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PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2024-005-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WCAA UPSTREAM, LLC, Permittee	:	**Issued: August 20, 2025**

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

By MaryAnne Wesdock, Judge

Synopsis

Summary judgment is denied to the Department and Permittee under Pa. R.C.P. 1035.2(2) where it is not clear that the Appellant has failed to make a prima facie case and where certain claims involve complex questions of law and fact.

O P I N I O N

Introduction

This matter involves an appeal filed by Protect PT, challenging the Department of Environmental Protection's (Department) issuance of several unconventional gas well permits to WCAA Upstream, LLC (WCAA).[1] The permits were issued in connection with WCAA's Draftina well pad located in Penn Township, Westmoreland County. Pending before the Environmental Hearing Board (Board) are motions for summary judgment filed by the Department and WCAA. In addition, the Department filed a memorandum of law in support of WCAA's motion, joining in

[1] The permits were issued to Apex Energy (PA), LLC (Apex) on December 7 and December 11, 2023. On May 13, 2025, the parties filed a Joint Stipulation to Amend Caption, advising the Board of Apex's name change to WCAA Upstream LLC.

certain arguments made by WCAA while declining to join in others. Protect PT filed responses in opposition to both motions, and the Department and WCAA filed replies to Protect PT's responses.

Protect PT's appeal challenges the Department's issuance of permits for the following wells: the Draftina 2H, 3H, 4H, 7H, 9H, 11H and 13H. However, in its response to the motions for summary judgment, Protect PT states that it has withdrawn its objections regarding the Draftina 2H well permit. (Protect PT Response Brief in Opposition to Permittee's Motion for Summary Judgment, p. 1.) Therefore, this appeal involves only the permits for the Draftina 3H, 4H, 7H, 9H, 11H and 13H wells, which we shall refer to as "the Draftina permits."

Standard of Review

Pursuant to the Pennsylvania Rules of Civil Procedure and in accordance with Board caselaw, there are two scenarios under which summary judgment may be granted:

(1) 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. 1035.2(1).

(2) If, 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 – in other words, where the party bearing the burden of proof has failed to make out a prima facie case. Pa. R.C.P. 1035.2(2).

See Yoder v. DEP, EHB Docket No. 2024-097-BP, slip op. at 3 (Opinion and Order on Motion for Summary Judgment issued Aug. 8, 2025) (citing *Whitehall Twp. v. DEP*, 2017 EHB 160, 163); *Protect PT v. DEP*, EHB Docket No. 2023-085-W, slip op. at 3 (Opinion and Order on Motions for Summary Judgment issued July 23, 2025); *Barr Farms, LLC. v. DEP*, EHB Docket No. 2023-034-B) (Consolidated), slip op. at 2-3 (Opinion and Order on Motion for Summary Judgment

issued April 4, 2025); *Kinsey v. DEP*, 2020 EHB 105, 107-08; *Marshall v. DEP*, 2019 EHB 352, 352-53; *Diehl v. DEP*, 2018 EHB 18, 23-24.

In evaluating whether either summary judgment scenario is appropriate, the Board views the record in the light most favorable to the non-moving party. *Liberty Township v. DEP*, 2024 EHB 872, 874 (citing *Stedge v. DEP*, 2015 EHB 31, 33); *Sierra Club v. DEP*, 2023 EHB 97, 98–99; *Kinsey*, 2020 EHB at 108. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Barr Farms,* slip op. at 3 (citing *Sierra Club*, 2023 EHB at 99). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, 2024 EHB 318, 319; *Amerikohl Mining Inc. v. DEP,* 2023 EHB 348, 352 (citing *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217).

Pa. R.C.P. 1035.2(2) – Prima Facie Case

The Department's motion for summary judgment relies on Pa. R.C.P. 1035.2(2) which states that summary judgment may be granted when the party with the burden of proof fails to produce facts essential to the cause of action. The Department argues that it is entitled to summary judgment because Protect PT, which bears the burden of proof in this matter, has failed to present evidence supporting any of its claims. In this section we address the Department's argument as it relates to Protect PT's claims regarding radiation/TENORM,[2] Air Quality Exemption 38(c), cumulative impact, and proximity to sensitive receptors and populations. While the Department also asserts that Protect PT failed to factually support its claims regarding PFAS and enforcement of the New Source Performance Standards, we address those arguments separately since Protect PT has withdrawn a portion of its claims relating to those two objections.[3]

[2] TENORM is technologically enhanced naturally occurring radioactive material.

