance...” *Id.* at § 7604(b)(1)(B) (emphasis added). In both *Baughman* and *L.E.A.D.*, the defendants had argued that a citizen suit was precluded by virtue of the fact that a civil penalty action had been brought before the Environmental Hearing Board. In examining this question, the Court of Appeals for the Third Circuit in *Baughman* determined that the Board was not “a court of...a State” for purposes of 25 Pa. Code § 7604(b)(1)(B). It is clear that, in reaching this conclusion, the Third Circuit limited its analysis to whether an action before the Board triggered the preclusion provision of § 7604(b)(1)(B). Recognizing that this issue was one of first impression, the Court analyzed the legislative history behind § 7604(b)(1)(B) and determined “that Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism.” 592 F.2d at 218 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 2, 35-36 (1970) and the comments of Senator Muskie and Senator Boggs in 116 Cong. Rec. (1970) at pp. 32902, 32918, respectively). The Court stated:

The preclusion of § 7604(b)(1)(B) and the constituent phrase "court of...a State", must be construed in light of those policies. Accordingly, for a State administrative board to be a "court" *under that sub-section*, that tribunal must be empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan.

Id. (emphasis added). The Court went on to state:

It follows that to constitute a "court" in which proceedings by the State will preclude private enforcement actions *under § 7604*, a tribunal must have the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts under the Clean Air Act.

Id. at 219 (emphasis added).

Thus, the Court of Appeals did not address the general question of whether the Board is a “court;” rather, its holding was limited to the question of whether an action before the Board could preclude a citizen suit under § 7604(b)(1)(B).⁵ Indeed, the Third Circuit pointed out that “an administrative board may be a ‘court’ if its powers and characteristics make such a classification necessary to achieve statutory goals. 592 F.2d at 217 (citing *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972)). It further pointed out the Board has been held to be a “State Court” for purposes of at least one federal statute, i.e., the Federal Removal Statute, 28 U.S.C. § 1442. 592 F.2d at 217-18 (citing *United States v. Pennsylvania Environmental Hearing Board*, 377 F. Supp. 545, 553 (M.D. Pa. 1974)). The holdings in *Baughman* and subsequently in *L.E.A.D.* indicate an intention on the part of those courts to focus

⁵ The Third Circuit concluded that the Board could not be considered “a court of...a State” under § 7604(b)(1)(B) for very narrow reasons: first, because the amount of penalty that the Board could assess under Pennsylvania’s Air Pollution Control Act, 35 P.S. § 4009.1 et seq., was lower than that which could be assessed by the federal courts; second, the Board did not have the power to enjoin a violation of a State Implementation Plan; and third, the Board’s rules did not allow intervention as of right.

on the very limited question before them, pertaining to § 7604(b)(1)(B), and not to circumscribe the Board's jurisdiction.

Moreover, the Delaware Interstate Discovery Act makes no mention of "a court of...a State." Rather, that Act simply states that a foreign subpoena must be issued by a "court of record." Olympus has provided no basis for arguing that the Board is not the "court of record" in this appeal. The Board is the statutorily created tribunal for hearing appeals of actions taken by the Department of Environmental Protection and has the power and duty to hold hearings and issue adjudications on orders, permits, licenses and decisions of the Department. 35 P.S. §§ 7513(a) and 7514(a). In fulfilling its statutorily mandated duty, the Board has the power to subpoena witnesses, records and papers. *Id.* at § 7514(f). This power was conferred upon the Board by the General Assembly when it enacted the Environmental Hearing Board Act. 35 P.S. §§ 7511-7516.

Former Chief Judge Thomas W. Renwand explained the role of the Environmental Hearing Board in *Hilcorp Energy Co. v. DEP*, 2013 EHB 701:

[The Board] functions as a court not a regulatory agency...[T]he "public hearings" the Board holds are formal court hearings in one of its five court rooms situated across the Commonwealth. Parties present their cases before the Board just as they would in the state and federal trial courts of the Commonwealth. The Board hears the evidence according to the law and the testimony is transcribed by court reporters. As noted earlier, the parties file extensive Pre-Hearing and Post Hearing briefs. The Board then issues written Adjudications which contain detailed findings of fact, discussion, and conclusions of law. Appeals of Board decisions go directly to the Pennsylvania Commonwealth Court which can only reverse Board decisions if its decisions are not supported by substantial evidence, contrary to law, or violative of the Constitution.

Id. at 713.

Likewise, the Board follows the Pennsylvania Rules of Civil Procedure with regard to discovery and the issuance of subpoenas. 25 Pa. Code §§ 1021.102(a) and 1021.103(a). As Judge Renwand further explained in *Hilcorp*:

The Board has not only adopted its own Rules of Practice and Procedure specific to the unique environmental litigation matters filed before the Board, but has adopted the Discovery Rules of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102 (a). Therefore, parties before the Board are assured that they will be afforded the right to conduct liberal discovery, partake in a robust motion practice, and participate in a detailed hearing process....The Board issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing.

Id. at 707.

Although cases before the Board are not “civil actions,” the Commonwealth Court has recognized that the Board is charged with carrying out an important “adjudicative function” with respect to appeals of actions taken by the Department of Environmental Protection. *Cole v. Department of Environmental Protection*, 257 A.3d 805, 815 (Pa. Cmwlth. 2019). The Board has an “overarching obligation to ensure that we conduct the fair hearing that due process requires.” *Big Spring Watershed Assn. v. DEP*, 2015 EHB 83, 88-89 (citing *In re Estate of Pedrick*, 482 A.2d 215 (Pa. 1984).

As Former Chief Judge Michael L. Krancer held in *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, 2005 EHB 123, “In our tri-partite system [governing environmental regulation in Pennsylvania], the Department is the executive branch which makes a decision and we are the separate and independent judicial branch which is open to review that decision with all the due process guarantees.” *Id.* at 141-42 (citing *Department of Environmental Protection v. North American Refractories, Inc.*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002) (“The EHB is the

judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act.”) The Board is indeed the “court” of record for purposes of issuing a subpoena in this matter since our “powers and characteristics make such a classification necessary to achieve [the] statutory goals” of the Environmental Hearing Board Act. *Baughman*, 592 F.2d at 217.

The objections of Olympus are overruled.



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ORDER

AND NOW, this 29th day of July, 2024, it is hereby ordered that Olympus Energy LLC's objections to Protect PT's proposed subpoena directed to Fluid Energy Industrial LLC are **overruled.**

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

DATED: July 29, 2024

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