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PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES and BARBARA ULLOM	:	
	:	
v.	:	**EHB Docket No. 2024-114-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CNX GAS COMPANY, LLC, Intervenor	:	**Issued: December 29, 2025**

OPINION AND ORDER ON
MOTION TO EXCLUDE EXPERT TESTIMONY

By MaryAnne Wesdock, Judge

Synopsis

The Permittee's motion to exclude the Appellants' expert report and expert testimony is denied. The objections relate to the weight to be given the expert testimony rather than its admissibility.

O P I N I O N

Introduction

This matter involves an appeal filed by James and Barbara Ullom (the Ulloms) challenging a Negative Determination by the Department of Environmental Protection (Department) under Section 3218 of the Oil and Gas Act, 58 Pa. C.S. § 3218, in connection with an investigation of alleged water loss at the Ulloms' property. On November 3, 2023,[1] the Ulloms made a water loss complaint to CNX Gas Company, LLC (CNX) in connection with operations at CNX's NV110 oil and gas well pad in East Finley Township, Washington County. CNX submitted the complaint to the Department, which conducted an investigation pursuant to Section 3218 of the Oil and Gas

[1] The date set forth in the Department's Negative Determination is November 3, 2024, but, based on the entire record before the Board, we believe this was an error and should read "2023."

Act, which provides that a landowner who suffers diminution or pollution of a water supply because of the drilling or operation of an oil or gas well may request an investigation by the Department. 25 Pa. Code § 3218(b). On June 28, 2024, the Department issued the results of its investigation, stating, "Based on the sample results and other information obtained to date, the Department cannot conclude that the Water Supply was adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well." (Exhibit to Notice of Appeal, Docket 2024-114-W, entry no. 5.) On July 26, 2024, the Ulloms filed this appeal of the Department's Negative Determination. On June 11, 2025, the Ulloms were granted leave to amend their appeal. A hearing in this matter has been scheduled for April 13–17, 2026.

On November 13, 2025, CNX filed a Motion to Exclude Expert Testimony (motion) seeking to exclude the expert testimony and expert report of Andrew M. Herrmann, LPG, Senior Manager and Geologist, and Christopher S. Abel, CHMM, Director and Senior Environmental Chemist, both with August Mack Environmental, with regard to the alleged water loss at the Ullom property (the Herrmann/Abel report). It is the contention of CNX that the opinions and information set forth in the report do not constitute competent and admissible expert testimony because they are not set forth to a reasonable degree of scientific certainty. The Ulloms filed a response in opposition to the motion on December 13, 2025. The Department did not weigh in on the motion. While none of the parties have filed prehearing memoranda at this time listing the expert witnesses or exhibits they intend to present at trial, we shall treat CNX's motion as a preemptive motion in limine seeking to preclude Mr. Herrmann's and Mr. Abel's expert testimony at trial and seeking to preclude the introduction of the Herrmann/Abel expert report into evidence.[2]

[2] The Board does not have a specific procedural rule or practice regarding the admission of expert reports at hearing. Rather, it is left to the discretion of the presiding judge. *See, e.g., Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 162. In some matters, the presiding judge may admit all or a portion of an expert report, alongside the associated expert testimony, where the judge determines it is a useful aid in

Standard of Review

A motion to strike an expert report or expert testimony is generally treated as a motion in limine. *Protect PT v. DEP*, 2024 EHB 352, 353 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161). The purpose of a motion in limine is to provide the Board an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at hearing. *Citizens for Pennsylvania's Future v. DEP,* 2024 EHB 232, 234; *Kiskadden v. DEP*, 2014 EHB 634, 635. In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. *McCauley v. DEP*, 2020 EHB 448, 450; *Morrison v. DEP*, 2020 EHB 404, 405.