[3] WCAA makes a similar argument with respect to Protect PT's PFAS claim, which is addressed separately.

In response, Protect PT argues that summary judgment is not appropriate because there are genuine issues of material fact in dispute. In reply, the Department argues that Protect PT has conflated the standard for summary judgment under Pa. R.C.P. 1035.2(2), under which the Department's motion was made, with that of Pa. R.C.P. 1035.2(1), which prevents the granting of summary judgment when there are genuine issues of material fact. The Department argues that Pa. R.C.P. 1035.2(1) is inapplicable to its motion.

We agree with the Department that Protect PT's response addresses the standard for summary judgment set forth in Pa. R.C.P. 1035.2(1), which was not relied upon by the Department in its motion. As the Board explained in *Diehl,* 2018 EHB at 24, "Under the first scenario [Pa. R.C.P. 1035.2(1)], the record must show that the material facts are undisputed. Under the second scenario [Pa. R.C.P. 1035.2(2)], the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a prima facie case."

However, we also believe that Protect PT has responded to the Department's contention that it has failed to produce evidence in support of its claims regarding TENORM/radiation, Air Quality Exemption 38(c), cumulative impact, and proximity to sensitive receptors and populations. As to the first issue, Protect PT asserts that the report of the Department's own expert and the Department's TENORM study provide support for its TENORM claim. It also asserts that the report of its expert, Marc Glass, provides further support for its claim. As to the second issue, Air Quality Exemption 38(c), Protect PT asserts that the report of Mr. Glass discusses air emissions that will be generated at the well site. It responds to the Department's assertion that Mr. Glass's report is speculative by pointing out that neither WCAA nor the Department has provided a list of the chemicals that will be used at the site and, therefore, it is difficult for an expert to offer an opinion on the exact emissions that will be generated. As to the final two issues, i.e. cumulative

impact and proximity to sensitive receptors and populations, Protect PT asserts that an expert report is not required on these topics and points to discovery responses that it believes provide support for its claims. In reply, the Department argues that, while Protect PT may point to pieces of evidence that it believes support its claims, it is not enough to carry its burden.

Judge Bruder recently explained the standard for reviewing a motion for summary judgment brought under Pa. R.C.P. 1035.2(2):

> Board case law is clear in that a party need not definitively or absolutely prove its entire case to survive a motion for summary judgment. *Protect PT v. DEP*, EHB Docket No. 2023-085- W, slip op. at 14 (Opinion and Order July 23, 2025) citing *Diehl v. DEP*, 2018 EHB 18, 25 ("In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument."); *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 11 (Opinion and Order Apr. 4, 2025); *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 724. In order to establish a prima facie case, the [party] who has the burden of proof in this matter, is only required to put forward sufficient evidence of facts essential to their cause of action that would justify moving forward to a hearing. 25 Pa. Code § 1021.122(b)(4); *Protect PT*, at 14 citing *Sunoco Pipeline L.P. v. DEP*, 2021 EHB 43, 53; *Dengal v. DEP*, 2024 EHB 605, 620. This burden of proof is contrasting to the standard at a hearing on the merits …. At this stage in the proceedings, the Board does not assess the quality or the merits of the evidence [] but simply whether there is enough evidence presented to overcome summary judgment. *Sunoco Pipeline*, at 51.

Yoder, slip op. at 9-10.

Here, we are not convinced that Protect PT's evidence necessarily falls short of a prima facie case. While it is unclear whether Protect PT can prevail on its claims, at this stage we do "not assess the quality or the merits of the evidence." *Id*. at 9.[4] Dismissal of a party's case on

[4] In *Delaware Riverkeeper Network v. DEP*, 2018 EHB 447, cited in the parties' filings, the Board held that an appellant had failed to demonstrate that air emissions from unconventional gas wells permitted under Exemption 38(c) would be exceeded or that emissions at those levels would unreasonably degrade, diminish, deplete or deteriorate the environment. However, *Delaware Riverkeeper* involved an assessment of the appellant's claim after a merits hearing, not in a motion for summary judgment.

summary judgment may only occur when it is absolutely clear that the moving party is entitled to summary judgment. We believe it is appropriate to allow Protect PT to move forward to a hearing on its claims.

Article I, Section 27 Claims

A number of Protect PT's objections involve Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. These include:

> The Department issued the Well Permits without consideration of the cumulative impact that this well site and all other well sites already permitted by the Department in Penn Township would have on the public's constitutional rights to clean air, pure water, and natural, scenic, historic, and esthetic values of the environment under the [Environmental Rights Amendment].
>
> Protect PT objects to the Department's approval of the Well Permits which allow hydraulic fracturing, well drilling, and natural gas production in close proximity to sensitive receptors and populations such as residential homes without taking into account the cumulative effects of all well permits in the area, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.
>
> The Permits do not place limits on or require a permit for air emissions of Hazardous Chemicals or TENORM, as the activities authorized under the Permits are exempt from regulation by 25 Pa. Code § 127.14(8)(38c). This exemption violates the [Environmental Rights Amendment].

(Notice of Appeal, para. 3, 42, 44.)

In its motion, WCAA argues that these claims must fail because they require the Board to "create and apply new regulations under the guise of the [Environmental Rights Amendment.]" (WCAA's Memorandum of Law in Support of Motion, p. 10.) It further argues that, to the extent the Environmental Rights Amendment is found to authorize changes in the regulatory scheme, Protect PT's construction of the Amendment is violative of the U.S. Constitution. (*Id.* at 18.)

Protect PT disputes WCAA's assertion that it is asking the Board to alter the existing statutory and regulatory scheme and contends that it is simply asking the Board to examine whether the Department fulfilled its obligations under the Environmental Rights Amendment. It argues that summary judgment is not appropriate on this question because genuine issues of material fact exist. The Department concurs with some of the assertions made by WCAA, including that Article I, Section 27 does not expand the agency's statutory and regulatory powers, but it does not join in the constitutional arguments raised by WCAA.

The Environmental Rights Amendment provides:

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

PA. CONST. art I, § 27.

To the extent that WCAA is arguing that compliance with the applicable statutes and regulations ensures that the obligations of Article I, Section 27 have been satisfied, the Pennsylvania Supreme Court has rejected such an approach, as we explained in *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 860 (*CCJ*) and *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1161. In *Friends of Lackawanna* we stated:

> In *[Center for Coalfield Justice]*, we expressly rejected the notion . . . that "the Article I, Section 27 Constitutional standard [is] coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *[Pa.Environmental Defense Foundation v. Commonwealth,* 161 A.3d 911 (Pa. 2017)] clearly rejected such an approach when it rejected the *Payne* [*v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978)] test." *Id.*, slip op. at 62. Thus, in theory, an operation may be compliant with all specific regulatory requirements and yet not be permittable due to the unreasonable degradation it will cause.

2017 EHB at 1161. *See also Delaware Riverkeeper Network v. DEP*, 2022 EHB 103, 139 ("[A]gencies' duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations ….").[5]

However, as Judge Labuskes, writing for the Board, recently explained in *Citizens for Pennsylvania's Future v. DEP*, EHB Docket No. 2023-026-L (Adjudication issued May 16, 2025):

> [A]s a practical matter, an appellant challenging a Department action that is otherwise compliant with the applicable statutes and regulations needs to explain what more the Department should have done to fulfill its responsibilities under the [Environmental Rights Amendment]. It will generally not be enough to merely restate the other arguments in the case relating to regulatory violations and reframe them as constitutional violations. *Liberty Twp. v. DEP*, 2024 EHB 36, 140; *Del. Riverkeeper Network,* [2022 EHB at 139-40].
>
> The [Environmental Rights Amendment] requires the Department to fully consider the environmental effects of its action, but that duty will often be described in the regulations. The [Environmental Rights Amendment] precludes actions that result in an unreasonable degradation, diminution, depletion, or deterioration of the environment, but what is reasonable or unreasonable will often be established and delineated by regulation. There may be some