The Parties' Arguments

CNX argues that the opinions set forth in the Herrmann/Abel report do not constitute competent and admissible expert testimony because they do not state to a reasonable degree of scientific certainty that CNX's drilling activities caused the Ulloms' water loss. In particular, CNX takes issue with the introduction to the report which states that the report provides "opinions as to *potential* causes and/or scenarios which were not considered by the PADEP during their recent Water Supply Investigation . . . ." (Ex. 5 to Motion, p.1) (emphasis added), as well as the following summary of opinions contained therein:

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understanding the testimony. *Compare Protect PT v. DEP*, 2024 EHB 853, 858 ("So long as the report's author testifies at the hearing and is subject to cross-examination and the Rules of Evidence…it is prudent to exercise judgment regarding the admissibility of expert reports on a case-by-case basis."), *and Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 98, 100–01 (So long as certain criteria are met, "we will exercise our judgment regarding the admissibility of expert reports on a case-by-case basis."), *with Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B, slip op. at 3 n.2 (Opinion and Order on Motion in Limine issued July 15, 2025) ("The Judge presiding over this case as a rule does not admit full expert reports as exhibits in cases he is hearing. Parties may seek to admit portions of their expert reports in conjunction with supportive testimony from their experts who have been admitted at the hearing after any objections to their testimony have been addressed.")

Opinion 1: The date of loss of yield from affected well W-1 should be confirmed.[3]

Opinion 2: Affected wells at the Property were susceptible to potential water loss as a result of the installation of fracking wells nearby.

Opinion 3: There are multiple scenarios in which CNX fracking well installation practices could have created new groundwater migration pathways resulting in water loss at the Property.

Opinion 4: PADEP did not adequately evaluate the potential for CNX installation activities to cause a loss of water at the affected wells on the Property.

Id.

With respect to the potential causes of the water loss set forth in the report, CNX argues that "[i]t is not enough to say that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could properly account' for the result, or even that it was 'very highly probable' that it caused the result." (Brief in Support of Motion, p.8 (citing *Niggel v. Sears, Roebuck & Co*., 281 A.2d 718, 719 (Pa. Super. 1971)).) CNX points out that, as the party challenging the Department's Negative Determination, the Ulloms bear the burden of proof in this proceeding and must demonstrate that the Department's determination was an error of law or abuse of discretion. In order to meet this burden, CNX argues, first, that the Ulloms may not simply assert that the Department's investigation was inadequate but must demonstrate, through expert testimony stated to a reasonable degree of scientific certainty, that CNX's drilling activities with regard to the NV110 oil and gas well pad caused the loss of their water well and, second, that any information the Department allegedly failed to consider would have caused the Department to reach a different conclusion.

[3] The Amended Notice of Appeal, filed by the Ulloms on May 16, 2025, states, "The Ulloms hereby withdraw Objection 1 (pertaining to the date when Well 1 went dry) from their Notice of Appeal. . . . All other objections from the Notice of Appeal are incorporated into this Amended Notice of Appeal." Thus, there appears to be no dispute as to the date of water loss at Well 1 (also referred to in the filings as "W-1.")

It is CNX's contention that the Herrmann/Abel report does neither of these things. Rather than opining that CNX caused the water loss, CNX argues that the report simply floats "potential" causes without any degree of scientific certainty. It further argues that the report fails to demonstrate that the information set forth in the report would have changed the Department's ultimate determination. Finally, CNX disagrees with a number of the factual premises on which the conclusions in the report are based.

In response, the Ulloms assert that CNX conflates the burden of proof needed to succeed at trial with the burden of proof needed to *get to* trial. While the Ulloms agree that they must establish by a preponderance of the evidence presented at trial that the Department erred or abused its discretion, they argue that this standard is not relevant in overcoming CNX's motion in limine. Rather, they assert that the appropriate standard in considering a motion in limine is whether the testimony or evidence is likely to cause undue prejudice. They point out that CNX has made no argument that the expert testimony and report are prejudicial; rather, CNX focuses on its disagreement with the validity of the report and its conclusions.