[5] WCAA relies on an unpublished decision of the Commonwealth Court in *Delaware Riverkeeper Network v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 42, 247 A.3d 1188 (Pa. Cmwlth. 2021) in support of its argument. Per the guidelines of the Commonwealth Court, an unreported panel decision of the Court issued after January 15, 2008 may be cited for its persuasive value, but not as binding precedent. In that case, the Delaware Riverkeeper Network *et al*. (Riverkeeper), asserted that the agencies at issue had a mandatory duty to evaluate and respond to a rulemaking petition under the Safe Drinking Water Act (SDWA), and their failure to respond constituted a violation of the Environmental Rights Amendment. The Commonwealth Court concluded that because the SDWA did not impose a mandatory duty on the agencies to respond to the rulemaking petition, Article I, Section 27 did not require that action. 2021 Pa. Commw. Unpub. LEXIS at *25-26. The Court reasoned that the relevant statute embodied the General Assembly's judgment about the agencies' duties under Article I, Section 27 and the "legislative process produces a statute that already reflects and incorporates agencies' relevant duties under the Environmental Rights Amendment." *Id.* at *24 and *26. As such, it concluded that the Environmental Rights Amendment "does not authorize [the Department] to disturb the legislative scheme." *Id.* at *25 (quoting *Funk v. Wolf*, 144 A.3d 228, 250 (Pa. Cmwlth. 2016)). However, in reaching its decision, the Court found it significant that Riverkeeper had based its claim solely upon the "mandatory duty" it purported to find in the SDWA, rather than arguing that the Act itself was inconsistent with the Environmental Rights Amendment or that the agencies' compliance with the Act would be insufficient to meet their constitutional obligations. *Id.* at *25. The Court appeared to leave open the possibility that the claim could move forward had Riverkeeper argued the latter.

> daylight between full compliance with the applicable regulatory programs and acting with prudence, loyalty, and impartiality, but a successful appellant will need to explain.

Slip op. at 71-72.

The analysis that the Board applies in determining whether the requirements of Article I, Section 27 have been satisfied is as follows: We first determine whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next, we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Stocker v. DEP*, 2022 EHB 351, 445.

An assessment of Protect PT's Article I, Section 27 arguments necessarily involves complex questions of law and fact. We find that these questions would be better addressed after the development of a full record, rather than in the context of a summary judgment motion. *Scrubgrass Creek Watershed Association v. DEP*, 2024 EHB 747, 761; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 499.

One point raised by WCAA in its memorandum bears mentioning. In footnote 6 it states, "The Board has previously rejected the suggestion that a proper harms/benefits analysis under a permit review requires a 'holistic view' by the Department," citing the Board's prior decision in *Protect PT v. DEP*, 2024 EHB 683. In that decision, the Board was tasked with determining whether objections raised by Protect PT in its appeal of the *renewal* of gas well permits – but not raised in the *initial* appeal of the permits – were outside the scope of review of the appeal of the permit renewal. Those objections included claims that the Department should have conducted a harms/benefits analysis and a "holistic review" that took into consideration the cumulative impact

of the permits when it approved the renewal of the permits. The Board found that those objections were outside the very limited scope of the appeal of the gas well permit *renewal. Id.* at 694-96. It did not address whether those objections could have been properly raised in an appeal of the issuance of the permits in the first place.

PFAS

In paragraph 45 of its notice of appeal, Protect PT raises the following objection:

> Appellant objects to the Department's approval of the Permits because the Permits do not limit and instead allow the introduction of Hazardous Chemicals, including PFAS, PFOAS [sic], 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 the [Environmental Rights Amendment].

(Notice of Appeal, para. 45.) [6]

Both the Department and WCAA assert that they are entitled to summary judgment on this claim pursuant to Pa. R.C.P. 1035.2(2) because discovery is complete and Protect PT has failed to produce evidence that PFAS are likely to be used at the Draftina site.

In response to the Department's and WCAA's motions, Protect PT states that it is withdrawing its claim as to the usage of PFAS at the Draftina site, but is reserving a portion of its claim as to the Environmental Rights Amendment: Specifically, in its response to the Department's motion, Protect PT states that it "withdraws its objections solely as to PFAS specifically existing on the well site but reserves the right to include PFAS in its objections related to the Department's violation of the Environmental Rights Amendment." (Protect PT's Response

[6] PFAS and PFOA are defined in the Department's drinking water regulations at 25 Pa. Code § 109.1. For the sake of brevity, we refer to "PFAS, PFOAS [sic] and related chemicals," as "PFAS" as do the parties in their briefs.

Brief in Opposition to Department's Motion, p. 8.) Using similar, but not identical, language, Protect PT responds to WCAA's motion by stating it "has withdrawn its objections to the specific use of PFAS on the Draftina Wells but reserves its right to objections related to the Department's failure to obtain this information prior to issuing the Permits…" (Protect PT's Response Brief in Opposition to Permittee's Motion, p. 3.) Reading these two responses together and in conjunction with paragraph 45 of the notice of appeal, we understand Protect PT's argument to be that the Department violated its duty under the Environmental Rights Amendment by issuing permits for the Draftina wells without knowing what hazardous chemicals, including PFAS, will be used at the site and without placing limits on their usage. In their replies, the Department and WCAA renew their request for summary judgment, and argue that, without producing evidence that PFAS are likely to be used at the site, Protect PT cannot make out a prima facie case on this claim.

The Department and WCAA rely heavily on the Board's decision in *Protect PT v. DEP*, 2024 EHB 683, which dismissed Protect PT's claim regarding PFAS usage at another well site which was permitted by WCAA's predecessor, Apex. The Board dismissed Protect PT's PFAS claim pursuant to Pa.R.C.P. 1035.2(2) for failure to make out a prima facie case. However, that case involved a very particular set of circumstances that included the following: 1) The corporate designee for the permittee testified in a deposition that PFAS would not be used at the site, and Protect PT had no evidence to the contrary, 2) the permittee provided test results for the water source that would be used in the fracking operation that showed no presence of PFAS, and 3) the permittee provided safety data sheets from one of its recently constructed well sites showing that no PFAS were present. Those facts, in conjunction with the fact that Protect PT had not filed a motion to compel the permittee to provide information on the chemicals it intended to use at the site, led the Board to grant summary judgment to the Department and permittee under Pa. R.C.P.

1035.2(2) on the sole issue of PFAS usage at the site. We do not find those circumstances to be present here.

Moreover, here we understand Protect PT's argument to be that it is the Department's duty to know what chemicals, including PFAS, are likely to be used at the site, and the failure to obtain this information is a violation of its duty under the Environmental Rights Amendment. As we noted earlier, this issue necessarily involves complex questions of law and fact that would be better addressed after the development of a full record. *Scrubgrass*, 2024 EHB at 761; *Sludge Free,* 2015 EHB at 499.

NSPS

In paragraph 43 of its notice of appeal, Protect PT raises the following objection pertaining to the federal New Source Performance Standards (NSPS):[7]

> Because the Department has failed in its obligation to enforce Federal Regulations as they apply to NSPS . . . the permit applications must be denied, and/or subject to further review.

(Notice of Appeal, para. 43.)

In its motion, the Department asserts that summary judgment should be granted pursuant to Pa. R.C.P. 1035.2(2) because Protect PT has produced no evidence in support of this claim. Additionally, WCAA argues that NSPS are not triggered until operations commence and, therefore, there was nothing for the Department to "enforce" when it considered the applications for the Draftina wells.

In its response to the Department's motion, Protect PT states that it "withdraws its objection solely related to the Department's enforcement of the Federal [NSPS]" but "reserves it objections with respect to the application of these standards as they apply to the Draftina Wells as well as

[7] These standards are addressed at 42 U.S.C. § 7411 and 40 C.F.R. Part 60.

their objections related to the Department's violations of the Environmental Rights Amendment." (Protect PT Response Brief in Opposition to Department's Motion, p. 8.) It expands on this statement in its response to WCAA's motion, stating as follows:

> With respect to the Department's obligation to "vet" NSPS compliance during review of the well permit applications, Protect PT reserves its objections related to the Department's violation of the Environmental Rights Amendment with respect to failing to obtain the requisite information regarding air emissions that are contemplated under the NSPS prior to issuing the Permits, health impacts, and cumulative effects.
>
> *****
>
> As Apex aptly notes, the Department only requires NSPS are not triggered until the wells are completed [sic]. At that point, the damage to the environment and risks to public health have already taken place. The Department should have evaluated the emissions contemplated by the NSPS that will be generated from the Draftina Wells prior to issuing the Well Permits by obtaining site specific data, including baseline testing. The failure to do so is a violation of the Environmental Rights Amendment. The fact that the NSPS is not triggered until completion is irrelevant to the Department's obligation under the Environmental Rights Amendment to obtain information related to air emissions prior to the issuance of the Permits.

(Protect PT's Response Brief in Opposition to Permittee's Motion, p. 3-4.)

While it is not clear, Protect PT appears to be preserving a claim similar in nature to its PFAS claim discussed above, i.e., that it believes the Department violated its Article I, Section 27 duties by not obtaining sufficient information during the permitting process. Summary judgment may only be granted in the clearest of circumstances, and it is not entirely clear to us exactly what claim Protect PT is preserving; therefore, we decline to grant summary judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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O R D E R

AND NOW, this 20th day of August 2025, it is hereby ordered the motions for summary judgment filed by the Department and WCAA are **denied.**

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: August 20, 2025

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