The Ulloms further assert that CNX's motion misinterprets the role of expert testimony in challenging the adequacy of the Department's investigation. They argue that it is the responsibility of the Department to investigate the cause of the water loss, and where the Department reaches a negative determination without adequate evidence, it cannot defer its investigatory responsibilities to those who are impacted by the activity in question. The Ulloms argue that it is "neither practical nor possible for average citizens impacted by regulated industries to investigate complex scientific harms like those at issue here" since such citizens "lack[] the access to data, scientific expertise, and financial means of the Department and/or industry." (Appellants' Brief in Opposition, p. 4.) Nonetheless, the Ulloms assert that the Herrmann/Abel report lays out numerous conclusions

which not only explain how the Department's determination was erroneous but also why the Board should reach a different conclusion; they further assert that these conclusions are supported by "studies, geological maps, evidence produced in discovery, and relevant expertise by the report's author." *Id.* at 5. The Ulloms argue that the expert testimony of Mr. Herrmann and Mr. Abel will indeed assist the Board in understanding the technical issues in this case and, therefore, should not be excluded. They assert that CNX's objections go to the weight to be assigned the testimony, which CNX will be able to point out at trial.

Discussion

A motion in limine should generally be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison*, 2020 EHB at 405. "[T]he first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert's specialized knowledge will aid us in understanding the evidence or determining a fact in issue." *Montgomery Township Friends of Family Farms v. DEP*, 2024 EHB 442, 445 (quoting *Rhodes v. DEP*, 2009 EHB 237, 239). A threshold determination for whether expert testimony will be an aid to us is whether the testimony will be relevant. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Pa.R.E. 401. Whether evidence has a tendency to make a given fact more or less probable is determined by the Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal. *Liberty Township v. DEP*, 2024 EHB 490, 493 (citing *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 474). Here, we agree with the argument put forth by the Ulloms that the testimony of their experts is relevant and the objections raised by CNX go to the weight to be assigned to the testimony, not its admissibility.

In support of its argument that we should exclude the expert report and opinions of Mr. Herrmann and Mr. Abel, CNX relies on the Board's decision in *O'Reilly v. DEP*, 2001 EHB 19, 45, for the proposition that it is generally not enough to argue that the Department conducted an inadequate investigation but rather, the appellant is required to convince the Board that it should overturn the Department's decision based on the record developed at a hearing. It is important to note that *O'Reilly* was an adjudication by the Board, issued after a hearing on the merits. *O'Reilly* did not deal with the exclusion of expert testimony but, rather, considered whether the testimony presented at the hearing was sufficient to meet the appellant's burden of proof.[4]

CNX cites a number of other Board decisions in support of its argument that the Herrmann/Abel report and testimony should be excluded: *Kiskadden v. DEP*, 2015 EHB 377; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221; *Marshall v. DEP*, 2020 EHB 60; and *Shuey v. DEP*, 2005 EHB 657. However, like *O'Reilly*, they are adjudications assessing the merits of the case after a hearing — they discuss the burden of proof that appellants must meet and what evidence is generally necessary to meet that burden at the hearing on the merits. In all of the cited cases, the Board found that the appellant had not produced adequate expert testimony to sustain its burden following a hearing. None of the cases found that the expert testimony or reports should have been excluded prior to the hearing; rather, they address the weight to be given to the testimony and whether the testimony was sufficient to meet the appellant's burden. In *Kiskadden*, while the Board acknowledged that "it is normally not enough for the Appellant to argue that the Department has conducted an inadequate investigation," it pointed out that "the Appellant must convince the

[4] We further note that *O'Reilly* involved a third-party appeal of the Department's issuance of an NPDES permit. The language referenced in CNX's brief, i.e., the Board's admonishment that the appellant must do more than simply assert that the Department had conducted an inadequate investigation, concerned the Department's investigation into the permittee's compliance history in connection with the permit application. That is substantially different from the investigation at issue here, i.e. the Department's investigation into the Ulloms' claim of water loss, which is the very action that is the subject of the appeal.

Board that, *based on the record developed at trial*, we should overturn the Department's decision." *Kiskadden,* 2015 EHB at 410 (emphasis added).

In *Barr Farms, LLC v. DEP*, EHB Docket No. 2023-034-B (Opinion and Order issued July 15, 2025), the Board recently considered a motion in limine to preclude an appellant's expert report and expert witness testimony. That matter involved an appeal of a water supply replacement notification and administrative order issued in connection with the Department's finding that the appellants' activities had resulted in contaminated well water of area residents. A number of the affected residents intervened in the appeal and sought to exclude an expert report and expert testimony offered by the appellants. They argued, similar to CNX's reasoning here, that the expert failed to perform his own testing and analyses and simply addressed what he believed was lacking in the Department's investigation, which, they asserted, did not qualify as expert testimony. The Board disagreed and stated that "those may be points worth raising on cross-examination but hardly support excluding [the witness'] expert testimony through a motion in limine." *Barr Farms, LLC*, slip op. at 5.

Likewise, in *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 68, the Board considered a motion in limine filed by the appellant seeking to exclude the testimony of the Department's expert witnesses on several grounds including the appellant's contention that the testimony did not meet the requisite standard of professional certainty and did not have a proper factual basis. In response, the Department argued that the basis for the appellant's motion was simply that the appellant disagreed with the opinions of the Department's experts. The Board rejected the appellant's motion, finding that the arguments went "to the weight that should be accorded the testimony and not its admissibility." *Id.* at 71. The Board noted that "the credibility

of the expert witnesses is best resolved by live testimony rather than in the context of a motion." *Id.* at 68.

As we explained in *Blythe Township v. DEP*, 2011 EHB 433, the use of a motion in limine as a vehicle for disputing an expert's opinions goes beyond the limited scope of such a motion. There, the Board stated:

> The Township uses its motion as a vehicle for arguing that [the expert's] opinions are simply wrong. This, of course, goes well beyond the limited scope of a motion in limine. "Where there is a dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment motions." *CMV Sewage Company, Inc. v. DEP*, 2010 EHB 540, 543; *Pileggi v. DEP*, 2010 EHB 244, 250; *ADK Development v. DEP*, 2009 EHB 251, 253- 54. The same approach applies to motions in limine. *Pine Creek Valley Watershed Association v. DEP*, [2011 EHB 90, 94].

Id. at 437. To the extent that CNX's criticisms of the Herrmann/Abel opinions have any validity, they go to the weight and credibility to be assigned to the experts' testimony, not its admissibility. *Id*. at 436.

CNX raises a valid point that the role of expert testimony is to aid the trier of fact in understanding complicated matters requiring specialized expertise, and where such testimony is not presented to a reasonable degree of certainty it may fail to achieve this purpose. However, while safeguards have been put into place to protect jurors who may be impressionable when presented with speculative testimony, the Board "operates in a nonjury setting. We deal with scientific theories every day." *Pine Creek Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 778. As we explained in *Range Resources – Appalachia, LLC*, 2022 EHB at 70 (quoting *Kiskadden v. DEP*, 2014 EHB 618, 623), "The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility

should be given to expert testimony presented at trial."[5] As fact finder, "weighing credibility and selecting among competing expert testimony is one of our most basic and important duties." *Pine Creek*, 2011 EHB 90, 93–94 (quoting *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544–45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)).[6]

To the extent that CNX contends that the Herrmann/Abel expert report and opinions are not specific enough, "this criticism goes to the weight and credibility to be afforded to [the Ulloms'] experts, not the admissibility of their expert testimony." *Protect PT*, 2024 EHB at 361 (citing *Blythe Township*, 2011 EHB at 436).

In conclusion we enter the following order:

[5] While *Range Resources*, *Kiskadden* and *Pine Creek* involved a challenge to the expert's credibility under *Frye v. United States*, 293 F. 1013 (D.C. 1923), we believe that the same rationale applies to the argument made here by CNX.

[6] Moreover, while using the phrase "to a reasonable degree of scientific certainty" is helpful, there is nothing magical about those words, and the Board has repeatedly held that the use of this phrase "is not a pre-requisite to including an expert opinion in the record." *Barr Farms*, slip op. at 6 (citing, *inter alia, High v. DEP*, 2023 EHB 331, 335 ("the absence of 'magic words' like 'reasonable degree of scientific certainty' or 'reasonable degree of certainty' does not necessarily discount or reduce the weight of [the expert's] testimony."); *Blythe Township*, 2011 EHB at 435 ("there is actually no absolute requirement that the phrase 'reasonable degree of scientific certainty' be used at the hearing, let alone in an expert report, so long as the testimony, when taken in context and a whole, reflects the requisite level of confidence.")).

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O R D E R

AND NOW, this 29th day of December, 2025, it is hereby ordered that the Motion to Exclude Expert Testimony filed by CNX is **denied** for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

DATED: December 29, 2025

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